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

which are now claimed to have been a warranty, were nothing more than an opinion upon, or an expression of confidence in, the mode and sufficiency of the fastenings, and that they were not intended or understood to be in the nature of a contract. The decisive test as to whether the words used constitute a warranty or not is well stated in Benj. Sales, § 613, as follows:

"Whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case there is a warranty; in the latter, not."

Having reached this conclusion upon the facts, we do not find it necessary to consider the question discussed by the court below in its opinion, as to whether evidence of the supposed guaranty was admissible, in view of the existence of the written contract, or whether, if the guaranty was made, it rested upon any sufficient consideration. No doubt, where there is a warranty, express or implied, on the part of the vendor of goods, the acceptance of them by the buyer does not preclude him from relying upon the warranty. The warranty "survives the acceptance," and one of the remedies which the buyer has in case there is a breach of the warranty is to sue the vendor for the damages he has sustained thereby. And so where work and materials go together. Waring v. Mason, 18 Wend. 426; Vincent v. Leland, 100 Mass. 432; Milton v. Rowland, 11 Ala. 732; Muller v. Eno, 14 N. Y. 597; Underwood v. Wolf, 131 Ill. 425, 23 N. E. 598. But that rule has no application to the present case. We have, as already stated, found that here there was no express warranty, and there can be no implied warranty, that the work and materials furnished were suitable and adapted to the purpose, in respect to the defect which it is claimed existed here, where it was open, and as plainly observable to the vendee as it was to any one. Jones v. Just, L. R. 3 Q. B. 197; Bridge Co. v. Hamilton, 110 U. S. 108, 3 Sup. Ct. 537; Dushane v. Benedict, 120 U. S. 630, 636, 7 Sup. Ct. 696. In Bridge Co. v. Hamilton, supra, Mr. Justice Harlan, delivering the opinion of the court, states the essentials to such an implied warranty as was found in that case to be "the construction by a company whose business it is to do such work, to be used in the same way the maker intended to use it, and the latent defects in which, as the maker knew, the buyer could not, by any inspection or examination at the time, discover; that the buyer did not, because in the nature of things he could not, rely on his own judgment, and, in view of the circumstances of the case and the relations of the parties, he must be deemed to have relied on the judgment of the company, which alone, of the parties to the contract, had or could have knowledge of the manner in which the work was done." The subject is fully discussed, and the distinction stated, in 2 Story, Cont. § 1071 et seq., from which it clearly appears that if the work is open to the inspection of the buyer, and the opportunities for forming a judgment of its sufficiency are open to the buyer as well as to the seller, the rule of caveat emptor applies.

It is right to add that we are impressed with the belief, upon consideration of the evidence, that the misfortune which befell the Coffinberry was due mainly, if not altogether, to the weakness and imperfections of the timbers in the frame of the vessel. She was comparatively old, and, although probably not much decayed, yet she had become somewhat loose jointed in that part of her structure where the boiler was located, and it is probable that the strain and working of the timbers when the vessel was racked by the storm had much to do with the displacement of the boiler; and we think the probabilities are more than even that the defects in the timber structure had more to do with the disaster than any defect inherent in the fastenings themselves. We conclude that the decree in the court below should be affirmed, with costs, and it is so ordered.

THE PEERLESS.

MANNING v. THE PEERLESS.

(District Court, E. D. New York. May 21, 1897.)

APPLICATION OF PAYMENTS—ACCOUNTS.

One owing wharfage for a yacht, paid $200, which was applied by the creditor upon a claim for brokerage on the purchase of the yacht. This brokerage was primarily the debt of the seller, and the creditor had originally charged it to him and rendered a bill therefor. Subsequent to the payment the creditor had rendered bills to the purchaser of the yacht which showed the application of the $200 to the brokerage demand. To these the creditor paid no attention, having always denied liability for the brokerage. *Held*, that this rendering of bills did not bring the case within the rules applicable to accounts stated, and that the $200 should be credited upon the wharfage account.

Peter S. Carter, for libelant.
Paul M. Turner, for claimant.

BENEDICT, District Judge. The question to be decided in this case is one of application of payments. The libel is to recover wharfage on the yacht Peerless. On a reference to ascertain the amount of the claim, it appeared that the libelant had not credited to the claimant $200 paid by him to the libelant on the wharfage account; the said sum having been credited by the libelant upon another account, to wit, upon a claim held by the libelant for brokerage for selling the yacht. When the $200 was paid by the claimant to the libelant, he made no designation of any account to which it should be credited; and the libelant, on receiving the money, credited the same upon the account which he sets up against the claimant for brokerage on the purchase of the yacht in Boston. The question is whether he can so credit this amount.

It is to be noticed that the liability which the libelant asserts against the claimant is not a primary liability. The yacht was sold to the claimant Ackerly by a man by the name of Lewis, in Boston, and Ackerly was not bound to pay the brokerage by usage. His lia-

bility must depend, therefore, upon a special agreement on his part so to do. The question is whether the evidence shows any such agreement on his part. The seller, Lewis, is not called as a witness. The claimant denies his liability, and denies any agreement to pay the brokerage. The brokerage in the first instance was charged by the libelant to Lewis, and I find no evidence in the case which would justify finding that Ackerly assumed that debt. The fact that, when the boat was sold, the present libelant charged the brokerage to Lewis, and rendered him a bill therefor, is adverse to the contention that there was then an agreement by Ackerly to pay brokerage. A man named Mitchell appears to have had much to do with the sale of the yacht to Ackerly, but he is not called as a witness, nor is there evidence that, if he had authority to bind the claimant, he ever did so. It is true that the libelant rendered to Ackerly some bills in which the $200 was credited on the demand for brokerage, to which Ackerly paid no attention, but the liability for this brokerage he had always denied. Bills rendered under such circumstances do not bring the case within the rules applied to accounts stated.

In my opinion the $200 was improperly disallowed as a credit, and should be credited upon the bill for wharfage, which was the only stated account then existing between the parties. The report is confirmed, except as to the $200, and a decree may be entered for the sum of $1,025.75.

THE MAYFLOWER.

MENDELSSOHN PARK EXCURSION & AMUSEMENT CO., Limited, et al. v. HEWITT et al.

(Circuit Court of Appeals, Third Circuit. April 5, 1897.)

No. 11, March Term, 1897.

COLLISION—STEAMER WITH WHARF BOAT.

Where a wharf boat sunk immediately after being struck by a steamer, and when she was raised it was found that a new and strong plank connected with the knee which received the blow was split a distance of many feet, and opened so as to admit water freely, *held*, on the weight of the evidence, that the sinking was due to the blow, so as to make the steamer liable, though the wharf boat was previously in bad condition and sometimes leaked.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

This was a libel in rem by Isaac Hewitt and James Hewitt, doing business as the McKeesport Wharf-Boat Company, against the steamboat Mayflower (the Mendelssohn Park Excursion & Amusement Company, Limited, claimant), to recover damages for an alleged collision. The libelants were the owners of a wharf boat which was moored at McKeesport, on the Monongahela river, and was used by them as a landing for packets and as a produce and provision store. They alleged that on the evening of October 31, 1894, the Mayflower, in attempting to land at McKeesport, struck a knee of the wharf boat, thereby causing a long split in one of her bottom planks; and that from the effects of this injury she sank the same night, and a lot of their produce was lost or dam-