The appeal and cross-appeal were heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

L. F. Heyd, K.C., for the plaintiffs.

George Wilkie, for the defendants.

RIDDELL, J., reading the judgment of the Court, said that the particulars of the $490.40 claimed by the plaintiffs began with $179.64, account rendered, and then items were added amounting to $859, making a total of $1,038.64. In the account credit was given for these sums: contra account, $211.07; carburetor allowance on trucks, $70; allowance on installing, $267.17: in all, $548.24; leaving $490.40 as the balance claimed.

The statement of defence and counterclaim set out a purchase, in April, 1916, by the defendants from the plaintiffs, of two motor-trucks with a loading capacity of 3½ tons and in a perfect operating condition; alleged non-delivery of one of the trucks till September, a capacity of only 2 instead of 3½ tons, want of perfect operating condition; an agreement by the plaintiffs to install new engines in the trucks, and deficiency of power in the new engines; and that the work for which the plaintiffs claimed payment was really done on their own behalf to implement their contracts. By the counterclaim the defendants (1) claimed $1,433.63 damages for loss of the use of the trucks and loss in the endeavour to operate them; (2) claimed the return of $800 which the defendants had paid the plaintiffs on account of the price of the trucks.

The trucks were second-hand articles; the agreement was for "two only 3½-ton second-hand Sheffield motor-trucks, formerly owned by Canadian Fairbanks Morse Co.," on the following conditions: "Hall Motors Limited to properly overhaul trucks and turn them out in A1 shape mechanically."

It was said that the plaintiffs did not "overhaul trucks and turn them out in A1 shape mechanically;" and it was mainly for damages for the breach of this contract that the counterclaim for $1,433.63 was made.

There were only three questions to be tried: (1) what damages, if any, the defendants were entitled to for breach of the primary contract; (2) the right of the defendants to recover the $800; and (3) what the plaintiffs were entitled to recover upon their claim.

The second question was dealt with by the trial Judge in a peculiar way: he dismissed this part of the counterclaim without costs, but allowed a separate action to be brought. This he should not have done without consent: Lockie v. Township of North Monaghan (1917), 12 O.W.N. 171; Tyrrell v. Tyrrell (1918), 43 O.L.R. 272. The trial Judge rightly dismissed this part of the