Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ayres v. The South Australian Banking Company, from the Supreme Court of South Australia; delivered 2nd February, 1871.

Present:—

SIR JAMES W. COLVILE.
SIR JOSEPH NAPIER.
LORD JUSTICE JAMES.
LORD JUSTICE MELLISH.

THIS is an action of Trover brought for the conversion of a large quantity of wool. The Defendants are the Trustees of a firm of Philip Levi and Company in South Australia, who became insolvent according to the laws of that country; and the action was brought by the South Australian Banking Company to enforce what is called a preferential lien, which they had obtained, as they alleged, on the wool of a large number of sheep, by an instrument made in accordance with the Australian Act on the 23rd August, 1866. Several objections were argued; but it is probably better first to allude to an objection which was taken in the Court below, though it was not seriously argued here, namely, that an action of trover would not lie for this wool, even if there was a good preferential lien given in accordance with the Australian Act. One of the learned Judges in the Court below was of opinion that no such action of trover could be maintained. Now, as regards that, their Lordships are clearly of opinion that an action of trover may be maintained by a person to whom a valid preferential lien has been given under this Act.

The real effect of this Act appears to be this, that it enables a proprietor of sheep to make a valid pledge of the wool of his next clip of sheep,

although no possession is given. Ordinarily by the common law, although of course a mortgage may be given of chattels as well as of land without delivering possession, yet a mere pledge cannot be given without the delivery of the possession of the goods,—though I believe by the laws of many other countries there can be a valid pledge without a delivery of possession. The effect of this Act simply appears to be this, that it enables a pledge of this wool to be given without a delivery of possession; but then it adds, "And the possession of "such wool by the said proprietor shall be to all "intents and purposes in the law, the possession of "the person or persons making such purchase or "advance." Therefore, the person who has made the advance is to be deemed to be in possession. That being so, there appears no reason whatever why he should not be able to maintain an action of trover, because there is no doubt at all that if goods are delivered by way of pawn or pledge to a person who makes advances on them, and then somebody else takes the goods out of his possession and converts them, he can maintain an action of trover. And the true effect of this Act appears to be that the lender is for the purposes of the Act to be deemed to be in possession, and to have the same rights in point of law as if he was in possession, and amongst those rights is the right of maintaining an action of trover if anybody wrongfully converts the wool.

Now, the next question, and the more material question, which was argued on behalf of the Appellants, is that Philip Levi, the person who signed his name to the instrument of the 23rd August, 1866, was not the proprietor of the whole of these sheep, and that, therefore, all that could pass under this instrument was the interest, whatever it might be, that Philip Levi happened to have in these sheep. Now, for the purpose of considering the validity of that objection, it is necessary, in the first place, to consider who may give this preferential lien, according to the true construction of the Act; and no doubt it uses the words in the first section, proprietor of sheep, "That in all cases "where any person shall make any *bonâ fide* advance "of money or goods, or give any valid promissory "note or bill to any proprietor of sheep, on condi-"tion of receiving in payment, or as security only

"for such money, goods, promissory note or bill, as "the case may be, the wool of the then next ensu- "ing clip of such proprietor," etc. And then, no doubt, it seems to be assumed that the proprietor is the person in possession of the wool, because it says afterwards, in the clause already referred to, "That the possession of such wool by the said "proprietor shall be, to all intents and purposes, in "the law, the possession of the person or persons "making such purchase or advance." But then, under the eighth section, which is the section which makes it a misdemeanour for people, after having granted such a lien, wrongfully to deal with the wool, it enacts "That any grantor of any "such preferable lien on wool, or of any mortgage "of sheep, cattle, or horses, or of their increase and "progeny, under this Act, whether such grantor "shall be principal or agent, who shall afterwards, "by the sale or delivery of the wool," etc., is to be guilty of a misdemeanour.

Now, their Lordships are of opinion that, according to the true construction of the Act, any person who is in possession of the sheep, either as principal or agent, and has authority from the real owner to deal with the sheep and create such a preferable lien, ought to be deemed to be the proprietor of the sheep within the meaning of the Act. The real object of the Act seems to be this,—independently of this Act, such an instrument as this would at the most have only created an equitable charge, and such a charge would have been invalid as against anybody who might have purchased the sheep or the wool after it was clipped, for valuable consideration without notice of the preferential lien. And the main object of the Act seems to have been to enable a valid legal security to be given of the wool of sheep before it was clipped, so that persons might with safety make advances on the security of such wool; and there seems no reason why the agent who is in possession of the property, and who has power from the owner to deal with it, who could clearly, by authority from the owner, create a valid equitable lien, should not also have power to create the legal security which it is intended by the Act to effect.

Now, then, we must see what the interest of Philip Levi was in these sheep. He was a part-

ner in the firm of Philip Levi and Company, and one of the other partners had previously agreed with the South Australian Bank, in consideration of their giving them large credit for £60,000 for the year 1866, and allowing them to draw upon them to that amount, that the firm would give them a preferable lien over their sheep. There is, then, the evidence of one witness, namely, Percy Wells. He says, "The interest of Philip Levi "in the station was defined by the books; he had "the sole management of the station." It is true another witness also says, "We," speaking of the firm, "had the entire management of the stations." Well, those two witnesses are not really inconsistent. No doubt Philip Levi was acting on behalf of the firm, and the firm were the persons who had the real interest. But, still, on the evidence of Wells, there appears no reason to doubt that Philip Levi was the person who had the actual management of the stations,—that he was, in fact, the managing owner, so to speak, of these stations; and that, apparently, was the reason (for there does not appear to be any other reason) why this instrument was made in his name.

Well, then, it appears on the face of the instrument, that the consideration was to Philip Levi and Company, because it is said to be "in considera- "tion of £38,000 *bonâ fide* value, for which I "admit to have received from the South Australian "Banking Company in the drafts (each draft being "in triplicate of the Manager in Adelaide of the said "South Australian Banking Company in London), "and payable to Philip Levi and Co., or order." Therefore, here it appears that in consideration of an advance made by the Bank to Levi and Company, Philip Levi, who is one of the partners, and the managing partner in this transaction, for the purpose of carrying out a contract previously made by the firm, and with the assent of all the other members of the firm, signs this particular instrument. If the Act makes it illegal, that might be another matter, but independently of that, nobody surely can doubt that this is an instrument which binds the firm; that it would have given, wholly independently of the Act, a perfectly good, equitable charge on the wool of the sheep of the firm; and it may well be argued that if a firm agree that

one of the members of the firm, who is the actual manager of the particular property which is in question, shall have power to transfer that property for the purpose of giving a charge and security for money advanced to the firm, and then he does it, the result of that transaction, *quâ* the firm, is, that he is made the owner for the purpose of executing that charge. He is in the actual possession, no doubt, as manager; he is a joint owner, and the other owners agree and consent that for a consideration advanced to them, he shall have power to make the charge.

Well, now, that being so, their Lordships do not see that there is any such restriction in this Act as to prevent them from holding that that which would give a perfectly good equitable charge independently of the Act, should not, in accordance with the Act, make a perfectly legal charge; and therefore their Lordships are of opinion that Philip Levi may fairly be considered as proprietor. But even if that were not so, Philip Levi and Company themselves having assented to this charge being made, it is plain that they never could set up, as against the South Australian Bank, who have made advances to them on the security of this instrument, which was executed with their assent, that it was not valid, or that any fact which was necessary to make it valid, was not true. Though their Lordships do not think that it is necessary, yet if it was necessary that Philip Levi should be the absolute proprietor, in order that this instrument should be good, their Lordships would be of opinion that Philip Levi and Company would be estopped from saying that the sheep and wool were not the sheep and the wool of Philip Levi at the time when he executed this instrument; and they are also clearly of opinion that the Plaintiffs, being trustees under an assignment from Philip Levi and Company, which is not executed for any consideration given at the time, but is merely an assignment in trust for the purpose of distributing their property among their creditors, the trustees under such an assignment, have no greater right than Philip Levi and Company themselves would have; and, therefore, cannot set up that Philip Levi had not power to execute this instrument, and cannot set up that he was not a proprietor of the sheep at the time the instrument was executed.

But then it was said on the evidence of Wells, that even the firm were not the real proprietors of these sheep, and on cross-examination they stated that a variety of persons had a variety of interest in these sheep. But then the same witness says, all the stations were in debt to the firm; and it is perfectly consistent with all the evidence that the whole of these sheep were mortgaged to the firm for advances made to them, and that the firm were perfectly entitled as between them and all the other real proprietors of the sheep to clip the wool and sell the wool, and apply the proceeds in payment of the debts due from those persons to the firm. There is evidence, in fact, that that is so, because we find in the letters it is stated that the wool was to be treated as the estate of the firm, and it is an undoubted fact that they did sell it, and they applied the proceeds for the purposes of the trustees and the insolvent estate; and it does not appear that any one of those persons ever in the smallest degree objected to it. It is perfectly impossible to say that that is not, under the circumstances of this case, absolutely conclusive evidence that the firm were the owners of these sheep so far as to enable them to give this preferable lien on the wool, which is all that is necessary for the purposes of this case, and that, therefore, the trustees, who are bound by what binds Philip Levi and Company, having applied this wool to their own purposes, there seems no reason why the Bank cannot bring this action.

Well, then, another objection was taken by Mr. Manisty on the terms of the Charter,—the clause in the Charter which says it shall not be lawful for the Bank to make advances on merchandise. Now, unquestionably, a great many questions might be raised on the effect of that clause in the Charter which may be of very great importance, but which also being of difficulty, their Lordships do not think it necessary to give any opinion upon. There may be a considerable question as to what are the transactions which come really within the clause, and whether this particular case does come within it. There may be also question whether, under any circumstances, the effect of violating such a provision is more than this, that the Crown may take advantage of it as a forfeiture of the Charter,

but the only point which it appears to their Lordships is necessary to be determined in the present case is this, that whatever effect such a clause may have, it does not prevent property passing, either in goods or in lands, under a conveyance or instrument which, under the ordinary circumstances of the law, would pass it. The only defence which can be set up here (there is no plea of illegality) is under the plea of not possessed, that the right of property and the right of possession never passed to the Plaintiffs. Their Lordships are of opinion that whatever other effect it has, it cannot have the effect of preventing the property passing. If that were otherwise, the consequences might be most lamentable, because if the property never passed to them, they could not themselves convey any property to third persons. Transactions of the most honest description might be set aside. They might do what is a very common thing, make advances and Bills of Exchange with the Bills of Lading attached. If it is to be said that the property in the goods mentioned in the Bill of Lading does not pass to them, then any purchaser to whom they might sell the goods under the Bill of Lading would get no title, and the original owner who had received the full proceeds of the goods, or a large advance upon them, might say, "Oh, the property never passed "to the South Australian Bank, and, therefore, it "never passed to you." Mr. Manisty admitted that he could find no authority for the proposition, that any violation of such a condition of a charter would prevent the property in goods passing to the person to whom an instrument otherwise valid professed to pass it, and their Lordships are of opinion that whatever other effect the violation of such a condition may have, it has not the effect of preventing the property in the goods passing, or of preventing an action of trover being maintained if there is a wrongful conversion.

On the whole, therefore, their Lordships are of opinion that the Judgment of the Court below was right, and they will humbly advise Her Majesty that this Appeal should be dismissed, with costs.