and against Hamilton and Walker for $250 liquidated damages for delay; further, that Burnham acted with such gross carelessness and negligence and so ignorantly, as well as collusively, with Hamilton and Walker, that the certificates given by him should be set aside and cancelled.

Burnham (by the same solicitor as Hamilton and Walker) sets up a counterclaim against this counterclaim for $60 on account of contract, $48.72 being 3 per cent. of extras, in all $108.72, and interest thereon. Upon this Vineberg joins issue.

The action came on for trial before my brother Sutherland at the non-jury sittings at Toronto; and he gave judgment for the plaintiffs for $1,544.04, being $1,453.49 and interest, with costs, and for Burnham, defendant by counterclaim, upon his counterclaim to the counterclaim of Vineberg for $60 and costs, dismissing the counterclaim to the original action with costs. Vineberg now appeals.

It is well established that a third party brought in, as Burnham was, by counterclaim, cannot himself set up a counterclaim against the plaintiff by counterclaim: Street v. Gover, 2 Q.B.D. 498; Alcoy and Gandia R.W. and Harbour Co. v. Greenhill, [1896] 1 Ch. 19; General Electric Co. v. Victoria Electric Light Co. of Lindsay, 16 P.R. 476, 529: unless what is called a counterclaim is in reality but a set-off or a defence: Green v. Thornton, 9 C.L.T. Occ. N. 139; General Electric Co. v. Victoria Electric Light Co. of Lindsay, 16 P.R. 476, at pp. 481, 534. That a claim for wages can be neither set-off nor defence to an action founded upon tort such as this, requires no authority.

But the plaintiff by counterclaim has joined issue on the counterclaim by Burnham, and gone on to trial without objection; and I think he cannot now complain of the irregularity. In Hyatt v. Allen, ante 370, the Divisional Court thought that an irregularity not unlike the present might be waived. Here Burnham might have brought his action against Vineberg; and possibly that action, while not consolidated with the present, might have been ordered to be tried at the same time. If the claim be considered well founded, we might say something as to the scale of costs, as the learned trial Judge has not passed upon that matter.

The first claim set up by Vineberg is that for $250 claimed for delay, and he appeals to clause 6 of the contract, which reads: "The contractors shall complete the whole of the work . . . to the satisfaction of the said architect by the 1st day of March, 1910, when the said house shall be complete and ready for occupation; and, failing to do so, they shall pay the