

the defendants enjoined from obstructing it and ordered to remove the fences.

G. F. Henderson, for plaintiff. *Chrysler, K.C.*, and *C. J. R. Bethune*, for defendants.

Robertson, J.]

MCDERMOTT v. HICKLING.

[Jan. 7.

Mistake—Recovery of money paid under mistake of fact—Mortgage—Account—Acknowledgment—Laches—Estoppel—Statute of limitations—Costs.

Upon a mortgage made in 1885 for \$2,750, the mortgagors made payments from time to time to the mortgagee, and after his death in Sept., 1892, to his executors. Written receipts were always given to the mortgagors, and an account was kept by the mortgagee in a book, but he failed to credit a payment of \$153 made on the 1st of November, 1890, and a further payment of \$25.16 made July 27, 1892. On Nov. 28, 1894, the three executors assigned the mortgage to one of themselves in part payment of a legacy to him from the mortgagee. The amount mentioned in the assignment as due upon the mortgage was \$1,159 and interest, but this was made up from the book, and in arriving at it credit was not given for the two payments of \$153 and \$25.16. On March 2, 1895, one of the mortgagors signed a written acknowledgement that the amount due at that date was \$1,159.54 for principal and \$76.49 for interest. Further payments were made from time to time by the mortgagors, and on Feb. 23, 1901, they made a final payment of \$47,488, which was supposed by them and by the assignee to be the balance due, though the true amount was about \$168 only. On Aug. 23, 1901, this action was brought by one of the mortgagors (who had acquired the rights of the others) to recover \$306.88 and interest from Feb. 23, 1901, as money paid under a mistake of fact. The action was begun against the assignee only, but the plaintiff afterwards added the executors as defendants, and claimed an account and to surcharge, etc.

The mortgagors were uneducated and incapable of keeping accounts or understanding them when made out, and depended entirely on the mortgagee, and after his death upon the active executor, for the keeping of the account, and although they had the written receipts in their possession they never had the account checked by them or an independent account made up from them.

Held, 1. The money paid in excess of the amount due having been paid in ignorance of the facts, was recoverable notwithstanding the acknowledgement and notwithstanding laches, the mortgagors not having waived all enquiry, because it would be unconscionable for the assignee to retain it. *Marriott v. Hampton*, 2 Sm. L. C., 10th ed., p. 431; *Kelly v. Solari*, 9 M. & W. 54, and *Townsend v. Crowley*, 8 C.B.N.E. 493, followed.