

and the costs awarded thereunder, and that the said settlement might be set aside. Defendant's solicitor also, at the same sittings, moved to have the order setting aside the notice of trial for the June sittings and staying proceedings, and asking leave to issue execution upon the judgment of the Divisional Court for costs.

These motions were argued together, and now may fitly be considered together. I do not see my way clear to setting aside the settlement between the parties, so far as to allow the defendant to set the case down for trial. By the settlement the case is settled, and the plaintiffs state they have no further cause of action against the defendant, and under this settlement the defendant seems to have secured very liberal terms. It appears that Mr. Plaxton's object in having the stay of proceedings set aside is that he thinks this stay is in the way of his proceeding to recover the costs ordered to be paid by plaintiffs, by the Divisional Court in Toronto, when the defendant succeeded in having the order for arrest set aside.

Now, when the application was made to set aside the notice of trial given for last county court sittings in June and stay proceedings, my intention was simply to stay further proceedings in the way of a trial about a matter which the parties had settled between them, and where the defendant had obtained the same benefit as if he should succeed at the trial.

I certainly did not consider that I was adjudicating in any way on the defendant's claim to proceed for the costs on the motion before the court above, nor was it necessary for me to do so. So far, then, as the order of June last, staying proceedings, affects either directly or indirectly the right of defendant to proceed for those costs, it must be varied so as to permit the defendant to proceed, if he be so advised, to recover those costs in the usual way. The settlement may, perhaps, then be set up as a defence to defendant's right to recover them. This settlement, which is silent as to any costs, releases the plaintiffs from all "claims, suits, actions, and demands of every nature and kind whatsoever, for and on account of this action, and the order of arrest and other proceedings taken by the plaintiffs."

Does not this appear as if it was intended to relieve the plaintiffs from any liability for what they had done in arresting the defendant? Does it relieve the plaintiffs from liability for

costs incurred on proceedings taken by the defendant?

But the settlement goes on to say: "It being the understanding that the defendant releases all actions and claims of every kind against the plaintiffs, and this being a final settlement of all differences, disputes, and actions between plaintiffs and defendant." The question now would be: Has this the effect of preventing defendant's solicitor from recovering the large amount of costs incurred in setting aside the arrest of the defendant and ordered to be paid by the plaintiffs, which Mr. Plaxton says the defendant is unable to pay, and which he must lose if he cannot get them from the plaintiffs? But apart from this, Mr. Plaxton files affidavits to show that the question of costs was expressly excepted when the settlement was made—that the plaintiffs' agent, who made the settlement on their behalf, said that they would pay the costs in question, and that the reason that this agreement to pay these costs was not included in the settlement was, that plaintiffs' agent said that he was not sure what the judgment (meaning, I presume, the order setting aside the arrest) said about the costs. The affidavit of the defendant is contradicted by that of the plaintiffs' agent (one Eggleston), who swears that "each party was to pay his own costs of the action"; and, further, that he agreed to allow the defendant to keep the binder (for which the notes sued on were given) to enable him to pay his solicitor's fees. It might be contended that the "costs of the action" meant only such costs as were yet *in medio*, and respecting which the liability of each party was as yet undecided. The defendant's statement is corroborated by the affidavit of one Thompson, who was present. The solicitor who drew up the settlement was examined before the Master at some length as to what took place at the settlement, but on reading his examination, I cannot come to any conclusion as to which version he supports.

If the agreement was, as Eggleston says, that each party should pay his own costs, he appears notwithstanding to have made the plaintiffs pay them, or a part of them at least, by handing over the binder in question to the defendant towards the payment of the costs for which he was liable—though the agreement itself does not appear to favor Eggleston's story on this point.