THE SUN LIFE ASSURANCE COMPANY OF CANADA, (PLAINTIFF)..... } APPELLANT.

AND

ELLEN ELLIOTT (DEFENDANT)..... RESPONDENT.

1900
*Oct. 23.
*Dec. 7.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Voluntary conveyance of land—13 Eliz. c. 5 (Imp.)—Solvent vendor—Action by mortgagee.

A voluntary conveyance of land is void under 13 Eliz. ch. 5 (Imp.) as tending to hinder and delay creditors though the vendor was solvent when it was made if it results in denuding him of all his property and so rendering him insolvent thereafter.

A mortgagee whose security is admittedly insufficient may bring an action to set aside such conveyance and that without first realizing his security.

Judgment of the Supreme Court of British Columbia (7 B. C. Rep. 189) reversed, Gwynne J. dissenting.

APPEAL from a decision of the Supreme Court of British Columbia (1) affirming the judgment at the trial in favour of the defendant.

The facts of the case are fully stated in the judgments published herewith.

Aylesworth Q.C. and *Wilson Q.C.* for the appellant.

Dockrill for the respondent.

The judgment of the majority of the court was delivered by:

SEDGEWICK J.—Henry Elliott, in his lifetime, carried on business at New Westminster, B. C.. acquiring sufficient money to enable him to retire from business about

*Present :—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 7 B. C. Rep. 189.

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five years before his death, which occurred on the 7th November, 1896. On the 6th January, 1892, he, together with one Benjamin Douglas, borrowed $45,000 from the plaintiff company with interest at 7 p. c. payable half yearly, the principal to be paid by instalments of $2,000 each on the 1st of January in the years 1893, 1894, 1895, 1896, and the balance on the 1st January, 1897. On the 29th September, 1892, he, Elliott, borrowed the further sum of $12,000 from the plaintiffs, a mortgage being taken therefor on a portion of a certain island called Annacis Island on the Fraser River, and containing about 905 acres. Interest at 8 p. c. was payable half yearly, and the principal was to be repaid in instalments of $500 each on the 1st days of July in the years 1893, 1894, 1895 and 1896, and the balance, $10,000, on the 29th September, 1897. At the time of the execution of these mortgages Elliott was a man of good standing and repute financially, and was the owner not only of the property mortgaged but of several other valuable lands, and at the end of the year 1892 had at his credit in cash in the Banks of Montreal and British Columbia at New Westminster, the sum of $11,788.53. The evidence leads to the conclusion that in the year 1892 there was an undue inflation in the value of real estate in British Columbia, and it was conclusively established that from 1892 to 1896 there was an enormous and steadily increasing depreciation. In the years 1892 and 1893 the deceased, Elliott, duly paid the interest and taxes upon the mortgaged property, the taxes amounting to several thousands of dollars having since been paid by the plaintiffs as mortgagees. In the year 1894 Elliott withdrew from his accounts in the banks large sums of money, placing the same to the credit of his wife in the same banks, the result being that while at the time of his death he had but a very small sum to his credit in the

bank, his wife had $7,330.60. This was not, however, the full extent of his generosity. Between the 10th February and the 10th December, 1894, he conveyed the whole of his real estate (except perhaps his equity of redemption in the mortgaged lands), amounting in value to $27,500 to his wife and daughter, without valuable consideration, thereby practically denuding himself of all his real property, so that at the time of his death in November, 1896, all that came into the hands of his administrator was the sum of $71.82, and the liabilities, including the two mortgages to the plaintiffs, being between $50,000 and $60,000. This suit is brought to have the voluntary conveyances made by Elliott to his wife and daughter declared void under the statute 13 Elizabeth c. 5. The plaintiffs recovered judgment against the administrator on the 17th August, 1897, for $13,467.20 and costs $21.73, and an administration order was duly made by which it was declared that the estate was insolvent.

Upon the trial of the case before the learned Chief Justice of British Columbia, the action was dismissed as against the defendant, Ellen Elliott, widow of the deceased, but the plaintiffs recovered judgment against the daughter, which judgment affects but a very small portion of the land covered by the impeached conveyances. From this judgment an appeal was taken to the Supreme Court of British Columbia, two of the learned judges dismissing the appeal upon a technical ground to which I will refer hereafter, and the dissenting judge being of the opinion that the appeal should be allowed. I entirely agree with him upon the merits of the case.

It may willingly be admitted that the deceased at the time he executed the mortgages in question was in a perfectly solvent condition. There is no doubt of that, nor is there any doubt but that he was in a per-

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fectly solvent condition before he made the conveyances and gifts of money to his wife and daughter in 1894. But it is equally clear, and the learned trial judge admits, that the effect of these gifts and transfers, assuming that they were regular and legal, was to create the deceased an insolvent thereafter. While there were two enormous mortgage debts outstanding against him and after he had ceased to pay the instalments and interest thereon, and when he must have been conscious that the lands held by the plaintiffs as security for their loan were rapidly decreasing in value, and in all probability no longer affording sufficient security to enable the Company to realize its loan from them alone, he voluntarily and deliberately presents to his wife and daughter the whole of his remaining property, denuding himself of everything and depriving his creditors, the mortgagees, of any practical remedy they might have against him upon his personal covenant, and leaving them to their remedy against the mortgaged lands alone. I cannot conceive a more glaring infraction of the Statute of Elizabeth than this case affords, opposed as the conduct of the deceased was to the elementary principles of justice and common sense. The learned trial judge seems to have given judgment in favour of the widow because, as he thought, at the time of the transactions impeached, the deceased was solvent and therefore in a position to make a voluntary conveyance. He admits that after the conveyances and gifts he was insolvent; that at the time of his death he was insolvent; and he shut off during the trial further evidence as to the depreciation of the real estate in question since the execution of the original mortgages, but appears to have lost sight of the principle that where at any time a person is solvent and then makes a voluntary conveyance the effect of which is to make him insolvent, the settle-

ment is void, and that too, no matter what the intent of the settlor was.

Lord Hatherley, in the leading case of *Freeman* v. *Pope*, (1) lays down the principle as follows at p. 541:

> In *Spirett* v. *Willows* (2) the settlor, being solvent at the time, but having contracted a considerable debt which would fall due in the course of a few weeks, made a voluntary settlement by which he withdrew a large portion of his property from the payment of debts, after which he collected the rest of his assets and (apparently in the most reckless and profligate manner) spent them, thus depriving the expectant creditor of the means of being paid. In that case there was clear and plain evidence of an actual intention to defeat creditors. But it is established by the authorities that in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute.

And that case has been followed in this court on several occasions. So much for the main question. If there ever was a case where a man's generosity was at the expense of his justice it is the present case, and equity demands that so much of the subject matter of his generosity as will be sufficient to discharge his debts should be restored to his estate.

But it is said that inasmuch as the plaintiffs are mortgage creditors, they are not creditors within the statute of Elizabeth, and cannot bring this action. I do not think that the mere fact of a creditor having something in pawn, or pledge, or hypothec or mortgage, destroys his character as creditor, or deprives him of the right which the statute gives a creditor. If, however, he is a *secured* creditor, if he has sufficient of the assets of the debtor in his hands to fully cover

(1) 5 Ch. App. 538. (2) 3 De G. J. & S. 293.

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the indebtedness, then undoubtedly the statute was not intended for him, but for the general and unsecured creditors. The cases, at all events those by which we are bound, assume when dealing with the question of secured creditors that the security is ample for its purpose. But the authorities show, as May points out, (2 ed. p. 164),

> that if the property mortgaged is not sufficient to satisfy the debt (as is the case here), the mortgagee of course will be a creditor for the balance.

An Ontario case, *Crombie* v. *Young* (1), was cited as authority for the proposition above referred to, but that case is altogether different from this.

In that case it was shewn that at the time of the impeached transaction, a donation from a husband to his wife, the settlor was perfectly solvent after the conveyance, still possessing other lands and a large interest in the mortgaged property, far in excess of the mortgage. And it was held, whether rightly or wrongly, that under these circumstances, any intent to hinder or delay could not be imputed to him. As already shown the facts here are the reverse of those in *Crombie* v. *Young* (1). At the time of the impeached conveyances (and all evidence of intent except at that particular time is irrelevant), the mortgaged lands were probably wholly insufficient to pay the mortgage debt, and the voluntary conveyances themselves forever precluded the settlor from having any means of making up the shortage.

No authority was cited to us to show that before a creditor, having admittedly insufficient security, can bring suit under the statute of Elizabeth he must first realise his security. That question may properly be raised in an administration suit, but the mere fact of such non-realisation is not, in my view, a defence.

(1) 26 O. R. 194.

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Finally, the judgment of the learned trial judge dismissing the action against the defendant, Ellen Elliott, and setting aside the conveyance in favour of the defendant, Mary Logan, was entered on the 8th of May, 1899, and an appeal was taken from that judgment in due form on the 29th of May. Subsequently, the learned trial judge prepared a written statement of his reasons for judgments, these reasons, although prepared after judgment, forming part of the case, and as they are brief, I insert them here.

I am now told by the registrar that my reasons for judgment are desired on the part of the plaintiff for the purpose of an appeal.

There is some misunderstanding as to the position. Mr. Wilson, of counsel for the plaintiff, asked me during his argument upon authorities which he cited, to direct an issue as to the insolvency of the deceased at the time of the impeached transaction, *if* I should be of opinion that such insolvency was not sufficiently established.

I had a strong opinion during the trial that the evidence as to insolvency was not directed to the time in question sufficiently as between the plaintiff and Ellen Elliott, and I so intimated and upon further consideration I remained of this opinion.

But I informed counsel that I would direct an issue as requested in case the plaintiff was not satisfied to have judgment against Mary Logan with costs, and in favour of Ellen Elliott without costs.

These two defendants occupy different positions, and I think the destruction by Mrs. Elliott of the books of the deceased warranted the bringing of the action, although it did not appear that she was actuated by any improper motive in doing so.

Mr. Wilson, after taking time, stated in open court, during the sitting of the twenty-first of April last, that as I understood him, he elected to take judgment in the terms mentioned which were taken down by the registrar, and initialed by me, and judgment formally given accordingly.

I do not, for myself, see how the facts stated by the learned Chief Justice in any way can affect the rights of the plaintiff to appeal from the judgment previously rendered. If we are to accept the directions of their Lordships of the Judicial Committee of the Privy Council, who are inclined to treat judgments

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written, as the present was, after delivery, as ineffectual for any purpose whatever, this document should not have formed part of the case upon appeal, either to the court *en banc*, or to this court. *Brown* v. *Gugy* (1); *Richer* v. *Voyer* (2).

Mr. Wilson, of counsel for the plaintiff, was satisfied that no additional evidence upon the question of insolvency could be obtained, even if a reference were had, and to insist upon a reference would therefore be useless, and the matter remained there, the judge giving judgment in favour of Ellen Elliott, because, in his view the plaintiff had failed to establish a case against her and, against Mary Logan because they had succeeded in establishing a case against her. It was not a consent judgment in any case of the term, or a compromise. Mr. Wilson, counsel for the plaintiff, both in his factum and on the hearing of the appeal before us, repudiates the idea that there was any intention on his part of compromising. I have always understood a compromise to be a settlement where each party gives away to some extent at least. I can see nothing given away in the present case, either by the plaintiff to the defendant Ellen Elliott, or by her to the plaintiff.

The appeal should therefore be allowed with costs, together with all costs in the courts below, and judgment entered against the defendant Ellen Elliott setting aside, as against creditors, the conveyance in her favour set out in the amended statement of claim herein, with costs.

GWYNNE J. (dissenting).—This action was commenced by writ of summons issued out of the Supreme Court of British Columbia upon the 23rd day of

(1) 2 Moo. P. C. (N. S.) 341. (2) L. R. 5 P. C. 461.

August, 1897, against Ellen Elliott and Mary Logan as the defendants thereto.

In their statement of claim the plaintiffs allege that on the 29th day of December, 1892, one Henry Elliott (since deceased, the husband of the defendant Ellen Elliott, and father of the defendant, Mary Logan), executed to the plaintiffs an indenture of mortgage of certain lands therein mentioned for securing repayment to the plaintiffs of the sum of twelve thousand dollars then lent by the plaintiffs to the said Henry Elliott, together with interest thereon at the rate of eight per cent per annum. That upon the 19th of February, 1894, the said Henry Elliott conveyed to the defendant Ellen Elliott, his wife, certain lands and tenements in the province of British Columbia in the statement of claim mentioned, and that upon the 29th day of October, 1894, he conveyed to his daughter, the defendant, Mary Logan, certain lands in the statement of claim particlarly mentioned, also situate in the Province of British Columbia. That the said Henry Elliott departed this life insolvent on or about the 7th day of November, 1896, and that one Charles George Major had been appointed administrator of his personal estate and effects. That on the 17th day of August, 1897, the plaintiffs recovered judgment by default against the said administrator for the sum of $13,467.20, and $21\frac{78}{100}$ costs.

The statement of claim then contains the paragraph following:

The plaintiff company say that the said Henry Elliott being to the knowledge of the defendants at that time in insolvent circumstances, or unable to pay his debts in full, *and at the same time indebted to the plaintiff company in divers large sums of money, conveyed the said hereditaments to the defendants voluntarily and without consideration, and with intent to delay, hinder and defraud the plaintiff company* and other

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the creditors of the said Henry Elliott in the payment of their just debts.

And the statement of claim prayed that the said conveyances be declared to be void as *against the plaintiffs* and all other creditors of the said Henry Elliott.

Now this statement of claim is in the precise form of the ordinary claim of a creditor who has proceeded or is proceeding to judgment, to set aside a voluntary conveyance as executed with the intent to delay or defeat the particular creditor and all other creditors from obtaining the fruits of a judgment recovered or to be recovered. In such cases the court goes no further than to avoid the deed in the event of a proper case being established leaving the several creditors to proceed by execution upon their judgments when recovered. It does not do anything further to assist the plaintiff unless the case made by the bill is one seeking for special relief applicable to the circumstances of the particular case. The defendants denied all the averments in the plaintiff's statement of claim, thus casting on the plaintiffs the burthen of every averment necessary to be established to justify a judgment avoiding the impeached conveyances. They also respectively expressly denied the crucial averment that Henry Elliott was insolvent when the deeds to the defendants were respectively executed.

At the trial it appeared that the plaintiffs not only held the mortgage mentioned in the statement of claim (in respect of which the judgment by default mentioned in the statement of claim was recovered) but also that on the 6th January, 1892, the said Henry Elliott and one Benjamin Douglas had executed to the plaintiffs a mortgage on certain lands therein mentioned situate in the City of New Westminster in British Columbia, in security for repayment to the plaintiffs of $45,000 and interest thereon at the rate of 7 per cent.

per annum, at the days and times and in the manner in the said indentures of mortgage mentioned. We have not on the record before us copies of these mortgages but only a short statement of their respective dates, of the lands therein respectively mentioned and the amounts thereby respectively secured: but they, no doubt, contained the powers of sale and lease on default usually inserted in all mortgages in British Columbia. It appeared also that upon the land mentioned in the mortgage of the 5th January, 1892, there were erected valuable buildings which in the year 1893 were leased at the sum of ($600 00) six hundred dollars per month and that the plaintiffs have been for some time in possession of these buildings receiving as mortgagees in possession the rents issuing thereout. What rents they are receiving now they did not shew, but they did admit on cross-examination that in the interval between the 1st December, 1896, and the 1st July, 1898, they received as such rents the sum of $7,503.60. It was also extracted from a witness of the plaintiffs that the lands in that mortgage were in 1894 of the value of $65,000.00 and that the buildings thereon were insured to the amount of $40,000.00

Then as to the 905 acres in the mortgage in the statement of claim mentioned one witness called by the plaintiffs valued these lands at ($10) ten dollars per acre, while another also called by the plaintiffs testified that in 1884 and at the present time these lands were well worth from ($15.00 to $20.00) fifteen to twenty dollars per acre, thus shewing at the lowest of these two last sums or $15.00 per acre the whole 905 acres to be worth $13,575.00 and at the mean between the two sums, or $17.50 per acre to be worth $16,837.50.

In a case like the present impeaching conveyances upon the ground of fraud the plaintiffs have no right to claim that more reliance should be placed on the

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testimony produced by them which placed the value of the lands at $10.00 per acre than upon the testimony of the witness also put forward by them to speak to value and who valued the same lands as well worth from $15.00 to $20.00 per acre. We have thus the value of the mortgaged lands to be: That the lands in the mortgage of the 6th of January, 1892, were, and so far as appears in the evidence still are worth the sum of $65,000.00 and are insured for $40.000, while the lands in the mortgage, in the statement of claim mentioned, were in 1894 and still are worth from $13,575.00 to $16,837 50 against which it was also extracted from the plaintiffs' witness that upon the 10th of February and and the 29th of October, 1894, the dates of the execution of the respective conveyances which are impeached the total amount due upon *both* mortgages together was $52,570.00, and upon the 1st of November, 1895, after the decease of Henry Elliott the sum of $52,500.00, of which sum if we attribute $12,500.00 to the mortgage in the statement of claim mentioned would leave only $40,000.00 due on 1st November, 1895, upon the other of which no mention is made in the pleadings, the whole of which sum was also covered by insurance.

This was the whole of the material evidence given in the case; all else was irrelevant, save that the only debts shewn in the evidence to have existed at the time of the decease of Henry Elliott independently of the plaintiffs' mortgage securities was the sum of $22.05 for a gas account and some taxes which being secured by liens on the lands assessed cannot be taken into consideration upon a question arising under the statute 13 Eliz. c. 5.

Upon this evidence the only judgment which upon the whole current of the authorities was warranted even if the plaintiffs were persons competent to maintain the action as set out in the statement of claim

was a judgment dismissing the action with costs. *Lord Townshend* v. *Windham* (1); *Stephens* v. *Olive* (2); *Doe d. Garnons* v. *Knight* (3.)

In *Lush* v. *Wilkinson* (4), which was the case of a bill filed by a subsequent judgment creditor to set aside a post marriage voluntary settlement made by a husband in favour of his wife as void within 13 Eliz. c. 5, no antecedent debt was proved, but the plaintiff having asked for an inquiry as to antecedent debts Lord Alvanley dismissed the bill giving leave to file another.

Sir William Grant in *Kidney* v *Coussmaker* (5) referring to this case, said that as that bill had charged insolvency at the time of the execution of the voluntary settlement, and no proof was given of any debt in existence at that time,

the only reason for surprise was that Lord Alvanley did not absolutely dismiss the bill instead of giving leave to file another.

The only exception to the rule that a creditor subsequent to a voluntary deed can only set it aside upon proof of some antecedent debts or debt is if the evidence be such as to warrant the conclusion that the voluntary deed was executed with the design and intent of incurring future debts, and of defeating them by the voluntary deed. But we have here no such case. Moreover, as upon the appeal from the judgment of the learned trial judge the court offered the plaintiffs an inquiry as to antecedent debts which they declined to accept, we may reasonably conclude that they could supply no evidence upon the point, and the fact may be regarded as established that no such debt did exist in so far at least as this action between the plaintiffs and defendants was concerned,

(1) 2 Ves. Sr. 1,
(2) 2 Bro. C. (Belt) 90.
(3) 5 B. & C. 695.
(4) 5 Ves. 384.
(5) 12 Ves. 136.

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and that therefore the deeds which in the statement of claim are impeached have not been effectually impeached.

But the plaintiffs being creditors of Henry Elliott, deceased, holding mortgages upon real estate in security for their debt are not creditors within 13 Eliz. c. 5, that is to say, in the language of May at p. 141 of his book giving the rationale of the authorities upon the point:

> The enactment is clearly intended to prevent persons from conveying away the whole or any part of their property in derogation of the rights of those who as general creditors have a claim on the general assets of their debtor. Mortgagees therefore who have a specific portion of land set aside, and so far as their interest is concerned, freed from liability to the general creditors, and to which they can primarily at least, resort for the satisfaction of their claim are not to be regarded as "creditors," or at least *a mortgage debt is not properly speaking a debt for the purposes of the statute.*

And so even in the case of the general creditors filing a bill for the administration of the estate of a deceased person, and therein seeking to set aside a voluntary conveyance as a fraud upon creditors within the statute 13 Eliz. c. 5, upon the question whether at the time of the execution of the impeached conveyance the settlor had creditors, with intent to defraud when the impeached conveyance can be said to have been executed, debts secured by mortgage are not to be taken into consideration

The learned counsel for the plaintiffs felt himself compelled to admit, as indeed he could not do otherwise, that the plaintiffs could not on their own behalf maintain the present action, but he contended that the present action was maintainable upon the ground of its being, as he contended, an action on behalf of all creditors of the deceased as of the plaintiffs themselves referring to a passage in Mr. May's book, (p. 466,) which is in these words:

The bill ought to be filed by a creditor or creditors on behalf of himself or themselves and all other the unsatisfied creditors of the settlor deceased, citing *French* v. *French* (1).

What Mr. May is there referring to, as plainly appears by the case cited, is the case of a bill filed by one simple contract creditor upon behalf of himself and all other the creditors of a deceased person for an administration of the assets of the deceased, and praying for the avoidance of a voluntary conveyance standing in the way of such creditors. That such an action must be instituted by one or more creditors on behalf of all is a very different thing from saying that a mortgagee, whose interests are quite distinct from the interests of the general unsecured creditors, can by assuming to act on behalf of himself and all other creditors of a deceased person invoke the court to set aside a conveyance which is impeachable only as standing in the way of the general creditors in which number as we have seen the mortgagee is not to be counted.

No case has been cited in support of such a proposition, nor is there any sense in saying that what a mortgagee could not effect in a suit instituted on behalf of himself alone he can effect by professing to act on behalf of himself and others whose interests are wholly distinct from his. Moreover as already observed this action is not *in form* an action on behalf of all the creditors of the deceased. No relief is sought other than the mere avoidance of the deeds impeached, upon which relief being granted the court goes no further but leaves all the creditors to avail themselves of their rights as best they may—no other relief is asked for in the present action and the plaintiffs declare themselves to be ready to seize the property to satisfy their judgment.

(1) 6 DeG. M. & G. 95.

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The case of *French* v. *French* is reported in 1 Jur. N. S. 840; 2 Jur. N S. 169 and 6 DeG. M. & G. 95. In the first of these reports the bill is shewn to have been filed by a simple contract creditor on behalf of himself and all other the creditors of a deceased person for an administration of the assets of the deceased and to set aside a voluntary settlement as fraudulent within the statute 13 Eliz. c. 5 against such creditors, and the bill prayed that an account might be taken of the personal estate and effects of the deceased, and that it might be declared that an annuity granted by the impeached instrument was as against the creditors of the deceased fraudulent, and that the wife in whose favour the annuity was granted might be declared trustee thereof for the benefit of such creditors, and that a receiver might be appointed. In 2 Jur. N. S. 170 the form of the decree pronounced in the case is given as follows:

> There will be a declaration that the settlement of 1852 (the impeached conveyance) was void as against creditors and the accounts will be taken on that footing, without prejudice to any question that may be raised by Mrs. French in case the assets should turn out to be more than sufficient to pay all the debts.

That this suit must have been instituted by a creditor upon behalf of himself and all other creditors entitled to share in the general assets of the deceased there can be no doubt; but the present is not a case like that and here it is to be observed how careful the court was to provide for protection of the interests of the volunteer beneficiary. To such a suit a mortgagee would have been an unnecessary party, for when a mortgagor dies leaving lands mortgaged and other lands and personal estate not mortgaged the only assets of the deceased to be administered for the benefit of creditors are the equity of redemption in the mortgaged lands and the residue of the deceased's estate, real and personal. To a

bill by the general creditors of the deceased the mortgagee cannot be called upon to take any part; the equity of redemption in the mortgaged premises may be sold in such administration suit but not so as in any way to prejudice or interfere with the exercise by the mortgagee of all his rights under the mortgage. He may sell the whole estate absolutely under the powers of sale ordinarily inserted in all mortgages executed in every province of the Dominion. He may by petition be admitted into the administration suit and consent to a sale therein of the mortgaged premises, he receiving the whole of the proceeds of such sale until his mortgage debt, interest and costs are fully paid. In such a case he must submit to rendering an account of all monies received by him in respect of the mortgage and the decree is for the taking of such account and for sale of the mortgaged premises with the mortgagee's consent, and if the proceeds of the sale should prove insufficient to pay the mortgage debt, interest and costs, that then he should be admitted to prove for the balance not realized as a specialty creditor.

The cases are numerous but uniform on this subject. A few will suffice: *Mason* v. *Bogg* (1); *Greenwood* v. *Taylor* (2); *Carr* v. *Henderson* (3); *Ward* v. *McKinley* (4); *Crowle* v. *Russell* (5).

A mortgagee may also himself file a bill for an administration of the estate of the deceased. In such case he must render an account of all his receipts and dealings in respect of the mortgaged premises and shall retain his right to have the proceeds of the sale of the mortgaged premises applied wholly in payment of his mortgage debt, interest and costs, and in case of the proceeds of sale proving insufficient for that

(1) 2 My. & Cr. 443.
(2) 1 Russ. & My. 185.
(3) 11 Beav. 415.
(4) 10 Jur. N. S. 1063.
(5) 4 C. P. Div. 186.

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purpose, he shall be allowed to prove for the unsatisfied balance as in the case of his applying by petition to be let into an administration suit instituted by the general creditors and consenting to a sale of the mortgaged premises in that suit. *Brocklehurst* v. *Jessop* (1); *Tipping* v. *Power* (2); *King* v. *Smith* (3); *Aldridge* v. *Westbrook* (4); *Skey* v. *Bennett* (5); *Spensley* v. *Harrison* (6); *Pinchard* v. *Fellows* (7).

The decree in *Pinchard* v. *Fellows* (7) shews the form of decree in such cases. The decree directed an account to be taken of what was due to the plaintiff for principal, interest and costs of suit, including the costs of the account and consequent on the sale thereafter directed — account of the rents and profits of the mortgaged premises received by the plaintiff or which without wilful default might have been received, deducting what should appear to be due on such account of rents and profits from what appeared to be due to the plaintiff for principal, interest and costs. Lands comprised in plaintiffs' mortgages to be sold with the approbation of the judge and the money to arise by such sale to be paid into court; and that thereout on an application in chambers what should be certified to be due to the plaintiff be paid to him; but in case the money to arise by the sale should be insufficient to discharge the said amount to be so certified to be due to the plaintiff then the whole thereof to be paid to him. In case such monies should be insufficient to pay the amount due to the plaintiff he was declared entitled to come in with the other creditors of the deceased and to receive satisfaction for such deficiency out of the deceased's assets in a due course of administration.

(1) 7 Sim. 438.
(2) 1 Hare 405.
(3) 2 Hare 239.
(4) 5 Beav. 188.
(5) 2 Y. & C. Ch. 405.
(6) L. R. 15 Eq. 16.
(7) L. R. 17 Eq. 422.

Now, in the present case, to a bill filed by the plaintiffs for administration of the deceased Henry Elliott's estate, his co-mortgagor, Benjamin Douglas, if living, and his representatives if dead, must needs be a party or parties. No such bill having been instituted it is quite obvious, as indeed the frame of the statement of claim also shews, that the plaintiffs are standing upon what they consider to be their rights distinct from, and not, by any means, in concert with the general creditors, if there be any, of Henry Elliott, deceased.

The evidence adduced by the plaintiffs seems to shew that in truth the plaintiffs are the sole creditors of the deceased, for they proved that the whole amount of deceased debts, so far as known, amounted to something over $50,000, how much was not stated and the plaintiffs gave evidence that the amount due to them by the deceased at the time of his death was $52,500. The only debts spoken of were the $22.05 for the gas account and the taxes already referred to, but the point in issue in the case is not whether the deceased was indebted at the time of his death, but at the times when he executed the impeached conveyances, and no debt whatever was proved to have then been in existence but the debt to the plaintiffs secured by mortgage, and as the evidence shewed amply secured.

In so far as the present action is concerned there is no other conclusion justified by the evidence and by the fact that the plaintiffs refused the opportunity for further inquiries as to the indebtedness of Henry Elliott at the time of the execution of the impeached conveyances than that the said Henry Elliott was free from all debt, save that secured to the plaintiffs at the times of execution of the said conveyances and had a perfect right to execute them without any interference on the part of the plaintiffs. The only judgment therefore, which was justified by the evidence was one

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dismissing the plaintiff's action with costs, and the appeal, therefore, in my opinion, must be dismisssed with costs.

The defendant, Mary Logan, not having appealed from the judgment rendered against her we can not deal with it, but I apprehend that means can readily be found to prevent the plaintiffs attempting, if they should attempt, to enforce an execution against the lands mentioned in Mary Logan's deed to obtain satisfaction of the judgment in the statement of claim mentioned to have been recovered against the administrator of the estate of Henry Ellliott, or of any part thereof.

Appeal allowed with costs.

Solicitors for the appellant: *Wilson & Senkler.*

Solicitors for the respondent: *Morrison & Cockrill.*