

UNITED STATES *v.* GUNNING and another.

(*Circuit Court, S. D. New York.* May 8, 1885.)

PATENTS FOR INVENTIONS—PATENT OBTAINED BY FRAUD—MOTION TO REOPEN CASE.

Motion to reopen case for further proof denied, and former opinion (22 FED. REP. 653) adhered to.

In Equity.

*Andrew J. Todd*, for defendant Ingersoll.

*G. E. P. Howard*, for plaintiff.

WHEELER, J. This cause has now been heard upon the motion of the defendant Ingersoll, made since the hearing in chief, (22 FED. REP. 653,) to reopen the case for further proof. The testimony sought to be had is that of the defendant Gunning, as to making the invention, and that of one Barnes, in corroboration. The patent is No. 265,051, dated September 26, 1882, and is for letters and figures of enamel, baked on copper or other metal, for signs on windows, and in other places. The testimony proposed is in substance that, seeing enameled articles, he conceived the idea of making letters and figures of the same material in the same way before any one else; and suggested it to others, who acted upon the suggestion, and made such letters, but not that he ever made any such letters or figures. The principal testimony is his own, and there is none shown to be had that he did not know of, nor that the defendant Ingersoll is shown not to have been aware of before the hearing. The principal ground for the motion is that she was not able to take his testimony after the plaintiff's testimony was closed. He and Barnes were both witnesses for the plaintiff, but not to the making of the invention. It does not appear that he was so far distant that she could not easily take his testimony if she had known where he was; nor that she made any arrangement with him, or undertook to, when she was in communication with him, for taking his testimony, or for keeping informed of his whereabouts. Affidavits are made that she diligently endeavored to find him, when she got ready to take testimony, but what efforts she made are not set out. On the whole, it appears that she lost this testimony rather from her own lack of diligence than from any other cause. She shows no right to have the case opened according to the usual practice in such cases; and her motion can be granted only by the exercise of large discretion in her favor.

As this is a bill to repeal the patent for fault in its procurement, the existence of the fraud, and not the validity of the patent otherwise, is the main thing in controversy. But upon the question whether discretion should be exercised to give unusual relief, it is proper to look into the nature of the patented invention far enough to ascertain

whether any useful result is likely to follow from its exercise. Gunning does not pretend that he invented enameling on metal, and of course not that he invented signs, or letters for signs. The materials and mode of manufacture were all old. The most that he did, according to his own story, as now told, was to conceive the idea of making letters out of old materials in an old way. There was nothing new but the purpose. This would not appear to be any patentable invention. *Pennsylvania R. Co. v. Locomotive Safety Truck Co.* 110 U. S. 490; S. C. 4 Sup. Ct. Rep. 220.

It does not appear that the patent could be saved from this suit for any good purpose, even if the proposed testimony would save it. Gunning might prefer that the patent should fail from other grounds than his fraud, but he is not asking for anything in this behalf. No costs were allowed against the defendant Ingersoll, and none would be taxable in her favor against the government if she should prevail in this case, and no fraud is proved against her; therefore it can make no difference to her whether the patent fails here or not, unless she wishes to hold it for some improper purpose, which is not to be presumed. Besides this, there is the fact which appears in the case, and which the proposed testimony does not meet, that the patented letters, made by others, were sold by Gunning more than two years prior to his application, which would invalidate the patent, although his affidavit that the invention had not been in public use or on sale for two years prior to the application, which accompanied the application, may not have been made with such fraudulent intent as to warrant a decree setting aside the patent.

Motion denied.

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THE ANCHORIA.

(*District Court, S. D. New York.* March 29, 1885.)

ADMIRALTY PRACTICE—EXCEPTIONS—FINAL HEARING—COSTS.

The hearing of exceptions to a pleading in admiralty, where the exceptions are in the nature of a special demurrer, or a motion to make more definite and certain, is not such a "final hearing in equity or admiralty," under section 824 of the Revised Statutes, as to entitle a party to a docket fee or costs.

In Admiralty.

*Scudder & Carter* and *Geo. A. Black*, for libelants.

*Hill, Wing & Shoudy*, for the Anchoria.

BROWN, J. The libelants having excepted to the answer for want of sufficiency, fullness, and distinctness, the exceptions were sustained, and the defendant was directed, as provided by rule 28 in admiralty, to answer more fully. On the settlement of the order the libelants claimed costs of the hearing upon the exceptions. Rule 28, promul-