

HOHORST v. HOWARD.<sup>1</sup>

(Circuit Court, E. D. New York. December 1, 1888.)

## 1. EQUITY—JURISDICTION—LOSS BY SUBSEQUENT EVENTS.

The jurisdiction of an equity court is not entirely ousted by the happening of an event, subsequent to the commencement of an action, which precludes the exercise of the power to grant an injunction. *Kirk v. Du Bois*, 28 Fed. Rep. 460, followed.

## 2. PATENTS FOR INVENTIONS—ABATEMENT AND REVIVAL—DEATH OF PARTY.

A suit for alleged infringement of a patent, praying that defendant be required to make discovery of profits, and for an accounting and injunction, may be revived, after the decease of defendant, against his executor.

In Equity. Final hearing on bill of revivor, its answer, and replication.

W. S. Logan, for complainant.

John L. Devenny, for defendant.

LACOMBE, J. This action was brought for an alleged infringement of a patent. The original bill prays that the defendant be required to make discovery as to the use of said invention and of all gains and profits received by him therefrom, or by means thereof, and that he be required to account to the plaintiff; and an injunction is prayed for against the defendant, his agents, etc. The answer of the original defendant is a specific denial. The original defendant having died, his executrix denies complainant's right to have the action revived, for the reason that no injunction can issue against the dead defendant, nor against his executrix, who is not alleged to infringe; and that therefore, as the title of the principal relief—the injunction and discovery—fails, the incident right to an account fails also. Defendant cites *Root v. Railway Co.*, 105 U. S. 189, and *Draper v. Hudson*, 1 Holmes, 208 (1873.) The whole subject was discussed in the later case of *Kirk v. Du Bois*, 28 Fed. Rep. 460, (1886, W. D. Pa.,) and the conclusion reached that *Root v. Railway Co.* does not go to the extent of holding that jurisdiction is entirely ousted by the subsequent happening of an event which precludes the exercise of the power to grant an injunction. The decision in *Kirk v. Du Bois* will be followed here. The complainant is entitled to the usual decree that the suit be revived against the executrix, and be put in the same state it was in prior to the death of the deceased.

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

COON *v.* ABBOTT.<sup>1</sup>

(Circuit Court, E. D. New York. November 28, 1888.)

## EQUITY—PRACTICE—TIME FOR TAKING TESTIMONY.

When a party's time to take his testimony has expired without its being taken, the court may, on cause shown, grant relief by allowing the testimony to be taken and filed *nunc pro tunc*.

In Equity. Application for extension of time to take testimony.

*H. A. West*, for complainant.

*John J. Allen*, for defendant.

LACOMBE, J. The defendant has failed to secure the taking of his proof by reason, apparently, of some misunderstanding between his counsel and his solicitor as to who would attend to it. To thus lose the opportunity of his presenting his defense, if he has any, would be a great hardship. The court has power under the rule to grant relief by allowing the testimony to be taken and filed *nunc pro tunc*. *Fischer v. Hayes*, 6 Fed. Rep. 76. In view of the fact that the next term for trial of equity causes will not be held till March, the granting of such relief will work no injustice to the complainant. The defendant may enter an order extending his time to take testimony to and including December 31st, such testimony, when taken, to be filed *nunc pro tunc* as of August 10, 1888. If defendant wishes to cross-examine any of plaintiff's witnesses who were examined on July 9th to July 13th, he may, before taking any of his own testimony, secure their presence by subpoena, and upon their appearance proceed with their cross-examination. Complainant may have 20 days after close of defendant's case to take testimony in rebuttal. Defendant must accept notice of trial for March term, and the case is ordered on the calendar for that term.

DUDEN *v.* MALOY.<sup>1</sup>

(Circuit Court, E. D. New York. November 21, 1888.)

## PARTNERSHIP—ACCOUNTING—PARTIES.

In an action between former partners for an accounting, defendant moved that a corporation be made a party to the suit on the ground that it had property belonging to the old partnership, and that complainant was irresponsible. Defendant had an action pending in the state court for similar relief, in which real estate had been impounded by the filing of a *lis pendens*. *Held*, that defendant must show a reasonable probability of his obtaining a judgment against complainant for a greater sum than that already secured in the state court. As all the evidence on that point had been regularly taken before the master, but defendant had not since then pressed the case to a decision, *held*, that the motion should be denied.

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.