under the tax sale certificate, for value and without notice of her special incapacity might not have acquired a title under a tax deed which would have cut out the plaintiff's mortgage.

6. To entitle Lawlor to claim protection as a purchaser for value without notice of Mrs. Rutledge's fraudulent conduct he should have pleaded this as a defence and given evidence of it, although the plaintiff had not in his pleading alleged notice to Lawlor of the concealment by Mrs. Rutledge: *McAllister* v. *Forsyth*, 12 S.C.R. 1; *Attorney-General* v. *Wilkins*, 17 Beav. 285; and as Lawlor had neither pleaded nor proved such want of knowledge and notice the plaintiff was entitled to judgment without being called upon to prove any notice to Lawlor, especially as the Court had not been asked for relief on the ground that such defence was omitted through any error or slip, and that it could be successfully raised, and the Court held that there was nothing to suggest that the defendant had been taken by surprise or misled in any way.

7. The judgment entered should be varied by striking out the clause declaring that Lawlor held as trustee for his co-defendants, and by substituting a declaration that any title to the lands in question which Lawlor took or holds under the tax sale deed is held by him subject to the plaintiff's mortgage.

8. The case does not come within section 186 of the Assessment Act, and Lawlor is not entitled to any lien on the land for the taxes paid as against the plaintiff's mortgage, and the clause in the judgment giving such lien should be struck out.

Culver, Q.C., and *Mulock*, Q.C., for plaintiff. *Ewart*, Q.C., and *Wilson* for defendant.

Full Court.] LAWLOR *v.* NICKEL. [July 9.

Bailment of goods—Sale of goods—Statute of Frauds.

Plaintiff delivered a quantity of wheat at an elevator leased by defendants whose employee agreed to purchase the wheat at "38 cents and the rise," meaning that plaintiff could take his wheat checks at any time, and get at least 38 cents per bushel, but if the market prices were higher, then he could demand the market price of the day. The wheat was received in the elevator, and receipts given for it, stating that it was received in storage for plaintiff, but as a matter of fact it was not intended that the identical grain received from plaintiff should be kept for him, the well understood course of the business being that, unless a price was agreed on, the plaintiff could only require the equivalent amount of wheat of the same grade to be accounted for to him. Plaintiff claimed the value of the wheat as if it had been sold to defendants, but it did not appear that there had been a price agreed on. Defendants disputed the receipt of three out of seven lots of the wheat delivered by the plaintiff, and paid into court a sufficient sum in payment for the other four lots.

Held, following *South Australia Insurance Co.* v. *Randell*, 6 Moore P.C. N.S. 341, that in such a case the contract between the parties is really one of sale and not of bailment, and that whether the vendor is to receive a price