

cattle-guards being erected and maintained; therefore defendants have no right to maintain fences which obstruct the highway; as to (4) that the question in dispute is not as to the construction of the railway along and across the highway within the meaning of sec. 11 (h) of the Railway Act; the railway committee have no jurisdiction, and this Court had jurisdiction: *Fenelon Falls v. Victoria R. W. Co.*, 29 Gr. 4; *City of Toronto v. Lorsch*, 24 O. R. 227.

Judgment for the plaintiffs for the relief asked with costs.

MacCraken, Henderson, & McDougall, Ottawa, solicitors for plaintiffs.

Chrysler & Bethune, solicitors for defendants.

ROBERTSON, J.

JANUARY 7TH, 1902.

TRIAL.

McDERMOTT v. HICKLING.

*Mistake—Money Overpaid on Mortgage—Ignorance of Facts
—Executor—Costs against, if Estate Insufficient.*

Marriott v. Hampton, 2 Smith's Leading Cases, 10th ed. 431, followed.

Action tried at Barrie, brought to recover money overpaid on a mortgage and interest thereon since 23rd February, 1901.

H. H. Strathy, K.C., and C. W. Plaxton, Barrie, for plaintiff.

W. A. Boys, Barrie, for defendant G. W. L. Hickling.

H. D. Stewart, Barrie, for both defendants as trustees.

ROBERTSON, J., after a lengthy review of all the facts:—
The case is within the third proposition which is deduced from the law as it now stands, and put in the notes to *Marriott v. Hampton*, 2 Smith's Leading Cases, 10th ed., p. 431, that money paid in ignorance of the facts is recoverable, notwithstanding laches, providing that the party paying it has not waived all inquiry. Laches, in the sense of a mere omission to take advantage of means of knowledge within the reach of the person paying the money, is not sufficient to disentitle him to recover it back. Judgment for plaintiff for \$306.88 and interest from 23rd February, 1901, against defendants as executors, who may have a reference if they desire. Costs of action and reference to plaintiff. If not sufficient estate in defendants' hands, costs on High Court scale to be paid de bonis propriis, but to be limited to such