

MIDDLETON, J., IN CHAMBERS.

OCTOBER 12TH, 1916.

*HENDERSON v. HENDERSON.

Practice—Writ of Summons—Special Endorsement—Appropriateness as to Part of Claim only—Defence and Counterclaim Set up by Affidavit of Defendant—Speedy Trial—Rules 56, 57, 117—Counterclaim an Answer to Action—Subsequent Delivery of Statement of Defence and Counterclaim by Leave—Affidavit not Superseded.

Appeal by the plaintiff from an order of the Master in Chambers refusing to strike out paras. 11 and 12 of the statement of defence and the counterclaim, on the ground that under the practice in an action commenced by a specially endorsed writ of summons, in which the plaintiff elects to have a summary trial, it is not competent for a defendant to counterclaim.

The action was for arrears of salary and commission and damages for wrongful dismissal.

The defendant filed an affidavit shewing a defence to the claim, and delivered a counterclaim for damages by reason of alleged misconduct on the part of the plaintiff—the same misconduct being relied on as a defence. The plaintiff thereupon made the election contemplated by Rule 56 (2), and set the action down for trial. The defendant did not object; but, not being satisfied that the affidavit adequately set up his defence, he applied for and obtained leave to deliver a further defence under Rule 56 (5), and delivered a statement of defence in which (paras. 11 and 12) the allegations of misconduct were more fully set forth, followed by a clause in which it was said that he by way of counterclaim repeated the allegations and asked for damages.

Grayson Smith, for the plaintiff.

A. W. Langmuir, for the defendant.

MIDDLETON, J., in a written judgment, said that the claim for damages for wrongful dismissal was not a proper subject of a special endorsement; a plaintiff has no right to a speedy trial save in a case in which the whole claim is specially endorsed. The amended defence, according to the learned Judge's understanding of Rule 56, does not supersede the defence set up in the affidavit; and in the affidavit the counterclaim was relied upon as an answer to the action. The question whether a defendant can file an affidavit setting up a counterclaim as an answer to the