

BOYD, C.

DECEMBER 22ND, 1911.

EVEL v. BANK OF HAMILTON.

Pleading—Counterclaim—Damages for Conspiring to Bring Foundationless Action—Counterclaim Dependent on Failure of Action—Unnecessary and Embarrassing Pleading—Striking out—Con. Rules 254, 261, 298.

Motion by the plaintiff to exclude the counterclaim or to strike it out as disclosing no reasonable cause of action or as unnecessary and embarrassing.

Grayson Smith, for the plaintiff.

C. A. Moss, for the defendants.

BOYD, C.:—The plaintiff claims relief from the defendants respecting transactions of a complicated character involving accounts and the cancellation of agreements and the adjustment of shares in the defendant company.

Besides the defence proper, which has been filed for all the defendants, some of them have set up by way of counterclaim certain allegations that the plaintiff's action is without foundation and is the outcome of a conspiracy between the plaintiff and his solicitor to coerce the payment of money whereby damage of \$1,000 has been suffered by the defendants.

The plaintiff now applies to remove this part of the record, under various provisions of the Rules—254, 261, 298. I am asked to strike it out as not disclosing any cause of action, on the authority of *Baxter v. Young*, 8th December, 1909, an unreported decision of Chief Justice Meredith, (It appears to me that this case should appear in some form in the reports accessible to the profession.)*

But here it may be that the allegation of conspiracy differs it from *Baxter's* case, and I prefer not to deal with the difficulty on a summary application, when a more obvious method of disposing of the application is manifest.

The counterclaim can only begin to possess an appearance of substance if the trial of the action fails on the part of the plaintiff, and there is no good purpose to be served by keeping it as a shadow of an excrescence upon the record. Under Con. Rule 254, I have power to "exclude" it, and under Con. Rule 298 to strike it out as unnecessary and tending to prejudice and embarrass the proper disposition and trial of the main action.

*See now ante 413.