responsible. In other words, the defendant claimed to set off against a debt due to Ash as trustee a claim against him personally. But these were not mutual debts, and could not be set off either in law or in equity: Ambrose v. Fraser (1887), 14 O.R. 551.

The plaintiffs were, therefore, entitled to recover the full amount claimed without any set-off.

As to costs: if, as contended by their counsel, each of the plaintiffs was entitled to maintain his own action in his own name without adding Ash as a party, then the plaintiffs were entitled to their costs of the action throughout; but the learned Judge could not take that view.

Reference to Dunlop Pneumatic Tyre Co. v. Selfridge and Co. Limited, [1915] A.C. 847, 853; Faulkner v. Faulkner (1893), 23 O.R. 252, 258; Moot v. Gibson (1891), 21 O.R. 248; Daniell's Chancery Practice, 8th ed., p. 151.

The learned Judge had not overlooked Rule 85, nor the contention that the documents shewed an assignment of a chose in action by Ash to the plaintiffs and notice to the debtor entitling them to sue in their own names. This was not the true view. Ash was a trustee for the plaintiffs, and they never bargained with him to accept from him an unascertained share of a contested balance due from the defendant in lieu of their full claim as cestuis que trust against both Ash and the defendant.

But, even if this were an assignment of a chose in action, the plaintiffs' position was not improved. The learned Judge agreed with what was said by the trial Judge in this regard, and referred to the remarks of Moss, C.J.O., in Seaman v. Canadian Stewart Co. (1911), 2 O.W.N. 576, 579.

The action was therefore not properly constituted until the order was made by this Court joining Ash as a co-plaintiff. Up to that point the plaintiffs were wrong. There should be no costs of the action or appeal to either the plaintiffs or the defendants.

The should be judgment for the plaintiffs for the amounts of their claims without costs and without prejudice to the defendant's claim to recover from Ash the $857.06 and without prejudice to any defence which Ash may set up to such claim.

MULOCK, C.J.Ex., and CLUTE, J., agreed with MASTEN, J.

SUTHERLAND, J., agreed in the result, for reasons stated in writing.

Appeal allowed.