

to the costs of the first trial. To this I assented, and required the defendants' undertaking not to tax the costs under the rule in the meantime.

The order conforms to the minute made by me, and read out to the parties at the time more than once without objection.

If it is alleged that there was no intention to assent to this reservation, the proper course was for the plaintiff's solicitor to have brought the matter before me in chambers. See *Hall v. West*, 13 L.J. Exch. 31, 1 D. and L.J., C. P., 412. There an order was drawn up as by consent; on an application by rule to set it aside on the ground that it was improperly drawn up as a consent order, the Court refused to entertain that objection, for that, if it was not correctly drawn up in that respect, he ought to have gone to the Judge who made it, and that the Court would assume it was right. Alderson, B. says, "You should have come to me to set it right before you came here." The rule was discharged, with costs.

If this were alleged as a misunderstanding, it should have been represented to me in chambers. If it had been then it is manifest, for the reasons above given, I must have refused to give to the plaintiff either the costs of the first trial or of the rule, and the order would have been silent as to them, as it in effect is—that is, it does not give them to either one side or the other, but leaves them as they were before the order.

The whole of this portion of the order is plainly beneficial to the plaintiff, and he has, from the date of the order till the present time, had the benefit of the defendants' undertaking not to tax or enforce the costs which the rule for the new trial gave him. The provision of the Resident Magistrates Act as to cost of actions in the Supreme Court has been given as a reason why the order ought to have contained a special order as to the costs of the cause. No instance has been pointed out; I have found none where such a provision has been made in such an order. While on the other hand, though the same necessity has existed, similar orders are found in the reports without any such provision. See *Jones v. Williams*, *supra*; see *Waylett v. Windham*, 33 L.J., Exch. 172, in which it is clear that no such provision had been imposed when leave was given to amend. I find no mention in any book of practice of the imposition of such a condition in such an order.

Even if I were of opinion that the effect of that provision in the Resident Magistrates Act is that contended for by the plaintiff, where money has been paid into Court and taken out, I should, nevertheless, be of opinion that it was not a matter to be considered when granting leave to pay the money into Court. If the Legislature has in such cases, intentionally or not, deprived the plaintiff of his costs, it is not for this Court or any Judge of it to defeat by his order provisions of the law. Mr. Travers contended on showing cause that the provision applied only to the case of a recovery after trial, and not to the case of judgment by default, or judgment without a trial. If that be so, as I think it is, and the money paid into Court be taken out in satisfaction, then the plaintiff will get the costs of the cause, without any order of a Judge.

He would get those under the general rules relating to the payment of money into Court; and it is for that reason that no provision is, so far as I can find, ever made, in orders for the payment of money into Court, as to the costs of the cause.

When the order of the present case was made no question as to the operation of the provision of the Resident Magistrates Act was raised, nor did it occur to me; but being now raised I state that the inclination of my opinion is that the provision applies only to the case of a recovery after trial. I am disposed to think that the words at the end of the provision, "unless the Judge before whom the case is tried shall certify that the case was a proper case to have been so tried," may be held to reflect back, to use the words of Mr. Justice Coltman, on the former part of the section, and show that it applies only to cases where a trial of the cause has taken place, and does not apply to the case of a judgment by default, or judgment for a sum paid into Court without a trial. To use the language of Mr. Justice Coltman in *Reed v. Shurbsole*, 18 L.J., C. P., p. 225, "the effect would be very serious if any other construction were adopted: great embarrassment would be introduced, and plaintiffs would frequently be most unjustly deprived of their costs." This opinion was pronounced by him, and the majority of the Court (J. Cresswell only dissenting) on the construction of a very similar provision in the first English County Court Act. This decision was approved in *Slates v. Mackie*, 19 L.J., C. P. 89, in which case, on its being mentioned at the bar, with regard to *Reed v. Shurbsole*, that Cresswell dissented, J. Maule said, "*Reed v. Shurbsole* shows how strong the opinions of the majority of the Court must have been when they decided contrary to the view taken by my brother Cresswell."

In the judgments given by the Judges other than Coltman, the same stress is not laid upon the effect of the addition of the words providing for the certificate of the Judge at the trial.

See also per Williams, J., in *Prew v. Squire*, 20, L.J., C. P., 175, as to *Reed v. Shurbsole*.

If this be the true construction of the provision in the Resident Magistrates Act, then, if the plaintiff takes the money out of Court, he is entitled to the costs of the cause up to the time of the money being paid into Court.

However, the point has not, I believe, been heretofore decided; it was scarcely argued at the argument of the rule; Mr. Travers stating that his view was that the provision in the Resident Magistrates Act would not take away the costs, and consented, as I understand, to have the order varied or amended, so as to put the question beyond doubt. The Register informs me that the practice in this district has been to tax costs in such cases, on the supposition that the Resident Magistrates Act does not apply. This being so, I feel myself at liberty to concur with my Brother Williams that in this case the order may be amended so as to put the question in this case beyond doubt. I ought not to omit to observe that this amendment ought to have been asked for by the plaintiff of the Judge who made the order, for until he had decided that question it was, I think, improper to appeal to the Court, and had that objection been raised by Mr. Travers I should have felt bound to consider whether this Court could properly by its rule sanction a practice which I am disposed to think improper. Such a practice is calculated to increase the cost of litigation. There should be no appeal to the Court till it is ascertained that the Judge at chambers has decided the point.