

SECOND DIVISIONAL COURT.

MARCH 26TH, 1920.

*BEST v. BEATTY.

*CALVERT v. BEATTY.

Trusts and Trustees—Assignment of Parts of Debt—Contract—Performance—Actions by Assignees—Necessity for Joining Assignor as Party—Rule 85—Addition of Assignor upon Appeal from Judgment Dismissing Action for Want of Parties—Consolidation of Actions—Costs—Trustee and Cestui que Trust—Claim to Set off Debt Due by Trustee in Personal Capacity—Assignment of Chose in Action.

Appeals by the plaintiffs from the judgments of HODGINS, J.A., the trial Judge, 17 O.W.N. 327.

The appeals were heard by MULOCK, C.J.Ex., CLUTE, SUTHERLAND, and MASTEN, JJ.

J. J. Gray, for the appellants.

W. J. McCallum, for the defendant, respondent.

MASTEN, J., read a judgment in which he said that the trial Judge dismissed the action on the ground that one Ash was a necessary party thereto.

Counsel for the appellants in opening the argument of the appeals said that he had failed to make his position clear at the trial; that he had never intended to withdraw from his offer to add Ash as a co-plaintiff; and he applied to this Court for an order making Ash a co-plaintiff, undertaking to file his consent, and representing him on the hearing of the appeals. Counsel for the defendant consented to the adding of Ash. An order was made accordingly, and the two actions were consolidated. This was all without prejudice to the plaintiff's right to contend, on the question of costs, that separate actions had been properly launched by the two plaintiffs.

The argument then proceeded upon what was admitted to have been throughout the real issue in controversy between the parties, namely, whether the defendant was entitled to deduct from the sum of \$5,900, claimed by the plaintiffs, \$857.06, being the amount of liabilities which he said he had paid in excess of what he had undertaken to pay. The issue was as to the right to set off against the \$5,900 due by the defendant to Ash as trustee the overpayment made by the defendant on account of general liabilities, for repayment of which Ash was alleged to be personally