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decreed and ordered, by consent of parties, by their counsel, that the decree of the said circuit court be and the same is hereby reversed and annulled. And it is further ordered, that the said cause be remanded to the said circuit court for further inquiry; and that the proceeds of the said Bello Corrunes and the cargo lie in the registry of the said circuit court, to be paid over, under the order of that court, to the Spanish owners, as interest shall be made to appear.

SMITH *et al.* v. UNIVERSAL INSURANCE COMPANY.*Marine insurance.—Total loss.*

Where, in a policy of insurance, a technical total loss is asserted, as the ground of recovery, the loss must be occasioned by the immediate operation of some of the perils insured against, and it is not sufficient, that the voyage be abandoned for fear of the operation of the peril.¹

The insurers do not undertake, that the voyage shall be performed, without delay, or that the perils insured against shall not occur; they undertake only for losses sustained by those perils; and if any peril does begin to act upon the subject, yet, if it be removed, before any loss takes place, and the voyage is not thereby broken up, but is, or may be, resumed, the insured cannot abandon for a total loss.

*177] Insurance on munitions of war, laden on board a neutral vessel, on *a voyage from New York, to and at a port or ports, place or places in the gulf of Mexico, from the Balize to Campeachy, both inclusive, and from either, back to New York, &c., with a memorandum, that the insurers should be free from any loss arising from illicit or prohibited trade: the goods insured were prohibited from being imported into the ports of New Spain, in possession of the royalists, by the laws of Old Spain, but were permitted to be introduced into such ports as were in possession of the insurgents: the vessel and cargo arrived off a place, in possession of the patriot general Mina, and the master made an agreement to sell the cargo to him, deliverable, from time to time, as he should want it, at St. Ander; but before the cargo could be delivered, the vessel was chased off by Spanish armed ships, and after making several attempts to return, was compelled to proceed to the Balize for repairs; after which, she again approached the coast, but found it still in possession of the royalists, General Mina having retired into the interior; the objects of the voyage being thus defeated, the vessel returned to New York, with the original cargo on board; and the insured then abandoned to the underwriters, not having before had information of the breaking up of the voyage: *Held*, that the insured were not entitled to recover as for a total loss of the voyage.

ERROR to the Circuit Court of Maryland. This was an action of covenant, on a policy of insurance, underwritten by the defendants, for the plaintiffs, on the 4th of February 1817, on a voyage at and from New York, to and at a port or ports, place or places, in the gulf of Mexico, from the Balize to Campeachy, both inclusive, and from either, back to New York, or a port of discharge in the United States, upon all kinds of lawful goods and merchandises laden, or to be laden, on board the schooner Ellen Tooker. In another part of the policy, it was stated to be "on cargo, consisting chiefly *178] of munitions *of war." There was a memorandum also in the policy, whereby the underwriters are warranted by the assured free from any charge, damage or loss which might arise, in consequence of a seizure or detention of the property for or on account of any illicit or prohibited trade. The declaration alleged, that the vessel, with the cargo, proceeded on the voyage, and asserted as a loss, within the contract, that while on the voyage, the schooner, with her cargo, was restrained and detained by certain per-

¹ See note to *Swan v. Union Ins. Co.*, 3 Wheat. 168.

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sons acting under the authority of the king of Spain, whereby the goods and merchandises became wholly lost.

The material facts, as they appeared on the trial, are these: The Ellen Tooker, having on board property of the plaintiff, of a greater value than the sum insured, sailed from New York, on the voyage insured, on the 31st of January 1817. On the 25th of February, she arrived at the Balize, where the master left the vessel and went to New Orleans, and having obtained information, that Nantla and Talacuta were in possession of the independents, to which places American vessels might proceed, on his return to the Balize, the schooner proceeded for Nantla, and arrived off that place, on the 23d of March, and found it in possession of the royalists. The schooner then proceeded to Talacuta, and having arrived off that place, a boat was sent ashore for information, the crew of which were made prisoners. Concluding from this occurrence, that the place was in possession of the royalists, the schooner put to sea, and on the 5th of April, fell in with a fleet *of [*179 six sail under the command of General Mina, with troops on board, bound for the bar of St. Ander. The master having had communication with General Mina, and received encouragement from him, that he would purchase the cargo, the schooner kept company with the fleet, and arrived off the bar of St. Ander, on the 28th of April, where the schooner came to anchor, in the open sea, the entrance being too shoal to permit her to cross the bar. On the 11th of May, the master left the schooner, and went up the river to Porto la Marina (where General Mina had his head-quarters), for the purpose of selling the cargo, which he accordingly did, deliverable to General Mina, as he should want it, from time to time, at St. Ander, the whole delivery to be completed by the first of July. On the 18th of May, while the master was on shore, a Spanish frigate and two armed schooners of the royalists hove in sight, and the schooner was immediately gotten under way, for the purpose of escaping them, and after four hours' chase, effected her escape. The schooner made several attempts to return, but was prevented by Spanish ships hovering about the place; on the 26th of May, finding the coast clear, she returned to St. Ander, which was still in possession of the independents, and the master was taken on board. The foremast of the schooner being found to be loose in the step and injured, and the crew being short of water, the schooner proceeded to the mouth of the Rio Grande, for water, and to examine the foremast; and there, the heel of the foremast being found to be gone, the schooner proceeded to the *Balize for repairs, and arrived there on the 6th of June. The fore- [*180 mast was there repaired, and the schooner sailed again for St. Ander, for the purpose of delivering the cargo to General Mina, according to contract, and on her arrival there, on the 22d of June, the place was found to be in possession of the royalists, who occupied it with a military force. In consequence of this, the schooner did not approach the shore, but proceeded along the coast northward, to a place called Pass Cavellos, about 270 miles from St. Ander, where information was received that St. Ander and the coast were completely in possession of the royalists. The objects of the voyage being in this manner defeated, the schooner returned to New York, with her original cargo on board, and arrived there on the 22d, of July 1817. The plaintiffs had no intelligence of the breaking up of the voyage, until the return of the schooner to New York, and then abandoned to the underwriters,

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in due time, assigning as a cause, that the *Ellen Tooker* was "compelled, by an armed force, to leave St. Ander, in the gulf of Mexico, where she had arrived and was about to deliver her cargo, and was prevented thereafter, by a like force, from re-entering that place." This abandonment was not accepted. It was also in evidence, that the cargo of the *Ellen Tooker* was shipped, and intended to be sold to the independent party of Mexico, which was waging war with the king of Spain, and that the same was prohibited from importation into Mexico, by the laws of Spain, and would have been seized and confiscated, if it had been carried into any of the ports in *181] possession of the royalists, but would have been freely admitted into any ports in possession of the independent party.

Upon these facts, a verdict was given, and judgment rendered for the defendants, and the cause was brought to this court by writ of error.

February 17th. *Winder and Raymond*, for the plaintiffs, stated, that this was an action of covenant on a policy of insurance, and that the breach assigned in the declaration was a loss occasioned by the restraint and detention of certain persons acting under the authority of the king of Spain. The voyage was broken up and destroyed by the constraint imposed upon the vessel to leave St. Ander, in order to avoid capture by the Spanish armed ships. The insurers were apprised of the nature of the risk. The port of St. Ander became the destination, and the vessel was prevented from entering it, by the risks insured against. This is a restraint within the meaning of the policy. Every restraint or control, exerted by a people, prince or state, over the subject-matter insured, so as to defeat the voyage, is a loss within the policy. Such are the restraints of a blockade (*Schmidt v. United Ins. Co.*, 1 Johns. 249; *Craig v. United Ins. Co.*, 6 Ibid. 226; *Yeaton v. Fry*, 6 Cranch 335; *Olivera v. Union Ins. Co.*, 3 Wheat. 183); an embargo, limited in point of time, or indefinite (*McBride v. Marine Ins. Co.*, 5 Johns. 299; *Walden v. Phoenix Ins. Co.*, 5 Ibid. 310; *Ogden v. Firemen Ins. Co.*, 10 Ibid. 177; *Rhineland v. Ins. Co. of Pennsylvania*, 4 Cranch 29); and *182] the municipal law of a *country which subjects the vessel and cargo to confiscation, if it is morally certain that it applies to the vessel, and would be enforced. *Craig v. United Ins. Co.*, 6 Johns. 226. So, if the port of destination be shut, by being in possession of an enemy, or by interdiction of trade, it is a just cause for breaking up the voyage. 1 Johns. 268, *per KENT*, Ch. J., citing 1 *Emerig. des Assur.* 242. There is a great apparent discrepancy in the English authorities, as to "restraint of princes." But this court has settled the import and meaning of the term in the case of *Olivera v. Union Insurance Company*, 3 Wheat. 183. But it may be said, that there is no proof that the blockade existed, at the time of the abandonment. To which it is answered, that this principle does not apply to a technical total loss, produced by blockade. In the case of an embargo or capture, the voyage is not necessarily broken up; it is merely suspended: but in that of a blockade, it is entirely defeated, and the object of the voyage cannot be accomplished. Though the restraint now under consideration, is not that of a blockade, yet it is equivalent; since the master was prevented by the restraint, from entering the port which he had selected, within the limits prescribed by the policy. A reasonable fear of loss by capture, seizure, &c., is a justifiable cause of deviation, and consequently, protects against all los-

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ses arising from deviation. In the case of *Schmidt v. United Insurance Company*, it is said to be "sufficient, to justify the master's conduct in cases of this kind, if he have good reason to apprehend that a capture will be the consequence of going on."^(a)

Pinkney and *D. B. Ogden*, contra, argued, that in order to establish a technical total loss, in this case, the insured must show a restraint, within the policy and declaration; and that it actually produced the breaking up of the voyage. The *onus probandi* is on the plaintiffs, and they must trace the supposed consequences of the peril home to its efficient cause. The insurance was on munitions, contraband of war; but the memorandum that the underwriters were not to be liable for a loss by illicit trade, secured them against any loss by mere municipal regulations. They have nothing to do with an internal conflict, by which the port may change masters. The declaration alleges a loss by restraint of princes; but this restraint must be the direct and immediate agent in breaking up the voyage; as in an embargo or blockade, which being removed, the peril instantly ceases. Here, the restraint was not only not the efficient cause of the loss, but it arose out of illicit traffic. This part of the coast of Mexico did not cease to be subject to the colonial code of Spain, by the temporary possession of the insurgents. The vessel attempted to escape, not merely from the *ordinary peril of capture in war, but from that combined with the local prohibition. [*184 It was a loss from a fear which, had it been realized, would not have made the underwriters liable. All the *quia timet* cases, are cases where they would be so liable. The attempt is to make the underwriters find a lawful market; whereas, the assured stipulates to take that upon himself, by his warranty. Even if the market were lawful for a time, its ceasing to be so, is not at the risk of the underwriters. So that the assured have broken up the voyage, for a technical total loss, arising from perils not insured against.

February 26th, 1821. STORY,* Justice, delivered the opinion of the court, and after stating the facts, proceeded as follows:—Upon these facts, the circuit court directed the jury, that the plaintiffs were not entitled to recover; and the propriety of this direction is the question before us upon this writ of error.

Two points have been argued at the bar: 1. That there were no actual restraint of persons acting under the authority of Spain, whereby the voyage was defeated. 2. That if a technical total loss took place, by the loss of the voyage, it was a loss occasioned by engaging in an illicit and prohibited trade, for which, by the memorandum in the policy, the underwriters are not liable.

The declaration and the abandonment, both tie up the case to a total loss of the voyage, by the restraint of Spanish authorities. If this case be not made out in proof, there is an end of the controversy. *In cases [*185 of this sort, where a technical total loss is asserted as a ground of recovery, it is not sufficient, that the voyage has been entirely frustrated

(a) Per LIVINGSTON, 1 Johns. 262; and Targa, Ponderaz. c. 59, 291; Casaregis, Disc. 83, No. 84, cited by him. See also 1 Emerig. *des Assur.* 509.

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and lost ; but the loss must be occasioned by some peril actually insured against. The peril must act directly, and not circuitously, upon the subject of the insurance. It must be an immediate peril, and the loss the proper consequence of it ; and it is not sufficient, that the voyage be abandoned, for fear of the operation of the peril.

The plaintiffs rely upon the fact of the Ellen Tooker's being chased away from St. Ander, and being prevented for several days from returning to that place, by the presence of Spanish armed ships, as decisive proof of actual restraint. But the voyage was delayed only, and not broken up, by this occurrence, for the vessel afterwards returned in safety to St. Ander. The insurers do not undertake that the voyage shall be performed, without delay, or that the perils insured against shall not occur ; they undertake only for losses sustained by those perils ; and if any peril does act upon the subject, yet if it be removed, before any loss takes place, and the voyage be not thereby broken up, but is, or may be resumed, the assured cannot abandon for a total loss. If a vessel be captured, during a voyage, and afterwards be re-captured, and performs, or may perform it, there can be no abandonment, after the re-capture, for a technical total loss. In the present case, the vessel actually did resume her voyage, after the restraint ceased ; and there is no evidence to show that any object of the voyage was defeated *186] by this temporary *restraint and delay to avoid capture. Then, what was the real cause of the final destruction of the voyage ? It was, that St. Ander, which, but for a short time, was in the possession of the troops of General Mina, was *in transitu*, again occupied by the royalists, and the colonial government resumed its functions. A trade was inhibited with that place, by the ordinary colonial laws of Spain ; and the voyage itself, in which the Ellen Tooker was engaged, placed her, and her cargo also, in the character of an enemy. It was clear, therefore, that a proceeding into St. Ander, would have subjected the Ellen Tooker to confiscation for a double cause ; for breach of the ordinary laws of trade, and for a violation of neutral duties. The voyage, then, was broken up from fear of loss, by reason of the seizure and confiscation of the property. It was abandoned by the master *quia timebat*, and not because there was any actual direct restraint, which prevented the vessel from proceeding to the port of destination. The case, therefore, falls directly within the authority of the cases of *Hodkinson v. Robinson*, 3 Bos. & Pul. 388, and *Lubbock v. Rowcroft*, 5 Esp. 50, which have never been shaken. In the former case, Lord ALVANLEY said, "any loss which necessarily arises from capture or detention of princes, is a loss within the policy ; but here the captain, learning that if he entered the port of destination, the vessel would be liable to confiscation, avoided that port, whereby the object of the voyage is defeated. This does not operate to the total destruction of the thing insured." There are precisely *187] the same circumstances *in the case now at bar. The underwriter does not warrant that the vessel shall have a right to trade at the port of destination ; but only that notwithstanding the perils insured against, the vessel shall proceed to such port. If the plaintiffs, in the events which have occurred, were entitled to abandon and recover, as for a technical total loss, they would have been entitled to abandon for the same cause, at the time of the vessel's sailing from New York on the voyage ; for St. Ander was at that time just as much shut against the vessel, and she was

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just as liable to confiscation, for illegal traffic with that place, as she was at the time the voyage was broken up.

It is the unanimous opinion of the court, that the judgment of the circuit court be affirmed, with costs.

Judgment affirmed.

THE ROBERT EDWARDS : SAVAGE, Claimant.

Duties on imports.

A question of fact under the 46th section of the collection law of the 2d March, 1799, c. 128, exempting from duty the wearing-apparel, and other personal baggage, of persons arriving in the United States.

Where the *res gestæ*, in a revenue cause, are incapable of explanation, consistently with the innocence of the party, condemnation follows, although there be no positive testimony of the offence having been committed : circumstances are sometimes more convincing than the most positive evidence.

*Although a mere intention to evade the payment of duties be not, *per se*, a cause of forfeiture, yet, when a question arises, whether an act has been committed, which draws [*188 after it that consequence, such intention will justify the court in not putting on the conduct of the party, in respect to the act in question, an interpretation as favorable as, under other circumstances, it would be disposed to do.

APPEAL from the Circuit Court of South Carolina.

February 17th, 1821. This cause was argued by *Winder* and *Raymond*, for the appellant and claimant, and by the *Attorney-General*, for the United States.

February 26th. LIVINGSTON, Justice, delivered the opinion of the court. —This is a libel for an alleged forfeiture under the 46th section of the collection law, passed the second of March 1799. This section exempts from duty the wearing-apparel, and other personal baggage, of those persons who arrive in the United States ; and to ascertain what articles are to be exempted, it is directed, that due entry thereof, as of other goods, but separate and distinct therefrom, shall be made with the collector, by the owner, or his agent, verified by oath, stating, among other things, that the packages mentioned in such entry, contain no goods whatever, except the wearing-apparel and other personal baggage of the person to whom they belong. And it is provided, that whenever any articles subject to duty, shall be found among such baggage, which shall not be mentioned to the collector, at the time such entry is made, they shall be forfeited, and the person in *whose baggage they shall be found, shall, moreover, forfeit [*189 and pay treble the value of such articles.

These proceedings commenced in the district court of the district of South Carolina, and after sentences of condemnation in that court, and in the circuit court of the United States for that district, the claimant has appealed to this court. The only question we have to decide, is, whether the goods libelled, and which are admitted to be subject to duty, were entered as baggage or not. If they were, they must be condemned ; if not, the claimant is entitled to restitution.

The claimant insists, that the trunks seized were not included in her baggage entry, and that no act of hers, prior or subsequent to the entry, shows