OSLER, J.A.—Two Courts, one of them of plaintiffs' own choosing, having passed against them, and considering what is now at stake in the action, viz., costs only, it would be a wrong exercise of discretion to grant leave to bring a further appeal, even assuming, as the plaintiffs very strongly urge, that the judgments below are open to criticism as having proceeded upon some misconception of the facts or wrong view of the law. The case is just such a one as, even if possibly wrongly decided, ought not, under all the circumstances, such as the subject matter and amount involved, the nature of the dispute, its origin, etc., to be further litigated. The Divisional Court have placed the right construction upon the judgment at the trial and the Rule of Court in holding that, in the event which has happened, of failure by the plaintiffs to prove tender, or dispensation of tender, the defendant became entitled to the costs. Had the question of costs been reserved by the original judgment, it is quite probable that the evidence would have justified the disposition which Street, J., made of them, i.e., giving them to neither party.

Motion refused with costs.

OSLER, J.A. SEPTEMBER 23RD, 1902.

C.A.—CHAMBERS.

PEGG v. HAMILTON.

Appeal—Court of Appeal—Leave—Mortgage—Payment—Reference.

Motion by plaintiff for leave to appeal from order of a Divisional Court (ante 418) affirming judgment of ROBERTSON, J., at the trial, dismissing the action, which was brought on a covenant contained in an old mortgage made by defendants to plaintiff, and was begun on the last or next to last day on which it could have been begun to save the running of the statute. The writ was not served on the defendants for nearly a year afterwards. The defence was payment. The amount involved was not quite $1,000. The main question was in regard to the application of certain moneys which had undoubtedly been paid to plaintiff by defendants. If these were applied on the debt represented by the mortgage, plaintiff had no further claim. No question of law arose in respect of the application. It was entirely a question of fact. It was contended that the trial Judge should have referred the case, instead of trying and disposing of it himself.

A. B. Armstrong, for plaintiff.

S. B. Woods, for defendants.