

Since these cases were decided a new Rule on the subject has been adopted in this Province. It was passed on the 23rd June, 1894, and is now Rule 214, and is the same as the English Order 16, r. 54, which was passed probably in consequence of the decision in *Witham v. Vane*, 32 W. R. 617, and came into force on the 24th October, 1883: *Snow's Annual Practice*, 1903, p. 203.

Rule 214 clearly, I think, gives power to the Court to order a plaintiff whose action is dismissed to pay the costs of the third party as well as of the defendant, and, if this be so, the matter is one of discretion, and there is no appeal unless by leave of the Judge, and his leave has apparently not been asked, and has not been obtained.

Tomlinson v. Northern R. W. Co. is therefore now useful only as a guide to the Judge in the exercise of his discretion. Appeal dismissed with costs.

FEBRUARY, 28TH, 1903.

DIVISIONAL COURT.

HIXON v. WILD.

Mortgage — Covenant against Incumbrances — Breach — Damages — Measure of — Costs — Payment into Court.

Action for damages for breach of covenant against incumbrances contained in a mortgage deed made by defendant to plaintiff. The trial Judge found for the defendant. The plaintiff appealed to a Divisional Court, which reversed the judgment and directed a reference to the Master in Ordinary to assess the plaintiff's damages. The Master assessed these damages at \$2,064, being the amount of a mortgage (and interest) made by defendant in favour of Ann McKenzie, which was the incumbrance constituting the breach of the covenant.

The defendant appealed to a Divisional Court from the Master's report, and the plaintiff moved the same Court for judgment on further directions and costs.

R. McKay, for defendant.

A. O'Heir, Hamilton, for plaintiff.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J.) was delivered by

MACMAHON, J.—We are concluded as to the damages by *McGillivray v. Mimico Real Estate Security Co.*, 28 O. R. 265. The defendant's appeal will, therefore, be dismissed.