

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Webster
and others v. Power and others, from Victoria;
delivered March 13th, 1868.*

Present:

SIR WILLIAM ERLE.
SIR JAMES W. COLVILLE.
SIR EDWARD VAUGHAN WILLIAMS.
SIR ROBERT J. PHILLIMORE.

THIS is an Appeal from a Decree of a single Judge of the Supreme Court of the Colony of Victoria, which was confirmed on appeal by the full Court.

The first question which suggests itself to their Lordships' consideration is, What was included in the Plaintiffs' original mortgage? It was admitted at the Bar that the answer to be given to the question whether the mortgage included any sheep brought upon the Run which were not the issue of those that were on the Run at the date of the mortgage, if considered with reference to the mere words of that instrument, must depend upon the construction which their Lordships put upon the word "increase." Their Lordships, looking at the deed, and seeing that "increase" is always spoken of as the increase, not of a flock, but as the increase of those sheep which were originally the subject of the mortgage, are clearly of opinion that it must be taken to mean the natural increase, or the offspring of those original sheep.

The second question is, whether that mortgage

has created any lien or interest in the Plaintiffs upon the leasehold property which was part of the subjects that were ultimately sold by the Respondents; and their Lordships are unable to find in that deed anything which can fairly be said to have that effect. There is undoubtedly a covenant in the deed which contemplates a possible lease, but the lease spoken of is clearly a lease which, under certain regulations then issued for this Colony, it was supposed might be granted by the Government in substitution for the licence under which the Run had previously been held. There is nothing in those words which can be taken to give the Plaintiffs an equity to a lien attaching upon a lease derived by some other title as this particular lease seems to have been. And if it were otherwise, there would be very considerable difficulty in administering that equity upon a Bill framed as this is, because it clearly appears on the evidence,—in fact, it was admitted at the Bar,—that when that particular lease was obtained from Mr. Manifold, the parties immediately proceeded to give the Respondents an equitable mortgage by deposit of it. If, therefore, it was the intention of the Plaintiffs to question that transaction, and to assert in themselves a prior encumbrance upon that lease, it was their duty to state such a case, to raise it by the Bill, and to put it properly in issue. But the Bill is wholly silent upon that point.

The third point to be considered is, whether, independently of the words of the original mortgage, this Court, sitting as a Court of Equity, has any grounds upon which to hold that the sheep which were "substituted," according to the term used in the deed, for those which were sold in 1862, are subject to the Plaintiffs' mortgage.

Their Lordships are clearly of opinion, and they entirely agree with Sir Roundell Palmer in saying that, emphatically in a case which involves an imputation of personal fraud, but in any case in which it is sought to raise a personal equity upon certain facts, against the Defendant, it is the duty of the Pleader who prepares the Bill to state those facts, to show his equity, and to put the point fairly in issue. It does not appear to their Lordships that any such case as was made at the Bar to-day, has been properly raised by the Bill before them.

That seems also to have been the view taken in the Court below ; in fact, upon these proceedings it would appear, that in the first Court,—the Court of First Instance,—the case was not raised at all. It seems to have been raised by the grounds of the Appeal, and is dealt with by the Judges of the Superior Court.

The result, therefore, of these findings is to reduce the Appellant's claim to a lien on the issue or increase of the sheep originally included in his security, and the proceeds realized by the sale of them. Of course we assume that all the original sheep have died long ago.

To this extent his right is affirmed by the decree which is impeached by the Appeal ; and the only question that remains is, whether it was the duty of the Court to give an immediate Decree for the sum claimed against the Respondents, presuming, by reason of the confusion or otherwise, that the proceeds of all the sheep that were sold were subject to the Plaintiffs' lien, or whether it was proper to direct an inquiry in order to ascertain what part of such proceeds was so subject.

With reference to this question of confusion, their Lordships think, upon the evidence, that it has not been established against the Respondents that they are responsible for any confusion which existed, or which had taken place before they took possession of the Run and the flocks. And, upon the evidence, it also seems probable, that whatever confusion has been occasioned by the intermixture of the flocks had then taken place.

If any difficulty has arisen as to ascertaining the rights of the parties under the inquiry directed, by reason of the sale of all the sheep to other purchasers without any attempt on the part of the Respondents to discriminate between them, or by any other act or omission for which they are responsible, the question, what presumptions ought to be drawn against the Respondents in consequence of the difficulty so caused by them, is one which, as it appears to their Lordships, will properly arise upon further directions, and after the Master has made his report. It possibly will arise before the Master in making the inquiry directed, if he shall think it his duty to draw any such presumptions. In that case, his conclusions will be, of

course, subject to Appeal before the Court, when the case comes before it, upon further directions. But it seems to their Lordships to be altogether premature to assume that the Master will not be able to come to a conclusion upon the matter referred to him by means of direct evidence.

With respect to what has been said as to the introduction of the word "probable," into the Decree, it does not appear to their Lordships that that affords any ground for varying the Decree. In fact, if the word introduces any fresh element into the inquiry, it is an element which seems to be rather in favour of the Appellants than in favour of the Respondents.

Upon the whole, their Lordships feel that it will be their duty humbly to recommend Her Majesty to affirm the Decree of the Courts below, and to dismiss this Appeal with costs.