defendant had not appeared within the time limited, but had subsequently entered an appearance, but had not served any notice of appearance. Notice of the motion had been posted up in the office as in case of non-appearance. This appears to be sufficient under Rules 61, 131.

FERGUSON, J.—The service of the notice of motion seems to be regular under the Rules to which you refer, but is the action ripe for judgment, must there not be a statement of claim filed?

Bain continued—It is not necessary to serve any statement of claim. There is nothing in the Rules making it necessary to do so. Rules 158 and 159 do not provide for the delivery of a statement of claim where a defendant does not appear. He referred also to Rules 5, 11, 159, 315, and *Minton* v. *Metcalfe*, 46 L.J., Chy. 584.

FERGUSON, J., Rule 211 provides that judgment may be given upon a statement of claim, but what authority is there for giving judgment according to the endorsement on a writ except in the special cases provided for by Rules 72-81?

Bain, I do not think there is any express authority; it is to be implied from Rule 315.

Cur. ad. vult.

Nov. 30.—FERGUSON, J.—I am of the opinion that the case is not ripe for judgment, and should not have been set down. The endorsemet is not a "special endorsement" within the meaning of Rules 14 or 15, or any of the Rules under which judgment can be entered by default for want of an appearance, so far as I can see, and I do not find in the Act or Rules any authority for setting the case down on a motion for judgment in its present stage.

I think the plaintiff must either file a statement of claim, or proceed under the provisions of Rule 159. It is not clear, however, that the latter course is open to him, owing to the nature of the matter contained in the so-called "special endorsement." The plaintff, should, I think, file his statement of claim.

The motion will be refused.

PRACTICE CASES.

Mr. Dalton, Q.C.] [Dec. 4, 1881.

HOPKINS v. SMITH.

Costs of day.

The practice of giving costs of the day is superseded by the O. J. A., as, if the plaintiff fails to set the case down, the defendant may do so, and then costs are in the discretion of the judge at the trial.

The Master in Chambers has now no authority to make an order for such costs.

Holman, for motion.

J. H. Macdonald, contra.

Osler, J.] [Nov. 10.

FEE v. MCILHARGEY.

Prohibition—Division Court—New trial.

After judgment in an action in a Division Court of the County of Victoria, the defendant, within the fourteen days required by Div Ct. Act, sec. 107, moved, on notice filed with the clerk of the Court, for a new trial, on the ground of the discovery of fresh evidence, but did not file an affidavit under Division Court rule 142. An affidavit was subsequently filed, the motion heard, and a new trial granted by the County Court judge.

This was a motion for a prohibition, on the ground that the rule, having the effect of a statute, by sec. 241 an omission to observe its requirements was as much a ground of prohibition as if the application itself had been made after time.

OSLER, J.—The general rules of the Division Court, framed by the judges under the authority of the statute, are rules of practice, and it is well settled that the transgression of a mere rule of practice forms no ground for prohibition, at all events, if the court proceeds to sentence or judgment on the particular motion before prohibition is moved for. *Jolly* v. *Baines*, 12 A. & E., 201-9, is precisely in point.

Motion refused with costs.

Aylesworth, for the motion.

T. Hodgins, Q.C., contra.

Boyd, C.] [Nov. 22.

TILT v. KNAPP.

Administration.

The property was sold under a decree of the court.

The conditions of sale were the standing conditions of sale of the court.

The purchaser paid 10% of his purchase money into Court, but made default in paying the balance, and the property, on a resale,