

Province of Manitoba.

KING'S BENCH.

Dubuc, J.] JOHN ABELL ENGINE ETC. CO. v. MCGUIRE. [April 25.
Contract—Conditional Sale—Rescission of contract—Expense of repairs to engine retaken on default in payment—Expense of resuming possession—Warranty.

Defendants in March, 1896, gave a written order to plaintiffs for a threshing engine and separator, which were delivered in the following August. The order provided for a conditional sale of the machines for the sum of \$2,875, for which promissory notes payable at intervals were to be given, and on the usual term that the property in them should remain in the plaintiffs until full payment of the price agreed on, and contained the following warranty: "The above machinery is warranted, with proper usage, to do a good work and to be of as good materials and as durable with proper care, as any of the same class made in Canada. . . . If the machinery cannot be made to fill the warranty, it is to be immediately returned by the purchaser to the place where received, free of charge, and another substituted therefor which shall fill the warranty, or the money and notes returned. Continued possession shall be evidence of satisfaction." The agreement further provided that on default of payment, the plaintiffs might resume possession of the goods sold and sell the same, and apply the proceeds after paying the expenses of taking possession and of such sale, towards payment of the amount remaining unpaid, and proceed for the balance by suit or otherwise. There were some weak or defective parts in the machines, and plaintiffs, on being notified, sent experts to remedy the defects. They put the machines in somewhat better shape, but delays were incurred, and defendants claimed that the machines never worked properly. Defendants, however, used the machines during the threshing seasons of 1896 and 1897 and for part of the season of 1898, when, on one of the pieces breaking, the machine was left in a field, where it remained unprotected until June, 1900. They had paid about \$1,200 of the purchase money when plaintiffs resumed possession of the machines at a cost of \$40, made repairs to them at a cost of \$466.35, and then entered into a conditional re-sale of them to a Mr. Weaver, for the sum of \$2,000, no part of which had been received by the plaintiffs at the time of bringing the present action, which was to recover the amount still due by defendants on their original purchase, viz. \$1677.09.

Held, 1. The defendants, having failed to return the machinery after trial, having used it during three seasons and paid nearly \$1,200 on account,