The only remaining objection is one not to the order itself, but to the defendants' delay in the drawing up and service of it.

The order was obtained in vacation, and the defendants seem to have assumed that, as no pleadings are deliverable during vacation, in this case the plea of payment into Court could not be delivered till after the vacation, which expired on the 10th of March. Whatever the reason may have been, the order was not served until the 12th March.

It was contended that the mere non-service for this is an abandonment or waiver of the order.

I am inclined to think that this is not the result of the authorities or the meaning of the rule which exists as to the matter. I think that, if the party who obtains an order does not serve it forthwith and if the other side has a step to take within or at a particular time, then, if the order which would have prevented or stayed that step is not served before that time, the step may be taken, and stands valid; but if, though there be a step to be taken, yet there is no fixed time for the taking it, then, if the order is served before taking the step, the opposite side has lost his opportunity of treating the order as waived, and if he takes the step afterwards the step is invalid if the order would have made it so if it had been served forthwith after it was made. *See* Charge v. Farhall, 4 B. and C., 866; Kenny v. Hutchinson, 9 L.J., N.S., Exch. 60.

I find no case of an order having been set aside on the ground of not having been served forthwith. The questions as to whether an order may be treated as waived because of delay in service have arisen on applications by the party who obtained the order to set aside a step taken by the opposite side. The only case I have found where delay in service was urged as a ground for setting the order aside was Landford v. Alcock, 12 L.J., Exch. 40; but the order was held valid and subsisting on the ground that the opposite side could not have taken another step. At the argument of this rule I asked for a case in which an order had been set aside on the ground of delay in service, but none was pointed out to me.

It seems to me that, as the plaintiff took no steps between the making the order, and the service was not prejudiced by the delay, he cannot use each delay as a ground for setting aside the order, and that his steps taken subsequent to the service are not valid. I also think that there was delay not accounted for in taking steps to set aside the order. Inasmuch as the plaintiff was enjoying the advantages of the defendants' undertaking to suspend his right to enforce the costs of the rule of the new trial, his application to the Court ought to have been without any delay.

As to the imputations of fraud and misconduct that have been so freely made, I think that they deserve no further remark than that they are, in my opinion, entirely unsupported.

The rule is made absolute for amending the order by the addition of the following terms:—

If the plaintiff shall take out of the Court the sum paid in in satisfaction of the claim in respect to which it is paid in, he shall be entitled to such costs up to the time of payment into Court as he would have been entitled to if the cause of action in reference to which the money paid into Court were one not within the jurisdiction of the Resident Magistrate's Court.

Each party will pay his own costs of this rule.

Mr. Justice Williams delivered judgment as follows:—

In this case the plaintiff brought his action on a declaration containing two counts.

At the trial the plaintiff obtained a verdict on the first count for a trifling amount, and on the second for the sum of £500. The defendants subsequently obtained a rule *nisi* to enter a verdict for the defendants on the first count, and for a new trial on both counts.

The rule was made absolute for a new trial of the issues raised on the second count, but the verdict on the first count was left undisturbed.

It was ordered by the rule absolute that the costs of an incident to the first trial should abide the further order of the Court, and that the plaintiff should pay to the defendants the costs of and incident to the rule. The rule was made absolute on the 8th January, and on the 15th February the defendants took out a summons asking for leave to withdraw the pleas to the second cause of action, to pay into Court the sum of £10, in respect of it to plead such payment into Court, and to be allowed to add to the plea a notice that they would give in evidence in mitigation the matters set forth in the plea proposed to be withdrawn. On the 22nd February a Judge's order was made on the terms of the summons. The order also provided that the costs of and incidental to the order and the costs of the amendment should be plaintiff's costs in the cause in any event. The order then proceeded in these terms: "And I do also further order, by consent, that the question as to payment of the costs of the first trial of the issues raised on the second count and of the costs of the rule for a new trial, as affected by this application, be reserved for the consideration of the Court at the time of the disposal by the Court of the questions as to costs which are reserved by rule for the new trial, the defendants also undertaking in the meantime not to proceed with the taxation of costs granted by the said rule." This is the order that the plaintiff now seeks to set aside. There can be no doubt as to the power of a Judge at any time to make an order allowing a defendant to withdraw a plea and pay money into Court. The interests of a plaintiff are protected by the rules which give him his costs up to the time of the payment of the money into Court if he choose to accept the amount paid in satisfaction. If he declines to accept it he declines at his own risk, and if he fails to recover more than the amount paid in he has to pay the defendant's costs incurred subsequently. If the defendant pays money into Court he admits the cause of action, and the plaintiff is freed from the necessity of leading any evidence in support of his claim except such as tends to show the amount of damage he has sustained. *Primâ facie* therefore it is for the advantage of a plaintiff that at any stage of the proceedings the defendant should be allowed to pay money into Court, as by so doing he admits a wrong done to the plaintiff, and leaves open only the question of how much the plaintiff is entitled to recover. It was suggested by the plaintiff inthe present case that, as the Court, had decided on the rule for a new trial that on the second count the plaintiff would be entitled to recover only nominal damages, he was prejudiced by the leave given to the defendants. If the Court has in effect so decided, no doubt a Judge at *nisi prius* would be bound by such decision, and it would have been his duty in case the