CORRESPONDENCE.

Rule 126, after providing for the statement of claim, reads as follows:

(*a*) "The defendant shall, within such time and in such manner as hereinafter prescribed, deliver to the plaintiff a statement of his defence, set off, or counterclaim (if any)."

(*b*) "The plaintiff may, in like manner, deliver a statement of his reply (if any) to such defence, set off, or counter-claim."

We have in this rule, a specific direction as to the names and order of pleadings, and a joinder is expressly omitted.

In dealing with questions of pleading we have to bear in mind that we can no longer look to the common law rules for guidance. In *Heap* v. *Marris*, L. R. 2 Q. B. D. 630, Grove, J. says: "In my opinion, it was the intention of the Legislature in introducing a new practice and procedure, to follow as guides the practice and procedure previously existing in the Court of Chancery." This is equally true of the Judicature Act here. Under the former Chancery practice, where a plaintiff wished to simply traverse the facts alleged in the answer, he did so in a pleading called a Replication, but which was framed in the same words as the Common Law Joinder of Issue. Did any one ever hear of filing such a pleading by way of answer to a Bill? The question, however, is not whether a joinder (which states no fact) can now be properly termed a Replication (in the sense in which it was formerly used in Chancery proceedings) and pleaded as such, but whether it can be termed and pleaded as a Statement of Defence, or as a Reply, under the Judicature Act.

The illustrations given by the writer of the article in the *Canadian Law Times*, in commenting upon the judgment in question, are singularly unfortunate; for in the first one he admits the very point which he seeks to controvert, namely, that the plaintiff may, under certain circumstances, join issue upon a counter-claim. And in the second illustration he takes it for granted that a defendant can give evidence of fraud, satisfaction, etc., without setting up such defences in his pleading—a procedure forbidden by Rule 147.

The reasoning of the court in *Hare* v. *Cawthrope* may be seen by the following extract from the judgment. At page 354, Mr. Justice Rose says "Order 21, Rule 176, O. J. A., differs essentially in its language from the above section (i.e., sec. 117 of the C. L. P. Act)." It reads:—"As soon as either party has joined issue upon any pleading of the opposite party simply, without adding any further or other pleading thereto . . . . . the pleadings as between such parties shall be deemed to be closed without any joinder of issue being pleaded by any or either party."

"In the Interpretation Clause, sec. 91 of the Act, pleading is said to include the statement in writing of the claim or demand of any plaintiff. It seems clear therefore, that a defendant may under Order 21, join issue upon a statement of claim without adding any further or other pleading thereto."

If Rule 176 is to be read in this very literal manner as entitling either party to join issue upon *any pleading* of the opposite party, and thereby close the pleadings, some curious results must follow.

Under sec. 91, we find that "pleading" shall include *any petition or summons*. So that if a defendant requires speedy justice, he may join issue the day after he is served with the writ or summons, and, under Rule 255, give notice of trial for the assizes which, perhaps, are fixed to commence within a fortnight. This would be a safe defence to rely upon in cases in which the plaintiff requires evidence to be brought from a distance. The defendant, however, would not have all the advantage of this novel procedure on his side, for all a plaintiff would have to do to rid himself of an awkward summons for security for costs or for particulars, under Rule 425, would be to clap a joinder of issue on the fyles, and give notice of trial for the approaching sittings.

But seriously speaking, if a joinder of issue be pleadable as a defence, then the rules applicable to a defence must govern it. When it is filed by way of defence, to a statement of claim or, reply to a counter-claim, then under *Hare* v. *Cawthrope*, the pleadings are closed and either party may give notice of trial.

In the case of a counter-claim, what becomes of Rule 153, and the right it gives to defendants to amend on precipe within eight days? Or, in the case of a defendant who files a joinder by way of defence, what becomes of the rights of the plaintiff, who may, under Rule 179, without any leave, amend his statement of claim once at any time before the expiration of the time limited for reply and before replying?

If a defendant rests his defence upon a denial of the facts alleged by the plaintiff, there is no reason why he should not put his denial in some other shape than in that of a joinder of issue.

There are several instances given in the forms which accompany the Judicature Act of all the pleadings authorized by the Act, and among them may be found several denials of the truth in the statement of claim. But I have searched in vain for an instance of a joinder of issue being pleadable as a statement of defence.