

And the grounds on which the rule *nisi* had been granted were—

1. That the said order, dated the 22nd day of February, 1878, was not served upon the plaintiff or his solicitor until the 12th day of March, 1878, and was abandoned by the defendants.
2. That the said order in effect varies and alters the rule of this Court, dated the 17th day of October, 1877, made in this action for a new trial of the issues joined in the action.
3. That the said order improperly reserves the question as to the payment of the costs of the first trial of the issues raised on the second count, and of the costs of the said rule for a new trial.
4. That the said order purports to be made by consent, meaning thereby by the consent of all parties to the action, and no consent was ever given on behalf of the plaintiff to the said order.
5. That the said order was drawn up so as to deprive the plaintiff of all costs of this action, and force him either to go to trial upon an issue which the Judge would direct the jury against him, or would force him to allow himself to be nonsuited, or to abandon his action, and pay all costs.

In this suit, at the time when the summons for leave to withdraw the pleas was made, there had been a trial, and as to the issues raised on the second count of the declaration the defendants had obtained a rule absolute for a new trial. By that rule the Court gave to the defendants the costs of the rule, and reserved the question of the costs of the first trial.

That rule was not appealed against by the plaintiff. On the contrary, the plaintiff had endeavoured to force the defendants to the new trial at the January sittings, but had failed for reasons unnecessary to refer to.

This Court, in its judgment on making absolute the rule for the new trial, had decided that the damages awarded by the jury on the second count were excessive, and in effect that in such a case as the present the damages were nominal.

The second count was for trespass on a shop and premises, and conversion of goods. The defendants held a bill of sale over the goods to secure advances, and the bill of sale gave powers of entry on the premises, and of seizure and sale of the goods, upon default of the payment on demand in writing. The defendants in their pleas justified the entry and seizure and sale of the goods on the ground that the plaintiff had made default of payment on demand. The entry and seizure appearing to have been made immediately, without any interval whatever of time after the demand, this Court, on the authority of English decisions, concluded that the justification failed as an absolute answer, but concluded, also on the authority of English decisions (amongst others *Brierley v. Kendall* and others, 21 L.J., Q.B., 161), that in such a case the measure of damages is the loss which the plaintiff has really sustained by being deprived of his possession of the goods too soon; and, further, that in this case the damages which could properly be given for such deprivation were nominal. The debt with which the goods were charged was as found by the jury £908, while the value of the goods seized was, on the evidence of one of the plaintiff's witnesses, £514. His own evidence put the value higher, but less than the debt secured.

The defendants, by their summons on which the now impeached order was obtained, appear to have determined to act upon the decision to give up the pleas of justification, and admit their liability to some damages, and pay those damages into Court, and for that purpose took out a summons already mentioned.

There can be no question of the power of a Judge at chambers to grant such an application at any stage of a suit; such an application has been granted at the trial or even later after a rule for a new trial.

The 289th of the rules of the Court, of 1856, is as follows: "Even after the defendant has pleaded, a Judge's order may be obtained to withdraw the plea, in order to pay money into Court and plead such payment."

Such an order is made on terms. The terms are the payment of the costs of the application and the payment of the costs of the amendment; and, in order to avoid the delay and expense of an interlocutory taxation, the payment of such costs, like the payment of the costs of other amendments, may, instead of being made a condition precedent to the withdrawal of pleas and amendment, be made payable to the plaintiff in any event, but to stand over till the conclusion of the suit.

See Day's Common Law Procedure Act, 1878, p. 3, where he says, "Some Judges, in order to avoid interlocutory taxation, direct the costs to be the costs of the party (not amending) in the cause in any event, and this, which is a growing, is generally the most beneficial, practice."

In *Jones v. Williams*, 42 L.J., Q.B., p. 48, which was a case of an order for leave to pay into Court after a trial and new trial ordered, so free of objection are such terms that in that case the order was made by consent.

See an earlier case, *Harold v. Smith*, 29 L.J., Exch., p. 141, where an order for leave to amend was granted, and to pay into Court after plea pleaded, notice of trial given, and only five days before the first day of the sittings of the Court where the trial was to be held. In that case there had not been a trial, and the order was not by consent; but the payment of the costs of the application and the amendment was not made a condition precedent; but the order made was, "The defendant be at liberty to amend by the payment into Court of £79, the costs to be plaintiff's costs in the cause at all events;" and *Bramwell, B.*, at p. 144, as to this portion of that order, says, "Which order was not in the usual terms, that the defendant had liberty to amend upon payment of the costs in the order, but in substance it amounted to the usual order to amend upon payment of the costs of the amendment. There was something not quite of course in the order, but in substance it amounted to the usual order to amend upon payment of costs occasioned by the amendment."

The order made in the present case as to these costs, the costs of the application and amendment, is in conformity with these precedents, and is, I think, beneficial, convenient, and just to both parties.

The plaintiff, under such an order, would have the benefit of those costs, whatever may be the result of the suit, even though the plaintiff should be nonsuited. It is true they are not taxable immediately, and if the defendants should recover any costs in the suit against the plaintiff, such costs may be set off against the costs of the amendment, but this is manifestly only just.