But it is, as I understand, contended that an order to amend and pay money into Court after a rule absolute for a new trial is improper, or, if made, that the payment of the costs of the first trial and of the costs of the rule for the new trial should be made a condition of the granting of such order.

There is no authority for either contention; the authorities and precedents are the other way (*see* Archbold's Queen's Bench Practice, Vol. ii, p. 1304, citing an anonymous case from Tidd, 672): "Money has been allowed to be paid into Court even after granting a new trial."

I have already referred to Jones *v.* Williams. In that case the plaintiff had a verdict at the first trial; the defendant obtained a rule absolute for a new trial on the ground that the damages were excessive and the verdict against the weight of evidence; the costs of the first trial were by the rule to abide the event. The cause was set down for the new trial on the 24th May, and on the 16th May the defendant obtained an order to amend his pleas by adding a plea of payment into Court of £5. In that case no condition was imposed in the order to amend as to the payment of the costs of the rule for the new trial or of the first trial; indeed, as already pointed out, the order was a consent order. This case, then, is an instance in which the order was made after a rule for a new trial, and without imposing terms as to the costs of the first trial.

It has not, so far as precedents show, been the practice to make the payment of the costs of a first abortive trial a condition in the somewhat analogous case of permitting a defendant after a rule for a new trial to withdraw pleas for the purpose of letting judgment go by default, or that of permitting a plaintiff to discontinue after a rule for a new trial, and this is so both where the costs of the first trial have been ordered to abide the event and where the rule is silent as to such costs; but in the present case the Court has not yet decided as to the costs of the first trial.

In Peacock *v.* Harris, 5 Ad. and Ellis 454, there was a verdict against defendant. He obtained a rule for a new trial, nothing being said therein as to the costs of the first trial, and then withdrew his pleas, suffered judgment by default, and on a writ on inquiry damages were assessed, but it was held that the costs of the first trial were not part of the costs in the cause to be paid by him. It was argued that by withdrawing his pleas he showed that the first verdict was right on the merits, and that he had no defence to the action. In that case he must have obtained a Judge's order for leave to withdraw his pleas. Yet it is evident that the condition of paying the costs of the first trial and the rule was not imposed upon him.

So in the case of a new trial obtained by plaintiff, and afterwards leave to discontinue granted, such leave is granted without imposing the condition of paying the costs of the first trial, if the rule far the new trial is silent as to these costs. (*See* Gray *v.* Cox, 2 Dowl, 220; Daniel *v.* Wilkin, 22 L.J., Exch. 73.)

The reason being that where there has been an abortive trial from the fault of neither party, neither party is to be mulcted in the costs of such a trial; not even that party, whether plaintiff or defendant, who by his subsequent acts shows that he ought not to have sued or defended as the case may be.

In the present case there is the additional reason why the order for leave to amend should have been granted without imposing any condition as to the costs of the first trial and the rule; that reason is, that the rule gave the costs of the rule to the defendant, and reserved the costs of the first trial for the consideration of the Court itself.

It is therefore, I think, plain that the order for leave to amend ought not to have given the costs of the first trial to the plaintiff, nor ought it to have given him the costs of the rule, nor ought it to have taken away those costs from the defendants.

The order was, I think, right in leaving those costs quite unaffected, as it does. But it was beneficial to the plaintiff to have the question of his right to those costs left open for future argument, and that the order does; hence the insertion of the concluding part of the order. This concluding part does, I think, substantially contain what I minuted on the summons, though it is not exactly the same. What was minuted was as follows:—

"I grant the application to withdraw the pleas to the second count, and to pay £10 into Court on the second count, and to plead it, and to give with plea a notice in mitigation of damages.

"The costs of this application and the costs of the amendment to be the plaintiff's costs in the cause in any event. As to the payment of the costs of the first trial of the issues raised on the second count, and the costs of the rule for a new trial by consent, this question to be reserved for the consideration of the Court at the time of the disposal by the Court of the question as to costs, which was reserved by the rule for the new trial; and if the Court should be of opinion that the payment of those costs ought properly to have been made a condition of the leave to withdraw plea and pay money into Court, then the plaintiff to have those costs, even though the Court would not have given them under the question reserved by the rule, and notwithstanding that as to the costs of the rule they are ordered thereby to be paid to the defendant

"The defendant undertaking not to proceed in the taxation of costs of the rule in the meantime, and until the Court shall otherwise order."

This portion of the order is not strictly an order at all, but is a reservation by agreement of parties of particular questions to be dealt with thereafter by the Court. This course, I am disposed to think, needed the assent of both parties. Hence it was so minuted by me, and being so minuted was so drawn up, and properly so. It may be that the words "by agreement of parties" would have more accurately expressed what I intended by my minute. I think the words used are substantially the same.

It is objected that the order is drawn up by consent, whereas no consent was given.

With regard to that it is unnecessary for me to refer to what took place before me in chambers further than this: That the clerk from the plaintiff's solicitor's office who appeared to oppose the summons offered no arguments, and gave no reasons why the application should not be granted. He stated simply that he opposed the application. I took time to consider the application, and on the occasion when I stated that I was prepared to make the order Mr. Fitzherbert (plaintiff's solicitor) requested that the question as to the costs of the rule should also be reserved as well as the question as