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DIARY FOR DECEMBER.

3. Sun... *Advent Sunday.*
4. Mon.. Armour, J., sworn in Q.B., 1877.
5. Tue.. County Court sittings begin.
6. Wed.. Rebellion in Canada, 1837.
9. Sat... Michaelmas Sittings end.
10. Sun... *2nd Sunday in Advent.*
11. Mon.. Blake, V.C., sworn in, 1872.
12. Tue.. County Court Sittings (except York) begin.
15. Fri... Morrison, J., sworn in Court of Appeal, 1877. Christmas vac. in Supreme Ct. and Exch. Ct. begins.

TORONTO, DEC. 1, 1882.

WE regret to say, both for his own sake and for that of our readers, that the gentleman who has hitherto prepared, with so much care and success, the "Recent Decisions" and "Notes of English Practice Cases" for this journal, has been seriously ill for some time, thus causing a temporary breack in the series. We trust, however, that he will soon be able to take up the thread of his narrative again.

THE "act of God or the Queen's enemies" is supposed to cover a multitude of difficulties. It has recently been held by the Supreme Court of California in *De Thomas* v. *Witherby*, (Central L. J., Oct. 20), that when property which has been wrongfully replevied is destroyed by act of God, such destruction will not relieve the liability of the wrong-taker. The point was in doubt in the American Courts, but this decision will doubtless be accepted as final, being founded on reason and justice.

THE conveyancing shoe is beginning to pinch in England. Since Lord Cairns' Act, which has reduced the length of conveyances, clients seem occasionally to have been staring at the continued length of their bills, being under the impression that the latter should be curtailed as well as the former. And worse than that, in country places it is said that this business is falling into the hands of accountants, and such like. A correspondent of a cotemporary says, "We have to pay for renewal certificates, like auctioneers—£6 for a country solicitor, £10 for the other. We are without the slightest protection—the auctioneer fully so. It may not be hard for large offices; but country solicitors, of small practice, complain bitterly."

MORE than a year ago (ante vol. 17, p. 201) we did not scruple to denounce the legislation which has come before the Courts in the *cause celebre* of *McLaren* v. *Caldwell*. The Supreme Court, which has just upset the majority judgment of the Court of Appeal, was so impressed with the iniquity of the measure, as to say that it was not possible to attribute to the Legislature an intention so "unreasonable and unjust," and, giving that body credit for a desire to do justice, decided that it never intended, and therefore had not in law interfered with the enjoyment of Mr. McLaren's rights as a private citizen. The Court was unanimous, and it is to be hoped, for the credit of the country, that there will be an end of a very questionable piece of legislation; and those that were concerned in it should thank the Supreme Court for thus giving them a loop-hole to creep out of.

A COTEMPORARY in the United States says: "In a composite form of government like ours, a certain amount of friction must inevitably be generated by the workings of the

Federal and State systems, and no point of contact has been more fruitful of discord than the government and regulation of the great transportation companies, which, as agencies of commerce, are one of the striking features of the age."

These remarks are peculiarly striking, in view of the present agitation in Manitoba, in reference to the disallowance of railway charters by the Dominion Government. To a lawyer it seems almost impossible to see more than one side to this question. In its present position it is a mere matter of contract between the public and the Railway Company, and the position of the latter seems unassailable. The duty of those who happen to be charged with conducting the public business, is simply to carry out the bargain under which the work was begun and liabilities incurred, until such time as the legal position of the parties may be changed, either by mutual agreement or by constitutional legislation.

BILLS OF LADING.

POLLARD *v.* VINTEN.

OUR valued contemporary, *The English Law Magazine*, remarks, in its last number, that at the forthcoming Tenth Conference of the Association for the Reform and Codification of the Law of Nations, at Liverpool, the subject of Bills of Lading was expected to form one of the prominent topics of discussion, and reproduces at full length the judgment of the Supreme Court of the United States, in a recent case of *Pollard* v. *Vinten*, reported in the *Virginia Law Journal* for June, in which Mr. Justice Miller, in delivering the opinion of the Court, was led to enter at some detail into the analysis of the character and effects of a Bill of Lading. The point actually decided was that an agent of a ship owner, with authority to execute and deliver Bills of Lading, has no authority, nor does it come within the scope of his employment, to deliver such Bills so as to bind his principal, unless the goods comprised have been actually received on board; and consequently, one who had advanced money in good faith on a Bill of Lading received from such an agent, the goods comprised in which had never been taken on board, and consequently never delivered by the ship owner, was held not to be entitled to recover against such ship owner for such non-delivery, although the Bill, as usual, contained a receipt for the goods. A previous decision (*Schooner Freeman* v. *Buckingham*, 18 How. 182,) to the same effect is cited.

On the general subject of Bills of Lading, apart from the question as to agency involved in this case, the judgment enumerates the following propositions:—

"A Bill of Lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hand of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without endorsement, and is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all enquiry into the transaction in which it originated because it has come into the hands of persons who have innocently paid value for it. The doctrine of *bona fide* purchasers only applies to it in a limited sense. It is an instrument of a two-fold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received there can be no valid contract to carry or to deliver."

POLICEMEN AND THEIR DUTIES.

Mr. Justice Hawkins has recently written an address to police constables, which will be found as a prefix to Mr. Howard Vincent's "Police Guide." It is so excellent in itself, and comes from such a high authority that we make no apology for inserting it at length. Mr. Justice Hawkins has had a larger experience of criminal law, and therefore of the rights and wrongs of policemen, than most judges. He says:—

"In the few words I purpose addressing to you it is not my intention to define every duty of a police constable, but rather to point out some matters that all who desire to become good officers ought constantly to bear in mind; for, by strict attention to them, every man may assuredly raise himself to a high position in the force; and, by neglect of them, he is equally sure always to occupy a low one. First of all let me impress upon you the necessity of absolute obedience to all who are placed in authority over you, and rigid observance of regulations made for your general conduct. Such obedience and observance I regard as essential to the existence of a police force. Obey every order given to you by your superior officer without for a moment questioning the propriety of it. You are not responsible for the order, but for obedience. In yielding obedience let the humblest member of the force feel that, by good conduct and cheerful submission, he may himself rise to be placed in authority to give those orders he is now called on to obey. As to the regulations, a single moment's reflection will teach you that when so many men of different classes and habits are enlisted in one service, some rules applicable to all are necessary for the purpose of ensuring uniformity in discipline, action, conduct, and appearance; therefore it is that there are regulations exacting sobriety, punctuality, and cleanliness, and many other matters to which I need not refer. The slightest disobedience in one begets a bad example to others, and if this bad example is followed by a few, is calculated to disorganize and bring discredit upon the whole body. Let me now say something to each of you as to the mode in which your obligations to the public ought to be performed. Depend upon it, to become a good and efficient officer you must, when on duty, allow nothing but your duty to occupy your thoughts. You must studiously avoid all gossiping. You must not lounge about as though your sole object were to amuse yourself, and kill the hours during which the public has a right to your best services, and during which constant vigilance and attention to what is passing around you is expected from you. It is this gossiping, lounging habit which sometimes gives rise to the observation that a policeman is never to be found when he is most wanted. Moreover, a man who gives way to such a habit never observes with so much accuracy that which occurs before his eyes, as he who makes it his endeavour to fix his attention upon all that is passing about him. This is a habit not difficult to acquire if you are in earnest; and, when once acquired, you will find the cultivation of it a source of pleasure, and the hours of duty much less irksome. I may add, too, that the man who takes no pains to acquire this habit, for want of attention, generally makes a very bad and inaccurate witness. I wish you to feel the importance of a steady constant endeavour, by your vigilance, to prevent crime as much as possible, and not by your negligence tempt persons to commit it; as you do if you fail in attention to your duty. To my mind, the constable who keeps his beat free from crime deserves much more credit than he does who only counts up the number of convictions he has obtained for offences committed within it. It is true the latter makes more show than the former, but the former is the better officer. The great object of the law is to prevent crime; and when many crimes are committed in any particular district one is apt to suspect that there has been something defective in the amount of vigilance exercised over it. Whatever duty you may be called on to perform, keep a curb on your temper. An angry man is as unfit for duty as a drunken one, and incapable of calmly exercising that discretion which a constable is so often called on to exercise. Be civil and listen respectfully to everybody who addresses you; and if occasionally you are remonstrated with for the course you are taking, do not hastily jump to the conclusion, as some constables do, that the person who so remonstrates wishes to obstruct you in the execution of your duty. Beware of being over-zealous or meddlesome. These are dangerous faults. Let your anxiety be to do your duty, but no more. A meddlesome constable, who inter-

feres unnecessarily upon every trifling occasion, stirs up ill-feeling against the force, and does more harm than good, An over-zealous man, who is always thinking of himself, and desiring to call attention to his own activity, is very likely to fall into a habit of exaggeration, which is a fatal fault, as I shall presently show you. Much power is vested in a police constable, and many opportunities are given him to be hard and oppressive, especially to those in his custody. Pray avoid hardness and oppression; be firm, but not brutal; make only discreet use of your powers. If one person wishes to give another into your custody for felony you are not absolutely bound to arrest. You ought to exercise your discretion, having regard to the nature of the crime, the surrounding circumstances, and the condition and character of the accuser and the accused. Be very careful to distinguish between cases of illness and drunkenness. Many very serious errors have been committed for want of care in this respect. Much discussion has on various occasions arisen touching the conduct of the police listening to and repeating statements of accused persons. I will try, therefore, to point out what I think is the proper course for a constable to take with regard to such statements. When a crime has been committed, and you are engaged in endeavouring to discover the author of it, there is no objection to your making enquiries of, or putting questions to, any person from whom you think you can obtain useful information. It is your duty to discover the criminal if you can, and to do this you must make such inquiries; and if in the course of them you should chance to interrogate and to receive answers from a man who turns out to be the criminal himself, and who inculpates himself by these answers, they are nevertheless admissible in evidence, and may be used against him. When, however, a constable has a warrant to arrest, or is about to arrest, a person on his own authority, or has a person in custody for a crime, it is wrong to question such person touching the crime of which he is accused. Neither judge, magistrate, nor juryman, can interrogate an accused person, and require him to answer questions tending to criminate himself. Much less, then, ought a constable to do so, whose duty as regards that person is simply to arrest and detain him in safe custody. On arresting a man the constable ought simply to read his warrant, or tell the accused the nature of the charge upon which he is arrested, leaving it to the person so arrested to say anything or nothing as he pleases. For a constable to press any accused person to say anything with reference to the crime of which he is accused is very wrong. It is well also that it should be generally known that if a statement made by an accused person is made under or in consequence of any promise or threat, even though it amounts to absolute confession, it cannot be used against the person making it. There is, however, no objection to a constable listening to any mere voluntary statement which a prisoner desires to make, and repeating such statement in evidence; nor is there any objection to his repeating in evidence any conversation he may have heard between the prisoner and any other person. But he ought not, by anything he says or does, to invite or encourage an accused person to make any statement, without first cautioning him that he is not bound to say anything tending to criminate himself, and that anything he says may be used against him. Perhaps the best maxim for a constable to bear in mind with respect to an accused person is, "Keep your eyes and your ears open, and your mouth shut." By silent watchfulness you will hear all you ought to hear. Never act unfairly to a prisoner by coaxing him, by word or conduct, to divulge anything. If you do, you will assuredly be severely handled at the trial, and it is not unlikely your evidence will be disbelieved. In detailing any conversation with an accused person, be sure to state the whole conversation, from the commencement to the end, in the very words used; and, in narrating facts, state every fact, whether you think it material or not, for you are not the judge of its materiality. Tell, in short, everything; as well that which is in favour of the accused as that which is against him; for your desire and anxiety must be to be fair, assist the innocent, and not convict any man by unfair means, such as suppressing something which may tell in his favour, even though you feel certain of his guilt. Unfairness is sure to bring discredit upon those who are guilty of it. If an accused in a conversation with you states any circumstances which you have the means of inquiring into, you ought, whether those circumstances are in his favour or against him, to make such inquiry, and the witnesses who can prove or disprove the truth of the statement ought to be taken before the magistrate when the prisoner is examined; and if an ac-

cused person desire to call witnesses, the police should assist him to the best of their power. I cannot too strongly recommend every constable, however good he may fancy his memory to be, to write down word for word every syllable of every conversation in which an accused has taken a part, and of every statement made to him by an accused person, and to have that written memorandum with him at the trial. The last but most important duty I would enjoin upon you is, on every occasion, "Speak the truth, the whole truth, and nothing but the truth." Let no consideration, no anxiety to appear of importance in a case, no desire to procure a conviction or an acquittal, no temptation of any sort, induce you ever to swerve one hair's breadth from the truth—the bare, plain, simple truth. Never exaggerate, or in repeating a conversation add a tone or colour to it. Exaggeration is often even more dangerous than direct falsehood, for it is an addition of a false colour to truth; it is something more than the truth; and it is most dangerous, because it is difficult to detect and separate that which is exaggeration from that which is strictly true; and a man who exaggerates is very apt to be led on to say that which he knows to be false. On the other hand, suppress no part of a conversation or statement, nor any tone or action which accompanies it; for everything you suppress is short of the whole truth. Remember always that reliance is of necessity placed in Courts of justice upon the testimony of policemen; and bear constantly in mind that in many cases the fate of an accused man, which means his life or his liberty, depends upon that testimony; and seriously reflect how fearful a thing it is for a man to be convicted and put to death, or condemned in penal servitude or imprisonment, upon false testimony. Remember, also, when you are giving evidence, that you are not the person appointed to determine the guilt or the innocence of a person on his trial, nor have you any right to express an opinion upon the subject. Your duty is a very simple and easy one—namely, to tell the Court all you know. The responsibitity of the verdict, whether it be guilty or not guilty, rests entirely with the jury or the magistrate (if the case is tried in a police Court), and they have a right to expect from you everything within your knowledge to enable them to form a just conclusion. It is right that I should tell you that wilfully to tell a falsehood, or pervert the truth, in a Court of justice, is perjury; and you all know perjury is a crime punishable with seven years' penal servitude, and your own common sense will tell you that when perjury is committed by an officer of justice he deserves and ought to receive a very severe sentence. Resolve, then, on every occasion to tell the plain, unbiassed, unvarnished truth in all things, even though it may for a moment expose you to censure or mortification, or defeat the object or expectations of those by whom you are called as a witness. Depend upon it, the censure or mortification will be as nothing compared to the character you will earn for yourself as a truthful, reliable man, whose word can always be implicitly depended upon, and the very mortification you endure will be a useful warning to you to avoid, in the future, the error you have candidly confessed. I could write a great deal more on the subjects I have touched; but then my address to you would be too long for this little work, which is intended for your guide, and wherein you will find your duties upon various occasions more fully defined. I have only endeavoured, in a few friendly sentences, to point out to you a line of conduct, the steady adoption of which will enable every man in the police service to feel that he is on the high road to all that he can desire, having regard to the important and very responsible calling he has selected for himself."

REPORTS

ONTARIO.

(Reported for the Law Journal.)

THE PARRY SOUND LUMBERING CO. V. FERRIS ET AL.

The Act respecting water privileges—R. S. O. Cap. 114.

Applicants petitioned to dam back the water of a lake some twenty miles distant from their mill so as to improve their water privilege. To do this they would flood over 200 acres of land, overflow a travelled road, and, according to the evidence, the effect of the flooding would be to make the neighbourhood of the lake very unhealthy.

Application refused as not being conducive to the public good, R. S. O. cap. 114, sect. 7, and for other reasons set out in the judgment.

The facts of the case and arguments sufficiently appear in the judgment.

T. S. Plumb, for applicants.

H. H. Strathy, for contestants.

ARDAGH, Co. J.—This is an application under the above statute to acquire portions of the lands of certain parties residing on the shores of Lake Lorimer, in the District of Parry Sound. The applicants have large saw-mills at the mouth of the Seguin River, into which river the waters of Lake Lorimer eventually discharge after passing through and forming a creek called Still Creek, and two smaller lakes. The object of the applicants is to store up a supply of water in Lorimer Lake, tnrning it into a large reservoir, by erecting a dam where Still Creek leaves the lake. Indeed, the dam has already been erected, and raises the water to about the height of eight feet above the level of the lake, thus flooding the lands of those parties who reside on the shores. The surplus water it is proposed to use as occasion requires, whenever the natural flow of the Seguin River may prove insufficient for the working of applicants' saw-mills.

Out of some thirteen persons affected by this flooding, the applicants have obtained grants of the right to flood from ten; of the remaining three (who are made defendants in this application) one of them, Mr. John Bell, is a resident of the United States, and does not appear to have had any notice of these proceedings. The other two, Francis B. Ferris and Edward Bell, appear and oppose the application.

Viva voce evidence has been taken on both sides, the necessary formalities and preliminary steps required by section four of the Act appear to have been regularly complied with and taken by the applicants. The maps filed show clearly what amount of land is required to be submerged—some 200 or 300 acres altogether. But of this only a comparatively small portion belongs to Ferris and Bell, some 20 acres or thereabouts.

The reasons for making this application are thus stated by Mr. David Beatty, a surveyor, called by the applicants. In his evidence he says:—"The company manufacture lumber, having a mill on the Georgian bay. Lake Lorimer communicates with the Georgian Bay. It is an offshoot of Seguin River, and would be a sort of reservoir in dry seasons; this would increase the lumbering facilities, and would be likely to prevent the necessity of shutting down the mill. The company does a large business, and employ 150 to 200 men, some of whom are thrown out of employment when the mill shuts down. This industry benefits the country about there. I speak from experince; it circulates money, and working men are able to find employment and live in Parry Sound. There are scores of men who would not be in that country, nor could live in it, but for the lumbering industry."

Another witness, David S. Miller, says:—"The P. S. L. Company have large works at Parry Sound; they benefit the country by affording a better market for produce; they were shut down last summer for want of water, as I was told, which prevented less money from being in circulation. (He evidently intended to say 'more money.') Raising this lake would keep up the supply."

The next witness called, Thomas McGown, says:—"The Company's power is supplied by the Seguin River, of which Lorimer Lake is a tributary. The company has been a benefit to the country. Farmers get a good price for all they raise. They employ 150 men. To keep a head of water up in this lake would be an assistance. They have spent a good deal of money in building reservoirs. Lack of water and some trouble with the Guelph Company caused a stoppage of water last fall."

Upon this evidence it is argued by Mr. Plumb, for the applicants, that I ought to make the order mentioned in sect. 7 of the Act. That sect. reads, "If such judge is of opinion that the allowance of such application will conduce to the public good, and is proper and just under all the circumstances of the case, he shall make an order describing the lands affected thereby, and empowering such persons to exercise the said powers or such of them as he may deem expedient, for such time and for such terms and conditions as he may determine."

At the close of the "plaintiffs" case, Mr. Strathy, for the defendants, took several objections. (1) That the Act never contemplated making a reservoir of this sort 20 miles away. (2) That these being free grant lands the wives of these "defendants" ought to be made parties, inasmuch as under the Free Grant Act (R. S. O. chap. 24), the wife of a grantee or locatee is entitled, on his death, to the same right or interest that he had, and, by sect. 15, every such wife must be one of the grantors in any deed of alienation by her husband to render the same valid. (3) That as to Bell's land, for which no patent has yet issued, the owner cannot be com-

pelled to make a deed of it. See sect. 10 of said chap. 24.

As to the first objection I shall deal with it by and by, only remarking here that the distance of this lake (Lorimer) from the company's mills was stated by Mr. Plumb to be only about 16 miles, though no positive evidence was given of the exact distance. As to the second objection, I think the wives are not necessary parties; they have no vested interest in the lands, only a contingent one; their husbands are the actual "owners and occupiers" of the lands. Suffice it to say that I think the wives of the defendants, and also any other persons, though not named in the record, might have appeared at the hearing and opposed the granting of the application. Whatever may be the interest of the wives, notice to the husbands must, I think, under the circumstances, be held sufficient notice to them.

It seems to me, too, that the conveyance to be made under sect. 10 being compulsory, and made under the order of the judge, can hardly be called an alienation such as is intended by sect. 15 of chap. 24, R. S. O. If it were necessary that the wife should join in such conveyance there is sufficient authority impliedly given by the Act to compel her to execute it, though if this were not quite clear the proper thing to do to preserve the right of the wife would be to limit the time for the exercise of the powers asked for by the applicants to the life-time of the husband, and no longer, unless, indeed, the wife had predeceased him; this sect. 7 of the Act would authorize. The only difficulty in such a case would be the quantum of damages to be allowed. As to the third objection, as it is only of his "rights" that Bell would be required to make a conveyance, there need be no difficulty on that head.

I now proceed to notice the evidence offered in opposition to the application so far as it relates to the point we are now considering, namely, whether the allowance of it will conduce to the public good, that is, how far such allowance will affect the rights and well being of others, for I think the expression, "public good," is one that is not always an abstract one. There may be times when a case of "public good" is made out so absolutely and completely that the question of the rights of others being interfered with cannot be inquired into. These rights must give way, and the only point then to be determined is that of the amount of the compensation to be paid; on the other hand there will arise a case where the "public good" is not so clearly established, and then it may be only right and proper to enquire what is the extent of the injury or damage arising from the exercise of such a right, as well as the public benefit derived from it, in order to determine the whole question, and have the expression "public good" as a relative one.

This question may be further considered presently when we have looked at the evidence as to the injury likely to ensue from the allowance of this application as well as the good to be gained by the public.

Francis B. Ferris, called to oppose application, says:—"It is healthy around this lake, (Lorimer), and there are lots of fish in it. The frost has not the same effect on crops grown around the lake as on those further off. The effect of granting this application will be that I will have to leave my house. Last year the water came up to the inner line (the witness is referring to the map showing the water line of the proposed flooding, and also the line to which he is referring) and affected my health, as the water created a stench when the hot sun came out. My family all suffered. I was feverish and could not work. I believe it was the effect of the malaria. I suffered this way once before when there was a dam lower down. Never suffered otherwise. The water comes within 28 feet of my dwelling house. I have a spring in my cellar, and it would flood the cellar if the water came to that height. The water touches the out-buildings, though a manure heap prevented it doing so when Mr. Beatty was there and it will flood the floor of it. I could not nor would I live there if the land is flooded, as the effect is to render it very unhealthy. I have seven children and a wife. There is no other Government land to be got like this. I know Bell's property. The water will come within 30 feet of his house. I believe malaria will arise on his place too. I don't think he could live elsewhere on the lot. The flooding prevents his draining a meadow, five or six acres of low ground. There is a lake at the back of his lot, also raised, and so I think he could not safely live between them. The same applies to my lot. I use to go by Still Creek to McKellar mills, with a boat 18 feet long. It averages two rods wide. Some parts are very deep, some shallow.

The channel is very deep. The settlers here all use it for the same purpose with the same sized boats. The dam prevents us using it now. Submerging 200 to 300 acres of land around the lake is destroying the settlement, and the settlers are leaving. The water will submerge the public road and prevent travel. We would have a school section but the settlers are being driven away. Six settlers have been driven away since the dam was built (names given) who would have been in our section. I have brought affidavits from other settlers objecting to this flooding." (I refuse to allow these affidavits to be read). On cross-examination the witness said:—"Before the dam was built the receding water left the ground wet, which dried at once. I don't consider this a public improvement. The company use steam as well as water."

Edward Bell's evidence on the same point is as follows:—"I agree with what Mr. Ferris says that Still Creek is navigable in mid channel. I have used it for going to McKellar mill, where there is a village with stores. There is a portage at Patterson's Falls, (on the way to McKellar village). People have taken logs past McKellar to Seguin River. Flooding the land round the lake is likely to make it unhealthy. Last year, during the flooding, my wife complained of sickness, arising from the stench of the lake. She had not been sick before. She was sick about two months. It began in August. We attributed the illness to the flooding, and I do so still. If the dam is kept there it renders my place unfit for a residence. It raises the water so high that I cannot cross it by a small bridge. I have crossed this bridge for four years without objection. The creek is not in my land. It would give me a mile or a mile and a quarter more to get to the high road. I could not live there, the water being stagnant. I have no other desirable place to build on, it is all bush. There is another small lake touching on the other side of my land. It will not be for the public good to leave this dam. Since it was erected five or six settlers have gone away (names given). I knew them all. I don't know of any one having gone away before that. Those that remain cannot now support a school section. We could have done so before those went away. I believe the cross-way of the public road will be put under water." On cross-examination the witness said:—"I can't say why those people actually left. There are five other settlers round the lake besides the six that have gone, and us two."

In rebuttal, Mr. Beatty was recalled and gave some explanation as to why some of the settlers went away. This is all the evidence given on the question as to this dam being for the public good.

On the argument neither counsel referred me to any cases or text books bearing on this subject, stating what I find, so far as my researches go, to be a fact, that there are no cases on the point to be found in our own reports. I am therefore driven to examine into the law and the cases to be found in American books, for statutes somewhat similar to the one we are now considering have been in force for a long time in several of the neighbouring States. As this case is, so far as I am aware, the first under this Act that has been brought to an actual trial upon evidence, and as it may be useful, on whatever way it eventually terminates, as a precedent in similar application, I feel bound to trace the foundation and history of such legislation as has produced the Act in question.

The legislature have thought fit to exercise the right of "eminent domain" in such matters as railways, which are, undoubtedly, for the public benefit; and have enacted that any lands may be taken which are required for such a purpose, without any possible objection or demur on the part of the owner; the only question to be settled by the Courts, if the owner and company cannot agree, being that of compensation for the lands required and taken.

Under the "Act respecting water privileges," however, the case is different. Here the legislature only says that the right of taking another man's property *may be* exercised provided the judge is of opinion that the allowance of the application to exercise such right "will conduce to the public good, and is proper and just under all the circumstances of the case." I am, therefore, somewhat in the position of a member of a legislature which has been called upon to pass an Act empowering the company to carry out their purpose. As such I will consider the question, and state my reasons for the conclusion I may come to. Upon the right of eminent domain, or the right which the Government retains over the estates of individuals to appropriate them to public use, Vatel says:—"To this

power men have impliedly yielded, though it has not been expressly reserved."—(Chap. 20, s. 34.) Bynkershoek (*lib.* 2. chap. 15,) says:—"This eminent domain may be lawfully exercised whenever public necessity or public utility requires it, and this law seems to be universally recognized."

In Blackstone we read, (Vol. I., p. 139,) "So great is the regard of the law for private property that it will not authorize the least violation of it, no, not even for the general good of the whole community. . . If a new road were to be made through the grounds of a private person it might perhaps be extensively beneficial to the public, but the law permits no man or set of men to do this without the consent of the owner of the land. In vain it may be urged that the good of the individual ought to yield to that of the community, for it would be dangerous to allow any private man, or even public tribunals, to be the judge of this common good, and to decide whether it be expedient or not. Besides, the public good is in nothing more essentially interested than in the protection of every individual's private rights as modelled by the municipal law. In this and in similar cases the legislature alone can, and, indeed, frequently does, interpose and compel the individual to acquiesce . . . by obliging the owner to alienate his possessions for a reasonable price, and even this is an extension of power which the legislature indulges with caution."

In Angell on Water Courses, sect. 457, the following language is used: "It is obvious that the government of no state can administer its public affairs in the most beneficial manner to the community at large, if it cannot, on particular emergencies and for public utility, exercise at least a qualified power of disposing of or impairing in value the property of an individual citizen." And in sect. 459 we read:—"It is now considered in England that the true principle applicable to all such cases is that the private interest of the individual is never to be sacrificed to a greater extent than is necessary to secure a *public object* of adequate importance, and that the interference is one of an extraordinary character."

"The extraordinary power with which railway companies and other similar companies are invested by parliament are given to them 'in consideration of a benefit which, notwithstanding all other sacrifices, is, on the whole, hoped to be obtained by the public.' And that since the public interest is to protect the private rights of all individuals, and to save them from liabilities beyond those which the powers given by such Acts necessarily occasions, they must always be carefully looked to, and must not be extended for other than the legislature has provided, or than is necessary and properly required for the purposes which it has sanctioned."—Per Lord Langdale, in *Coleman* v. *E. Co.'s, R. W. Co* 16 L. J. (Chan.) 78.

It has been held in *Manser* v. *N. & E. Co., R. W. Co.*, 2 Rail. cases; and in *Agar* v. *Regents Canal Co.*, Coop. C. C. 77, "That if railway companies in England, in carrying on their works, do more damage than the necessity of the case requires, the Court of Chancery will restrain them by injunction."

While then formerly the maxim "*salus populi suprema lex*," was the ground for interference with the "sacred private rights" of the subject, where such interference is, to use the words of Mr. Broom, "obviously dictated and justified *summa necessitate*," yet, to quote from the same writer "The general maxim applies likewise to cases of more ordinary occurrence in which the legislature of *publicam utilitatem* disturbs the possession or restricts the enjoyment of the property of individuals."

As a legislator then I would find ample warrant under the general law for considering the advisability of granting the powers here asked for if they are of *publicam utilitatem.* In this case, however, the legislature has thought fit to qualify the absoluteness of this language, for the seventh section says:—"If the allowance of such application will conduce to the public good, *and is proper and just under all the circumstances of the case.*" Here another element is introduced, one which is to govern in arriving at a correct decision. I can well understand the legislature adding this clause in view of the extremely large and ample powers which seem to be contemplated in the first section of the Act. I must consider then first, whether the granting the powers asked for will conduce *ad utilitatem publicam*, or "to the public good," and on the threshold of this enquiry, or rather prior to entering upon it, is the consideration of the objection raised at the hearing that the statute does not contemplate the making of the dam in question at such a long distance, some 20 miles, above the mills of the applicant.

The only case I can find bearing directly on this point is an American one, *Woolcot Manufacturing Co.* v. *Upham*, 5 Pick. (Mass.) R., mentioned in section 489 of Angell on Water Courses. It is there quoted thus :—"The reservoir for the use of the mill was erected more than three miles from the pond at which the mill was situated ; and it was held that the owner of the land lying between the two dams, which was overflowed by the water from the reservoir, must apply for damages in the mode provided by the statute. The Court thought it very common that two or more ponds were required for a mill, though they were not often so remote from each other as in this instance." From this it would appear that the distance of three miles between the mill and the reservoir was an unusual one. On this question of "public use" Angell says, (sect. 466,) "As a general rule it must undoubtedly rest in the discretion and wisdom of the legislature to determine when public uses require the assumption and appropriation of private property. Although the question is one not without embarrassment, as the line of demarcation between a use that is public and one that is strictly private is not to be drawn without much consideration." And the writer quotes the opinion of Shaw, C.J., in the case of the *Boston Water Power Co.* v. *Boston and Worcester Ry. Co.*, 23 Pick.(Mass.) R. 360, where he is reported as saying:—"It is difficult, perhaps impossible, to lay down any general rules that would precisely define the power of the government in the exercise of the acknowledged right of eminent domain ; it must be large and liberal so as to meet public exigencies, and it must be so limited and restrained as to secure effectually the rights of the citizen ; and it must depend in some instances upon the nature of the exigencies as they arise, and the circumstances of particular cases." And the writer adds, "One thing is incontrovertible, and that is, that the necessities of the public for the use to which the property is to be appropriated must exist as *the basis* upon which the right is founded." And in sect. 467, "Although it rests with the wisdom of the legislature to determine what is a 'public use,' and also the necessity for taking the property of an individual for that purpose, yet the right of eminent domain does not authorize the government, even for a full compensation, *to take the property of one citizen and transfer it to another* when the public is not interested in the transfer."

And here I would give expression to a certain state of doubt I am in as to the full intent and meaning of our own Act. The first section contemplates the entering of one person upon the lands of another for acquiring certain rights and privileges which are manifestly of a *private* nature ; while in the seventh section reference is specially made to the necessity of those rights and privileges being "for the public good."

The Act has been passed since the case of *Dickson* v. *Burnham*, 14 Grant, 594, where Mowat, (then V.C.,) says :—"This right of private property is made by parliament to give way, on proper terms, and with proper precaution, in order to enable railways and canals to be built, and other objects of general utility to be accomplised. And I see no reason why the legislature should not, on the same principle, make some provision of a like kind to encourage the building of mills and manufactories. Laws for this purpose were passed in several of the neighbouring Ssates when they were colonies of Great Britain, and still exist in them." On reference to those laws, as passed in the States of Maine and Massachusetts, I find no such limitation as that contained in our Act in reference to the "public good." And this ought to be borne in mind in considering any of the American cases that are made use of. I quote again from Angell, s. 487, "An opinion has been entertained by some persons that the enactment of the above statutes (*i. e.*, such as have already been referred to,) is an abuse of the right of eminent domain . . . though mills might, with propriety, have been considered public easements, and as of public convenience and necessity in the first settlement of the country."

The late Chief Justice Parker of Massachusetts, speaking of the statutory law of that State at that time, which re-enacted the old provincial Act, prior to the Revolution, says in the case of *Stowell* v. *Flagg*, 11 Mass. R. 364, "We cannot help thinking that this statute was *incautiously* copied from the ancient colonial and provincial Acts, which were passed when the use of mills, from the necessity for them, bore a much greater value compared to the land used for the purposes of agriculture, than at present." Upon this Mr. Angell remarks, "The real question is, whether authorizing the flowing of another's land is sufficiently for the public good to justify depriving the owner of the use of it, even for a

just compensation." The foundation and *raison d'etre*, so to speak, of all these American statutes seems to be the necessity of mills for the public benefit. The old Massachusetts statutes speak of mills as greatly beneficial to the public; and the preamble of Provincial Statute 12 Am. c. 1, "An Act for upholding and regulating mills," recites that they sometimes fall into disrepair and are rendered useless and unserviceable, if not totally demolished, *to the hurt and detiiment* of the public. Chap. 8 of same year speaks of "mills serviceable to the public good and the benefit of the town." In the case of *Beekman* v. *Saratoga and Schenectady Ry. Co.*, 3 Paige (N.Y.) 73, Chancellor Walworth, speaking of the right of eminent domain, says that it has been upon this principle that the Legislatures of the several States have authorized the condemnation of lands of individuals for mill sites where, from the nature of the country, such mill sites would not be established for the accommodation of the inhabitants, without overflowing lands thus condemned.

In 2 Am. Jurist, art. II., the support of grist-mills and saw mills is said to have been, in those early days, a measure of vital necessity. And they were consequently encouraged in every possible manner.

If the "accommodation of the inhabitants," then, be another form of the expression "public good," let us see how far it will throw light upon this case.

The chief point in Mr. Plumb's argument, and that to which most of his evidence was directed, was that the Parry Sound Mill Co. gave employment to a great number of men, who would otherwise not be in that part of the country at all, and that thus a good market for their produce was afforded to the farmers around. Now it seems to me, this is a very indirect way of shewing the "public good" of this mill. It is not shown that the mill itself, *qua* mill, is of any benefit to the public around there, in the same way that the mills spoken of in the American cases referred to were, namely, by supplying flour and lumber to the settlers around, and which were spoken of as being a "vital necessity."

This mill last season, it was shown, manufactured some 15,000,000 feet of lumber. How much of this was required for the use of the "public" about Parry Sound, where there is also another large saw mill? Would the total stoppage of this mill occasion any injury, or even inconvenience, to the people about? that is, so far as the manufactures of the mill are concerned. True, they are beneficial by the employment of a large number of men; but the same result would be obtained by almost any branch of industry which called for the use of manual labour to a large extent. And this result is constantly obtained now-a-days by the holding out of a bonus by a town or village to any one establishing a manufactory on a large scale.

Supposing, however, it be assumed that this mill is for the good of the public about Parry Sound without this reservoir, and still more so if the reservoir be established, what shall be said about the "public good" to a settlement some 20 miles distant? If the employment of a large number of men at Parry Sound benefits the public there, how far does it benefit the public about Lorimer Lake? They, it was shown, have several saw-mills sufficient for their wants about a quarter of the distance off that Parry Sound is.

The effect of this flooding upon the health of some of the residents has already been shown. True we have only the evidence of two of them, but if one of the other ten riparian proprietors were called—those opposing this application, stating that they had not the means of bringing any witnesses other than themselves the long distance of some 120 miles, (of these ten, too, some six had left for some cause or other since the raising of the dam)—we might reasonably have some doubt as to their having been benefited by it.

On the subject of the malarial sickness spoken of in the evidence, I find that in the Act of Florida when a mill owner wishes to overflow his neighbours land for mill purposes he obtains a writ of *ad quod damnum*, commanding the sheriff to summon twelve householders to examine the land. "But in no case is the writ to be granted if the jury, in their report, state that the injury likely to result to the neighbourhood from the erection of the dam, by sickness or otherwise, will be greater than the benefit to be derived from the same."—(Thompson's Digest of Laws of Florida, 401-402). Under that statute clearly this application cannot be granted, for the benefit to the neighbourhood is not even suggested, while the sickness spoken of, as well

as the injury to the fish, the obstruction by the dam to the use of boats going to MeKellar village, the flooding of Ferris' stable and the cellar of the house, and the overflowing of the public highway, seem far to outweigh any possible benefit that can be conceived.

The statute of Virginia goes even further, for, by sect. 5, "If on one such inquest, or on any other evidence, it shall appear to the Court that the mansion house of any proprietor, or the office, curtilage or garden thereto immediately belonging, or orchards will be overflowed, or the health of the neighbours be annoyed, they shall not give leave to erect the said dam."

Mr. Ferris evidently would be perfectly safe if he lived in Virginia. Now if I ask myself the question, whether the allowance of this application will conduce to the public good, and is proper and just under all the circumstances of the case? I cannot, when I look at all these circumstances, with a good conscience, answer in the affirmative. *The good* to be derived from it would, it seems to me, result more to the private benefit of this company than to that of the public in the neighbourhood of Parry Sound. And much more to them than to the public at Lorimer Lake.

It was not shown that the mill could not be worked without this additional water power, or that the ordinary supply of water ever failed. The most that was said was, that last summer (one of the driest we have had for many years) the mill had to stop for a while owing to the lack of water, and to some difficulty with the Guelph Lumber Company. I cannot see how a temporary failure of water, even every year, would be any inconvenience, still less an injury to this company, inasmuch as they use steam in addition to their water power—being already provided with the necessary works and machinery for the purpose of using steam. It is not as though they had to go to the expense of now doing so. It may be unfortunate for the company that they have already erected the dam, at some considerable expense no doubt; in doing so, however, they exceded their powers. The only right given them by the Act before this application was to enter upon the lands required, to examine and survey them afterwards, if their application was granted they must have paid in the assessed damages before they would be entitled to a conveyance of the land, or to exercise any of the powers mentioned in the first section of the Act.

I have not thought it necessary to say anything as to the objection raised, that Still Creek was a navigable river, as my judgment proceeds upon other grounds. No doubt, in the technical sense of the word, it is not a navigable stream, as it is not affected by the ebb or flow of the tide. But it might be said to be a boatable one. The common law has preserved the right to the public, as a highway, such rivers above the flow of tide water as are naturally of sufficient depth for valuable floatage, giving them an easement therein for the purposes of transport and commercial intercourse. The Thames, the Severn and the Wye are instances of this. In the State of Maine, where the English common law prevails, it seems that if a stream is naturally of sufficient size to float boats or mill logs, the public have a right to its free use, for these two purposes, unencumbered with dams, etc. (*Wadsworth* v. *Smith*, 11 Maine 278).

Taking the view I do, it is unnecessary to make any reference to the subject of compensation. I find, however, a case in our Courts where the decision of the Court was, that when land is overflowed by the erection of a mill, the owner may recover full compensation for all the injury he has sustained thereby, whether it be more or less direct, whether it effect his domain in the land by taking away its use, or impair the value of that domain by rendering the land unfit for a place of residence, or whether the injury—reaching beyond its immediate mischief—extends also to the personal property of the petitioners.

This application will therefore be refused, with costs to the defendants Ferris and Edward Bell, to be paid by the plaintiffs, the Parry Sound Lumber Company.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

FORRISTAL ET AL V. MCDONALD.

Supreme and Exchequer Court Act, sec. 31—Supreme and Exchequer Court Amendment Act, 1879, sec. 14—The Judicature Act of Ontario, sec. 43—Motion for leave to appeal to Supreme Court refused by Court of Appeal for Ontario—Subsequent motion to Supreme Court for leave to give proper security in Supreme Court, granted.

On the 15th day of September, 1882, an appeal to the Court of Appeal for Ontario, in which the present appellants (defendants) were appellants, and the present respondent (plaintiff) was respondent, was dismissed. The matter in controversy in the action amounted to the sum of $576.30 exclusive of costs. The present appellants, on said 15th day of September, applied to the Court of Appeal in virtue of sect. 43 of the Judicature Act of Ontario for special leave to appeal from the judgment of said Court of Appeal to the Supreme Court of Canada, and the Court of Appeal refused to grant such special leave. The appellants thereupon made an application to Mr. Justice Fournier, in Chambers, for leave to appeal from said judgment of the Court of Appeal in virtue of the same sect. 43 of the Judicature Act for Ontario, or for an order that appellants be at liberty to give proper security to the satisfaction of the Supreme Court, or a judge thereof, that they will effectually prosecute their appeal, or such further or other order as the judge or Court might direct. This application was made on the 4th day of October, 1882, being within thirty days after the said judgment was pronounced. Mr. Justice Fournier, on finding that the question as to whether the section in question of the Judicature Act of Ontario was *ultra vires* of the Legislature of the Province of Ontario had been raised by the application, referred it to the full Court, and on the 7th of November the motion was argued before the full Court.

Gormully, for the appellants.

Maclean, for respondent.

In the course of the argument the Court expressed great doubt as to the constitutionality of the Ontario statute, but as the appellants's counsel abandoned the first alternative of his motion the Court made the following order :—

"Upon motion this day made unto this Court by Mr. Gormully, of counsel for the appellants, for an order for leave to appeal to this Court from the judgment of the Court of Appeal for Ontario, pronounced in this cause on the 15th day of September, 1882, or for an order that the appellants be at liberty to give proper security to the satisfaction of this Court, or a judge thereof, that they will effectually prosecute their appeal, and pay such costs and damages as may be awarded in case the judgment appealed from be affirmed, or for such further or other order as to this Court may seem meet, upon hearing read the affidavit of George Christie Gibbons, filed in support of the said motion, and upon hearing what was alleged by counsel for the said appellants, and also by counsel for the said respondent, and it appearing that this application was originally made to the Hon. Mr. Justice Fournier, in Chambers, on the 4th day of October, 1882, within thirty days after the said judgment was pronounced, and was, by the said Mr. Justice Fournier, referred to this Court, and counsel for the said appellant abandoning the first alternative of the said motion, this Court, exercising the powers conferred by the 14th section of the Supreme and Exchequer Court Act, 1875, as amended by the 14th section of the Supreme Court Amendment Act of 1879, doth order that the second alternative of the said motion be granted, and that the said appellants be at liberty to give the security required by the statute in such case made and provided, that they will effectually prosecute their appeal, and pay such costs and damages as may be awarded in case the judgment appealed from be affirmed by forthwith paying the sum of five hundred dollars ($500) into this Court to the credit of the Registrar thereof, to abide the event of this appeal."

BANK OF BRITISH NORTH AMERICA V. WALKER.

Motion for leave to file a printed case not certified by clerk of Court below—Extension of time to complete and file case granted.

This was a motion for an order granting leave

to file and inscribe an appeal for hearing, notwithstanding that the case had not been certified and transmitted by the clerk of the Supreme Court; or for an order directing a writ of *certiorari* to issue to the clerk of that Court to compel him to send to the Supreme Court of Canada the record and all papers filed in the case.

On the 22nd of June last the Supreme Court of Canada made an order allowing appellants until the 15th of September following to file the case and their *factums*. In default the appeal to stand dismissed without further order. Before the 15th of September the appellants moved before the Chief Justice for leave to proceed with their appeal on a printed case submitted, although such printed case was not duly certified and transmitted by the clerk of the Court below.

The Chief Justice referred the motion to the Court.

Christie, for appellants, contended that it was through no fault of the appellants if the printed case had not been certified, that it had been settled by the Chief Justice of the Supreme Court of British Columbia, and that the appellants had been already obliged to pay a sum of $1,000 to the respondents by order of the Court below, and that the excuse given by the clerk of the Court was that the case as printed was not a *correct* case. If there was any part of the record omitted appellants were willing to have the same added.

McIntyre showed cause, and contended that the *case* had not been finally settled, and that an important part of the evidence, which formed part of the judge's notes at the trial, had been omitted from the case, and that it was now too late for appellants to file their case.

Held, that the appellants should have a further extension of time, viz., till January 1st next, to complete and file their printed case. Respondents to pay $50 costs of the present motion, and $20 costs of the previous motion in Chambers. The Chief Justice stated that if any further obstacles were placed in the way of appellants, this Court would take the necessary means in order to have a speedy hearing of the appeal.

F. X. MAJOR v. CORPORATION OF THE CITY OF THREE RIVERS.

Appeal—Circuit Court (P.Q.,) being a Court of original jurisdiction, judgment from Court of Queen's Bench (P.Q.,) in such a case not appealable to the Supreme Court of Canada.

This was an appeal from a judgment of the Court of Queen's Bench (P.Q.,) whereby the judgment of the Circuit Court at Three Rivers was reversed. The case was settled and agreed to by both parties, and no objection taken to the jurisdiction.

Held, that an appeal will not lie to the Supreme Court of Canada from a final judgment of the Court of Queen's Bench (P.Q.,) in cases in which the Court of original jurisdiction is the Circuit Court for the Province of Quebec.

MacLaren, for appellant.

Denoncourt, for respondents.

Appeal quashed without costs.

BICKFORD v. HOWARD.

Trial by judge without a jury—Plea of set-off to an action on a contract—Verdict for plaintiff—Affirmed by two Courts—Weight of evidence, appeal on.

The appellant appealed from two judgments of the Court of Appeal for Ontario, affirming judgments recovered against him by the respondent in two several actions brought on alleged contracts, to which actions appellant pleaded *inter alia* a plea of set-off. The cases were tried before a judge without a jury, and the respondent obtained two verdicts. These verdicts having been moved against, were sustained by the Courts of Queen's Bench and Common Pleas respectively, and both by the Court of Appeal for Ontario. On appeal to the Supreme Court against the judgment of the Court of Appeal affirming those judgments and verdicts,

Held, that before reversing the verdict of a judge who has tried a case without a jury, and whose verdict has been affirmed by two Courts, this Court, sitting in appeal, will not reverse the conclusion arrived at by the lower Courts on the weight of the evidence, unless convinced beyond all reasonable doubt that all the judges before whom the case has come have clearly erred and that in this case there was no error, and the

verdict in favour of respondent should not be disturbed.

Robinson, Q.C., and *McCarthy*, Q.C., for appellant.

Martin, for respondent.

Appeal dismissed with costs.

[Nov. 28.

BOURGET V. BLANCHARD.

Motion to rescind an order of a Judge of the Court of Queen's Bench, Province of Quebec, in Chambers—Security—Jurisdiction.

This was a motion for leave to appeal from a judgment of the Court of Queen's Bench (appeal side), rendered on the 5th October last, and praying that an order of Mr. Justice Tessier, a judge of said Court, made in Chambers on the 23rd October last, refusing to grant leave to appeal from said judgment, be rescinded, and that the said Judge, or any other Judge of the said Court of Queen's Bench, be ordered to receive security offered by appellant.

Held, that this Court had no jurisdiction to entertain such a motion.

Motion refused with costs.

Turcot for appellant.

Livernois for respondent.

CHANCERY DIVISION.

The Chancellor.] [Nov. 15.

GUEST V. GUEST.

Alimony—Foreign marriage and divorce—Adultery—International law.

The marriage of the plaintiff and defendant took place in the State of New York in 1876, after which they came to reside in Ontario. Thereafter, the husband deserted his wife, and went to the state of Ohio, where he has since been domiciled. He there obtained a decree of divorce, on the ground of adultery of his wife committed in Ontario, after notice of the proceedings had been personally served on the wife and witnesses had been heard on his behalf. The wife now claimed alimony, on the ground of his desertion.

Held, that credit should be given to the foreign decree of divorce, which should therefore be acted upon in this Province; for the domicile of the husband was the domicile of the wife, so as to give the Ohio Court jurisdiction. There was no evidence that the divorce proceedings were collusive, or conducted contrary to national justice, and the cause alleged was such as to entitle the party injured to a dissolution of the marital relation wherever Christianity is accepted.

The Chancellor.] [Nov. 22.

MCCARDLE V. MOORE.

Administration—Default of executor—Costs.

The plaintiff being a lunatic, and entitled to maintenance out of the income of a fund in the hands of executors, brought an action for the income; and for administration.

The Master reported a balance of interest in the hands of the executors, which they had not admitted; but the conduct of the executors was otherwise proper.

Held, if the question of the liability of executors for the interest had been the only one in the action, the executors should have been ordered to pay the costs; but inasmuch as a general administration was sought and granted, no costs should be awarded for or against the executors.

The original plaintiff having died pending the action, and an order having been granted to continue the proceedings in the name of an administrator *ad litem*,

Held, that the plaintiff's costs, between solicitor and client, should be paid out of the interest recovered

Held also, that the administrator *ad litem* was not entitled to be paid the residue of the fund; but as to this, liberty to appeal was granted.

J. A. Donovan, solicitor for plaintiff.

Bethune, Moss, Falconbridge & Hoyles, solicitors for defendants.

The Chancellor.] [Nov. 22.

FOLEY V. CANADA PERMANENT LOAN & SAVINGS CO.

Infant—Mortgage—Acquiescence—Confirmation of voidable instrument—Laches—Ratification.

The plaintiff, being an infant, on the 20th February, 1878, executed a mortgage in favour of the defendants. The proceeds were chiefly

applied in paying off prior encumbrances on the lands. The plaintiff came of age, according to his statement of claim, on the 16th March, 1881, but according to the evidence, on the 19th April, 1880. No steps were taken to disaffirm the mortgage until 7th December, 1881, and on the 30th of September, 1882, this action was commenced.

Held, that the mortgage was not void, but only voidable, and that the plaintiff's conduct after he came of age, and after he had full knowledge of his rights, amounted to a ratification of it.

Shaw & Robertson, solicitors for plaintiffs.

Jones Brothers & McKenzie, solicitors for defendants.

The Chancellor.] [Nov. 22.

O'CONNOR V. ANDERSON.

Will—Power of sale—Mortgage.

A testator devised and bequeathed all his real and personal estate to his wife for her life, with remainder to his only son. By the will he also gave the wife the right to sell and dispose of all his personal property, she affording a home for all the testator's children till they should attain the age of 18. He then appointed his wife and the plaintiff O'C. his executors, and ended the sentence, "to which I hereby subscribe my lawful signature." Without subscribing his signature, however, at this point, the will proceeded, "P. S. If through sickness or poverty that my wife, Eliza O'Callaghan, is sore embarrassed, and Francis O'Connor thinks it advisable to sell my real estate, she is to have the liberty." After this followed the signature of the testator, and then several testatum clauses. The wife did become embarrassed, and two mortgages were executed by her and O'Connor, for the payment of which O'Connor became personally liable. The proceeds were applied in the maintenance of the wife and her child. The plaintiff O'C. subsequently was compelled to repay the mortgages, and took an assignment thereof to his co-plaintiff in trust for him.

Held, the power of sale authorized a mortgage of the realty.

Held also, that the plaintiff O'C. was entitled to a sale of the lands to indemnify him against the moneys paid the mortgagees, with interest and costs of action.

Wm. Kingston, solicitor, for plaintiff.

Macdonald & Macdonald (Guelph), solicitors for defendant Anderson.

J. Hoskin, Q.C., for infant defendant.

DARLING V. DARLING.

Foreign commission—Return.

A commission was issued to examine witnesses in England, pursuant to Order XXXIII., in the form given in the Schedule to the rules of Court, the 1st of February being named as the return day. Upon application the Master in Ordinary made the following order :—"I extend the time for the return of the commission peremptory to the 24th of February." The witnesses were examined on the 24th February, but the commission and evidence did not reach the Master's office until some time afterwards.

Held, that the effect of the Master's order was to extend the time of return to the 24th of February, up to which time the commissioners had the right to take evidence ; and the commission having been executed and posted within that time there was no irregularity, because of the necessary delay occasioned by its transmission from the foreign country.

Held also, that the attendance before the commissioners of all parties, on the 24th February, had the effect of a waiver of any objection that the evidence was not returned to the Master's office by the 24th February.

Ferguson, J.] [Nov. 29, 30.

HUNTER V. WILCOCKSON.

Motion for judgment—Default of appearance—Statement of claim—Endorsement on writ.

Where on default of appearance it is necessary to move for judgment, a statement of claim must be first filed, and the plaintiff cannot, on motion, obtain judgment for the relief claimed in the endorsemunt on the writ without filing a statement of claim.

J. Bain, for plaintiff, moved for judgment for the relief claimed by the endorsement on the writ. The action was for the rectification of a deed and for a declaration that the plaintiff was entitled to a right of way, and for an injunction restraining defendant from interfering therewith. The endorsement stated the relief claimed ; the

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,

brought twenty-five dollars more than the applicant bid.

An application, by the purchaser, to have his deposit repaid to him on the ground that there had not been any loss to the parties was refused.

Armour, for purchaser.
H. Cassels, for plaintiff.
Hoyles and *Moffat*, for defendant.
J. Hoskin, Q.C., guardian *ad litem*.

Boyd, C.] [Nov. 22.

ROSENSTADT V. ROSENSTADT.

Adultery—General charge—Particulars.

This was an alimony suit. Paragraph 12 of the statement of claim was as follows: "The plaintiff alleges and charges adultery on the part of the defendant as a further ground for relief in the premises."

The Master at Hamilton refused to make an order for particulars.

On appeal,

BOYD, C., ordered that plaintiff give within one month particulars of the acts of adultery intended to be proved under the general charge, and be limited to those at the hearing, and that in default of such particulars no evidence was to be given under the general charge.

Costs of application and appeal to be costs in the cause.

Mackelcan, Q.C., for plaintiff.
H. Cassels for defendant.

Boyd, C.] [Nov. 22.

CHADBOURNE V. CHADBOURNE.

Will—Legal heirs—Mixed devise—43 Vict., c. 14, sec. 2.

A testator left three children, and four grandchildren, the issue of two other of his children who pre-deceased him.

The will was dated 28th April, 1880, and subsequently the testator died. He disposed of the residue of his estate as follows: "I give and bequeath the remainder of my personal and real estate to my legal heirs, including my daughter, Jemima Woodside, to be divided equally amongst them."

On the reference in a partition suit, the Master divided, under this clause, the residue into seven equal parts on a *per capita* principle.

Held, on appeal, that a division *per capita* and not *per stirpes*, was correct.

43 Vict., c. 14, s. 2, which defines the word "heirs" in a devise of "real estate," does not apply, as this is a devise of a "mixed fund" to "legal heirs." Legal heirs means heirs legally born: *Harris* v. *Newton*, 25 W.R. 228.

Costs out of the estate, as the appeal was proper on account of the importance of the question.

Cattanach, for appeal.
J. Hoskin. Q.C., contra.

Boyd, C.] [Nov. 22.

O'DONOHOE V. WHITLEY.

Appeal—Sect. 33, O. J. A.

Certain bills of costs were filed in the Taxing Master's office amounting in all to $250. On taxation they were reduced to $187.

The plaintiff applied for leave to appeal under sect. 33, O. J. A., contending that the matter in controversy exceeded $200.

The Master in Chambers refused leave to appeal to the Court of Appeal under the above section. On appeal,

Held, that the matter in controversy for the Court of Appeal was, whether the appellant (the plaintiff) was liable to pay $187, or anything, as no greater sum than that could, whatever became of the appeal, be recovered against him.

Appeal dismissed with costs.

Howells, for appellant.
Hoyles, contra.

Patterson, J. A.] [Nov. 24.

MCCRAE V. WHITE.

Bond on appeal—Time—Filing.

Judgment was delivered by the Court of Appeal on the 24th March last, and on the same day application was made for leave to appeal, the case being one in which, under O. J. A., leave to appeal was necessary. The application was considered, and leave to appeal granted on 1st May following. The bond was filed on the 22nd May.

Held, by PATTERSON, J.A., after consultation with BURTON, J.A., that the delay being the act of the Court the time for filing the bond must

count from the granting of leave to appeal, as no delay took place in applying for such leave.

J. H. McDonald, for appellant.

Hoyles, contra.

Cameron, J.] [Nov. 27.

CHAPMAN V. SMITH.

Notice of trial—Dismissal of action—Rule 255.

The pleadings in the action had been closed for more than six weeks when the plaintiff entered the case, and gave due notice of trial under Rule 255. By consent, at the assizes, the case was struck off the list by the judge without costs to either party.

Held, by the Master in Chambers on a motion by the defendant, to dismiss, for want of prosecution, under Rule 255, for not setting the cause down for a subsequent assize, that Rule 255 contained, in fact, two directions, 1st, that either party might give notice of trial; 2nd, that either might give such notice for the first assize held ten days after issue joined, and that, as a consequence, from the first direction of the rule, the defendant might move to dismiss for any default of the plaintiff in not setting down and giving notice for any future assize.

Order accordingly.

Held, on appeal, that where a case is struck off the list by the Court in the manner in question, as the old practice of striking out no longer prevails, it is equivalent to a dismissal of the action, and neither party can move in it without the special leave of the Court. That after notice of trial has been given and cause entered, it is not competent to dismiss an action except under Rule 269. That by the giving of notice of trial and the entry of the cause for trial, an action is completely removed from the operation of Rule 255.

Semble, the proper course in the present case was to have applied for a postponement to the next or a future sitting of the Court, or, under Rule 171, producing a written consent to the proper officer of the Court.

Appeal allowed without costs.

Holman, for the appeal.

Watson, contra.

LAW STUDENTS' DEPARTMENT.

LAW STUDENTS' LIBRARY.

To the Editor of the LAW JOURNAL.

DEAR SIR,—The Law Society have provided for the use of students a library consisting of the text books used on the course for the law examinations.

This library consists of about twenty-five text books, and these mostly old editions now of very little use. There are understood to be two copies of each work, one of which must always remain for use in the Hall.

Now, Mr. Editor, there are studying in the City of Toronto alone some three hundred law students, and most of them are endeavouring to get a training in Toronto on account of the additional advantages in the way of practice, and get along as best they can on little or no salary, consequently they cannot, as a general rule, afford to purchase the text books.

Each student pays into this society sums amounting to about forty-three dollars a year during his five years' course, and the Law Society with their large surplus, swollen every three months with the fees of law students, should, we think, have a little more consideration for them, and furnish a library of text books that would be something nearly adequate for their use—say ten or fifteen copies of each work used on the course.

When one copy of a work is being watched for by sixty or seventy students it seldom finds its way back to the Hall if taken out a month or two previous to an examination, until that examination is over, and it is then secured by another student only to be retained by him until he is through with it. Of course it is impossible for the librarian to prevent students taking these books, as he cannot remain and watch the miserable collection in this text book library all the time; but if there were a number of copies of each work supplied the student would then feel satisfied that when he wanted to read a work he would be able to get it, this evil would be done away with.

We do not forget that the society has been good enough to furnish us with a course of lectures, and for this we are truly thankful, still we think this will prove a far less expensive boon and one that would be fully appreciated.

I hope, Mr. Editor, that this grievance will be redressed ere long, and thanking you for publishing this, we are,

Yours truly,

LAW STUDENTS.

BOOK REVIEW.

BLACKSTONE'S COMMENTARIES for the use of students-at-law and the general reader, by Marshall D. Ewell, LL.D., Professor in the Union College of Law, Chicago. Boston: Soule & Bugbee, 1882.

What Mr. Leith has done for the Canadian student in relation to real property, Mr. Ewell has done for the Anglo-Saxon student in connection with this the best known of all text books. So far as we have been able to judge, obsolete and unimportant matter is omitted, the paging of the original has been inserted, and as a rule the exact language of the author retained. The book presents an appearance of compactness and convenience which renders it attractive and less like a dry text book. Masters would do well to encourage their students by the occasional present of some standard text book, and could not do better than begin with Ewell's Blackstone.

THE ADMIRALTY DECISIONS of Sir Wm. Young, Kt., LL.B., Judge of the Court of Vice-Admiralty for the Province of Nova Scotia, and late Chief Justice of the Supreme Court, 1865–1880. Edited by James M. Oxley, LL.B., B.A., Barrister-at-Law, Editor of the "Nova Scotia Decisions." Toronto: Carswell & Co., Law Book Publishers, 1882.

We have received "The Admiralty Decisions" of Sir Wm. Young, Judge of the Court of Vice-Admiralty for the Province of Nova Scotia, and late Chief Justice of the Supreme Court. The volume, one of over 300 pages, contains the decisions of the above judge during a period of fifteen years—from 1865 to 1880. A long felt want by those of the profession practising in the Maritime Court has thus been supplied, and these Reports are sure to be appreciated by them. Sir Wm. Young has been always known as a conscientious and painstaking judge, and a perusal of his judgments now reported will show a vast amount of research, and a great deal of careful preparation by the learned judge.

The compilation of the present volume was undertaken by Mr. Oxley, Barrrister, of Halifax, and editor of "The Nova Scotia Decisions," and "contains," as the preface informs us, "all the judgments of permanent value delivered by Sir Wm. Young, and will be found to embrace decisions upon many of the most important questions of principle and practice falling within the jurisdiction of such a court." From Mr. Oxley's well known abilities in this line we would expect to find, what we do find in this work, evidences of great care in its compilation. The head notes are particularly clear, and all that could be desired. The paper and type, too, are of excellent quality; and a most creditable volume has thus been added to our Canadian Reports.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

Excuses for non-performance of contracts.—*Central L. J.*, Nov. 10.
Charter parties.—*Am. Law Review*, Nov.
Impeachable offences under the constitution of the United States.—*Ib.*
Discriminative tariff rates.—*Ib.*
A history of the English Judicature.—*London L.J.*, Sept. 16, *et seq.*
Solicitor's relations with sheriff.—*Ib.*, Sept. 23.
Contracts as to employers' liability.—*Ib.*, Oct. 21.
Perpetuities arising out of contract.—*Ib.*, Oct. 28.
Excluding counter-claims.—*Ib.*, Nov. 4.
Privilege of witness as to criminating questions. —*Irish L. T.*, Oct. 14.
The law relating to burglars.—*Ib.*
Indemnity of trustees for wrongs.—*Justice of the Peace.*
Recent decisions on attachment of the person.—*Law Times.*
Contempt of Court.—*Irish L. T.*, Nov. 4.
Conveyance of easements by implication.—*Albany L. J.*, Sept. 23.
Common words and phrases.—*Ib.*, Oct. 14.
Once in jeopardy — Subsequent indictment founded on same transaction.—*Ib.*, Oct. 21.
Negotiable instrument—Time of payment.—*Ib.*, Oct. 28.
Promissory note payable on or before a specified day.—*Ib.*
Evidence of defendant's good character in civil actions.—*Ib.*, Nov. 11.
Burden of proof as to testator's sanity.—*Ib.*, Nov. 11.
Estoppels against married women.—*Southern Law Review*, Nov.
The law in relation to crops.—*Ib.*
Negotiability of detached coupons.—*Ib.*
Disfranchisement from private corporations.—*Am. Law Register.*
Partnership—Implied power to bind the firm by negotiable paper.—*Central L. J.*, Oct. 20.
The foreclosure of pledges.—*Ib.*, Nov. 17.
Equitable consideration.—*Ib.*