No. 12573

Supreme Court of Illinois

Jones

---

vs.

Joliet & Northern

Indiana R.R.Co.

71641 7

161 = 38

The State of Southern
Indiana Rail Road Co.

vs

Robert Jones

167

1858

12573

167

Supreme Court.

The Joliet & N. I. R. R. Co
Appellants

vs.

Robert Sonis,
Appellee.

Printed Argument for Appellants.

Filed April 20, 1858
S. Leland
Clk

1. The People of the State of Illinois — By the Grace of God free
and Independant, To All Whom these presents may Come
Greeting —

Know Ye that We having caused to be inspected
the Records and proceedings remaining in the Office of
our Clerk of Our Circuit Court in and for the County
of Will and State aforesaid — do find therein certain
proceedings in the words and figures following to Wit —

"Will County Circuit Court,"

"September Term A. D. 1856" —

"United States of America
"State of Illinois }
"County of Will } ss — "Pleas before the Honorable Sylvester
"W. Randall Judge of the Eleventh Judi-
"cial Circuit of the State of Illinois, at the September
"Term of the Will County Circuit Court, began and held
"at the Court House in the City of Joliet in said County
"of Will and State aforesaid On the first Monday of September
"(the same being the first day of said month of September)
"in the Year of Our Lord One thousand Eight Hundred
"and fifty Six — And of the Independance of the United
"States the Eighty first —
"Present, Hon S. W. Randall Judge of 11th Jud' Cir' —
"S. W. Bowen States Atty —
"P. P. Scantlin Sheriff of Will County —
"R. E. Barber Clerk Will Co' Cir' Court —

£12573-17

And afterwards to wit. On the first day of September aforesaid in the Year of our Lord One Thousand eight hundred and fifty Six, it also being One of the Regular days of said September Term of said Court for the said Year A.D. 1856 aforesaid, and the said Court being then duly organized and Sitting in open Court for the transaction of business, the following proceedings were had and entered of record by the said Court in words and figures following To wit—

"In the Matter
" of
"Pleadings

Filing—

"And now come the respective plaintiffs in "Suits now pending upon the Docket in which Pleas have "not been filed by their respective attorneys, and enter their "motion for a rule to plead against the respective defendants "in the said causes respectively— Thereupon Come the said "respective defendants by their respective attorneys in said "respective causes, and enter their Cross motion for "time to plead therein until Tomorrow Morning at Nine "O, Clock— Whereupon it is Ordered by the Court that all "pleas in all cases pending on the Common Law and "Chancery Dockets and not heretofore filed, be filed "respectively by tomorrow Morning at Nine O, clock—

3

3.

And Heretofore to Wit on the Ninth Day of April in the Year of Our Lord One Thousand eight Hundred and fifty Six — a "Precipe" was filed in the Offices of the Clerk of the Circuit Court in and for said County of Will, and State aforesaid, Which said "Precipe" is in words and figures following to Wit —

"Will Co Circuit Court, "Of the September Term One Thousand Eight Hundred and fifty Six —

"Robert Jones

" " "Action On the Case

"The Joliet and Northern "Damages $500 —

"Indiana Rail Road Company

"The Clerk of the Will Co "Circuit Court will please file Security for Costs, and "issue Summons to Shff of Will Co, in favor of the above "named Robert Jones, v The Joliet and Northern Indiana "Rail Road Company laying the Damages at $500 — "Returnable as the Law directs —

"7th April 1856 — + "Oblige Yours

"E. C. Kellogg

"Atty for Plff"

Upon the aforesaid Precipe, Summons was issued by the said Clerk, Which Summons cannot be found among the files of this Office —

And afterwards to Wit, On the

[12513-5]

Twenty Sixth day of February in the Year Of Our Lord One thousand eight hundred and fifty Seven a "Precipe" for Alias Summons was filed in the Office of the Clerk of the Circuit Court in and for said County of Will and State aforesaid, Which said "Precipe" is in the words and figures following to Wit,

"Robert Jones
"
"
"The Joliet & Northern
"Indiana R. Road Co

On the Case

"The Clerk Will issue Alias
"Summons to Shff of Will Co.

"Fellows Atty for Plff"

And afterwards to Wit on the Twenty Sixth day of February aforesaid A.D. 1857 the Clerk of the Circuit Court in and for the County and State aforesaid, issued an Alias Summons in the words and figures following to Wit.

"State of Illinois"
"Will County } ss The People of the State of Illinois
to the Sheriff of said County Greeting.

"We Command You as we have before Commanded
"you that You Summon The Joliet and Northern
"Indiana Rail Road Company if they be found in
"your County personally to be and appear before

5

"our Circuit Court of our said Will County, on the
"first day of the next Term thereof, to be holden at
"the Court House in Joliet, in said Will County, on the
"Third Monday of March 1857, to answer Robert Jones
"of a Plea of Trespass on the case to the damage of
"him the said plaintiff Five Hundred Dollars as is
"said— And have you then there, this writ—

"Witness Alexander McIntosh Clerk of our said
"Court, and the Seal thereof hereto affixed at
"his Office in Joliet, in said Will County this
"26th day of February A.D. 1857—

"A. McIntosh Clerk"

And afterwards to wit, On the Twenty Eight day of February
in the Year of Our Lord One thousand Eight Hundred
and fifty seven, the Sheriff of the aforesaid County of
Will and State of Illinois, returned said Summons to
the Clerk aforesaid endorsed as follows to wit—

"Served the within writ on the within named Company
"by leaving a copy with C. Knowlton agent of said
"Company—
"Feby 28th 1857—

"S. R. Dyer Shff"
"J. L. Sander Dept"

[12573-3]

And heretofore to wit, On the Twenty Second day of August in the Year of Our Lord One thousand Eight hundred and fifty Six, the plaintiff filed in the Office of the Clerk of the Circuit Court his Plea which said Plea is in the words and figures following to wit—

"In the Will Co Circuit Court, Of the September Term in
"the Year A.D. 1856—
"State of Illinois"}
"Will County" } ss.

"Robert Jones the plaintiff in this suit
"by E. C. Sellons his Attorney complains of the Joliet and
"Northern Indiana Rail Road Company defendants in this
"suit being Summoned &c of a plea of Trespass on the Case,

"For that Whereas the said defendants under
"And by the Corporate name of "the Ottawa and Indiana
"Plank Road Company", heretofore to wit, on the 13th day of
"October 1853, to wit, at Joliet in the County Of Will aforesaid,
"being about to Construct a Rail Road from said Joliet
"in an Easterly direction to the Indiana State line, applied
"to the said plaintiff for the right of way for said Rail
"Road over and across the East half of the North East
"Quarter of Section fourteen in Township Thirty five Range
"Ten East of the 3d principal Meridian in the County aforesaid,
"Which said tract of land was then and there owned

7.

"by the said plaintiff, and the said plaintiff for
"the purpose of enabling said defendants to construct
"their said Rail Road across the land aforesaid, afterwards
"to wit - On the said 13th day of October 1853, in consideration
"among other things, that the said defendants would before
"said Rail Road was in operation make erect and forever
"thereafter maintain a good and sufficient fence along
"the South side of their said Rail Road on the land aforesaid,
"sold and conveyed to the said defendants then a Corporation
"under the name of Owego & Indiana Plank Road Company
"by a good and sufficient Deed of Conveyance so much
"of said tract of land above described as lies and is
"included in the following boundaries. To wit, Commencing
"at the North East corner of said Section 14 running thence
"South on the Section line Eight Chains and Sixty links,
"thence West ten Chains - thence North Eight Chains and Sixty
"links, thence East ten Chains to the place of beginning -
"Containing Eight acres and Sixty Hundredths of an acre -

"And the said defendants then and there
"received and accepted the said Deed and the conveyance
"of the land aforesaid for the right of way for said Rail
"Road from the said plaintiff upon the condition and with
"the express promise and agreement to and with the said
"plaintiff, that the said defendants would build the fence
"aforesaid -

"And the said plaintiff avers that afterwards
"to wit on the 24th day of June A.D. 1855 and after
"said Rail Road was built across the above described

L12573-27

"track of land, by the said defendants, and in operation,
"cars and locomotives passing and repassing over and
"along said Rail Road, the said plaintiff then and there
"did owning and possessing the land aforesaid lying
"adjacent to and bounded on the North by the track of land
"so conveyed to said defendants as aforesaid by the said
"plaintiff.

"Yet the said defendants well knowing the premises
"and well knowing that they of right, and in pursuance
"of their said agreement with the said plaintiff ought
"to build and maintain a good and sufficient fence
"on the South side of their said Rail Road, between the
"said land of the said plaintiff and the track of land
"so deeded by the said plaintiff to said defendants for
"the right of way aforesaid described as aforesaid, and
"well knowing that the cattle and sheep of the said plaintiff
"which were lawfully running, feeding and departing in the
"close and upon the land of the said plaintiff described
"as aforesaid, lying on the South side of said rail road
"adjacent and contiguous to the said piece of land so
"sold by the said plaintiff to the said defendants for the
"right of way aforesaid - would err, escape and stray
"on to the track of their said Rail Road and would be
"run over, injured and killed by the cars and locomotives
"then and there passing and repassing on said Rail Road
"through the want of the fence which the said defendants
"so agreed to construct as aforesaid" -

"Yet the said defendants

9

"Contriving and intending wrongfully and unjustly to
"injure and agrieve the said plaintiff in that behalf—
"Whilst the said plaintiff was so possessed of the said Close
"and land aforesaid, to wit On the day and year aforesaid
"to wit. at the County of Will aforesaid, wrongfully neglected
"and omitted to erect build or mantain any fence on the
"South side of said Rail Road between the aforesaid Close
"and land of the said plaintiffs and the land of the said
"defendants so sold to them by the said plaintiff as aforesaid
"whereby the sheep of the said plaintiff, to wit One Hundred
"sheep lawfully running feeding and depasturing in the said
"Close and on the land of the said plaintiff, to wit, on the
"day last aforesaid, and on divers other days then next
"following, ~~& wit~~ went, Erred Strayed and escaped out of said
"Close of said plaintiff through the want of said fence to
"and upon the track of said Rail road and were then and
"there run over by the locomotives and Cars, then and there
"passing and repassing on said rail road, thereby fifty
"of said sheep of great value to wit, Of the value of Two
"Hundred dollars were then and there killed & fifty of said
"sheep of great value to wit, of the value of Two Hundred
"dollars, were then and there greatly bruised, lamed injured
"and damaged, and the said plaintiff was forced and
"obliged to and did lay out and spend a large sum
"of money to wit, the sum of fifty dollars in and about
"the endeavouring to cure the said last mentioned fifty
"sheep so wounded as aforesaid—

"Wherefore the said plaintiff—

{12593-5}

"Says that he is injured and hath Sustained damage
"to the Amount of Five Hundred dollars and therefore
"brings this Suit &c

"E.C. Fellows Plffs Atty"

And Heretofore to wit On the Ninth day of April in the Year of our Lord One Thousand eight Hundred and fifty Six, the Plaintiff filed in the Office of the Clerk of the Circuit Court of Will County and State aforesaid his Security for Costs in the aforesaid action which Security for Costs is in the words and figures following to wit—

"In the Will Co Circuit Court
"Of the September Term 1856"

"State of Illinois
"Will County } SS—
"Robert Jones
"
"The Joliet and Northern
"Indiana Rail Road Company"

"Action On the Case"
Damages $500.

"I do hereby enter myself Security
"for Costs in this cause and acknowledge myself bound
"to pay or cause to be paid all Costs which may accrue
"in this action, either to the opposite party, or to any—

11

"of the Officers of this Court in pursuance of the Laws
"of this State — Dated this Seventh day of April
"A.D. 1856" —

"E. L. Sellers"

And afterwards to wit On the Eighteenth day of
March in the Year of Our Lord One thousand eight
Hundred and fifty Seven, It also being One of the regular
days of said March Term of said Court for the said
Year A.D. 1857. aforesaid, And the said Court being then
duly Organized and Sitting in Open Court for the transaction
of business — the following proceedings were had And
entered of Record by the said Court in words and figures
following To wit —

"Robert Jones

"Case"

"The Joliet and Northern
"Indiana Rail Road Company," "And now come the said defendants
"by Parks and Elwood their Attorneys
"and enter their motion to call this Suit for hearing, Whereupon
"it is ordered by the Court that this Cause be and it now is
"called as aforesaid, Thereupon said defendants enter their
"motion to vacate the rule to plead heretofore entered herein,
"And the Court being fully advised in the premises it is Ordered
"that the rule to plead heretofore entered herein against the
"said defendants in this Cause, be and it is Vacated" —

3/2573-67

And afterwards to wit On the Twenty first day of March in the Year of Our Lord One thousand eight Hundred and fifty Seven. It also being one of the regular days of said March Term of said Court for the said Year A.D. 1857 aforesaid, And the said Court being there duly Organized and Sitting in open Court for the transaction of business. the following proceedings were had and entered of record by the said Court, in words and figures following To wit.

"Robert Jones

vs "Case"

"The Joliet and Northern

"Indiana Rail Road Company "And now Comes the said Plaintiff

"by E. C. Sellers his Attorney

"and enters his motion that this Cause be now Called up for "hearing. Whereupon it is Ordered by the Court that this Cause "be and it now is Called as aforesaid, Thereupon said "Plaintiff enters his Motion for a rule on the said defendants "to plead issuably to his said declaration in this Cause. And "said defendants by Parks and Elwood their Attorneys enter "their Cross Motion for time to plead as aforesaid until "the first of May."

"And the Court being fully advised in the "premises, it is Ordered that said defendants do file their "plea herein, as aforesaid by the first day of May next."

13.
13

And afterwards to wit, On the Eleventh day of May in the Year of Our Lord One Thousand eight hundred and fifty Seven, the defendants aforesaid filed in the Office of the Clerk of the Circuit Court in and for the County of Will and State aforesaid their Plea General issue, which said Plea & Issue, issue is in the words and figures following to wit —

"Will Circuit Court
"Joliet & N. Ind R. R. Co.
"ads
"Robert Jones"

"Of May Special Term A. D. 1857 —

"And the said defendants the Joliet and "Northern Indiana Rail Road Company, by Parks and "Elwood their Attornies, come and defend the wrong and "injury when &c and say that they are not guilty of the "said several supposed grievances in manner and form "as the said plaintiff hath above in his said declaration "laid to their charge, and of this they put themselves upon "the Country —

"Parks & Elwood
"Attornies for defts —

"And the plaintiff doth the like &

"Fellows"
"for plff"

12573-9

And afterwards to wit- On the fourteenth day of May in the Year of Our Lord One thousand eight Hundred and fifty Seven. It Also being One of the regular days of said May Term of said Court for the Year A.D. 1857 aforesaid, And the said Court being then duly Organized and Sitting in open Court for the transaction of business, the following proceedings were had and entered of Record by the said Court in words and figures following To wit-

427 "Robert Jones

" " "Case"

"The Joliet & Northern

"Indiana Rail Road Company"

"And now comes the said plaintiff "by E.L. Fellows his Attorney and enters his motion "to call this suit for hearing. Whereupon it is Ordered by "the Court that this cause be and it is called as aforesaid "Thereupon said Plaintiff enters his motion that this cause "be set down for trial. And said defendants by Parks and "Elwood their Attorneys enter their Cross motion to set some "particular day on which to try this suit. And the Court "being fully advised in the premises it is Ordered that the "Trial of this Cause be and it is set down for One week from "and after next Monday, at Ten O'clock in the afternoon"-

And afterwards to wit on

15

the Twenty Sixth day of May in the Year of Our Lord One thousand Eight hundred and fifty Seven. It also being One of the regular days of said May Term of said Court for the said Year A.D. 1857 aforesaid, and the said Court being then duly Organized and Sitting in Open Court for the transaction of business, the following proceedings were had and entered of record by the said Court in words and figures following To Wit:—

"427" "Robert Jones
" " "Case"
"The Joliet & Northern
"Indiana Rail Road Company"

"And now comes the said Plaintiff "by E. C. Fellows his Attorney and enters his Motion that "this Cause be set down for trial. And the said Defendants "by Parks and Elwood their Attorneys also enter their Cross "Motion to set this Suit for trial. And the Court being "fully advised in the premises it is Ordered that the trial "of this Cause be and it is set down for Tomorrow Morning "at Eleven O'Clock"—

And afterwards To Wit. On the Twenty Seventh day of May in the Year of Our Lord One thousand eight hundred and fifty Seven. It also being One of the regular days of said May Term of said Court for the said Year A.D. 1857 aforesaid, and the said Court being then duly Organized and Sitting in Open Court for the transaction

Ex 572-E

of business, the following proceedings were had and entered of record by the said Court in words and figures following To Wit -

"427" "Robert Jones
" vs "Case"
" The Joliet & Northern
" Indiana Rail Road Company

"And now comes the said Plaintiff "by E. C. Sellors his Attorney and enters his motion that "this Cause do now proceed to Trial - And that a Jury be "empannelled herein for that purpose, And said defendants "by Parks and Elwood their Attorneys, also enter their Cross "motion to proceed to Trial herein as aforesaid - Whereupon "it is Ordered by the Court that this Cause do now proceed "to trial, And that a Jury Come herein - Thereupon Come "the Jurors of a Jury of good and lawful men (To Wit -)

"A. A. Cutter, D. W. Wheeler, A. G. McMakin,
"D. L. Holden, A. M. Spoor, Burd A. Fuller,
"Orville D. Cagwin, Henry Sogan, Nelson Baker,
"William Keen, A. S. Chester, 2d Bela Luce,

"Who being duly empannelled and sworn to well and truly try "the issues herein joined between the said parties to this suit "and a true Verdict give according to the evidence, And after "hearing the evidence adduced, and the arguments of Counsel "and receiving the instructions of the Court - And by Consent "of said parties hereto it is Ordered by the Court that "A. S. Chester, One of said Jurors be and he is Excused

17.

"from further attendance on the Trial of this Cause, and
"that said remaining Eleven Jurors be allowed to bring in
"a Verdict in this Cause, Thereupon said Jury retire in
"Charge of an Officer of this Court to Consider of their Verdict.

And afterwards to wit. On the Twenty Eighth day Of May in the Year Of Our Lord One Thousand Eight Hundred and Fifty Seven. It also being One of the regular days of said May Term of said Court for the said Year A.D. 1857 aforesaid, and the said Court being then duly Organized and Sitting in Open Court for the transaction of business. The following proceedings were had and entered of Record by the said Court in words and figures following To wit.

"Robert Jones
"
" "Case"
"The Joliet & Northern
"Indiana Rail Road Company

"And now again comes the said "plaintiff by E.C. Sellers his Attorney, And the said defendants "also come by Parks and Elwood their Attorneys, And the "aforesaid Eleven Jurors heretofore Empannelled herein "also again come and present to the Court their sealed "Verdict in this Cause (To wit) "We the Jurors find the "issues herein for the said plaintiff and assess his damages "to the Sum of Two Hundred and Thirty One Dollars and "fifty Cents. Thereupon said defendants enter their motion

[12578-9]

"in Arrest of Judgment in this Cause, And also for
"a New Trial herein –

And Afterwards to Wit. On the Thirtieth Day of May in the Year of Our Lord One thousand eight Hundred and Fifty Seven. It also being One of the Regular Days of the said May Term of said Court for the said Year A.D. 1857 aforesaid, And the said Court being then duly Organized and Sitting in Open Court for the transaction of business, the following proceedings were had and entered of Record by the said Court in Words and figures following To Wit –

"427" "Robert Jones
" " "Case"
"The Joliet & Northern
"Indiana Rail Road Company

"And now Comes the said Plaintiff
"by E.C. Pellows his Attorney, And the said defendants also
"Come by Parks and Elwood their Attorneys, And after hearing
"the arguments of Counsel upon the said defendants Motion
"in Arrest of Judgment in this Cause, And also on said
"defendants Motion for a New Trial herein – And the Court
"being fully advised in the premises it is Ordered that said
"Motion in Arrest of Judgment, And also said Motion for
"a New Trial be and they are respectively Overruled" –

"Thereupon said Plaintiff enters his Motion

19.

19

"for Judgment against the said defendants for his
"damages aforesaid on the Verdict of said Jury heretofore
"on a former day of this present Term hereof entered herein—
"And also enters his further motion for Execution Thereon—
"Whereupon it is Ordered by the Court that said plaintiff
"do have Judgment against the said defendants for his
"damages aforesaid to the Sum aforesaid"—

"It is, Therefore ~~Ordered~~ Considered
"by the Court that said plaintiff do recover of the said defendants
"his damage aforesaid to the Sum of Two Hundred and
"Thirty One dollars and fifty Cents, Together with his Costs
"and Charges by him about his Suit in this behalf Expended
"and that he do have Execution Therefor— Thereupon said
"defendants by their said Attorneys, Excepts to the Opinion
"and ruleing of this Court in overruleing their said motions
"in Arrest of Judgment, and for a new Trial in this Cause—
"And enter their motion that their Bill of Exceptions thereto
"be Signed and Sealed by the Court— And also enter their
"further motion for an Appeal from the Judgment of this
"Court in this Cause, to the Supreme Court of this State, And
"the Court being fully advised in the premises it is Ordered
"that said Appeal be and it is granted, upon Condition
"that the said defendants do file an Appeal Bond with the
"Clerk of this Court within Sixty days with R. E. Goodell
"as Security— And it is further Ordered that the same
"time be, and it is given for making up and filing
"said Bill of Exceptions herein"—

L 12573-M

And afterwards to wit on the Thirteenth day of July in the Year of Our Lord One thousand Eight Hundred and Fifty Seven — The said Defendants filed in the Office of the Clerk of the Circuit Court in and for the County of Wise and State aforesaid an Appeal Bond, which said Appeal Bond is in the Words and figures following to wit —

21. "Know all men by these presents that we Calvin Knowlton
"agent and Attorney in fact for the Joliet and Northern
"Indiana Rail Road Company and Roswell E. Goodell are
"held and firmly bound unto Robert Jones of the City,
"County and State of New York in the penal sum of Four
"Hundred dollars, for the payment of which sum well
"and truly to be made unto the said Jones his heirs or
"personal representatives or assigns, we bind ourselves our
"heirs and personal representatives jointly and severally
"firmly by these presents. Sealed with our seals, and dated
"this 10th day of July A.D. 1857."

"The condition of this above
"obligation is as follows. Whereas at the May Term of the
"Circuit Court of Will County A.D. 1857 in a certain suit
"therein pending between the said Robert Jones as plaintiff
"and the said Joliet and Northern Indiana Rail Road
"Company as defendants, the said plaintiff recovered
"a Judgment against the said defendants for Two
"Hundred and Thirty One dollars and fifty cents, and
"his costs of suit. from which Judgment the said
"defendants have taken an Appeal to the Supreme Court
"in the 3d Grand Division of the State of Illinois. Now
"therefore if the said Appellants shall duly prosecute
"their said appeal, and in case the same shall be
"dismissed or said Judgment affirmed, shall pay
"the amount of said Judgment with the costs, interest
"and damages, then this obligation to be void, otherwise"

JFW.

L12573-117

22.

"to remain in full force and effect"—

"Joliet & Northern Indiana"
"R. R. Co. by their Atty in fact" "Seal"
"O. Knowlton" Seal
"R. E. Goodell" Seal

"Taken Entered into & approved"
"at Office this 13th. day of"
"July A. D. 1857"—
"A. McN. Intosh Clk"
"Will Co Cir Court"

And afterwards to wit On the fourteenth day of July A.D. 1857 the defendants aforesaid filed in the Office of the Clerk of the Circuit Court, in and for said County of Will in the State aforesaid, their Bill of Exceptions— which said Bill of Exceptions is in the words and figures following To wit—

23.

23

Will Circuit Court.

Joliet & Northern Indiana Rail Road Company

ads

Robert Jones

May Term A. D. 1857.

Be it remembered that in the September Term A. D. 1856 of the Circuit Court of Will County came Robert Jones by E. C. Sellons his attorney and impleaded the Joliet and Northern Indiana Rail Road Company in a certain plea of Trespass on the case, On which the said Robert Jones declared against the said Joliet and Northern Indiana Rail Road Company as follows —

"For that whereas the said "defendants under and by the Corporate name of the Oswego "and Indiana Plank Road Company" heretofore to wit "on the 13th day of October 1853 to wit at Joliet in the "County of Will aforesaid being about to Construct a Rail "Road from said Joliet in an easterly direction to the "Indiana State line applied to the said plaintiff for the "right of way for said rail road over and across the "East half of the North East quarter of Section fourteen "in Township thirty five Range ten East of the 3d principal "meridian in the County aforesaid, which said track of land "was then and there owned by the said plaintiff, And the "said plaintiff for the purpose of enabling the said defendants "to Construct their rail road across the land aforesaid "afterwards to wit On the said 13th day of October 1853 in "Consideration among other things that the said defendants

[12543-13]

"would, before said Rail Road was in operation make
"erect and forever thereafter maintain a good and sufficient
"fence along the South side of their said Rail Road on the
"land aforesaid, Sold and Conveyed to the said defendants
"then a Corporation under the name of the Osnego and Indiana
"Plank Road Company, by a good and sufficient deed
"of conveyance so much of said track of land above
"described as lies and is included in the following boundaries
"to wit, Commencing at the North East corner of said Section
"fourteen, running thence South on the Section line eight Chains
"and Sixty links, thence West ten Chains, thence North eight
"Chains and Sixty links — thence East ten Chains to the place
"of begining, Containing eight acres and Sixty Hundredths
"of an acre —

"And the said defendants then and there received
"and accepted the said deed and the conveyance of the land
"aforesaid for the right of way for said rail road from the
"said plaintiff upon the Condition and with the express promise
"and agreement, to and with the said plaintiff that the said
"defendants would build the fence aforesaid —

"And the said plaintiff
"avers that afterwards to wit on the 24th day of June A.D. 1853.
"and after said rail road was built across the above described
track of land by the said defendants and in operation
Cars and Locomotives passing and repassing over and along
said rail road the said plaintiff then and there still owning
and possessing the land aforesaid lying adjacent to and
bounded on the north by the track of land so conveyed to

"said defendants as aforesaid by the said plaintiff:
"Yet the said defendants well knowing the premises and well
"knowing that they of right and in pursuance of their said
"agreement with the said plaintiff, ought to build and
"maintain a good and sufficient fence on the South side
"of their said rail road between the said land of the said plaintiff
"and the track of land so decided by the said plaintiff to the
"said defendants for the right of way aforesaid described as
"aforesaid, and well knowing that the Cattle and Sheep of
"the said plaintiff which were lawfully running feeding and
"pasturing in the close and upon the land of the said plaintiff
"described as aforesaid lying on the South side of said rail
"road adjacent and contiguous to the said piece of land
"so sold by the said plaintiff to the said defendants, for
"the right of way aforesaid would es- escape and stray on to
"the track of their said rail road and would be run over injured
"and killed by the Cars and locomotives then and there passing
"and repassing on said rail road through the want of the fence
"which the said defendants so agreed to construct as aforesaid,
"Yet the said defendants contriving and
intending wrongfully and unjustly to injure and aggrieve
the said plaintiff in that behalf, whilst the said plaintiff was
so possessed of the said Close and land aforesaid, to wit, on
the day and year aforesaid to wit, at the County of Will aforesaid
wrongfully neglected and omitted to erect build or maintain
any fence on the South side of said rail road between the
aforesaid Close and land of said plaintiffs and the land
of the said defendants so sold to them by the said plaintiffs

[12543-13]

"as aforesaid, Whereby the Sheep of the said Plaintiff to wit,
"One Hundred Sheep lawfully running, feeding and depasturing
"in the said Close, and on the land of the said Plaintiff
"to wit, on the day last aforesaid and on divers other days
"then next following, went, erred, Strayed and escaped out of
"said Close of said plaintiff through the want of said fence to
"and upon the track of said Rail Road, and were then and there
"run over by the Locomotive and Cars, then and there passing and
repassing on said Rail Road, Whereby fifty of said Sheep of great
"value to wit, of the value of two hundred dollars were then
"and there killed, and fifty of said Sheep of great value to wit,
"of the value of two Hundred dollars were then and there
"greatly bruised lamed injured and damaged, and the said
"plaintiff was forced and obliged to and did lay out and
"expend a large sum of money to wit, the sum of fifty dollars
"in and about the endeavouring to cure the said last mentioned
"fifty Sheep so wounded as aforesaid, Whereupon the said
"plaintiff says, that he is injured and hath sustained damage
"to the Amount, of five Hundred dollars and therefore brings
"this Suit &c."

And afterwards at the Special May Term A.D. 1847
of the Court aforesaid the said defendants by Parks & Elwood
their Attorneys, pleaded to said declaration as follows—

"And
"the said defendants, the Joliet and Northern Indiana Rail
Road Company by Parks & Elwood their Attornies come and
defend the wrong and injury When &c and say that they are
not guilty of the said Several supposed grievances in manner

27.

"And form as the said plaintiff hath above in his said "declaration laid to their charge and of this they put themselves upon the Country—

Parks & Elwood
Attornies for defts—

To which the said plaintiff by his said attorney added a similiter as follows— "And the said plaintiff doth the like &c
Sellons for plff"

Whereupon the issue was joined between said parties; And afterwards to wit at the May Term A.D. 1857— of said Circuit Court, held at the Court House in the City of Joliet, in and for said County of Will before the Honorable Jesse O. Norton Judge of the Eleventh Judicial Circuit of the State of Illinois and Presiding Judge of said Circuit Court, on the 27th day of May, the aforesaid issue came on to be tried by a Jury of the said County of Will for that purpose duly impannelled and sworn, at which day came thro the said plaintiff, as also the said defendants by their respective attornies aforesaid—

Upon the trial the following is the substance of all the evidence introduced upon the part of the plaintiffs—

In the first place, the defendants Counsel waiving any objection to the form of the evidence as being of a secondary character, the plaintiff offered in evidence the Record of a certain deed from Robert Jones and wife to the Ottawa and Indiana Plank Road Company

L1257314

bearing date the 13th day of October 1853, Conveying the premises discribed in the plaintiffs declaration, In the habendum clause of said deed was the following Condition viz- "Subject to the following Covenants of the said party of the second part to wit, they are to erect and forever maintain a good and sufficient fence along the South side of their said rail road and are to build and maintain in suitable repair a sewer of suitable material under their said rail road So that the water from the Spring and the Surface water from the adjacent premises of the first part may pass freely off at all times after said road shall be built-

To the introduction of this deed the defendants Counsel objected, as not tending to support the issue on the part of the plaintiff. The objection was overruled by the Court and the defendants counsel then And there excepted to the opinion of the Court-

John W. Stevens, was then called as a witness on the part of the plaintiff: He testified that he was well acquainted with the locality in question: that he knew the boundary lines of the E½ of the N. E¼ Of Sec 14, T. 35, N of R. 10, E. of the 3d P. M. that it was in the possession of the plaintiff: that he witness resided there at the time of the accident to the sheep, for which the suit was brought; that there was no fence on the South side of the rail road, and none was put up till after passenger trains Commenced running on the road,- that in June 1855 Some sheep were killed on the track, belonging to Plff Jones; that the flock of

29.

29.

Sheep of the plff were at the time in the habit of laying around the barn on the hill opposite the track; that they were not enclosed at the time, but were running at large; that they were killed on the morning of the 24th day of June; that the fence was not built till the following fall, that it was some fifteen or twenty rods to the rail road from the plffs barn; that the South line of the Eight acre track in question was about half way between the barn and rail road track; that in the morning he found nine Sheep lying dead on the track, and forty four injured more or less, some having both hind legs broken and some otherwise injured; that sixteen more were killed, and six or seven of the wounded sheep died afterwards, and the balance recovered after being under medical treatment for a week or two; that the flock had been washed for shearing, that in addition to the twenty five which were killed seven or eight died within the period of six weeks from the effects of the injuries; that it was a good deal of trouble to take care of the wounded sheep; worth witness thought $3.50 per head; that the sheep killed were buried by plffs hands and was worth $5; that the damage was done just before daylight; He further testified that the most natural place for the sheep to get on to the rail road track from the barn was straight across; that on the day of the accident he witness had an interview with a Mr. McGregor; McGregor said he would make inquiries about it and that anything should be made right and satisfactory; that he witness did not know he McGregor was an agent of the defts in this

5/25/43

Suit; That he had seen him frequently along the line of the road acting as Superintendant; Refers to what is Commonly Called the Cut Off road";

Being Cross examined by Defts Counsel, Witness said, that there were at the time no fences on the East and West lines of the plffs land Extending to the South line of the rail road; that there was a highway Crossing East of the East line of plffs land and there was no enclosure along the highway from the barn to the rail road.

Henry Johnson was then called as a Witness on the part of the plff. He corroborated the evidence of Stevens as to the quality, and value of the Sheep, He further stated that he lived near the place in question; that from the barn there was no difficulty in getting onto the track anywhere; Couldnt State where they got on; they might have got on either above or below the place where they were found.

Being Cross Examined by the Defts Counsel he testified, that there was quite a wide bottom intervening between the Bluff on which the barn of plff Stands and the rail road, extending along the highway which Crosses the rail road on the east, for some rods, but Could not say how many.

31

Richard Hendrick was next sworn as a Witness for the plff. He testified in regard to the quality and value of the

Sheep, Corroborating the Statements of the other Witnesses upon this point, He further Stated that the track was from five to six feet high, at the place in question; that there was grass on each side in the bottom; and that at night it was natural for the Sheep to seek the track to lie down upon.

Being Cross Examined by defendants Counsel he Stated that there was a highway Crossing not more than three or four rods from the East line of the land in question, that it was from ten to twelve rods from the place where the nearest Sheep was found killed.

Clark Baker was then Called as a Witness on the part of plff. His testimony was merely on the question of Value of the Sheep.

James Jones was next Called as a Witness on the part of the plff. He testified that he was the Son of the plff. The plffs Counsel then proposed to interogate him in regard to a Conversation and agreement between him as the agent of the plff and Governor Mattison, as the agent of the Oswego and Indiana Plank Road Company, in negotiating for the right of way; The defendants Counsel objected to any evidence upon that Subject prior to the execution of the deed, which had been introduced in evidence: The Objection was Overruled upon the Statement of plffs Counsel that the agreement proposed to be proved was not embraced nor intended to be embraced in the Condition to plffs deed. And

the defendants Counsel then and there excepted to the Opinion of the Court, —

The Witness then, testified ~~stated~~ that he had a Conversation with Govenor Matteson some time before the deed was Executed, that Govenor Matteson then told him that he would pay any damage which might be caused by reason of the want of a fence along the Rail Road; that he would have the fence built as soon as the trains got to running that Mr S.W. Bowen who was engaged by the Company to assist in negotiating for the right of way, was present on the occasion, and also Mr McGregor, and that the building of said fence was a part of the Consideration for the purchase of the land over which the road run;

On Cross Examination by defts Counsel, he Stated that the Conversation was in the Spring of 1853 —

John W Stevens, was then recalled by the plffs Counsel, and Stated that the accident in question occured early in the morning, while the Witness was in bed and asleep, that he was awoke by the Whistling of the Locomotive; The plffs Counsel then asked the Witness whether, the engineers on the road were in the habit of Whistling or making Signals as they approached the highway Crossing; To this the defts Counsel objected, but the objection was overruled, And the defts Counsel then and there excepted to the Opinion of the Court —

The Witness then testified that the engineers were not regular in giving

33.
33.

Signals at this place. That frequently they gave no signals—

Being Cross examined by the defendants Counsel he testified, that he did not know by what Company the road was operated at the time to which his testimony refered— did not know whether the train in question was a train of the Michigan Central Rail Road Company or of the Chicago and Mississippi Rail Road Company— did not know that the Michigan Central Rail Road Company as a matter of public notoriety running trains upon the road; Could not say what or whose train did the damage; the Sheep were scattered along the track rather nearer the west side than the East side of the track of land in question,—

The plff here rested his case—

The defendants Counsel then called, Joel A Matteson who being first sworn on his voir dire, testified, that he was not interested in the event of the suit; He was then sworn in Chief. He testified that he remembered having a conversation with the Witness James Jones before the deed from Robert Jones was obtained, believes Mr Bowen and Mr McGregor were present; that when negotiations were commenced with said Jones for procuring the right of way thought the damages asked were very high, that to obviate the objections of said Jones in a

12543-17

great measure he proposed to purchase not only the right of way but the track of Eight acres and some Hundredths, in nearly a Square form lying on the North east Corner of Section fourteen;— that he did not recollect either in that Conversation or any other with said James Jones agreeing to pay all damages which might be caused by the want of a fence;—

The Witness further testified that the possession of the road was transfered to the Michigan Central Company in the early part of June 1855, that the defts never operated the road with freight or passenger trains;— but that the trains was either of the Michigan Central Company or of the Chicago and Mississippi Company which then run trains on the road under an arrangement with the Michigan Central, This Witness Corroborates the Statement of Jones, that he was the agent of the Oswego & Indiana Plank Road Company, and as to the building of a fence, & the time of its being built— And that the building of the fence was a part of the agreement for the right of way;—

Sherman W. Bowen, was then called as a Witness on the part of the defendants— He was present at the Conversation between Mattison and Jones— was assisting in getting right of way— Heard no promise or agreement by Mattison to pay damages for want of a fence, as testified to by Jones, think he should have heard it, if such had taken place—

54

35

Nelson D. Elwood was then called as a witness on the part of the defendants, He stated that the transfer of the road from the defendants to the Michigan Central Rail Road Company was consummated and went into effect on the 4th day of June 1856, The defendants never operated the road, and had no trains on the road after that date. The trains belonged to the Michigan Central or Chicago and Mississippi.

The defendants testimony was here closed. The foregoing is the substance of the defendants evidence.

The defendants Counsel then moved to exclude from the consideration of the Jury the evidence relating to the deed from Jones to the Oswego and Indiana Plank Road Company upon the ground that the identity of that Company with the defendants in this suit had not been proved nor was presumable from identity of name, and if they were not identical no evidence had been offered by the plff to show that the defendants were liable upon the contracts made or conditions assumed by the Oswego and Indiana Plank Road Company. This motion was overruled, to which ruling of the Court the defendants Counsel then and there excepted.

The Plaintiffs Counsel then asked the Court for the following instructions to the Jury which were given, without objection from the defendant.

[125?3-18]

1st That if they believe from the evidence that the defendants, in Consideration of the right of way over and across the plaintiffs land, promised and agreed with the plaintiff to build the fence in question, and that the sheep of the said plaintiff, by reason of the defendants neglect to build such fence, went upon the rail road track, without the fault of the plaintiff and were injured or killed, then the law is for the plaintiff —

2 That if they belive from the evidence the plaintiff ought to recover they may find for damages the value of the property proven to have been destroyed —

The defendants Counsel then asked the Court for the following instructions to the Jury —

1, If from the evidence the Jury believe that the sheep of the plaintiff were killed or injured by the train of the Michigan Central Rail Road Company, or the Chicago & Mississippi Rail Road Company, running under a lease or by licinse of the Joliet and Northern Indiana Rail Road Company, who are the defendants here — And were so killed with-

-out the authority on direction of said defendants, then said defendants are not liable in this action —

Which instruction the Court refused to give — to which opinion the defendants Counsel then and there excepted —

2. If no evidence has been produced by the plaintiff satisfying the jury that the defendants the Joliet & Northern Indiana Rail Road Company are the same identical Corporation with the Ottawa and Indiana Plank Road Company which made the Contract for which the plff sues, then the plff has failed to sustain his declaration and the law is for the defendants —

Which instruction the Court refused to give; to which opinion the defendants Counsel then and there excepted —

3. Although the jury should believe from the evidence, that the defendants were bound by the conditions in the deed of the right of way from Robert Jones to build a fence along the Rail Road on the South side thereof and had failed to do so, yet this breach of duty on their part did not absolve the plff from the exercise of such care and prudence in the management of his stock, as the actual condition of his

fame and the Circumstances of the Case
seemed to call for at the time —

Which

was given, to which the plff Counsel then and there excepted,

4th — If from the evidence the jury believe, that the immediate agency which killed or injured the plffs sheep was a locomotive engine on the rail road track running against them — then — although from all the Circumstances the jury might imagine it probable that the sheep would not have been on the track if a fence had been built, according to Contract, yet if such want of fence is not the immediate and proximate Cause of the injury, that fact would not of itself make the Company liable —

Which

instruction was given, to which the plff Counsel then and there excepted —

5th — That although the defendants may themselves have been guilty of negligence in the management of the train in question, either by not giving the proper signals in time, or by not keeping a proper look out — or by not slackening the speed of the train — yet if the plaintiff was himself also guilty of want of proper and reasonable care and prudence on the occasion

by leaving his Sheep in an unenclosed field on the side of and open to the rail road, then unless the proof shows that the Conduct of the Engineer was wanton and Malicious, and not merely Careless and imprudent – the law is for the defendants, and the plff cannot recover for the damage done –

Which instructions was refused. To which opinion of the Court the defendants Counsel then and there excepted –

6th That in Order to enable the plff to recover in this case, he must have Satisfied the Jury from the evidence that the Sheep were his property and also as to the amount and kind of damage sustained –

Which was given –

7th In Order to make the defendants liable in respect to the Condition inserted in the deed to fence the road on the South side, it is incumbent on the plff to prove by evidence either positive or Circumstancial, that the Sheep got on to the rail road track at some point in the line, which the defendants were so bound to fence and not elsewhere – – – – – And it is also incumbant on him to prove that such fence if built would

have formed a perfect inclosure for said sheep from and against the rail road—

The Court considered the instructions as consisting of two distinct and independent propositions, and gave the first, ending at the word "elsewhere" and refused the other— To which opinion the defendants Counsel then and there excepted—

8th. Although the jury believe from the evidence that McGregor agreed to and with the plff to pay for the injuries done to the sheep— Yet before the defendants can be made liable for such agreement, the plff must prove that said McGregor was the agent of the defendants for the purpose of making such agreement—

Which was given—

9th. Although from the evidence the jury may believe that said McGregor was an authorized agent of said defendants— Yet unless some Consideration has been proved for such promise moving from said plff to said defendants, such agreement is not a valid Contract and unless the defendants are originally liable, the law is for the defendants—

Which was given—

10th. If the Jury believe from the evidence that

that the entire agreement in regard to the fencing of the plaintiffs land in question was finally contained and embodied in the condition or provision in the deed on which the suit is brought, then the said agreement forms the only measure of the rights of the parties and no evidence of previous agreements or negotiations between the parties, in regard to said fencing, is admissable—

Which was given—

Whereupon the case was submitted to the jury, and the Jury then and there gave their Verdict, for the said plaintiff for two Hundred and thirty One dollars and fifty cents—

And thereupon the defendants Counsel made a motion in behalf of said defendants for a new trial, which motion was overruled, and the said defendants Counsel then and there excepted thereto—

The defendants Counsel then made a motion in arrest of judgment in said cause, which was by said Court overruled, and the defendants then and there excepted thereto—

To which said several opinions of the Court hereinbefore recited, the said defendants except, and pray the Court to sign and seal this Bill of Exceptions and make it a part of the record in this case, which is done—

J. D. Horton [Seal]

Judge 11th Jud Circuit Ala—

[12573-21]

State of Illinois }
County of Will } ss.

I Alexander McIntosh Clerk of the Circuit Court in and for the County of Will in the State aforesaid, do hereby Certify the above and foregoing to be a full true and correct Transcript of the Records of the Will County Circuit Court in said Cause as Will appear from the Records of said Court now on file in my Office—

Attest my hand, and the Seal of Our said Court hereto affixed at Office in the City of Joliet in said County this 2d day of February A. D. 1858—

A. McIntosh Clerk

5 12573-22

Supreme Court.

The Joliet & Northern Indiana R. Rds, appellants.

vs

Robert Jones, appellee.

Record the appellants

Upon the foregoing assign for error the matters following:

1. The Court erred in refusing the second instruction asked for by the appellants, (defts below), to the effect that it was incumbent on the plff to prove the identity of the Joliet & Northern Indiana Rail Road Company with the Osweg and Indiana Plank Road Company, with whom the contract sued on was made.
2. The Court Erred in refusing what is designated in the Bill of Exceptions as the Second clause of the seventh instruction asked for by appellants.
3. The Court erred in refusing the sixth instruction asked for by appellants.
4. The Court erred in not excluding from the consideration of the jury the Deed from Jones to the Osweg and Indiana Plank Road Company, upon a motion made by appellants' Counsel, after the plff had closed his testimony.
5. The Court erred in admitting testimony, (after the deed had been produced in Evidence showing a written contract between the parties),— designed to prove verbal agreements made previously, touching the same subject matter.
8. The Court erred in refusing the motion of the appellants for a new trial, because the verdict was against law and evidence.

~~1. It was directly in defiance of the~~

[12573-23]

9th " The Court erred in not arresting the judgment for the reason that the declaration did not state a legal cause of action against the defendants.

For which errors they pray that the ~~error~~ judgment aforesaid may be reversed.

Parks & Elwood
attornies for appellants

187
Will County Cir. Court
The Joliet & Northern Indiana Rail Road Co.
ads.
Robert Jones
Assignment of Errors
Filed April 20. 1858.
L. Leland
Clerk

Supreme Court State of Illinois

Robert Jones

ads

The Joliet & Northern
Indiana Rail Road Co

And the said defendant by W. K. McAllister
his Attorney says that there is no
error in the record & proceedings or in
giving the judgment aforesaid & prays
that the said court will reexamine the same
& well as the Errors above assigned &
that the said judgment may be
affirmed &c

W. K. McAllister
Atty for Dept

[13-573-34]

Supreme Court

Robert Jones

ad, 167

The Joliet & North

Indiana R Road Co

Jonathan Ewen

Filed April 22. 1858

L. Leland

Clk

SUPREME COURT. Appeal from Will.

JOLIET & NORTHERN INDIANA RAIL ROAD COMPANY, *Appellants*,
vs.
ROBERT JONES, *Appellee.*

Points and argument for Appellants, Defendants below.

By the record it will be seen, that the essential facts of the case are as follows:

The Oswego and Indiana Plank Road Company, a corporation authorized by its charter to build a railroad or a plank road on the whole or any portion of its line, having decided to construct a railroad from Joliet to a given point on the Indiana State Line, purchased from Jones, the plaintiff below, a piece of land in the N. E. corner of Sec. 14, T. 35 N., R. 10 E., in Will County, containing about eight acres. On the 13th of October, 1853, Jones executed to that Company a deed in fee simple of this tract: this deed contained a clause which was called a covenant, though not technically such, that the grantees should build a good and sufficient fence along the south side of their railroad, across the tract in question.

The railroad was completed in June, **1855**, and on the 4th of that month, when as appears by the proof, it was in the hands of the Joliet & Northern Indiana R. R. Co., was by that Company transferred to the Michigan Central R. R. Co., but by what particular form of proceeding does not appear. Immediately after this transfer, the last named Company commenced running trains over the road. The J. & N. I. R. R. Co., as it appears, never owned any rolling stock or operated the road. On the 24th day of June, and twenty days after the Michigan Central Co. had commenced business on the road, some twenty-five or thirty sheep belonging to the plaintiff were early in the morning killed by a train, and several others more or less injured. No eye-witness was called by the plaintiff below, and none of the particular circumstances disclosed at the trial. The fence was not built at the time of the accident.

For this injury the plaintiff brought an action on the case against the Joliet & N. I. R. R. Co., obviously upon the precedent of Conger's case **15** Ill. 366. The declaration recites the substance of the deed, alleges that the condition of building the fence was an essential part of the consideration, avers the neglect of the defendants to fulfill that condition, and claims the killing and injuring the sheep as damages accruing from such neglect. It studiously avoids alleging, as the Court will notice, that the train belonged to or was operated by defendants, or that it was negligently managed on the occasion. The cause of action assigned is simply and distinctly the breach of defendants duty to build the fence, by means whereof the plaintiff's sheep were left at liberty to stray upon

the track and become exposed to injury. Plea *gen. issue.* Verdict **$231-50.**

The points taken by the appellants, to which all the exceptions in the record will found referrible, are these:

First. That, admitting for the sake of argument a technical cause of action, yet the want of the fence was not shown to be the *proximate* and *responsible* cause of the special damage for which suit was brought and the verdict given.

Second. That his legitimate damages for the breach would have been the loss of the use of his land for its natural or customary purposes either of agriculture or pasturage; the cost of making the fence, if he had built it himself; or, if the keeping of sheep had been a part of his regular business on the farm at the time, an indemnity for the extra care and attention necessarily imposed upon him by such defect in his enclosure against the railroad; or, if reasonably anticipating that during the season the Co. would build the fence, he had prepared the ground for a crop or actually cultivated it, the consequent damages, whatever they might have been, as in Ward's case, **16 Ill. 522.**— These were the only damages contemplated by the parties. The Court cannot presume, that until the fence should be built (for which no definite time was fixed,) the defendants agreed to stand paymaster for any and all losses, whether resulting from plaintiff's own negligence, or otherwise.

Third. Inasmuch as the original contract was made with a corporation called at the time the Oswego & Indiana Plankroad Company, while the breach was alleged to have been committed by the Joliet & Northern Indiana Railroad Co.; and as the identity of a corporation is *prima facie* manifested by its corporate name only, the plaintiff should have positively averred *and proved*, either that the two names applied to the same corporation, by force of some statute to that effect; or, if one was the successor of the other, then that it was chargeable with the contracts of its predecessor, particularly reciting by what train of proceedings such liability had been created.

Fourth. The want of certain forty rods of fence on the south side of the railroad across the tract conveyed being alleged as the effective cause of injury, and as it could only have been such cause upon the supposition that, in case it had been

built, it would have formed an adequate enclosure against the railroad, the plaintiff should have established that fact. No such proof was given, but the record will show evidence directly to the contrary.

Fifth. Some proof should have been adduced reasonably tending to show that the sheep got upon the road at some point over the line which Jones' grantees were bound to fence, and not elsewhere. We believe the Court will find no such proof.

Sixth. The action being for breach of duty assigned upon the condition in the Deed, no evidence of negotiations or parol agreements prior to the execution of the deed, in which that matter was finally embodied, should have been received.

To clear the record of all matters not involved in controversy, we admit, in the outset, that although the special damage laid in the declaration had not been sufficiently proved or was not legally recoverable, yet, if we were liable at all, the plaintiff would have been entitled at least to *nominal* damages, according to the suggestion of this Court in the case of Conger *vs.* C. & R. I. R. R. Co., **15 Ill., 367.**

I.

WE HOLD THAT THE INJURY WAS NOT THE DIRECT AND PROXIMATE CONSEQUENCE OF THE BREACH ALLEGED.

The relation of cause and effect did not exist between them, according to the legal rules of responsibility. The immediate *physical* agent of the injury of course was the engine—managed, as the Court by the evidence must infer, with all due care, and, as was clearly proved, by the servants of another Corporation. The theory of the plff.'s case was, that, nevertheless, by reason of our fault in not building the fence the sheep were permitted to come upon the track and place themselves in a condition to be exposed to danger; and hence that we were liable for the consequences at all events. But we contend,

1. That, in causing this state of things, the grossest imprudence and recklessness on the part of the plaintiff concurred with the fault of the defendants. The breach of the condition to fence, we may admit, was the *primary* and *remote* cause; but the keeping his sheep, before any fence was actually built, unwatched and untended, in the immediate vicinity of the railroad and on ground contiguous and open to it, and open and contiguous to a highway leading to it, was the *proximate* and *direct* cause of the exposure. See Pierce on Railroads, p. 277, cases cited in note (**1**). Because the defendants were bound to build him a fence within a reasonable time, was no reason why he should be exempt from the plain social duty of proper care and prudence in the preserva-

L 12578-26

tion of his property so long as the fence remained unbuilt—especially as the law would have liberally paid him for the practice of those virtues. The question whether he did exercise due care and prudence under the circumstances is not, we suppose, to be discussed with any side glance at any words written down in any deed in anybody's pigeon hole. If the defendants failed in their duty to him, they were responsible for the damage; and that damage was the loss of such uses of his land as a careful and prudent man could only safely put it to when protected by a fence. We know of no sensible definition of care and prudence that makes these qualities depend upon anything else than *the existing facts of the case* of which they are predicated—no matter how or by whose fault those facts are caused. If one party is in a position of wrong towards another, there is no principle of morals or of law which allows the party wronged, by a course of ingenious and elaborate negligence, to make that wrong yield the greatest possible extent of mischief to himself or property. In this case, the same sound morality which bound the defendants below to pay damage for not doing what they had agreed to do bound the plaintiff also on his part, although the suffering party, to act as a careful, discreet and reasonable man, so long as the grievance continued. While so acting, the law would have abundantly protected him in every right and recompensed him for every injury.

That he was guilty of such GROSS negligence, we think shown by the plaintiff's evidence beyond all doubt. The testimony of Stevens and Newkirk (see Record, pages 28, 29, 30, 31, 32,) shows that the ground of the plaintiff over which the sheep ranged was contiguous to the rail road on the south side; that it was and had been entirely uninclosed; that the plaintiff's barn was from 15 to 20 rods distant from the railroad on a sort of bluff; that at night the sheep were in the habit of laying around the barn; that there was grass in the bottom on both sides of the railroad embankment; and that, as must have been well known to plff.'s servants, they were in the habit during the night of going on to the track to lay down, it being high and dry and an inviting resort for them. He knew the facts, the condition of his grounds, the instincts and habits of his sheep. He knew, that without a fence they were exposed to great hazard; and it was from this very knowledge, and with a view, as was contended, to this very danger, that he had required the condition in the deed to be inserted. If this be managing a flock of sheep with common care and prudence, we shall despair of ever knowing a case of negligence. No doubt, the sheep were lawfully depasturing on his own land. But how does this affect the question? The exercise of a lawful right upon a man's own premises does not, we apprehend, exempt him from the obligation to exercise it with such care and prudence as the surrounding circumstances call for at the time. Notwithstanding the contract, the moment his sheep crossed his line and went upon the land of the defendants, they were there without positive lawful right, as this Court has repeatedly determined, though not committing an actionable trespass according to the rule adopted in Illinois. The violation of the plff.'s right in not building the fence may have induced or facilitated the violation of the defendants' rights by the trespass of his sheep, and would have effectually precluded them from making any complaint

in any event. But they were nevertheless both legal wrongs, in a technical view of their mutual relations as adjacent land owners.

See C. & M. R. R. Co. *vs.* Patchin, 16 Ill., 201.
Pierce on R. R., p. 328–9, note (1), 330, note (1).

Nor can it be said that the construction of the fence was in any sense a condition precedent to the right of running trains upon the the road. The deed, it will be observed, was not simply of the right of way, but of the fee simple in the land. From the phraseology of the deed, it is manifest that the vesting of the title was not designed to be made dependent upon the fulfillment of the condition. It only went to a part of the consideration—it was indefinite in respect to time of performance—it must have been foreseen that fencing stuff could not be delivered along the line until the track was completed, or at least in running order for construction trains, the frequent transit of which would be equally dangerous to plaintiff's sheep with any other—and the condition was, moreover, continuing and perpetual in its character. It no doubt involved a duty upon the grantees inherent in the grant; but for a breach of that duty the grantor plainly relied upon his action for damages.

It may be said, that although the train which caused the injury was the property of another Company, yet the defendants were liable for their acts; that being so liable, the state of the case is essentially the same, for all purposes, as if it had been a train of the defendants; and that the relations of duty between the plaintiff and defendants, under the contract, were such as to cast upon the latter the burthen of proving affirmatively that the train was managed with proper skill and prudence.

We may, for the sake of argument, concede that the two first propositions are true; and consider the question precisely as if the train had belonged to the defendants. We may then well insist that, even if the naked fact of the happening of the injury were *prima facie* evidence of negligence, and devolved upon us the *onus* of rebutting that presumption, the plff.'s own witnesses have effectually done that for us. The accident occurred in the morning *just before daylight*, (see Stevens' testimony, Rec. p. 29,) and "a *prolonged* whistling," which awoke the witness, appears to have been given, to scare the sheep from the track. Assuredly, upon the advancement of such evidence on the part of the plff., meager as it would be in a contested case, it cannot be said the defendants were called upon to show that they were not guilty of negligence.—Indeed, as will be manifest from glancing through the record, the plff. in his declaration studiously avoided alleging, and in making out his case did not seriously urge that, so far as the management of the train was concerned, there was any blame whatever. Additional force is given to this view by the fact, that the engineer and hands in charge of the train were not in the employment of the defendants; that the road for the time being was used by two companies, the Michigan Central and Chicago & Mississippi; and the plff.'s proof left it doubtful which company did the damage. The defendants, therefore, were not in a condition to be called on for a history of the transaction.

But, as a question of law, is the position tenable? Let us grant that the plff., under the circumstances, was not bound to exercise *extraordi-*

nary care; and this for the reason, that the defendants at the time were owing him a duty by contract which they were neglecting to perform. Yet, was he not meantime bound to use *ordinary* care—reasonable precautions against danger? The decision of this Court in the case of the Aurora Branch R. R. Co. *vs.* Grimes, **13 Ill., 585,** seems conclusive upon the point. The defendants had violated their contract, and were undoubtedly liable for the consequent damages. But, nevertheless, in running their trains they were in the exercise of their lawful rights upon their own exclusive premises; and the lawfulness of their acts certainly was not and could not be affected by the fact that they owed damages to A, B or C, for breach of divers special contracts not touching the right of way. The sheep were not perhaps *actionable* trespassers upon the track; but when the locomotive sounded its "prolonged" notice to quit, we think, as a matter of law, they should have quit.

The general rule seems to be that the plaintiff must be, and must show himself to be, free from any negligence which contributes to the damage; and even where on the occasion of the injury the plaintiff is in a position of right and the defendant in a position of wrong, yet if in presenting his case the evidence clearly discloses the want of ordinary care and prudence, he cannot recover. In analyzing the agencies which caused the final result, the Court finds that he himself was an agent; and it does not help his case to say that the defendants' fault preceded his. The damages cannot all be imputed to the defendants, and they cannot be apportioned.

2. But without regard to the question of the plff.'s negligence, we think the injury cannot be recognized as the *proximate* and *direct* result of the breach of duty alleged. It is no doubt amongst the nicest questions which courts have to consider, whether, where one fact is followed by another fact, as a sequence, the legal relation of cause and effect exists between them. And in looking at the authorities, we believe this distinction will be found prominent throughout: where the fault of the defendant is some *positive wrongful act*, wilfully committed, not a mere negligent omission to perform a duty arising *ex contractu*, and is unaccompanied with very gross negligence on the part of the plaintiff himself, there courts have been inclined to hold the wrong doer to the widest range of responsibility, and to make him answer even for the indirect and remote consequences of his conduct. But, on the contrary, in cases of mere neglect to perform an agreement, not involving fraud or moral turpitude, they have uniformly restrained themselves by the strict rule, that the defendant shall only respond for such damages as were manifestly contemplated by the parties in making the contract, referring to its language, subject matter and circumstances; or such as were the direct results of the alleged non-feasance; excluding from the estimate such as the aggrieved party at small cost and by easy precautions might have prevented or stopped, and such (sometimes called *speculative* damages) as were accidentally occasioned by the state of his own particular affairs at the time.

Sedgwick on Damages, 57 to 95, *passim*.
Loker *vs.* Damon, 17 Pick., p. 284.
Blanchard *vs.* Ely, 21 Wend., 461.
16 Ill., 527—C. & R. I. R. R. *vs.* Ward.
Clark vs. Brown, 18 *Wend.*, 228.
Flower *vs.* Adam, 2 Taunt., 314.
3 Greenleaf Rep., 51–5–6.

For a very philosophical discussion of this subject we refer to the opinion of Senator Tracy in the case of *Clark vs. Brown*, above cited. The leading features of that case will be found strikingly similar to this. A and B were adjacent farmers. A was bound to keep up one half and B the other half of the partition fence. B failed to make his half. Thro' this opening A's cattle got into B's field, ate of unripe corn, and died from the effects. A sought to recover of B the value of his cattle. The Supreme Court decided the damages too remote, and the Court of Errors affirmed the decision.

In *Loker vs. Damon*, cited above, the facts were that the defendant had broken down the plff.'s fence in the fall. Plaintiff did not repair it till the following May. In consequence, cattle got in and spoiled his crop. He sued, and the Supreme Court of Massachusetts pronounced the damages too remote. It is needless to multiply authorities. To say that the appellants are liable in the case at bar, it seems to us, would be virtually repealing the maxim that "*every sequence is not a consequence.*" All the sound and reasonable limits of responsibility which it is for the wisdom and prudence of Courts to maintain would be broken down.—Suppose A, a banker, should contract with B, a manufacturer, to deliver him a fire-proof safe in a given period. B fails to fulfill. A's money and papers in the meantime are destroyed by fire, with or without his own fault. He sues B for the loss. Could such a suit be sustained?—and yet why not, if this can be?

Again, it was for the plaintiff at least to present evidence from which it would be probable that, if the fence had been built, the injury would not have happened. But, to do this, he requires the Court to piece out his case with a series of suppositions: *First*, that if the fence had been built, he would have used the ground as a sheep pasture; *second*, that he would have made an enclosure of it by fencing up to it on the east and west sides, without which it is obvious the railroad fence would have been unavailing.

For the above reasons, we say that the verdict, being for the special damage claimed, was clearly against law and evidence, and should have been set aside.

II.

Nothing need be said upon the second point, but that no evidence was adduced by the plaintiff to show any other than the special damage set out in the declaration. Hence, conceding his technical cause of action, he was only entitled to *nominal* damages.

III.

The suit was brought, evidently, upon the precedent of Conger's case, **15 Ill., 366.** It was in case for breach of duty, and that duty was alleged to have arisen from the fact that the plaintiff had executed to the defendants a deed in consideration of a covenant to fence, and had accepted and enjoyed the benefits of such conveyance. The action, therefore, was essentially based upon the terms of the deed. The deed was made to the Oswego and Indiana Plank Road Company. The

suit was brought against the JOLIET AND NORTHERN INDIANA RAIL ROAD COMPANY. The declaration sets forth that the defendants, under the name of the O. & I. P. R. Co. received the deed in question, without, however, in positive terms, averring that they were identical, or undertaking to show how the change of name occurred.

It will of course be agreed, that in every case when a plaintiff seeks to recover for a breach of duty, he must aver and prove that the duty charged rested upon the defendant in the suit. In a case hinging on a written instrument, where the name of the defendant is identical with that of the party in the instrument, the law, as a general rule, will presume identity, and will require no affirmative proof, until a suspicion is raised from the other side. But when the names are totally different, this ground of presumption fails even in the case of natural persons, much more in the case of corporations, which, having no physical attributes, can only be recognized by their corporate appellations.

3. Gil 611

Assuming the declaration to be sufficient in point of form, there are but two questions: *First*, was it enough to aver, without proof, that they were identical; *second*, was the identity proved, or attempted to be proved? The mere averment of identity could not have been enough, unless made so, under the rules of pleading, by the form of our plea, the general issue. But can it be said that this was an admission of identity? Our plea puts *all* the plaintiff's substantive allegations in issue, and amongst them the allegation that the defendants were ever chargeable with the duty for the breach of which the suit was brought. It obviously was not a matter for a plea in abatement, as no misnomer was or could be pretended; and as obviously did not come within the operation of our Practice act dispensing with proof of the execution of written instruments unless denied under oath. The deed was not *set out* in the declaration—it was not an instrument alleged to have been executed *by* the defendants—and the action was not brought *upon* the deed in the sense of the statute. In fact the plff., notwithstanding our opposition, undertook, after introducing the deed and condition, to rally back on certain verbal promises of Gov. Matteson made in the spring of 1853.

15 Ill. 454.

There was no evidence whatever produced upon the trial, showing or tending to show this identity. The not attempting it was probably an an oversight; but if the attempt had been made it must have failed. If it be proper here to allude to a matter of public notoriety, not in the record, the truth was, they were *not* the same corporation with the name changed by the Legislature, as has often been done; but a *new* corporation had been formed, by the consolidation, under special and complex arrangements, of two original corporations—one in Indiana and one in Illinois—by virtue of corresponding laws of the two States enacted for the purpose.

By looking at the record it will be seen, that the only evidence possibly tending to show identity was that of Matteson and Elwood, (see Rec., pages 33-4-5,) to the effect that the road *was in the possession of the defendants* for some time (how long does not appear) prior to the 4th day of June, **1855**, when by some arrangement it was handed over to the Michigan Central Co. to operate. The presumption against identity from the entire dissimilarity of name—the only means by which corpo-

rations can be legally distinguished—could not be overcome by any presumptions in favor of identity from the mere fact of the possession, use and control of the same road. The leasing of railroads by one company to another has become a common arrangement. Indeed this very case, as will be observed, disclosed an instance of it.

For these reasons, we contend that the Judge erred in not sustaining the motion to exclude from the consideration of the jury the evidence relating to the deed from Jones to the Oswego & Indiana Pland Road Company; and in refusing the *second* instruction asked by defts. below.

The question as to the propriety of the *first* instruction asked by defts. is unimportant, as the recovery was not pressed upon the ground of carelessness or negligence in the management of the train. The record shows that there was no evidence whatever, positive or circumstancial, as to the particulars of the accident.

Illinois C. R. R. Company *vs.* Ready 17 Ill. 580.

IV.

The absence of forty rods of fence along the South side of the railroad, across the tract of land conveyed is assigned in the declaration as the efficient cause of the particular injury complained of. Whether it was or was not such cause depends upon the question, whether *if built* it would, according to the state of facts then existing, have been likely to shut off the plff.'s sheep from access to the railroad. A fence is only useful as an inclosure, and a detached piece of ~~ground~~ fence would not have served the purpose of an inclosure. This consideration does not, we admit, affect the plaintiff's technical cause of action; but, when he undertakes to show, that this breach of agreement was the actual cause of certain alleged special damage, something more is required. He must establish the practical relation of cause and effect between the breach and damage. So far from this, he freely showed by his own witnesses on the trial that his land contiguous to the railroad was and had been entirely open and unenclosed on all sides, so that in the language of the witness Johnson, (see Rec. p. 30,) "there was no difficulty in getting on to the "track any where, either above or below the place where they got on." It was also shown, that a public road led from the barn around which the sheep congregated at night to the railroad, unfenced on the side next to the barn, and crossing the railroad but a few rods East of the East line of plaintiff's land.

It may be answered, that if the Company had built the fence in question the plaintiff would probably have completed the enclosure. Perhaps if it had been shown, that previously to the construction of the railroad, the territory in question had been customarily enclosed, or even if proof had been offered of his plans and preparations to that end, at the time of the injury, this difficulty might have been relieved. But in the entire absence of proof upon the subject, it is taxing the grace and powers of fancy of the Court too heavily to ask that it should presume all this.

For these reasons we think the Court erred in refusing the second clause of the Defendant's seventh instruction.

V.

There was no proof showing that the sheep came on the track at any point in the line of forty rods which the defendants were required to fence. An eye-witness to the fact, of course, was not to be expected; but there should have been some circumstancial evidence to the point produced. The place where and position in which the sheep were found after the accident afforded no indications whatever as to where or from what direction they got on the track. Stevens, it is true, swears that the most direct course was from the barn down across the bottom. But he did not state, that he had ever seen them take that course or had ever heard of their taking it. He states all that was stated on the point, and the little he states is the merest conjecture. The whole evidence indeed demonstrates indisputably that the road was easily accessible at all points from the usual range and resorts of the plaintiff's sheep. And perhaps we may be pardoned for adding in conclusion, that against any other defendant than a railroad Company, no lawyer upon such proof would have dared hope for a verdict.

For these reasons, we contend that the finding was palpably against evidence, and a new trial should have been granted.

And in thus assailing the verdict, as against evidence, we are not unmindful of the often repeated and emphatic language of this Court in regard to disturbing the conclusions to which juries have arrived upon contested questions of fact. The substance of the evidence is fairly and fully in the record, and we confidently refer to it to show that not even a serious attempt was made to sustain these essential parts of the plff.'s case, which we have had under discussion.

VI.

We believe that the mere statement of the *sixth* proposition, to which the Court are referred, will be sufficient without discussion.

The declaration did not set out the condition in the deed, nor expressly and specifically set up the duty arising from it. But it recited the fact, that such a deed had been executed; and that the erection of the fence in question was a part of the consideration theretor. On the trial the deed was the first piece of evidence introduced by the plaintiff. That deed, when introduced, showed on its face the condition, that the grantees should build the fence proposed. We contended, that by legal presumption the entire contract of the parties touching that subject matter was reduced to and embodied in the deed by which the arrangement was finally consummated; and that all evidence of prior verbal agreements to pay damages was inadmissible.

The *tenth* instruction, which was given by the Court, it is true covered the point; and it is also true that the testimony of Jones was flatly contradicted by Matteson and Bowen. But the evidence was admitted by the Court and in a case of this character was likely to have and did have, an injurious effect upon the defendants, notwithstanding its contradiction and the caution finally given by the Court. The Court will observe that the cause of action occurred prior to the going into operation of the law of 1855, relating to the subject of fencing railroads.

PARKS & ELWOOD, *for Appellants.*

167 - 39

The Joliet & Northern Indiana R. Rs. Co

vs

Robert Jones

argument

by Parks & Ellwood

for Appellants

Filed May 12. 1858

L. Leland

Clk

Supreme Court---State of Illinois.

ROBERT JONES, *Appellee*
ads.
JOLIET & NORTHERN INDIANA RAILROAD COMPANY, *Appelants.*

BRIEF OF APPELLEE.

I

No error is shown in the Circuit Court overruling the motion at the close of the evidence, to exclude the deed given in evidence; or in overruling the motion for a new trial.

1st. This Court cannot review the rulings in those particulars, because the bill of exceptions does not state that the *whole* of the evidence is included therein.

At the commencement of the statement of evidence, the pleader uses the following language: "Upon the trial the following is the *substance of all the evidence* introduced upon the *part of the plaintiff*." (See Rec. Page .)

At the close of the evidence, is the following statement: (and there is no other.)

"The foregoing is the substance of the defendant's evidence." (See Rec. Page .)

Now, it is insisted that the last statement does not with certainty impart a statement of *the whole* of the defendant's evidence. It is vague, and leaves a doubt on the mind.

In Rogers vs. Hall, 3 Scam., 6, the Court say: "It is apparent that the bill of exceptions is not to be considered as a writing of the judge, but is to be esteemed as a pleading of the party alleging the exception; and if liable to the charge of ambiguity, uncertainty, or omission, it ought, like any other pleading, to be construed most strongly against the party who prepared it."

In Rowan vs. Dosh, 4 Scam., 460, the court say: "the bill must state that *the whole of the evidence is included in the bill.*"

It is therefore insisted that any inquiry into the propriety of the rulings aforesaid, is wholly unnecessary.

2. The rule is, that if there is any evidence tending to prove a particular point, however slight, the finding of the jury is conclusive. For a very strong case on that point, see Morse vs. Bogert 1 Comstock, 377.

12573-31

Now the evidence of Joel A. Matteson, and Nelson D. Elwood, as set out, tends to show that the defendants were the owners of Railroad in question, and making a disposition of it as such to the Michigan Central Co. (See Rec. Page .) Mr.Elwood says that the transfer of the Road *from the defendant* to the Michigan Central R. R. Company, was consummated and took effect on the 4th day of June, 1855. (Rec. Page .) From such evidence the jury might infer, without explanation, that the defendants were the same Corporation which received and accepted the deed given in evidence by the name of the Oswego & Indiana Plank Road Company, which is the fact.

Angel & Ames on Corporations, page 584, in treating upon the subject of Corporations, making or receiving deeds in a name different from that in which the suit is brought, say thus: Mr. Kyd lays it down that where a deed is made to a Corporation, by a name varying from the true name, the plaintiffs may sue in their true name, and in the declaration aver, *that the defendant made the deed to them by the name mentioned in the deed.*" So if a deed be made by a Corporation, by a name different from the true name, the plaintiff may sue them by their true name, and aver, that, by the name mentioned in the deed, they made such a deed to him." And further, "Mr. Kyd feels no hesitation in saying, that *in all cases* where, by express averment, or by the finding of the jury, it is made apparent that the Corporation *sued* is the same that made the deed, whether the name in the deed be the same in effect or not with the name of the incorporation, or whether the difference between them be seeming or real, that judgment ought to be given in favor of the deed."

II.

All that remains of this case is upon the instructions. Those given for the plaintiff below were not excepted to. (See Rec. page .) And the first, second, and fifth, are the only ones refused on the part of defendants below.

The first instruction asked for and refused on the part of defendants assumes that if the defendants did, in fact, accept the deed given in evidence, yet if the sheep in question were killed or injured by trains of the Michigan Central R. R. Co., or of the Chicago & Mississippi R. R. Co., the lessees of defendants, and were killed, &c. without the authority &c. of defendants, the defendants are not liable.

This instruction cannot be the law. The gist of this action is the breach of the duty arising from the acceptance of the deed in ques-

[12573-32]

tion, and consequent injury to plaintiff's property by reason thereof. (See 15, Ill. R. 366.) And it is simply absurd to say that by leasing the road to another Company, the defendants could, without the plaintiff's assent, be discharged from obligations arising from a deed between them and plaintiff. Such a doctrine is not to be found in any respectable authority.

2nd. The second instruction refused on the part of defendants, is, in substance, as follows: "If no evidence has been produced by the plaintiff satisfying the jury that the defendants &c. are the same identical Corporation with the Oswego & Indiana Plank Road Co., *which made the contract for which the plaintiff sues*, then the plaintiff has failed to sustain his declaration and the law is for the defendants."

The defendants' counsel, instead of leaving it to the jury to determine whether the defendants, by the name of the Oswego & Indiana Plank Road Co., accepted the deed, and undertook to make the fence in question, plainly assumes that the Plank Road Co. made the contract for which the plaintiff sues; thus precluding the jury from passing upon the fact of the defendant's contracting under another name. For this reason the Court below was correct in refusing the second instruction on the part of the defendant.

3rd. The fifth instruction was not pertinent to the issue. The action is not founded upon the negligence of defendant's servants in managing the trains upon the road. If the instruction was pertinent, it lacks one element at least, to make it correct law, which is, whether the plaintiff's want of due care contributed to the injury complained of. Suppose the plaintiff failed to exercise due and proper care relative to the sheep in question, unless his carelessness caused, or contributed to the injury for which the suit is brought, how could that furnish an excuse for the defendants?

There is a quotation from the case of Kinnard vs. Burton 12, Shepley 39, made by Mr. Justice Caton in the 13 Ill. 588, directly in point. "An examination of all the cases leads to the conclusion that the correct rule is, that if the party, by want of ordinary care, contributed to produce the injury, he will not be entitled to recover. But if he did not exercise ordinary care, and yet did not by the want of it contribute to produce the injury, he will be entitled to recover."

L12573-39

III.

But it is objected by the plaintiff in error, that the damage sustained by defendant in error, was not such direct consequence of the breach of duty charged as would sustain the action. This objection is untenable.

Broom's Com. on the Com. Law, page 670, and cases there cited. Farocett vs. The York & North Midland R. C. 71 E. C. L. Reps 610. In Rickets vs. E. & W. J. Docks &c. Railway. The action was case for not building a fence, and plaintiff's sheep escaping upon the road where they were killed. The sheep, it appeared, escaped from the plaintiff's premises into, and were trespassers upon the lot adjoining the railroad, and for that reason the judgment was for the defendants, but it was conceded that if they had been on the premises adjoining, by the right of the plaintiff, and from thence gone upon the railroad for the want of fence, the action could have been sustained. 78 E. C. L. Reps. 213.

W. K. M'ALLISTER,
Attorney for Appellee.

S12573-34

In Supreme Court

Robert Jones
Deft in Err

ads

The Joliet & North Ind RR Co
Pltff in Err

Defts Brief

April 23

SUPREME COURT. Appeal from Will.

JOLIET & NORTHERN INDIANA RAIL ROAD COMPANY, *Appellants*,
vs.
ROBERT JONES, *Appellee.*

Points and argument for Appellants, Defendants below.

By the record it will be seen, that the essential facts of the case are as follows:

The Oswego and Indiana Plank Road Company, a corporation authorized by its charter to build a railroad or a plank road on the whole or any portion of its line, having decided to construct a railroad from Joliet to a given point on the Indiana State Line, purchased from Jones, the plaintiff below, a piece of land in the N. E. corner of Sec. 14, T. 35 N., R. 10 E., in Will County, containing about eight acres. On the 13th of October, 1853, Jones executed to that Company a deed in fee simple of this tract: this deed contained a clause which was called a covenant, though not technically such, that the grantees should build a good and sufficient fence along the south side of their railroad, across the tract in question.

The railroad was completed in June, **1855**, and on the 4th of that month, when as appears by the proof, it was in the hands of the Joliet & Northern Indiana R. R. Co., was by that Company transferred to the Michigan Central R. R. Co., but by what particular form of proceeding does not appear. Immediately after this transfer, the last named Company commenced running trains over the road. The J. & N. I. R. R. Co., as it appears, never owned any rolling stock or operated the road. On the 24th day of June, and twenty days after the Michigan Central Co. had commenced business on the road, some twenty-five or thirty sheep belonging to the plaintiff were early in the morning killed by a train, and several others more or less injured. No eye-witness was called by the plaintiff below, and none of the particular circumstances disclosed at the trial. The fence was not built at the time of the accident.

For this injury the plaintiff brought an action on the case against the Joliet & N. I. R. R. Co., obviously upon the precedent of Conger's case **15** Ill. 366. The declaration recites the substance of the deed, alleges that the condition of building the fence was an essential part of the consideration, avers the neglect of the defendants to fulfill that condition, and claims the killing and injuring the sheep as damages accruing from such neglect. It studiously avoids alleging, as the Court will notice, that the train belonged to or was operated by defendants, or that it was negligently managed on the occasion. The cause of action assigned is simply and distinctly the breach of defendants duty to build the fence, by means whereof the plaintiff's sheep were left at liberty to stray upon

the track and become exposed to injury. Plea *gen. issue.* Verdict **$231-50.**

The points taken by the appellants, to which all the exceptions in the record will found referrible, are these:

First. That, admitting for the sake of argument a technical cause of action, yet the want of the fence was not shown to be the *proximate* and *responsible* cause of the special damage for which suit was brought and the verdict given.

Second. That his legitimate damages for the breach would have been the loss of the use of his land for its natural or customary purposes either of agriculture or pasturage; the cost of making the fence, if he had built it himself; or, if the keeping of sheep had been a part of his regular business on the farm at the time, an indemnity for the extra care and attention necessarily imposed upon him by such defect in his enclosure against the railroad; or, if reasonably anticipating that during the season the Co. would build the fence, he had prepared the ground for a crop or actually cultivated it, the consequent damages, whatever they might have been, as in Ward's case, **16 Ill. 522.**— These were the only damages contemplated by the parties. The Court cannot presume, that until the fence should be built (for which no definite time was fixed,) the defendants agreed to stand paymaster for any and all losses, whether resulting from plaintiff's own negligence, or otherwise.

Third. Inasmuch as the original contract was made with a corporation called at the time the Oswego & Indiana Plankroad Company, while the breach was alleged to have been committed by the Joliet & Northern Indiana Railroad Co.; and as the identity of a corporation is *prima facie* manifested by its corporate name only, the plaintiff should have positively averred *and proved*, either that the two names applied to the same corporation, by force of some statute to that effect; or, if one was the successor of the other, then that it was chargeable with the contracts of its predecessor, particularly reciting by what train of proceedings such liability had been created.

Fourth. The want of certain forty rods of fence on the south side of the railroad across the tract conveyed being alleged as the effective cause of injury, and as it could only have been such cause upon the supposition that, in case it had been

built, it would have formed an adequate enclosure against the railroad, the plaintiff should have established that fact. No such proof was given, but the record will show evidence directly to the contrary.

Fifth. Some proof should have been adduced reasonably tending to show that the sheep got upon the road at some point over the line which Jones' grantees were bound to fence, and not elsewhere. We believe the Court will find no such proof.

Sixth. The action being for breach of duty assigned upon the condition in the Deed, no evidence of negotiations or parol agreements prior to the execution of the deed, in which that matter was finally embodied, should have been received.

To clear the record of all matters not involved in controversy, we admit, in the outset, that although the special damage laid in the declaration had not been sufficiently proved or was not legally recoverable, yet, if we were liable at all, the plaintiff would have been entitled at least to *nominal* damages, according to the suggestion of this Court in the case of Conger *vs.* C. & R. I. R. R. Co., **15 Ill., 367.**

I.

WE HOLD THAT THE INJURY WAS NOT THE DIRECT AND PROXIMATE CONSEQUENCE OF THE BREACH ALLEGED.

The relation of cause and effect did not exist between them, according to the legal rules of responsibility. The immediate *physical* agent of the injury of course was the engine—managed, as the Court by the evidence must infer, with all due care, and, as was clearly proved, by the servants of another Corporation. The theory of the plff.'s case was, that, nevertheless, by reason of our fault in not building the fence the sheep were permitted to come upon the track and place themselves in a condition to be exposed to danger; and hence that we were liable for the consequences at all events. But we contend,

1. That, in causing this state of things, the grossest imprudence and recklessness on the part of the plaintiff concurred with the fault of the defendants. The breach of the condition to fence, we may admit, was the *primary* and *remote* cause; but the keeping his sheep, before any fence was actually built, unwatched and untended, in the immediate vicinity of the railroad and on ground contiguous and open to it, and open and contiguous to a highway leading to it, was the *proximate* and *direct* cause of the exposure. See Pierce on Railroads, p. 277, cases cited in note (**1**). Because the defendants were bound to build him a fence within a reasonable time, was no reason why he should be exempt from the plain social duty of proper care and prudence in the preserva-

12573-96

tion of his property so long as the fence remained unbuilt—especially as the law would have liberally paid him for the practice of those virtues. The question whether he did exercise due care and prudence under the circumstances is not, we suppose, to be discussed with any side glance at any words written down in any deed in anybody's pigeon hole. If the defendants failed in their duty to him, they were responsible for the damage; and that damage was the loss of such uses of his land as a careful and prudent man could only safely put it to when protected by a fence. We know of no sensible definition of care and prudence that makes these qualities depend upon anything else than *the existing facts of the case* of which they are predicated—no matter how or by whose fault those facts are caused. If one party is in a position of wrong towards another, there is no principle of morals or of law which allows the party wronged, by a course of ingenious and elaborate negligence, to make that wrong yield the greatest possible extent of mischief to himself or property. In this case, the same sound morality which bound the defendants below to pay damage for not doing what they had agreed to do bound the plaintiff also on his part, although the suffering party, to act as a careful, discreet and reasonable man, so long as the grievance continued. While so acting, the law would have abundantly protected him in every right and recompensed him for every injury.

That he was guilty of such GROSS negligence, we think shown by the plaintiff's evidence beyond all doubt. The testimony of Stevens and Newkirk (see Record, pages 28, 29, 30, 31, 32,) shows that the ground of the plaintiff over which the sheep ranged was contiguous to the rail road on the south side; that it was and had been entirely uninclosed; that the plaintiff's barn was from 15 to 20 rods distant from the railroad on a sort of bluff; that at night the sheep were in the habit of laying around the barn; that there was grass in the bottom on both sides of the railroad embankment; and that, as must have been well known to plff.'s servants, they were in the habit during the night of going on to the track to lay down, it being high and dry and an inviting resort for them. He knew the facts, the condition of his grounds, the instincts and habits of his sheep. He knew, that without a fence they were exposed to great hazard; and it was from this very knowledge, and with a view, as was contended, to this very danger, that he had required the condition in the deed to be inserted. If this be managing a flock of sheep with common care and prudence, we shall despair of ever knowing a case of negligence. No doubt, the sheep were lawfully depasturing on his own land. But how does this affect the question? The exercise of a lawful right upon a man's own premises does not, we apprehend, exempt him from the obligation to exercise it with such care and prudence as the surrounding circumstances call for at the time. Notwithstanding the contract, the moment his sheep crossed his line and went upon the land of the defendants, they were there without positive lawful right, as this Court has repeatedly determined, though not committing an actionable trespass according to the rule adopted in Illinois. The violation of the plff.'s right in not building the fence may have induced or facilitated the violation of the defendants' rights by the trespass of his sheep, and would have effectually precluded them from making any complaint

in any event. But they were nevertheless both legal wrongs, in a technical view of their mutual relations as adjacent land owners.

See C. & M. R. R. Co. *vs.* Patchin, 16 Ill., 201.
Pierce on R. R., p. 328–9, note (1), 330, note (1).

Nor can it be said that the construction of the fence was in any sense a condition precedent to the right of running trains upon the the road. The deed, it will be observed, was not simply of the right of way, but of the fee simple in the land. From the phraseology of the deed, it is manifest that the vesting of the title was not designed to be made dependent upon the fulfillment of the condition. It only went to a part of the consideration—it was indefinite in respect to time of performance—it must have been foreseen that fencing stuff could not be delivered along the line until the track was completed, or at least in running order for construction trains, the frequent transit of which would be equally dangerous to plaintiff's sheep with any other—and the condition was, moreover, continuing and perpetual in its character. It no doubt involved a duty upon the grantees inherent in the grant; but for a breach of that duty the grantor plainly relied upon his action for damages.

It may be said, that although the train which caused the injury was the property of another Company, yet the defendants were liable for their acts; that being so liable, the state of the case is essentially the same, for all purposes, as if it had been a train of the defendants; and that the relations of duty between the plaintiff and defendants, under the contract, were such as to cast upon the latter the burthen of proving affirmatively that the train was managed with proper skill and prudence.

We may, for the sake of argument, concede that the two first propositions are true; and consider the question precisely as if the train had belonged to the defendants. We may then well insist that, even if the naked fact of the happening of the injury were *prima facie* evidence of negligence, and devolved upon us the *onus* of rebutting that presumption, the plff.'s own witnesses have effectually done that for us. The accident occurred in the morning *just before daylight*, (see Stevens' testimony, Rec. p. 29,) and "a *prolonged* whistling," which awoke the witness, appears to have been given, to scare the sheep from the track. Assuredly, upon the advancement of such evidence on the part of the plff., meager as it would be in a contested case, it cannot be said the defendants were called upon to show that they were not guilty of negligence.—Indeed, as will be manifest from glancing through the record, the plff. in his declaration studiously avoided alleging, and in making out his case did not seriously urge that, so far as the management of the train was concerned, there was any blame whatever. Additional force is given to this view by the fact, that the engineer and hands in charge of the train were not in the employment of the defendants; that the road for the time being was used by two companies, the Michigan Central and Chicago & Mississippi; and the plff.'s proof left it doubtful which company did the damage. The defendants, therefore, were not in a condition to be called on for a history of the transaction.

But, as a question of law, is the position tenable? Let us grant that the plff., under the circumstances, was not bound to exercise *extraordi-*

12573-39

nary care; and this for the reason, that the defendants at the time were owing him a duty by contract which they were neglecting to perform. Yet, was he not meantime bound to use *ordinary* care—reasonable precautions against danger? The decision of this Court in the case of the Aurora Branch R. R. Co. *vs.* Grimes, **13 Ill., 585,** seems conclusive upon the point. The defendants had violated their contract, and were undoubtedly liable for the consequent damages. But, nevertheless, in running their trains they were in the exercise of their lawful rights upon their own exclusive premises; and the lawfulness of their acts certainly was not and could not be affected by the fact that they owed damages to A, B or C, for breach of divers special contracts not touching the right of way. The sheep were not perhaps *actionable* trespassers upon the track; but when the locomotive sounded its "prolonged" notice to quit, we think, as a matter of law, they should have quit.

The general rule seems to be that the plaintiff must be, and must show himself to be, free from any negligence which contributes to the damage; and even where on the occasion of the injury the plaintiff is in a position of right and the defendant in a position of wrong, yet if in presenting his case the evidence clearly discloses the want of ordinary care and prudence, he cannot recover. In analyzing the agencies which caused the final result, the Court finds that he himself was an agent; and it does not help his case to say that the defendants' fault preceded his. The damages cannot all be imputed to the defendants, and they cannot be apportioned.

2. But without regard to the question of the plff.'s negligence, we think the injury cannot be recognized as the *proximate* and *direct* result of the breach of duty alleged. It is no doubt amongst the nicest questions which courts have to consider, whether, where one fact is followed by another fact, as a sequence, the legal relation of cause and effect exists between them. And in looking at the authorities, we believe this distinction will be found prominent throughout: where the fault of the defendant is some *positive wrongful act*, wilfully committed, not a mere negligent omission to perform a duty arising *ex contractu*, and is unaccompanied with very gross negligence on the part of the plaintiff himself, there courts have been inclined to hold the wrong doer to the widest range of responsibility, and to make him answer even for the indirect and remote consequences of his conduct. But, on the contrary, in cases of mere neglect to perform an agreement, not involving fraud or moral turpitude, they have uniformly restrained themselves by the strict rule, that the defendant shall only respond for such damages as were manifestly contemplated by the parties in making the contract, referring to its language, subject matter and circumstances; or such as were the direct results of the alleged non-feasance; excluding from the estimate such as the aggrieved party at small cost and by easy precautions might have prevented or stopped, and such (sometimes called *speculative* damages) as were accidentally occasioned by the state of his own particular affairs at the time.

Sedgwick on Damages, 57 to 95, *passim.*
Loker *vs.* Damon, 17 Pick., p. 284.
Blanchard *vs.* Ely, 21 Wend., 461.
16 Ill., 527—C. & R. I. R. R. *vs.* Ward.
Clark vs. Brown, 18 *Wend.*, 228.
Flower *vs.* Adam, 2 Taunt., 314.
3 Greenleaf Rep., 51-5-6.

For a very philosophical discussion of this subject we refer to the opinion of Senator Tracy in the case of *Clark vs. Brown*, above cited. The leading features of that case will be found strikingly similar to this. A and B were adjacent farmers. A was bound to keep up one half and B the other half of the partition fence. B failed to make his half. Thro' this opening A's cattle got into B's field, ate of unripe corn, and died from the effects. A sought to recover of B the value of his cattle. The Supreme Court decided the damages too remote, and the Court of Errors affirmed the decision.

In *Loker vs. Damon*, cited above, the facts were that the defendant had broken down the plff.'s fence in the fall. Plaintiff did not repair it till the following May. In consequence, cattle got in and spoiled his crop. He sued, and the Supreme Court of Massachusetts pronounced the damages too remote. It is needless to multiply authorities. To say that the appellants are liable in the case at bar, it seems to us, would be virtually repealing the maxim that "*every sequence is not a consequence.*" All the sound and reasonable limits of responsibility which it is for the wisdom and prudence of Courts to maintain would be broken down.—Suppose A, a banker, should contract with B, a manufacturer, to deliver him a fire-proof safe in a given period. B fails to fulfill. A's money and papers in the meantime are destroyed by fire, with or without his own fault. He sues B for the loss. Could such a suit be sustained?—and yet why not, if this can be?

Again, it was for the plaintiff at least to present evidence from which it would be probable that, if the fence had been built, the injury would not have happened. But, to do this, he requires the Court to piece out his case with a series of suppositions: *First*, that if the fence had been built, he would have used the ground as a sheep pasture; *second*, that he would have made an enclosure of it by fencing up to it on the east and west sides, without which it is obvious the railroad fence would have been unavailing.

For the above reasons, we say that the verdict, being for the special damage claimed, was clearly against law and evidence, and should have been set aside.

II.

Nothing need be said upon the second point, but that no evidence was adduced by the plaintiff to show any other than the special damage set out in the declaration. Hence, conceding his technical cause of action, he was only entitled to *nominal* damages.

III.

The suit was brought, evidently, upon the precedent of Conger's case, **15 Ill., 366.** It was in case for breach of duty, and that duty was alleged to have arisen from the fact that the plaintiff had executed to the defendants a deed in consideration of a covenant to fence, and had accepted and enjoyed the benefits of such conveyance. The action, therefore, was essentially based upon the terms of the deed. The deed was made to the OSWEGO AND INDIANA PLANK ROAD COMPANY. The

suit was brought against the JOLIET AND NORTHERN INDIANA RAIL ROAD COMPANY. The declaration sets forth that the defendants, under the name of the O. & I. P. R. Co. received the deed in question, without, however, in positive terms, averring that they were identical, or undertaking to show how the change of name occurred.

It will of course be agreed, that in every case when a plaintiff seeks to recover for a breach of duty, he must aver and prove that the duty charged rested upon the defendant in the suit. In a case hinging on a written instrument, where the name of the defendant is identical with that of the party in the instrument, the law, as a general rule, will presume identity, and will require no affirmative proof, until a suspicion is raised from the other side. But when the names are totally different, this ground of presumption fails even in the case of natural persons, much more in the case of corporations, which, having no physical attributes, can only be recognized by their corporate appellations.

3 Gil. 641.

Assuming the declaration to be sufficient in point of form, there are but two questions: *First*, was it enough to aver, without proof, that they were identical; *second*, was the identity proved, or attempted to be proved? The mere averment of identity could not have been enough, unless made so, under the rulesof pleading, by the form of our plea, the general issue. But can it be said that this was an admission of identity? Our plea puts *all* the plaintiff's substantive allegations in issue, and amongst them the allegation that the defendants were ever chargeable with the duty for the breach of which the suit was brought. It obviously was not a matter for a plea in abatement, as no misnomer was or could be pretended; and as obviously did not come within the operation of our Practice act dispensing with proof of the execution of written instruments unless denied under oath. The deed was not *set out* in the declaration—it was not an instrument alleged to have been executed *by* the defendants—and the action was not brought *upon* the deed in the sense of the statute. In fact the plff., notwithstanding our opposition, undertook, after introducing the deed and condition, to rally back on certain verbal promises of Gov. Matteson made in the spring of 1853.

15 Ills. 454.

There was no evidence whatever produced upon the trial, showing or tending to show this identity. The not attempting it was probably an an oversight; but if the attempt had been made it must have failed. If it be proper here to allude to a matter of public notoriety, not in the record, the truth was, they were *not* the same corporation with the name changed by the Legislature, as has often been done; but a *new* corporation had been formed, by the consolidation, under special and complex arrangements, of two original corporations—one in Indiana and one in Illinois—by virtue of corresponding laws of the two States enacted for the purpose.

By looking at the record it will be seen, that the only evidence possibly tending to show identity was that of Matteson and Elwood, (see Rec., pages 33-4-5,) to the effect that the road *was in the possession of the defendants* for some time (how long does not appear) prior to the 4th day of June, **1855**, when by some arrangement it was handed over to the Michigan Central Co. to operate. The presumption against identity from the entire dissimilarity of name—the only means by which corpo-

rations can be legally distinguished—could not be overcome by any presumptions in favor of identity from the mere fact of the possession, use and control of the same road. The leasing of railroads by one company to another has become a common arrangement. Indeed this very case, as will be observed, disclosed an instance of it.

For these reasons, we contend that the Judge erred in not sustaining the motion to exclude from the consideration of the jury the evidence relating to the deed from Jones to the Oswego & Indiana Pland Road Company; and in refusing the *second* instruction asked by defts. below.

The question as to the propriety of the *first* instruction asked by defts. is unimportant, as the recovery was not pressed upon the ground of carelessness or negligence in the management of the train. The record shows that there was no evidence whatever, positive or circumstancial, as to the particulars of the accident.

Illinois C. R. R. Company *vs.* Ready 17 Ill. 580.

IV.

The absence of forty rods of fence along the South side of the railroad, across the tract of land conveyed is assigned in the declaration as the efficient cause of the particular injury complained of. Whether it was or was not such cause depends upon the question, whether *if built* it would, according to the state of facts then existing, have been likely to shut off the plff.'s sheep from access to the railroad. A fence is only useful as an inclosure, and a detached piece of ground would not have served the purpose of an inclosure. This consideration does not, we admit, affect the plaintiff's technical cause of action; but, when he undertakes to show, that this breach of agreement was the actual cause of certain alleged special damage, something more is required. He must establish the practical relation of cause and effect between the breach and damage. So far from this, he freely showed by his own witnesses on the trial that his land contiguous to the railroad was and had been entirely open and unenclosed on all sides, so that in the language of the witness Johnson, (see Rec. p. 30,) "there was no difficulty in getting on to the "track any where, either above or below the place where they got on." It was also shown, that a public road led from the barn around which the sheep congregated at night to the railroad, unfenced on the side next to the barn, and crossing the railroad but a few rods East of the East line of plaintiff's land.

It may be answered, that if the Company had built the fence in question the plaintiff would probably have completed the enclosure. Perhaps if it had been shown, that previously to the construction of the railroad, the territory in question had been customarily enclosed, or even if proof had been offered of his plans and preparations to that end, at the time of the injury, this difficulty might have been relieved. But in the entire absence of proof upon the subject, it is taxing the grace and powers of fancy of the Court too heavily to ask that it should presume all this.

For these reasons we think the Court erred in refusing the second clause of the Defendant's seventh instruction.

V.

There was no proof showing that the sheep came on the track at any point in the line of forty rods which the defendants were required to fence. An eye-witness to the fact, of course, was not to be expected; but there should have been some circumstancial evidence to the point produced. The place where and position in which the sheep were found after the accident afforded no indications whatever as to where or from what direction they got on the track. Stevens, it is true, swears that the most direct course was from the barn down across the bottom. But he did not state, that he had ever seen them take that course or had ever heard of their taking it. He states all that was stated on the point, and the little he states is the merest conjecture. The whole evidence indeed demonstrates indisputably that the road was easily accessible at all points from the usual range and resorts of the plaintiff's sheep. And perhaps we may be pardoned for adding in conclusion, that against any other defendant than a railroad Company, no lawyer upon such proof would have dared hope for a verdict.

For these reasons, we contend that the finding was palpably against evidence, and a new trial should have been granted.

And in thus assailing the verdict, as against evidence, we are not unmindful of the often repeated and emphatic language of this Court in regard to disturbing the conclusions to which juries have arrived upon contested questions of fact. The substance of the evidence is fairly and fully in the record, and we confidently refer to it to show that not even a serious attempt was made to sustain these essential parts of the plff.'s case, which we have had under discussion.

VI.

We believe that the mere statement of the *sixth* proposition, to which the Court are referred, will be sufficient without discussion.

The declaration did not set out the condition in the deed, nor expressly and specifically set up the duty arising from it. But it recited the fact, that such a deed had been executed; and that the erection of the fence in question was a part of the consideration therefor. On the trial the deed was the first piece of evidence introduced by the plaintiff. That deed, when introduced, showed on its face the condition, that the grantees should build the fence proposed. We contended, that by legal presumption the entire contract of the parties touching that subject matter was reduced to and embodied in the deed by which the arrangement was finally consummated; and that all evidence of prior verbal agreements to pay damages was inadmissible.

The *tenth* instruction, which was given by the Court, it is true covered the point; and it is also true that the testimony of Jones was flatly contradicted by Matteson and Bowen. But the evidence was admitted by the Court and in a case of this character was likely to have and did have, an injurious effect upon the defendants, notwithstanding its contradiction and the caution finally given by the Court. The Court will observe that the cause of action occurred prior to the going into operation of the law of 1855, relating to the subject of fencing railroads.

PARKS & ELWOOD, *for Appellants.*

167

Supreme Court.

The Joliet & N. I. R. R. Co.
appellants
vs.
Robert Jones
Appellee.

Printed Argument for Appellants.

For the Court.

Filed April 20. 1858
C. Leland
Clk

Supreme Court---State of Illinois.

ROBERT JONES, *Appellee*
ads.
JOLIET & NORTHERN INDIANA RAILROAD COMPANY, *Appelants.*

BRIEF OF APPELLEE.

I

No error is shown in the Circuit Court overruling the motion at the close of the evidence, to exclude the deed given in evidence; or in overruling the motion for a new trial.

1st. This Court cannot review the rulings in those particulars, because the bill of exceptions does not state that the *whole* of the evidence is included therein.

At the commencement of the statement of evidence, the pleader uses the following language: "Upon the trial the following is the *substance of all the evidence* introduced upon the *part of the plaintiff*." (See Rec. Page .)

At the close of the evidence, is the following statement: (and there is no other.)

"The foregoing is the substance of the defendant's evidence." (See Rec. Page .)

Now, it is insisted that the last statement does not with certainty impart a statement of *the whole* of the defendant's evidence. It is vague, and leaves a doubt on the mind.

In Rogers vs. Hall, 3 Scam., 6, the Court say: "It is apparent that the bill of exceptions is not to be considered as a writing of the judge, but is to be esteemed as a pleading of the party alleging the exception; and if liable to the charge of ambiguity, uncertainty, or omission, it ought, like any other pleading, to be construed most strongly against the party who prepared it."

In Rowan vs. Dosh, 4 Scam., 460, the court say: "the bill must state that *the whole of the evidence is included in the bill.*"

It is therefore insisted that any inquiry into the propriety of the rulings aforesaid, is wholly unnecessary.

2. The rule is, that if there is any evidence tending to prove a particular point, however slight, the finding of the jury is conclusive. For a very strong case on that point, see Morse vs. Bogert 1 Comstock, 377.

[12573-4]

Now the evidence of Joel A. Matteson, and Nelson D. Elwood, as set out, tends to show that the defendants were the owners of Railroad in question, and making a disposition of it as such to the Michigan Central Co. (See Rec. Page .) Mr.Elwood says that the transfer of the Road *from the defendant* to the Michigan Central R. R. Company, was consummated and took effect on the 4th day of June, 1855. (Rec. Page .) From such evidence the jury might infer, without explanation, that the defendants were the same Corporation which received and accepted the deed given in evidence by the name of the Oswego & Indiana Plank Road Company, which is the fact.

Angel & Ames on Corporations, page 584, in treating upon the subject of Corporations, making or receiving deeds in a name different from that in which the suit is brought, say thus: Mr. Kyd lays it down that where a deed is made to a Corporation, by a name varying from the true name, the plaintiffs may sue in their true name, and in the declaration aver, *that the defendant made the deed to them by the name mentioned in the deed.*" So if a deed be made by a Corporation, by a name different from the true name, the plaintiff may sue them by their true name, and aver, that, by the name mentioned in the deed, they made such a deed to him." And further, "Mr. Kyd feels no hesitation in saying, that *in all cases* where, by express averment, or by the finding of the jury, it is made apparent that the Corporation *sued* is the same that made the deed, whether the name in the deed be the same in effect or not with the name of the incorporation, or whether the difference between them be seeming or real, that judgment ought to be given in favor of the deed."

II.

All that remains of this case is upon the instructions. Those given for the plaintiff below were not excepted to. (See Rec. page .) And the first, second, and fifth, are the only ones refused on the part of defendants below.

The first instruction asked for and refused on the part of defendants assumes that if the defendants did, in fact, accept the deed given in evidence, yet if the sheep in question were killed or injured by trains of the Michigan Central R. R. Co., or of the Chicago & Mississsippi R. R. Co., the lessees of defendants, and were killed, &c. without the authority &c. of defendants, the defendants are not liable.

This instruction cannot be the law. The gist of this action is the breach of the duty arising from the acceptance of the deed in ques-

[12593-45]

tion, and consequent injury to plaintiff's property by reason thereof. (See 15, Ill. R. 366.) And it is simply absurd to say that by leasing the road to another Company, the defendants could, without the plaintiff's assent, be discharged from obligations arising from a deed between them and plaintiff. Such a doctrine is not to be found in any respectable authority.

2nd. The second instruction refused on the part of defendants, is, in substance, as follows: "If no evidence has been produced by the plaintiff satisfying the jury that the defendants &c. are the same identical Corporation with the Oswego & Indiana Plank Road Co., *which made the contract for which the plaintiff sues*, then the plaintiff has failed to sustain his declaration and the law is for the defendants."

The defendants' counsel, instead of leaving it to the jury to determine whether the defendants, by the name of the Oswego & Indiana Plank Road Co., accepted the deed, and undertook to make the fence in question, plainly assumes that the Plank Road Co. made the contract for which the plaintiff sues; thus precluding the jury from passing upon the fact of the defendant's contracting under another name. For this reason the Court below was correct in refusing the second instruction on the part of the defendant.

3rd. The fifth instruction was not pertinent to the issue. The action is not founded upon the negligence of defendant's servants in managing the trains upon the road. If the instruction was pertinent, it lacks one element at least, to make it correct law, which is, whether the plaintiff's want of due care contributed to the injury complained of. Suppose the plaintiff failed to exercise due and proper care relative to the sheep in question, unless his carelessness caused, or contributed to the injury for which the suit is brought, how could that furnish an excuse for the defendants?

There is a quotation from the case of Kinnard vs. Burton 12, Shepley 39, made by Mr. Justice Caton in the 13 Ill. 588, directly in point. "An examination of all the cases leads to the conclusion that the correct rule is, that if the party, by want of ordinary care, contributed to produce the injury, he will not be entitled to recover. But if he did not exercise ordinary care, and yet did not by the want of it contribute to produce the injury, he will be entitled to recover."

5/12593-43

III.

But it is objected by the plaintiff in error, that the damage sustained by defendant in error, was not such direct consequence of the breach of duty charged as would sustain the action. This objection is untenable.

Broom's Com. on the Com. Law, page 670, and cases there cited. Farocett vs. The York & North Midland R. C. 71 E. C. L. Reps 610. In Rickets vs. E. & W. J. Docks &c. Railway. The action was case for not building a fence, and plaintiff's sheep escaping upon the road where they were killed. The sheep, it appeared, escaped from the plaintiff's premises into, and were trespassers upon the lot adjoining the railroad, and for that reason the judgment was for the defendants, but it was conceded that if they had been on the premises adjoining, by the right of the plaintiff, and from thence gone upon the railroad for the want of fence, the action could have been sustained. 78 E. C. L. Reps. 213.

W. K. M'ALLISTER,
Attorney for Appellee.

Broom is 66th Vol Law Library

12573-44

Robert Jones
Deft in Error
vs
The Joliet & North
Ind R R Co

Defts Argument

III.

4

W. K. MCALLISTER,
Attorney for Appellee.

SUPREME COURT. Appeal from Will.

JOLIET & NORTHERN INDIANA RAIL ROAD COMPANY, *Appellants*,
vs.
ROBERT JONES, *Appellee*.

Points and argument for Appellants, Defendants below.

By the record it will be seen, that the essential facts of the case are as follows:

The Oswego and Indiana Plank Road Company, a corporation authorized by its charter to build a railroad or a plank road on the whole or any portion of its line, having decided to construct a railroad from Joliet to a given point on the Indiana State Line, purchased from Jones, the plaintiff below, a piece of land in the N. E. corner of Sec. 14, T. 35 N., R. 10 E., in Will County, containing about eight acres. On the 13th of October, 1853, Jones executed to that Company a deed in fee simple of this tract: this deed contained a clause which was called a covenant, though not technically such, that the grantees should build a good and sufficient fence along the south side of their railroad, across the tract in question.

The railroad was completed in June, **1855**, and on the 4th of that month, when as appears by the proof, it was in the hands of the Joliet & Northern Indiana R. R. Co., was by that Company transferred to the Michigan Central R. R. Co., but by what particular form of proceeding does not appear. Immediately after this transfer, the last named Company commenced running trains over the road. The J. & N. I. R. R. Co., as it appears, never owned any rolling stock or operated the road. On the 24th day of June, and twenty days after the Michigan Central Co. had commenced business on the road, some twenty-five or thirty sheep belonging to the plaintiff were early in the morning killed by a train, and several others more or less injured. No eye-witness was called by the plaintiff below, and none of the particular circumstances disclosed at the trial. The fence was not built at the time of the accident.

For this injury the plaintiff brought an action on the case against the Joliet & N. I. R. R. Co., obviously upon the precedent of Conger's case **15** Ill. 366. The declaration recites the substance of the deed, alleges that the condition of building the fence was an essential part of the consideration, avers the neglect of the defendants to fulfill that condition, and claims the killing and injuring the sheep as damages accruing from such neglect. It studiously avoids alleging, as the Court will notice, that the train belonged to or was operated by defendants, or that it was negligently managed on the occasion. The cause of action assigned is simply and distinctly the breach of defendants duty to build the fence, by means whereof the plaintiff's sheep were left at liberty to stray upon

the track and become exposed to injury. Plea *gen. issue.* Verdict **$231-50.**

The points taken by the appellants, to which all the exceptions in the record will be found referrible, are these:

First. That, admitting for the sake of argument a technical cause of action, yet the want of the fence was not shown to be the *proximate* and *responsible* cause of the special damage for which suit was brought and the verdict given.

Second. That his legitimate damages for the breach would have been the loss of the use of his land for its natural or customary purposes either of agriculture or pasturage; the cost of making the fence, if he had built it himself; or, if the keeping of sheep had been a part of his regular business on the farm at the time, an indemnity for the extra care and attention necessarily imposed upon him by such defect in his enclosure against the railroad; or, if reasonably anticipating that during the season the Co. would build the fence, he had prepared the ground for a crop or actually cultivated it, the consequent damages, whatever they might have been, as in Ward's case, **16 Ill. 522.**— These were the only damages contemplated by the parties. The Court cannot presume, that until the fence should be built (for which no definite time was fixed,) the defendants agreed to stand paymaster for any and all losses, whether resulting from plaintiff's own negligence, or otherwise.

Third. Inasmuch as the original contract was made with a corporation called at the time the Oswego & Indiana Plankroad Company, while the breach was alleged to have been committed by the Joliet & Northern Indiana Railroad Co.; and as the identity of a corporation is *prima facie* manifested by its corporate name only, the plaintiff should have positively averred *and proved*, either that the two names applied to the same corporation, by force of some statute to that effect; or, if one was the successor of the other, then that it was chargeable with the contracts of its predecessor, particularly reciting by what train of proceedings such liability had been created.

Fourth. The want of certain forty rods of fence on the south side of the railroad across the tract conveyed being alleged as the effective cause of injury, and as it could only have been such cause upon the supposition that, in case it had been

built, it would have formed an adequate enclosure against the railroad, the plaintiff should have established that fact. No such proof was given, but the record will show evidence directly to the contrary.

Fifth. Some proof should have been adduced reasonably tending to show that the sheep got upon the road at some point over the line which Jones' grantees were bound to fence, and not elsewhere. We believe the Court will find no such proof.

Sixth. The action being for breach of duty assigned upon the condition in the Deed, no evidence of negotiations or parol agreements prior to the execution of the deed, in which that matter was finally embodied, should have been received.

To clear the record of all matters not involved in controversy, we admit, in the outset, that although the special damage laid in the declaration had not been sufficiently proved or was not legally recoverable, yet, if we were liable at all, the plaintiff would have been entitled at least to *nominal* damages, according to the suggestion of this Court in the case of Conger *vs.* C. & R. I. R. R. Co., **15 Ill., 367.**

I.

WE HOLD THAT THE INJURY WAS NOT THE DIRECT AND PROXIMATE CONSEQUENCE OF THE BREACH ALLEGED.

The relation of cause and effect did not exist between them, according to the legal rules of responsibility. The immediate *physical* agent of the injury of course was the engine—managed, as the Court by the evidence must infer, with all due care, and, as was clearly proved, by the servants of another Corporation. The theory of the plff.'s case was, that, nevertheless, by reason of our fault in not building the fence the sheep were permitted to come upon the track and place themselves in a condition to be exposed to danger; and hence that we were liable for the consequences at all events. But we contend,

1. That, in causing this state of things, the grossest imprudence and recklessness on the part of the plaintiff concurred with the fault of the defendants. The breach of the condition to fence, we may admit, was the *primary* and *remote* cause; but the keeping his sheep, before any fence was actually built, unwatched and untended, in the immediate vicinity of the railroad and on ground contiguous and open to it, and open and contiguous to a highway leading to it, was the *proximate* and *direct* cause of the exposure. See Pierce on Railroads, p. 277, cases cited in note (**1**). Because the defendants were bound to build him a fence within a reasonable time, was no reason why he should be exempt from the plain social duty of proper care and prudence in the preserva-

[12573-46]

tion of his property so long as the fence remained unbuilt—especially as the law would have liberally paid him for the practice of those virtues. The question whether he did exercise due care and prudence under the circumstances is not, we suppose, to be discussed with any side glance at any words written down in any deed in anybody's pigeon hole. If the defendants failed in their duty to him, they were responsible for the damage; and that damage was the loss of such uses of his land as a careful and prudent man could only safely put it to when protected by a fence. We know of no sensible definition of care and prudence that makes these qualities depend upon anything else than *the existing facts of the case* of which they are predicated—no matter how or by whose fault those facts are caused. If one party is in a position of wrong towards another, there is no principle of morals or of law which allows the party wronged, by a course of ingenious and elaborate negligence, to make that wrong yield the greatest possible extent of mischief to himself or property. In this case, the same sound morality which bound the defendants below to pay damage for not doing what they had agreed to do bound the plaintiff also on his part, although the suffering party, to act as a careful, discreet and reasonable man, so long as the grievance continued. While so acting, the law would have abundantly protected him in every right and recompensed him for every injury.

That he was guilty of such GROSS negligence, we think shown by the plaintiff's evidence beyond all doubt. The testimony of Stevens and Newkirk (see Record, pages 28, 29, 30, 31, 32,) shows that the ground of the plaintiff over which the sheep ranged was contiguous to the rail road on the south side; that it was and had been entirely uninclosed; that the plaintiff's barn was from 15 to 20 rods distant from the railroad on a sort of bluff; that at night the sheep were in the habit of laying around the barn; that there was grass in the bottom on both sides of the railroad embankment; and that, as must have been well known to plff.'s servants, they were in the habit during the night of going on to the track to lay down, it being high and dry and an inviting resort for them. He knew the facts, the condition of his grounds, the instincts and habits of his sheep. He knew, that without a fence they were exposed to great hazard; and it was from this very knowledge, and with a view, as was contended, to this very danger, that he had required the condition in the deed to be inserted. If this be managing a flock of sheep with common care and prudence, we shall despair of ever knowing a case of negligence. No doubt, the sheep were lawfully depasturing on his own land. But how does this affect the question? The exercise of a lawful right upon a man's own premises does not, we apprehend, exempt him from the obligation to exercise it with such care and prudence as the surrounding circumstances call for at the time. Notwithstanding the contract, the moment his sheep crossed his line and went upon the land of the defendants, they were there without positive lawful right, as this Court has repeatedly determined, though not committing an actionable trespass according to the rule adopted in Illinois. The violation of the plff.'s right in not building the fence may have induced or facilitated the violation of the defendants' rights by the trespass of his sheep, and would have effectually precluded them from making any complaint

in any event. But they were nevertheless both legal wrongs, in a technical view of their mutual relations as adjacent land owners.

See C. & M. R. R. Co. *vs.* Patchin, 16 Ill., 201.
Pierce on R. R., p. 328–9, note (1), 330, note (1).

Nor can it be said that the construction of the fence was in any sense a condition precedent to the right of running trains upon the the road. The deed, it will be observed, was not simply of the right of way, but of the fee simple in the land. From the phraseology of the deed, it is manifest that the vesting of the title was not designed to be made dependent upon the fulfillment of the condition. It only went to a part of the consideration—it was indefinite in respect to time of performance—it must have been foreseen that fencing stuff could not be delivered along the line until the track was completed, or at least in running order for construction trains, the frequent transit of which would be equally dangerous to plaintiff's sheep with any other—and the condition was, moreover, continuing and perpetual in its character. It no doubt involved a duty upon the grantees inherent in the grant; but for a breach of that duty the grantor plainly relied upon his action for damages.

It may be said, that although the train which caused the injury was the property of another Company, yet the defendants were liable for their acts; that being so liable, the state of the case is essentially the same, for all purposes, as if it had been a train of the defendants; and that the relations of duty between the plaintiff and defendants, under the contract, were such as to cast upon the latter the burthen of proving affirmatively that the train was managed with proper skill and prudence.

We may, for the sake of argument, concede that the two first propositions are true; and consider the question precisely as if the train had belonged to the defendants. We may then well insist that, even if the naked fact of the happening of the injury were *prima facie* evidence of negligence, and devolved upon us the *onus* of rebutting that presumption, the plff.'s own witnesses have effectually done that for us. The accident occurred in the morning *just before daylight*, (see Stevens' testimony, Rec. p. 29,) and "a *prolonged* whistling," which awoke the witness, appears to have been given, to scare the sheep from the track. Assuredly, upon the advancement of such evidence on the part of the plff., meager as it would be in a contested case, it cannot be said the defendants were called upon to show that they were not guilty of negligence.—Indeed, as will be manifest from glancing through the record, the plff. in his declaration studiously avoided alleging, and in making out his case did not seriously urge that, so far as the management of the train was concerned, there was any blame whatever. Additional force is given to this view by the fact, that the engineer and hands in charge of the train were not in the employment of the defendants; that the road for the time being was used by two companies, the Michigan Central and Chicago & Mississippi; and the plff.'s proof left it doubtful which company did the damage. The defendants, therefore, were not in a condition to be called on for a history of the transaction.

But, as a question of law, is the position tenable? Let us grant that the plff., under the circumstances, was not bound to exercise *extraordi-*

nary care; and this for the reason, that the defendants at the time were owing him a duty by contract which they were neglecting to perform. Yet, was he not meantime bound to use *ordinary* care—reasonable precautions against danger? The decision of this Court in the case of the Aurora Branch R. R. Co. *vs.* Grimes, **13 Ill., 585,** seems conclusive upon the point. The defendants had violated their contract, and were undoubtedly liable for the consequent damages. But, nevertheless, in running their trains they were in the exercise of their lawful rights upon their own exclusive premises; and the lawfulness of their acts certainly was not and could not be affected by the fact that they owed damages to A, B or C, for breach of divers special contracts not touching the right of way. The sheep were not perhaps *actionable* trespassers upon the track; but when the locomotive sounded its "prolonged" notice to quit, we think, as a matter of law, they should have quit.

The general rule seems to be that the plaintiff must be, and must show himself to be, free from any negligence which contributes to the damage; and even where on the occasion of the injury the plaintiff is in a position of right and the defendant in a position of wrong, yet if in presenting his case the evidence clearly discloses the want of ordinary care and prudence, he cannot recover. In analyzing the agencies which caused the final result, the Court finds that he himself was an agent; and it does not help his case to say that the defendants' fault preceded his. The damages cannot all be imputed to the defendants, and they cannot be apportioned.

2. But without regard to the question of the plff.'s negligence, we think the injury cannot be recognized as the *proximate* and *direct* result of the breach of duty alleged. It is no doubt amongst the nicest questions which courts have to consider, whether, where one fact is followed by another fact, as a sequence, the legal relation of cause and effect exists between them. And in looking at the authorities, we believe this distinction will be found prominent throughout: where the fault of the defendant is some *positive wrongful act*, wilfully committed, not a mere negligent omission to perform a duty arising *ex contractu*, and is unaccompanied with very gross negligence on the part of the plaintiff himself, there courts have been inclined to hold the wrong doer to the widest range of responsibility, and to make him answer even for the indirect and remote consequences of his conduct. But, on the contrary, in cases of mere neglect to perform an agreement, not involving fraud or moral turpitude, they have uniformly restrained themselves by the strict rule, that the defendant shall only respond for such damages as were manifestly contemplated by the parties in making the contract, referring to its language, subject matter and circumstances; or such as were the direct results of the alleged non-feasance; excluding from the estimate such as the aggrieved party at small cost and by easy precautions might have prevented or stopped, and such (sometimes called *speculative* damages) as were accidentally occasioned by the state of his own particular affairs at the time.

Sedgwick on Damages, 57 to 95, *passim.*
Loker *vs.* Damon, 17 Pick., p. 284.
Blanchard *vs.* Ely, 21 Wend., 461.
16 Ill., 527—C. & R. I. R. R. *vs.* Ward.
Clark vs. Brown, 18 *Wend.*, 228.
Flower *vs.* Adam, 2 Taunt., 314.
3 Greenleaf Rep., 51-5-6.

For a very philosophical discussion of this subject we refer to the opinion of Senator Tracy in the case of *Clark vs. Brown*, above cited. The leading features of that case will be found strikingly similar to this. A and B were adjacent farmers. A was bound to keep up one half and B the other half of the partition fence. B failed to make his half. Thro' this opening A's cattle got into B's field, ate of unripe corn, and died from the effects. A sought to recover of B the value of his cattle. The Supreme Court decided the damages too remote, and the Court of Errors affirmed the decision.

In *Loker vs. Damon*, cited above, the facts were that the defendant had broken down the plff.'s fence in the fall. Plaintiff did not repair it till the following May. In consequence, cattle got in and spoiled his crop. He sued, and the Supreme Court of Massachusetts pronounced the damages too remote. It is needless to multiply authorities. To say that the appellants are liable in the case at bar, it seems to us, would be virtually repealing the maxim that "*every sequence is not a consequence.*" All the sound and reasonable limits of responsibility which it is for the wisdom and prudence of Courts to maintain would be broken down.—Suppose A, a banker, should contract with B, a manufacturer, to deliver him a fire-proof safe in a given period. B fails to fulfill. A's money and papers in the meantime are destroyed by fire, with or without his own fault. He sues B for the loss. Could such a suit be sustained?—and yet why not, if this can be?

Again, it was for the plaintiff at least to present evidence from which it would be probable that, if the fence had been built, the injury would not have happened. But, to do this, he requires the Court to piece out his case with a series of suppositions: *First*, that if the fence had been built, he would have used the ground as a sheep pasture; *second*, that he would have made an enclosure of it by fencing up to it on the east and west sides, without which it is obvious the railroad fence would have been unavailing.

For the above reasons, we say that the verdict, being for the special damage claimed, was clearly against law and evidence, and should have been set aside.

II.

Nothing need be said upon the second point, but that no evidence was adduced by the plaintiff to show any other than the special damage set out in the declaration. Hence, conceding his technical cause of action, he was only entitled to *nominal* damages.

III.

The suit was brought, evidently, upon the precedent of Conger's case, **15 Ill., 366**. It was in case for breach of duty, and that duty was alleged to have arisen from the fact that the plaintiff had executed to the defendants a deed in consideration of a covenant to fence, and had accepted and enjoyed the benefits of such conveyance. The action, therefore, was essentially based upon the terms of the deed. The deed was made to the OSWEGO AND INDIANA PLANK ROAD COMPANY. The

suit was brought against the JOLIET AND NORTHERN INDIANA RAIL ROAD COMPANY. The declaration sets forth that the defendants, under the name of the O. & I. P. R. Co. received the deed in question, without, however, in positive terms, averring that they were identical, or undertaking to show how the change of name occurred.

It will of course be agreed, that in every case when a plaintiff seeks to recover for a breach of duty, he must aver and prove that the duty charged rested upon the defendant in the suit. In a case hinging on a written instrument, where the name of the defendant is identical with that of the party in the instrument, the law, as a general rule, will presume identity, and will require no affirmative proof, until a suspicion is raised from the other side. But when the names are totally different, this ground of presumption fails even in the case of natural persons, much more in the case of corporations, which, having no physical attributes, can only be recognized by their corporate appellations.

3 Gil. 641.

Assuming the declaration to be sufficient in point of form, there are but two questions: *First*, was it enough to aver, without proof, that they were identical; *second*, was the identity proved, or attempted to be proved? The mere averment of identity could not have been enough, unless made so, under the rules of pleading, by the form of our plea, the general issue. But can it be said that this was an admission of identity? Our plea puts *all* the plaintiff's substantive allegations in issue, and amongst them the allegation that the defendants were ever chargeable with the duty for the breach of which the suit was brought. It obviously was not a matter for a plea in abatement, as no misnomer was or could be pretended; and as obviously did not come within the operation of our Practice act dispensing with proof of the execution of written instruments unless denied under oath. The deed was not *set out* in the declaration—it was not an instrument alleged to have been executed *by* the defendants—and the action was not brought *upon* the deed in the sense of the statute. In fact the plff., notwithstanding our opposition, undertook, after introducing the deed and condition, to rally back on certain verbal promises of Gov. Matteson made in the spring of 1853.

15 Ill. 454.

There was no evidence whatever produced upon the trial, showing or tending to show this identity. The not attempting it was probably an an oversight; but if the attempt had been made it must have failed. If it be proper here to allude to a matter of public notoriety, not in the record, the truth was, they were *not* the same corporation with the name changed by the Legislature, as has often been done; but a *new* corporation had been formed, by the consolidation, under special and complex arrangements, of two original corporations—one in Indiana and one in Illinois—by virtue of corresponding laws of the two States enacted for the purpose.

By looking at the record it will be seen, that the only evidence tending to show identity was that of Matteson and Elwood, (see Rec., pages 33-4-5,) to the effect that the road *was in the possession of the defendants* for some time (how long does not appear) prior to the 4th day of June, **1855**, when by some arrangement it was handed over to the Michigan Central Co. to operate. The presumption against identity from the entire dissimilarity of name—the only means by which corpo-

rations can be legally distinguished—could not be overcome by any presumptions in favor of identity from the mere fact of the possession, use and control of the same road. The leasing of railroads by one company to another has become a common arrangement. Indeed this very case, as will be observed, disclosed an instance of it.

For these reasons, we contend that the Judge erred in not sustaining the motion to exclude from the consideration of the jury the evidence relating to the deed from Jones to the Oswego & Indiana Pland Road Company; and in refusing the *second* instruction asked by defts. below.

The question as to the propriety of the *first* instruction asked by defts. is unimportant, as the recovery was not pressed upon the ground of carelessness or negligence in the management of the train. The record shows that there was no evidence whatever, positive or circumstancial, as to the particulars of the accident.

Illinois C. R. R. Company *vs.* Ready 17 Ill. 580.

IV.

The absence of forty rods of fence along the South side of the railroad, across the tract of land conveyed is assigned in the declaration as the efficient cause of the particular injury complained of. Whether it was or was not such cause depends upon the question, whether *if built* it would, according to the state of facts then existing, have been likely to shut off the plff.'s sheep from access to the railroad. A fence is only useful as an inclosure, and a detached piece of ground would not have served the purpose of an inclosure. This consideration does not, we admit, affect the plaintiff's technical cause of action; but, when he undertakes to show, that this breach of agreement was the actual cause of certain alleged special damage, something more is required. He must establish the practical relation of cause and effect between the breach and damage. So far from this, he freely showed by his own witnesses on the trial that his land contiguous to the railroad was and had been entirely open and unenclosed on all sides, so that in the language of the witness Johnson, (see Rec. p. 30,) "there was no difficulty in getting on to the "track any where, either above or below the place where they got on." It was also shown, that a public road led from the barn around which the sheep congregated at night to the railroad, unfenced on the side next to the barn, and crossing the railroad but a few rods East of the East line of plaintiff's land.

It may be answered, that if the Company had built the fence in question the plaintiff would probably have completed the enclosure. Perhaps if it had been shown, that previously to the construction of the railroad, the territory in question had been customarily enclosed, or even if proof had been offered of his plans and preparations to that end, at the time of the injury, this difficulty might have been relieved. But in the entire absence of proof upon the subject, it is taxing the grace and powers of fancy of the Court too heavily to ask that it should presume all this.

For these reasons we think the Court erred in refusing the second clause of the Defendant's seventh instruction.

S12573-49

V.

There was no proof showing that the sheep came on the track at any point in the line of forty rods which the defendants were required to fence. An eye-witness to the fact, of course, was not to be expected; but there should have been some circumstancial evidence to the point produced. The place where and position in which the sheep were found after the accident afforded no indications whatever as to where or from what direction they got on the track. Stevens, it is true, swears that the most direct course was from the barn down across the bottom. But he did not state, that he had ever seen them take that course or had ever heard of their taking it. He states all that was stated on the point, and the little he states is the merest conjecture. The whole evidence indeed demonstrates indisputably that the road was easily accessible at all points from the usual range and resorts of the plaintiff's sheep. And perhaps we may be pardoned for adding in conclusion, that against any other defendant than a railroad Company, no lawyer upon such proof would have dared hope for a verdict.

For these reasons, we contend that the finding was palpably against evidence, and a new trial should have been granted.

And in thus assailing the verdict, as against evidence, we are not unmindful of the often repeated and emphatic language of this Court in regard to disturbing the conclusions to which juries have arrived upon contested questions of fact. The substance of the evidence is fairly and fully in the record, and we confidently refer to it to show that not even a serious attempt was made to sustain these essential parts of the plff.'s case, which we have had under discussion.

VI.

We believe that the mere statement of the *sixth* proposition, to which the Court are referred, will be sufficient without discussion.

The declaration did not set out the condition in the deed, nor expressly and specifically set up the duty arising from it. But it recited the fact, that such a deed had been executed; and that the erection of the fence in question was a part of the consideration therefor. On the trial the deed was the first piece of evidence introduced by the plaintiff. That deed, when introduced, showed on its face the condition, that the grantees should build the fence proposed. We contended, that by legal presumption the entire contract of the parties touching that subject matter was reduced to and embodied in the deed by which the arrangement was finally consummated; and that all evidence of prior verbal agreements to pay damages was inadmissible.

The *tenth* instruction, which was given by the Court, it is true covered the point; and it is also true that the testimony of Jones was flatly contradicted by Matteson and Bowen. But the evidence was admitted by the Court and in a case of this character was likely to have and did have, an injurious effect upon the defendants, notwithstanding its contradiction and the caution finally given by the Court. The Court will observe that the cause of action occurred prior to the going into operation of the law of 1855, relating to the subject of fencing railroads.

PARKS & ELWOOD, *for Appellants.*