

*Per* WEATHERS, J. (dissenting): Even if the judgment by default entered on behalf of plaintiffs was irregular, the practice that prevailed prior to the 1st October, 1884, must be followed, and there must be an application to set it aside.

*Held*, also that no order could have been made without shewing that the authority of F., who assumed to act on behalf of defendants after the commencement of the action, had been revoked.

*Held*, also, there being a mistake in the order which could only be corrected on appeal, it was no ground for withholding costs to plaintiffs that the defect in the order was due to the mistake of the solicitor who drafted it.

*Held*, that the order appealed from could only be supported under O. 34, r. 28, where it appeared that the cause was called for trial and that the defendants appeared and the plaintiffs did not, and that as the order did not shew these facts it could not be sustained.

R. E. Harris, K.C., for appellants. J. A. Chisholm, for respondents.

Full Court.]

BAULD F. FRASER.

[March 5.

*Practice—Goods sold and delivered—Counterclaim for short delivery and plea of tender—Plea held bad as incorporating counterclaim—Costs where appeal partly successful.*

Plaintiffs contracted to supply defendant, who was buying on commission for third parties, with a quantity of canned meats, to be delivered at a fixed price, f.o.b. at Halifax.

Plaintiffs furnished a portion of the goods contracted for but were unable to furnish the balance, and, after some negotiations, authorized K., who was managing the business on behalf of defendants, to settle with the parties for whom defendant was buying on the best terms possible, which was done. In an action by plaintiffs for the price of goods sold and delivered defendant counterclaimed for damages for breach of contract, and for grounds of defence, repeating the clauses of the counterclaim, pleaded (1) payment into Court of an amount alleged to be sufficient to satisfy plaintiffs' claim, and (2) tender before action brought of the amount paid into Court. Plaintiffs replied (1) denying that the amount paid in was sufficient to satisfy their claim, and (2) objecting to the paragraphs of the defence, so far as they incorporated the paragraphs of the counterclaim, as bad in law, on the ground that the counterclaim was no defence to the action and could not be so pleaded.

*Held*,—1. The setting aside in part the judgment appealed from defence, was no answer to the action, and the plaintiffs were entitled to recover the full amount of their claim with costs of suit.

2. The tender was bad, being pleaded to the whole cause of action and being insufficient to cover it.

3. The finding of the trial judge in favour of the defendant on the counterclaim, being supported by the evidence, should be affirmed.