

LATCHFORD, J., IN CHAMBERS.

OCTOBER 1ST, 1913.

## EVERLY v. DUNKLEY.

*Costs—Scale of—Action Brought in High Court—Jurisdiction of County Court—Amount Awarded by Judgment—Amount Claimed—Set-off—Rule 649.*

Appeal by the plaintiff from the ruling of the Local Registrar at Chatham, upon taxation of the plaintiff's costs, as to the scale of costs.

Shirley Denison, K.C., for the plaintiff.

H. S. White, for the defendant.

LATCHFORD, J.:—This is an appeal from the ruling of the Local Registrar at Chatham determining that the plaintiff is entitled only to County Court costs under the judgment as settled by counsel for the parties, and—though never formally entered—used upon the appeal to a Divisional Court, reported (1912), 27 O.L.R. 414, and that his taxation must proceed accordingly; the defendants to be entitled to tax their costs as between solicitor and client on the former High Court scale, with right of set-off and allowance as provided by Con. Rule 1132 of the Rules of 1897, now Con. Rule 649.

The judgment declared the plaintiff to be "entitled to recover from the defendants \$422.09, being \$542.17, the amount sued for, and interest on \$416.92 from the 15th April, 1912, to the date of the judgment, less \$125.25 paid by the defendant Dunkley for funeral expenses and doctor's bills."

I think the learned Registrar erred. He evidently treated the amount awarded by the judgment as the test of whether the action was within or in excess of the jurisdiction of the County Court. There are indeed many cases where that is the test. But there are many others in which it is not. This case is one where the amount of the judgment is not conclusive as to the proper jurisdiction. The sum claimed exceeded \$500. The set-off of \$125.25 allowed by the trial Judge was not pleaded. It was not assented to by the parties so that in law it constituted a payment. In the absence of such an assent, "a plaintiff"—to use the language of Middleton, J., in the late case of *Caldwell v. Hughes* (1913), 4 O.W.N. 1192—"having a claim against which