

U. S. Rep.]

FRIEDMAN V. RAILROAD CO.

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taken a fresh step after knowledge of the irregularity. Obtaining an extension of time to plead is not a "step in the cause," so as to waive defendant's right to set aside the filing of the plaint. There is no exact decision on the point, but the principle is recognised in the rule which has now become settled practice, that obtaining an extension of time to plead is no waiver of the defendant's right to move for security for costs: *Clarke v. Riordan*, 9 Ir. C. L. App. 34; *Stewart v. Bullance*, 10 Ir. C. L. App. 1.

Kavanagh, for the plaintiff.—The defendant is now precluded from making the objection. He has taken a fresh step after notice of the irregularity, and the 179th General Order is a bar to this application. The cases cited do not apply. They were not decided on the principle that obtaining an extension of time is a "step in the cause," but on the special nature of the applications. This motion comes too late; the 179th General Order directs that applications of this nature should be made within a reasonable time: *Roche v. Wilson*, 3 Ir. C. L. 252; *Price v. Powell*, 6 Ir. Jur. 277.

Lyster in reply.

LAWSON, J.—It has been clearly decided that obtaining an extension of time to plead is no waiver of a defendant's right to obtain security for costs. This case is somewhat different and raises a point which has not yet been decided. I think that obtaining an extension of time to plead should not operate to prevent the defendant from moving to set aside a plaint for irregularity, especially when that irregularity, as in this instance, is a matter of substance. I must, therefore, grant this motion.

Motion granted.

UNITED STATES REPORTS.

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The dying declaration of the deceased, as to the cause of the accident, is not evidence in an action for negligence.

Opinion by Hare, P. J., July 2, 1870.

This was an action brought by a widow and her children to recover damages for the death of her husband, who was fatally injured by the wheels of a passenger car belonging to the defendants. The plaintiff offered to prove the dying declaration of the deceased, that his death was due to the negligence of the conductor. This evidence was objected to and admitted under an exception. The point is now before us on a motion for a new trial.

A death-bed declaration is a statement made out of court and brought before the jury indirectly through the testimony of witnesses. It is therefore contrary to the rule which forbids hearsay evidence. The reason for this exception has been differently stated. The law, it has been said, presumes that a dying man can have no motive to falsify the truth, and standing in the shadow of another life does not need the sanction of an oath.

If this were the foundation of the doctrine, no declaration made in the immediate view of death could be shut out, and a man might be convicted of theft or arson, on evidence that he had been

charged with the offence by some one who was about to leave the world. The authorities, however, seem to agree, that such proof can only be adduced in trials for murder, and to show the cause of the death. It is therefore the nature of the offence, and not the situation of the witness, which justifies the relaxation of the rules of evidence. The fear of detection naturally prompts the murderer to choose an occasion when his victim is alone; if the statements of the latter were not admissible the crime might go unpunished for want of proof. This argument was felt with peculiar force in earlier times when violence was more common than it is at present, and a practice to which necessity seems to have introduced, has grown inveterate through the lapse of time.

It is obvious, that a doctrine which is so strictly limited in criminal cases can hardly apply in civil. Conceding that the statements of a dying man carry as much weight with them as if they were under oath, there are other considerations which should not be overlooked. To render testimony safe it must be subject to cross-examination. It is not enough that the witness desires to speak the truth, there should be an opportunity to sift his statements, and elicit facts and circumstances that may have been overlooked from inadvertence. The suppression of a seemingly immaterial incident may lead to error without an intention to deceive. The deceased is said to have declared in the present instance, that his death was caused by the fault of the conductor, and the jury may have thought that his conclusion was one which they were not at liberty to disregard. If he had been required to state the grounds upon which this opinion was based, it might have appeared that the conductor was free from blame, and that the accident was due to his own negligence. There is another danger that the statements of the dying man will not be faithfully repeated by those who hear them. Their passions or interests may lead them to suppress certain portions of the story, and give undue prominence to others. The authorities afford but little light on a point which is of so much importance that it should be well settled.

Dying declarations have been treated in some instances as admissible under all circumstances and for every purpose: *Clymer v. Sells*, 3 Bur. 1244; *Farrund v. Shaw*, 2 N. C. Repository, 402; while they have been viewed in others as an exceptional growth of the criminal law which has no place in civil jurisprudence: *Wilson v. Howen*, 15 Johnson, 284. In *Fallom's Adm'r. v. Ammon*, 1st Grant's Cases, 125, cited at the argument for the plaintiffs, the declarations were admissible on other grounds, and did not require the aid of the principle under consideration. There is seemingly but one decision bearing on the only question which admits of a reasonable doubt; whether such statements can be received to show the cause of the death when it is material to the issue. I refer to the case of *Daily v. The New York and New Haven Railroad*, 32 Conn., which is identical with the present, and where the court excluded the evidence. The silence of the reports is significant of the opinion of the profession. If, in the innumerable cases in which actions have been brought to recover damages for fatal accidents, it had been thought possible to introduce the last words of the deceased