

Case No. 5,111.

FRESE ET AL. V. BIEDENFELD.

[14 Blatchf. 402; 3 Ban. & A. 205.]¹

District Court, S. D. New York.

Jan. 31, 1878.

EQUITY PRACTICE—EXAMINER'S FEES—ATTACHMENT.

In a suit in equity the proofs taken on the part of the defendant were not filed, because the examiner's fees had not been paid. The plaintiff moved for an order that such proofs be filed, and that an attachment issue against the defendant to compel payment of such fees. *Held*, that the motion must be denied.

[Cited in *J. L. Mott Iron Works v. Standard Manuf'g Co.*, 48 Fed. 347.]

[This was a bill in equity by *J. C. Frese & Co.* against *Shalberg Biedendorf*.]

Arthur v. Briesen, for plaintiffs.

James L. Onderdonk, for defendant.

WHEELER, District Judge. This cause has been heard on the motion of the complainant to have the defendant's proofs ordered to be filed, and for an attachment to compel payment of the examiner's fees. Equity rule 82 requires a master to file his report whether his fees are paid or not, and provides for an attachment to compel payment. There is no rule requiring an examiner to file testimony taken by him, without payment of his fees. Doubtless he has a lien as against the party for whom testimony is taken, upon the testimony, for his fees; and, in addition to that remedy, he may proceed by application to the court for an attachment to compel payment *Caldwell v. Jackson*, 7 Cranch [11 U. S.] 276. The other party can have no greater, if as great right to the testimony. In this case, the other party claims that the testimony shall be put on file, not for the purpose of establishing his case, but that it may be overruled as showing a defence. It is doubtful whether he has any right to the testimony for that purpose, but if he has, it must be subordinate to the right of the examiner to have his fees first paid. To order the testimony filed without payment to the examiner would cut off one of his remedies, and it may be a very useful one. If the party who has caused the testimony to be taken is willing or prefers to have his cause heard without it the opposite party does not seem to have any just cause for complaint. If, however, he deems the testimony of sufficient value to him to be paid for by him, he may be entitled to have it filed on making the payment. But that is not his position on this motion. Here he asks to have it ordered on file without making payment that it may be overruled as constituting a defence. That he does not appear to be entitled to. Motion denied.

¹ [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 3 Ban. & A. 205; and here republished by permission.]