

Chan. Cham.]

CARR V. MOFFATT.

[Chan. Cham.]

point, my impression at the hearing of the motion was, and after further consideration, still remains, that the plaintiff submitting to a demurrer and obtaining leave to amend, is bound within fourteen days to act under the order, or else his right to amend is gone. He is bound either to amend within fourteen days, or to make an application to extend the time for such amendment; but failing this, the defendant can move to dismiss. From the cases of *Armistead v. Durham*, 11 Beav. 428 and *Bainbrigge v. Baddeley*, 12 Beav. 152, it is clear that where an order to amend issues without limiting the time when such amendment is to be made, whether the order issue before or after answer, or demurrer upon an ordinary or special application, the Bill must under such order be amended within fourteen days, this being so when the defendant pleads in such a way as that the plaintiff is obliged to admit his bill is defective, and the Court allows him to make a better case by his pleading. I do not think it is unreasonable to say that unless the necessary amendments be made within fourteen days, or by special application, the time for amendment be enlarged, the bill shall stand dismissed. It is true there are two cases, *Nicholson v. Peile*, 2 Beav. 497, and *Deeks v. Stanhope*, 1 Jur. N. S. 413 which go to shew that before answer and after demurrer submitted to, and leave to amend given, the plaintiff can issue as many orders to amend as he pleases, the result being that a plaintiff can continue to issue orders to amend and delay the proceedings until the defendant, by a special application, procures from the Court, some order limiting the time within which such amendment is to be made. But it is to be observed that Lord Langdale who gave judgment in the three cases cited from Beaven, says in disposing of *Bainbrigge v. Baddeley*, "I certainly was of opinion that if upon the allowance of a demurrer, more than ordinary time to amend was required, it ought to be asked for, the plaintiff might either have applied specially to extend the time, or for a special order to amend, but the order of course was irregular." The force of *Nicholson v. Peile* is thus weakened, as it is also by the case of *Vernon v. Vernon*, 6 Chy. App. 833, where it is cited but not followed. In *Hofstick v. Reynolds*, 9 W. R. 431, V. C. Kindersley after referring to two of the Registrars and two of the Clerks in Court said, "the view they had taken appeared to be the sound one, and it was this, when the order for leave to amend was obtained that had the effect of getting rid of the Bill as it then stood, and unless the

"plaintiff amended within the time prescribed by the order, the bill was gone." In *Vernon v. Vernon*, a demurrer having been filed to a bill the plaintiff in due time served an order of course for leave to amend. Two days before the expiration of the time for amending, he served a summons for further time to amend, returnable the day after such expiration, which application was refused by V. C. Bacon. The plaintiff appealed to the Lords Justices from this decision and it was upheld. There the Court could have granted the request of the plaintiff either by extending the time under the order already made, or by issuing a fresh order to amend, and if the Court approved of *Nicholson v. Peile*, the latter course would have been followed, but in place of that, the Court of Appeals virtually over-ruled that decision. I think therefore, that I am justified by the authorities, as they stand at present, in the conclusion that under the circumstances of this case apart from the peculiar terms of the order to amend, that the plaintiff was bound to amend within fourteen days from the date of the order, and that after the expiration of that time, the plaintiff was put to make a special application to the Court for any indulgence he might think himself entitled to. I think therefore, he was not justified in taking out an *ex parte* order to revive, but that not having taken advantage of the order to amend within fourteen days, he was put to make a special application to Court for an order to revive. The bill was preserved for one specific purpose, and a specified time was appointed for carrying that out; the plaintiff accepted these terms, and it is not for him to say further time must be given, and the suit kept alive for all the purposes I desire, and I will proceed without calling upon the defendant to shew cause. If my view of the practice be correct, as against the original defendant at the time of his death, the plaintiff could not have taken any step except by a special application, and I cannot see that the death of the defendant can place the plaintiff in any better position in this respect. But the terms of the order in this case put another difficulty in the plaintiff's way. It gives him liberty to amend on certain terms, amongst which are submitting to the demurrer, and making the amendments within fourteen days. These are the conditions upon which the indulgence asked for is granted. He is to be at liberty to amend, if he submit to the demurrer, and if he amend within fourteen days. Now, under Order 196, where a person obtains an order upon condition, and fails to comply with the condition, he is considered