plaintiff, instead of taking the money out of Court, had replied damages ultra, to have directed the jury accordingly, and the plaintiff would therefore gain nothing by a second trial, although, if the plaintiff considered the law as to the measure of damages untenable, he could have come to the Court to review the Judge's direction, and reconsider their own decision. Suppose, however, that the record had remained unaltered, still the law as to the measure of damages being the same the Judge would have been equally bound to follow such direction. The extraordinary argument used by Mr. Barton, that if the record had been left unaltered he might have induced the jury to defy the direction of the Judge, and to give a verdict contrary to law, is, of course, no reason for allowing the defendant to withdraw his pleas. Such an unfortunate contingency might, moreover, happen with equal probability with the record in its altered as well as in its unaltered state. Another objection urged was, that it took away from the plaintiff the power to apply to amend by adding a count. Clearly it does nothing of the kind. I can only say that if the plaintiff had wished to amend it is strange he has not long ago made an application for the purpose.

Apart, therefore, from any effect the 28th section of the Resident Magistrates Act may have, the first part of the order is unobjectionable, unless it is rendered objectionable by something inserted in the latter part of the order, or from the omission of some condition which should have been imposed by the order on the defendants. It seems to me that the latter part of the order which purports to be by consent has practically no effect at all. It leaves in *statu quo* the question of the costs of the rule and of the first trial, and so far as it has any operation it operates in favour of the plaintiff, as it suspends the issuing of execution by the defendant for the costs he had obtained by the rule. If this part of the order is stated erroneously to have been made by consent, it is clear that the Judge who made the order should have been resorted to, so that any doubt as to what actually took place on the making of the order should be set at rest, and the order, if necessary, amended. The Court will not now interfere with the order on the ground of this mistake, if mistake it be, unless it also appears that the order is impeachable by reason of some condition not having been imposed on the defendants which ought to have been imposed. Ought, then, any condition to have been imposed on the defendants either as to paying the costs of the first trial, or as to abandoning the costs he had obtained by the rule for a new trial. The order leaves both these matters as they were left by the Court, and does not prevent the Court hereafter from giving the plaintiff the costs of the former trial if it thinks fit to do so. I see no reason why the order should have imposed any such conditions. When a defendant upon being defeated at his first trial obtains a rule for a new trial, and then withdraws his pleas and suffers judgment by default, he has not to pay to the plaintiff the costs of the first trial (Peacock *v.* Harris, 5 A. and E., 454). So also when a plaintiff defeated at the first trial obtains a rule for a new trial and then discontinues, he has not to pay the defendant the costs of the first trial (Jolliffe *v.* Mundy, 4 M. and W., 502). Why, therefore, when a defendant, after having obtained a rule for a new trial, pays money into Court, must it be made a condition of his doing so that he should pay the costs of the first trial? These costs fall to the ground unless some mention of them is made in the rule for a new trial. In the present case the costs were reserved for the subsequent decision of the Court. It would have been manifestly wrong for the Judge to have adjudicated upon the question, and thus have prevented the Court from exercising the power it had reserved to itself. It would have been also wrong for the Judge to have interfered with the costs of the rule that had been given by the Court. It by no means follows that because the defendant pays money into Court he was not justified in moving for a new trial; and, unless it were made pefectly clear to the Judge that the rule had been altogether futile, there is no reason why the defendant should have been made to waive the costs the Court had given him.

The question in the case which has given me the most difficulty is as to the effect of section 28 of "The Resident Magistrates Act, 1867," in depriving plaintiff of his costs. There is no need on the present occasion to decide the precise effect of that section. The construction placed upon it by Mr. Barton may or may not be the correct one, but at any rate a great deal of argument could be adduced favourable to Mr. Barton's view. If Mr. Barton's view on this point is correct, and if it is necessary in any action brought in the Supreme Court, where the plaintiff has recovered a less sum than he might have recovered in the Magistrate's Court, that in order to entitle him to any costs there must be a trial and a certificate of the presiding Judge, then it might follow in the present case that if the plaintiff took out of Court the money paid in he would be entitled to no costs at all. I think that if the defendants obtained the concession of being allowed to pay money into Court it would have been a fair condition; that the plaintiff should not run the risk of being possibly deprived of his costs by a side wind. The question, however, of the construction of the Magistrates Act was not raised before the Judge who made the order, and the plaintiff has therefore himself to thank if any reference to it was omitted in the order. It was admitted, as I understood, by Mr. Travers, that, according to his construction of the order and of the Magistrates Act, it was neither the intention of the order nor the effect of the Act to deprive the plaintiff of these costs. As this is so, though there may be some doubt as to whether it is strictly right to vary the order in this particular, yet it does not seem unreasonable that the Court should now so amend the order that the doubt might be set at rest.

I think that the order might be amended by making it an express term of the order granting leave at so late a stage to the defendant to withdraw his pleas, that if the plaintiff should take out of Court the sum paid in in satisfaction of his claim, the defendants should pay to the plaintiff such costs of the action up to the time of payment into Court as they would have had to pay if the action had been one which could not have been brought in the Magistrate's Court. This would, of course, leave untouched the question of the costs of the first trial and of the rule for a new trial.

As to the question of the order becoming abandoned by delay, I agree with what has been already said by the Chief Justice. With respect to the charges of fraud that were made at the hearing, I can only say that there is not the slightest evidence before the Court to support them.