Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of Moore v. *R. M. Shelley and George W. Shelley, from the Supreme Court of New South Wales; delivered Tuesday, February* 13*th*, 1883.

Present:

LORD BLACKBURN.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

THIS is an appeal from an Order of the Supreme Court of New South Wales, refusing a rule nisi for a new trial in an action in which the Respondents were Plaintiffs, and Frederick Henry Moore, the Appellant, was the Defendant.

The action was an action of trespass brought by the Plaintiffs against the Defendant and his partner, since deceased, for breaking, entering, seizing, and taking possession of a certain run, called the Wallah Wallah station, in the Lachlan district, in New South Wales, and seizing and taking possession of certain cattle, sheep, and other things which were on the run, and also for seizing other sheep belonging to the Plaintiffs which were not on the run, and for converting them to their own use. The Defendants pleaded that the Plaintiffs were not possessed of the property; they also pleaded leave and license, and that the lands were not, nor was any part thereof, the property of the Plaintiffs.

It appears that on the 10th December 1878 Suttor mortgaged the run and 3,000 wethers, more or less, and all other sheep, cattle, or live stock then upon or belonging to or which should

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thereafter, during the continuance of the security, be acquired by or purchased for or be upon the run, to the Defendant and his partner, Mr. Blackwood, to secure the sum of 7,000*l.* advanced and 1,000*l.* to be advanced, with compound interest thereon at 9 per cent., to be calculated by half-yearly rests.

On the 19th February 1879 an agreement was entered into between Suttor and the Plaintiffs for the sale to the Plaintiffs of the sheep run, together with 8,000 wethers, nine horses, stores, and ration cart, then on the run, for the sum of 9,000*l.* It was arranged that 2,000*l.* of the 9,000*l.* was to be paid in cash, and 2,000*l.* by a bill at nine months, and that 5,000*l.*, should remain on mortgage to the Defendants. It was further stipulated that, in addition to the 9,000*l.*, the Plaintiffs should bring on to the run about 10,000 good ewes of mixed ages, and that until the cash payments were made the 10,000 ewes to be placed upon the station and the station and stock should remain as a security to the Defendants, but that afterwards Suttor's liability to the Defendants' firm in respect of 5,000*l.* should cease.

That arrangement was come to with the knowledge of the Defendant, and he drafted the agreement. It seems to have been signed in his office. He says after that agreement was signed Suttor and the Plaintiffs left his office. He never objected nor stated that the Plaintiffs were purchasing for 9,000*l.* that which was not worth that amount, and evidently it was considered at that time that the Plaintiffs were making a reasonable bargain with Suttor in agreeing to purchase the run and the sheep which were then on the station for 9,000*l.*, and to bring 10,000 more sheep on to the run. The object of bringing on the 10,000 more sheep at that time was to make the property an ample security. But the arrangement having been altered,

another mortgage was entered into on the 5th July 1879, and by which the Plaintiffs mortgaged to Suttor the sheep run and all the sheep on it and all the sheep then lately purchased by them from Oliver Brothers, then on their way to the station, and all sheep or cattle which should thereafter be purchased for or be upon the station, as a security for the 9,000*l*. Speaking of that mortgage, the Defendant says: "I asked for security over the "balance of the Melrose sheep,"—those were a portion of the sheep which the Plaintiff had purchased to put on the run.—"It had been "represented to me that 6,000 had been sold," —that was the fact.—"They said they could not "give security, because there was a lien over "them to someone else. Eventually they told "me they had got over the difficulty, and it was "arranged that they should give security over "the balance of the Melrose ewes and Swift "and Hann, and that was to be a mortgage to "Suttor, to be assigned to me." The Defendant, in order to get a security beyond that which he had got from Suttor, prepared the deed, or got it prepared, as a security to Suttor, which was to be assigned by Suttor to him, and which was subsequently assigned to him by a deed of the 10th July 1879.

Now the question is whether by virtue of that mortgage and assignment, the mortgage being not a mortgage of lands but of a sheep run, and also of certain chattels and sheep, the intention was that the mortgagee was to have immediate possession of the chattels, or whether the Plaintiffs were to remain in possession until they should make default upon demand in paying the 9,000*l*. It should be observed that no time was fixed by the mortgage for the payment of the 9,000*l*. It was merely stipulated that if the Plaintiffs should pay the 9,000*l*., with interest, upon demand, Suttor

would re-assign the mortgage; that in case the Plaintiffs should make default in payment of the 9,000*l.* and interest, then the mortgagee should be at liberty to enter. There were also several covenants in the deed which lead their Lordships to the conclusion that it was the intention of the parties that, until default should be made in payment of the amount upon demand, the Plaintiffs were to remain in possession. Amongst others of these covenants there is one at page 15, in which it is stated that the mortgagors will "from time to time, and at all times hereafter "during the continuance of this security, take, "or cause to be taken, due and proper care of, "and also do, or cause to be done, all such acts, "deeds, matters, and things as may be necessary "for beneficially or properly carrying on, the said "mortgaged property, and also will and shall, "from time to time, and at all times during the "continuance of this security, keep the whole of "the said sheep, horses, and stock hereby "assigned, and the increase and progeny thereof, "well and sufficiently branded or marked." That was a covenant for the performance of which it was necessary for the Plaintiffs to remain in possession, and it appears to their Lordships that although, as contended by the Defendant, it was not a re-demise by Suttor, it was a stipulation that the Plaintiffs should remain in possession until default should be made on demand.

It was argued that it was the intention of the Defendant that the Plaintiffs were to remain in possession, and take care of the sheep and manage the property, merely as bailiffs or servants of the mortgagee. It appears to their Lordships that that is not the case. There was no stipulation that the mortgagee should make the payments which were necessary for carrying on the business on the sheep run, or that he was to be liable for anything which the Plaintiffs might do in carrying on that business, which there would have been if

the Plaintiffs had been the agents or bailiffs of the mortgagee in retaining in possession. It also appears clear that, in case the Plaintiffs should make default in payment of the 9,000*l.* upon demand, it was to be lawful for the mortgagee "to enter upon and seize the mortgaged property, "and to take possession thereof, and in his dis- "cretion to assume and continue the management "thereof, and immediately thereupon, or at any "time thereafter, and whether in or out of pos- "session, and whether he shall or shall not have so "taken possession, of his own accord, absolutely "to sell and dispose of the said mortgaged pro- "perty." Such a stipulation is not at all consistent with the fact that the Plaintiffs were all along and before the Defendant's entry considered as holding possession and managing the property as the agents or bailiffs of the mortgagee. Their Lordships are of opinion that it was part of the terms of the deed that the Plaintiffs were to remain in possession on their own account, and manage the property until they should make default in payment of the 9,000*l.* upon demand or some other default. It is not proved that they made any other default, and the only question now is whether they did make default in payment of the 9,000*l.* upon demand. Now the Defendant, having prepared and got the mortgage of the 5th July executed, and having got that mortgage assigned to him by Suttor on the 10th July, sends an order to Mr. Campbell on the 18th of that month to take possession of the station, together with wether sheep, cattle, and horses thereon. Surely, when the Plaintiffs purchased the property and mortgaged it to Suttor on the 5th July, they never anticipated or expected that it was to be seized by the mortgagee on the 18th for nonpayment of the 9,000*l.* on demand. That was not the intention of the parties, although it might have been within the

strict legal right of the Defendant to make a demand of payment at any time and to seize in case of default. But he gives this authority to Mr. Campbell on the 18th July 1879, within a fortnight after he had obtained the assignment. That was a mere authority, however, to take possession of the property which had been mortgaged by the deed of the 10th December 1878; but it was not an authority to Campbell to take possession of the ewes which had been placed by virtue of the contract on the estate, nor to seize the ewes which were travelling and to be brought upon the estate. Campbell, in fact, seized all the sheep that were upon the station. He says he could not help it; he never intended to seize the ewes, but they were seized with the wethers because they were mixed with them and he could not help seizing them as well as the wethers. He never intended to seize them, and he did not substantially seize them, for the benefit of the Defendant. A letter was written on the 26th July 1879 by the Plaintiff (George W. Shelley) to the Defendant with reference to this seizure of the property, but this letter had no relation to the seizure of the 10,000 ewes, but only to the seizure of the Wallah Wallah station and the 8,000 wethers and other property which were upon the run and which had been mortgaged by the mortgage of 1878. He says, "I re-
" ceived intimation from Mr. Campbell last night
" that he had instructions from you to take
" possession of Walla Wallah, stating that it was
" under the original mortgage that the place was
" seized, and that if I was to see you some arrange-
" ment might be made. I am not in a position to
" take a trip to Sydney at once; the little money I
" had is exhausted, for I have been keeping the
" station going for five months. So by this mail I
" have written to my brother to see you and know
" what can be done in the matter. My letter

" cannot reach him before next Wednesday or " Thursday. So it will be the end of next week " before he can communicate with you. In the " meantime please be kind enough to let me know " whether it is your intention to sell the station, " or if you would be willing to effect an arrange- " ment." That was merely asking whether he intended to sell the station under the seizure which Campbell had made by virtue of the mortgage of 1878, not of the sheep under the mortgage of 5th July 1879.

The Defendant sent an answer on the 31st July 1879, and on the 27th August 1879 he sent up Mr. Thomas Berrie with a written demand for the 9,000*l.*, which the bearer was authorised to receive. The deed of mortgage specified as follows how the demand of payment was to be made. "It is hereby declared that such " demand as aforesaid shall be made in writing " for and on behalf of the said mortgagee, and " delivered either personally to the said mort- " gagors or either of them, or left at their or his " usual or last known place of abode in the said " Colony of New South Wales, or on the said " station or run, or sent through the medium of " any post office addressed to them or either of " them, as aforesaid." The demand in writing was made on the 27th August 1879. It was left at the station; but the question is, Was there a default upon that demand. The Plaintiff (George W. Shelley) was not there; he had no opportunity to judge whether the alleged authority to Berrie to receive the 9,000*l.* was genuine or not. His wife had no authority to enter into that question: but because the 9,000*l.* were not then paid immediately to Berrie, the Plaintiff (George W. Shelley) being absent from the station and his wife being there alone, Berrie immediately seized all the sheep which were on the station, namely, the 4,500 or 5,000 ewes which had been purchased

by the Plaintiffs and brought on to the station. Was the nonpayment of the money when the notice was served upon the wife a default?

The case of *Toms* v. *Wilson*, in 4 Best and Smith, page 442, which was cited in the court below, (there is a similar case in the 3rd Best and Smith,) is an authority to show that there was no default to justify the seizure. It may, therefore, be well to refer to what Lord Chief Justice Cockburn says in that case. "We are all of "opinion," he says, "that by the terms of the "bill of sale the Plaintiff was under an obliga- "tion to pay immediately upon demand in "writing, and if he did not, then the Defen- "dants were entitled to take possession of and "sell the goods. Here such a demand was made. "The deed must receive a reasonable construc- "tion, and it could not have meant that the "Plaintiff was bound to pay the money the very "next instant of time after the demand, but he "must have a reasonable time to get it from "some convenient place. For instance, he might "require time to get it from his desk, or to go "across the street or to his banker's for it. "There are other circumstances in the case. "When, as here, the person making the demand "is not the person entitled to the money, but his "attorney, the person on whom the demand is "made must have a reasonable opportunity to "inquire into the authority of the person making "the demand. The attorney may send a bailiff "to make the demand, and authorise him to "receive the money, but the mere demand by "that bailiff does not intimate to the Plaintiff "that payment to him will suffice; that fact, at "least, ought to have been comunicated to the "Plaintiff, and even if that fact had been "communicated to the Plaintiff, still, if he bonâ "fide doubted the truth of the statement, he "would have been entitled to some opportunity

" to inquire into its truth before the Defendants " would be entitled to seize his goods."

Here the Plaintiff (George W. Shelley) had no opportunity to inquire into the truth of Berrie's statement. He was not at the station when the demand was served upon his wife, but he had gone down to look after the sheep, which the Defendant, on the 31st July 1879, told him he ought to do. Their Lordships, therefore, are of opinion that there was not a default which justified the Defendant in entering upon the possession of the Plaintiff and seizing the property.

The Defendant not only seized the 4,500 or 5,000 sheep which had been brought upon the run, but he also seized about 5,000 sheep which had been purchased by the Plaintiffs and which were travelling on the road. It seems that the Plaintiff (George W. Shelley) had purchased two lots of sheep. From Swift and Hann he purchased 5,000 at 8*s.* 6*d.*, and sent them or 4,500 of them on to the station. Those were on the station, and those were seized by Berrie. He had also purchased 11,000 at 5*s.* 6*d.* a head from Oliver Brothers; he sold 6,000 of those at 7*s.* 6*d.*, and the remaining 5,000 were the travelling sheep. Those sheep were subsequently seized, in September, by a man who was authorised by the Defendant to seize them, and they were sold by or on account of the Defendant at 7*s.* 6*d.* a head. The Plaintiff (George W. Shelley), however, in his evidence said that these sheep were worth 10*s.* 6*d.* a head, and not 7*s.* 6*d.*

It is admitted that a man who has got merely an equity of redemption in property is not entitled to recover the full value; he is entitled to recover only the damage which he has sustained. Considering the price which the Shelleys were willing to give in December 1878, and the additional sheep brought on to the premises, the equity of redemption may fairly be taken as worth

a substantial sum of money. The Defendant seized the station and the sheep before he was entitled to do so. He had no right to seize them until default had been made, and no default had been made; he was therefore liable to pay to the Plaintiffs damages for the seizure. In the case of *Massey* v. *Slater*, 4th Law Reports, Exchequer, page 18, which was referred to in the argument at the bar, it was held that the Plaintiff was entitled to substantial damages. In this case it appears that the Defendant seized the 4,500 or 5,000 sheep which had been brought on to the station as well as those which were off the station, and that he sold those 5,000 which were off the station for 7*s*. 6*d*. a head, the Plaintiffs having said that they were worth 10*s*. 6*d*. The jury assessed the damages at 750*l*., but they did not state the grounds upon which they found their verdict. Upon a motion being made for a new trial upon the ground that the jury had given excessive damages, the Chief Justice, who heard the evidence and who tried the cause, upheld the verdict, and did not think it right to grant a new trial. Sir William Manning, who was also one of the full Court before whom the case came, gave his reasons for thinking that there was no cause shown for disturbing the verdict. Now, the jury having found the verdict, and the Chief Justice, who tried the case, and Sir William Manning, having come to the conclusion that the verdict ought not to be disturbed, we are asked in England to say that they were wrong. They were Judges who may naturally be supposed to know more of matters relating to stations and runs, and the value of sheep in the Colony, than we do; and the jury having thought that the Plaintiffs had sustained substantial damage to the extent of 750*l*., those learned Judges refused to disturb the verdict.

Their Lordships cannot say that there was no

evidence to support the verdict, and they think that they ought not under the circumstances to advise Her Majesty to say that the jury who found the verdict, the Chief Justice, who upheld it, and Sir William Manning, who supported it, were all wrong in the conclusions at which they arrived; and under these circumstances their Lordships will humbly advise Her Majesty to affirm the judgment of the Court below. The Appellant must pay the costs of this Appeal.