

2. There was no estoppel, neither the assignee nor the estate of the mortgagee having been placed in a worse position than if the overpayment had not been made.

3. The plaintiff's claim was not barred by the Statute of Limitations, because no cause of action arose until the 23rd February, 1901, when the mortgagors paid a sum in excess of what was really due.

4. The plaintiff should have only such costs as he would be entitled to had he commenced his action in the first place against the executors.

*H. H. Strathy*, K.C., and *C. W. Plaxton*, for plaintiff. *W. A. Boys*, for defendant *G. W. L. Hickling*. *D. M. Stewart*, for defendants as trustees.

Meredith, C.J., Lount, J.]

[Jan. 8.

McGUINNESS v. McGUINNESS.

*Execution—Sale of land under—Distribution of proceeds—Costs of execution creditor—Creditor's Relief Act, s. 26.*

The appellant, on Feb. 2, 1900, placed in the hands of the sheriff for execution a writ of execution against the goods and lands of the execution debtor issued on a judgment recovered by the appellant against him, and the writ was indorsed with the usual direction to the sheriff to levy in accordance with its provisions. Later on the same day the respondents placed their writ of execution against the goods and lands of the execution debtor in the hands of the sheriff for execution; it was issued upon a judgment for costs which they had recovered in an action brought by the execution debtor against them. No further steps were taken by the appellant, but the respondents' solicitor directed the sheriff to advertise for sale under their writ certain lands of the execution debtor. The lands were in pursuance of this direction duly advertised to be sold under the respondents' writ only, and the sheriff offered the lands for sale pursuant to his advertisement, under the respondents' writ, but no sale was effected for want of buyers. A writ of ven. ex. was then issued on the respondents' judgment and delivered to the sheriff, under which he sold the lands.

*Held*, that the respondents were the creditors at whose instance and under whose execution the seizure and levy were made, within the meaning of s. 26 of the Creditors' Relief Act, R.S.O. c. 78, and they were, therefore, entitled to be paid in full their taxed costs and the costs of their execution, in priority to the other execution debts and claims, out of the residue of the proceeds of the sale in the hands of the sheriff for distribution after deducting his own fees and charges.

*W. H. Wallbridge*, for appellant. *H. L. Drayton*, for respondents.