

SCHNEIDER v. THILL.

(Circuit Court, E. D. New York. June 16, 1880.)

1. PATENT—PRACTICE—REARGUMENT.

C. H. Watson and George Gifford, for plaintiff.

E. H. Brown and J. J. Allen, for defendant.

BENEDICT, D. J. This action was brought to establish the validity of a patent re-issued to the plaintiff as the assignee of Carl Volti, and numbered re-issue 7,511, and also of a patent issued to the plaintiff as assignee of Homer Broobe, on the twenty-ninth of May, 1877, and numbered 191,224. The cause proceeded regularly to a hearing upon pleadings and proofs, and, having been argued in behalf of the respective parties, is now before the court for its decision upon the merits. In this stage of the case the defendant applies for permission to take further proofs and to reargue the case.

While technically and legally the application is made by the defendant, and the defendant, to some extent, at least, has a substantial interest in the determination of the cause, it is plain to be seen that the reason why this application is made is not because of defendant's interest in the result, but because of the effect upon the interests of a third party in certain other patents, which such party has come to believe may be produced by a determination of this cause in favor of the plaintiff. This circumstance would be no reason for refusing the defendant's application, if it were matter of right; but this is an application for a favor, and is strongly opposed by the plaintiff. I confess that it is not easy to see how the plaintiff can desire to see the decision in this case to be made upon a part of the evidence material to the issue, inasmuch as the very fact that evidence affecting the issue was not before the court must deprive the decision of any value which it might otherwise have as a ground upon which to apply for preliminary injunction in other suits. Nor is it easy to see how any serious result to any person not a party to this suit can arise from a decision in this case, if the testimony now

claimed to have been omitted is calculated to affect the decision.

It is possible, therefore, that the parties in pressing and opposing this application are impelled by some motive not fully disclosed; but, however this may be, and undesirable as it is to be called on to decide a case of this character upon an imperfect exhibit of the facts, I do not think it can be proper to grant an application like the present, addressed to the favor of the court and strongly opposed, when the result will be to compel the plaintiff, after he has brought his case to a final hearing, and it has been submitted by both sides for decision, again to renew the contest upon additional testimony, and in substance with another party, in order that detriment to the interests of such third party, which it is anticipated may follow a decision in favor of the plaintiff, may be avoided.

Motion denied.

KENNEDY v. I., C. & L. R. Co.—*In re* Petition of FRANK
CORK, Administrator.*

(Circuit Court, S. D. Ohio. July, 1880.)

1. RECEIVERS—SUITS AGAINST.—Property in the hands of a receiver is *in custodia legis*. His possession is the possession of the court appointing him. No suit can be brought against him to disturb his possession, or to charge him with liability for an act done in the performance of his duties as such receiver, without the consent of such court. Any one instituting such a suit without leave may be enjoined or attached for contempt. The proper proceeding is to apply to the court appointing the receiver by petition, setting forth therein the grounds of complaint. Thereupon the court will direct a trial by a jury, reference to a master, or such other mode of proceeding as, in its discretion, it may deem best.
2. SAME—SAME—CONSTITUTIONAL RIGHT OF TRIAL BY JURY.—The right of trial by jury in such a proceeding against a receiver, on a common-law cause of action, is not an absolute right, but the granting or withholding thereof lies within the sound discretion of the court. Such a proceeding is not a "suit at law" within the provision of the constitution guarantying the right of trial by jury.
3. RAILROADS — SUIT AGAINST RECEIVER — TRIAL BY JURY. — Upon application of bond holders of the Indianapolis, Cincinnati & La Fayette Railroad, in a suit to foreclose their security, a receiver was appointed to operate the road. During such operation a train ran over a Mrs. Cork. A petition was filed in the foreclosure proceeding by her husband, as administrator, to recover damages for her death. *Held*, that petitioner was not entitled to a trial by jury.

Upon motion for a trial by jury. The facts sufficiently appear in the opinion.

D. Thew Wright, for Cork, petitioner.

Hoadly, Johnson & Colston, for receiver.

BAXTER, C. J. The defendant, a railroad corporation, issued a large number of bonds, and executed a mortgage on its road, franchise, and property, to secure their payment; and, having failed to pay the interest as it accrued, a bill was filed in this court to foreclose the security. On complainant's application a receiver was appointed to preserve and operate the prop-

*Reported by Messrs. Florian Giauque and J. C. Harper, of the Cincinnati Bar.