#### Tyson *vs.* Wells *et al.*

Where *an* order granting a new trial was made in the court helow upon the payment of costs, and the defendants paid the costs, and the plaintiff then appealed from the order, and a motion was made to dismiss the appeal on the gronnd that the acceptance of the costs by the plaintiffs attorney was a waiver of the right to appeal; *Held,* that the acceptance of the costs was not a waiver of the right of appeal, and the motion was accordingly denied.

*Mr. Burritt,* for the motion.

*John Cheiwood,* in opposition.

*By the Court,*

Bennett, J.

Motion to dismiss appeal. An application was made for a new trial in the superior court of the city of San Francisco, and the court made an order granting a new trial upon the payment of costs by the defendants. The attorney for the plaintiff caused his bill of costs to be made out [\*379](#p379)and presented it to the defendants, who paid it. An appeal was then taken from the. order granting a new trial, and this motion is made to dismiss the appeal upon the ground that the acceptance of the costs by the plaintiff’s attorney was a waiver of the right of appeal. We think the motion should be denied. The order appealed from was a conditional order. The report of the referees, and the judgment of the court based thereon, remained in full force until the performance of,the condition specified in the order granting a new trial. Tim order was inoperative until the costs were paid, and it would have been useless for the plaintiff to appeal before the condition was performed by which alone his judgment could be disturbed. This decision in no respect affects the question whether an appeal will lie from an order granting a new trial.

Motion denied.