The counterclaim, in my opinion, must also be struck out for two reasons:—

(1) No action is maintainable against the Crown except by petition of right, and for this a fiat must first be had. If any remedy is attempted against any one by the ordinary procedure, it must be in the way pointed out in Muskoka Mill Co. v. The Queen, 28 Gr. 563.

It was sought to support the counterclaim by reference to Rule 238 and the case of Regina v. Grant, 17 P. R. 165. But any such contention has been disposed of by Anglin, J., in Attorney-General v. Toronto Junction Recreation Club, 8 O. L. R. 440, 4 O. W. R. 72. To allow a defendant in this way to avoid the necessity of resorting to a petition of right, would be to violate the firmly established rule that you cannot do that indirectly which you cannot do directly. If any authority is required for this proposition, it will be found in the judgment of Tindal, C.J., delivering the opinions of the Judges to the House of Lords, in Booth v. Bank of England, 7 Cl. & F. at p. 540; and in that of Moss, J.A., in Dryden v. Smith, 17 P. R. 500.

The second ground is that, even if admissible, the counterclaim is premature. It says "that plaintiff is indebted to defendants in the sum of $25,000 damages by reason of the wrongful acts on the part of the plaintiff and of the Department of Crown Lands as hereinbefore complained of and set out." This is based on sec. 89 of the Land Titles Act, R. S. O. 1897 ch. 138: "If any person lodges a caution . . . without reasonable cause, he shall be liable to make, to any person who may sustain damage by the lodging of such caution, such compensation as may be just; and such compensation shall be deemed to be a debt due to the person who has sustained damage from the person who has lodged the caution."

Without stopping to consider whether the Attorney-General or the Department of Crown Lands comes within the definition of the word "person" in sub-sec. 13 of sec. 8 of the Interpretation Act, it seems self-evident that until the present action has been finally disposed of and dismissed, no want of "reasonable cause" can be presumed. The so-called counterclaim is not really a counterclaim at all, in the true sense of the word. It has no separate and independent existence, but can only arise after the plaintiff has failed in his action. It is like the analogous action for malicious prosecution, in which it is a condition precedent to any