*Edward Carrington and others *v.* The Merchants' Insurance Company.

Marine insurance.—Illicit trade.

In a policy of insurance, there was a memorandum, stipulating, "that the assurers shall not be liable for any charge, damage or loss which may arise in consequence of seizure or detention for or on account of illicit trade, or trade in articles contraband of war." This provision is not to be construed, that there must be a legal or justifiable cause of *condemnation*, but that there must be such a cause for *seizure* or *detention*.

It is not every seizure or detention which is excepted, but such only as is made for and on account of a particular trade; a seizure or detention, which is a mere act of lawless violence, wholly unconnected with a supposed illicit or contraband trade, is not within the terms or spirit of the exception; and as little is a seizure or detention, not *bonâ fide* made upon a just suspicion of illicit or contraband trade, but the latter used as a mere pretext or color for an act of lawless violence; for, under such circumstances, it can, in no just sense, be said to be made for or on account of such trade; it is a mere fraud to cover a wanton trespass; a pretence, and not a cause for the tort. To bring a case, then, within the exception, the seizure or detention must be *bonâ fide*, and upon a reasonable ground; if there has not been an actual illicit or contraband trade, there must at least be a well-founded suspicion of it—a probable cause to impute guilt, and justify further proceedings and inquiries; and this is what the law deems a legal and justifiable cause for the seizure or detention.

The ship insured, when seized, had not unloaded all her outward cargo, but was still in the progress of the outward voyage, originally designated by the owners; she sailed on that voyage from Providence, Rhode Island, with contraband articles on board, belonging, with the other parts of the cargo, to the owners of the ship, with a false destination and false papers, which yet accompanied the vessel; the contraband articles had been landed, before the policy, which was a policy on time, designating no particular voyage, had attached; the underwriters, though taking no risks within the exception, were not ignorant of the nature and objects of the voyage; and the alleged cause of the seizure and detention was the trade in articles contraband of war by the landing of powder and muskets, which formed a part of the outward cargo. By the principles of the law of nations, there existed, under these circumstances, a right to seize and detain the ship and her remaining cargo, and to subject them to adjudication for a supposed forfeiture, notwithstanding the prior deposit of the contraband goods; there was a legal and justifiable cause of seizure.

According to the modern law of nations, for there has been some relaxation in practice from the strictness of the ancient rules, the carriage of contraband goods to the enemy, subjects them, if captured *in delicto*, to the penalty of confiscation; but the vessel and the remaining cargo, if they do not belong to the owner of the contraband goods, are not subject to the same penalty; the penalty is applied to the latter, only when there has *been some actual co-operation on their part, in a meditated fraud upon the belligerents, by covering up the voyage under false papers and with a false destination. This is the general doctrine, when the capture is made *in transitû*, while the contraband goods are yet on board; but when the contraband goods have been deposited at the port of destination, and the subsequent voyage has thus been disconnected with the noxious articles, it has not been usual to apply the penalty to the ship or cargo upon the return-voyage, although the latter may be the proceeds of the contraband; and the same rule would seem, by analogy, to apply to cases where the contraband articles have been deposited at an intermediate port, on the outward voyage, and before it had terminated; although there is not any authority directly in point. But in the highest prize courts of England, while the distinction between the outward and homeward voyage is admitted to govern, yet it is established, that it exists only in favor of neutrals who conduct themselves with fairness and good faith in the arrangement of the voyage; if, with a view to practice a fraud upon the belligerent, and to escape from his acknowledged right of capture and detention, the voyage is disguised, and the vessel sails under false papers and with a false destination, the mere deposit of the contraband, in the course of the voyage, is not allowed to purge away the guilt of the fraudulent conduct of the neutral.[1]

*496]

Nothing is better settled both in England and America, than the doctrine, that a non-commis-

[1] See The Bermuda, 3 Wall. 514.; The Springbok, 5 Id. 1.

sioned cruiser may seize for the benefit of the government; and if his acts are adopted by the government, the property, when condemned, becomes a *droit* of the government.

When there has been a *bonâ fide* seizure and detention for and on account of illicit or contraband trade, and by a clause in the policy of insurance it was agreed, that "the assurers should not be liable for any charge, damage or loss, which may arise in consequence of seizure or detention for or on account of illicit trade or trade in articles contraband of war," a sentence of condemnation or acquittal, or other regular proceeding to adjudication, is not necessary to discharge the underwriters. If the seizure or detention be lawfully made, for or on account of illicit or contraband trade, all charges, damages and losses consequent thereon, are within the scope of the exception; they are properly attributable to such seizure and detention as the primary cause, and relate back thereto. If the underwriters be discharged from the primary hostile act, they are discharged from the consequences of it.

CERTIFICATE of Division from the Circuit Court of Massachusetts. The case, as stated in the opinion of the court, was as follows:

On the 1st of October 1824, the defendants, the Merchants' Insurance Company, underwrote a policy of insurance for the plaintiffs, Carrington and others, for $10,000, on property on board the ship General Carrington, at and from the port of Coquimbo, in Chili, to any port or ports, place or places, one or more times, for and during the term of twelve calendar months, commencing on the 5th day of June 1824, *at noon, and ending on the 5th day of June 1825, at noon. The policy was [*497 against the usual perils, and contains the following clause: "It is also agreed, that the assurers shall not be answerable for any charge, damage or loss which may arise in consequence of seizure or detention, for or on account of illicit or prohibited trade, or trade in articles contraband of war. But the judgment of a foreign consular or colonial court shall not be conclusive upon the parties, as to the fact of there having been articles contraband of war on board; or as to the fact of an attempt to trade in violation of the law of nations."

The ship sailed from Providence, Rhode Island, on the 21st of December 1823, cleared for the Sandwich Islands and Canton, but was immediately bound to Valparaiso, in Chili, with such ulterior destination as was stated in her orders; the clearance being a usual and customary mode of clearance at that time for vessels bound to Chili and Peru. A part of the cargo consisted of eighteen cases of muskets and bayonets, each case containing twenty; and three hundred kegs or quarter kegs of cannon powder, containing about twenty-five pounds each; and these, together with the residue of the cargo, belonged to the owners of the ship. At the commencement of the voyage, and until the final loss of the ship, open hostilities existed between Spain and the new governments or states of Chili and Peru. From the orders, it was apparent, that the object of the voyage was to sell the cargo in Chili and Peru. The ship was to proceed direct for Valparaiso, and was to enter that port, under the plea of a want of water. Some part of the cargo was expected to be sold at that port; and thence the ship was to proceed along the coast of Chili and Peru, for the purposes of trade. There was no allegation that the underwriters were not well acquainted with the nature and objects of the voyage.

The ship arrived at Valparaiso, on the 17th of April 1824. At the time of her arrival, and until the loss, as hereinafter stated, the Spanish royal authorities were in possession of a portion of upper Peru, including Quilca and Moliendo, and of the port of Callao, in lower Peru. The rest of Peru,

and the whole of Chili, were in possession of the Peruvian and Chilian new governments. In the harbor of Valparaiso, sixteen casks of the powder
*498] were, with the knowledge of the government, *sent on board of an English brig, then in the harbor; and, as the plaintiffs alleged, sold to the master of the brig; and all the muskets, except ten, alleged to be kept for the ship's use, were landed in Valparaiso, with the knowledge of the government.

The ship, with the remainder of her cargo on board, sailed from Valparaiso, early in May following; and arrived at Coquimbo, in Chili, on the 13th day of the same month. There, the remainder of the powder, except nine casks, more or less damaged, alleged to be retained for the ship's use, was landed, in the course of the same month, with the knowledge of the government. The ship sailed from Coquimbo, for Huasco, in Chili, on or about the 5th day of June following, and arrived at Huasco, in the same month; having sold, at the previous port, a part of her outward cargo, by permission of the government, as the plaintiffs alleged, and taken in merchandise belonging to the plaintiffs, and other citizens of the United States, to be delivered at some ports on the coast. The ship arrived at Quilca, with the greater part of her outward cargo still on board, on the 20th of June, and there sold, with the knowledge of the government, as the plaintiffs alleged, a considerable portion of her outward cargo; and delivered some of the articles taken in at the previous ports. While lying at anchor in the roadstead of Quilca, and before she had completed the discharge of her outward cargo, she was seized by an armed vessel, called the Constante, commanded by one Jose Martinez, sailing under the royal flag, and acting, as the defendants alleged, by the royal authority of Spain; but alleged by the plaintiffs to be fitted out and commissioned at Callao, by Jose Ramon Rodil, the highest military commander of the castle of Callao, holding his commission subordinate to La Serna, the viceroy of Peru, under the king of Spain; there being, as the defendants alleged, no regular civil government in the place; the castle of Callao being then, and until the final loss of the ship, besieged by sea and land. The ship was carried from Quilca to Callao, where certain proceedings were had against her and her cargo on board, by the orders of General Rodil; and they were never restored, but were totally lost to the plaintiffs. The alleged cause of the seizure and detention, was the trade in articles contraband of war, by the landing of the powder and muskets in Chili, as aforesaid.

*499] *Upon the trial of the cause, upon the evidence, the following questions occurred, upon which the opinions of the judges were opposed; and, thereupon, it was ordered by the court, on motion of the counsel for the plaintiffs, that the points on which the disagreement happened, should be certified to the supreme court of the United States, for their decision, viz:

1. Whether a seizure and detention, to come within the exception of the policy relating to contraband and illicit trade, must be for a legal and justifiable cause?

2. Whether, assuming the other facts to be as stated and alleged, and taking the authority of the seizing vessel to be such as the plaintiffs alleged, there was a legal and justifiable cause for her seizure and detention of the General Carrington and her cargo?

3. Whether, assuming the other facts to be as stated and alleged, and taking the authority of the seizing vessel to be such as the defendants alleged, there was a legal and justifiable cause for the seizure and detention of the General Carrington and her cargo?

4. Whether a general in the military service of Spain, subordinate to La Serna, viceroy of Peru, under the king of Spain, but having the actual and exclusive command of Callao, and no civil authority existing therein, and cut off by the forces of the enemy, by sea and land, from all communication with any superior civil or military officer, could lawfully seize and detain neutral property, for contraband trade, if just cause exis'ed for a condemnation thereof?

5. Whether such officer, so situated, had a right to appoint and constitute a court, of which he himself was one, for the trial and condemnation of such property?

6. Whether, supposing the ship to have traded in articles contraband of war, in the ports of Chili, and to have been seized afterwards, in a port of Peru, then under the royal authority, before she had discharged her outward cargo, for and on account of such contraband trade, the underwriters were not discharged, whether the subsequent proceedings for her adjudication were regular or irregular?

The case was argued *Binney* and *Sergeant*, for *the plaintiffs; and by *Franklin Dexter* and *Webster*, for the defendants. [*500

Binney, for the plaintiffs, contended, upon the first point—whether a seizure and detention, to come within the exception of the policy relating to contraband and illicit trade, must be for a legal and justifiable cause? That the seizure must be for a legal and justifiable cause, in order to take it out of the policy; an asserted cause is not enough. This is evident from the words of the policy, from the context and circumstances of the insurance, from the reason and spirit of the agreement of the parties, from the mischief of the old law; and from the consequences of a contrary doctrine.

The words of the policy designate an actual, not a supposed trade in contraband goods. There cannot be a seizure for cause of contraband, unless there has been actually such a trade. There could not be a seizure *for or on account of such a trade*, without there having been such a trading. If the fact of the trade does not exist, it is a mere allegation, suspicion or pretence of trade, when there is none in reality. Had such been the intention of the parties, the words would have conformed to it. Both the fact and the illegality must concur, or there is no trade in contraband. This is implied in the term *contraband*. In legal understanding, gunpowder and muskets are not contraband; they may be innocently transported by a neutral; although, under particular circumstances, their transportation may be illegal and a breach of neutrality, and they become contraband. There is no trade in contraband, except what the law declares such; nor can there be a seizure for contraband, when the fact and the law do not concur to prove contraband. The plain natural meaning of the words of the policy is: 1. That there must be a seizure. 2. That there must be a trade in contraband in fact. 3. That it must have been so in law, to justify a seizure.

2. The context is conclusive to show, that the fact of a contraband trade, instead of pretence or allegation, was intended by the parties; and this is

conformable to the law. The language used is intended to exclude the conclusion of a material fact, resulting from the judgment of a foreign court; *501] and this *shows the materiality of that question of fact. Both parties agreed, that the fact was material, and provision is made to guard against the operation of a foreign judgment; and to leave that question open to the parties, if it should become material.

3. The reason and spirit of the whole contract confirm this construction. The intention of the assured was, to secure themselves against unlawful violence. In the policy, there were many exceptions in which the assured took upon themselves the risk of loss. An exception against *unlawful* violence, is contrary to the whole spirit of the instrument. An exception against *lawful* violence is not so, but is inconsistent with its general tenor.

4. The mischief of the contract to the underwriters, before the clause was introduced into policies, sustains the construction. The clause, it is believed, is of Pennsylvania origin, having been introduced into policies of insurance, in Philadelphia, in 1788. In Boston, it was introduced in 1823. Its history is given by Chief Justice TILGHMAN, in *Smith* v. *Delaware Insurance Company*, 3 Serg. & Rawle 81. He says, that the assured contended, that unless the foreign revenue laws were known to them, the underwriters were not answerable for a loss by their violation. Perhaps, it would have been more accurate to say, that they contended, that if the underwriters knew, or were bound to know, that the trade insured was prohibited, they were liable for the loss. This was so held, in 1780, in *Lever* v. *Fletcher*, 1 Marsh. 54, and it is now the doctrine of insurance as held by various authorities. Phillips 276; 1 Emerigon 684; 2 Valin 131; *Parker* v. *Jones*, 13 Mass. 173; *Richardson* v. *Marine Insurance Company*, 6 Ibid. 102, 114; *Seton* v. *Low*, 1 Johns. Cas. 1; 2 Ibid. 77, 120; Phill. 280. The mischief was, that the underwriters were liable, in cases in which they knew, or were bound to know, that the trade was contraband or illicit, for a lawful seizure. The clause was introduced to guard against this mischief. It could never have been regarded as a mischief, that the underwriters were answerable for a seizure which was unlawful; and, consequently, the clause should not be construed to extend to such a seizure.

*5. The consequences of a different construction are, that they *502] make the clause depend, not on the fact of contraband and the law of contraband, but on the allegation, pretext and false suggestion of the wrongdoer. The policy protects against thieves, enemies, pirates; but does not protect against a pirate or thief who robs with a lie in his mouth. It makes the case of the assured, however innocent, fall before the false suggestions of a rogue. These views are sustained by express decisions. *Smith* v. *Delaware Insurance Company*, 3 S. & R. 82; *Faudel* v. *Phœnix Insurance Company*, 4 Ibid. 59; 1 Caines Cas. 29; *Johnston* v. *Ludlow*, 2 Johns. Cas. 481; *Church* v. *Hubbart*, 2 Cranch 187, 236; 1 Marsh. 356; 1 Cond. Rep. 385, 393, 346; 12 Mass. 291; 1 Pick. 281.

II. Upon the second question—whether, assuming the other facts to be as stated and alleged, and taking the authority of the seizing vessel to be such as the plaintiffs allege, there was a legal and justifiable cause for the seizure and detention of the General Carrington and her cargo?—he contended, that on any supposition, there was no justifiable cause of seizure. The only difference as to the facts under which the second and third ques-

tions on which the judges were divided in opinion is, that the authority of the seizing vessel, is, by the plaintiffs, alleged to have been of one kind, and by the defendants, of another kind. The facts sustain the position of the plaintiffs. The facts sustain the following positions:

1. That a seizure for contraband at Callao was illegal and unjustifiable, because there was no contraband on board; it had all been previously landed in Chili. 2. There was nothing in the other facts to make the seizure legal, in consequence of having previously carried contraband. 3. The seizure was not lawful, because no contraband articles were on board, at the time of the seizure. This point, of course, depends on another: that to justify a seizure for contraband, the contraband goods must be seized.

The character of contraband trade, *jure belli*, is in one respect peculiar. It is a trade which a neutral has a right to carry on; and which a belligerent has a right to intercept and to confiscate. It presents the case of conflicting rights. The neutral *to do, and the belligerent to prevent. [*503
If the neutral can carry his right into effect or enjoyment, the belligerent cannot complain. If the belligerent can intercept him, and prevent his carrying it into effect, the neutral cannot complain. The neutral commits no offence by the successful attempt. The belligerent commits none, by defeating it. The contrabrand article is alone the offence in the sight of the belligerent; and the only penalty is the confiscation of the article. These principles flow from authorities. Bynk. ch. 10, Du Ponceau's translation, p. 74, 76, 80, 81; Grotius, lib. 3, ch. 1, 520; Vattel, lib. 3, ch. 7, § 111. 310 (503), § 113; *Richardson* v. *Marine Insurance Company*, 6 Mass. 112-13; *The Santissima Trinidad*, 7 Wheat. 292; 1 Kent's Com. 132; Phillips 152; *Seton* v. *Low*, 1 Johns. Cas. 1; 2 Ibid. 77, 120. The doctrine of the English adjudication is, that the contraband articles must be taken, the goods must be intercepted. It is wrong to say, this must take place when they are *in delicto*. There is no *delictum*. 3 Rob. Adm. 138 (167).

But it is supposed, that some English cases assert the doctrine, that if the contraband is carried outward, and the proceeds homeward, they are prize; and if carried out with false papers, or under a false destination, that the penalty may be inflicted on the ship, or other goods of the same owner on the homeward voyage. This doctrine is a novelty, of which it is supposed, no trace in an earlier authority, than cases decided in 1809, 1810, can be found. These cases are *The Baltic*, and *The Margaret*, cited in Chitty's Law of Nations 128, 143. In England, the doctrine is a novelty, merely the result of their principles in regard to the colonial trade, under the rule of 1756; and has not been applied to any other than a case of that trade. It is not the law of nations, as understood by others nations, and shown by their conventional law, particularly by Spain. In support of these positions, cited, *The Margaretha Magdalena*, 2 Rob. 115; *The Rosalie and Betty*, Ibid. 281; *The Nancy*, 3 Ibid. 102; *The Franklin*, Ibid. 178; 6 Ibid. 390. It is the doctrine of the British, under the rule of 1756, which is, that, whether concealed or not, contraband outward *affected [*504
the proceeds home; and if concealed, affected the ship and cargo. It proceeds on the principle, that the whole trade is illegal, except as the British release or permit it. This is shown by the British orders. 4 Rob. app'x, A; 7 Ibid. 473, app'x, note 1; and the subsequent orders of council,

in 2 Ibid. 126, 311, app'x, 1, 2; 5 Ibid. 367, app'x. This doctrine is an interpolation, as the rule of 1756 was. It has been rejected by the United States. Message of the president of the United States to congress, 27th January 1806, (5 Waites' State Papers, 321). It is entirely an English doctrine, and modern English; not admitted by other nations; and is inapplicable to a voyage to Chili, which is not a relaxed trade, but a trade to an independent country.

The general doctrine claimed for the plaintiffs appears to be sanctioned by the conventional law of nations between the United States and foreign nations—that concealment of contraband goods does not aggravate the case. With England, by the treaty of 1794, art. 17, 18; with France, by the treaty of 6th February 1778, art. 12, 13, 23; of 3d September 1800, art. 12, 13, 20; with Holland, by the treaty of 8th October 1782, art. 10, 11; with Sweden, by the treaty of 3d April 1783, art. 7, 12, 13. The French ordinance of 1681 expressly makes a provision which excludes capture, unless contraband is *on board.* 2 Valin 266, liv. 3, tit. 9, Reglement de 23d July 1704. But the treaty with Spain would seem to leave no doubt on this subject. Treaty of 27th October 1795, confirmed by the treaty of 1819; 8 U. S. Stat. 138; Ibid. 250, art. 15, 17. Such is the Spanish law generally: contraband is to *be found;* and is punishable only *in delicto.* It permits no molestation for having carried contraband articles. 3 Nov. Recop. tit. 8, ley 4, 20 June 1801, art. 34, p. 128.

III. There is no ground on which the seizure was justifiable, within the exception. 1. The contraband was not on board. 2. The papers of the cargo were true. 3. The papers of the ship were true. 4. The clearance was according to the customary form of the place, and in conformity with the requisition of thn treaty. Art. 17, 8 U. S. Stat. 148. 5. There is *505] *no allegation by the captors of anything but the landing of contraband in Chili. 6. Chili is an independent state, and was at the time recognised by the United States as such.

The attention of the court is asked to another suggestion. The question is, whether the facts show a justifiable cause of seizure within the exception; whether landing contraband at Chili, is a justifiable case of seizure, and is within the exception? It may be granted, that it was a justifiable cause of seizure; yet if it is not within the exception, then it was not a justifiable cause of seizure, to exonerate the underwriters; and the second and third questions must be so answered. The exception excludes a loss by seizure for contraband trade: the question is, contraband trade on what voyage? The answer is, contraband trade on the voyage insured from Coquimbo. The exception means not only seizure on the voyage insured for trade or contraband, but seizure for contraband trade on that voyage. This is the true interpretation of the clause. Had not the exception been inserted, the policy would have covered a loss by contraband trade on this voyage. The exception is intended to cut off this loss, and nothing more. The goods are insured for this voyage, and the exception is of contraband in the same voyage. Whether the underwriters are liable for a seizure made for carrying contraband on a former voyage may, or may not be; but the disagreement certified concerns the exception; and the exception does not exclude contraband trade on any voyage but that on which the seizure was made. Upon

either hypothesis, there was no justifiable cause of seizure, upon the second and third questions.

IV. Whether a general in the military service of Spain, subordinate to La Serna, viceroy of Peru, under the king of Spain, but having the actual and exclusive command of Callao, and no civil authority existing therein, and cut off by the forces of the enemy by sea and land from all communication with any superior civil or military officer, could lawfully seize and detain neutral property for contraband trade, if just cause existed for a condemnation thereof? 1. A lawful authority to seize must exist, to bring the case *within the exception. 2. A person so described had not lawful [*506 authority to make the seizure.

1. The seizure must be by lawful authority. It has been shown, that there must be a justifiable cause of seizure. It follows, that the seizure must be by *lawful* authority, to come within the exception. A justifiable seizure is a cause which justifies the party who makes the seizure. If he is not authorized to seize, the trade does not justify the seizure, and is not a justifiable cause of seizure. The lawfulness of a seizure, necessarily regards the party who seizes, as much as the offender. This is not only logically, but it is practically so, under this exception. A seizure by a neutral, by a pirate, by the very person with whom the contraband trade is carried on, would all be included, if lawful authority to seize were not necessary. A seizure by any one who has no right to seize, is an act of mere violence and unlawful force. The trade can be no more than a pretence or a pretext to such a person. The policy covers all risks on contraband, except the lawful penalties of the trade: the losses lawfully arising from it. But seizure without authority is not one of them; but, in terms, is a loss *unlawfully* arising. Every seizure without authority is a trespass and wrong, and the policy means to protect the assured against such injuries.

If the laws of Spain did not prevent a seizure by Rodil, or by a vessel under his commission, the same laws made the seizure unlawful. The court must hold, that the contraband did not justify that seizure; was not a justifiable cause of seizure. The clause does not mean a justifiable cause of seizure in the abstract, but a cause justifying a particular seizure. It means, a seizure according to law, and a trade against the law which justifies him who seizes. The seizure was not made by lawful authority in this case. This depends on the law of Spain. Proceedings by a competent court, affirming the seizure and condemning the goods, might be evidence of authority to seize; but in this case, there are no such proceedings. The authority of Rodil must be shown by the law of Spain. It is a question to be settled by that law; for unless by that law there was authority to made the seizure, it was unlawful. *There is nothing in the particular circumstances set [*507 forth in this question, from which the court can infer a lawful authority in Rodil. The circumstances, as stated, do not confer it, by force of any principles that are applicable to the case as described. Whether a general, so separated, can lawfully seize, must depend upon the power that the laws of his own country give him. The case of necessity it supposes, may be sufficient, if his sovereign so wills; but not otherwise. But so far from the acts of Rodil being authorized by the laws of Spain, by those laws, this act was piratical. The commission to make prize of war must issue from a differ-

ent officer, from the *commandant militar de la marina;* or if there be no such officer, it must be issued by the captain-general of the province.

V. Whether such officer, so situated, has a right to appoint and constitute a court, of which he himself is one, for the trial and condemnation of such property? The court in question, like all other courts, must proceed from the sovereign power of the nation. This principle is particularly true as regards prize courts, whose judgments affect the public relations of the country. It is due to other nations, that such court should be authorized by the sovereign power, and by that power only. 2 Azuni 262; 2 Bro. Civil and Adm. Law 331; 1 W. C. C. 271; 3 Binn. 239. If the constitution of the court is not known, it will be presumed to be legal. If known, and not according to what is usual among civilized nations, it must be proved to have been enacted by competent authority. The erection of a court is the act of the sovereign; nothing is to be presumed in favor of a court erected by a military commander. Is such a court as the question supposes, usual among civilized nations? Appointed by a military commander; appointing himself as one of the judges? Possibly, the law, the sovereign, may authorize such a tribunal: but it cannot be presumed; because it is unusual, and to the highest degree dangerous to the rights of individuals, and to the peace of the public. The existence of the power to appoint courts in the hands of a subject, is unknown in the practice of nations; that of a power to appoint the court, himself a judge, is monstrous. *The defendants mush show the law for it, or the negative must be adapted. But the laws of Spain are the other way. 3 Recop. 125, art. 11, 12, 13.

*508]

VI. Whether, supposing the ship to have traded in articles contraband of war, in the ports of Chili, and to have been seized afterwards, in a port of Peru, then under the royal authority, before she had discharged her outward cargo, for and on account of such contraband trade, the underwriters be not discharged, whether the subsequent proceedings for her adjudication were regular or irregular? 1. There must be a lawful seizure. 2. A lawful cause of seizure. 3. Loss by this cause. The question is, whether lawful adjudication is the only proof? No instance has occurred in which there has been a decision that a loss was within the exception, without such an adjudication. *Church* v. *Hubbard*, 2 Cranch 187, requires it.

It is the duty of the captors to proceed to a regular adjudication. The question is, whether the seizure legally affects the property, or what is the operation of law upon the thing taken? How is this proved? Force is not a title which the world respects, without the aid of law to sanction it. There being two kinds of force, lawful and lawless force, the usages of the civilized world require, that all claims to property by an act of force, should be shown to be lawful force by the adjudication of a competent tribunal. Wheaton on Capt. 262, 274.

What is a lawful court? It is a court of the nation under whose laws, and by whose authority the seizure has been made, and the thing taken is possessed. This is so in the case of a seizure under municipal law. *Hudson* v. *Guestier*, 4 Cranch 293. If it be a capture as prize of war, this same principle prevails. Wheaton on Capt. 261. Such a court alone has jurisdiction. Adjudications by any other are null and void, for want of jurisdiction. The sentence of such a court, regularly pronounced, is universally

respected ; and is conclusive as to its direct effect, and as to the facts directly decided by it. Wheaton on Capt. 274 ; 4 Cranch 434.

These principles will not be questioned as to the property seized. No court can consider a title as passing but by such an adjudication. Every court must consider the seizure *as an act of mere force, until its legality is adjudged by such a court. The same is true as to ques- [*509 tions of the same kind, collaterally arising under a policy of insurance. The court is bound to hold the same doctrine in a collateral inquiry, as if the property were brought before them. This court has said, that if adjudication is not obtained in reasonable time, the seizure must be regarded as trespass. *Hudson* v. *Guestier*, 4 Cranch 293. If it is to be so regarded in questions of title to property, it must be so as to every question concerning that trespass. The underwriter who sets up the capture, is bound to prove the very fact, that the property was lawfully lost by a seizure for contraband trade. The utmost this court can say is, that it ought to have been so lost; but nothing can show that it was lost according to the law of another country, but the judgment of a competent court. The difficulty in a case of prize is insuperable. A court of common law cannot adjudge it. It belongs to the prize courts, both the direct and consequential question. 2 Doug. 594, 613 ; 6 Taunt. 439. This court has regarded the condemnation as necessary to bring the case within the exception. *Church* v. *Hubbard*, 2 Cranch 187.

Franklin Dexter, for the defendants.—The answer to the first question must depend on the sense in which the word *cause* is to be understood. If it means, as the counsel for the plaintiff seems to contend, the actual state of the facts, in contemplation of which the seizure was made, the question must be answered in the negative : because, to answer it in the affirmative, would be to require that to discharge the underwriters, legal and justifiable cause of condemnation, as well as of seizure and detention, must have existed. Such is not the language of the question, nor of the exception in the policy. It is said, on the other side, that a vessel cannot, with propriety, be said to be seized, for or on account of contraband trade, unless such trade had been carried on. We think, the common use of language does not require this. It is not unusual, to say, that claims are made, suits brought, and even judgments *rendered, for or on account of a cause of action, without meaning to affirm that the cause exists in point of fact. It [*510 would surely be no solecism to say, that the General Carrington had been seized for contraband trade, but on examination was found innocent and discharged. We understand the word *cause*, in the question, and the words *for or on account of*, in the policy, to relate to the motive of the seizers ; and that any seizure is for and on account of contraband, which is made because the party *bonâ fide* believes such contraband trade to have been carried on. It is a question of good faith ; involving, of course, the question of probable cause on the one hand, and of wanton and lawless violence on the other. It is said, if such be the construction, seizures under mere pretext of contraband trade will discharge the underwriter; and that the motive cannot be proved. We answer, that the question of probable cause is always open to the party, indicative of the motive, and can be tried by a jury, as well as in other causes. We think, this construction will reconcile the apparent contradictions of the cases cited. Those in which it is said,

that there must have been both illicit trade and a seizure on account of it, arose under exceptions of breaches of foreign municipal laws, where the question was not as to the fact of trading; but whether the prohibitory law actually existed, and was binding on the party. The case of *Church* v. *Hubbard*, so much relied on, was decided on the want of sufficient proof of the alleged law of Spain; and the *dicta* of the court which have been cited, were mere concessions to counsel, made *arguendo*. Taking the whole opinion in that case together, we think, it plainly takes the distinction between *bonâ fide* and colorable seizures. This is confirmed by the case of *Livingston and Gilchrist* v. *Maryland Insurance Company*, 7 Cranch 506; which turned, like the present, on a question of national law. The court there decided, that an actual breach of the law of nations was not necessary to discharge the underwriters.

The argument drawn from the proviso of the exception, that the judgment of a foreign consular or colonial court, shall not be conclusive of the fact of contraband goods having been on board, is carried too far. That proviso does not imply, that the fact of such goods having been on board, was thought necessary to the discharge of the underwriter; but only, that
*511] a *fact so material in determining the character of the seizure, shall not be conclusively determined by the courts of the captors. It is a fact to be submitted to a jury, to show probable cause for the seizure, or the want of it.

It is admitted, that the language of some of the cases cited, would seem, at first, to favor the position taken for the plaintiff; but when taken in connection with the facts before the court, they will be found consistent with the view of the defendants. In other cases, equally respectable *dicta* may be found, expressly recognising the doctrine that actual delinquency is not necessary to discharge the underwriter. *Livingston and Gilchrist* v. *Maryland Insurance Company; Radcliff* v. *United Insurance Company*, 7 Johns. 38. The law of Massachusetts is the *lex loci contractûs;* and in the case of *Higginson* v. *Pomeroy*, 11 Mass. 104, this is very clearly stated. The case of *Smith* v. *Delaware Insurance Company*, was decided chiefly on the ground that the foreign law did not extent to the territory in which the seizure was made. *Faudel* v. *Phœnix Insurance Company*, was decided on the ground, that the sentence of the court showed that the seizure was not within the exception. There is no case which refuses to discharge the underwriter under this exception, because the captors have been honestly mistaken in the facts. This point, however, is of little importance to the present case, because there is no dispute about facts.

Webster, for the defendants, considered the case under three heads. 1. The contract, as to its nature and object. 2. The facts applicable to the case under the policy. 3. The law growing out of the facts.

1. As to the exception in the policy, and the risks assumed by the undertakers under it, he contended, that they took upon them no risks for or on account of contraband goods or illicit trade. The words of the exception are the same as if they were in the form of a warranty by the assured. All risks which are fairly to be laid to the account of illicit or contraband trade, were not taken by the insurers, but were to be borne by the owner. The

underwriters assumed all sea risks, and the other risks enumerated in the policy.

*2. The voyage was from Providence to where the outward cargo was to be landed. The ship was to enter at Valparaiso, under a false [*512 pretence—the want of water, and then proceed to Coquimbo, where the risk was to commence, on the 5th of June 1824. The ground of the plaintiffs' claim must be for seizure and detention, as all the counts in the declaration allege that as the cause of the loss, except one, which asserts a loss by piratical seizure. The seizure was the cause of the loss, and this is alleged to have been for contraband or prohibited trade. Was this the true cause? If it was, the underwriters are excused; but if there was not such a seizure, then the underwriters are liable under the general words in the body of the policy. There can be no doubt, but that the contraband trade was the cause of the loss; if there had been no contraband trade, there would have been no seizure. It is said, the seizure was too late; but this is not a question for the underwriters. It is enough, that the seizure was actually on account of contraband trade. Probable cause was enough, whether there was cause or not for condemnation. 3 W. C. C. 127; *Higginson* v. *Pomeroy*, 11 Mass. 104, 110. The contract in the present suit was made in Massachusetts; if there is any discrepancy between the law of different states, the *lex loci* must govern. The cases in 7 Johns. 38, and 9 Ibid. 281, fully sustain the ground assumed for the defendants. The excuse is that the vessel was not taken *in delicto*. If this be so, it is a question with which the underwriters have no concern. But this assertion is denied. When the vessel was seized, a state of facts existed, which warranted the seizure and condemnation. The risk was produced by the conduct of the plaintiffs, and was not assumed by the underwriters. By their conduct, the vessel was forfeited; and nothing but the form of a condemnation was wanted.

3. The rule of 1756, is not necessarily involved in the decision of this case; but it is denied, that any new rule in international law was then introduced. That rule arose out of the war of *1756; and it was [*513 established to prevent the trade of the Dutch with the French colonies, under Danish licenses. To show that it was the ancient, and well-settled law of nations, that trading in contraband goods forfeited the vessel, he cited, 3 Rob. 178, and note. The relaxation of the law was, that the articles only should be seized when taken *in delicto*; excusing the ship and innocent cargo. If there was a fraudulent destination originally, the ancient rule applied; the vessel and the innocent cargo were forfeited on account of the fraud. When the vessel is forfeited for carrying on contraband trade, you may pursue her, until she is taken; but public convenience requires a limit, and that limit is fixed by universal assent, to the end of the voyage. The same rule exists as to all seizures for breach of revenue laws. In Chitty's Law of Nations 128, is the case of a vessel seized on the outward voyage. There is necessarily a difference as to the right of seizure for illicit trade, and for trade in contraband articles. In the first case, the vessel was in the prohibited port; in the latter, she was not, but in a neutral port. In the present case, there could not have been a visitation and search; for her false papers showed she was bound to the Sandwich Islands and Canton. If this is a common practice, it is so much the worse. But this can have no operation on the rights or exemptions of the under-

writers; for it would have no effect on the right of the belligerent to seize. 6 Rob. 376, note; *The Edward*, 4 Ibid. 56.

It is insisted, that it is not necessary to show there was cause for condemnation. If there was cause for seizure, it is sufficient, under the exception in the policy, to discharge the underwriters. In the cases cited for the plaintiffs, it may have been shown there was not cause for condemnation; but in those cases, it was considered there was cause for seizure. 3 Rob. 138, 141; 2 Ibid. 115; 1 Acton 25, 333.

The sixth point was intended to raise the question, whether the underwriters could be discharged, before condemnation. This would delay the question of their liability, until a condemnation; and this cannot be.

*514] *Sergeant*, in reply, stated, that the form of the policy *adopted in this case has been in use in Boston since 1823; and the exception as to illicit trade, is in all the policies in the United States; the part as to contraband trade only is new. The principle adopted by the clause had long been recognised in the courts of the United States.

The situation of the country, at the time of the seizure, was peculiar. Chili had actually established her independence. The possession of Rodil was temporary and accidental; and whenever actual possession of any place came into the hands of the officers of Spain, the laws of the Indies applied; and all trade with the place became illegal.

There must be an interpretation of the contract consistent with the *bonâ fide* intention of both parties to it. The parties had no reference to anything which had taken place before the policy attached, on the 5th June 1824, at Coquimbo. The policy is dated in October 1824, and was on the property, "lost or not lost." When the policy attached, the vessel had no contraband articles on board, and never afterwards had; and it may be presumed, that the underwriters knew she had some contraband goods on board. She had not the proceeds of the contraband goods on board, when she was seized in Quilca by an armed vessel.

The whole of the questions in the case turn on the construction of the clause of exception. The first question is, whether the seizure was for a justifiable cause. It must be legal and justifiable, or there was no cause at all. The court cannot say, whether the seizure was *bonâ fide*. Nor can they say, whether there was probable cause or not. They have not the evidence before them. There must be a legal and justifiable cause, or there is no cause.

The clause is not a warranty; it is an exception. A warranty is not of the like effect as an exception. The interpretation of the clause was settled in principle, before it was inserted in policies. It was so settled in 1804, in the case of *Church* v. *Hubbard*, 2 Cranch 187, which was a Massachusetts case; so, 2 W. C. C. 130, decided in 1807; 3 Serg. & Rawle 74, decided in 1817; 4 Ibid. 59; 1 Caines Cas. 29, decided in 1801; 2 Johns. Cas. 481; Marshall on Insurance 346, published in 1810. There never has been a

*515] decision to the contrary. *The principle the plaintiffs claim and rest the case upon is, that there must be a legal and justifiable cause of seizure, and one which would justify a condemnation. *Higginson* v. *Pomeroy*, 1 Mass. 194, when examined, sustains this principle.

The clause allows the contraband trade to be carried on, but at the risk

of the assured; and it rests with the underwriters to show that the seizure was for an unlawful and prohibited trade. A mere lawless seizure is not, therefore, within the exception. The law, as understood, made the underwriters liable in a case like this, and the exception was introduced to excuse them. The specific kind of loss must be by seizure or detention. Mere allegation, of course, will not do. The cause must be shown by a condemnation.

Contraband is a lawful trade, as has been decided in the courts of the United States; and this court will not now pronounce such a trade illegal, and expose the whole vessel and cargo to condemnation. This is the doctrine contended for on the other side. It is denied, that the principle of the law of nations authorizes a seizure and condemnation, after the goods are landed. The cases cited by the opposite side, do not support the position; and it is exclusively British doctrine. There never is an adhering taint, when the offending article was lawful, and no proceeds of it on board, or when there is not a false destination; neither of which existed in this case This court would not condemn the cargo for what the vessel had done with respect to contraband. The case of *The Santissima Trinidad*, 7 Wheat. 292, and the cases in New York show that contraband trade is lawful.

The fourth question is founded on the assumption, that this was enemy's property. It is admitted, that if it had been, any one may seize. But it is denied to have been enemy's property. It may have been liable to seizure, *jure belli;* but this must be under the commission of a regular privateer, when a neutral is concerned. The neutral has the right to claim the benefit of being carried in and tried by a regular tribunal, established by the sovereign of the country. It then becomes the act of the government, which is accountable to the injured party.

*The last three questions, in order to be decided in favor of the underwriters, must decide that it is immaterial how, or in what manner, the seizure was made, if the trade had been a trading in contraband. Unless the court was legally constituted, the trial and condemnation were nothing, and were absolutely void. [*516

Story, Justice, delivered the opinion of the court.—After stating the case, he proceeded: This cause comes before the court upon a certificate of a division of opinion of the judges of the circuit court for the district of Massachusetts. Upon the trial of the cause upon the evidence, the parties propounded certain questions, upon which the circuit court (with the assent of the parties) certified a division of opinion, for the purpose of obtaining the final decision of this court in regard to them.

The first is, whether a seizure and detention, to come within the exception of the policy relating to contraband and illicit trade, must be for a legal and justifiable cause? The question here propounded is not, whether there must be a legal or justifiable cause for condemnation? but simply, whether there must not be such cause for the seizure and detention? And we are of opinion, that the question ought to be answered in the affirmative. The language of the exception, when properly construed, leads to this conclusion; and it is confirmed by authorities standing upon analogous clauses. The language is, "the assurers shall not be liable for any charge, damage or loss which may arise in consequence of seizure or detention for or on account of illicit trade, or trade in articles contraband of war." It is not,

then, every seizure or detention which is excepted ; but such only as is made for, and on account of, a particular trade. A seizure or detention, which is a mere act of lawless violence, wholly unconnected with any supposed illicit or contraband trade, is not within the terms or spirit of the exception. And as little is a seizure or detention, not *bonâ fide* made upon a just suspicion of illicit or contraband trade, but the latter used as a mere pretext or color for an act of lawless violence ; for under such circumstances, it can in no just sense be said to be made for or on account of such trade. *It is a mere fraud, to cover a wanton trespass ; a pretence and not a cause for the tort. To bring a case, then, within the exception, the seizure or detention must be *bonâ fide*, and upon a reasonable ground. If there has not been an actual illicit or contraband trade, there must, at least, be a well-founded suspicion of it, a probable cause to impute guilt, and justify further proceedings and inquiries ; and this is what the law deems a legal and justifiable cause for the seizure or detention. The general words of the policy cover the risks of restraints and detainments of all kings, princes and people ; the exception withdraws from it such as are *bonâ fide* made for, and on account of, illicit or contraband trade. So that, upon the mere terms of the exception, there would not seem any real ground for doubt. But if there were, the next succeeding clause, associated with it, demonstrates that such must have been the understanding of the parties. It is there said, that the judgment of a foreign consular or colonial court shall not be conclusive upon the parties, as to the fact of there having been articles contraband of war on board, or as to the fact of an attempt to trade in violation of the laws of nations. Now, if a mere lawless seizure or detention, under the pretext of illicit and contraband trade, were within the exception, the inquiry, whether there had been contraband articles on board, or an attempt of illicit trade, would be, in most, if not in all, cases, wholly unimportant and nugatory to the assured, for whose benefit the clause is introduced ; since the sentence would always establish a pretence for the seizure and detention, although not a justifiable cause for it. The reasonable interpretation of the clause must be, that it was introduced to enable the assured to disprove the existence of justifiable cause for the seizure or detention, by showing that the facts did not warrant it.

*517]

We think that the authorities cited at the bar, lead to the same conclusion. In *Church* v. *Hubbard*, 2 Cranch 187, where the exception was, "that the insurers do not take the risk of illicit trade with the Portuguese, and the insurers are not liable for seizure by the Portuguese for illicit trade ;" the main question was, whether an attempt to trade, not consummated by actual trading, was within the exception. The court held that it was. On that occasion, the chief justice said, "no seizure, not justifiable under the laws and regulations established by the crown of Portugal, for the *restrictions of foreign commerce with its dependencies, can come within this part of the contract ; and every seizure which is justifiable by those laws and regulations must be deemed within it." And applying this language to the circumstances of the present case, we may add, that no seizure or detention, not justifiable by the law of nations, can come within the present exception, and every seizure which is justifiable by the law of nations, must be deemed within it. The cases of *Smith* v. *Delaware Insurance Company*, 3 Serg. & Rawle 74 ; and *Faudel* v. *Phœnix Insurance Company*, 4 Ibid. 29 ;

*518]

Johnston and Weir v. *Ludlow*, 1 Caines Cas. 29 ; s. c. 2 Johns. Cas. 481,(*a*) adopt a similar doctrine, if they do not proceed beyond it. The case of *Higginson* v. *Pomeroy*, 11 Mass. 104, contained an exception of "illicit trade with the Spaniards ;" and the court held, that the exception extended to every seizure and detention suggested by the prohibitions of trade and intercourse, as the means of enforcing them, and whether of prevention or of punishment for infraction ; and that, therefore, it extended to cases where the charge of illicit trade with the Spaniards might be ultimately repelled, and where the property seized might be, in consequence, acquitted, under the circumstances of the particular case. But this supposes, that there was probable or justifiable cause for the seizure, *bonâ fide* existing ; and the court explicitly assented to the general doctrine in *Church* v. *Hubbard*. It is true, that the learned chief justice, in delivering the opinion of the court, added, that "perhaps (we may add), although not necessary to the present decision, even arbitrary acts of the Spanish colonial governments, if assumed to be justified on their parts by the prohibitions of trade and intercourse, are, we think, within the exception of seizure for illicit trade." This is professedly a mere *dictum* of the court ; and giving it every reasonable force as authority, it proceeds on the supposition, that such arbitrary acts are *bonâ fide* done, and are not mere pretexts to cover an illegal seizure.

The second question is, whether, assuming the other facts to be a stated and alleged above, and taking the authority of the seizing vessel to be such as the plaintiffs allege (that is to say, of an armed vessel fitted out and commissioned at Callao by Rodil), there was a legal and justifiable cause for the seizure of the General Carrington and her cargo? [*519 The third is precisely the same in terms, except taking the authority of the armed vessel to be such as the defendants allege (that is to say, to be an armed vessel sailing under the royal Spanish flag, and acting by the royal authority of Spain).

Both these questions present the same general point, whether there was, under the circumstances of the case, a legal and justifiable cause for the seizure and detention of the ship and her cargo. The facts material to be taken into consideration in ascertaining this point are, that the ship, when seized, had not landed all her outward cargo, but was still in the progress of the outward voyage originally designated by the owners ; that she sailed on that voyage from Providence, with contraband articles on board, belonging, with the other parts of the cargo, to the owners of the ship, with a false destination and false papers, which yet accompanied the vessel ; that the contraband articles had been landed, before the policy, which is a policy on time, designating no particular voyage, had attached ; that the underwriters, though taking no risks within the exception, were not ignorant of the nature and objects of the voyage ; and that the alleged cause of the seizure and detention was, the trade in articles contraband of war, by the landing of the powder and muskets already mentioned. If, by the principles of the law of nations, there existed, under these circumstances, a right to seize and detain the ship and her remaining cargo, and to subject them to adjudication for a supposed forfeiture, notwithstanding the prior deposit of

(*a*) See also Laing *v.* United Insurance Company, 2 Johns. Cas. 174; s. c. Id. 487; Tucker *v.* Juhel, 1 Johns. 20.

the contraband goods; then the question must be answered in the affirmative, that there was a legal and justifiable cause.

According to the modern law of nations, for there has been some relaxation in practice of the strictness of the ancient rules, the carriage of contraband goods to the enemy, subjects them, if captured *in delicto*, to the penalty of confiscation; but the vessel and the remaining cargo, if they do not belong to the owner of the contraband goods, are not subject to the same penalty. The penalty is applied to the latter, only when there has been some actual co-operation, on their part, in a meditated fraud upon the belligerents, by covering up the voyage under false papers, and with a false
*520] destination. This *is the general doctrine, when the capture is made *in transitû*, while the contraband goods are yet on board. But when the contraband goods have been deposited at the port of destination, and the subsequent voyage has thus been disconnected with the noxious articles, it has not been usual to apply the penalty to the ship, or cargo upon the return-voyage, although the latter may be the proceeds of the contraband. And the same rule would seem, by analogy, to apply to cases where the contraband articles have been deposited at an intermediate port, on the outward voyage, and before it had terminated; although there is not any authority directly in point. But in the highest prize courts of England, while the distinction between the outward and homeward voyage is admitted to govern, yet it is established, that it exists only in favor of neutrals, who conduct themselves with fairness and good faith in the arrangements of the voyage. If, with a view to practice a fraud upon the belligerent, and to escape from his acknowledged right of capture and detention, the voyage is disguised, and the vessel sails under false papers, and with a false destination, the mere deposit of the contraband, in the course of the voyage, is not allowed to purge away the guilt of the fraudulent conduct of the neutral. In the case of *The Franklin*, in 1801, 3 Rob. 217, Lord Stowell said, "I have deliberated upon this case, and desire it to be considered as the settled rule of law received by this court, that the carriage of contraband with a false destination, will make a condemnation of the ship, as well as the cargo." Shortly afterwards, in the case of *The Neutralitet*, 1801, 3 Rob. 295, he added, "The modern rule of the law of nations is, certainly, that the ship shall not be subject to condemnation for carrying contraband goods. The ancient practice was otherwise; and it cannot be denied, that it was perfectly justifiable in principle. If to supply the enemy with such articles is a noxious act, with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose, cannot be innocent. The policy of modern time has, however, introduced a relaxation on this point; and the general rule now is, that the vessel does not become confiscated for that act. But this rule is liable to exceptions. Where a ship belongs to the owner of the cargo, or where the ship is going on such service, under a
*521] false destination or false *papers; these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient rule." The cases in which this language was used, were cases of capture upon the outward voyage.(*a*) The same doctrine was afterwards held by the same learned judge to apply to

(*a*) See also, The Edward, 4 Rob. 68.

cases, where the vessel had sailed with false papers, and a false destination upon the outward voyage, and was captured on the return-voyage.(a) And, finally, in the cases of *The Rosalia* and *The Elizabeth*, in 1802 (4 Rob. note to table of cases), the lords of appeal in prize cases held, that the carriage of contraband outward, with false papers, will affect the return-cargo with condemnation. These cases are not reported at large. But in the case of *The Baltic*, 1 Acton 25, and that of *The Margaret*, Ibid. 333, the lords of appeal deliberately re-affirmed the same doctrine. In the latter case, Sir WILLIAM GRANT, in pronouncing the judgment of the court, said, "The principle upon which this and other prize courts have generally proceeded to adjudication in cases of this nature (that is, where there are false papers), appears simply to be this; that if a vessel carried contraband on the outward voyage, she is liable to condemnation on the homeward voyage. It is by no means necessary, that the cargo should have been purchased by the proceeds of this contraband. Hence, we must pronounce against this appeal; the sentence (of condemnation) of the court below being perfectly valid and consistent with the acknowledged principles of general law."

We cannot but consider these decisions as very high evidence of the law of nations, as actually administered; and in their actual application to the circumstances of the present case, they are not, in our judgment, controlled by an opposing authority. Upon principle, too, we think, that there is great soundness in the doctrine, as a reasonable interpretation of the law of nations. The belligerent has a right to require a frank and *bonâ fide* conduct on the part of neutrals, in the course of their commerce, in times of war; and if the latter will make use of fraud and false papers, to elude the just rights of the belligerents, and to cloak their own illegal purposes, there is *no injustice in applying to them the penalty of confiscation. [*522
The taint of the fraud travels with the party and his offending instrument, during the whole course of the voyage, and until the enterprise has, in the understanding of the party himself, completely terminated. There are many analogous cases in the prize law, where fraud is followed by similar penalties. Thus, if a neutral will cover up enemy's property under false papers, which also cover his own property, prize courts will not disentangle the one from the other, but condemn the whole as good prize. That doctrine was solemnly affirmed in this court, in the case of *The St. Nicholas*, 1 Wheat. 417.

Upon the whole, our opinion is, that the general question involved in the second and third questions, whether there was a legal and justifiable cause of capture, under the circumstances of the present case, ought to be answered in the affirmative. The question, as to the authority of the cruiser to seize, so far as it depends upon her commission, can only be answered in a general way. If she had a commission, under the royal authority of Spain, she was, beyond question, entitled to make the seizure. If Rodil had due authority to grant the commission, the same result would arise. If he had no such authority, then she must be treated as a non-commissioned cruiser, entitled to seize for the benefit of the crown; whose acts, if adopted and acknowledged by the crown, or its competent authorities, become equally binding. Nothing is better settled, both in England

(a) See The Nancy, 3 Rob. 122; The Christiansberg, 6 Id. 376.

and America, than the doctrine, that a non-commissioned cruiser may seize for the benefit of the government; and if his acts are adopted by the government, the property, when condemned, becomes a *droit* of the government. (*a*)

The fourth and fifth questions involve the point as to the authority of Rodil. The fourth is in the following terms: Whether a general in the military service of Spain, subordinate to La Serna, viceroy of Peru, under the king of Spain, not having the actual and exclusive command at Callao, and no civil authority existing therein, and cut off by the forces of the *523] *enemy, by sea or land, from all communication with any superior civil or military officer, could lawfully seize and detain neutral property from contraband trade, if just cause existed for a condemnation thereof? The fifth question is, whether such officer, so situated, has a right to appoint and constitute a court, of which he himself is one, for the trial and condemnation of such property? These questions are both understood to refer to the supposed authority of Rodil, as an officer of the government, to make the seizure in his official capacity. We are of opinion, that no sufficient facts are stated to enable this court to give any opinion as to the nature or extent of the authority of such an officer, under the laws of Spain, or his commission from and under the Spanish government. We shall, therefore, return an answer to them, declaring that they are too imperfectly stated to admit of any opinion to be given by this court.

The sixth and last question is, whether, supposing the ship to have traded in articles contraband of war, in the ports of Chili, and to have been seized afterwards, in a port of Peru, then under the royal authority, before she had discharged her outward cargo, for and on account of such contraband trade, the underwriters be not discharged, whether the subsequent proceedings for her adjudication were regular or irregular? This question is understood to raise the point, whether, if the seizure and detention be *bonâ fide* for and on account of illicit or contraband trade, a sentence of condemnation or acquittal, or other regular proceedings to adjudication, are necessary to discharge the underwriters. We are of opinion, that they are not. If the seizure or detention be lawfully made, for or on account of illicit or contraband trade, all charges, damages and losses consequent thereon, are within the scope of the exception. They are properly attributable to such seizure and detention, as the primary cause, and relate back thereto. If the underwritters be discharged from the primary hostile act, they are discharged from the consequences of it. The whole reasoning in *Church* v. *Hubbard*, 2 Cranch 187, presupposes, that if the underwriters be exempted from the risk of a justifiable seizure for illicit trade, they are not accountable for losses consequent thereon, whether arising from a sentence of condemnation or otherwise.

*524] *This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Massachusetts, and on the points and questions on which the judges of the said circuit court were divided in opinion, and which were certified to this court for its opinion, agreeable to the act of congress in such case made and pro-

(*a*) The Amiable Isabella, 6 Wheat. 1; The Dos Hermanos, 10 Ibid. 306; The Melomane, 5 Rob. 43; The Elsebe, 5 Ibid. 174; The Maria Françoise, 6 Ibid 282.

vided, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that upon the question so certified by the circuit court for the district of Massachusetts, upon which the judges of that court were opposed in opinion, the opinions of this court be certified to that court as follows, to wit:—Upon the first question, "whether a seizure and detention, to come within the exception of the policy relating to contraband and illicit trade, must be for a legal and justifiable cause?" that it is the opinion of this court, that the seizure and detention, to come within the exception of the policy relating to contraband and illicit trade, must be for a legal and justifiable cause. Upon the second question, "whether, assuming the other facts to be as stated and alleged above, and taking the authority of the seizing vessel to be such as the plaintiffs allege, there was a legal and justifiable cause for the seizure and detention of the General Carrington and her cargo?" that it is the opinion of this court, that assuming the facts stated in that question, there was a legal and justifiable cause for the seizure and detention of the ship General Carrington and cargo. Upon the third question, "whether, assuming the other facts to be as stated and alleged above, and taking the authority of the seizing vessel to be such as the defendants allege, there was a legal and justifiable cause for the seizure and detention of the General Carrington and her cargo?" that it is the opinion of this court, assuming the facts stated in that question, there was a legal and justifiable cause for the seizure of the ship General Carrington and cargo. If the armed vessel referred to was lawfully commissioned by Rodil (upon which this court can pronounce no opinion), then she is to be deemed entitled to make the seizure and detention, in the same manner as if she had been commissioned by the royal authority of Spain; but if she was not so commissioned, then the parties making the seizure and detention are to be treated as non-commissioned cruisers, seizing for the government of Spain; *and their validity depends upon their adoption and recog- [*525
nition by the competent authorities of Spain, according to the general principles of the law of nations on this subject. Upon the fourth question, "whether, a general in the military service of Spain, subordinate to La Serna, viceroy of Peru, under the king of Spain, but having the actual and exclusive command of Callao, and no civil authority existing therein, and cut off by the forces of the enemy, by sea and land, from all communication with any superior civil or military officer, could lawfully seize and detain neutral property for contraband trade, if just cause existed for a condemnation thereof?" and the fifth question, "whether such officer, so situated, has a right to appoint and constitute a court, of which he himself is one, for the trial and condemnation of such property?" that it is the opinion of this court, that the facts are too imperfectly stated to enable this court to ascertain and decide what are the nature and extent of the powers of such an officer, according to the laws of Spain, or his commission from and under the Spanish government. Upon the sixth question, "whether, supposing the ship to have traded in articles contraband of war, in the ports of Chili, and to have been seized afterwards, in a port of Peru, then under the royal authority, before she discharged her outward cargo, for and on account of such contraband trade, the underwriters be not discharged, whether the subsequent proceedings for her adjudication were regular or irregular?" that it is the opinion of this court, that under the circum-

stances stated in that question, the underwriters are discharged, whether the subsequent proceedings, after the seizure and detention of the ship and cargo for their adjudication, were irregular or not.

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*526] *Mary Deneale, Executrix of George Deneale, and others, Plaintiffs in error, *v.* John Archer and John W. Stump, Executors of John Stump, deceased, Defendants in error.

Practice.

A writ of error, brought in the name of "Mary Deneale and others," dismissed for irregularity; a new one, in due form, may be brought.

Error to the Circuit Court of the District of Columbia and county of Alexandria. Upon the opening of the record in this case, it was found, that the writ of error had been issued in the name of Mary Deneale, executrix of George Deneale, and others.

Coxe, for the defendants, objected to the writ of error as informal. All the parties to the proceedings in the circuit court should be parties to the writ of error; those who have not joined in it, are not before the court. The court cannot know who are the persons meant by "others."

Lee, for the plaintiff in error, contended, that the record showed who were the parties to the case.

Marshall, Ch. J., delivered the opinion of the court.—This was the case of a *scire facias* against devisees, to revive a judgment. The *scire facias* is, in its form, without precedent, and a demurrer was filed to it. Process on the *scire facias* issued against four devisees, and service was made upon two only of them. An office-judgment was then taken against all the devisees. The two of them, on whom the process was served, afterwards appeared, and the office-judgment was set aside as to them, and they then pleaded the statute of limitations. There was a demurrer to the replication, and judgment against all the devisees.

The present writ of error is brought by Mary Deneale "and others," as plaintiffs; but who the others are cannot be known to the court, for their
*527] names are not given in the writ of error, *as they ought to be. Mary Deneale cannot alone maintain a writ of error on this judgment; but all the parties must be joined, and their names set forth, in order that the court may proceed to give a proper judgment on the case. The present writ of error must, therefore, be dismissed for irregularity; but a new one, in due form, may hereafter be brought to revise the judgment.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Alexandria, and was argued by counsel: On consideration whereof, it is the opinion of this court, that this writ of error is irregular, and should be dismissed, inasmuch as it is in the name of "Mary Deneale and others," without naming who those others are; whereupon, it is ordered and adjudged by this court, that this cause be and the same is hereby dismissed.