

circumstances, I think that, the allowance of the amendments being within the power of the court, it is its duty to allow them; and that to refuse the allowance would be an improper precedent. The question will hereafter arise as to the propriety of a decree for an account of the profits, or an assessment of the damages which accrued before the purchase of the patents.

The motion is granted.

REAY v. BERLIN & JONES ENVELOPE CO.

(Circuit Court, S. D. New York. June 10, 1884.)

PATENT—IMPROVEMENT IN ENVELOPE-MAKING MACHINE.

Claim in the patent being for improvement in envelope-machine in respect to the table over the conveyor, whereby the blanks are held in place while being carried by the conveyor to the creasing box, the alleged infringer may continue the use of the machine, the table and conveyor being changed, such use not being inconsistent with the claimant's rights.

In Equity.

Arthur v. Briesen, for orator.

Stephen D. Law, for defendant.

WHEELER, J. The second claim of the orator's patent for improvements on envelope machines is for the arrangement of the table over the conveyor so that the blanks are held even and in place by the table while being carried by the conveyor to the creasing box. The defendant was enjoined not to use several machines having this arrangement, made in violation of that claim of the patent. 19 FED. REP. 310. The table and conveyor were changed and the use continued. These proceedings are instituted against that use as a contempt of the injunction. The question is whether that claim covers any more of the machine than the table and conveyor. The defendant was in good faith advised that it did not, and continued the use in the assertion of supposed rights without intending to violate any order of the court. The orator claims that the claim covers the parts which operate in connection with the conveyor and table. The creasing box was old. The blank is made ready to be taken by the conveyor in the defendant's machines by contrivances different from the orator's. The blanks, when ready, were to be taken to the creasing box. This claim was for the arrangement of mechanism to accomplish that object. When the blank reaches the creasing box another operation upon it begins. The table and conveyor finish with each blank when it arrives there, and have nothing to do with the next operation upon it, which is to crease it. The arrangement of the table over the conveyor, to steady the blank while on the conveyor, affects nothing but the work-

ing of those two parts. So, when those parts were changed, the patented arrangement was changed, and the machines became, *pro tanto*, new machines made out of the reach of the patent.

The motion is denied.

THE HETTIE ELLIS.¹

(Circuit Court, E. D. Louisiana. June 9, 1884.)

1. DECK-LOAD.

With reference to cargo stored on deck, the ship is not liable as a common carrier, but its liability in this case is limited to ordinary care, *i. e.*, such degree of care as a prudent owner would exercise. If the loss was the result of the negligence, want of skill and care, of the master, the liability of the vessel is established. *Lawrence v. Minturn*, 17 How. 111, followed; *The Hettie Ellis*, ante, 393, affirmed.

2. SAME—JETTISON.

In a case where a vessel, built with a view of carrying the major part of her cargo on deck, running in a trade where it is customary and necessary to load the major part of the cargo on deck, so trading and so loaded, is compelled by a peril of the sea to jettison part of her deck-load to save the ship and remaining cargo, *held*, the shipper whose goods have been so destroyed for the common safety is entitled to just remuneration. In such a case the whole reason for exempting deck cargo from the benefit of general average fails, and the rule itself ought to fail.

Libel for Short Delivery of Cargo of Lumber shipped from Tensas river, Alabama, to New Orleans, Louisiana.

E. H. Farrar, for libelants.

James R. Beckwith, for claimants.

PARDEE, J. Under the evidence in the case there is practically no dispute that the quantity and quality and value of lumber, as claimed by libelants, was shipped by the Hettie Ellis, and that there was the short delivery as claimed. It is agreed that there was no contract between the parties, save as to rate of freight, and such contract as the law implies in cases of shipment. Who loaded the craft, and whether the large deck-load was with or without the consent of the shipper, does not appear. There is evidence which, taken with the description of the craft, is sufficient to show that on her and like craft in that trade, it was usual, customary, and necessary to load the major part of the cargo on deck. The responsibility of the Ellis under the circumstances was that of a common carrier. Where there is short delivery by a common carrier the burden is on him to excuse himself. And it makes no difference in this respect whether the goods were taken on a vessel as deck-load with the consent of the shipper, or were shipped between the decks. If the goods are shipped as deck-load, the carrier may have excuses that would not avail him

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.