Olivera *v.* Union Insurance Company.

Marine insurance.—Blockade.

A vessel within a port, blockaded after the commencement of her voyage, and prevented from proceeding on it, sustains a loss by a peril, within that clause of the policy insuring against the "arrests, restraints and detainments of kings," &c., for which the insurers are liable; and if the vessel so prevented be a neutral, having on board a neutral cargo, laden before the institution of the blockade, the restraint is unlawful.

A blockade does not, according to modern usage, extend to a neutral vessel, found in port, nor prevent her coming out with the cargo which was on board, when the blockade was instituted.

A technical total loss must continue to the time of abandonment. *Quære*, as to the application of this principle to a case, where the loss was by a restraint on a blockade, and proof made of the commencement of the blockade, but no proof that it continued to the time of the abandonment ? [*184

Error to the Circuit Court for the district of Maryland. On the 29th day of December, in the year 1812, the plaintiffs, who are Spanish subjects, caused insurance to be made on the cargo of the brig, called the St. Francis de Assise, "at and from Baltimore to the Havana." Beside the other perils insured against in the policy, according to the usual *formula*, were "all unlawful arrests, restraints and detainments of all kings," &c. The cargo and brig were Spanish property, and were regularly documented as such.

The vessel sailed from Baltimore, and was detained by ice, until about the 8th day of February, in the year 1813, when, being near the mouth of the Chesapeake bay, the master of the brig discovered four frigates, which proved to be a British blockading squadron; he, however, endeavored to proceed to sea. While making this attempt, he was boarded by one of the frigates, the commander of which demanded and received the papers belonging to the vessel, and indorsed on one of them the words following: "I hereby certify, that the Bay of Chesapeake, and ports therein, are under a strict and rigorous blockade, and you must return to Baltimore, and upon no account whatever, attempt quitting or going out of the said port." The brig returned; after which the master made his protest, and gave notice to the agent of the owners, in Baltimore, who abandoned "in due and *reasonable time." The underwriters refused to pay the loss, on which this suit was brought. It appeared also, on the trial, that the [*185 vessel had taken her cargo on board, and sailed on her voyage, before the blockade was instituted.

On this testimony, the plaintiff's counsel requested the court to instruct the jury, that if they believed the matters so given to them in evidence, the plaintiffs were entitled to recover. The court refused to give this instruction, and the jury found a verdict for the defendants; the judgment on which was brought before this court, on a writ of error.

February 4th. *Harper*, for the plaintiffs, argued, that a right of abandonment accrued on the original restraint or obstruction of the voyage, by the blockade, without an actual attempt to pass. Upon reason and authority, the interposition of the blockade was a prevention of the prosecution of the voyage, and consequently, a loss within the policy. To constitute a technical total loss, which would give a right to abandon, it was not necessary that the vessel should expose herself to a physical risk, or actual manucaption. It was sufficient, that there was a moral impossibility of prosecuting the voyage. But here was an actual restraint by the *vis major*, in indorsing the

vessel's papers, and ordering her back to Baltimore, which would unquestionably justify the abandonment. The restraint was "unlawful," according to the true intent of this qualification of the usual terms of the policy; because the blockade was instituted, after the cargo was taken on board, and
*186] the vessel had a legal *right to proceed with it, notwithstanding the blockade. *The Betsey*, 1 Rob. 93; *The Vrow Judith*, Ibid. 150; *The Potsdam*, 4 Ibid. 89. The case of *Barker* v. *Blakes*, 2 East 283; s. c. 2 Marsh. on Ins. app'x, No. VIII., p. 835, supports the doctrine, that the insured may abandon upon a mere proclamation of blockade, although under the peculiar circumstances of that case, the party was held to have delayed his abandonment too long. The decisions of our own courts concur to support this doctrine. *Schmidt* v. *United Ins. Co.*, 1 Johns. 249; *Symonds* v. *The Union Ins. Co.*, 4 Dall. 417.

Jones and *Winder*, contrà, contended, that the decisions of this court laid the true foundation for the determination of the present case. The loss did not fall within the peculiar clause of the policy as to "unlawful arrests, restraints and detainments." The case of *Mc Call* v. *Marine Insurance Company*, 8 Cranch 59, determines, that the qualification "unlawful," extends to all the perils mentioned, to arrests, and restraints and detainments; and that a blockade is not an unlawful restraint. Whether egress, in the present case, was unlawful or not, is immaterial, unless the vessel had been actually detained and carried in for adjudication. The manner in which the blockade is to be enforced, is of military discretion, and a neutral vessel, with a cargo taken on board after the commencement of the blockade, may be turned back, though she may not be liable to condemnation as prize. Had
*187] the vessel been sent in *for adjudication, the captors would have been excused from costs and damages, though she might have been acquitted, and pursued her voyage; consequently, the restraint was not unlawful. This is a claim for indemnity, on account of a technical total loss, consequential on some of the perils insured against; a loss breaking up the voyage, or rendering it not worth pursuing. But there is no proof on the record, that the blockade still continued at the time of the abandonment. Besides, the voyage must be completely and entirely broken up. The authorities have settled it, that mere apprehension is no ground of abandonment; no loss, *quia timet*, is known to the law. In *Barker* v. *Blakes*, the two circumstances of capture and the supervening blockade were combined and connected together, to render the voyage not worth pursuing, and to justify the abandonment. The elementary writers have collected the cases concurring to establish the doctrine that a blockade or embargo, or any other inhibition of trade will not authorize an abandonment. 1 Marsh. on Ins. 219; Park on Ins. 221 (6th ed.).

Harper, in reply.—The case of *Mc Call* v. *Marine Insurance Company* went on the ground, that the blockade was lawful, and therefore, the assured was held not entitled to recover. But in this case, it is contended, that the blockade was unlawfully applied to a neutral vessel attempting to depart, with a cargo taken on board before the commencement of the blockade.
*188] The right of the neutral *to depart is inconsistent with the pretended right of the belligerent to prevent his egress. The supposed exemption

from costs and damages on the part of the blockading squadron, would not show that the neutral had no right to proceed, but only that his right was not so manifest and apparent as to subject the captors to costs and damages. It was unnecessary for the assured to prove that the blockade continued after the vessel was turned back. The legal presumption is, that it still continued; and it is a public, notorious, historical fact, that it did continue. In *Barker* v. *Blakes*, the court of K. B. merely state the previous detention by the capture, in order to show that the party was not in fault, in not reaching Havre, before the blockade commenced. But the main stress of the opinion tends to show, that the institution of a blockade may afford a ground of abandonment, without an actual attempt to enter the blockaded port. The cases cited by Marshall and Park, are not cases of blockade, but of municipal edicts interdicting trade with the ports of the sovereign by whom they were established.

February 19th, 1818. MARSHALL, Ch. J., delivered the opinion of the court, and after stating the facts, proceeded as follows:—On the part of the plaintiff in error, it has been contended, that the assured have sustained a technical total loss, by a peril within that clause in the policy, which insures "against all unlawful arrests, restraints and detainments of kings," &c. *He contends, 1st. That a blockade is "restraint" of a foreign [*189 power. 2d. That, on a neutral vessel, with a nautral cargo, laden before the institution of the blockade, it is "an unlawful restraint."

The question, whether a blockade is a peril insured against, is one on which the court has entertained great doubts. In considering it, the import of the several words used in the clause has been examined. It certainly is not "an arrest," nor is it "a detainment." Each of these terms implies possession of the thing, by the power which arrests or detains; and in the case of a blockade, the vessel remains in the possession of the master. But the court does not understand the clause as requiring a concurrence of the three terms, in order to constitute the peril described. They are to be taken severally; and if a blockade be a "restraint," the insured are protected against it, although it be neither an "arrest" nor detainment.

What, then, according to common understanding, is the meaning of the term "restraint?" Does it imply, that the limitation, restriction or confinement must be imposed by those who are in possession of the person or thing which is limited, restricted or confined; or is the term satisfied by a restriction, created by the application of external force? If, for example, a town be besieged, and the inhabitants confined within its walls by the besieging army, if, in attempting to come out, they are forced back, would it be inaccurate to say, that they are restrained within those limits? The court believes it would not; and if it would not, then, with equal propriety, may be *said, when a port is blockaded, that the vessels within are con- [*190 fined or restrained from coming out. The blockading force is not in possession of the vessels inclosed in the harbor, but it acts upon and restrains them. It is a *vis major*, applied directly and effectually to them, which prevents them from coming out of port. This appears to the court to be, in correct language, "a restraint" of the power imposing the blockade, and when a vessel, attempting to come out, is boarded and turned back, this restraining force is practically applied to such vessel.

Although the word, as usually understood, would seem to comprehend the case, yet this meaning cannot be sustained, if, in policies, it has uniformly received a different construction. The form of this contract has been long settled; and the parties enter into it, without a particular consideration of its terms. Consequently, no received construction of those terms ought to be varied. It is, however, remarkable, that the industrious researches of the bar have not produced a single case, from the English books, in which this question has been clearly decided. In the case of *Barker* v. *Blakes*, which has been cited and relied on at the bar, one of the points made by the counsel for the underwriters was, that the abandonment was not made in time, and the court was of that opinion. Although, in this case, it may fairly be implied, from what was said by the judge, that a mere blockade is not a peril within the policy, still, this does not appear to have been considered, either at the bar or by the bench, as the direct question in the cause, nor was it expressly decided. The opinion *of the court was, that the *191] blockade constituted a total loss, which was occasioned by the detention of the vessel; but that the abandonment was not made within reasonable time, after notice of that total loss. In forming this opinion, it had not become necessary to inquire, whether the blockade, unconnected with the detention, was, in itself, a peril against which the policy provided. The judgment of the court could not be, in the most remote degree, influenced by the result of this inquiry; and consequently, it was not made with that exactness of investigation, which would probably have been employed, had the case depended on it. It is also to be observed, that the vessel did not attempt to proceed towards the blockaded port, but lay in Bristol, when the abandonment was made. The blockading squadron, therefore, did not act directly on the vessel, nor apply to her any physical force. It is not certain, that such a circumstance might not have materially affected the case. This court, therefore, does not consider the question as positively decided in *Barker* v. *Blakes*.

The decisions of our own country would be greatly respected, were they uniform; but they are in contradiction to each other. In New York, it has been held, that a blockade *is*, and in Massachusetts, that it *is not*, a peril within the policy. The opinions of the judges of both these courts are, on every account, entitled to the highest consideration. But they oppose each other, and are not given in cases precisely similar to that now before this court. The opinion that a blockade was not a restraint, was held by the courts of Massachusetts; but was expressed by the *very eminent *192] judge who then presided in that court, in a case where the vessel was not confined within a blockaded port, by the direct and immediate application of physical force to the vessel herself. Believing this case not to have been expressly decided, the court has inquired, how far it ought to be influenced by its analogy to principles which have been settled.

It has been determined, in England, that if the port for which a vessel sails, be shut against her, by the government of the place, it is not a peril within the policy. In *Hadkinson* v. *Robinson*, 3 Bos. & Pul. 388, a vessel bound to Naples was carried into a neighboring port, by the master, in consequence of information received at sea, that the port of Naples was shut against English vessels. In an action against the underwriters, the jury found a verdict for the defendants, and, on a motion for a new trial, the

court said, "a loss of the voyage, to warrant the insured to abandon, must be occasioned by a peril acting upon the subject-matter of the insurance, immediately, and not circuitously, as in the present case. The detention of the ship, at a neutral port, to avoid the danger of entering the port of destination, cannot create a total loss, within the policy, because it does not arise from any peril insured against." It will not be denied, that this case applies, in principle, to the case of a vessel whose voyage is broken up, by the act of the master, on hearing that his port of destination is blockaded. The peril acts directly on the vessel, not more in the one case than in the other. But if, in attempting to pass the blockading *squadron, the [*193
vessel be stopped and turned back, the force is directly applied to her, and does act directly, and not circuitously. Without contesting or admitting the reasonableness of the opinion, that the loss of the voyage, occasioned by the detention of the ship, by her master, in a neutral port, is not within the policy, it may well be denied to follow, as a corollary from it, that a vessel confined in port by a blockading squadron, and actually prevented by that squadron from coming out, does not sustain the loss of her voyage, from the restraint of a foreign power, which is a peril insured against.

Lubbock v. *Rowcroft* (5 Esp. 50), which was decided at *nisi prius*, is, in principle, no more than the case of *Hadkinson* v. *Robinson*. Having heard that his port of destination was blockaded by, or in possession of the enemy, the master stopped in a different port, and the assured abandoned. The loss was declared to be produced by a peril, not within the policy. It is unnecessary to repeat the observations which were made on the case of *Hadkinson* v. *Robinson*.

An embargo is admitted to be a peril within the policy. But as has been already observed, the sovereign imposing the embargo is virtually in possession of the vessel, and may, therefore, be said to arrest and detain her. Yet, in fact, the vessel remains in the actual possession of the master or owner, and has the physical power to sail out and proceed on her voyage. The application of force is not more direct on a vessel stopped in port by an embargo, than on a vessel stopped in port by a blockading squadron. The danger of attempting to violate a blockade is as *great as the danger [*194
of attempting to violate an embargo. The voyage is as completely broken up in one case, as in the other, and in both, the loss is produced by the act of a sovereign power. There is as much reason for insuring against the one peril, as against the other; and if the word restraint does not necessarily imply possession of the thing by the restraining power, it must be construed to comprehend the forcible confinement of a vessel in port, and the forcible prevention of her proceeding on her voyage. If so, the blockade is, in such a case, a peril within the policy.

The next point to be decided is, the unlawfulness of this restraint. That a belligerent may lawfully blockade the port of his enemy, is admitted. But it is also admitted, that this blockade does not, according to modern usage, extend to a neutral vessel, found in port, nor prevent her coming out with the cargo, which was on board when the blockade was instituted. If, then, such a vessel be restrained from proceeding on her voyage, by the blockading squadron, the restraint is unlawful. The St. Francis de Assise was so restrained, and her case is within the policy.

It has been contended, that it was the duty of the neutral master to show

to the visiting officer of the belligerent squadron, his right of egress, by showing not only the neutral character of his vessel and cargo, but that his cargo was taken on board, before the institution of the blockade. This is admitted; and it is believed, that the bill of exceptions shows satisfactorily, that these facts were proved to the visiting officer. It is stated, that the
*195] *vessel and cargo were regularly documented; that the papers were shown, and that the cargo was put on board, and the vessel had actually sailed on her voyage, before the institution of the blockade.

There is, however, a material fact which is not stated in the bill of exceptions, with perfect clearness. The loss, in this case, is technical, and the court has decided that such loss must continue to the time of abandonment.(*a*) It is not necessary, that it should be known to exist, at the time of abandonment, for that is impossible; but that it should actually exist; a fact which admits of affirmative or negative proof, at the trial of the cause. Upon the application of this principle to this case, much diversity of opinion has prevailed. One judge is of opinion, that the rule, having been laid down in a case of capture, is inapplicable to a loss sustained by a blockade. Two judges are of opinion, that proof of the existence of the blockade, having been made by the plaintiff, his case is complete; and that the proof that it was raised, before the abandonment, ought to come from the other side. A fourth judge is of opinion, that connecting with the principle last mentioned, the fact stated in the bill of exceptions, that the abandonment was "in due and reasonable time," it must be taken to have been made, during the existence of the technical loss. Four judges, therefore, concur in the opinion, that the plaintiffs are entitled to recover; but as they form this opinion on different principles, nothing but the case itself is decided:
*196] that is, that a vessel within a port *blockaded after the commencement of her voyage, and prevented from proceeding on it, sustains a loss by a peril within the policy; and if the vessel, so prevented, be a neutral, having on board a neutral cargo, received before the institution of the blockade, the restraint is unlawful.

Judgment reversed.(*b*)

(*a*) See Rhinelander *v.* The Ins. Co. of Pennsylvania, 4 Cranch 29; Marshall *v.* Delaware Ins. Co., Id. 202; Alexander *v.* Baltimore Ins. Co., Id. 370.

(*b*) On the question of blockade, three things must be proved: 1st. The existence of an actual blockade; 2d. The knowledge of the party; and 3d. Some act of violation, either by going in, or by coming out, with a cargo laden after the commencement of blockade. The Betsey, 1 Rob. 93.

The government and courts of the United States have constantly maintained, "that ports, not actually blockaded by a present, adequate, stationary force, employed by the power which attacks them, shall not be considered as shut to neutral trade, in articles not contraband of war; that, though it is usual for a belligerent to give notice to neutral nations, when he intends to institute a blockade, it is possible, that he may not act upon his intention at all, or that he may execute it insufficiently, or that he may discontinue his blockade, of which it is not customary to give any notice: that consequently, the presence of the blockading force is the natural criterion by which the neutral is enabled to ascertain the existence of the blockade, at any given period, in like manner as the actual investment of a besieged place, is the evidence by which we decide, whether the siege, which may be commenced, raised, recommenced, and raised again, is continued or not; that, of course, a mere notification to a neutral minister, shall not be relied upon, as affecting with knowledge of the actual existence of the

blockade, either his government or its citizens; that a vessel, cleared or bound to a blockaded port, shall not be considered as violating, in any manner, the blockade, unless, on her approach towards such port, she shall have been previously warned not to enter it; that this view of the law, in itself *perfectly correct, is peculiarly important to nations, situated at a great distance from the belligerent parties, and [*197 therefore, incapable of obtaining other than tardy information of the actual state of their ports; that whole coasts and countries shall not be declared (for they can never be more than declared) to be in a state of blockade, and thus the right of blockade converted into the means of extinguishing the trade of neutral nations; and lastly, that every blockade shall be impartial in its operation, or, in other words, shall not open and shut for the convenience of the party that institutes it, and at the same time, repel the commerce of the rest of the world, so as to become the odious instrument of an unjust monoply, instead of a measure of honorable war." For the conduct of the government in this respect, see the documents in the Appendix to this volume, Note I. The decisions of the courts are collected it Mr. Condy's edition of Marshall on Insurance, vol. 1, p. 81, note 3. To the cases there cited, add the following: Williams *v.* Smith, 2 Caines 1; Radcliff *v.* United Insurance Company, 7 Johns. 38.

In the case of Fitzsimmons *v.* Newport Insurance Company (4 Cranch 185, 198), it was laid down by this court, that the 18th article of the treaty of 1794, between the United States and Great Britain, seems to be a correct exposition of the law of nations, and is admitted by the parties to the treaty, as between themselves, to be a correct exposition of the law, or to constitute a rule in that place of it. "Neither the law of nations, nor the treaty, admits of the condemnation of a neutral vessel, for the intention to enter a blockaded port, unconnected with any fact. Sailing for a blockaded port, knowing it to be blockaded, has been, in some English cases, construed into an attempt to enter that port, and has, therefore, been adjudged a breach of the blockade, from the departure of the vessel. Without giving any opinion on that point, it may be observed, that in such cases, the fact of sailing is coupled with the intention, and the sentence of condemnation is founded on an actual breach of blockade." *"It is [*198 impossible to read that instrument (the treaty), without perceiving a clear intention in the parties to it, that after notice of the blockade, an attempt to enter the port must be made, in order to subject the vessel to confiscation. By the language of the treaty, it would appear, that a second attempt to enter the port must be made, in order to subject the vessel to confiscation." "It is agreed," says that instrument, "that every vessel, so circumstanced" (that is, every vessel sailing for the blockaded port, without knowledge of the blockade), "may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, after notice, she shall again attempt to enter."

As to violating a blockade, by coming out with a cargo, the time of shipment is very material, for although it might be hard to refuse a neutral liberty to retire with a cargo, already laden, and by that act already become neutral property; yet, after the commencement of a blockade, a neutral cannot be allowed to interpose in any way, to assist the exportation of the property of the enemy. After the commencement of the blockade, a neutral is no longer at liberty to make any purchase in that port. The Betsey, 1 Rob. 93; The Frederick Molke, Id. 72; The Neptunus, Id. 170. A neutral ship departing, can only take away a cargo *bonâ fide* purchased and delivered, before the commencement of the blockade: if she afterwards take on board a cargo, it is a violation of the blockade. The Vrouw Judith, 1 Rob. 150; The Rolla, 6 Id. 364. Where a ship was transferred from one neutral merchant to another, in a blockaded port, and sailed out in ballast, she was determined not to have violated the blockade. The Potsdam, 4 Rob. 89; The Juffrouw Maria Schroeder, Id. note *a*. But a ship which had been purchased by a neutral, of the enemy, in a blockaded port, and sailed from thence, on a voyage to the neutral country, was held liable to condemnation. The General Hamilton, 6 Rob. 61. And where the vessel was captured on a voyage to the blockaded port, in ballast, she having sailed for the purpose of bringing away goods, which had become the property of neutral merchants, before the date of the blockade,

she was held liable to condemnation. The rule of *blockade permits an egress to ships innocently in the port, before the restriction was imposed, and even with cargoes, if previously laden; but in the case of ingress, there is not the same reason for indulgence; there can be no surprise upon the parties, and therefore, nothing short of a physical necessity is admitted as an adequate excuse for making the attempt of entry. The Comet, Edw. 32. A maritime blockade is not violated, by sending goods to the blockaded port, nor by bringing them from the same, through the interior canal navigation of the country. A mere maritime blockade, effected by a force operating only at sea, can have no operation upon the interior communications of the port. The Ocean, 3 Rob. 297; The Stert, 4 Id. 65. But goods shipped in a river, having been previously sent in lighters, along the coast, from the blockaded port, and under charter-party with the ship, proceeding also from the blockaded port, in ballast, to take them on board, were held liable to confiscation. The Maria, 6 Rob. 201. The penalty for a breach of blockade is remitted, by the raising of the blockade, between the time of sailing from the port and the capture. When the blockade is raised, a veil is thrown over everything that has been done, and the vessel is no longer taken *in delicto*. The *delictum* completed at one period is, by subsequent events, entirely done away. The Lisette, 6 Rob. 387. A neutral ship, coming out of a blockaded port, in consequence of a rumor that hostilities were likely to take place between the enemy and the country to which the ship belongs, is not liable to condemnation, though laden with a cargo, where the regulations of the enemy would not permit a departure in ballast. The Drie Vrienden, 1 Dods. 269. But the danger of seizure and confiscation by the enemy, must be immediate and pressing. The mere apprehension of possible and remote danger, will not justify bringing a cargo out of a blockaded port. The Wasser Hundt, Id. 270, note.

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*200] *SHEPHERD *et al. v.* HAMPTON.

Measure of damages.

In an action by the vendee, for the breach of a contract of sale by the vendor, in not delivering the article, the measure of damages is the price of the article, at the time of the breach of the contract, and not at any subsequent period.[1]

Quære? How far this rule applies to a case, where advances of money have been made by the purchaser, under the contract?

ERROR to the District Court of Louisiana. The plaintiffs filed their petition or libel in the court below, stating, that on the 12th day of December 1814, they entered into a contract with the defendant for the purchase of 100,000 pounds weight of cotton, to be delivered by the defendant to the plaintiffs, on or before the 15th day of February ensuing the date of said contract, the said cotton to be of prime quality, and in good order, and for which the plaintiffs stipulated to pay at the rate of ten cents per French pound; and in case the price of cotton, at the time of delivery, should exceed the above limited price, then the petitioners were to allow the common market price on 50,000 pounds of said cotton: and alleging a breach of the agreement on the part of the defendant in not delivering the cotton, &c.

The case agreed, stated the contract as set forth in the petition, and that 49,108 pounds of cotton were delivered by the defendant, under the con-
*201] tract, about the time mentioned therein, to wit, on the 15th day *of February 1815, when the highest market price of cotton at New Orleans was 12 cents per pound; that the defendant refused to deliver the

[1] Blydenburgh *v.* Welsh, Bald. 331; Halsey *v.* Dunlop, 5 N. Y. 537; Edgar *v.* Boies, 11 *v.* Hind, 6 McLean 102; Clarke *v.* Pinney, 5 S. & R. 445; Smethhurst *v.* Woolston, 5 W. Cow. 681; Dey *v.* Dix, 9 Wend. 129; McKnight & S. 106.