The decision in this case was overruled in In re Hall v. Curtain, 28 U. C. R. 533, and In re Judge of the County Court of Northumberland and Durham, 19 C. P. 299; the effect of these decisions, however, is not at all to question the accuracy of the definition by the learned Judge, but to make it even more clear that a claim cannot be reduced by allowing a set-off to the defendant, unless there has been an agreement between the parties to set off one claim against the other in whole or pro tanto. See also Furnival v. Saunders, 26 U. C. R. 119; Re Jenkins v. Miller, 10 P. R. 95.

In this case the payment to Dunnett entitled the defendant to a set-off or counterclaim — it is immaterial to consider which — and the plaintiff was not entitled by giving credit for this sum to bring his action in the Division Court. In this view it is unnecessary to consider the second ground taken (for the first time before us), viz., that the plaintiff's claim being for an annuity during his life, the fact that he was alive must be proved. As at present advised, I do not think that there is any presumption that, because an action is brought in the name of a person who under a deed is said to be entitled to a life annuity, that person is or was at any particular time alive. I am not, of course, speaking of a case in which the action is brought shortly after the making of the deed. There, there may be a presumption that the annuitant was alive, or at least believed to be alive at the time the deed was made, and it may probably be presumed that he continues to live. But here the deed is made in 1892, and the action brought 13½ years later. I fail to see that there is any presumption that the grantee was alive, say, in the year 1905, unless the fact that an action is brought in his name raises such a presumption, and that, I think, it does not. It is not without precedent that an action should be brought in the name of a person long dead. And it is no answer that in the defence it is admitted that "the plaintiff is a retired farmer residing in the township of Murray." The plaintiff was not bound to anticipate that this would be admitted.

I am of opinion that the appeal should be allowed with costs both in this Court and below, and that the ruling of the of the taxing officer at Belleville should be restored.

BRITTON, J., gave reasons in writing for the same conclusion.

FALCONBRIDGE, C.J., also concurred.