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continuance of the lease, though she accommodated the lessees by accepting their rent from other persons let in under them. A landlord would, of course, accept his rent from anyone who would be willing to pay it. [BARRY, J. The grant of a new lease to a third party, with the consent of the lessee, has been held a surrender by operation of law : *Davison v. Gent* (b)].

PER CURIAM. In this case there is evidence of an estoppel. The lessor has entered into a written agreement to accept, and has accepted, other persons in the place of her tenants, and has received rent from them as tenants. She cannot now be permitted to alter her position, and hold the defendants to the obligations of the original lease, from which, by her own acts, she had discharged them.

Appeal allowed; nonsuit to be entered.

Attorney for the appellants : *Sabelberg*.

Attorney for the respondent : *Mills*.

(b) 1 H. & N. 744; 26 L.J. (Ex.) 122.

Nov. 27.

MACK APPELLANT v. MURRAY RESPONDENT.

Pounds Act 1874 (No. 478), secs. 14, 33—Illegal impounding—Burden of proof of exceptions—Unsworn statement of defendant—Statute of Evidence 1864 (No. 197), sec. 44.

Upon the hearing of an information for the offence of illegally impounding sheep known to the defendant to belong to an owner resident within five miles, without giving forty-eight hours' notice: *Semble*, it is for the informant to negative the exceptions in that section, *e.g.*, to prove that the same sheep had not trespassed on the land in question within twelve months previously. Section 44 of "*The Statute of Evidence 1864*" (No. 197), gives to the unsworn statement of an accused person the effect of evidence, and it may be so considered when it is not inconsistent with the sworn evidence adduced.

APPEAL from Petty Sessions at Echuca.

The information was for illegally impounding 469 sheep of the informant and one Austin Mack, without first giving to the owners, their agent, or overseer, either personally, or by some other person acting on his behalf, forty-eight hours' notice to

remove the sheep, although the owners, &c., were, to the defendant's knowledge, then residing within five miles of the place trespassed upon, and the land trespassed upon was not under tillage and enclosed with a substantial fence, nor had the sheep been found trespassing a second time within twelve months. The police-magistrate dismissed the information with costs.

It was proved that the defendant seized the sheep as herdsman of the Terriek Terriek West Common, on which they were trespassing, on 18th July, 1879, and immediately impounded them, claiming a farthing a head damage; that the informant next day paid the amount under protest, and released the sheep; that the owners were resident within five miles, to the knowledge of the defendant, who did not give them any notice; that the owners were aware that several of their sheep had trespassed on the common within twelve months, and, on 10th July, 1879, received from the defendant a written notice; that he had been appointed herdsman of the common, and that, if the sheep were not removed forthwith, he would impound them. The defendant called no evidence, but stated that he could swear that the greater number of the sheep impounded were the same as had previously been seized, and released the day before. The magistrate held that it was not necessary that every sheep in a flock should be identified.

Higinbotham (with him *Williams*) for the appellant—The information should not have been dismissed; the taking, and the absence of notice, and the position with reference to the informant's residence, were all proved; while there was absolutely no evidence of the identity of the sheep with those which were said to have trespassed previously within twelve months. The defendant said merely that he *could* swear to some of them, but he did not swear to them, or produce any one else to do so; and evidence to that effect would not have been sufficient. The whole of the sheep seized must be identified as having trespassed previously within twelve months: "*The Pounds Act 1874*" (No. 478), sec. 14. Proof of the exception lies upon the defendant, who has to avail himself of it.

Wrixon for the respondent—The burden of proof does not lie on the defendant, in respect of the identity of the sheep. The

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informant has to prove that none of the exceptions in sec. 14 apply; the information is for an offence of a *quasi* criminal nature, for which, under sec. 33, subs. (3), imprisonment, as well as a penalty, might be inflicted. Therefore, it was that the defendant did not give evidence on oath; he made a statement, as any prisoner on his trial might make one, which is equivalent to evidence, and which a jury is at liberty to accept and act upon. "*The Statute of Evidence 1864*" (No. 197), sec. 44, allows any person charged with an offence "to make a statement of facts (without oath) *in lieu of* or in addition to any evidence on his behalf." He was always at liberty to make a statement, and the jury were at liberty to accept it, before this Act. This enactment must therefore be taken to carry the effect of the prisoner's statement much further, and to make it evidence. The defendant's statement was not in conflict with the sworn evidence. Besides this, sec. 14 of Act No. 478, does not confer a new right, subject to restrictions and exceptions; it simply restricts the common law right to impound trespassing animals; it must, therefore, be construed strictly, and the person complaining of the exercise of this common law right, as transgressing the limits imposed, must prove his case completely. *Main v. Robertson* (a) lays this down even in a civil proceeding. Another principle, also, throws the burden on the informant; the fact is one which is more peculiarly within his own knowledge; he ought to know his own sheep, and where they have been kept. The information undertakes to prove (among other things) that these sheep had not trespassed before, within twelve months. [STAWELL, C.J. There is another view of the matter; the defendant is charged in respect of something which he purported to do under a statute; having used the proclaimed pound as provided by that Act, can he now allege that he was impounding these animals, not according to the provisions of that enactment, but at common law? STEPHEN, J. He is charged with violating the enactment in one or all of three particulars; if he has done so in any one of those particulars, is he not rightly convicted?] The information does not show that he put the sheep into such pound. "Illegally impounding" means without any colour of right; for other sections of the Act

(a) 2 V.L.R., L. 25.

(e.g. secs. 28 and 29) deal with irregularities in impounding. It was also proved that a previous notice had been given by the defendant to the informant, 10th July, about the trespass of his sheep.

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Higinbotham in reply—The common law right of impounding does not come into question. The charge is of illegally impounding contrary to the Act, and is proved as soon as it is shown that the defendant impounded without complying with the injunctions of the Act. [STAWELL, C.J. Why is the accused to prove himself innocent?] The offence is the composite one of impounding sheep known by him to belong to an owner resident within five miles, without having given forty-eight hours' notice; then afterwards comes the exception which the defendant has failed to bring himself within—the case in which the sheep have been found trespassing a second time within twelve months. The evil intended to be remedied is an unnecessary, expensive and injurious driving the animals to a distant pound, without any benefit to either impounder or owner. The same trespass rates are made recoverable without this injury. The negating of the exceptions, in the information, does not make it necessary for the informant to prove such negative: "*The Justices of the Peace Statute 1865*" (No. 267), sec. 108; *Bendigo Waterworks Coy. v. Fletcher* (b). The defendant has not brought himself within the exceptions. Sec. 44 of "*The Statute of Evidence 1864*" (No. 197), was not intended to make the prisoner's statement displace the uncontradicted sworn evidence against him. The notice proved was of 10th July, eight days before the seizure complained of, and must have related to different sheep and a different trespass.

STAWELL, C.J. The present appeal, in seeking to set aside a verdict of Not Guilty, and to have another trial on a question of fact, appears to conflict with the recognised principle that no person ought to be twice placed in jeopardy on the same criminal charge. Apart from this objection, it has been almost the invariable practice of this Court, not to interfere with conclusions of fact drawn by the constituted tribunal. Where justices have

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correctly apprehended the law, the Court ought not to set aside their conclusions on evidence.

Sec. 44 of "*The Statute of Evidence 1864*" (No. 197) seems to place the statement of a prisoner or accused person in a higher position than it occupied before the passing of that enactment. The justices would, in my opinion, be justified in accepting it, where it is not inconsistent with the sworn evidence; and this view, so far as my experience extends, has been adopted in criminal proceedings. In the present case, the accused stated he could swear—that is, as I understand, could swear, were he permitted—that the sheep in question were the same as those previously found trespassing and seized. There was thus a statement not inconsistent with the evidence, on which it was competent for the justice to have acted. It thus becomes unnecessary to decide on whom the *onus* of proof lay, that the defendant was, or was not, within the exemptions in sec. 14 of "*The Pounds Act 1874*," though I should be disposed to think it was not on the defendant. The same section contains the prohibitory and excepting clauses. The appeal ought, I think, to be dismissed.

BARRY, J. I do not feel called upon to place a definite interpretation upon sec. 44 of "*The Statute of Evidence 1864*," but I can conceive a case in which the prisoner's statement might be received against all the sworn evidence for the prosecution, where it is consistent with the probabilities of the case.

Appeal dismissed.

Attorney for the appellant: *Fink* for *H. S. Barrett*, Dunolly.

Attorneys for the respondent: *Casey & Bradly* for *Wrixon*, Sandhurst.