

Falconbridge, C.J.K.B., Street, J., Britton, J.] [Nov. 18, 1905.

LEVI v. EDWARD.

*Solicitor's lien—Set-off—Counterclaim—Con. Rules 1130, 1165.*

Appeal from judgment of ANGLIN, J.

The effect of Rule 1165, which provides that "a set-off of damages or costs between parties shall not be allowed to the prejudice of the solicitor's lien for costs in the particular action in which the set-off is sought," seems to be that if A. has judgment against B. for payment of a sum of money, and B. has judgment against A. for a sum of money which includes costs due B.'s solicitor, A. cannot insist upon having B.'s judgment set off against his own, if the effect of the set-off would be to prejudice a lien of B.'s solicitor for his costs of obtaining B.'s judgment.

But the case of a claim and counterclaim in the same action does not come within the purview of this rule. In such a case for the purpose of execution for the final balance between the amount recovered by the plaintiff for debt and costs, and that recovered by the defendant for his debt and costs, there is only one action.

This being so Rule 1164 is special authority for setting off costs taxable to the defendant against those taxable against him without any saving of solicitor's lien.

Per FALCONBRIDGE, C.J.—Rule 1165 does not fetter the discretion of the trial judge which by Rule 1130 (subject to saving clause as to trustees, etc., and subject to the Judicature Act, 1895, and the express provision of any other statute) is practically unlimited. Rule 1165, however, restricts the power of a taxing officer and probably of the judge in Chambers to allow a set-off to the prejudice of the solicitor's lien, but it does not limit the power of the trial judge to order such a set-off.

R. McKay, for defendant. G. M. Clark, for plaintiff.

Divisional Court.]

[Nov. 21, 1905.

GUMMERSON v. TORONTO POLICE BENEFIT FUND.

*Benefit fund—Pension—Right to—Proper forum—Injury in the execution of duty.*

By Rule 32 of the Rules and Regulations of a Police Benefit Fund it was provided that where a member "in the execution of duty" received such injury as "in the opinion of the Police Commissioners" permanently incapacitated him from service in the police force, he should receive a pension as therein provided.