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APPEAL TO PRIVY COUNCIL.

The case of *Brewster & Lamb*, noted at p. 75, and also in the present issue, p. 109, has brought up a rather interesting point of practice. It has been the custom to ask the Court of Appeal for leave to appeal to the Privy Council, when it is desired to take a case before that tribunal. The Court then gives an order, granting leave to appeal, and fixing a certain delay to put in security. As judgments are often rendered in appeal on the last day of the term, and there may be only a few minutes at the conclusion for receiving motions, it is sometimes inconvenient for counsel to be present at the right moment, and yet if the motion is not made then, execution may be issued long before the first day of the succeeding term. In the case of *Brewster & Lamb* the counsel charged with the case for appellant was accidentally absent, and although his client, who was only partially successful, was desirous of taking the case to England, leave was not obtained in the usual way. Before the expiration of fifteen days from the date of judgment, however, Brewster offered security before the Chief Justice in Chambers (p. 75). The security was accepted purely and simply, and Brewster relied upon this as equivalent to the giving of security within a delay fixed by the Court.

It is to be remarked that the right of appeal does not depend on the giving of security, but on the amount of the suit, and here there was no question as to the right of appeal. But the judgment appealed from is not suspended unless the appellant gives security "within the delay fixed by the Court." (Art. 1179.) In this case it was urged that there being no delay fixed by the Court, the respondent had a right to execute the judgment, and therefore had a right to have the record transmitted to the Court below. The Judges were of opinion, however, that by putting in security within the fifteen days allowed for execution, the appellant had effectively taken his appeal, and stood in just as favorable a position as if the ordinary course had been followed. It is evident that this ruling has no tendency to protract proceedings. On the contrary, those who take advantage of it will have to give security within fifteen days, whereas they would have six weeks under the ordinary practice.

JUDICIAL BUSINESS IN ENGLAND.

A correspondent of the *Manchester Guardian* writes in very strong terms of what he witnessed at the recent Assizes in that city, at which eighty-eight causes were entered for trial. "For my own part," he says, "after an experience of nearly 25 years, I may say I never saw or heard of such a burlesque of trying causes, in one of the Courts at all events. Counsel, solicitors, suitors, and witnesses bustled into Court to have their causes tried, and were as quickly hustled out again, disappointed, indignant, and venting their feelings in strong language at some compromise or other they had been—well, induced to enter into, or at the sudden collapse of their cases before one-fourth of their witnesses had been called. However, as I heard Lord Justice Brett say, about 5.30 p.m. last Saturday, when he cheerily announced to jaded counsel and weary jurors his intention of trying five or six more cases that evening, 'if the people of Manchester will enter eighty-eight causes they must take the consequences.'" It may be some consolation to reflect that things are not so bad with us yet. But it is becoming a perplexing question almost everywhere, how the judicial machinery is to be adjusted to cope with the ever increasing volume of business.

TRADE-MARK CASES.

An article copied elsewhere from the London *Law Times* refers to the number of trade-mark cases coming before the English Courts at the present day. The American Courts are equally busy; yet it is to be remarked that this is comparatively a new branch of law, for the cases prior to the nineteenth century are very few in number: Sebastian's Digest, recently published, contains but three. In fact, it is only within forty years that questions arising from infringement of proprietary marks have been much discussed before the Courts. The last ten years, however, have added very largely to the jurisprudence on this head, and the subject promises to give rise to many questions of complication.

GRAND JURIES.

Mr. Justice Ramsay, at the opening of the Term of the Court of Queen's Bench, Crown side, at Montreal, referred in the following terms to the subject of the abolition of Grand Juries. The observations possibly were elicited by the introduction of the bill noticed in last issue:—

"On more than one occasion I have taken the opportunity to allude in my address to the Grand Jury to the importance of the functions you have to perform. There is, I am aware, a popular opinion, and one, I venture to say, based on a very superficial view of the matter, that the introduction of bills of indictment through the medium of the Grand Jury should be abolished. It is not very clearly said what is the objection to the Grand Jury, nor, so far as I know, has it been even attempted to show by statistics that it has failed to perform or that it performs imperfectly its duties. The sharpest criticism to which it has been exposed is that it is expensive, and that it, to a very small extent, increases the services of the jury class. The former of these arguments is an appeal to the cupidity of the Government, the latter to the lack of public spirit of the jurors. I am very far from under-rating the question of economy in public matters. It is unquestionably the duty of those entrusted with the administration of public affairs to be constantly solicitous to keep down and to curtail, where it is possible, the public expenditure. But there is another duty still greater, and that is to be watchful as to the efficiency of the public service. It will scarcely be denied that those who stand in the defence of an existing institution have a right to challenge the innovator to show clearly that the institution sought to be demolished is bad, or, at all events, that he has something unmistakeably better to put in its stead. It has just been observed that there has been no attempt to establish the former, and if I may add the testimony of my, comparatively speaking, limited experience, I would say that such an attempt would signally fail, and if it were necessary or proper to enter into details, I could point out special cases in which the Grand Jury rendered signal services. Next, let us enquire what is to be substituted for the Grand Jury? Is everyone to be indicted and tried who is committed by a magistrate? Or, is no one to be tried except on information by the Attorney-General? Whichever of these methods is adopted it removes the popular check on the administration of the criminal law, and hands it over bodily to official control. I can hardly be accused of any strong personal prejudice against officials; many years of my life have been passed in office, or in intimate connection with persons in office, and my opinions don't run much in what are generally considered as popular channels; but I consider that the abolition of the Grand Jury would be a most dangerous innovation and the destruction of a great safeguard of our public liberties. It may be said that these safeguards are no longer necessary, and that there can be now no question of political rights in the trial of 999 out of 1,000 malefactors who come before the Courts. This is very true, but with all due deference to the powers that be, it appears to me that the dangers of the past have not ceased to exist, although their form is changed. The excellence of our system does not depend on its symmetry, but on a succession of checks and counterchecks which prevent any influence from becoming omnipotent."

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, March 22, 1880.

SIR A. A. DORION, C.J., MONK, RAMSAY, TESSIER, CROSS, JJ.

Ex parte McCAFFREY, petr. for habeas corpus.

Guardian—Liability for goods—Habeas Corpus where imprisonment is under civil process.

Sir A. A. DORION, C.J. The petition is by a guardian who was condemned to go to jail in default of producing the effects placed under his guardianship. The petitioner urges three grounds, first, that the option of paying the value of the goods was not given him. This question has already been decided in *Leverson & Boston*, (2 L. C. J. 297) where the Court of Appeal held that it was for the guardian to prove the value of the goods, and to ask that he should only have to pay the value. The second reason is that more than two months have elapsed since he was appointed. But the two months' rule never applied to the time of the guardian's appointment, but only to the time when the opposition ceased, and I do

not remember any case where the rule was applied under our system. Third, that the commitment is for $71 more than it ought to have been for. There might be a question if the commitment had been for an amount different from that specified in the judgment. But here the judgment is for the exact amount for which the commitment issued. The Court cannot say, on a petition for *habeas corpus*, that the judgment was wrong. Therefore we think this petition cannot be maintained upon any of the grounds urged in support of it.

Ramsay, J. This is an application for a writ of habeas corpus. The petitioner is held under *contrainte par corps* for failure to produce certain goods of which he had been established guardian. He contended that the *contrainte* was illegal, (1) Because he was not given the alternative to pay the value of the goods; (2) Because he was held for certain costs not ordered by the judgment.

In support of the petition it was said that by section 20, C. S. L. C., cap. 95, it was enacted that "when any person is confined or restrained of his liberty otherwise than for some criminal or supposed criminal matter" &c., he shall have a right to a writ of *habeas corpus;* and it was urged that this legislation gave a right to the writ when any one was restrained of his liberty in a civil suit, independently of the enactments of the Statute of Charles. The answer to this pretention is to be found in Sect. 25 of this Act, which declares that this shall not apply to any one "charged in debt or other action, or with process in any civil suit." Our Act is copied from 56 Geo. III, cap. 100. It would have been a strange innovation to have employed the writ of habeas corpus as a means of verifying the procedure of the civil courts. The question has been frequently decided by the courts here, as the error in the rubric "Habeas Corpus ad subjiciendum in civil matters" has served to mislead. See *Ex parte Whitfield*, 2 Rev. de Leg., p. 337. The principle of this rule is fully explained in a case decided by this Court, *Exp. Donaghue*, 9 L. C. R. p. 285, and in another case, in the Superior Court, of *Barber et al.* v. *O'Hara*, 8 L. C. R. p. 216. And even where there is excess of jurisdiction, the writ will not be granted unless it be a commitment of an inferior court, else we should have a judge in chambers deciding as to the extent of the jurisdiction of the superior courts of law. See *Leboeuf & Viaux*, S. C., 18 L. C. J. 214. On the other side we have a case *Exp. Crebassa*, 15 L. C. J., p. 331, where it is said that a judge in chambers discharged a prisoner confined on *contrainte* for *rebellion à justice;* and there is also a case of *Exp. Lemay* mentioned in a note, in which it is said a party was discharged by a judge in chambers because the amount of certain costs was not stated. If these cases are not misreported, they can hardly be received as authority against the cases on the other side, and the express terms of the statute, which are reproduced in arts. 1040 and 1052 C. C. P. I do not mean to say that there may not be cases in which the judgment pretended to justify the imprisonment, may not really support it, and in such a case a party may be discharged on *habeas.**

Nor can it be contended that the writ of *habeas corpus* can be used in any case to relieve one of imprisonment under the law. So even a person condemned by a court of law to an illegal imprisonment cannot be discharged on *habeas—Exp. Plante*, 6 L. C. R. p. 20. And we refused the writ when it appeared that a man had been sentenced to five years' imprisonment with solitary confinement. See also the case of O'Kane in 1875, where we intimated that there was probably excess of jurisdiction by a court of record. The remedy in these cases is by writ of error.

The writ must be refused.

Sir A. A. Dorion, C.J., remarked that the majority of the Court did not express the opinion in the present case that there can be no *habeas corpus* at all where the petitioner is restrained of his liberty under civil process.

Monk, J. I would not like to go quite as far as Mr. Justice Ramsay, who has a very decided opinion that in civil cases the *habeas corpus* cannot be made applicable. Cases might arise where a person might be detained in jail for years unless released on *habeas corpus*. But I

* Three cases were cited at the bar, *Exp. Cutler*, in which the writ was refused by the Chief Justice and Mr. Justice Cross. In the case of *Martin* there was no judgment ordering the imprisonment. 22 L. C. J. pp. 85 and 86. And in *Exp. Thompson*, Mr. Justice Cross refused the writ in chambers; ib. p. 89. See also *Exp. Healey*, decided by me in chambers; ib. 138.

think the question of the power of the Court does not come up here, because the petition must be rejected as unfounded.

R. & L. Laflamme for petitioner.

Davidson (C. P.) for the Crown.

ANGERS, Appellant; & MURRAY, Respondent.

Information—Delay for appeal from judgment.

Sir A. A. DORION, C.J. A motion is made by the respondent to reject the appeal, because the writ was not issued within forty days after the judgment, under art. 1038, C.C.P. The action was in the name of the Attorney-General, to annul letters-patent. Art. 1035 says that all demands for annulling letters-patent may be made by suits in the ordinary form, or by *scire facias*, upon information brought by Her Majesty's Attorney-General, or Solicitor-General, &c. Art. 1037 says: "An appeal lies from the final judgment rendered upon such information, provided the writ of appeal issues within forty days from the rendering of the judgment." Here there is no doubt that the writ of appeal issued more than forty days after the rendering of the judgment, but in answer to that objection it is said that this is not an information, but an ordinary suit (1035 C.C.P.), and that the limitation only applies when the proceeding began by information and *scire facias*. We have already decided that the Attorney-General is now the only person who can take proceedings to annul letters-patent. There is hardly any distinction between an information and a declaration. The only difference is that the Queen lays an information before her Courts that an abuse exists, and a declaration states a complaint. It would be very singular that the Attorney-General should have a year for an appeal if the proceeding was by ordinary suit, and only forty days if by information. Blackstone says the *scire facias* does not vary much from the ordinary proceeding. We think the only delay for appeal in these cases, whether by information or by suit in the ordinary form, is forty days, and therefore the present appeal, being taken after the delay expired, is dismissed.

Abbott, Tait, Wotherspoon & Abbott for appellant.

W. W. Robertson for respondent.

CITIZENS INSURANCE CO., Appellants; & LAJOIE, Respondent.

Judgment settling the facts for jury trial—Désistement from judgment.

Sir A. A. DORION, C.J. This is a motion for leave to appeal from an interlocutory judgment of the Superior Court settling the facts for a jury trial. The defendants are dissatisfied with the settlement of facts as made by the judge. The plaintiff is also dissatisfied, and declares in writing that he wishes to desist from the judgment of the Court below. But the defendants wish to go on with their appeal and to have the facts settled by this court. We do not think, as both parties are dissatisfied with the judgment, that we should allow the appeal. It would only cause useless delay and expense. We therefore, give *acte* to the plaintiff of his declaration that he desists from the judgment, and we say that the motion of the Citizens Insurance Company is only granted as to costs, thus sending the parties to the court below to have the facts settled. We do not mean to say that this court has no right to settle the facts on an appeal; where only one of the parties is dissatisfied with the facts settled, it is quite probable that we would entertain the application for leave to appeal. But here, as neither party is satisfied with the facts, we send them again before the judge of the court below.

Abbott, Tait, Wotherspoon & Abbott for Appellants.

Archambault & David for Respondent.

OUIMET, Appellant; & DESJARDINS, Respondent.

Surety on appeal bond.

Sir A. A. DORION, C. J. The respondent has moved that appellant be ordered to furnish new security, one of the sureties being insolvent, and the other being over 70 years of age, and not liable to coercive imprisonment. As to one of the sureties, Louis Dupuy, the writ of insolvency was produced. The motion is granted as to him, and he must be replaced within 15 days. As to Guilbault, the other surety, it was not established that he was over 70 years of age, and the motion is rejected.

RAMSAY, J. I concur. The appellant should have destroyed the presumption arising from the writ, and therefore further security must be given. As to the other surety, there is no evidence of the age, even if the pretention were

good. If the age had been proved a curious question might have arisen. Art. 2276 C. C. says that "no priest or minister of any religious denomination, no person of the age of 70 years or upwards, and no female, can be arrested or imprisoned, by reason of any *debt* or *cause* of *civil action*, except such persons as fall within the cases declared in articles 2272 and 2273." By articles 2272, 2273, judicial sureties are enumerated. So it would seem that they are within the exception, and are liable to *contrainte* even after 70 years of age. And so it was held in the case of *Leverson & Boston*, that the Sheriff was liable to *contrainte par corps* even after he had attained the age of 70. But as Codes are created for the purpose of rendering the law obscure where otherwise it would be clear, we have Art. 793 C. C. P., which declares that the debtor may obtain his discharge if he has attained to and completed his seventieth year. And still we are admonished not to refuse to adjudicate under *pretext* of the silence, obscurity or insufficiency of the law. (Art. 11 C. C.)

At the argument another difficulty was raised, namely, that the surety in appeal was not *contraignable par corps*, and consequently his age did not signify. Art. 2272 says: "The persons liable to imprisonment are (3) any person indebted as a judicial surety." By Art. 1930 there is a learned classification of "suretyship," followed by definitions of the different sorts. It says: "Suretyship is either conventional, legal or judicial. The first is the result of agreement between the parties, the second is required by law, and the third is ordered by judicial authority." Now appellant argues that the judicial surety alone is *contraignable*, and that the surety on an appeal bond, although required by law, is not ordered by *judicial authority*, and consequently that he is not *contraignable par corps*.

B. A. T. De Montigny for appellant.

L. O. Taillon for respondent.

BREWSTER, Appellant, and LAMB, Respondent.

Appeal to Privy Council—Security received without leave to appeal first obtained—Execution suspended by giving security.

Sir A. A. DORION, C.J. A motion has been made on the part of respondent that the record be transmitted to the Court below, in order that the judgment may be executed. Lamb obtained a judgment against Brewster in the Court below. Brewster appealed, and in this Court the judgment was reformed. On the day judgment was rendered, a motion was made by appellant for distraction of costs. Five days afterwards Brewster presented a petition to me sitting in Chambers, alleging that the lawyer who was charged with the case was prevented from being present at the rendering of judgment; that appellant was desirous of appealing to the Privy Council; and he prayed that he be allowed to give security, and that the petition for leave to appeal stand as a rule for the first day of next term. After conferring with the other judges, I consented to security being received *de bene esse*, and rejected the rest of the petition. Lamb now moves, not that the security be rejected, but that the record be transmitted to the Court below for execution. The question is not without difficulty. Art. 1178 defines the cases where there is an appeal to the Privy Council, and art. 1179 says, "nevertheless, the execution of a judgment of the Court of Queen's Bench cannot be stayed, unless the party aggrieved gives good and sufficient sureties, within the delay fixed by the Court, that he will effectually prosecute the appeal," &c. Usually the Court grants leave to appeal, and fixes a delay for putting in security. Here no delay was fixed by the Court, but the security was given before the expiration of fifteen days—that is, before the plaintiff could have executed his judgment. We think, therefore, the plaintiff does not suffer in any way, and his motion is dismissed. If the party had presented himself after the expiration of the fifteen days, we would probably have decided differently. It is to be remarked that the Code nowhere says it is necessary to ask leave to appeal.

Motion rejected.

Davidson & Cushing for appellant.

Girouard, Wurtele & Sexton for respondent.

GIROUARD, Appellant, and GERMAIN, Respondent.

Appeal from judgment under Insolvent Act—Clause shortening delay for appeal.

Sir A. A. DORION, C.J. A motion is made on the part of respondent to dismiss the appeal, as having been taken after the expiration of the eight days under the Insolvent Act. We have already decided several times that this delay is

fatal. But a question is raised on the part of appellant. It is pretended that the Federal Legislature had no right to shorten the delay fixed by the ordinary rule of procedure for appeals. But if the Federal Parliament had no right to touch the ordinary procedure in a matter of this kind, nothing of the Insolvent Act would remain. Moreover, we have already decided in election matters that the Dominion Legislature has a right to legislate on matters of procedure incidental to a subject assigned to it.

Appeal dismissed.

M. Mathieu for appellant.

A. Germain for respondent.

MATTINSON et al. (*tiers saisis* below), Appellants, and CADIEUX (plff. below), Respondent.

Contestation of declaration of garnishee must be proved like declaration in ordinary suit—Appeal lies from every judgment of Superior Court, irrespective of amount in dispute.

The appeal was from a judgment of the Superior Court, Montreal, (Johnson, J.) 27 Sept. 1878, maintaining a contestation by the plaintiff Cadieux of the declaration of the garnishees Mattinson et al. The garnishees did not answer the contestation of their declaration, and judgment was rendered against them *ex parte*: "Attendu que les dits Mattinson, Young & Co. n'ont pas produit de réponse à la dite contestation, dans le délai requis par la loi, la cour maintient la dite contestation," &c.

The garnishees appealed, alleging that judgment could not be rendered against them without proof of the contestation. Art. 627 says contestations of garnishees' declarations are subject to the same rules as those of ordinary suits; a garnishee who fails to answer a contestation of his declaration is in exactly the same position as a defendant sued in an ordinary action who fails to plead, and, in an ordinary action, the plaintiff is bound to prove his demand.

The respondent submitted that the case came under Art. 144 C. P.: "Every fact, the existence or truth of which is not expressly denied or declared to be unknown, is held to be admitted."

The COURT held that it was necessary to prove the allegations of the contestation, and the judgment was reversed, the judgment being as follows:—

"Considérant qu'en vertu des Art. 1115 et 1116 du Code de Procédure, il y a appel de tout jugement rendu par la Cour Supérieure, quelque soit le montant de la demande ou de la somme en litige; et que le jugement rendu en cette cause est sujet à appel en vertu des articles ci-dessus;

"Et considérant que l'intimé n'a fait aucune preuve des allégués contenus dans sa contestation de la déclaration des appelants comme tiers saisis;

"Et considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure à Montréal le 27e jour de Septembre, 1878;

"Cette Cour casse et annule le dit jugement du 27 Septembre, 1878, et renvoie la contestation de l'intimé de la déclaration des appelants comme tiers saisis, et condamne l'intimé aux frais encourus tant en Cour inférieure que sur le présent appel."

Judgment reversed.

Archibald & McCormick for appellants.

Longpré & David for respondent.

MAY et al. (plffs. below), Appellants; and L'HEUREUX (opposant below), Respondent.

Serment Judiciaire submitted to complete proof of Opposant's ownership of moveables.

The appeal was from a judgment of the Superior Court, Montreal, (Jetté, J.) 6th Dec., 1878, maintaining an opposition *afin de distraire* filed by respondent, wife *séparée de biens* of one Fréchet, defendant in the cause. A large number of articles had been seized by appellants under an execution, the articles being in the house occupied by defendant and his wife, the opposant.

The opposant proved ownership as to all but two or three articles, and the Court below, by an interlocutory judgment, ordered the *serment judiciaire* to be deferred to opposant to complete the proof as to these articles. The Judge remarked:—

"L'opposante, épouse séparée de biens du défendeur, s'oppose à la vente des effets saisis sur ce dernier, les réclamant comme sa propriété privée.

"Les demandeurs ont contesté l'opposition en se contentant d'en nier toutes les allégations.

"L'opposante a donc été obligée de prouver son titre à la propriété de tous les effets saisis

Il y a au-dela de cent articles mentionnés au procès-verbal de saisie, et la preuve me parait satisfaisante pour tous ces articles moins quatre : deux tapis, dix verges de toile peinte et un miroir, pour lesquels il n'y a aucune affirmation spéciale. Cependant, la preuve de l'opposante, qui n'a pas été contredite, établit en outre généralement que tous les effets dans la maison du défendeur appartiennent à l'opposante, sa femme, et lui ont toujours appartenu. Sous ces circonstances, je crois devoir déférer le serment à l'opposante pour compléter la preuve quant à ces articles, C. C. art. 1254."

The opposant having sworn to her property, the opposition was maintained.

The plaintiffs appealed on the ground of insufficiency of proof, and also because the judicial oath had been illegally submitted.

The COURT held that under the circumstances the oath had been properly submitted, and the judgment was confirmed.

Judgment confirmed.

C. H. Stephens for Appellants.
Longpré & David for Respondent.

O'BRIEN (plff. below), Appellant, and WEAVER, (deft. below), Respondent.

Sale—Price payable partly in stock not fully paid paid up, which the company refused to transfer to vendor.

The appeal was from a judgment of the Superior Court, Montreal, (Loranger, J.), dismissing the plaintiff's action.

The plaintiff, appellant, brought an action against the respondent to compel him to take a deed of three lots of land in Mount Royal Vale, near Montreal, and praying that respondent be condemned to pay him $500 cash, and to transfer to him a sufficient number of fully paid up shares in the capital stock of the Montreal Railway and Newspaper Advertising Company, to make the equivalent of $2500.

It appeared that respondent held fifty shares of the stock, on which $55 per share had been paid, and $45 per share was unpaid. He bargained with appellant to transfer this stock to him, and to pay him in addition $500 cash, for the three lots in question. The company, however, refused to transfer the stock to appellant, on the ground that he would not be good for further calls, if any were made. The respondent then wrote the following letter to appellant :—

"Montreal, 7th June, 1878.

"T. F. O'Brien, Esq.

"Dear Sir,—I am sorry that I cannot hold to my bargain for those building lots, that I chose last Tuesday afternoon, as the Directors of the Advertising Co. will not accept you as a guarantee, in case that any more calls are made. For further explanation please call on the President, A. W. Ogilvie, Esq., or myself.

"Hoping that there is no harm done as it is not my fault.

"I remain, Yours, &c.,

"A. O. W."

The appellant then tendered a deed for signature, and prayed that respondent be condemned to pay him $500, and to transfer to him a sufficient number of fully paid up shares in the stock of the Company to make the equivalent of $2500.

The respondent pleaded in effect that he never purchased the land or bargained for it in any other way or for any other consideration than the acceptance of the stock, and that the $500 in cash was only agreed to be given for the purpose of getting the appellant to accept the stock, and thus relieve respondent from liability for further calls.

The judgment of the Court below dismissed the action : "Considérant que le demandeur n'a pas établi légalement et suffisamment que le défendeur soit jamais convenu avec lui d'acheter les lots de terre mentionnés en la déclaration pour trois milles piastres, cinq cents piastres payables comptant, et deux milles cinq cents piastres, la balance, par des actions payées dans la Montreal Railway and Newspaper Advertising Company, que le défendeur ne soit jamais engagé à signer un acte de vente à cet effet, et notamment, le projet d'acte de vente relaté en la déclaration, et que, conséquemment, il a failli à établir un droit d'action contre le défendeur dont il n'est pas nécessaire d'apprécier les défenses, voir l'absence de preuve du fait fondamental de la demande, a débouté et déboute le demandeur de son action, avec dépens."

In appeal,

The COURT held that the action had been rightly dismissed. The agreement by respondent was to give the stock as it then was, 55 per cent.

paid up, and appellant's demand for fully paid up stock could not be sustained.

Judgment confirmed.

J. L. Morris for appellant.

Gilman & Holton for respondent.

Ross v. Smith, and Cantin, opposant.—In the note of this case at p. 76, it is stated that Mr. Justice Rainville dissented from the judgment. This was so recorded in the prothonotary's entry, but we understand that it was a clerical error. Mr. Justice Rainville, though formerly of a different opinion, did not, in fact, record any dissent from the judgment of the Court of Review in *Ross* v. *Smith*.

THE LAW OF TRADE MARKS.

Scarce a week passes during the legal year without some addition being made to the authorities upon the Law of Trade Marks. In a case which was heard on the 24th instant, on appeal from the Master of the Rolls (*Re* Worthington's Trade Mark), the question for decision was whether certain brewers were entitled to register a trade-mark which consisted of a triangle with the picture of a church inside, and the name and address of the firm around it. One of the well-known brewery firms had already adopted a triangle of a different color and without the picture inside. Was the former mark so like the latter that it was "calculated to deceive" within the meaning of the Trade Marks Registration Act? The Master of the Rolls decided the question in the affirmative. He thought that, if the applicants were allowed to register the proposed mark, they might subsequently color it red, the color of the trade mark already registered, so as to obscure the church, and that the proposed mark was in fact an unfair attempt to gain advantage by adopting a mark as nearly as possible resembling the other. Registration was accordingly refused. On appeal this decision was upheld by Lords Justices James, Brett and Cotton. What is the object of the Trade Marks Registration Act? In the words of Lord Justice James, it is to prevent the mischief arising from one trader adopting a similar mark to that already used by another trader. His Lordship admitted that, if the marks were used in black and white only, there would be a substantial difference between them. The Act, however, founded no distinction upon differences of color. Hence, if the appellants' marks were registered, there would be nothing to prevent them from adopting a red color. Lord Justice Brett thought there were two questions—one of law, the other of fact, the former being whether, in construing the Act, the marks were to be looked at only as printed in the advertisements, or as they would probably be used in the trade. Nothing was said in its provisions about outline, form or design. The thing to be registered was stated to be "a distinctive device, mark, heading, label or ticket." "That being so," said his Lordship, "and the mischief being one which was to be done in the course of the trade, it would be a narrow construction to say that you were only to look at the mark as printed in the advertisements, and not as it would be used in the trade. There is nothing in the Act to prevent a trade-mark from being used in any color. In registering a trade-mark, not only the outline or design as registered will be protected, but the trade-mark which can be used in the trade." The question then was resolved into this: assuming both trade-marks to be registered, and the owner of each to be ignorant of the other, would any fair use of either be calculated to deceive, both being of the same color? This raised the question of fact, which was answered in the affirmative. The Lords Justices, however, were not altogether unanimous, for Lord Justice Cotton entertained great doubts as to the decision of the Master of the Rolls. Speaking for himself, he was of opinion that there was sufficient difference between the two marks and distinctness of device to prevent the court from arriving at the conclusion that the proposed mark was so similar to that already registered as to be calculated to deceive. This difference of opinion was, it will be noticed, really upon a question of fact. It had no influence upon the result of the case.—(London) *Law Times*.

GENERAL NOTES.

Metallic Fasteners. — The Master of the Rolls in England, it is rumored, dislikes metallic fasteners for papers in his Court as much as the Montreal Judges abhor documents on tissue paper. His Honor desires to return to the use of silk or red tape.