

successive years held timber licenses issued by the Provincial Government. These licenses, giving the right to cut timber and exclusive possession in the usual form, were dated respectively the 5th of July, 1883, the 10th of December, 1884, and the 22nd of July, 1885, and each extended from its date to the 30th of the next April. The defendants entered upon the limits in question about the end of the year 1884, and the road was completed in July, 1886. In building the road the defendants cut down timber on the line and also both within and outside of the six rod belts mentioned in the statute. No timber was cut after December, 1885. The plaintiffs brought this action on the 9th of September, 1886, to recover damages for the timber cut. It was admitted that as to timber cut outside the six rod belts they were entitled to recover, but it was contended that as to timber cut on the line and within those belts the action was barred. The defendants had filed their plan and book of reference, but they had not taken any of the statutory steps to acquire the interest of the plaintiffs.

*Held*, per HAGARTY, C.J.O., and OSLER, J.A., that the damage to the timber on the line and within the six rod belts was damage "sustained by reason of the railway" within the meaning of s. 27 of R.S.C., 109, and that that section was *intra vires* the Dominion Parliament. That the plaintiffs were entitled to damages for the illegal occupation of the limits, and as consequent thereon to damages for all injury done during the illegal occupation; but that the plaintiffs had no title to the limits sufficient to maintain an action, either on legal or equitable principles, in the intervals between the licenses. That, therefore, the right of action was barred except as to damages sustained during the currency of the last license, but was saved as to those by virtue of the occupation being illegal up to the 30th of April, 1886, less than six months before action.

Per BURTON, J.A., and MACLENNAN, J.A. That the section was *ultra vires* the Dominion Parliament as being an unnecessary interference with property and civil rights within the Province, but that even if valid would not avail for the protection of the defendants, as they were mere trespassers.

Per MACLENNAN, J.A. That even if the section were valid and applied, the plaintiffs were entitled to recover all the damages, the

trespass having been a continuous uninterrupted one, and the plaintiffs' right of renewal of their licenses being sufficient to enable them to recover, notwithstanding the intervals between them.

The Court being divided in opinion, the judgment of STREET, J., 15 O.R., 733, was affirmed.

*W. Nesbitt and Aytoun-Finlay* for the appellants.

*S. H. Blake, Q.C.*, and *E. Martin, Q.C.*, for the respondents.

*Irving, Q.C.*, for the Attorney-General.

From Chy.D.]

[March 4.

MCDONALD *v.* MCDONALD.

*Trusts and trustees—Executors—Acceptance of office—Purchase by trustee of trust property—Statute of Limitations.*

The plaintiff and defendant were brothers, and their father who died in the year 1846, appointed the plaintiff and two other sons of the testator his executors, and among other devises devised the land in question to the defendant. The testator had endorsed a note for the accommodation of the plaintiff, and after the testator's death, the holders of this note sued the plaintiff and the two brothers as executors, and recovered judgment against them. The land in question was sold under that judgment at sheriff's sale, and was bought in by the plaintiff. The will had been registered, but had not been proved. Subsequently the plaintiff mortgaged the land in question, and sold it subject to the mortgage. The mortgagees afterwards sold, and the plaintiff again bought in the land.

*Held*, that the plaintiff and his brothers having defended the action on the note as executors, and judgment having been recovered against them as such, must be held to have accepted the office and want of probate was immaterial and the sheriff's sale was valid.

*Held*, also, that it being the plaintiff's duty to pay the note, he had not acquired title to the land for his own benefit at the sheriff's sale but, became a trustee for the devisee, the defendant, and that this trust revived when the plaintiff bought in the land for the second time.

*Held*, also, that assuming that the plaintiff was not a trustee for the defendant and had no paper title, there was not, upon the evidence,