

Eng. Rep.]

PELL V. LINNELL AND OTHERS.—BRADY V. PICKERING.

[Irish Rep.]

that the plaintiff made default in going to trial; whereas his default, if any, was not in entering the suggestion, for until it was entered, the cause could not proceed.] But it might have been entered at any time without notice to the defendants. [BOVILL, C. J.—Surely it is traversable.] The 136th section of the Common Law Procedure Act, 1852, enacts that the action shall not be abated. [BYLES, J.—Yes, but it is suspended until the suggestion is entered. It may be that the defendant who died was the substantial defendant, and that the others were merely joined for conformity. Is not the plaintiff to have the opportunity of considering whether it is worth while to proceed?] [BOVILL, C. J., referred to *Pinkus v. Sturch*, 5 C.B. 474.]

C. Russell, in support of the rule, referred to *Barnewall v. Sutherland*, 19 L. J. C. P. 291; *Mullings v. —*, 5 Taunt. 88; Day's Common Law Procedure Act, 3rd ed. pp. 90 and 116.

BOVILL, C. J.—It seems to me that the defendants are not entitled to their costs. I assume that the countermand of notice of trial was too late, but the mere absence of such countermand does not give the defendants a right to the costs of the day. The 99th section of the C. L. P. Act, 1852, does not give the costs of the day; it only shows the mode of proceeding to obtain those costs, which are regulated by the former practice. The plaintiff was always at liberty to show any good excuse for not going to trial. Here the cause, though not abated, was suspended, and no trial could take place till the suggestion was entered. The cases establish that if the trial takes place without such a suggestion, and a witness is prosecuted for perjury, he would not be responsible (*R. v. Cohen*, 1 Stark. 511), showing that the whole proceeding would be a nullity. Mr. James assumed that it was the imperative duty of the defendant to make the suggestion, but there is no authority for that, and the defendants might equally, if they desired to have the record complete, suggested the death. But neither party chose to enter it, and so the cause could not be tried by reason of the death, that is, by reason of the act of God. Suppose, however, it were the duty of the plaintiff to have entered it, it does not follow that the defendants are entitled to their costs of the day. If the plaintiff has any reasonable excuse for not proceeding to trial, the costs of the day need not be given. The absence of a material witness has been held such an excuse (*Eastern Union v. Symonds*, 4 Ex. 502), and surely, then, the death of one of the parties to the action may be so considered. The death here took place shortly before the trial, and I do not think there is any default on the part of the plaintiff, or anything entitling the defendants to their costs of the day. Mr. James must contend that the plaintiff would be bound to enter the suggestion if the death took place upon the commission day itself.

BYLES, J.—I am of the same opinion. At common law this action would have abated, and the costs on both sides been thrown away. In the present state of the law the action is not abated, but it is suspended by the act of God and the act of the law, unless one or other party enter a suggestion, which neither of them did here.

Rule absolute.

IRISH REPORTS.

BRADY V. PICKERING.

Practice—Pleading—Extension of time to plead—Construction of order.

A defendant having, two days before the ordinary time for pleading had expired, obtained an order granting him a week further time to plead.

Held, upon motion to set aside judgment for having been marked before the time for pleading had expired, that the further time to plead was to be computed from the expiration of the ordinary time for pleading, and not from the date of the order.

[C. P. (Ir.) 16 W. R. 730, Apr. 20, 1868.]

This was an application on behalf of the defendant that the judgment in this case might be set aside, on the ground of its having been marked before the time for pleading had expired. The summons and plaint was served upon the defendant on the 27th of February, and the ordinary time for pleading thereto would have expired on the 12th of March following; but two days previous to the latter date, namely on the 10th of March, the defendant applied to Mr. Justice O'Hagan for an extension of time for pleading, and obtained an order in the following terms:—"On motion of Mr. Keogh, the counsel for defendant, it is ordered by the Right Honorable Mr. Justice O'Hagan, that the defendant do have a week further time to plead, undertaking to take short notice of trial, if necessary." This order was dated the 10th of March, and a copy of it was, on the 12th of March following, served upon the attorney for the defendant. Notwithstanding this, the plaintiff caused judgment by default to be marked on the 18th of March, and on the next day issued a notice of inquiry before the Master of the Court to assess damages.

P. Keogh, for the motion, relied upon the order of the 10th of March, as having given the defendant a week to plead from the day on which the ordinary time for pleading would expire.

J. A. Byrne and *E. M. Kelly*, *contra*, contended that the order was to be taken as giving a week's time from the date of the order; and relied upon 1 Lush Prac. 445, 3rd edit.

Per CURIAM.—The construction contended for by the defendant seems the most reasonable. The judgment must be set aside on payment by the defendant of the costs incurred in marking judgment.

GENERAL CORRESPONDENCE.

Unprofessional business.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—Will you be good enough to explain to me to what branch of our learned profession "Lehigh Egg Coal" belongs. I have searched in vain all works on real and personal property, special pleading, and conveyancing, to which I have access. And yet from day to day I see an advertisement signed by gentlemen describing themselves as "Bar-risters, &c.," wherein it is announced that they have for sale "a quantity of Lehigh Egg Coal on reasonable terms." To what part of