PARDEE, Circuit Judge (after stating the facts). This suit is founded on a charter party which contains, among others, the following provisions:

"The bills of lading to be signed without prejudice to this charter, and any difference to be settled before vessel sails." "The cargo or cargoes to be received and delivered according to the customs of the ports of loading and discharge." "Charterers' responsibility to cease when cargo is all on board and bills of lading signed, but master or owners to have an absolute lien on cargo for freight, dead freight, or demurrage."

The bills of lading issued to the charterers and others made no reference to the charter party, and contained, among other provisions, the following:

"To be delivered from the ship's tackle, where the ship's responsibility shall cease." "The goods to be discharged from the ship as soon as she is ready to unload at the quay or into hired lighters, if necessary, but at the expense and risk of owners of the goods." "Goods to be taken delivery of as soon as they can be discharged from the steamer, the goods to be and remain at consignee's risk or expense immediately after being placed in the lighters or on the quay."

The evidence in the case proves a custom in the port of New Orleans, in regard to the delivery of coffee, that the ship is to unload the coffee from the vessel onto the wharf, pile it upon skids in separate lots according to the bills of lading, and there make delivery to the several consignees. The ordinances of the city of New Orleans provide that all produce, wares, goods, and other articles landed on the wharves or levees by any vessel or other water craft shall be laid as near as possible to the paved part of the levee approaching the street, so that the bank of the river and wharves be neither obstructed nor incumbered thereby, and fix 48 hours as the longest time that said produce, goods, wares, or other articles shall be allowed to remain on the wharves or landings. We find in the evidence no sufficient proof of any custom in the port of New Orleans as to the length of time that coffee, after being unloaded from a ship, shall be allowed to remain upon the wharves.

The first contention of the appellants is that the effect of the "cesser of liability" clause in the charter party is to take away all right of action by owners or charterers on the charter party when cargo is all delivered on board and bills of lading signed. The cases cited in support of this contention (Sanguinetti v. Navigation Co., 2 Q. B. Div. 238; Gullischen v. Stewart, 13 Q. B. Div. 317) are conclusive as to the proposition that, after cargo is all on board and bills of lading issued, no right of action remains by the owners of the ship against the charterers upon a charter party which contains a "cesser of liability" clause in favor of the charterers; and very properly so, because that is the exact language of the clause itself. Under the charter party in hand, charterers' responsibility is to cease as soon as the cargo is all on board and bills of lading signed; but, conceding this, it by no means follows that the responsibility of the ship, which in the main begins when cargo is loaded on board, shall also cease, and we find no adjudged cases asserting any such

effect to be given such stipulation. Charter parties frequently contain important stipulations which are to be performed by the ship at the end of the voyage, and, unless it clearly appear from the contract that such stipulations are to be avoided on delivery of goods on board, no construction having that effect can be given to the cesser clause. The present charter contains a provision that goods were to be delivered according to the custom at the port of discharge, but of what use was it to insert such provision in the charter party, if all responsibility under the charter party was to cease when cargo was all on board? The same may be said of other provisions in the charter party in regard to the employment of a stevedore and the designation of wharf for unloading at the port of destination.

Appellants' next contention is that the bills of lading, which contain no reference to the charter party, supersede all stipulations contained in the charter party in regard to the delivery of the goods. This contention has been well examined, and, as sought to be applied in this case, we are satisfied it is not sound. "They [bills of lading] do not, as between the shipowner and the charterer, operate as new contracts or as modifying the contract in the charter party." Carv. Carr. by Sea, 152, 159, 163; Abb. Shipp. 277; Pars. Adm. 286; Lamb v. Parkman, 1 Spr. 343, Fed. Cas. No. 8,020; The Chadwicke, 29 Fed. 521; Steamship Co. v. Theband, 35 Fed. 620; Gledstanes v. Allen, 12 C. B. 202; Faith v. East India Co., 4 Barn. & Ald. 630; Wagstaff v. Anderson, 5 C. P. Div. 177; Capper v. Wallace, 5 Q. B. Div. 166. See Leduc v. Ward, 20 Q. B. Div. 475, 479. This disposes of the first three assignments of error.

The fourth and last assignment of error is that the court below erred in decreeing upon the amended libel. The amendment is not germane to the claim set forth in the original libel, and it should not have been allowed. The Oregon, 158 U. S. 186, 15 Sup. Ct. 804; The Beaconsfield, 158 U. S. 303, 15 Sup. Ct. 860. The Charles Morgan, 115 U. S. 70, 5 Sup. Ct. 1172, treats of amendments in the appellate court, and holds that, to be allowed, they must be confined to the original subject of controversy. The decree of the district court should be amended by reducing the amount awarded to the sum of $521.90, the amount of principal and interest claimed in the original libel,—to date of decree below,—and as so amended the decree appealed from should be affirmed, the appellants to pay the costs of the district court, and the appellees the costs of appeal, including the costs of transcript. So ordered.

CARLETON et al. v. JENKS et al.

(Circuit Court of Appeals, Sixth Circuit. May 17, 1897.)

No. 451.

1. SALES—PERFORMANCE—ACCEPTANCE.
   Where, after a new boiler is made and placed in a vessel under a contract, the owners of the vessel, after thorough inspection by the captain, engineer, and manager, made at the request of the contractors, accept the machinery and take the vessel away, without any further requirement, they are precluded from afterwards raising any question of the nonperformance of the contract in respect to the manner of fastening the boiler in place. Nor, after such inspection and acceptance, will the owners be considered as relying upon representations of the contractors in respect to the sufficiency of the fastenings, the same being fully opened to inspection, and presumedly as much within the knowledge of the captain and engineer as of the contractors themselves; and the rule of caveat emptor applies.
2. SAME—IMPLIED WARRANTIES.
   The rule in respect to an implied warranty that work and materials furnished shall be suitable and adapted to the purpose for which they are intended has no application in respect to an alleged defect which is open, and as plainly observable to the purchaser as to the seller.

Appeal from the District Court of the United States for the Eastern District of Michigan.

This is the case of a libel in personam filed by the appellants in the court below for the purpose of recovering of the appellees damages alleged to have resulted to the steamer H. D. Coffinberry and her machinery in consequence of a breach of contract by the appellees, in failing to secure by sufficient fastenings in the steamer a new boiler which the appellees had built and put into the steamer in the spring of 1892. The appellants, desiring to put a new boiler into the vessel and make other changes in the machinery, applied to the appellees to make a bid or name a price for which they would furnish the boiler and make certain alterations in the machinery, by compounding the engine. After some verbal negotiations had taken place, the appellees mailed to the appellants the following letter:

"Port Huron, Mich., Jan. 7, 1892.

"Messrs. Carleton, Bunce & Others, City: Gentlemen: We will furnish boiler and compound steamer Coffinberry as follows: Boiler to be 10 ft. dia., 16 ft. long; return-flue fire box marine boiler, with water bottom; to be allowed 125 pounds steam. Engines to be compounded by putting in two cylinders, 17 inches dia., 36 inches stroke, connecting same to present cylinders, valve gear, and throttle. Old boiler to be taken out of the boat and delivered on the dock by us; you to cut away the present woodwork around the boiler so that we can get it out without hoisting it higher than the rail; we to put the new boiler down in its place, furnish new breaching to connect to old stack, four cast-iron saddles for fire box to rest on, repipe the new boiler all up ready for use, furnish new steam reverse gear; all to be done for $7,200.00 (seven thousand two hundred dollars). If new grate bars are wanted, price to be $100.00 (one hundred dollars) extra. You to deliver boat at our dock in Black river, and do all carpenter or wood work. This price does not include any repairs on old work. Trusting you may decide to have us do this work for you, we remain,

"Yours, truly, Phœnix Iron Works,
"By O. L. Jenks.

"Dictated by O. L. Jenks."

This proposition was accepted by the appellants, and the appellees proceeded with the work, and constructed the boiler and machinery contemplated

by the contract. They took out the old boiler, and had the new one placed in the steamer about the 20th of May, 1893, when they notified Mr. Carleton, the managing man for the appellants in this business, that the machinery was ready for their acceptance, and asked when he would come to where the steamer was lying to see about it, to which he replied that he had wired Symes, the captain of the boat, "to accept the machinery if it worked all right"; but, a day or two after, Carleton himself came from Cleveland to Port Huron, where the vessel was, and there personally inspected the work, including the boiler fastenings. The vessel was inspected by the United States inspector of steam vessels, and found to conform to legal requirements. The chief engineer of the steamer was also present. According to Capt. Symes' testimony, the turn-buckles of the straps which held the boiler to its place were set up tight, and the fastening in this respect was thought to be sufficient. The appellants contend, and gave some testimony in the court below which, as they claim, supported their contention, that at the time of this inspection the agents of the appellants called the attention of the appellees to what they thought an insufficiency of the fastenings of the boiler, in that the cradles upon which the bottom of the boiler rested were insufficient, and not attached with sufficient security to the timbers of the vessel, and that Mr. Jenks, for the appellees, replied that there was no defect in that respect, that the fastening was strong and sufficient, and that they would warrant it to be so. The vessel went into business directly after, and worked through the season until about the 25th of August, when the vessel, being out on Lake Huron, encountered a heavy gale, in which she careened somewhat, and the boiler slid along the timbers, out of its place, crushing the connecting machinery, and so wrenching and injuring the timbers of the vessel as to spring a leak, the consequence of which was to compel those navigating the steamer to run her upon the beach to save her from sinking in deep water. Considerable loss was sustained by the libelants from the injury which happened to the machinery, as well as to the vessel itself, and the loss of earnings during the time the vessel was delayed in consequence of the disaster. No complaint was made by the appellants of any fault on the part of the appellees in respect to the manner in which the boiler was put in for several months afterwards. The appellants recovered the insurance which had been placed upon the vessel. The notes which had been given by the appellants for the work had been transferred, and were held by a bank at Port Huron, which was calling for payment; and on February 27, 1893, Mr. Carleton addressed the following letter to the cashier:

"Dear Sir: Replying to your favor of the 25th inst., would say that the notes given the Phœnix Iron Works were lien notes on the steamer Coffinberry, and signed by only part of the owners; and as the other owners refuse to pay any share of the debts, and said to let her go at marshal's sale, we concluded to let her go; and I wrote the Phœnix people to that effect, and asked them to file a libel for the amount of their claim or the amount of the notes they hold against us, so as to make the owners stand their share. I have already paid eleven thousand dollars of the bills personally, and do not feel like paying any more. Trusting this will prove satisfactory to the holders of the note, I am,

"Yours, truly, E. M. Carleton."

On February 24th he had written to the appellees as follows:

"Gentlemen: I have been absent from the city a good deal of the time lately; hence the delay in answering your last favor. I do not agree with you in your version of the contract, but, aside from that, the conditions are such that a part of the owners of the boat refuse to pay their share of the bill; and, as other creditors are pushing us, think you had better have your libel on the boat, and have her sold at marshal's sale. I can see no other way out of the matter, and think the sooner it is done the better for all.

"Yours, truly, E. M. Carleton."

The first complaint of the alleged failure of the appellees to properly fasten the boiler was made about the 13th of February, 1893. The reason which the

appellants gave for this delay in informing the appellees of the disaster which had happened, and of their claim to recover therefor on account of the insufficiency of the fastenings of the boiler, was that they had been engaged in collecting the insurance from the underwriters, and feared that the raising of a controversy in respect to the fastenings of the boiler would develop a question of the seaworthiness of the vessel, and embarrass them in recovering the insurance. The appellees, in reply to the complaint of the owners of the steamer, insisted that they had fully executed their contract, and that the work had been accepted by the owners of the vessel after they had been requested to make an inspection to satisfy themselves of the fulfillment of the contract, and after such inspection had been fully made. They therefore refused to acknowledge any liability for the damage which had occurred. The appellants thereupon brought their suit, claiming to recover, not only upon the construction contract above set forth, as embodying, according to their claim, an obligation on the part of the manufacturers of the boiler to secure it properly in place, but also upon the ground that the respondents had given an express warranty that the fastenings were secure. The respondents (the present appellees) appeared and answered, setting up substantially the defense above stated, and denying the making of any warranty; and upon the issues joined the case went to trial before the district judge. Proofs were taken, and the court, being of opinion that the work stipulated for by the contract had been performed, and accepted by the appellants after an inspection of it, and, further, that the guaranty which the appellants relied upon in respect to the security of the boiler fastenings was not in fact made, entered a decree dismissing the libel, whereupon the libelants brought the case here on appeal.

Harvey D. Goulder, for appellants.

T. E. Tarsney, for appellees.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge, having stated the case as above, delivered the opinion of the court.

The first question on this appeal presented by the appellants arises upon the construction of the contract of January 7, 1892. It is insisted by them that this contract, upon its fair interpretation, required the contractors not only to build and set the boiler in place on the vessel, but also required that they should fasten it down so that it would not, in the ordinary incidents of navigation, be moved out of its place by the motion of the vessel. The appellees deny that the contract extended to impose such an obligation as this, and contend that their duty was discharged when the boiler was properly put in its place.

Proof was taken in the court below with respect to the conduct of the parties at the time when the inspection was made in respect to the boiler fastenings, as indicating the view which the parties respectively took of the obligations of the contract in this particular. It must be conceded that, if the decision of the case turned upon this question, it would be a matter of considerable difficulty; but we do not find it necessary to decide it. It is shown beyond doubt that when the time arrived for the completion of the contract, and the boiler was put in its place, the contractors made special request of the owners of the steamer to examine the work for themselves, for the purpose of determining whether it was satisfactorily done, and

that, in pursuance of that request, Mr. Carleton (the manager), Capt. Symes, and the chief engineer were all present for that purpose, had full opportunity to inspect the boiler and its fastenings, and did in fact inspect them and comment upon the fastenings, in respect of the very subject upon which complaint is now made. Without requiring any alterations to be made or anything further to be done by the appellees, the work was accepted, and the steamer, with its machinery, taken away. After this inspection, made for the purpose of determining the question of their acceptance, and the taking the machinery away without any further requirements, we think the appellants were properly held to have been concluded from afterwards raising the question of the nonperformance of the contract. Beverley v. Coke Co., 6 Adol. & E. 829; Parker v. Palmer, 4 Barn. & Ald. 387; Bianchi v. Nash, 1 Mees. & W. 545; Norton v. Dreyfuss, 106 N. Y. 90, 12 N. E. 428; Iron Co. v. Pope, 108 N. Y. 232, 15 N. E. 335; Pierson v. Crooks, 115 N. Y. 539, 22 N. E. 349; Studer v. Bleistein, 115 N. Y. 316, 22 N. E. 243; Hirshhorn v. Stewart, 49 Iowa, 418. The two cases in 115 N. Y. and 22 N. E. contain very full and elaborate discussions of the law on this subject.

A suggestion is made in behalf of the appellants that the appellees were skilled in their work, and that for that reason they (the appellants) were entitled to rely upon the representations made by the manufacturers, that the fastening was sufficient, and that, their acceptance being founded upon a representation which turned out to be untrue, the appellants are not bound by such acceptance. We are unable, however, to find much force in this suggestion. It might have significance if the question related to the construction of the boiler itself, and applied to inherent defects, or those which were not as readily observable to the other party as to the manufacturers; but the matter of the fastenings to the boat was open, and as much exposed to the inspection and judgment of the appellants as to the manufacturers, and the requirements would seem to be as much within the knowledge of the manager, the captain of the boat, and more especially the chief engineer, who had immediate charge of the machinery, as to any one. In these circumstances, the doctrine which the appellants invoke would not have application. Dounce v. Dow, 57 N. Y. 16; Gurney v. Railway Co., 58 N. Y. 359; Dounce v. Dow, 64 N. Y. 411; Benj. Sales, § 701. But it is contended that in fact the appellants raised a question as to the sufficiency of the fastenings of the boiler at the time of the inspection, and that thereupon the appellees entered into an express agreement to warrant the fastenings to hold; and the appellants claim that this was a continuing guaranty, upon which the owners of the vessel might take the machinery, and look to the manufacturers if any damage should subsequently ensue in consequence of any defect in the fastenings. We have looked through the evidence bearing upon the question whether any express guaranty was in fact given or intended, and we quite agree with the conclusion which was reached by the learned judge in the court below,—that the remarks made by Mr. Jenks, who represented the manufacturers on the occasion of the inspection, and