

JUNE 2ND, 1915.

*DAVIS ACETYLENE GAS CO. v. MORRISON.

Practice—County Courts—Action for Money Demand—Writ of Summons — Special Endorsement — Affidavit Filed with Appearance—Election of Plaintiff to Treat Endorsement and Affidavit as Record—Ex Parte Order of Junior Judge Allowing Defendant to Deliver Statement of Defence — Delivery of Statement of Defence and Counterclaim — Order of Senior Judge Setting aside—Determination that Pleadings Unnecessary—Right to Deliver Counterclaim—Rules 56, 112—Right of Appeal—County Courts Act—Final Order.

Appeal by the defendant from the order of the Senior Judge of the County Court of the County of Lambton setting aside a statement of defence and counterclaim delivered by the defendant in an action brought in that Court.

The action was begun by a specially endorsed writ of summons issued on the 10th March, 1915. On the 22nd March, the defendant entered an appearance, with a sufficient affidavit of merits under Rule 56. The plaintiffs elected, under Rule 56 (2), to treat the endorsed claim and the affidavit as the record; on the 27th March, they applied to the Senior Judge to appoint a day for trial; the Senior Judge named the 21st April, and the plaintiffs served notice of trial under Rule 56 (2). On the 30th March, the defendant applied ex parte to the Junior Judge and obtained an order for leave to deliver a statement of defence: Rule 56 (5); he then delivered the statement of defence and counterclaim which were set aside by the order of the Senior Judge now in appeal.

The appeal was heard by FALCONBRIDGE, C.J.K.B., HODGINS, J.A., RIDDELL and LATCHFORD, JJ.

D. Inglis Grant, for the appellants.

Featherston Aylesworth, for the plaintiffs, respondents.

RIDDELL, J., read a judgment in which he said that, in his opinion, Rule 56 contemplated that the defendant should set out in his affidavit all the facts and circumstances constituting his defence; but if, by mistake, inadvertence, or even intention,