against Waterman and Jenckes & Farnum, the assignees, to avoid the assignment; alleging that they have a lien upon the property in New York, or its proceeds, as creditors of Harris & Waterman, because Waterman's assignment to Jenckes & Farnum contained a reservation to the assignor, which, by the laws of New York, was fraudulent. And so it would have been, had the assignment been made in that State, by persons residing there. But the assignment was made in the State of Rhode Island, by a person and to persons residing there, and is in every particular just such a one as, by the laws of that State, merchants and others in failing circumstances, residing there, are allowed to make in favor of creditors within that State and those residing elsewhere, wherever the property of the assignor may be. We see no cause for thinking it was fraudulently made. The respondents deny it upon their oaths, as responsively to the charge made by the complainants as that can be done. The latter have not sustained their charge by any proof whatever. For that cause alone, if there was no other, we should concur with the circuit judge in the decree given by him in this case. And we also concur with him, that the complainants never acquired nor ever had any lien upon the property in New York, so as to subject it legally or equitably to their demand against Harris & Waterman, either before or after it was carried into judgment in the Supreme Court of New York. Deeming the grounds stated decisive of this controversy, we abstain from a discussion of other points learnedly and ably argued by the counsel in the cause in their respective printed briefs. They were appropriate to the cause, but we do not deem them necessary for the decision of it.

We direct the affirmance of the decree given in the court below.

FREDERICK L. BARREDA AND PHILIP BARREDA, PLAINTIFFS IN ERROR, *v.* BENJAMIN H. SILSBEE, JOHN H. SILSBEE, BENJAMIN W. STONE, WILLIAM STONE, GEORGE T. SANDERS, AND WILLIAM D. PICKMAN.

Where a vessel was chartered to bring a cargo of guano from the Chincha Islands to the United States, at the rate of twenty-five dollars per ton freight, with a

stipulation that the ship should be entitled to any advance in the guano freight made by the charterers, and they subsequently chartered vessels to go from the United States for guano, (reserving certain privileges to the charterers,) at the rate of thirty dollars per ton freight, it was proper for the Circuit Court to leave it to the jury to say, from all the evidence in the case, whether or not the real contract in the last charters was to bring home guano at the rate of thirty dollars per ton freight.

Contingent agreements between merchants and ship-owners ought to receive a reasonable construction, so as to carry their intentions into effect, and, in general, those intentions must be gathered from the language employed, the surrounding circumstances, and the subject-matter.

The case of Gether *v.* Capper, 80 Eng. C. L., examined.

The declarations and statements of the agents of the charterers, made at the time of the execution of the subsequent charters above mentioned, were properly admitted in evidence as part of the *res gestae*, and to show that the charterers were acting in bad faith towards the owners of the vessel which was first chartered.

Where the effect of a written agreement, collaterally introduced as evidence, depends not merely on the construction and meaning of the instrument, but upon extrinsic facts and circumstances, the inferences of fact to be drawn from it must be left to the jury.

Moreover, the fact whether or not the charterers had paid thirty dollars per ton freight might have been proved by oral as well as written evidence.

The authorities examined.

Although the contracts between the charterers and the last owners might have been fair as between themselves, yet, if their effect was to work an unfairness to the first owners, parol evidence was admissible to show it.

This case was brought up by writ of error from the Circuit Court of the United States for the district of Maryland.

On the 11th of April, 1854, a charter-party was executed by B. H. Silsbee, acting owner of the ship Shirley, and F. L. Barreda & Brother, residing in Baltimore, acting as agents for the Peruvian Government. The charter-party provided that the ship should "proceed to Callao, from Australia, where she is at present bound," and take in a cargo of guano at the Chincha Islands. The freight to be paid was at the rate of twenty-five dollars in full per ton of 20 cwt. net, guano, custom-house weight.

At the conclusion of the charter-party, there was the following stipulation:

"The ship to have the benefit of any advance on the guano freights made by the charterers in the United States before

she finishes loading at the islands. It is understood the ship is to be laden as deep as prudent, without regard to the clause restricting her to one-third above her register tonnage."

The principal question in the case was upon the construction of this clause, and whether chartering other vessels, under the circumstances mentioned in the opinion of the court, brought the case of the Shirley within its operation.

The opinion of the court also contains the instructions given by the Circuit Court to the jury, together with the exception to evidence.

The case was argued by *Mr. Wallis* and *Mr. Nelson* for the plaintiffs in error, and by *Mr. Brune* and *Mr. Johnson* for the defendants in error.

At the trial in the court below, both parties, plaintiffs and defendants, applied to the court for instructions to the jury; but the court rejected those offered on both sides, and gave instructions of its own. In the argument here, all these propositions were necessarily discussed, and it would not be possible to report these arguments without stating also the prayers to the court below, which it is not considered necessary to do. But the exception to the admissibility of the parol testimony stands in a different situation, and, with respect to that, the points made by the respective counsel were as follows:

For the plaintiffs in error, it was contended:

3. That parol evidence was not admissible to affect the construction of the subsequent charters in question, or to show any intentions or views of the plaintiffs in error and the other contracting parties in making them, because it is not pretended, and there is no evidence professing to show, that there was any outside contract or understanding in reference to any one of them, varying or qualifying the written stipulations in any way, or that any intentions or views of the plaintiffs in error, or of the other parties, were embodied or carried out otherwise than in and through the writings themselves, by which, and which only, all parties agreed to be and held themselves bound.

This point was in conflict with the court's second instruction, and was raised by the sixth prayer of the plaintiffs in error.

Shankland *v.* The Corporation of Washington, 5 Peters; 394.

Sprigg *v.* Bank of Mt. Pleasant, 14 Peters, 200.

Selden *v.* Myers, 20 Howard, 509.

4. That even if parol evidence had been admissible at all, under the circumstances stated in the preceding point, the particular parol proof especially objected to by the plaintiffs in error was not, because it consisted exclusively of statements made by agents of the plaintiffs, not only without authority, but in direct opposition to the written instructions, which constituted their special and only authority. It was not offered on behalf of a party to whom the alleged representations were made, nor to show that any such party was induced, by such representations, to enter into a contract by which he did not intend and agree, knowingly, to be bound. It was the naked offer of the unauthorized statements of agents—made while negotiating contracts, which they were authorized to and did negotiate—produced in evidence, neither to contradict nor to qualify the written stipulations agreed on, nor to avoid the instruments themselves, but merely to show the existence of fraudulent intentions, which, if they existed at all, were not otherwise carried out than by the writings, and the imputation of which is perfectly gratuitous.

This point was raised by the first exception of the plaintiffs in error, and was in conflict with the court's second instruction, also.

2 Starkie's Evidence, 34.

Farlie *v.* Hastings, 10 Ves. jun., 126, 127.

Betham *v.* Benson, 1 Gow., 45.

5. That the imputation of fraud, on the part of the plaintiffs in error, was not only gratuitous, but unnecessary. The utmost that could be made out of the charters with the $5 clause, by the aid of all possible parol proof, would be, that they were contracts for the use of vessels, out to the Chincha Islands and back to the United States, at $30 per ton of guano delivered. Let them be as fraudulent as could be desired, they could

amount to nothing worse than that. If that establishes an "advance" on the Shirley's freight, it is quite clear that a single charter-party, with provisions equivalent to that, must make out the case of the defendants in error as effectually as fifty. Now, all the charter-parties, with the $5 clause, negotiated by Nesmith & Sons, are actually, in terms, to that identical effect, without the assistance of parol proof. All of the vessels so chartered were to proceed "direct" from New York or the other ports in the United States where they were. The owners elected to do so, in the very act of making the contracts, and the language of the charters was altered accordingly. The case of the defendants in error could not be bettered, therefore, by showing that the Boston charters, with the aid of parol testimony, amounted to what was patent on the New York charters, without it. Hence the parol proof in controversy was as superfluous as it was in opposition to what are believed to be the established rules of evidence.

The counsel for the defendants in error contended:

2. Parol testimony of the declarations and statements of Nesmith & Brown, the agents of F. L. Barreda & Bro., made by them in respect to the charter-parties which they were negotiating, prior to and at the time of the execution thereof, are admissible and competent evidence to explain the meaning and purpose of unusual provisions, to inform the ship-owners whether the plaintiffs in error meant to avail themselves of privileges reserved in the charters, or would waive them, as well as to show the true character of the transaction, that there was in fact a rise in freights, to the benefit of which the defendants in error were entitled, and that it was the object of the plaintiffs in error to disguise and conceal such rise by the form of the charter-parties executed by them.

U. S. *v.* Gooding, 12 Wh., 469, 470.
American Fur Co. *v.* U. S., 2 Pet., 364.
Stokes *v.* Saltonstall, 13 Pet., 183, 186, 194.
Wood *v.* U. S., 16 Pet., 360.
Wescot *v.* Bradford, 4 Wash. C. C. R., 500.
Hayes *v.* Rutter, 24 Pick., 245.

Hammett *v.* Emerson, 27 Maine, 332, 335.
Franklin Bank *v.* Steward, 37 ib., 524.
Wilson *v.* Hart, 7 Taun., 303.
Crocker *v.* Lewin, 3 Sumner, 1, 6, 10.
Jasigi *v.* Brown, 17 How., 183.
1 Greenleaf's Ev., sec. 285.
2 Cowen Phillips's Ev., (3d Amer. Ed.,) 354, 368, 369.
Note 290, p. 587.
2 Starkie's Ev., (7th Amer. Ed.,) 765, 766, 790, 791.
Gresley's Eq. Ev., 288.
Powell on the Law of Evidence, 144, 147.
96 Law Library, 100, 102.
Duvall *v.* Medtart, 4 H. and I., 15.
Byer *v.* Etnyre, 2 Gill, 160.
The U. S. *v.* The Amistad, 15 Pet., 594.

Mr. Justice CLIFFORD delivered the opinion of the court.

This case comes before the court upon a writ of error to the Circuit Court of the United States for the district of Maryland. It is an action of *indebitatus assumpsit*, and was brought in the court below by the defendants in error, who were the original plaintiffs, to recover the freight earned by the ship Shirley on a charter of the ship made by the plaintiffs to the original defendants for the transportation of guano from the Chincha Islands to the United States. At the date of the charter-party, the defendants were the agents of the Peruvian Government, and, as such, had been for some time in the habit of chartering vessels to bring guano to the United States for sale. Its exportation from the islands is a Government monopoly, in which none except those employed by the Government are permitted to engage, and the defendants are the sole agents of that Government in the United States. They reside in Baltimore, and have agents in New York and Boston, duly authorized to negotiate for vessels, and, after the charters are signed by the owners, to transmit them to the defendants for their approval and signature. Their agents in Boston negotiated the charter of the Shirley, and, after it was executed in behalf of the owners, it was accordingly transmitted and signed

by the defendants. It is dated Boston, April 11, 1854, and recites, among other things, that the Shirley was then lying at New York, and that she was to proceed to Callao, from Australia, where she was then bound, and from thence with all convenient dispatch to the Chincha Islands, to take in her cargo of guano. She was to be at Callao ready to load in the course of January and February, 1855, or sooner, and ninety running days were allowed for loading. After completing her loading, she was to proceed direct to Hampton Roads, her place of destination, to receive orders from the defendants or their agents to discharge at any safe port not south of Hampton Roads or north of Cape Ann. Freight was to be paid at the rate of twenty-five dollars per ton, custom-house weight, and the ship was to have the benefit of any advance in the guano freights made by the charterers in the United States before she finished loading at the islands.

She sailed from New York the first of May, 1854, with a full cargo on owners' account, which she discharged at Australia, and sailed thence, in pursuance of her charter, to Callao and the Chincha Islands. Her cargo of guano was loaded between the first day of January and the ninth day of March, 1855, and on the following day she sailed for Callao, and thence to her place of destination for orders. On her arrival at Hampton Roads, she received orders to go to Baltimore, which she accordingly did, and was there unloaded between the first and the twenty-fifth day of July, 1855, having brought home fourteen hundred and fifty-nine tons of guano. Some correspondence, however, had taken place between the parties before the Shirley arrived. On the eighth day of June, 1855, the plaintiffs wrote to the defendants, referring to that clause in the charter providing for an advance, and suggesting that they had been induced to make the charter at the solicitation of their agents, upon the assurance that they should receive every advantage from any rise in freight, and expressing their astonishment at learning that they did not intend to pay more than at the rate of twenty-five dollars per ton, and signifying at the same time their willingness to listen to any fair proposition the defendants had to make. To that letter the defend-

ants replied, under date of the eleventh of June, 1855, to the effect that the guano freights had remained at the same rates since the Shirley was chartered, admitting, however, that they had since taken up certain vessels with the privilege of using them outwards, and saying that they had done so in several instances, and that in such cases they had allowed the vessels a compensation for that use, but that such additional compensation had nothing to do with the rates of guano, as would appear by referring to those charters. Other correspondence took place between the parties, or their counsel, which it is not necessary to notice at the present time. After the cargo of the Shirley was discharged, the defendants rendered an account of the voyage to the plaintiffs, showing a balance in their favor of twenty-one thousand nine hundred and forty-three dollars and eighty-nine cents, calculating the freight at twenty-five dollars per ton, without any allowance for a rise under the advance clause of the charter, which was not satisfactory to the plaintiffs. They claimed a further sum under the advance clause, equal to five dollars per ton upon the whole freight brought home. Seven other vessels were chartered by the defendants between the eleventh day of April and the twenty-seventh day of May, 1854, for the transportation of guano from the Chincha Islands to the United States. All of those charters were introduced by the plaintiffs, subject to objection, and they are substantially the same with that of the Shirley, and contain a similar clause, giving the vessels the benefit of a subsequent rise in the guano freights. On the first day of June, 1854, after these charters were executed, the defendants wrote to their agents in New York and Boston, enclosing a *pro forma* charter-party for vessels out and home, and authorized and instructed them to take up as many vessels as they could under such charters, without allowing the least deviation from its terms, and directing them in the same communications to keep former rates, without benefit of advance, for home charters. It recites that the vessel taken up shall proceed to Callao, from a port in the Indian or Pacific oceans, "where she is at present bound," and thence with all convenient dispatch to the Chincha Islands to take in her car-

go, and that the vessel shall be ready to load in the course of January, 1855, and shall thence proceed to Hampton Roads for orders and to discharge, as is provided in the charter of the Shirley. Freight was to be paid on charters conforming to those instructions at the rate of twenty-five dollars per ton, custom-house weight, and the charters were to contain the following stipulation:

"It is further agreed, that within one week from the date hereof, the owners of the vessel may, if they see fit, elect to dispatch her direct to Callao and the Chincha Islands, to load, as hereinbefore provided; and in case the owners shall so elect, the charterers shall be entitled to all her earnings for such outward voyage, and shall further have the privilege of shipping by her such outward cargo, not exceeding two hundred tons, as they may desire, provided they shall do so within ten days after the owners shall have announced their election. The charterers, on the arrival of the vessel at the home port, to pay, in full satisfaction for such earnings and privilege, and of all outward freight, such gross sum as shall be equivalent to *five dollars* per ton on the return cargo delivered."

Twenty-five vessels were subsequently taken up under charter-parties substantially conforming to that stipulation, all bearing date prior to the thirtieth day of July following that instruction. Sixteen were negotiated by the agents of the defendants residing in New York, five by the defendants themselves, and the remaining four by their agents in Boston. In many of these charters, the clause prescribing the port from which the vessel was to proceed to Callao, as contained in the *pro forma* charter-party, was omitted, and another substituted in its place, as "from where she was bound," or "from Amsterdam, where bound," or from New York direct to Callao. These deviations, however, from the form of a charter furnished by the defendants must have been approved by them, as all the charters subsequently negotiated by their agents were duly transmitted to Baltimore, and received their signatures, before they went into operation. Some other deviations from the *pro forma* charter-party, of minor importance, were introduced into one or more of these charters, which it is not im-

portant to notice in this investigation, as they all contained the stipulation above mentioned, which is the principal subject of controversy in this suit. Under that stipulation, the owner might elect, within a week from the date of the charter-party, to dispatch the vessel direct to Callao and the Chincha Islands; and in that event, the charterers had the privilege to ship the outward cargo for their own benefit, not exceeding two hundred tons, provided they elected so to do within ten days after the owner announced his decision to send the vessel direct; and in case the owner so elected and sent the vessel, no matter whether the charterers freighted her out or not, the owner was entitled in all events to demand five dollars per ton on the return cargo of guano, in addition to the twenty-five dollars agreed to be paid in the general clause of the charter-party already stated.

Whether the vessel carried out much or little freight, or none at all, was entirely immaterial to the owner, so far as respected the earnings of the vessel, as the additional compensation in any event was to be estimated and ascertained, not upon the outward freight, but upon the return cargo; and it made no difference in respect to time, as the owner contracted that the vessel, whether freighted or not, should be at Callao ready to load in the course of January, under the penalty of twelve thousand dollars.

That stipulation, whatever might have been its object, resulted in no material pecuniary advantage to the defendants. They did not furnish any outward cargo, except in a single instance, and then only to a small amount, consisting of seven or eight boxes of cigars. In another instance, they offered to ship two iron boilers for Callao, but the owners refused to take them as deck load, alleging that it would be dangerous, and the dispute led to a cancellation of the contract by mutual consent. Except in those two cases, the defendants never attempted to avail themselves of the benefits secured by that provision, either by furnishing the freight directly or by advertising the vessels. Their counsel insist that the additional compensation was paid for the privilege thus secured; and that it makes no difference whether it was exercised or not, inasmuch as they had the right to avail themselves of it if they saw

fit, and found it to be for their advantage. All or nearly all of the vessels proceeded directly from the United States, carrying out no freight for the defendants, and on their return were paid the additional five dollars for every ton of guano brought home. How much that additional compensation amounted to does not appear, nor are there any data in the record from which it can be definitely ascertained. According to the charter of the Shirley, she was a ship of nine hundred and ten tons burden, and it appears that she brought home fourteen hundred and fifty-nine tons of guano, reckoned at custom-house weight. Eleven of the charters of the other vessels give their tonnage, showing that their measurement, on an average, is a fraction more than eight hundred tons. Assuming that the average of the eleven, whose tonnage is given, is the true average of the whole number chartered containing that provision, and that each brought home cargo in proportion to the Shirley, it would show that the amount of the additional compensation allowed to those vessels under that clause could not have been much less than one hundred and fifty thousand dollars. Whatever the sum was, whether more or less than the amount supposed, it must be assumed, on the theory of the defendants, that it was allowed and paid by the charterers, in consideration of the privilege secured to load the vessels outward for their own benefit, which privilege the case shows they never exercised to an extent to enable them to realize therefrom more than the sum of fifty dollars. It was insisted by the plaintiffs in the court below that this stipulation was inserted in those charters, as a device to avoid the effect of the advance clause in the charter of the Shirley and other vessels, which had gone out under similar charters, and that the real contract was one to give thirty dollars per ton for the transportation of the guano to the United States, and consequently showed that the charterers, within the period specified, had made an advance in the guano freights equal to the amount of such additional compensation.

They also offered parol proof in support of their view of these transactions, which was received by the court, subject to objection.

Such brief portions only of the testimony as are necessary to a proper understanding of the legal questions to be decided will here be reproduced.

In respect to the vessels whose charters required that they should proceed from some port in the Indian or Pacific ocean, the plaintiffs proved that the vessels proceeded direct to Callao, and that the owners, at the time the charters were made, did not and had not contemplated any such indirect voyage, and elected, in the act of executing the charters, to send the vessels direct, and, in some instances, were told immediately, by the agents of the defendants, who negotiated the charters, that they might proceed at once, as there was no outward cargo for them. Those charters from which the above clause had been stricken out still contained the stipulation in question, allowing the election to the owners as to the course of the voyage; and in such cases, the vessels went out in ballast direct to Callao, and on their return from the Chincha Islands with a cargo of guano were paid the additional compensation.

Another class of testimony was to the effect that the agents of the defendants in New York and Boston offered thirty dollars per ton for the charter of the vessels to go direct, and, after the offers were accepted by the owners, that the charters were drawn up, containing this stipulation; and that the owners, when the charters were presented for execution, inquired why they were so drawn, and were told that it was because they had made charter-parties at twenty-five dollars per ton, and consequently did not wish that these charters should show more than that sum; and in one instance, the answer to the inquiry was, that they did not wish these charters to conflict with former charter-parties, which provided for a freight of twenty-five dollars per ton, with the benefit of a rise. These declarations of the agents of the defendants were proved by the owners of the vessels who made the charters. It was proved by the defendants that their agents never had any authority in respect to such charters, except what was conferred by the letters of instruction of the first of June, 1854; and those agents, upon being called as witnesses, denied that

they had ever made the declarations ascribed to them by the witnesses called by the plaintiffs.

Further explanatory and rebutting testimony was introduced by the defendants; but, as it does not give rise to any legal question for the consideration of the court, it is omitted.

After the testimony was concluded, the counsel of the defendants requested the court to exclude from the consideration of the jury all the declarations and statements of those agents given in evidence by the plaintiffs, respecting the terms, conditions, or purposes, of the charter-parties negotiated by them, varying from the authority and powers conferred on them by their written instructions; which the court refused to do, so far as regarded the declarations and statements made at the time the charters were executed, and ruled and determined that all such declarations and statements were admissible and competent evidence. To which refusal and ruling the defendants excepted, and their exception was allowed by the court.

Prayers for instruction were then made by both parties—first by the plaintiffs, and then by the defendants. Those presented by the defendants were made the subject of exception. They are eight in number, including the one embraced in the third bill of exceptions; but inasmuch as we have come to the conclusion that the instructions given by the court cover the whole controversy between the parties, they will not be specifically examined; and for the further reason, that their separate consideration would be tedious and unprofitable.

The instructions given by the court are to the effect that, in addition to the balance proved on the account rendered, "the plaintiffs are entitled to recover such further sum, if any, as the jury may find to have been the advance on the freights agreed to be paid by the defendants to any one for bringing guano from the Chincha Islands to the United States in charters executed here between the eleventh day of April, 1854, and the day the jury shall find the Shirley finished loading at the Chincha Islands.

2. "That in ascertaining whether any contract for advanced freight was made, the jury are not confined to the considera-

tion alone of the charter-parties executed after the eleventh day of April, 1854, but are to consider them in connection with all the evidence in the case; and if they find that the real contract, in some one or more of the charter-parties, was a contract to bring guano here and deliver it at thirty dollars per ton, and that the five-dollar clause was added to avoid any responsibility under the advance clause in the charter of the Shirley, then the five dollars advance is an advance freight, within the meaning of the first instruction."

Under these instructions, the jury returned a verdict for the plaintiffs in the sum of thirty thousand nine hundred and forty-four dollars and sixty-two cents. Whereupon, the defendants brought a writ of error to this court.

1. They now insist, among other things, to the effect that the advance clause in the charter-party of the Shirley must be interpreted to refer only to homeward voyages from the Chincha Islands to the United States.

2. That the charter-parties introduced by the plaintiffs to show an advance in the guano freights are on their face for voyages of a different character from that of the Shirley, and afforded no evidence to maintain the action.

3. That the parol evidence introduced by the plaintiffs was not admissible, and should have been rejected.

4. That even if the parol evidence were admissible, and it were competent to treat the charters under consideration as stipulations for a round voyage out and home, they would still furnish no evidence of an advance in the guano freights over the charter of the Shirley, unless it were shown that the earnings of the Shirley out, and the twenty-five dollars per ton home, were less than the thirty dollars per ton stipulated to be paid under that construction of these charters.

I. All of these propositions except one involve, directly or indirectly, the construction of the advance clause in the charter of the Shirley. Under that clause, the Shirley was to have the benefit of any advance in the guano freights made by the charterers in the United States, before she finished loading at the islands. She was chartered on the eleventh day of April, 1854, and finished loading on the eighth day of March, 1855;

and consequently her owners were entitled, by the express words of the contract, to claim the benefit of any advance in such freights made by the defendants in the United States between those dates.

Such an advance in guano freights could only be made by the defendants, as they were the only persons in the United States who were authorized by their Government to contract for its transportation. They could raise the price of transportation or reduce it, if the owners of vessels would accept their terms; and if not, they could refuse to contract; and if no contracts for an advance were made by them within the period specified in the charter of the Shirley, then her owners would have no claim for additional compensation. Their right to such compensation was not referred to the state of the market, but to the subsequent contracts made by the defendants for the transportation of guano from the Chincha Islands to the United States. Freights in general might rise ever so much, and it would not benefit the plaintiffs unless the defendants yielded to its influence, and made contracts to give higher rates for the transportation of guano. They might engage in any other branch of commerce, and give what rates of freight they pleased, and yet if they did not make any advance in the guano freights in the United States, it would not confer any benefit upon the plaintiffs. Any other advance in freights, however great and by whomsoever made, were not to be taken into account in determining the question whether the plaintiffs were entitled to additional compensation. In order to avail the plaintiffs in that behalf, it must be an advance made by the defendants, and one paid, or agreed to be paid, as the price for the transportation of guano to the United States; and it must appear that the contract for such payment was made within the period specified in that clause of the charter of the Shirley. Looking, therefore, to the plain import of the language of the parties, and applying that language to the subject-matter of the contract, as described in the contract itself, it is clear that the word "freight," as qualified by the word "guano," was used in a special sense, and refers solely to the price paid, or agreed to be paid, by the defendants, within the prescribed time for

the transportation of guano from the Chincha Islands to the United States. According to the terms of the contract, the parties agreed that the subsequent transactions of the defendants in the same trade should furnish and constitute the standard or criterion by which their rights and duties towards each other growing out of that clause in the charter-party should be ascertained and determined. Their agreement was to the effect that the plaintiffs contracted unconditionally to perform the service mentioned, for which they were in all events to receive the sum specified in the general clause of the charter-party; and in case the defendants paid or contracted to pay other persons a greater sum for the like service before the Shirley finished loading, then the plaintiffs were entitled to an additional compensation under this special clause, equal to the excess so paid or contracted to be paid to such other parties. They chartered their vessel early in the season, as appears from the date of the charter-party, and it may fairly be inferred from the nature of the transaction and the surrounding circumstances, independently of the correspondence, that some such stipulation was regarded as necessary to protect their interests in the contingency of a rise in freights as the season advanced. Such contingent agreements are of frequent occurrence between merchants and ship-owners, and are entitled to receive a liberal interpretation, as they are in furtherance of trade and equal justice between the parties. They are, perhaps, more frequently based upon the future state of the markets, and not, as in this case, upon the transactions of the merchant in the particular trade. Parties, however, have the right to select what criterion they please; and where their contracts are fairly made, they must receive a reasonable construction, so as to carry their intention into effect, and in general that intention must be gathered from the language employed, the surrounding circumstances, and the subject-matter. Our attention has been drawn to the case of Gether *v.* Capper, (80 Eng. C. L., 695,) as asserting a contrary doctrine. On a careful examination of the facts of that case, and the opinions of the judges, we have come to the conclusion that it is not opposed to the views here expressed. It was an action for freight

upon a charter-party. Under the general clause, a given rate of freight was to be paid in all events, as in this case; and it contained a special clause, which stipulated that the plaintiff "was to receive the highest freight which he could prove to have been paid for ships on the same voyage, when the vessel passed Elsinore." At the trial, the plaintiff was unable to prove that any other vessel had made the voyage referred to in the charter-party. Failing in that attempt, he then offered proof that a higher rate had been paid for vessels about that time from Lundswall, or an adjacent port, to London, which is a very different voyage. Whereupon a verdict was taken for the plaintiff, reserving leave to the defendant to move to enter a verdict in his favor, or to reduce the damages, as the court should think fit. A rule to show cause was accordingly granted, and after argument it was made absolute. Separate opinions were given on the occasion by the judges, to the effect that the owner could not entitle himself to the additional compensation by proving that other vessels had been chartered at higher rates from Lundswall to London, that being a different voyage, and not within the fair intendment of the charter-party. Every one of the judges present placed the decision expressly upon the words of the charter-party, and the failure of the plaintiff to bring his case within their intendment. His right to additional compensation was made to depend, by the express words of the contract, upon his being able to prove that other vessels at the time specified received or were to receive higher rates of freight for the same voyage. He failed to exhibit the proof, and, of course, was not entitled to recover. His contract prescribed the criterion by which his claim to additional compensation was to be ascertained and determined, and he had no right to go out of the contract and select a new standard, to which the other contracting party had not consented. It is far otherwise with the plaintiffs in the case under consideration. Their case rests upon somewhat different grounds. They have proved the state of facts on which their right to recover depends. According to the verdict of the jury, and the instructions of the court, their case is brought within the legal intendment of the contract, leaving nothing for the considera-

tion of this court, except the legal questions presented in the bills of exception. Their ship was to have the benefit of any advance in the guano freight made by the charterers in the United States before she finished loading. They contracted to bring guano from the Chincha Islands to the United States for a given rate per ton, and the defendants stipulated to pay that rate, and if they paid or contracted to pay other vessels a higher rate before the Shirley finished loading, then they agreed to give the plaintiffs an additional compensation equal to that excess; and for that excess of rate per ton the plaintiffs were entitled to recover, together with the balance of the account rendered, which was admitted to be correct by the defendants. These suggestions lead necessarily to the conclusion that there is no error in the charge of the Circuit Court, so far as respects the construction of the contract, as the instruction in that particular was in strict conformity to the views here expressed. It was to the effect that if the jury found that the defendants had agreed to pay others more than twenty-five dollars per ton for bringing guano from the Chincha Islands to the United States under charter-parties executed here between the dates before mentioned, then they were authorized to find a verdict in favor of the plaintiffs for that excess. All of the charters relied on by the plaintiffs as tending to show that such was the fact, were substantially of the same character, so that if one had that tendency, then all had, and that was conceded in the argument, and must have been so understood by the jury.

II. In the next place, it is insisted that the declarations and statements of the agents of the defendants, made at the time those charters were executed, were improperly admitted as evidence, and two grounds are assumed in support of the proposition. First, that they were made without authority, and therefore were not admissible to affect the interests of the defendants; and, secondly, that they were admitted in violation of the well-known rule that parol evidence is not admissible to explain, vary, or contradict, a written instrument. All such declarations and statements made subsequently to the execution of the charters were properly ruled out and excluded from the consideration of the jury.

1. Some brief reference to the facts of the case becomes necessary, in order to test the correctness of the first ground assumed under this last proposition. Full authority had been conferred upon those agents to negotiate for the vessels whose charters were introduced by the plaintiffs. Those declarations and statements were made by their agents in respect to the subject-matter of the negotiation, and at the time the charters were presented to the owners of the vessels for execution. After they were executed by the owners, they were forwarded to the defendants and received their signatures, and every assurance given by the agents to the owners of the vessels was subsequently made good by the defendants. They were told there was no outward cargo for them, and that they might proceed immediately; and they were allowed to do so, without objection or remonstrance. The vessels carried out no freight, and, on their return, the owners were paid thirty dollars per ton on the return cargo, without hesitation or complaint. Accompanying those explanations were others to the effect that the stipulation in question had been inserted in the charters, so that they might not conflict with those previously made providing for a rise in freight; and the circumstances fail to disclose any other substantial purpose for which it was done.

Parties do not usually contract heavy pecuniary obligations without some object in view; and as no substantial one is disclosed, except the one assigned by the plaintiffs, it is impossible to say, as matter of law, that the charters in question and the surrounding circumstances had no tendency to maintain the issue for the plaintiffs. Where the fact of agency has been proved, says Mr. Starkie, either expressly or presumptively, the act of the agent, co-extensive with the authority, is the act of the principal, whose mere instrument he is, and then, whatever the agent says, within the scope of his authority, the principal says; and evidence may be given of such acts and declarations, as if they had been actually done and made by the principal himself. That principle was directly sanctioned by this court in United States *v.* Gooding, 12 Wheat., 470, where the views of the author, as above quoted, were cited and approved. (2 Star. Ev., 45.) Whatever the agent

does in the lawful prosecution of the business intrusted to him by the principal, is the act of the principal; and there, says Mr. Greenleaf, his representations, declarations, and admissions, respecting the subject-matter, will also bind him, if made at the same time, and constituting a part of the *res gestae*, and they are of the nature of original evidence, and not hearsay; and Judge Story, in his valuable Treatise on the Law of Agency, maintains the same doctrine. (1 Greenl. Ev., 35; 113 Story on Ag., sec. 134.) Acts and declarations of an agent are admissible under such circumstances, upon the ground that, whatever an agent does or says in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal, and consequently may be proved in like manner as if the evidence applied personally to the principal. (American Fur Co. *v.* The United States, 2 Pet., 364.) On the whole case, we are of the opinion that the evidence of original authority in the agents was sufficient to warrant the court in submitting their declarations and statements to the jury.

In the same connection, it was also denied at the argument that there is any sufficient evidence in the case to show that the agents of the defendants had any authority to make deviations from the *pro forma* charter-party furnished to them on the first day of June, 1854. A recurrence to the evidence, however, will show that the suggestions are not well founded. They commenced negotiating for vessels under those instructions shortly after they were received, and continued the business till nearly the close of July. All the charters, after they were executed by the owners, were forwarded to the defendants, and received their signatures. One bears date as early as the fifth day of June, and others as late as the twenty-ninth day of July, showing that they were approved as they were forwarded, and at different times. These facts present strong presumptive evidence of authority, fully warranting the court in submitting the question to the jury.

2. The second ground assumed by the defendants, under this proposition, is, that the declarations and statements of their agents ought to have been excluded, for the reason that

parol evidence is not admissible to explain, vary, or contradict, a written contract. That principle, as a general rule applicable to parties and privies, and their representatives, and those claiming under them, is undeniable, and is not disputed by the counsel of the plaintiffs. They contended, however, in the court below, and still insist, that the right of the plaintiffs to demand additional compensation in this case was made to depend, by the express words of the contract, upon the subsequent transactions of the defendants in the same trade, and that the stipulation in the subsequent charters is so framed that it covers up and conceals the real nature of the contracts between the parties. They went farther in the court below, and still insist that the real contract was one to pay thirty dollars per ton to bring guano from the Chincha Islands to the United States, and that the stipulation was framed in the form in which it appears, graduating five dollars on the outward and twenty-five dollars on the home voyage, for the express purpose of relieving the defendants from the responsibility which they had incurred to the plaintiffs, under the charter of the Shirley, and the jury have found all these alleged facts in favor of the plaintiffs. Whether the jury were warranted in so finding or not, is not a question for an appellate tribunal. That question cannot be re-examined by this court. For the purposes of any examination of the case which it is competent for this court to make under the Constitution of the United States and the laws of Congress, it must be assumed that the facts of the case have been correctly found by the jury. Repeated decisions of this court have affirmed the doctrine, which is but a repetition of the constitutional provision upon the subject, that no fact tried by a jury shall be otherwise re-examinable in any court of the United States than according to the rules of the common law; and it is well known that the only modes known to the common law of re-examining the facts of a case, after they have been found by a jury, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or by the award of a *venire facias de novo* by an appellate court, for some error of law which intervened in the proceedings.

Parsons *v.* Bedford et al., 3 Pet., 447.
United States *v.* King et al., 7 How., 845.
Richardson *v.* Doane, 3 Dall., 102.
United States *v.* Eliason, 16 Pet., 301.
Phillips *v.* Preston, 5 How., 289.

Whether the evidence, when offered, is admissible, is a question for the court; but when admitted, the question whether it is sufficient or not is for the jury, and it is their province to draw from it all such inferences and conclusions as it conduces to prove, and which, in their judgment, it does prove; and their finding is conclusive, unless a new trial is awarded by the court in which the case is tried, or in the appellate tribunal, for some error of law. Guided by these principles, it must be assumed, in the further examination of this question, that the facts are as they have been found to be by the jury It then appears that the real contract in these charters was one to pay thirty dollars per ton for bringing guano from the Chincha Islands to the United States, and that the stipulation in question was inserted in the charters to cover up and conceal the real nature of the contract, in order to enable the defendants to relieve themselves from the responsibility which they had incurred in their previous contract with the plaintiffs; and the question is, whether the parol evidence was properly admitted to prove those facts. When the plaintiffs offered to prove those facts in the court below, the question was then presented to the Circuit Court precisely as it is here stated. Evidence, when offered at the trial, must be assumed to exist, and to be true, for the purpose of determining the question of its admissibility. Proof, such as was offered and received in this case, could only be rejected upon one of two grounds—first, that the evidence of the facts was not admissible; and, secondly, that if the facts were proved, they would have no tendency to maintain the action. That they would maintain the action if proved, no one can doubt; so that the only question is, whether they were admissible.

One further explanation is necessary, in order to present the question in its true light. It is not pretended that the parol evidence conflicts in any manner with the written contract on

which the suit was brought. On the contrary, the objection is directed solely to its effect upon the charter-parties subsequently executed by the defendants with the owners of the other vessels. Those charters were introduced by the plaintiffs as evidence in the cause, to show their right to recover. They also relied on the circumstances attending the transactions, and the declarations and statements of the agents who negotiated them, and the subsequent conduct of the defendants in respect to the same subject-matter. At the trial, the charters were submitted to the jury as evidence, and the jury were told, in effect, that they were not confined to the charters alone, but were at liberty to consider them in connection with all the other evidence in the case, in order to ascertain what the real contracts were between those parties.

Where the effect of a written agreement collaterally introduced as evidence, as in this case, depends, not merely on the construction and meaning of the instrument, but upon extrinsic facts and circumstances, the inferences of fact to be drawn from it must be left to the jury. It was so held by this court in Etting *v.* The Bank of the United States, 11 Wheat., 75, and we think the principle is correct. In that case, the testimony consisted of various communications and reports made to the bank, of their own transactions, and of the admissions of the parties or their agents, and it was insisted, on the part of the bank, that the jury were not at liberty to draw inferences of fact from the written evidence; to which objection, Marshall, Ch. Jus., replied, that "were the fact as alleged, and were it true that all the testimony is in writing, the consequence drawn from it cannot be admitted." Other cases have been decided by this court, applying the same doctrine as in Iasigi *v.* Brown, 17 How., 182. That was an action brought to recover damages against the defendant for a false representation respecting the pecuniary standing of a third party, whereby the plaintiff had been induced to sell goods, and had incurred loss. Letters were introduced, and facts and circumstances connected with them proved; and this court held that it was for the jury to say, after examining the letters in connection with the facts and circumstances, whether they

were calculated to inspire, and did inspire, a false confidence in the pecuniary responsibility of the party, to which the defendant knew he was not entitled.

Another view of the question is also very properly invoked by the plaintiffs. Their claim to additional compensation, by the express words of the contract, was made to depend upon their being able to exhibit proof that the defendants had paid other parties a higher rate than twenty-five dollars per ton for the same service. Oral proof to that effect, if credible, was as good as written. They were at liberty to rely upon the one or the other, or upon both combined, as circumstances might indicate it to be for their interest or convenience. Beyond question they might introduce those charters for that purpose, if they saw fit; or, if they had the means, and preferred to do so, they might prove their case by other evidence; and it cannot be maintained that their right to do so was in any manner impaired after those charters were introduced. They were not parties to those contracts, nor did they in any legal sense claim under them. Their rights being made to depend upon the subsequent transactions of the defendants with third parties, it was clearly proper to admit proof to show what those transactions were.

Several courts and text writers have stated the principle much broader than it is here laid down. The rule excluding parol proof in such cases, says Mr. Greenleaf, cannot affect third persons; who, if it were otherwise, might be prejudiced by things recited in the writings contrary to the truth, through the ignorance, carelessness, or fraud, of the parties, and who therefore ought not to be precluded from proving the truth, however contradictory to the written instruments of others. In Krider *v.* Lafferty, (1 Whar., 314,) it is held, that the rule is applicable only in suits between parties to the agreement, and their representatives and those claiming under them, and not to strangers. It is also held in England, in several cases, that the rule is not applicable to strangers. (King *v.* Inhabitants of Cheadle, 3 Barn. and Ad., 833; 2 Taylor's Ev., sec. 827, and cases cited; Wilson *v.* Hart, 7 Taun., 294; Overseers of Berlin *v.* Norwich, 10 John., 229; Poth on Obl., by Evans, n. 766; 2

Cow. and H., notes, 354, 368; Reynolds *v.* Magness, 2 Ired., 26; 1 Greenl. Ev., sec. 279.)

Parol testimony is always admissible in matters of contract, to show fraud, notwithstanding its effect may be to contradict what is in writing. That principle is too well established and too generally acknowledged to require any confirmation. Parties have the right to make their own contracts; and, in general, when they are satisfied, that is sufficient, and others have no right to complain. Cases, however, occasionally arise, where a contract, though *bona fide* between those who made it, may operate as a fraud upon third parties; and in this case, assuming the facts to be as they have been found by the jury, and as the evidence tends to prove, that the stipulation in question was inserted in those charters for the purpose of enabling the defendants, by that device, to avoid their responsibility to the plaintiffs, whether the owners of the vessels knew the purpose or not, the act so far partakes of the nature of a fraud between the parties to this suit as to authorize the introduction of parol evidence, to show what the truth was in regard to those transactions.

For these reasons, we are of the opinion that the instructions given by the Circuit Court were correct, and that there is no error in the record.

The decree of the Circuit Court therefore is affirmed, with costs.

Mr. Justice WAYNE, Mr. Justice CATRON, and Mr. Justice GRIER, dissented.

THE UNITED STATES, APPELLANTS, *v.* JOHN A. SUTTER.

The evidence is satisfactory to this court, that Alvarado, the Governor of California, granted a tract of land, to the extent of eleven leagues, to John A. Sutter, in 1841.

Although the original grant has not been produced, yet there is sufficient proof that it once existed, and was destroyed by fire. A draught of the grant, prepared by the Governor, is found in the archives, and the grant was recorded in the county registry of deeds; and this, together with the other evidence in