

The new section of the Evidence Act, 4 Edw. VII. c. 10, s. 21, applies only where but for this section the witness would have been excused from answering, and therefore had no application in the present case inasmuch as under the Election Act the evidence was compellable.

*DuVernet*, for the prosecution. *R. McKay* and *W. M. McKay*, for the accused.

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## Province of Manitoba.

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### KING'S BENCH.

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Full Court.]

McLENAGHEN *v.* HOOD.

[June 9.]

#### *New trial—Surprise—Negligence.*

The plaintiff's claim was for loss of 29 young cattle out of 47 which the defendant had agreed to feed, salt and winter for the plaintiff at \$4.50 per head, and to be responsible for the loss of any of the cattle "through getting lost or killed or any other way except dying from ordinary disease." The statement of claim charged that defendant had failed to carry out the provisions of the said agreement and that, by reason thereof, 29 of the cattle had died while under the care of the defendant and were lost to the plaintiff and the remainder of the said cattle were improperly provided with food and shelter and otherwise improperly cared for. The evidence satisfied the trial judge that the stable provided by defendant had been too small and low for so many cattle, that they had not sufficient ventilation, and that they had in consequence contracted colds resulting in catarrh, which increased in severity, and caused the deaths of the 29, and plaintiff had a verdict for their value.

Defendant applied to the Full Court for a new trial on the ground of surprise in the evidence produced by the plaintiff as to the size of the stable.

PERDUE, J.:—The statement of claim contains no direct allegation of negligence on the part of the defendant nor anything that can be construed as a charge of negligence except as to the 18 cattle which survived. The defendant's solicitor states upon affidavit that it was impossible to ascertain from the statement of claim upon what grounds the plaintiff relied, that he was examined for discovery, and that the defendant was unable to