defendant who swore that he had cut every year for thirty-five years. The defendant, however, swore that this uncle had nothing to do with the land. The jury found for the plaintiff.

Held, affirming the judgment of the Supreme Court of Prince Edward Island, that these acts of cutting lumber were nothing more than isolated acts of trespass on wilderness land, which could not effect an ouster of the true owner, and give the defendants a title under the Statute of Limitations.

Appeal dismissed.

Hodgson, Q.C., for the appellants.

Davies, Q.C., for the respondents.

[March 14

FAIRBANKS ET AL. (Plaintiffs), Appellants, v. BARLOW ET AL. (Defendants), and O'HALLORAN (Intervenant), Respondents.

Pledge without delivery—Possession—Rights of creditors.

B., who was the principal owner of the South-Eastern Railway Company, was in the habit of mingling the moneys of the company with his own. He bought locomotives which were delivered to and used openly and publicly by the railway company as their own property for several years. In January and May, 1883, B., by documents *sous seing privé*. sold ten of these locomotive engines to F. *et al.*, the appellants, to guarantee them against an endorsement of his notes for $50,000. B. having become insolvent, F. *et al.*, by their action directed against B., the South Eastern Railway Company, and R. *et al.*, trustees of the company under 43 & 44 Vict. ch. 49, Q.C., asked for the delivery of the locomotives, which were at the time in the open possession of S.-E. Ry. Co., unless the defendants pay the amount of their debt. B. did not plead. The S.-E. Ry. Co. and R. *et al.*, as trustees, pleaded a general denial, and during the proceedings O'H. filed an intervention, alleging he was a judgment creditor of B. notoriously insolvent at the time of making the agreement.

Held, affirming the judgments of the courts below, that as the transaction with B. only amounted to a pledge not accompanied by delivery, F. *et al.*, the appellants, were not entitled to the possession of the locomotives as against creditors of the company, and that in any case they were not entitled to the property as against O'H., a judgment creditor of B., an insolvent. The action was therefore rightly dismissed and intervention maintained.

Appeal dismissed with costs.

Church, Q.C., and *Nicolls*, for appellants.

O'Halloran, Q.C., for respondents.

COURT OF APPEAL.

Co. Ct. Carleton.]

SEABROOK v. YOUNG.

Pleading—Trespass—Title to land.

Under the system of pleading in the High Court and in County Courts under the Judicature Act, Rules 128, 146, 147, 148, 240, where a material fact is alleged in a pleading, and the pleading of the opposite party is silent with respect thereto, the fact must be considered as in issue. And where in an action of trespass for pulling down fences and for mesne profits the plaintiff alleged his title at the time from which he claimed to recover the mesne profits: and the defendant, in his statement of defence, denied that he committed any of the wrongs in the plaintiff's statement of claim mentioned, and denied that he was liable in damages or otherwise on the alleged causes of action.

Held, that on these pleadings the title to land was expressly brought in question, and the jurisdiction of the County Court thus ousted. The defendant was not estopped from raising the question of jurisdiction at the trial, because of his omission to file an affidavit under R. S. O. c. 43, s. 28, that his pleading was not pleaded vexatiously, nor for the mere purpose of excluding jurisdiction; such an omission was a mere irregularity for which the plea might have been set aside, but it could not operate to confer jurisdiction where the plea raised the question of title.

The statement of claim presented a cause of action within the jurisdiction, and the defendant could not have demurred; it depended