

MEREDITH, C.J.

JANUARY 8TH, 1902.

TRIAL.

THOMAS v. CALDER.

Fraudulent Conveyance—Creditor, Mortgagee as well as Simple Contract Creditor—13 Eliz. ch. 5.

Action tried at Stratford, brought by simple contract creditors to set aside a conveyance of land and bill of sale of goods made by defendant John Calder to his wife, defendant Catherine Calder.

G. F. Shepley, K.C., for plaintiffs.

J. Idington, K.C., for defendants.

MEREDITH, C.J.—Had the plaintiffs been only simple contract creditors they would be entitled to succeed, but the evidence establishes that they are secured creditors, having a second mortgage of the land in question, made before the conveyance, and it is ample security for their claims. The result is that the plaintiffs are not entitled to relief. It has long been settled that a mortgagee is not a creditor within 13 Eliz. ch. 5, unless the mortgaged property is not sufficient to satisfy the debt secured by his mortgage. Refer to *May on Fraudulent Conveyances*, 2nd ed., pp. 57, 163-4; *Masuret v. Mitchell*, 26 Gr. 435; *Crombie v. Young*, 26 O. R. 194; *Sun Life Assurance Co. v. Elliott*, 31 S. C. R. at p. 98.

It is immaterial that defendants attacked the mortgage and sought to set it aside, because they failed, with the result that the mortgage has been declared valid and plaintiffs are now and have always been fully secured creditors. Action dismissed, but, in view of all the circumstances, without costs.

Smith & Steele, Stratford, solicitors for plaintiffs.

Idington & Robertson, Stratford, solicitors for defendants.

MEREDITH, C.J.
LOUNT, J.

JANUARY 8TH. 1902.

DIVISIONAL COURT.

PETERS v. WHYTE.

Trial—Jury—Judge's Charge—Malicious Prosecution—Want of Reasonable and Probable Cause—Before Judge Rules as to, Facts must be Passed upon by Jury.

Motion by plaintiff to set aside a non-suit entered by Ferguson, J., at the trial at Stratford of an action for malicious prosecution, and for a new trial. The trial Judge ruled that the plaintiff had not shown the absence of reasonable and probable cause for the prosecution, which was for