

sons in the employ of appellant, who were present at the trial; the agent of the appellant, who was also present at the trial; and the chief engineer of the appellee's steamer, who was examined at the trial. Another item of testimony is a protest made by the master of the said steamer, a copy of which was in the hands of proctor and counsel of the libelant before the trial in the district court. It is conceded that, up to the time this motion was argued, no reason was shown or attempted to be shown, either on the record or otherwise, why these supposed matters of evidence were not produced at the trial in the court below. No new allegations or amendments have been made in the pleadings.

Appellate courts in admiralty treat an appeal as a new trial, in which new pleadings and new proofs are permitted, in furtherance of justice. But it is not a matter of course to allow parties who have withheld evidence available to them in the district court to present such evidence on appeal. Such was declared to be the law of this circuit in *The Saunders*, 23 Fed. Rep. 303, and *The Stonington and The Wm. H. Payne*, 25 Fed. Rep. 621. It is unnecessary to add anything to the discussion of this question in the case of *The Saunders*. The decision therein seems to be in entire accord with the authorities, and when objection is raised the party offering the new evidence should show some good reason, if any, why it was not produced before. It has, however, been the practice in this circuit to take such testimony, without excusing its nonproduction below, where neither side has objected. Upon the hearing of this motion an affidavit was filed by the proctor for the appellant, stating that the new proofs are material and necessary to the determination of the appeal, and "relevant to points referred to in the written decision of the district judge, but not referred to by counsel on the trial in the court below," which, it is contended, is sufficient excuse for failure to produce the evidence before. If this means that the district judge detected a weakness in the appellant's case, which counsel had overlooked, the bald statement of that fact is not sufficient. If it means that the district judge decided the case on facts not in proof, or upon assumptions and inferences not warranted by the evidence, such errors, for all that appears, may be corrected without new testimony. It appears, however, that no objection was interposed by the appellee to the taking of this new proof until such taking was completed. Although present and cross-examining the witnesses, its counsel did not raise the point that such witnesses were available or were examined at the trial below until their testimony in this court was closed. Under these circumstances, we do not think he should be allowed to insist upon the suppression of such testimony, in view of the practice in this circuit, above referred to. If a party wishes to insist upon his rights in that regard, he should interpose his objections promptly, and not wait till his adversary has been put to the trouble and expense of taking the new proofs.

The other points argued by appellee in support of this motion should be determined on the argument of the appeal, not on motion to suppress. The motion is denied.

ROCHESTER COACH LACE Co. v. SCHAEFER.

(Circuit Court of Appeals, Second Circuit. January 18, 1892.)

PATENTS FOR INVENTIONS—NOVELTY.

Letters patent No. 177,194, issued May 9, 1876, to Oscar Boehme, for an improvement in the manufacture of balls and rosettes of yarn, consisting in the use of a funnel-shaped tube, through which the yarn is drawn, so that it comes out of the small end in a compressed condition, ready to be bound and out, are void for want of patentable novelty.

In Equity. Suit by the Rochester Coach Lace Company against Schaefer for infringement of letters patent No. 177,194, issued May 9, 1876, to Oscar Boehme, and afterwards assigned to complainant. In the circuit court the patent was held void for want of patentable novelty, and decree entered dismissing the bill. The opinion was delivered by Judge COXE. See 46 Fed. Rep. 190. Plaintiff appeals. Affirmed.

George W. Hey, for appellant.

Fred. F. Church, (*Church & Church*, of counsel,) for appellee.

PER CURIAM. We are entirely satisfied with the conclusions reached by the learned district judge who decided this case in the circuit court, as expressed in his opinion. The decree is affirmed.

BATTLE *et al.* v. FINLAY *et al.*

(Circuit Court, E. D. Louisiana. April 8, 1892.)

1. TRADE-MARK—FEDERAL COURTS—EQUITY JURISDICTION.

As the jurisdiction of equity in matters of trade-mark is recognized by a long line of both English and American cases, the federal courts may administer equitable remedies therein when they have jurisdiction by reason of the citizenship of the parties, notwithstanding that the federal statutes on the subject have been declared unconstitutional in the Trade-Mark Cases, 100 U. S. 82.

2. SAME—INFRINGEMENT.

It is an infringement of a trade-mark to employ an imitation likely to deceive and impose upon the customers and patrons of the proprietor, and the use of the arbitrary term "Bromidia," previously adopted by another, is such an imitation, notwithstanding the fact that the infringing manufacturer's name is printed on each label.

In Equity. Bill by Battle & Co. against Finlay & Brunswig for injunction against the infringement of a trade-mark. Injunction allowed.

Denegre & Bayne, for complainants.

B. R. Forman, for defendants.

BILLINGS, District Judge. This cause is submitted upon bill, answer, depositions, and exhibits for a final decree. Upon the motion for an injunction *pendente lite*, an opinion was rendered by the circuit judge, PARDEE, reported in 45 Fed. Rep. 796, which states the facts and the