

*tioned in sub-sec. 12 of sec. 6 of R.S.C., ch. 109. The timber was all cut more than six months before action brought.*

*Held,—that under the sub-section above referred to, the timber cut within the six rod limit became the property of the railway, and that the loss of the trees was damage or injury sustained by the plaintiffs by "reason of the railway" under sec. 27 of R.S.C. ch. 109, and the action was therefore barred by that section by reason of its not having been brought within the six months.*

This was an action brought by the plaintiffs, who were timber licensees under the Ontario Government, for damages sustained by them by reason of the defendants having built their railway through the land covered by the plaintiffs' license, and having cut down and removed and converted to their own use the timber, to a great distance, on both sides of the railway, both within and outside of the six rod belt, mentioned in R. S.C. ch. 109, sec. 6, sub-sec. 12.

The cause was tried before Street, J., without a jury, at Toronto, at the Winter Assizes of 1888.

The learned Judge reserved his decision, and afterwards delivered the following judgment in which all the material facts are stated.

*Osler, Q.C., and Creedman, for the plaintiffs.*

*Walter Cassels, Q.C., and E. Martin, Q.C., for the several defendants.*

STREET, J.—The defendants, the Railway Company, are incorporated under an Act of the Dominion Parliament, and their line of railway has been constructed through certain lands in this Province, the fee of which remained in the Crown, but which at the time of the construction of the railway were included in certain timber licenses issued by the Ontario Government, under R.S.O. ch. 26, to the plaintiffs.

The plaintiffs complain that in the autumn of 1884 the defendants entered upon these lands, and built their railway through them, and cut down and removed and converted to their own use the timber upon their line of railway for a great distance on both sides of it, both within and outside of the belt of six rods in width mentioned in sub-sec. 12 of sec. 6 of R.S.C., ch. 109.

It is admitted that none of the trespasses complained of took place at a date later than December, 1885, more than six months before this action was commenced.

The defendants, other than the railway company, are the contractors under them; and it is agreed that any questions which may arise between the defendants themselves are to be dealt with in any reference which may be ordered.

The main question argued before me was as to whether the plaintiffs' rights as to any or all of the trespasses complained of are barred by sec. 27 of R.S.C., ch. 109, which provides that "all actions or suits for indemnity for any damage or injury sustained by reason of the railway company shall be commenced within six months next after the time when such supposed damage is sustained, or, if there is continuation of damage, within six months next after the doing or committing of such damage ceases, and not afterwards."

The rights of the plaintiffs under their license are defined in sec. 2 of R.S.O., ch. 26, which enacts that the "licenses shall describe the lands upon which the timber may be cut, and shall confer for the time being upon the nominee the right to take and keep exclusive possession of the lands so described . . . and . . . shall vest in the licensee thereof all rights of property in all trees, timber and lumber cut within the limits of the license during the time thereof whether . . . cut by authority of the holder of the license, or by any other person, with or without his consent; and such licenses shall entitle the holders thereof to seize in revendication, or otherwise, such trees, timber or lumber when the same are found in the possession of any unauthorized person, and also to institute any action against any wrongful possessor or trespasser, and . . . to recover damages, if any."

So far as regards the timber, if any, cut by the defendants beyond the six rod belt, it is conceded by them that the limitation of time fixed by the 27th section of the Railway Act does not apply, and the plaintiffs are entitled to a reference as to this.

So far as the six rod belt is concerned, the