

an omission were made, the defendant would not in every case be precluded from setting up the omitted facts as a defence.

Rule 56 (5) allows a statement of defence only which sets up a "further or other answer to the plaintiff's claim." The claim here was for the balance due upon a written order for a Davis generator. The defence was based upon misrepresentation. Upon comparing the statements in the affidavit with what was set up in the statement of defence delivered by the defendant, no ground appeared for reversing the finding of the Senior Judge that the affidavit was sufficient to enable the defendant to prove at the trial all that he alleged in the statement of defence.

But the defendant had delivered a counterclaim also. Rule 56 (5) does not give power in so many words to grant leave to file a counterclaim; and, in view of the language of Rule 112, "statement of defence" in Rule 56 (5) does not include a counterclaim. The case of a defendant to an action commenced by a specially endorsed writ desiring to counterclaim where the plaintiff elects under Rule 56 (2) seems to be a *casus omissus*; and in such a case no power is given to allow a counterclaim to be pleaded.

A question as to the right of appeal was raised, but was answered by *Smith v. Traders Bank* (1905), 11 O.L.R. 24, approved in *M. Brennen & Sons Manufacturing Co. Limited v. Thompson* (1915), ante 206.

The opinion was also expressed that the Junior Judge was not precluded from making the order upon any ground such as that the Senior Judge should have been applied to because he was seised of the case—there was no difference between the powers of the two Judges in that regard.

FALCONBRIDGE, C.J.K.B., and LATCHFORD, J., concurred.

HODGINS, J.A., concurred in the dismissal of the appeal, on the ground that the order of the Junior Judge, having been made *ex parte*, could not be supported, and was properly set aside: *Joss v. Fairgrieve* (1914), 32 O.L.R. 117.

The learned Judge doubted whether the defendant was debarred by the language of Rule 56 from obtaining leave to deliver a counterclaim.

*Appeal dismissed with costs.*