

*Judgment of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of  
Guthrie and another v. Simson from the  
Supreme Court of the Colony of Victoria;  
delivered Saturday, 12th February 1876.*

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Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THIS was an action brought by the assignee of one John Middleton, an insolvent, who was a stock dealer, against the Defendants, who were stock salesmen, in which the assignee sought to recover a considerable sum of money against the Defendants, upon grounds which are stated in his declaration. The declaration contained four counts : -the first, for money payable and money had and received to the use of Middleton ; the second, for conversion of the goods of Middleton ; the third, for money payable or money had and received to the use of the assignee ; and, the fourth, for conversion of the goods of the assignee. The jury found a verdict for the Plaintiff for the sum of 1,803*l.* 9*s.* 9*d.*

In order to make the case intelligible, a few facts require to be stated. It appears that Middleton, who had formerly been a partner of the Defendants, had been in the habit of purchasing stock, and of putting a considerable portion of it into the hands of the Defendants for sale, and that they had occasionally assisted him with advances at various times on bills and cheques. Middleton filed a declaration of insolvency on the 15th March 1873 ; and the evidence in the

case related to the transactions between Middleton and the Defendants a week or 10 days prior to that declaration of insolvency. The substance of it, which is enough to state at present, is that during that time Middleton consigned to the Defendants for sale a considerable quantity of sheep, and that they made him certain advances, on the 1st of March 775*l.*, on the 3rd of March 927*l.*, in respect of bills which turned out to have been forged by him, and on the 5th of March 500*l.*, making altogether 2,232*l.*

The main questions in the cause turned upon the construction and validity of two documents, both dated the 5th of March 1873, but one of them ante-dated by five days, the time of its execution really being Sunday, the 10th of March 1873. The first of these documents is in these terms: "Geelong, 5th March 1873. Messrs. Guthrie, Bullock & Co., Geelong. Dear Sirs, In consideration of your having given me an advance of 775*l.*, I hereby place in your hands for sale 1,200 fat sheep from Camperdown, the proceeds of which are to recoup you for your advance as aforesaid. And in consideration of a further advance made by you to me this day of 500*l.*, I also place in your hands 3,600 fat ewes for sale, proceeds to be held by you for liquidation of said advance and other balance." It may be stated here, to follow the order of dates, that on the 8th of March following this, a sale was made by the Defendants, the particulars of which are stated at page 18 of the Record: "Account sales of sheep sold by Guthrie, Bullock, & Co. by order and on account of Mr. John Middleton: 614 broken mouthed ewes 6*s.*, 184*l.* 4*s.*; 900 wethers 10*s.*, 450*l.*" And then with commission, &c., the net proceeds of that sale amounted to 538*l.* 7*s.* 4*d.*

The second document to which reference has

been made bears date the 5th March 1873, but, as before observed, was ante-dated five days. It is in these terms:—"In consideration  
 " of having received from you on 3rd instant the  
 " sum of 1,000*l.*, I hereby place in your hands  
 " for sale 70 head of cattle, which I request you  
 " to sell on Monday 10th instant in the yards,  
 " if not previously disposed of, and carry proceeds  
 " of same to my cr. in account with you. I  
 " also give you a lien on 609 ewes, as further  
 " security for above and other advances; said  
 " ewes being of various brands, and now in  
 " charge of Donald Buchanan." On the Monday, as it is alleged by the Plaintiff, in pursuance of this document, a second sale was effected by the Defendants of 3,606 ewes and wethers for 1,262*l.*, of 65 bullocks for 520*l.*, and of some cows, and so on. And the gross proceeds of that sale amounted to 1,782*l.* 2*s.*

It is contended on behalf of the Plaintiff that this document was void, as being a fraudulent preference, and consequently that the Defendants took no property and no rights whatever under it. That question was submitted to the jury; and it may be as well here to refer to the questions which were put to the jury, and to their answers to those questions. In the first place this question was put:—"Was the delivery  
 " of the 609 broken-mouthed ewes and the 65  
 " head of cattle to the Defendants, by the letter  
 " written on the Sunday morning"—(that is the last document),—"given with a view to prefer the  
 " Defendants to other creditors; Middleton at  
 " that time being unable to meet his debts as  
 " they fell due?" To that the jury answer, "Yes." Then, "Was it made in good faith and  
 " for valuable consideration?" They answer "No." "Was it given under pressure of the  
 " creditors, and not voluntarily by Middleton?" Answer, "Voluntarily." "Did the transfer take

" place with intent to defraud or delay his  
 " creditors, Middleton at that time being unable  
 " to meet his debts as they fell due?" Answer,  
 " Yes." Then the jury say:—"As to the docu-  
 " ment of the 5th of March, we are of opinion  
 " that transfer of the Camperdown sheep made  
 " on Wednesday, 5th March, to secure 775*l.*,  
 " was made to defeat other creditors, the Defen-  
 " dants having accepted Middleton's promissory  
 " note on 1st March as security for same. We  
 " are of opinion that the lien for 500*l.* was *bonâ*  
 " *fide*. We are of opinion that the transactions of  
 " the 10th March were made to defeat the other  
 " creditors." Then it would appear that such  
 questions were submitted to the jury as were sug-  
 gested by the respective Counsel for the Plaintiff  
 and Defendants, and by the Counsel for the Plain-  
 tiff these questions were suggested:—Whether the  
 document was obtained from Middleton by undue  
 influence, and whether he was capable of under-  
 standing it? To the first they said, No; and to  
 the second, Yes. There is another question,  
 which does not turn out to be material. Then  
 there are questions suggested by the Counsel for  
 the Defendants:—"Would the 500*l.* have been  
 " advanced on the 5th March 1873, if the  
 " memorandum of that date had not been  
 " signed?" Answer, "No."

The verdict of the jury seems to have been  
 arrived at in this way. They considered that  
 the Plaintiff was entitled to recover the net  
 proceeds of the first sale, 538*l.* 7*s.* 4*d.*, and the  
 gross proceeds of the second sale, 1,782*l.* 2*s.* ;  
 that 500*l.* should be deducted therefrom, which,  
 together with the sum paid into Court, makes  
 precisely the sum given by the verdict.

It has been contended on the part of the Defen-  
 dants, that the document of the 10th of March was  
 not a fraudulent preference; that it was not given  
 voluntarily, or at all events only partly voluntarily

and partly under pressure. And it has been further contended that, assuming it to have been given voluntarily, and to be therefore void, that nevertheless the Defendants had, independently of it, authority to make the sale of the 10th of March, either derived expressly from Middleton, or to be inferred from the course of business between him and them.

With respect to the first point there is not very much evidence. There is, in the first place, the evidence of Middleton himself, who says, "He then asked for this second lien, or whether I offered it myself I cannot say." He is not certain whether it was asked for by Guthrie, or whether it was offered. The evidence of Guthrie is to this effect:—that on the Sunday evening, the 9th, he went to Middleton, in pursuance of a communication which had taken place between them; that he found Middleton in a very depressed state, and a state of partial stupefaction, he having taken a quantity of laudanum. And the account which he gives of the transaction that then took place is as follows: "He covered his face with his hands, and wept." It should be explained that Mr. Guthrie had discovered on the day before that one forgery had been committed by Middleton; and on the Sunday, at all events, he had discovered from him, from his own confession, that a bill which had been mentioned before between them of a Mr. Bennett for 957*l.* was also a forgery by Middleton. Mr. Guthrie says, "He covered his face with his hands, and wept. I said, Do you mean to say Bennett's transaction is a myth? He said, Yes, it is. I said, That materially alters our position, and we must have another lien. He said, Did I consider it necessary? I said, Perhaps, as we had the cattle, I might be safe without it, but as it did not weaken our position we might as well have a lien. He said, You had better

“ write it ; which I did. He said, You had better  
“ make it the 5th, the date. I said, I could  
“ not go away without satisfaction. More than  
“ once I read it to him, and he signed it.”  
That, together with the previous statement of  
Middleton, is all the material evidence upon the  
subject ; and upon that evidence their Lordships  
are not able to say that the jury might not  
reasonably have found, as they did, that the  
document was given voluntarily, and not under  
pressure. They were not bound to believe  
Mr. Guthrie ; but, even if they did believe him,  
it by no means follows that their verdict on this  
question was so unwarranted that it ought to  
be set aside.

Their Lordships have next to consider the  
second material point raised on the part of  
the Defendants ; namely, that, assuming this  
document to be void, nevertheless there was  
authority to make the sale of the 10th March  
without it. That sale consisted partly of the  
sale of 3,606 ewes and wethers for a sum of  
1,262*l.* 2*s.*, and partly of the sale of 65 bullocks  
for 520*l.* ; and it may be here observed that if the  
sale of the bullocks only was unauthorised, that  
of itself would be sufficient to give the Plaintiff  
a verdict for something above the amount of  
the verdict which he has. If their Lordships  
assumed that these 3,606 ewes and wethers  
were part of those sheep which had been men-  
tioned in the previous document of the 5th of  
March, and which the Defendants had authority  
to sell, and gave them the benefit of that  
supposition, still the question remains, whether  
there was any authority, express or implied,  
for the sale of the 65 bullocks. And here the  
statement inserted by the Defendant Guthrie  
himself in the document of the 10th of March  
1873, that those bullocks had been thereby  
put into his hands, throws upon him a con-

siderable burden of proof that that statement was false, and that they were in his hands before. Their Lordships may here observe that, although it would appear that the counsel on both sides had the opportunity of suggesting what questions should be put to the jury, it does not seem that the counsel on either side suggested that any question should be put to this effect: "assuming the document of the 10th of March to have been void, was there authority irrespective of it to make this sale?" No such question appears to have been suggested; and their Lordships would always be unwilling to direct a new trial, much less to enter a verdict, if they had the power of doing so, upon a question which might have been submitted to the jury, and was not. But they have thought it right to examine the evidence for the purpose of seeing whether, if such a question should be submitted to another jury, there would be any reasonable probability of their finding it in favour of the Defendant.

The evidence on this subject of express or implied authority appears to their Lordships exceedingly slight. There is, indeed, a general statement of Guthrie, that on Wednesday the 5th "the cattle were put into our hands for sale." But he gives no particulars of any conversation upon the subject with Middleton; he says nothing about any approximate price having been agreed upon or even mentioned; and he gives no other statement upon the subject except this very vague and general one. Middleton himself gives no evidence of an authority to sell these cattle; and upon cross-examination no question appears to have been asked him as to whether he gave any authority to sell them. It appears that a clerk of the Defendants was sent on Sunday the 9th, somewhere about 5 o'clock in the evening; and that about 9 o'clock

in the evening he possessed himself of these cattle, which were at a place called the Duck Ponds, seven or eight miles from Geelong, and that they were brought into the yard of the Defendants upon the morning of the Monday, and were then sold. Their Lordships do not think that it would be desirable to send the case for a new trial, for the purpose of submitting to a jury the question which has been last suggested.

Their Lordships do not think it necessary to go into the details of the figures upon which the Court arrived at the conclusion that a verdict should be finally retained for the Plaintiff for the sum of 490*l*. It appears to them enough to say that upon the facts proved they think the Plaintiff entitled to a verdict for that sum, and perhaps for something more. Under these circumstances they will feel it their duty humbly to advise Her Majesty that the judgment of the Supreme Court be affirmed, and this Appeal dismissed, with costs.