

Bradley and Others V. Keighran 23 March 1848

Law Intelligence. Supreme Court.-Tuesday. Before His Honor the Chief Justice, And a Jury of Four.

Bradley and Others V. **Keighran**.

This was an action of trespass. The declaration stating that the plaintiffs were possessed of a certain run called "Bumbowle," and that the defendant broke and entered the same, and with sheep and cattle, &c, eat up the grass there growing, and from thence drove away the sheep and cattle of the plaintiffs; in consequence of which the plaintiffs were compelled to take their sheep to another station, and they there became diseased, and many of them then died, to the damage of the plaintiffs of £1000.

The defendant pleaded first, not guilty; secondly, that the defendant was not possessed of the station, &c.; and, lastly, the plea of liberum tenementum, that is, that the station, &c, was the freehold of the defendant. Upon these pleas issues were joined.

The Solicitor-General and **Mr. Fisher** appeared for the plaintiffs; and **Messrs. Broadhurst and Michie** for the defendant.

The Solicitor-General stated the plaintiffs' case to the Jury: he said this was an action brought to recover damages for trespasses committed to a station beyond the boundaries of the colony. He would in the outset state, that a Commissioner of Crown Lands in the present state of the law relating to stations, had no jurisdiction over a case like this, and therefore parties trespassed upon have no other means of redress than coming to the Supreme Court; the plaintiffs were therefore compelled now to come here: and if the Commissioner's jurisdiction still existed, yet there were objections why such disputes should not be left to the arbitrament of such a judge. He (the Solicitor-General) had had great experience in squatting cases, and certainly he had been at times astonished at the extraordinary views that different Juries have taken of the various cases submitted to them; their verdicts, in many cases, as far as damages were concerned, were certainly not commensurate with the damages suffered or proved. And truly, the success that most plaintiffs had met of late in these squatting actions, so popularly called, would by no means induce

others to maintain their rights to their stations; and if any party can disturb another in the possession of his station, with almost impunity, then there would be an end to sheep farming; and consequently a blow would be aimed at the real wealth of the colony. However, to the facts, and the probable proofs in the case; the station in question, called Bumbowle, is situate on the Murrumbidgee River, and was originally taken up by **Mr. George Shelly**, some sixteen years since; he occupied it for six or seven years with sheep and cattle; then it was disposed of to his brother, William, who remained in possession until his death, in 1844; since his death, **Young and Howell** have had charge for his representatives, the present plaintiffs; in June last, the original occupier, **G. Shelley**, took charge for the same persons; the spot where the trespasses complained of took place, is a tract of country near the "Wianga Creek" or "Range" of that name. It will be proved beyond all controversy, that the **George Shelley**, and those who have intervened between his first and present occupation, have occupied that spot continually. When he first went up there his cattle camped there, and years afterwards he placed his sheep there. The defendant had before committed a trespass on this Range, but complaint being made to the Commissioner of the district, the sheep were removed; **Young** then had charge of the station; again he trespassed when **Howell** had charge, and again he had due notice to keep away. The last time the defendant trespassed, and which is the subject matter of this action, was in July last, the defendant then fed there four flocks of sheep. This Range had peculiar advantages for the sheep former, it being high ground; in the wet season the sheep could depasture there without being subject to the disease known by the name of the foot rot. It will be shown that from the defendant having depastured over this spot, the plaintiffs were compelled to remove their sheep into other parts of the station, where they got the above-named disease, and which made great havoc amongst them; true, some of the sheep may have been diseased in this way before; but it will be clearly proved, that if these sheep had been removed to the range trespassed upon, they would have soon recovered. It will be proved, too, that when sheep are so diseased, they require extra care and attention at the hands of an increased number of shepherds. These were the damages the plaintiffs complained of - these were not

speculative, but would be, if he were properly instructed, be borne out by indubitable evidence; and if so, then the plaintiffs would be entitled to more than nominal damages - the more especially so now, since the new Act relating to these leases had come into force, (giving the occupiers of stations a more permanent title to them) trespassers had been excited to lay claim to the best part of their neighbours' stations, in the hopes of eventually getting the exclusive possession, and ultimately being clothed with a long lease of them. The simple question was, who had here the first possession?

The following witnesses were then called: **Thomas Percival**, settler at the Tumut: Know the station; knew it first seventeen years ago; know the Wattlo Creek, Wianga Range, and Kilmacut Creek; the space of ground between those boundaries belongs to that station; in June and July last, saw two flocks of sheep near **Piper's** hut on the Wianga Creek; they belonged to the defendant; they were there several times; saw the same sheep before and after at the defendant's head station; there were about 1600 in the two flocks; defendant's head station, from where they were feeding, is about ten miles; there was a hut built there; the map produced is tolerably correct; defendant's brand is the two ends of the ears being cut off. When he first went up, **Mr. G. Shelley** was in possession of the run; have seen **Shelley's** cattle on the same part of the run; saw sheep on it eleven years ago; before July last, constantly on the run; first saw the huts of the defendant's shepherds (the **Lawlors**) in July last.

Cross-examined: When first went up, defendant had a station in that part of the country; defendant's run is called Brungle; knew **Reedy**; he was up there eighteen years ago; Wianga Creek is near Piper's hut, and it runs into Kilmacut Creek; defendant has not fed cattle or sheep for years, up to the Wianga Creek; his sheep did not feed there until lately; have seen a few odd cattle on it lately; know the Wianga Plain; for nineteen years defendant's cattle have not fed there; is on friendly terms with the defendant; witness's wife's father was not turned off defendant's run.

Re-examined: Sheep drive cattle from their feed; have seen plaintiffs' cattle on the Wianga Plain; may have seen a few strange straggling

cattle there also, but could not tell whose they were; when defendant first went up he had about 200 head of cattle.

Mr. G. Shelley: Know Bumbowle station; was there in June and July last, acting then as agent for plaintiffs; the map is pretty correct; have known the station nineteen years; witness took possession of it; put cattle on the part depicted yellow on the map; they remained there for nine years; put cattle on the whole of the run; the whole of the Bumbowle station is marked pink on the map; placed sheep on the same part of the run about ten years ago, and it has been used as a sheep station ever since: of the yellow part a greater portion is high land; in June and July saw strange sheep feeding there in two flocks, about 700 in each flock; the same part had been fed over by the plaintiffs, or those who had the same station, cattle, and sheep; that part had been reserved for two flocks of ewes to lamb upon; the lambing season is in September; those strange sheep prevented that intention from being carried out; compelled to keep them in a bad scrubby country, they were then sound; lost fifty per cent in consequence on the lambs, and those that lived were not very good; according to his experience, otherwise the percentage of increase would have been eighty at the lowest; had a flock diseased about this time, and wished to place them on the spot marked yellow, but could not, and was obliged to remove them to low ground; they were 800 in number; about 200 died; the lowest damage done was three shillings per head: another flock become diseased, and this flock became almost valueless; there were 700 in that flock; when sheep become diseased, expenses attending them are increased,-they require more men to attend them.

Cross-examined: Took charge in June last; when first went there in June, 1828, defendant I was not in the district with cattle; know **Warby**, cannot say that he had been there before witness; it was not until five or six years afterwards that witness saw defendant up there; first saw defendant's servant in December, 1829; **Mr. William Warby** has not assisted witness to separate his cattle from the defendant's; know **Reedy**, he was there before witness; **Reedy** has done so, but not for four or five years after witness first went up there; know **Thomas Keighran**, the brother of defendant; he has assisted witness in driving off cattle; **Thomas Keighran** is witness's stockman; **William Shelley**

died in 1844; he had cattle for a short time on the station; he has had sheep there also; the station is not the witness's; witness sold it to **William Shelley** ten years ago; **William Shelley** had about 10,000 sheep there; eighteen years ago, and for years after, the defendant's cattle did not feed up to the Wianga Creek, as much as they fed over his own station; they never camped on the Wianga Plain; a few straggling cattle may have done so; the whole of the part marked yellow is not all Wianga Plain; a part near the hut is swampy; the Pine mountain is sometimes called the Wianga Range; **Mr. Young** and **Mr. William Howell** have both had charge of the sheep on the station; took charge of the sheep in June last from **Mr. W. Howell**; the sheep were witness's brother's sheep at his death; he never resided there constantly; know **Mr. Whitty**; his sheep were diseased at this time; the sheep generally throughout that country were diseased; all the disputed part is high ground - some six or seven hundred feet high; has given instructions for the action; has no interest in it; has not made himself liable for costs.

Re-examined: His brother occupied the same station that he (the witness) took up; so did **Howell**; and so does witness himself now; the first cattle taken up camped on the disputed ground; at first there were no straggling cattle; never quitted possession of the disputed part.

The Court was then adjourned.

Wednesday. **Mr. John M'Donald**, squatter on the Tumut, gave evidence similar to the other witnesses, as to the boundary of the station - its being occupied by the **Shelleys**; as to the defendant's sheep trespassing there in July last: as to the spot in question being a good lambing country; as to the plaintiffs not being able to lamb their sheep there; and, in consequence, the plaintiffs lost many lambs.

Cross-examined: Had it not been for the removal the per cent, of increase would have been ninety-five.

Thomas M'Calister: Twelve years ago removed **Shelly's** cattle from the yellow spot; sheep were put there afterwards; **Lawler's** hut was built eleven years ago by witness; defendant's cattle were not running there; they were running at Brungle, seven miles off.

Cross-examined : Live at the Tumut, at a place once in the occupation of **Shelley**; never saw defendant's sheep in the yellow spot until lately; the Pine Mountains are two miles from the Wianga Creek, or about that distance; defendant's cattle did not feed up to the Wianga Creek - they never came near the creek; Black Spring Creek is the boundary between the plaintiffs' and defendant's stations; it is called on the map Black Swamp Creek; Wianga Range is not high - the sheep feed over it.

Re-examined: It is higher than any other part of the station. **John Welch**: Had been stockman on the station; gave similar evidence to former witnesses.

Cross-examined: Had seen **Wm. Warby** on the station in 1833, and **P. Suttle**; the latter was a stockman to a neighbour; the Black Swamp runs towards the Wianga Range; the swamp is not more in length than a mile and a half.

Mr. Viner, a settler on the Tumut; confirmed the testimony of other witnesses; and in addition said that he saw the plaintiffs' sheep feeding on low ground in September last; the effect would be that the sheep would have got the foot rot; if put upon high ground they would not have had that disease; it is a disease difficult to cure; sheep thus diseased are almost valueless; ewes lambing on low ground get diseased and poor, and the lambs would also be diseased, and would not be enabled to follow their mothers, and would die.

Cross-examined : Foot rot was prevalent in that country during the last year.

Mr. R. Young: Was for five years superintendent at the station, and gave up possession to **George Shelley**; in 1840 defendant built a hut, and brought sheep on the yellow spot; went before the Commissioner; after that, defendant removed his hut and sheep, and he never came again during the five years.

Cross-examined : The defendant was present before the Commissioner, (**Mr. Bingham**); the defendant did not feed his sheep there again; plaintiff's sheep would prevent defendant's sheep coming there; **Mr. Bingham** ordered the defendant to remove his sheep, and the plaintiffs were ordered to remove a hut; it was not removed; he

made an order about the plaintiff's sheep too; **Mr. Bingham** said in substance, the defendant's hut was on the plaintiff's run; **Mr. Shelley** paid part of the Commissioner's fee, and the defendant paid the other part; when defendant's sheep were removed, the plaintiff's were placed there immediately.

Re-examined: Defendant's sheep never come back; the hut of the plaintiffs ordered to be removed has nothing to do with the part of the station in dispute.

John Piper: Was at the station in June and July last; saw defendant's sheep in that month in four flocks on the disputed part; went to put sheep on the spot, and did so; there may have been 800 in each flock; witness had about 700 sheep in a flock; they lambed afterwards; remained at the same spot with defendant's sheep; did not see any of defendant's sheep, feeding on the range; defendant's sheep are feeding on the same spot still.

By His Honor: The yellow spot will not feed seven flocks; four flocks have fed on the same spot at the same time; never was driven off the ground; the same flock lambed in September at the head station on the plains, which are low; they were removed because the range would not do for that purpose.

Mr. Howell: Superintended on the station for three years; - and he gave similar evidence to **Mr. Young's**. In addition, he said defendant's sheep had trespassed in 1846; prior to that he never saw them on the station; wrote to the defendant about it; got an answer to that letter; defendant's sheep remained after that.

Cross-examined: The Pine Mountain is not untruly laid down in the map.

Mr. Broadhurst then addressed the Jury: He said, he had not heard the whole of the opening address of his learned friend the Solicitor-General; but he had been told what had fallen from his lips. No doubt many of those topics were made use of with a view of influencing them (the jury) in assessing the damages. But they had, he would tell them, in fact, no bearing upon the case; the case must be tried on its own merits, and upon its own evidence. But supposing those topics had any bearing, the most remote, upon the case, yet they would cut

two ways, they were equally available for the plaintiffs as for the defendant. He would submit, that the plaintiffs upon their own evidence had not clearly shown that they had been in the exclusive possession of the disputed part of the run; this they ought to have shown, and if they have even left it in a state of doubt, then he (Mr. B.) would call upon the jury to give the defendant their verdict. The question that had been raised in this case was, to which run did the disputed part belong? Perhaps the plaintiffs may have made out a prima facie case that it belonged to them; but he would inform them, and impress it upon their minds, that nothing was more easy, in a case like this, than to make out a prima facie case; - any loose evidence of parties having seen sheep depasture on such and such portions of a run, would amply serve for that purpose. The principal witness in the present case, who had made out the prima facie case, was Mr. George Shelley; the evidence of this gentleman, he (Mr. B.) would call upon them to receive with caution, as it was evidently given under a bias, and he certainly had an interest, indirect though it might be, to get a verdict. Other witnesses had been called to confirm, and add to, the evidence of Mr. Shelley; but it was strange that none would swear, that the defendant's sheep or cattle had not constantly fed up to the Wianga Creek. Another remark he would make as to the special damages complained of in the declaration; it had been alleged, that in consequence of the trespasses, the plaintiffs were prevented lambing down a flock of ewes, and it had been proved, or would be proved, that the lambing season was in all September, and the present action was commenced on the 1st of that month; so one ground of damage must fall to the ground. And affecting the question of damages, he would also state, that the man Piper who had had charge of the flock of ewes in question, did not dare to deny but that there was ample room for his sheep to lamb down on the disputed part; and further, that it had been amply proved, that foot rot was prevalent in all that country during the last season; therefore, he (Mr. B.) would ask them to conclude, that it was quite possible it was not owing to the defendant's actings, that the plaintiffs' sheep were so affected. He (Mr. B.) intended to call witnesses, and by them, he would in the first place contradict what had been sworn to by Mr. Young, as having been said by Mr. Bingham; they (the witnesses) would also carry back the

possession and occupation of the disputed part of the run, by the defendant, to a time anterior to that during which the plaintiffs had shown their possession to have commenced. It would be shown that **William Warby** went into this neighbourhood in the first instance, and was soon followed by the defendant and his cattle, and that he continuously fed his cattle and sheep up to the Wianga Creek, which it would be proved was the natural boundary between the station of the plaintiffs and defendant, and had been so recognised by the deceased **William Shelly**.

The following witnesses were then called: **Wm, Warby**, grazier: Knew plaintiffs' and defendant's stations, they are in the Tumut district; went up there first in 1828, the latter part of the year; know defendant and **George Shelley**; did not go up with defendant; defendant was there in 1829; showed the station (defendant's) to him: took cattle and sheep there: no other squatter was on that river then; was the first white man on that river; recollect **Thomas Reedy** taking possession of the plaintiffs' station; it was a few months afterwards; knew the Wianga Creek, and the Kilmacut Creek; they are the same; defendant's cattle during these years have fed up to that creek; had assisted **George Shelley** to take the cattle on his own side of that creek in 1833 from off the defendant's side of the creek, Black Swamp Creek is not a boundary between the two stations; defendant's stock fed across the Wianga Range; they used to camp on the Wianga Plain; defendant's cattle fed over the parts marked yellow during 1829 to 1835.

Cross-examined: Defendant came up there in July or August, 1829; he came to witness's house on the Murrumbidgee; it was distant from the Wianga Range eleven or twelve miles; after this cannot say saw defendant again during 1829; cannot say when next saw him; defendant's cattle came up in September, 1829; saw them at Brungle; the cattle were not many weeks at the station before the witness saw them on the Wianga Range in a mob of one hundred head; plaintiffs' stray cattle have fed over the same place; has seen defendant's sheep there in 1835.

Re-examined: Plaintiffs' station did not include the part marked yellow on the map.

The action was admitted to have been commenced on the 1st September, 1847.

Mr. Ryan, grazier: Knew plaintiffs' station in 1829; did not see defendant there then; saw him there years afterwards; know defendant's run since 1829; has seen defendants's cattle on the run; **Mr. Shelley** was not there in the August of 1829.

Patrick Suttle: Seventeen years ago was in service of defendant, and remained so five years, know Wianga Creek; defendants' cattle fed up to that creek, and up to the mountains in the other direction; know the water-hole near Piper's hut, that is near that creek; if plaintiffs' cattle wore over the creek, they were driven back, and so vice versa; defendant's cattle camped on Wianga Plain; George Shelley has assisted to draft his cattle from off that place.

Cross-examined: When witness first went in defendant's employ, had fifty pet sheep; afterwards he had more; defendant had 400 head of cattle.

Re-examined: Defendant's sheep-station was the first formed in that part of the country, and it was formed eleven years ago, on the Brungle Creek.

Thomas Keighran, brother to the defendant: Was first up at defendant's station eighteen years ago; remained there six or seven years before going to **Shelley's**; defendant had about 700 head of cattle there; know Wianga Creek and Kilmacut Creek; defendant's cattle fed up to the creek; they fed over the yellow spot; was stockman afterwards to **Shelley**; remember a meeting before **Mr. Bingham**; **Mr. Bingham** then said, that the defendant must remove his hut further on his run, as it was too near the hut of the plaintiffs; the meeting took place in the very hut that was removed; **Mr. Bingham** also said, that the plaintiffs should remove a hut that they had on the station; defendant's hut was removed; defendant's sheep were not removed after the meeting.

Cross-examined: Will not swear that he had never stated, in 1840, before **Mr. Bingham**, that the plaintiffs' sheep had fed on the disputed ground for the three years prior; will not swear did not say that the

camping ground at Wianga Creek was the plaintiffs'; after the decision marked some trees, but not for a boundary.

Re-examined: Has no interest in this action; the trees were marked because the shepherds were strangers in the country.

Daniel French, shepherd to defendant: Has shepherded over the Wianga Range; has fed over the Wianga Plain, and never was warned off.

Two other witnesses were then called, and they proved that they had seen defendant's sheep and cattle feed constantly over the disputed ground.

Here closed the defendant's case, and the Solicitor-General was about to reply, when the Jury intimated that they had made up their minds as to their verdict.

The Solicitor-General refrained from replying, after hesitating some time whether he should do so or not.

His Honor then addressed a few words to the Jury, and they found for the plaintiffs, damaged £75.

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