*Church *v.* Hubbart.

Marine insurance.—Illicit trade.—Foreign laws.

If it be inserted in a policy, that "the insurers are not liable for seizure by the Portuguese for illicit trade," and the vessel be seized and condemned for an attempt to trade illicitly, the underwriters are not liable for the loss.[1]

The right of a nation to seize vessels, attempting an illicit trade, is not confined to their harbors, or to the range of their batteries.[2]

Foreign laws must be proved like other facts: they must be verified by oath, or by some other such high authority that the law respects not less than the oath of an individual. The certificate of a consul of the United States, under his seal, is not sufficient.

A certificate of the proceedings of a court, under the seal of a person who states himself to be the secretary of foreign affairs in Portugal, is not evidence.

If the decrees of the Portuguese colonies are transmitted to the seat of government, and registered in the department of state, a certificate of that fact, under the great seal, with a copy of the decree, authenticated in the same manner, would be sufficient *primâ facie* evidence.[3]

Error from the Circuit Court for the district of Massachusetts, in an action on the case, upon two policies of insurance, whereby John Barker Church, Jr., caused to be insured $20,000 upon the cargo of the brigantine Aurora, Nathaniel Shaler, master, at and from New York to one or two Portuguese ports on the coast of Brazil, and at and from thence back to New York.

At the foot of one of the policies was the following clause: "The insurers are not liable for seizure by the Portuguese for illicit trade;" and in the body of the other was inserted the following, "*N. B.* The insurers do not take the risk of illicit trade with the Portuguese."

The vessel was cleared out for the Cape of Good Hope, and Mr. Church went out in her, as supercargo. On the 18th of April, she arrived at Rio Janeiro, where she obtained a permit to remain fifteen days, and where Mr. Church sold goods to the amount of about $700, which were delivered in open day, and in the presence of the guard which had been previously put on board, and to all appearance, with the approbation of the officers of the customs. On the 6th of May, she sailed from Rio Janeiro, bound to the port of Para, on the coast of Brazil, and on the 12th, fell in with the schooner

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[1] A warranty against illicit trade has in view the municipal laws of the country where it is to be carried on; and foreigners going there are bound to know and observe them. Smith *v.* Delaware Ins. Co., 3 W. C. C. 127. But to bring a case within the exceptions, the seizure must be *boná fide*, and upon reasonable grounds. Carrington *v.* Merchants' Ins. Co., 8 Pet. 495. Where the trade is no otherwise unlawful, than in consequence of an accident, over which the assured has no control, the underwriters cannot avail themselves of it, as a breach of warranty. Savage *v.* Pleasants, 5 Binn. 403; Hallet *v.* Jenks, 3 Cr. 210; s. c. 1 Caines Cas. 43; 1 Caines 60. A seizure and condemnation, under pretext of illicit trade, is not a breach, if the trade be, in fact, legal. Johnston *v.* Ludlow, 1 Caines Cas. xxix; s. c. 2 Johns. Cas. 481; Laing *v.* United Ins. Co., Id. 487. The prohibition must be a legal one, such as the prohibiting power had a right to make. Smith *v.* Delaware Ins. Co., 3 S. & R. 73; Fauel *v.* Phœnix Ins. Co., 4 Id. 29. And the underwriter is liable for a loss occasioned by illicit trade barratrously carried on by the master. Suckley *v.* Delafield, 2 Caines 222; Dunham *v.* American Ins. Co., 2 Hall 422; s. c. 12 Wend. 463; 15 Id. 9. And to bring a case within the warranty, there must be both a seizure and proof of an illicit trade. Graham *v.* Pennsylvania Ins. Co., 2 W. C. C. 113.

[2] Talbot *v.* Seeman, 1 Cr. 1; Strother *v.* Lucas, 6 Pet. 673; Armstrong *v.* Lear, 8 Id. 52; Stern *v.* Bowman, 13 Id. 209; Ennis *v.* Smith, 14 How. 400.

[3] Rothschild *v.* United States, 6 Ct. Cl. 204; Dauphin *v.* United States, Id. 221.

Four Sisters, of New York, Peleg Barker, master, bound to the same port, who agreed to keep company, and on the 12th of June, they came to anchor, about four or five leagues from the land, off the mouth of the river Para, in the bay of Para, about west and by north from Cape Baxos, and about two miles to the northward of the cape "on a meridian line drawn from east to west." The land to the westward could not be observed from the deck, but might be seen from the mast-head.

The destination of the vessel, after her departure from Rio Janeiro, was, by the master, kept secret from the crew, at the request of Mr. Church, and the master assigned as a reason why they came to anchor off the river Para, that they were in want of water and wood, which was truly the case, the greater part of the water on board having been caught a night or two before, and the crew had been on an allowance of water for ten days.

*After the vessels had come to anchor, Mr. Church, with two of the seamen of the brig, and the mate of the schooner, with two of her seamen, went off in the schooner's long boat, to speak a boat seen in shore, to endeavor to obtain a pilot to carry the vessels up the river, that they might procure a supply of wood and water, and, if permitted, sell their cargo. [*188

Shortly after the long boat had left the schooner, the latter got under way (the master of the brig having first gone on board of her), proceeding towards shore; and observing a schooner-rigged vessel coming from the westward, from whom they expected to get a pilot, they fired a shot ahead of her, to bring her to, but not regarding the first shot, a second was fired, when she came to, and her master came on board, apparently much alarmed, as if he supposed the schooner and brig to be French. The persons in the Portuguese boat got off, in a squall of wind and rain, leaving their captain on board the Four Sisters.

Mr. Church, and the others who went on shore with him, as well as the second mate of the schooner, who was sent on shore with the master of the Portuguese vessel, and in search of Mr. Church, were seized and imprisoned; and on the 14th of June, both the brig and schooner were taken possession of by a body of armed men, on board of three armed boats, and carried into Para. The masters and crews were imprisoned, and underwent several examinations, the principal object of which seemed to be, to ascertain whether they were not employed by some of the belligerent powers to examine the coast, &c.; whether they had not come with intention to trade; whether they had not traded at Rio Janeiro, and why they had kept so close along the coast. They denied the intention to trade, but alleged that they were obliged to put in for wood and water, and to refit. On the 28th of July, the master of the brig was put on board a vessel for Lisbon, but was taken on the passage by a Spanish vessel, and sent to Porto Rico, from whence he obtained a passage to the United States. The Aurora was armed with two carriage guns mounted, and about one hundred weight of powder.

It was in evidence also, that when vessels belonging to foreigners go into Rio Janeiro, they allege a pretence of *want of repairs, want of water, or something of that kind, on representing which, they obtain leave to sell part of the cargo for repairs, and to remain a certain time, usually twenty days, and then, by making presents to the officers, they are not prevented from selling the whole; but without those presents, they would [*189

probably be informed against. Such trade is a prohibited trade, but it is frequently done, without a bribe.

The defendant, to prove that the trade was illicit, offered a copy of a law of Portugal, entitled "A law by which foreign vessels are prohibited from entering the ports of India, Brazil, Guinea, and Islands and other provinces of Portugal," which, after reciting a prior law of 1591, prohibiting foreign vessels, and foreigners of whatever station or quality, to go, either from the ports of Portugal, or from any other ports whatever, to the conquests of Brazil, without special license of the king, ordains, "that from the day of the publication hereof, no vessel whatever, of any foreign nation, shall be permitted to go to India, Brazil, Guinea, or Islands, nor to any other province or islands of my conquests, either already discovered, or that may be discovered hereafter." (The Azores and Madeira are excepted.) "And I am further pleased to order, that no stranger whatever shall be permitted to go in any vessels, belonging to my subjects, even though he be an inhabitant of my kingdoms." "And any foreign vessel that shall hereafter go to any of the said ultramarine ports, against the contents of this my law, I am pleased to order, that it shall be seized, with all the cargo, as well that of the master and proprietors of the said vessel, as of any other persons; and further, that all those who, on board of said foreign vessels, shall load any goods or merchandise, shall lose all whatever else they possess, and they shall be banished for life to Africa, without remission, and no petition for pardon shall be received from them, nor shall it be valid, even if dispatched; and any foreigner who, in any ship of his own, or any other, or in any ship or vessel of my subjects, shall go to said ports, contrary to this my law, besides incurring the loss of all his property, shall likewise incur the penalty of death, which shall be put in execution against him, without appeal, by order of any governor, captain or judge before whom they are accused, even
*190] if such execution *in other cases should not come within their authority; and the same penalty of death shall be incurred by any of my subjects who shall freight said vessels, or by any other manner send them, either on their own account, or on any other person's account, to said ultramarine possessions, which shall be put into execution against them in the manner above mentioned, without appeal. And all those who, in any manner, shall go against this my law, may be denounced by any person whatever, and the denouncer shall be entitled to, and receive, one-half of the goods appertaining to the accused, and the other half shall be forfeited to my treasury. And I am further pleased to order, that all those who, from henceforth, shall in any manner act against the said law made by the king my father (whom God keep!) or shall change their voyage, or cause the same to be done, shall be accused in the manner above mentioned by any person whatever. And I hold as strong and valid all the contents of this my law, and order that it should be fully complied with and observed, notwithstanding any contrary laws, orders, gifts, privileges, contracts, or any grants, either general or particular, being all hereby repealed, as if each one in particular was herein mentioned. And this law shall be as valid as any letter made in my name, signed by myself, and passed through chancery, notwithstanding the ordinance of book the second, title the 40th, which orders the contrary. And that the knowledge of the contents hereof should be made manifest to all, I order the high chancellor to cause it to be published

in chancery, and to pass a certificate of the same on the back hereof, and have it registered in the books of my exchequer court, India house, custom-house of this city of Lisbon, and in all other parts of the kingdom of Portugal; for which purpose, the comptroller of my exchequer shall send copies hereof to the said ports, and similar ones to all the ports in India, Brazil, Guinea, and Islands, to the end that this my law be there published and registered, and reach to the knowledge of all. Made in Valladolid, the 18th of March 1605. The secretary, Luis de Figueiredo, had it written.

(Signed) KING."

*"I, William Jarvis, consul of the United States of America, in this city of Lisbon, &c., do hereby certify to all whom it may or doth concern, that the law in the Portuguese language, hereunto annexed, dated the 18th March 1605, is a true and literal copy from the original law of this realm, of that date, prohibiting the entry of foreign vessels into the colonies of this kingdom, and as such, full faith and credit ought to be given it in courts of judicature or elsewhere. I further certify, that the foregoing is a just and true translation of the aforesaid law. In testimony whereof, I have hereunto set my hand and affixed my seal of office, at Lisbon, this 12th day of April 1803. [*191

(Signed) WILLIAM JARVIS."

Another law was produced, said to be made at Lisbon, on the 8th of February 1711, certified in the same manner, entitled, "A law in which is determined the non-admission of foreign vessels into the ports of the conquests of this kingdom," which directs, "That orders should be given to the governors of the conquests, not to admit into any of their ports the vessels of any foreign nation, unless they went in with the fleets of this kingdom, and returned with the same, in conformity to treaties, or obliged by tempestuous weather, or for want of provisions; in which cases, providing them with the necessaries they require, they ought to be ordered out again, without permitting them to do any business; and as this cannot be done without the consent and tolerance of the governors, which requires a speedy and efficacious remedy, on account of the consequences which may result from a toleration and overlooking of this traffic, and the equity of justice requiring that so great an injury should be avoided, and the inflicting a punishment on those who should in any way be concerned in such an illicit trade with foreigners; I am pleased to order, that the persons who shall traffic with them, or shall consent that such traffic shall be carried on, or, knowing it, shall not hinder it, such person, being a governor of any of my ultramarine conquests, *shall incur the penalty of paying to my treasury the three doubles of the salary which he receives, or may have received, by such office of governor, besides losing all the gifts he holds from the crown, and remaining inhibited from ever being employed in any other offices or governments for the future: such person being an officer in the army, or of justice, or any other private person, being a Portuguese and a subject of this kingdom, shall incur the penalty of confiscation of all his goods and possessions, one-half for the denouncer, and the other half for my royal treasury." Then follow other provisions for the detection and punishment of offenders against the law; and an order to all governors of the ultramarine conquests to carry [*192

it into execution, and that it should be published and registered in all necessary places.

To prove that the vessel was seized for illicit trade, the defendant produced the following paper, purporting to be a copy of "the sentence of the governor of the capital of Para, on the brig Aurora."

"In consequence of the acts of examination made on board the brig Aurora, questions put to Nathaniel Shaler, who it is said is the captain of her, and to those said to be the officers and crew, and according to the act of examination, made in the journal annexed, which they present as such passport and dispatches, together with other papers; I think, the motives hereby alleged for having put into a port of this establishment, are unprecedented and inadmissible, and the causes assigned cannot be proved: I, therefore, believe it to be all affected, for the purpose of introducing here commercial and contraband articles of which the cargo is composed (if there are not other motives besides these, of which there is the greatest presumption): 1st. Because it cannot be supposed that an involuntary want of water and wood would take place in thirty-four days' voyage from Rio Janeiro, where the said vessel was provided with every necessary, until she passed the Salinas, without alleging and proving an unforeseen accident, when there was none in sixty-four days' passage from New York to said port of Rio Janeiro, and it
*193] appears by these papers, and by the information *from the commanders of registry or guard at the Salinas, and it is not to be believed, that they did not see that land at the hour of the morning which they passed it, on the 9th day of the present month, as well as they were seen; and when it ought to be supposed, that they should have solicited immediately the remedy for such urgent necessity as they wish to make it. 2d. Because, after they were in sight and opposite to the village of Vigia, on the 12th of the said month, having also got clear and passed safely by the shoals, and after, by violent means, having boarded and obliged different vessels to board him, it does not appear, that any of those that were brought to the village as prisoners, alleged the want of water as a motive for coming in, nor that they had made the least endeavors, or demanded to be supplied with such want; it being very well known, on the contrary, that all their endeavors were to obtain *pratic*, and to proceed to this capital, alleging the pretext of being leaky, but which, from the examination made on board by the masters of the arsenal, did not appear to be true. 3d. And finally, because in the space of eight or ten days from the time they passed the cape of St. Agostinho, until they passed by the Salinas, should their want of water be true, they might have supplied themselves with it, in any of the numerous ports on the northern coast of the Brazils, till that of Pernambuco, or they would have directed their course directly for the destined port of Martinico and Antilles, as they say; it appearing very strange, they should come to sound all the coast, the excuse of the winds not being admissible. But by the same informer's journal, it appears, that from the 28th of May, when, by observation, they were northward of St. Agostinho, they had constantly the trade-winds upon the quarter, until the 3d instant, with which they steered always along the coast, when they ought only to have gone to this latitude, to have continued the same winds to the said islands, and to have got clear of the calms and currents of the coast; if it had not been their only intention to look for the same coast and to this port, for business and smuggling, which he could not

perform at the Rio Janeiro, for the reason which is specified in the letters annexed to folio —; it being presumed, that the master of this brigantine *ought to be understood as having the same disposition as that of the [*194
schooner Four Brothers, with which he sailed and fell into conversation. Therefore, I command, that in conformity to the law made on the 5th October 1715, the observance of which has been so repeatedly recommended and revived to me by government, let their papers be brought to the house of justice, to be continued as prescribed in the same law, and laws of the kingdom (they remaining in prison until the final decision), for which they gave cause by the hostile means which they practised.

"Palace of Para, the 27th June 1801.

D. Francisco de Souza Coutinho."

"On the 27th June 1801, these deeds were given to me by his excellency the governor and captain-general of state, D. Francisco de Souza Coutinho, with his sentence, *ut supra*, of which I made this term; and I, Joseph Damazo Alvarez Bandiera wrote and finished the same.

"It is hereby determined by the court, &c., that in the certainty of it being affected and unprecedented, that the brig Aurora, Captain Nathaniel Shaler, putting into this port as in the decision fol. 43; as it is justly declared and adopted for the same incontestible causes there specified, that in consequence thereof, and of the respective laws thereto applying, she ought to be condemned, they concurring to convince that it was the project of the said captain (if he had no other reason besides these, of which there is suspicion) to look for a market for the merchandise, which were found, not only as it appears by the letters hereto annexed, but in the society and conversation in which he sailed with the schooner Four Brothers, which captain is convicted, by very clear proofs, of such an intention, and the same specious pretext with which he pretends to color the cause for putting into this port, manifesting in this manner that he was not ignorant of the laws of the state concerning coming in and doing business therein. *Therefore, [*195
they declare him to have incurred the transgression of the order fol. 1 to 107, and decree of the 18th March 1605, and they order that after proceeding in the sequester on the vessel and cargo, to send the captain as prisoner, with the necessary information by the competent secretary, that his royal highness may be pleased to determine about him, as may be his royal pleasure.

"Para, 27th June 1801. D. Jono de Almeida de Mello de Castro, of the council of state of the prince regent our lord, and his minister and secretary of state of the foreign affairs and war departments, &c., do hereby certify that the present is a faithful copy taken from the original deeds relative to the brig Aurora. In witness whereof, I order this attestation to be passed and goes by me signed and sealed with the seal of my arms. Lisbon, the 27th January 1803.

(Signed) D. Jono de Almeida de Mello de Castro."

"I, William Jarvis, consul of the United States of America, in this city of Lisbon, &c., do hereby certify unto all whom it may concern, that the foregoing is a true and just translation of a copy from the proceedings against the brig Aurora, Nathaniel Shaler, master, at Para, in the Brazils, which is hereto annexed and attested by his Excellency Don Jono de Almeida

de Mello de Castro, whose attestation is dated the 27th January 1803. In testimony whereof, I have hereunto set my hand and affixed my seal of office, in Lisbon, this 16th day of April, one thousand eight hundred and three. WILLIAM JARVIS."

The bill of exceptions, besides the foregoing, stated a variety of depositions, papers and other evidence, which it is deemed unnecessary here to insert, and then proceeded as follows:

"Whereupon, the said plaintiff did then and there insist before the said court, that the said paper writings offered in evidence as aforesaid, by the
*196] defendant, ought *not to be admitted and allowed to be given in evidence to the jury, on the said trial, in behalf of said defendants; but the said judges did then declare and deliver their opinions, that the same paper writings ought to be admitted in evidence to the jury. Whereupon, the said counsel for the said defendant, did then and there insist before the said judges, that the said several matters so produced, and given in evidence on the part of the said defendant as aforesaid, were sufficient, and ought to be admitted and allowed as sufficient evidence, to prove that the loss of the said brig and cargo was by a peril within the exception made in the aforesaid policies, respecting seizure by the Portuguese for illicit trade, and therefore, that the said Church ought to be barred of his aforesaid action, and the said defendant acquitted thereof. And thereupon, the said defendant, by his counsel, did then and there pray the said judges to admit and allow the said matters and proof, so produced and given in evidence for the defendant aforesaid, to be sufficient evidence to bar the said Church of his action aforesaid. But to this the counsel of said John Barker Church, Jr., on behalf of said Church, did insist before the said court, that the matters and evidence aforesaid, so produced and proved on the part of the said defendant, were not sufficient, nor ought to be admitted or allowed, to bar the plaintiff of his action, and that it did not prove the loss of the said brig and cargo to be by a peril within the exception contained in said policies, respecting seizure by the Portuguese for illicit trade, but that the evidence, on the part of the plaintiff did prove the same loss to have happened through a peril for which the underwriters on said policies were liable, by the terms thereof.

"And the said WILLIAM CUSHING, Esq., did then and there deliver his opinion to the jury aforesaid, in the words following, to wit: The first objection to this action is, that it is brought in the name of John B. Church, Jr., when the contract was not made with him, but with his father, John B.
*197] *Church. But from the evidence of Mr. Samuel Blagge, it is plain, the policy was made for the son, in pursuance of the express application and direction of the witness. The property of ship and cargo is proved to be in the plaintiff.

"The principal question is, whether the brig Aurora and cargo (insured by these policies) were seized by the Portuguese for (or on account of) illicit trade? If so seized, the insurer is not liable; if not seized for illicit trade, the defendant must answer for the sums by him insured.

"The brig went to Brazil for the purpose of trade; first to Rio Janeiro, where, with leave, part of the cargo was sold, then proceeded to Para. It

is pretty well understood, that a trade there is illicit and prohibited, unless particular license can be obtained; sometimes it is obtained, sometimes not; and in want of leave, seizures have been made. It seems, that the seizure and sequestration which took place at Para, were on account of attempting to trade there. The sentence of the governor of Para appears to me decisive as to this point, that there was an attempt to trade, and that was against the effect of the Portuguese law referred to in the decree.

"It is contended, that this vessel was not within the Portuguese dominions, and therefore, not in violation of any of their laws. It appears, the vessel was hovering on the coast of Para, and anchored upon that coast, and that the plaintiff, with others from the vessel, went on shore in the boat among the inhabitants.

"It is said, that this sentence has no appearance of an admiralty decree; but there does not appear any other authority at Para to condemn for illicit trade than that of the governor. The governor does undertake to decide, and I do not know that he had not authority, according to their modes of colony government, so to do. One thing seems certain, that is, that the property was seized and sequestered and taken away, by *the governor's sentence, on account of prohibited trade; in part, at least. [*198

"As to a design against the country, it is said, there were suspicions. It does not seem probable, that the government of Para could seriously think the country endangered, by a few Americans coming with a cargo for trade.

"I am, therefore, of opinion, that it falls within the meaning and true intent of the exceptions in the policies, viz., 'that the insurers should not be liable for seizure by the Portuguese for illicit trade,' and that you ought to find for the defendant."

"Whereupon, the said counsel for the plaintiff did then and there, in behalf of the plaintiff, except as well to the said opinion of the said judges in relation to the said paper writings, as to the opinion of the said CUSHING, delivered to the said jury," &c.

Stockton, for plaintiff in error, contended, that the circuit court had erred, 1st. On the general merits of the case; and 2d. In admitting improper evidence to go to the jury.

I. As to the merits. The exception in the policies is of the case of seizure for illicit trade, not of seizure for an attempt to trade. The latter case is within the policy, and is one of the risks which the underwriters have taken upon themselves. Actual trade, and a consequent seizure therefor, must both concur, in order to protect the underwriters. The evidence stated in the record, if it proves anything, does not show that the seizure was for any act of illicit trade. To make the most of it, would be to say, that it was a seizure on suspicion. But it rather seems to be an act of violence, a marine trespass, not warranted even by the law which the defendant has produced. It appears in the record, that the trade has been, generally speaking, interdicted, ever since the year 1591, and that this fact was known to both parties. Every general history of the country proves the general prohibition of the trade, but that it is sometimes permitted. The intent to trade is not an illicit trade. The real import of the policy is this, "we know the general prohibition of the trade, but that permission is sometimes granted. Go on

with the voyage, *try to get permission, but see that you do not trade without leave; if you do, it is not at our risk. Underwriters are always presumed to know the nature of the voyage, and the course of the trade. "In general," says Lord MANSFIELD, in *Pelly* v. *Royal Exchange Assurance Co.* (1 Burr. 341), "what is usually done by such a ship, in such a voyage, is understood to be referred to by every policy, and to make a part of it, as much as if it were expressed." The same principle is recognised in *Noble* v. *Kennoway*, Park (49) 44; 2 Doug. 512.

No objection can be taken to the policy, because it was upon a voyage for a trade illicit by the laws of Portugal, although a policy upon a trading voyage, made illegal by our own laws, might be vacated. *Delonada* v. *Motteux*, *Planche* v. *Fletcher*, and *Lever* v. *Fletcher*, Park 268 (236).

The intention to trade can never be construed an actual trading. The difference between the intent and the act, in the case of a deviation, is taken in Park 359 (314), *Foster* v. *Wilmer*, and *Carter* v. *Royal Exchange Assurance Co.* If the intention could be taken for the act, the vessel might have been seized by the Portuguese, on the very day she left New York, and the underwriter would be discharged.

The sentence does not go on the ground of illicit trade. At most, it only expresses a suspicion. Besides, the vessel was seized five leagues from the land, at anchor on the high seas. The seizure was not justified by their own laws: she was not within their territorial jurisdiction. By the law of nations, territorial jurisdiction can extend only to the distance of cannon-shot from the shore. Vattel, lib. 1, c. 23, § 280, 289. A vessel has a right to hover on the coast: it is no cause of condemnation. It can, at most, justify a seizure for the purpose of obtaining security that she will not violate the laws of the country. The law which is produced forbids the vessel to enter a port, but does not authorize a seizure upon the open sea. Great Britain, the greatest commercial nation in the world, has extended her revenue laws the whole length of the law of nations, to prevent smuggling. But she authorizes seizures of vessels only within the limits of her ports, or
*200] *within two leagues of the coast; and then only for the purpose of obtaining security. 4 Bac. Abr. 543.

The reason that the supercargo went on shore was the want of water; and the evidence proves that the want was real. For this purpose, he had a right to go on shore, and although he thereby placed his person in their power, yet that did not bring the vessel into port.

The sentence is not evidence of the facts which it recites. It is conclusive only as to the very point of the judgment. Peake's Law of Evidence, 46, 47. It shows on its face, that the seizure was made, not for an actual trading, but on suspicion of an intention to trade.

II. The circuit court erred in admitting the evidence which was objected to.

1. It did not appear to be the sentence of a court having competent jurisdiction. *The Henrick and Maria*, 4 Rob. 55. "A legal sentence must be the result of legal proceedings, in a legitimate court, armed with competent authority upon the subject-matter, and upon the parties concerned; a court which has the means of pursuing the proper inquiry, and of enforcing its decisions." The court may, perhaps, take judicial notice of the proceedings of a court of admiralty, but this cannot apply to the sentence of a

governor. The circuit judge declared the sentence to be evidence, because he did not know that there was any other tribunal. But the jurisdiction of the court ought to appear. The laws which are produced do not show the authority of the governor to condemn. Peake's L. Ev. 47, 48.

2. But the laws themselves are not sufficiently authenticated. They are only certified by a secretary of state, with his sign manual and private seal. They ought at least to be certified under the great seal. A private act of this country must be proved by a sworn copy compared with the roll. So of foreign laws: they must be proved as facts, by testimony in court. *Freemoult* v. *Dedire*, 1 P. Wms. 431; *Mostyn* v. *Fabrigas*, Cowp. 174; *Collet* v. *Lord Keith*, 2 East 260, 272–3. *It appears by the testimony in the record, that the vessel was not seized for an attempt to trade, but captured on suspicion of being an enemy, or as a spy sent by the French. [*201

3. The sentence is not duly authenticated. Is a secretary of state a proper certifying officer of a judgment of a court in the colonies? To ascertain what is a sufficient mode of authentication, the principles of the common law must be our guide. By that law, there are only three modes: 1. Exemplication under the great seal: 2. A sworn copy, proved by a person who has compared the copy with the original: 3. The certificate of an officer specially authorized *ad hoc*. It has not even the seal of the court. If the court had no seal, that fact ought to have been proved. Why was it not certified under the great seal? One nation will take notice of the national seal of another. Why was not the American consul sworn? Of what validity is the certificate, or the seal of a consul? Why have they not produced a sworn copy of the proceedings? An American consul is not a certifying officer. The court can take no more notice of his certificate than of that of a private person. There is no case to be found in a court of common law where it has ever been received as evidence. Bull. N. P. 226–29; *Leyfield's Case*, 10 Co. 93; *Anon.*, 9 Mod. 66; *Greene* v. *Proude*, 1 Ibid. 117; *Hughes* v. *Cornelius*, 2 Show. 232; *Green* v. *Walker*, 2 Ld. Raym. 863; Peake's L. Ev. 48.

Adams, for defendant.—From the papers which have been read to the court, and from the statement of the case made by the gentleman who opened the cause in behalf of the plaintiff in error, it becomes unnecessary to make any preliminary observations, to possess the court of the questions between the parties now to be decided. The verdict of the jury, and the sentence of the court being in favor of the defendant, the underwriter on the two policies, the judgment, it is presumed, will, of course, be affirmed, unless the objections stated against it by the plaintiff in error should be deemed by this court sufficiently substantiated, and of such a conclusive character as necessarily to require a reversal. It *is, therefore, incumbent on us, only to meet the exceptions taken by the plaintiff's counsel against the judgment of the circuit court; which exceptions are two: 1st. Against the construction given by the circuit judge to the policies; and 2d. Against the evidence admitted for the defendant; the one of substance, the other of form. The one involving the merits of the only question upon which the issue of this litigation can depend, and the other only pointed at the weight and authenticity of the evidence admitted by the circuit court. The one founded on the position, that the defendant has no good bar to the claim of the plain- [*202

tiff against him; the other resting on the basis, that strong and unanswerable as his defence may be, the proof that supports it was not clothed with that official solemnity which could alone entitle it to credit, and that it wanted that most powerful of all tests of truth—a bit of sealing-wax.

I shall ask the liberty of inverting the course of argument adopted by the gentleman who opened the cause, because, in point of time, the objection against the omission of the evidence, naturally precedes the discussion on its legal operation. He certainly was aware of this, and it is presumable, that he himself inverted the natural order of his argument, only because he wished to reserve for the last, the point upon which he placed his principal, perhaps, his only, reliance for success. A similar motive, however, must produce the contrary effect upon me, and induce me to return into that direct road, that broad highway, from which he deviated, only because the winding path gave him a shorter passage to the term at which he was desirous to arrive. For my own part, though confident, as before the decision of this court I ought to be, that the objections against the evidence are not so powerful as that gentleman's eloquence represented them, though persuaded that this court will concur rather with the opinion of the circuit court, than with that of the plaintiff's counsel, even upon this point, yet I will candidly confess, that I feel more sanguine upon the question to the merits, than upon the question to the forms; for if the evidence can but show its face in the cause, we think it must require the utmost refinements of ingenuity, to raise the shadow of a doubt upon its operation.

The objection against the evidence divides itself into two branches:
*203] *1. Against the two Portuguese laws. 2. Against the sentence of condemnation by the governor at Para.

Before I examine the reasons and authorities upon which these papers are respectively questioned, I must make one remark, which will be alike applicable to the attacks upon both. All the arguments by which they are assailed, rest only upon the rules, and not upon the principles of evidence. I do not mean to say, that the rules of evidence are not founded upon principles. I know them to be founded upon the soundest principles; but the operation of the rule which is positive, and, in some sort, arbitrary, is not always conformable to the principles upon which it is founded. Thus written evidence is in its nature of superior weight to mere parol testimony, for *verba volant, litera scripta manet;* words barely spoken are fleeting, but when written become permanent. From this principle, is derived the rule, that parol testimony shall not control the operation of a written instrument: yet it often happens, from various causes, that parol testimony is stronger than written evidence, and in such cases, it is the practice of all courts to receive it, in contradiction to the general rule. Thus, as all the positive rules of evidence are derived from some principle, so, in their operation, they are always governed by this principle at once of reason and of humanity, that no man can be required to perform impossibilities. Hence, all the positive rules and gradations of evidence are subject to this exception, and both in courts of law and of equity, no party can be required to produce evidence of a higher order than he can obtain. It cannot possibly be necessary to produce the authorities, with which the books teem, of cases in which evidence of a lower order has been admitted, when the higher evidence, appropriate to the cause, was not accessible to the party. But if the principle itself be re-

cognised, I trust it will be in our power to show, that the defendant comes within the rule of its application, and that this testimony was the best which it was in his power to obtain. These observations will furnish an answer to the rules and authorities which the gentleman adduced in support *of his objections, both against the laws, and against the sentence of condemnation. [*204

I. As to the laws.—We are told that foreign laws must be proved; and what the foreign law is; and the authorities alleged in support of this assertion are, Cowp. 174, and 2 East 260, 273. This we are not at all disposed to deny; though reasons might be given, why the rule ought not to be admitted, in its fullest latitude, in this country. This question is, however, quite immaterial to us, in the present case; because we did adduce proof of these foreign laws, and the only point to settle is, whether it was good and sufficient proof.

It is said, that foreign laws must be put on the footing of private laws, and must be authenticated, 1st. By an exemplification under the great seal; or 2d. By a sworn copy from the rolls. To this we answer—

1st. That the rules for the proof of foreign laws ought not to be put upon the footing of private laws; for this plain reason, that every subject can obtain, of right, an exemplification under the great seal, or a sworn copy, from the rolls, of a private act of parliament. But it is not the practice of all foreign governments, to issue exemplifications under the great seal; or to keep their laws in rolls of parchment. It is not the practice, for instance, in Portugal, as is apparent from these laws themselves. The practice appears to be, to register the laws in sundry public offices, and one of them, the comptroller of the exchequer, is required to send copies to the possessions abroad; but it does not appear, that any subject, much less any foreigner, can obtain copies of them by application to any officer whatsoever. The first law is dated at Valladolid, was made by a King of Spain, while Portugal was under the dominion of that kingdom, and was a public law. To require, therefore, an exemplification, or a copy from the rolls of this, would be, as if a party, in these *United States should be called upon to produce an exemplification, under the great seal of England, or a copy from the rolls of parliament, of a public act of parliament, passed in the reign of Queen Elizabeth, in order to prove it a law in this country. A copy from the rolls, therefore, where there are no rolls to copy; an exemplification under the great seal of Portugal, of records in the chancery of Spain, are impossible things; a party can never be required to produce them, and the authentication of these foreign laws, at least, cannot be put on a footing with that of private statutes in Great Britain. [*205

Yet even if the rules relative to private statutes were applicable to the case, we should certainly come within the exceptions which have been allowed in the British courts. The rule itself is founded rather on a quaint and artificial process of reasoning, than upon a fair and liberal principle; and when the object of a private statute is in any degree public, or is of a nature to be notorious, the English judges do relax from the rigid muscle of the common law, and receive the printed statute book as evidence. 2 Bac. Abr. 609 (Gwillim's edition), and the authorities there cited.

If the principles recognised in these authorities are just, they apply eminently to this case. Here is a law, public in its nature, known to all the

world, for these two centuries, and confessedly known to both the parties in the present action. On principle, therefore, a printed copy would be admissible; and if, by the reasoning of the English judges, the printed statute book derives authenticity from the types of the king's printer, surely this copy of a foreign law must be allowed to derive more authenticity from the official certificate of so respectable an officer as a consul.

But with all submission to the opinion of the court, I contend, that under the circumstances of this case, the certificate of the consul was the best evidence, which, in the nature of the thing, could be produced, of these laws. To whom else could the parties have applied? Even in England, a copy of public acts of parliament, from the rolls, would not be furnished to individual applicants. In Portugal, there is every reason to presume, no such *206] copy could be obtained. As it respects the first law, made by *a king of Spain, two hundred years ago, it may be considered as demonstrated. The jealousy of the country with regard to any intercourse between foreigners and their colonies, might, and probably would, have made it dangerous for any foreigner to apply for a copy, under the great seal, or with any extraordinary authentication, of these laws. And after all, when obtained, would the great seal of Portugal, or the signature of the chancellor of Portugal, have been so well known to this court, as the seal and signature of an officer of our own government residing there?

We are asked for an office copy, certified by an officer intrusted *ad hoc*. But why is credit given to office copies? Because the officer is publicly known; because his business to keep the records is equally notorious, and courts of justice will take notice of it. Surely, this can give no credit to the office copy of a Portuguese clerk or secretary. Surely, neither the name, nor office, nor trust, nor duty of a scribe in the chancery at Lisbon, can be so well known to this court, as the consul commissioned by the executive government of our own country.

We are called upon for a sworn copy; but by whom should the affidavit be made? By the consul, said the gentleman. And before whom? This he did not say, but it could be only before a Portuguese magistrate. And who is to authenticate the magistrate's certificate of the oath? The consul. So that, in the end, the authenticity of the whole transaction must depend upon the consul's certificate. The magistrate who administers oaths, is a person of notoriety to his own government; but to make him equally known to the tribunals of foreign nations, requires, in general practice, the attestation of some officer recognised by the law of nations. Such an officer is a consul; and where no public agent of a higher rank from the same nation is resident, I cannot imagine any attestation of the laws of one country, to the courts of another, so well entitled to credit, as that of the consul from the nation to whose courts the attestation is to be made.

I have observed, that by the Portuguese practice, the laws are registered, and not enrolled. There is an express authority that a copy attested by a *207] notary-public, *of an agreement *registered* in Holland, may be given in evidence; and if a public notary's certificate is sufficient to authenticate a registered agreement, I see not why a consul's certificate should not be equally well adapted to authenticate a registered law. 12 Viner 123.

Let me add, that in this country there are peculiar reasons for unscrewing the most rigorous positive rules for the forms of evidence, in these cases

where transactions beyond seas are to be ascertained. The intercourse of European nations with one another is carried on by a continual and almost daily interchange of mails. In six weeks, a communication and its return may be accomplished from one extremity of Europe to the other. Defects of forms in obtaining evidence may be repaired, within the term of a court in session, or at most, from one quarterly term to another. An accident, by the loss of papers transmitted by the post-offices, seldom happens: and happening, can speedily be remedied. The delay and expense to the party is not necessarily of material importance to him, even if he is compelled to renew an experiment to obtain papers properly authenticated. The same inflexibility of rule must, in the nature of things, much more powerfully check and retard the pace of justice in this country. There is no regular and periodical communication of mails, for instance, between the United States and Portugal. Instructions to get evidence can be sent, and answers received, only by the occasional conveyance of commercial navigation. Six months, on an average, is the shortest period of time within which answers to letters can be received. If any of the accidents of the seas happen to the orders transmitted, or to the documents returned, the time requisite to receive them is more than doubled. This court, the court of final resort for most cases in which these rules of evidence can apply to the matter in dispute, sits but once a year. It is remote from many of the cities where causes requiring evidence from abroad must in general arise. If an end of litigation is an object of importance to the public welfare; if it be of the greatest interest to all individual suitors, every inducement, public and private, must combine to prescribe rules of facility, and not rules of rigor for the mere formalities of evidence to be brought from beyond the Atlantic. *If, then, the unbending maxims of the common law really required for [*208 foreign laws a different authentication than the certificate of a consul, there would still be the most cogent reasons for admitting it as sufficient in this country.

2d. The same reasons apply still more forcibly to the sentence of the Governor of Para. How is it possible to require that a suitor should produce an exemplification, a sworn copy, or an office copy, of a document, when he is forbidden, on paln of death and confiscation, to set his foot in the country where alone those modes of authentication could be obtained? The practice of the Portuguese government appears upon the face of these papers. The governor transmits to the secretary of state at Lisbon, the original sentence of condemnation, with the proceedings upon which it was founded. And the secretary of state, who remains in possession of these original papers, furnishes, under his hand and seal, a copy of them to the public agent of the nation to which the condemned vessel and cargo belonged. If this evidence is not of so high a nature as an exemplification under the broad seal, it derives, from the high and important station of the attesting officer, a higher credit than a mere office copy, or even than a copy attested by the affidavit of an obscure individual. *Bingham* v. *Cabot*, 3 Dall. 19–42.

The laws, therefore, and the sentence of the governor are authenticated by the best evidence which, in the nature of things, was attainable by the party; and if this court should be of opinion, that it ought to have been rejected, I should be altogether at a loss to instruct my client, where or how to apply for better, unless the court would themselves condescend to give

their directions; the methods suggested by the plaintiff's counsel being altogether impracticable.

3d. But it is said, the sentence was not of a court of competent jurisdiction upon the subject-matter; and we are called upon to prove the jurisdiction of the court. This objection was made by the gentleman, before he
*209] questioned the evidence as to the laws; and he appealed *to the laws themselves, to support it. He said, the laws themselves speak of judges: that this court will not presume the jurisdiction of the governor of a province; and that it is not like a court of admiralty, which is a court for all the world. But—

1. The laws do, in many places, give, by necessary implication, and in express words, jurisdiction to the governor,

2. The second law does speak of other judges; but they are appointed for the trial of the governors themselves, and of Portuguese subjects offending against the laws, and not of foreigners. Indeed, most of the penalties of the second law are pointed against the subjects of Portugal engaging in, or conniving at, the forbidden traffic, as those of the first law are chiefly directed against the foreigner. And—

3. The comparison between the governor's court and a court of admiralty is inapplicable, for the very reason which the gentleman suggests. A court of admiralty is a court for all nations; and no such court can exist, where all nations but one are excluded upon the most vindictive penalties. The gentleman's arguments against the colonial jurisdiction of a governor might be of weight, addressed to the court of Lisbon, to persuade them to open the ports of their colonies to all the world, and establish courts of admiralty in the ports of Brazil; but they cannot take from the governor the jurisdiction given by the laws, and further recognised by the attestation of the Portuguese secretary of state to the papers transmitted by him.

II. I shall now return to the first point of the gentleman's argument, and considering the evidence as duly authenticated, examine his objections against the opinion of the circuit judge, relative to the construction of the policies. The opinion of the judge was, that the loss came within the exceptions in the policies, and therefore, that the underwriter was not liable.

*210] *The plaintiff, by his counsel, says, that the loss was not within the exceptions, and that, therefore, the underwriter was liable. The question, therefore, is a question of construction upon the true intent and meaning of the exceptions contained in the policies; and it will be proper to state the words in which the exceptions are couched, and then apply to them the facts in evidence, and the proper rules of construction adopted in similar cases.

The words in one policy are, 1. "The insurers are not liable for seizure by the Portuguese for illicit trade." In the other, 2. "*N. B.* The insurers do not take the risk of illicit trade with the Portuguese." In both instances, the words are within the body of the policy, and in their effect are in the nature of a warranty *quoad hoc.* The meaning appears to be exactly the same in both instances, and had the words been "warranted against seizure by the Portuguese, for illicit trade," their force and meaning would have been exactly the same.

If there can be a reasonable doubt as to the construction of these words, we must recur to the ordinary rules of construction, which govern the cases

of warranties and exceptions. There is no rule more universally known, than that, as for what the underwriter takes upon him in the policy, a large and liberal construction must be given to his words, to favor the assured; so, for what is excepted out of the policy, or warranted by the assured, a rigorous and strict construction must be given, to favor the underwriter; upon the reasonable and reciprocal principle, that words introduced for the benefit of either party shall receive the construction most favorable to the interest of that party. Hence, if the meaning of these words were, in either case, equivocal, that construction which would be *most favorable to the underwriter, for whose benefit they were introduced, [*211 ought to prevail.

I apprehend, however, that there will be no occasion for resorting to this rule of construction. To me, the meaning of the parties appears so obvious, in the expressions used, that they are susceptible only of one construction. It must be remembered, that this was professedly a voyage for the purpose of illicit trade. The voyage itself was illegal, according to the Portuguese laws, and known to be so by both parties. The vessel, though bound to two Portuguese ports, was cleared out for the Cape of Good Hope, a deception not intended to be practised on the underwriters, but on the Portuguese, and proving to demonstration, the full knowledge on the part of the plaintiff, that the mere act of going to Brazil, was a violation of the Portuguese trade laws, subjecting his vessel and cargo to seizure and confiscation. Indeed, the gentleman who opened the cause for the plaintiff, in one part of his argument, admitted, and strenuously urged, this knowledge of the illegality of the voyage, and most ingeniously attempted to draw from it a deduction in favor of Mr. Church's claim. I shall notice this hereafter; at present, I shall only remark, that the directly opposite inference, appears to me the true one. It appears by the papers, that the instructions to Mr. Blagge, in Boston, the agent who effected the insurance, were to obtain it at the Marine Insurance Office, in preference. Yet the insurance was not effected there, nor at the other incorporated office, then existing in Boston. They never make insurance of any kind on voyages known to be illegal. Mr. Church's agent, therefore, could obtain insurance only at the private offices of individual underwriters, and that on the express condition, that they would take no risk for illicit trade, nor answer for seizure on that account.

The exception, therefore, is not, and could not be, against illicit trade; for this was intended; and it would have been absurd, to warrant against what was the sole object of the voyage. But this was a risk which the underwriters would not assume; and their language in *the policy is, we will insure you against the usual risks of an ordinary voyage, and [*212 although you clear out for the Cape of Good Hope, you shall go to one or two ports of Brazil; but as your voyage, by the laws of that country, is illegal, we will bear none of the perils which this circumstance may lead you into with the Portuguese. Your profits from the voyage may be enormous; but you may get into trouble, and those chances you must take entirely upon yourself.

The language in the exceptions is conformable to this idea. It refers entirely, not to the act of the party, but to the acts of the Portuguese. It excepts, not against the illicit trade itself, but against seizure on that ac-

count; and against the risk with which it must be attended. So that, if there had been no sentence of condemnation, but merely an order for seizure, on account of illicit trade, by the Governor of Para, the underwriters would have been discharged. There is some analogy between this exception and an ordinary warranty of neutrality; but this is a much stronger case. To falsify a warranty of neutrality, the sentence of a court of admiralty is necessary, because that alone can decide the question of neutral or not. But a warranty against detention for not being neutral, or against capture as enemy's property, would resemble this; and such a warranty would undoubtedly discharge the underwriters, from the moment of the detention or capture on that account, without needing the sentence of a court of admiralty on the question of prize or not.

The gentleman, in the principal part of his argument on this point, urged, however, that the exception was not against the risk of illicit trade, not against seizure for illicit trade, but against illicit trade itself; that is, against the sole object of the voyage. He says the language of the underwriters is, go and get permission to trade, if you can; but take care not to trade, without permission, and he has laid great stress upon the depositions, to show that all nations do trade there, with permission. But the whole weight of this reasoning rests upon the idea, that the permission to trade, by the governor, *would have made the trade legal, and that the plaintiff did not intend to trade illegally. This contradicts the whole tenor of the gentleman's argument, founded upon the known illegality of the trade. It contradicts the words of both exceptions, which explicitly refer, not to the trade, but to its perils, and it contradicts the whole tenor of the testimony, as well as what is known, and what I shall prove, that permission could not make the trade legitimate.

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We are told, however, that the voyage alone could not be within the policy, because it was at and from New York to one or two Portuguese ports in Brazil; and authorities have been cited to show that underwriters are bound to know the course of the trade. The voyage alone was not without the policy, in respect to all the perils undertaken; but it was without the policy, in respect to the perils excluded by the exception. Thus, although the vessel was cleared out for the Cape of Good Hope, and the course from Rio Janeiro to Para was as wide as possible from that of such a destination, yet it was within the policy, and the underwriters could not have discharged themselves, on the ground of deviation. Thus far they were bound to know the course of the trade; and they did know it, for they expressly declared they would take no risk arising from the peculiar character of the trade on which the vessel was bound. As to the authorities which the gentleman has read to show that no nation takes notice of the revenue laws of another, and that underwriters may be bound by insurance on a trade, illicit by the laws of the country where it is carried on, I shall not dispute them; but they seem altogether inapplicable. The difference between the case of *Lever* v. *Fletcher* and ours is, that there, the underwriters had not thrown the risk of illicit trade out of the policy by any express exception: in ours, they have. Had our policies been without this exception, undoubtedly, the underwriters must, and would, have paid for this loss. But can any one imagine that if, in that case of *Lever* v. *Fletcher*, the words of our exception had been in the policy, Lord MANSFIELD would

have told the jury that the underwriter might be liable for a risk of illicit trade, which they had, in so many words, excluded?

*It is said, that all nations do trade, with permission; and to this I have replied, that even such permission does not legitimate the trade. [*214 This is proved by the deposition of one of the plaintiff's witnesses, who testifies, "that when vessels go into Rio Janeiro, belonging to foreigners, they allege a pretence of want of repairs, want of water, or something of that kind, on representing which they obtain leave to sell part of the cargo for repairs, and to remain a certain time, usually twenty days, and then, by making presents to the officers, they are not prevented from selling the whole, but without those presents, they would probably be informed against. Such trade is a prohibited trade, but it is frequently done without a bribe." From this process, which is confirmed by historical testimony, it is apparent, that the Portuguese governors have no authority to license the trade. The same thing is equally clear, from the most ancient of these laws.

The principles of the Spanish and Portuguese governments have always, from the earliest periods of their colonial establishments, been founded on this total exclusion of strangers. In the autumn of the year 1604, a treaty of peace was concluded between Philip III. of Spain, and James I. of England. These two nations had, before that time, been for many years at war, and just then, their political interests attracted them towards a close alliance together. In the negotiations for the peace, this jealousy of the Spaniards against any commercial intercourse between foreigners and their colonies, formed one of the points upon which the greatest difficulties occurred. Spain insisted, not only that British subjects should be excluded from all trade to the Indies, but that James should expressly prohibit them from engaging in such trade, by his royal proclamation. This the British government peremptorily refused. The parties were, for some time, on the point of breaking off, at this very knot; and they finally could meet on no other terms, than those of total silence on the subject. Spain, therefore, as a substitute for negotiation, immediately afterwards issued this decree, which has never since been repealed; and when Portugal, some forty years afterwards, asserted and maintained her independence, she adopted, and has ever since practised on the same law. But in times when the mother country has been at war, and unable to superintend, with the usual keenness of observation, *the conduct of the colonial governors; when she is unable, from the [*215 obstructions in her navigation, to furnish the colonies with the supplies they are accustomed to receive from her, in peaceable times; when the demand for these supplies swells the prices of articles to exorbitant rates, and the governors are at once assailed by the impulse of opportunity, of necessity and of temptation, they have always occasionally yielded to the force of those inducements, and in various modes, have sacrificed the severity of official duty to the sweets of profitable corruption. They shut their eyes, and open their palms. They connive at the trade, and secure to themselves a large portion of its advantages. But the modes of transacting this business are themselves the most decisive proofs of its illegality. To show this, and as a comment upon the depositions which have been read in this case, I must ask permission to read a short passage from Raynal's Hist. of the Indies, vol. 6, p. 326.

"The illicit trade of Jamaica was carried on in a very simple manner.

An English vessel pretended to be in want of water, wood or provisions; that her mast was broken, or that she had sprung a leak, which could not be discovered or stopped, without unloading. The governor permitted the ship to come into the harbor to refit. But for form's sake, and to exculpate himself to his court, he ordered a seal to be affixed to the door of the warehouse where the goods were deposited; while another door was left unsealed, through which the merchandise that was exchanged in this trade was carried in and out by stealth. When the whole transaction was ended, the stranger, who was always in want of money, requested that he might be permitted to sell as much as would pay his charges, and it would have been too cruel, to refuse this permission. It was necessary, that the governor, or his agents, might safely dispose in public of what they had previously bought in secret; as it would always be taken for granted, that what they sold could be no other than the goods that were allowed to be bought. In this manner, were the greatest cargoes disposed of."

Thus we see, that the modes of procedure in these cases are uniform, and hence, we may duly estimate the real secret both of Mr. Church's and Captain Barker's want of *water and of wood. The fuel, of which they stood in need, was the produce, not of the forests, but of the mines. The thirst they suffered, was the thirst of gold: and as the clown in the play says, that Carolus must be the Latin for one and twenty shillings, so here, as from time immemorial, want of wood and water, on the coast of Brazil, is the Portuguese for want of money.

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The fact, therefore, that foreigners do sometimes trade in Brazil, can be of little avail to the plaintiff's cause. Truly, they do trade; at great hazard, and sometimes, with great success. But as Mr. Church took the chance of this success upon himself, so he must be content to bear the consequences of its hazards, it being expressly so stipulated in the contract with the underwriters.

His counsel, however, has endeavored to assist him with another distinction between trade and an attempt to trade. "There is," says he, "no exception in the policies against an attempt to trade;" now, here, was no actual trading; for the seizure and confiscation took place before that could be accomplished. If this be a solid distinction, and can bear at all upon this cause, it is very certain, that the words of the exceptions in both the policies were very insignificant and immaterial, both to Mr. Church and to the underwriters. If the perils which they so cautiously excluded from the policy, were only such as could arise from actual trading, after bargain and sale of the cargo, the exceptions themselves were not worth the ink with which they were written. The only risk of the trade, the only peril of seizure for the trade, to which Mr. Church could possibly be exposed, was, before he could effect his sales. Could he once have got over the danger of going to the port, and of landing his goods, there was no danger of any subsequent seizure for illicit trade. To say, therefore, that an attempt to trade, is not within the exceptions, is to say, that the exceptions meant nothing at all; that they were precautions against misfortunes which could never happen; anxious guards against impossible contingencies; it is to remove the railing of security from the borders of the precipice which needs it, to the middle of a plain, where it can have no use. Strange, indeed, must be the construction which supposes parties so keen to pene-

trate, and *fence themselves against a peril which could not befall, and so blind to the foresight of the very thing that did happen, and was most likely to happen. It is the attempt to trade which constitutes the offence punishable with seizure and confiscation. When the trade is once effected, the danger is removed; the governor's connivance is secured; the laws are soundly slumbering, under the specific opiate of corruption, and the governor, instead of seizing the property, is satisfied with partaking of its proceeds.

It is, then, manifest, that the voyage itself, especially, when accompanied with the actual landing of persons from the vessel, constitutes the illicit trade. So it is there understood, and so it is understood by the trade laws of our own, and of all other countries. The gentleman has taken the definition of smuggling from the English law-books, and has argued, as if all illicit trade were synonymous with it. Smuggling is, indeed, said to be the landing or running of goods, contrary to law; but in the British revenue laws, and our own, there are many acts of illicit trade which subject to seizure and confiscation, without the landing of the goods. (1 U. S. Stat. 694, § 84; Ibid. 701, § 103.)

The gentleman, to illustrate his distinction between an attempt to trade, and actual trade, compared it to the case of deviation, and has read an authority (Park 359, 361), to show that an intended deviation, never carried into effect, does not vacate a policy, though an actual deviation does. But deviation consists of a single fact, and the intent can never be taken for the thing. Trading consists of a great variety of acts, each of which constitutes part of the thing. Navigation is trade; fishery is trade; bargain and sale of goods is trade, and the attempt to accomplish this, in the revenue and colonial laws of all countries, is equivalent to the last act of bargain and sale. The intent to deviate is so totally distinct from its accomplishment, that there can be no such thing as an attempt at deviation. As to trade, carrying goods from one place to another, is as much an act of trade as selling the goods carried. We say of a ship that she is a London or an Indian trader. An important branch of our business is the carrying trade. The word itself, like many others, *has various meanings, [*218
and must be understood in the sense dictated by the subject-matter to which it relates. Thus, by the Portuguese laws, going to Brazil for the purpose of trade, is itself illicit trade; as by our collection laws, a false entry of goods for the benefit of a drawback, or an importation of beer or spirits in casks or vessels different from those prescribed by law, would be acts of illicit trade, in our own country.

The second ground, upon which the gentleman alleges that the loss was within the policy is, that this was not a legal seizure for illicit trade; but a mere marine trespass; a violent, outrageous trespass committed by the governor. This, he says, appears, 1. From the testimony; and 2. Upon the face of the sentence.

If the meaning of the exceptions be such as I have contended, and as their express words import, this question might fairly be laid out of the case. If the exceptions were meant against seizure, and the risk of illicit trade, the only fact the underwriters can be required to establish is, that the property was seized for illicit trade. Whether the seizure was legal or not, is not for them to prove, as Mr. Church reserved that peril for himself. Let us, however, examine whether, either from the testimony or from the sen-

tence, it was so outrageous a proceeding on the part of the Governor of Para. That it was, on the contrary, conformable both to the law of nations and to the Portuguese laws, will, I think, not be very difficult to prove.

It is said, that the testimony proves that the vessel was at anchor, five leagues from the shore. That by the law of nations, cannon shot is the boundary of territorial jurisdiction. And therefore, that the Governor of Para had no authority to seize and condemn the vessel and cargo.

1st. As to the fact. It will be found, upon examining and comparing the depositions, that they were manifestly drawn up with a view to taking this ground. The distance and the bearings from Cape Baxos, the extreme south and east point of land at which the Bay of Para pours into the Atlantic, is laid down in all the depositions with most minute attention, and
*219] three depositions repeat *not only the distance at which the vessel lay from that Cape, but also the exact distance northward of it, by a meridian line drawn due east and west. Captain Shaler, however, only undertakes to say the distance from Cape Baxos was four or five leagues, and he candidly confesses that, at the time, both he and Captain Barker did call the place where they were anchored, the Bay of Para. Now, it is very apparent from their geographical bearing, so precisely laid down, which was west and by north, about four or five leagues distant, and only two miles north, that they called it by its right name, or that they were at least within a bay. Thus, then, stands the fact. They were about four or five leagues from Cape Baxos, and within the bay.

2d. As to the law. The gentleman read a passage from Vattel, to show that cannon shot from the coast is, by the law of nations, the utmost bound of territorial jurisdiction. Lib. 1, § 289. This passage is evidently restricted to the extent to which the rights of a neutral territory extend in time of war. The rule is apparently laid down for the sake of the inference from it, that a belligerent vessel cannot be taken under the cannon of a neutral fortress. It is a very indefinite rule, indeed, even for the purpose to which it extends, for it makes the extent of a nation's territory depend upon the weight of metal, or projectile force of her cannon. It is a right which must resolve itself into power; and comes to this, that territory extends so far as it can be made to be respected.

But this principle does not apply to the right of a nation to cause her revenue and colonial laws to be respected. Here, all nations do assume, at least, a greater extent than cannon-shot; and other passages from Vattel show the distinctions which are acknowledged on this point. Lib. 1, § 287, 288. It will also be remarked, that the territorial rights of a nation are extended in the utmost latitude to bays. Thus, then, Mr. Church's vessel was completely within the territorial jurisdiction of Brazil.

*220] But the gentleman read an authority from 4 Bac. Abr. *543, upon smuggling. "The British revenue laws," says he, "go as far as the law of nations will permit, and they extend the right of boarding smugglers only to two leagues." Instead of appealing to Bacon's Abridgment, and British laws, I prefer looking into our own statute book, and take there the measure which our own government has asserted for the extent of our jurisdiction. (1 U. S. Stat. 646, § 25–27; Ibid. 700, § 99.) Here we see the principles are assumed of exercising this jurisdiction four leagues from the coast, and at indefinite distances, within bays. All this is perfectly conform-

able to the law of nations. But it proves that the Aurora, when at anchor within the Bay of Para, and four or five leagues from Cape Baxos, was completely within the territorial jurisdiction of the governor of Para.

I have here said nothing of Mr. Church's going on shore for purposes of trade, nor of the imprudent conduct of the people with whom he was associated, which probably occasioned the exercise of the governor's authority. Either of these facts, however, would have warranted the governor in seizing the vessels, even if they had not been within his territorial jurisdiction. Mr. Church's going on shore was, under these laws, an act of hostility, which, undoubtedly, gave the governor a right to seize the vessel in which he came, as well as his person. But a much more offensive act of hostility was committed by the vessel in company with which Mr. Church's vessel was. For it appears from the testimony, that they had forced a Portuguese schooner, in the bay, to board them, by firing two guns successively to bring her to; and had detained the master of that schooner, on board their own vessel, because they wanted a pilot. The people in the Portuguese schooner were excessively alarmed; nor is it surprising they should be. They immediately went into port, and doubtless, complained of the usage they had received. Now, I ask, what sort of laws they would be, which, under such circumstances, should deny to the government of a country, the right to touch a vessel thus conducting, because she is anchored *four or five [*221
leagues distant from the shore. I cannot dwell upon this argument. The Governor of Para knew of no such laws. The next day, he sent three armed gun-boats, which took possession of both the vessels. And far from seeing anything outrageous in this procedure, I think the governor would have been guilty of a high breach of duty had he done otherwise.

But Mr. Church really wanted water, and had a right to go on shore to procure it! After the deposition of Van Voorhies, with the commentary of Raynal, it is scarcely possible to hear this allegation, without a smile. It is, however, very conclusively answered by the governor's sentence, and I shall notice it, in examining the objections to that. The court will need no argument to show that, if Mr. Church wanted water, it was his own fault, and in consequence of his own purpose. But further, the testimony is express, that he went for trade as well as for water, and this alone made him liable to the loss of his vessel and cargo.

But the testimony shows the seizure was on account of their being French spies! When these vessels and their force was known, there could be very little occasion to fear them as enemies. But I have no doubt, questions of the kind were put to the witnesses, as they state in their depositions; and the reason for those questions is explained by that imprudent firing and forcing of the Portuguese schooner to board them, which I have before noticed. It was very natural, that the people of the Portuguese schooner should be alarmed; and on going ashore, that they should communicate their alarms, which would, of course, be immediately spread, with exaggeration. Such acts of direct and violent hostility, within the bay, might, and in all probability would, be imputed to French cruisers, and not to American traders; to a nation with which Portugal was at war, and not to a people with whom she was at peace. Hence, suspicions, probably, at first, existed which led to the examination of the witnesses on those questions. But when the truth was discovered, the governor gives the real reasons for his decision.

*Thus much, to justify the governor's sentence, from the testimony; upon which I shall conclude with one more observation. It is extremely probable, that this firing of guns, and the violence done to a Portuguese schooner, was the foundation of all the severity used towards Mr. Church, his companions and their property. When he landed in the evening, most probably, the people of the Portuguese schooner had got in before him. They had, doubtless, entered their complaint, and represented the detention of their captain on board the American vessel. The offence was irritating to the highest degree: it must, in any civilized country, have alarmed the sympathies, and roused the resentments, of the people. It was one of those cases which call in a voice of thunder upon the ruling power of a country to exercise, with firmness and rigor, all its force for the protection of the laws, and the personal security of the subject. Let us, but for a moment, suppose one of our own coasting vessels to go into a harbor of Chesapeake or Delaware Bay, with intelligence that she had been forcibly brought to, and her master taken from her, by a vessel at anchor within four or five leagues of the shore. Is there a governor of one of these states, who, upon such a representation made to him, would not feel it his duty to use the strongest arm of the law to protect his fellow-citizens, and to punish the outrage? Surely not. He would immediately send an armed force and take possession of the vessel; and if, upon the examination, it should appear that the vessel itself came for the purpose of prohibited trade, in the name of common sense, and common justice, what indulgence could the supercargo or crew of such a vessel expect at the hands of the public officers of the country? If

> In the corrupted currents of this world,
> Offence's *gilded* hand can shove by justice,

she must, in truth, gild her hand, and not arm it with steel. Had the Governor of Para been ever so much disposed to grant Mr. Church the permission to trade, he could not have indulged his inclination, after what had taken place.

*223] The sentence itself seems also to carry its own justification *with it. The order and sentence condemn the property, on account of their having put into a port of the establishment; and of their having incurred the transgression of the decree of the 18th March 1605. When we apply the facts in evidence to the law of 18th March 1605, we find that Mr. Church and his property had actually incurred these penalties. They certainly had put into a port of Brazil; and for trading purposes. They had even traded at Rio Janeiro; and although that was to a small amount, and with permission, the Governor of Para, comparing their traffic there, under pretence of distress, with their conduct afterwards, in coming within his own province, might justly recur to that former act, as connected with the present one, in constituting the offence against the law.

But the sentence goes further. It states the reasons upon which it is founded. It recites the allegations of the master in his defence, and assigns the reasons of the court for disbelieving them. It notices in a special manner the pretence of wanting water, and very conclusively disproves it.

1. Because they were only 34 days from Rio Janeiro; and had suffered no want of water, in a voyage of double that time from New York to that place. The reason is certainly logical in substance, if not in form. If they

were supplied with water for more than sixty days from New York, why were they not supplied for an equal length of time from Rio Janeiro? No accident being even pretended for the failure of their supply.

2. Because they had neglected to supply themselves, as they might have done, at various places along the coast.

3. Because they had, at their first landing, alleged a wish to traffic and not to obtain water.

4. Because they had alleged that the vessel had sprung a leak, which, upon regular examination of the ship, had proved not to be the case.

*5. Because they were steering their course wide from the pre- [*224
tended destination of their voyage, and had neglected to sail for the trade-winds, which they would have wanted for that destination.

6. Because they must be considered as accessary to the hostile acts of the vessel with which they were in company; against which vessel the proofs were decisive. And—

7. Because these false allegations were themselves a proof that the person who made them was not ignorant of the laws he had violated.

Far from considering this sentence, therefore, as an outrageous act, I cannot avoid expressing the opinion, that it indicates a sound judgment, a sincere respect for the rights of humanity and of innocence, and a punctilious adherence to the law of nations, and the duties of hospitality. Certain it is, that the governor's reasoning led him to a conclusion which was just in fact; for Captain Shaler tells us that, on his examination, he denied that trade was intended, and he also tells us, that trade was intended. The governor, therefore, had not learned the truth from him; but he had discovered it, by just deductions from fair premises, though in direct opposition to Shaler's declaration.

The regard for the rights of humanity and the duties of hospitality is apparent, from the anxious care with which the governor details his reasons for believing that the want of water was falsely alleged; mere pretence; mere affectation; for this solicitude to disprove the fact, is the strongest implication that had he believed the want of water real, and unintentional, he would not have seized the vessel. The variance between the professed destination of the vessel and the course of her navigation, would be strong presumptive proof, in any judicial court. The company kept by the two vessels together, and the landing of the two parties from them, in the same boat, and at one and the same time, would, upon the principles of the common law itself, have made each party a principal to the hostile and illegal acts of the other. And what reasoning can be better founded *than that the allegation of [*225
falsehood proves the knowledge, the consciousness of illegal conduct in the person guilty of it. The order of seizure, therefore, contains a charge of unlawful acts, knowing them to be unlawful, and even in our own country, where the freedom of our citizens requires that every accusation should be direct, precise and pointed, I know of no one essential ingredient of indictment, which is not contained in this order of seizure by the governor of Para. The sentence of condemnation is founded upon it, and adopts its conclusions. It has, therefore, all the material characteristics of a legal condemnation for illicit trade; and must be a decisive bar against Mr. Church's claim of indemnity upon these policies.

I have now gone through the examination of the grounds upon which the

exceptions of the plaintiff against the judgment of the circuit court were attempted to be supported by his counsel. It has been my endeavor to show that the evidence was properly admitted, and that its operation was justly held conclusive against his demand in this action. I shall not detain the court with any further argument, but leave the remainder of my client's defence to the management of abler hands.

Mason, on the same side.—It is objected, that this is the sentence of the governor, and it does not appear that he had admiralty jurisdiction. But the record produced does not state the condemnation of the vessel to have been made by the governor, but by a court. The governor only ordered the vessel to be seized, the master and crew imprisoned, and their papers to be sent to the house of justice. But the condemnation begins with these words: "It is hereby determined by the court," &c., and goes on, "therefore, *they* declared him to have incurred," &c.

It is admitted, that the trade is illegal. A permission obtained by bribery and corruption, cannot make it lawful. But it is said, that two things must concur to bring the case within the exception to the policy; an act of trading, and a seizure for that cause. *Why should the underwriters in- *226]
sure against the risk of attempting to trade, and yet refuse to insure against a seizure for actual trade, when the whole risk of the insured was in the attempt? For after the water and the wood are gone, and the vessel, in due form, sprung a leak; when the goods are landed, and one of the doors of the warehouse sealed, and the other left open, all risk is past; for although the trade does not become lawful, yet a security is gained against prosecution.

It is objected, that the Portuguese had no right, by the law of nations, to legislate respecting vessels in the situation in which this vessel was seized. But every nation has a right to appropriate to her own use a portion of the sea about her shores; and to legislate respecting vessels coming within that line. A vessel, coming within the line, contrary to the municipal laws of the country, may lawfully be seized. Vattel, lib. 1, § 287.

The insurers did not take the risk of illicit trade; that is, of the unlawfulness of the trade. The word trade cannot be confined to the act of landing, or of selling the goods, but must mean the general course of the trade. And if any risk attended the attempt to land, or sell the goods, it was certainly one of the risks of the trade, and clearly within the letter of the exception. But if the evidence respecting the laws of Portugal, and the sentence, ought to have been rejected, still enough remains, to show that the loss is within the exception. For it is admitted, that the trade which the voyage was intended to effect, was illicit; the testimony shows that the vessel was seized by the Portuguese, and the jury had a right to infer that the seizure was on account of such illicit trade.

Martin, in reply, made two points.—1st. That the evidence was not admissible. 2d. That if admissible, it did not warrant the instruction given by the judge to the jury.

1st. As to the admissibility of the evidence. *Foreign laws must *227]
be proved as private acts of parliament. Public laws are permitted to be read from the statute book, not because that is evidence, for no evidence is necessary, as the judges are presumed to know the law, but the

statute book is permitted to be read, to refresh their memory. Our courts are not bound to notice the laws of Portugal; they must, therefore, be proved by evidence. And in this, as in every other case, the best evidence which the nature of the case will admit, must be produced; that is, the evidence produced must be such as does not show better evidence in the power of the party producing it.

The customs and usages of a foreign country may be proved by testimony of persons acquainted with them, by a public history, or by cases decided. But an edict, registered in any particular office, must be proved by a copy, authenticated in one of three modes. 1st. By an exemplification under the national seal; and this is admitted as evidence, because one nation is presumed to know the public seal of another. Peake's L. of Ev. 48. 2d. Under the seal of the court, which seal must be proved, if it be of a municipal court; or 3d, By a sworn copy collated by a witness. An exception has been allowed, as to the seal of courts of admiralty, in cases under the law of nations, because they are courts of the whole civilized world, and every person interested is a party. *The Maria*, 1 Rob. 296.

A copy certified by a person authorized *ad hoc*, is good in his own, but not in a foreign country, without evidence of his being such an officer.

Why is not a copy of the law produced, certified under the great seal of Portugal? In excuse for not producing such a copy, they ought at least to how that they have demanded it, and that it has been refused. They might have applied to the officer who kept the *original, for a certified copy. [*228
If they have done so, and have been refused, where is their evidence of that fact? They might have got a witness to compare a copy with the original, and proved it. The laws themselves, if authentic, show that there is a place where they are registered, and where the defendant might have applied.

The certificate of the consul is no authentication. He was not an officer authorized by the laws of this country to certify that the magistrate of the foreign country, before whom an oath has been taken, was a magistrate authorized to administer such an oath. He was not authorized *ad hoc;* and his certificate is not better than that of any other person. England, a great commercial nation, has many consuls in foreign countries, yet there is no case decided in England, in which the certificate of one of her consuls has been held to be evidence in the courts of common law.

As to the case of the notarial certificate, cited from 12 Viner, a notary-public is an officer of the law of nations. In the case cited, he was an officer of Holland, not of England; and the reason why the court allowed his certificate to be evidence, seems to have been, that the opposite party had also taken a like copy from the same notary.

The common mode of obtaining evidence was open for the defendant, and he ought to have availed himself of it, by taking a commission to Portugal, to examine witnesses there.

The case of *Bingham* v. *Cabot*, from 3 Dall. 19, is not in point. The question was not made, as to the validity of the certificate of the register of the court of admiralty, respecting the order given by the Marquis de Bouille, nor was the decision of the court given upon that point.

There is no proof that the law of 1605 was ever *adopted by Portugal; but if it was, yet that is not the law upon which the governor [*229

proceeded, for he himself says he proceeded upon the law of 15th of October 1715.

The sentence of the governor was not a sentence of a court of admiralty. It was not conclusive. The decrees of courts of admiralty are only conclusive when deciding upon questions of the law of nations; Peake's L. Ev. 47. When deciding upon other questions, they are to be considered as mere municipal courts. This was not a question of the law of nations, but of their own municipal law. Even if it was a court of admiralty, deciding upon a question of the law of nations, no evidence could be admitted of its decree, but a copy under the seal of the court. But the judgment of a municipal court, upon a municipal law, must be proved like any other fact. Even the seal of the court would not be sufficient, without other evidence, that there was such a court, having such a seal.

Another objection to the evidence is, that the proceedings at large ought to have been set forth, not the sentence alone; and even the sentence is not complete, for it refers to other pages of the proceedings which are not produced. Peake's L. Ev. 26; Loft's Gilbert 24, 25; Bull. N. P. 228.

It has been said, that in this country the rule of evidence ought to be relaxed, on account of the distance from Europe, and the difficulties in procuring testimony. This might be a good argument before a legislature, but it cannot alter the law in this court. The rules of evidence already established ought to be strictly guarded. To break in upon them, would be to strike out every star and every constellation which can guide us through the tempestuous sea of legal litigation.

There is no evidence that the original proceedings were sent to the sec-
*230] retary of state in Portugal. There is no *certificate of the clerk of any court. If it is a copy of the original proceedings, they appear to have all taken place on the same day. The judgment is only an interlocutory decree, and is not signed by any body. The officer who certifies that it is a true copy, resided at Lisbon, and not at Para. There is no evidence that he was authorized *ad hoc*, and he has affixed only his private seal.

In order to make a legal sentence, there must be legal proceedings, in a legitimate court, armed with competent authority upon the subject-matter, and upon the parties concerned. *The Henrick and Maria*, 4 Rob. 55. The defendant must show the law which gives the court of Para jurisdiction, and that the authority has been pursued. The authority of the court does not appear; and it is contrary to the natural principles of justice, to condemn the vessel, without giving the owner an opportunity to be heard. In this case, there was no monition issued. No forms were pursued, either against the vessel or the owner, and the evidence shows that he had no notice. The sentence, if it proves anything, does not show that the condemnation was for illicit trade, or even for an attempt to trade; and it cannot be evidence of any collateral fact.

As to the pretended act of hostility, it was by another person, not the owner or master of this vessel. It was in its nature equivocal, and is explained away by the testimony.

2d. The instruction of the judge to the jury ought not to have gone further than that, if they were of opinion, that the vessel was seized for illicit trade, the insurers were discharged; but if for any other cause, they were liable. If any ground of condemnation can be gathered from the sen-

tence, it is that of being an enemy, and not illicit trade. Although the trade is generally prohibited, yet it is a well known fact, that foreign ships do trade there, and have done so for a century. It is not illegal, to insure smuggling voyages against the risk of seizure by a foreign government. There is no instance of a vessel being seized for going along shore, or into the ports of the colonies of *Spain or Portugal for the purpose of trading, if they could gain permission, provided they did not actually trade without permission. There must be some act done, more than going into port. This must be the construction of the law. Such is the construction given to the English law, which prohibits foreign vessels from going into their ports. They are not liable to seizure, unless they go *malâ fide*. Reeves' Law of Shipping, 203. [*231

The premium is twenty per cent., which implies extraordinary risks. In the case of *Graves* v. *Boston Marine Insurance Company*,[1] now pending in this court, the premium was only twenty per cent., and yet no such exception was made.

The exception is not a warranty. Policies are to be construed in favor of the assured. The exception is the language of the insurers, and to be taken most strongly against them. It means only legal seizures. A warranty against all claims, means all legal claims. The general clause of the policy is against all seizures; the exception, therefore, must mean all legal seizures.

No act of trading is proved. If the intention makes the offence, a Portuguese vessel might have seized the Aurora, on the day after her leaving the port of New York, and carried her to Portugal and condemned her. If, then, her sailing with the intention to trade was not an act of illicit trade, something further was necessary to constitute the offence. The policy does not except the risk of seizure for suspicion of illicit trade. It is a general rule, that words are to be construed most strongly against the person using them, and who ought to have explained himself.

If the evidence respecting the laws and the sentence be rejected, the remaining evidence will only show that a seizure was made, but not that it was lawful; and for all unlawful seizures, the underwriters are liable. Legal seizures only are excepted. To make it a lawful seizure, it must be for some act done; not merely upon suspicion. The underwriters meant that the plaintiff should go and *try to get permission to trade; but if he attempted to trade, without leave, they would not take the risk. [*232

March 5th, 1804. MARSHALL, Ch. J., delivered the opinion of the court.—If, in this case, the court had been of opinion, that the circuit court had erred in its construction of the policies, which constitute the ground of action; that is, if we had conceived, that the defence set up would have been insufficient, admitting it to have been clearly made out in point of fact, we should have deemed it right to have declared that opinion, although the case might have gone off on other points; because it is desirable to terminate every cause, upon its real merits, if those merits are fairly before the court, and to put an end to litigation, where it is in the power of the court to do so. But no error is perceived in the opinion given on the construction of the

[1] Reported, *post*, p. 419.

policies. If the proof is sufficient to show that the loss of the vessel and cargo, was occasioned by attempting an illicit trade with the Portuguese; that an offence was actually committed against the laws of that nation, and that they were condemned by the government on that account, the case comes fairly within the exception of the policies, and the risk was one not intended to be insured against.

The words of the exception in the first policy are, "the insurers are not liable for seizure by the Portuguese for illicit trade." In the second policy the words are, "the insurers do not take the risk of illicit trade with the Portuguese." The counsel on both sides insist that these words ought to receive the same construction, and that each exception is substantially the same. The court is of the same opinion. The words themselves are not essentially variant from each other, and no reason is perceived, for supposing any intention in the contracting parties to vary the risk.

For the plaintiff, it is contended, that the terms used require an actual traffic between the vessel and inhabitants, *and a seizure in consequence of that traffic, or at least, that the vessel should have been brought into port, in order to constitute a case which comes within the exception of the policy. But such does not seem to be the necessary import of the words. The more enlarged and liberal construction given to them by the defendants, is certainly warranted by common usage; and wherever words admit of a more extensive or more restricted signification, they must be taken in that sense which is required by the subject-matter, and which will best effectuate what it is reasonable to suppose was the real intention of the parties.

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In this case, the unlawfulness of the voyage was perfectly understood by both parties. That the crown of Portugal excluded, with the most jealous watchfulness, the commercial intercourse of foreigners with their colonies, was, probably, a fact of as much notoriety as that foreigners had devised means to elude this watchfulness, and to carry on a gainful but very hazardous trade with those colonies. If the attempt should succeed, it would be very profitable, but the risk attending it was necessarily great. It was this risk which the underwriters, on a fair construction of their words, did not mean to take upon themselves. "They are not liable," they say, "for seizure by the Portuguese for illicit trade." "They do not take the risk of illicit trade with the Portuguese;" now, this illicit trade was the sole and avowed object of the voyage, and the vessel was engaged in it, from the time of her leaving the port of New York. The risk of this illicit trade is separated from the various other perils to which vessels are exposed at sea, and excluded from the policy. Whenever the risk commences, the exception commences also, for it is apparent that the underwriters meant to take upon themselves no portion of that hazard which was occasioned by the unlawfulness of the voyage.

If it could have been presumed by the parties to this contract, that the laws of Portugal, prohibiting commercial intercourse between their colonies and foreign merchants, permitted vessels to enter their ports, or to hover off their coasts for the purposes of trade, with impunity, and only subjected them to seizure and condemnation *after the very act had been committed, or if such are really their laws, then, indeed, the exception might reasonably be supposed to have been intended to be as limited in its

*234]

construction, as is contended for by the plaintiff. If the danger did not commence, until the vessel was in port, or until the act of bargain and sale, without a permit from the governor, had been committed, then it would be reasonable to consider the exception as only contemplating that event. But this presumption is too extravagant to have been made. If, indeed, the fact itself should be so, then there is an end of presumption, and the contract will be expounded by the law? but as a general principle, the nation which prohibits commercial intercourse with its colonies, must be supposed to adopt measures to make that prohibition effectual. They must, therefore, be supposed to seize vessels coming into their harbors, or hovering on their coasts, in a condition to trade, and to be afterwards governed in their proceedings with respect to those vessels, by the circumstances which shall appear in evidence. That the officers of that nation are induced occasionally to dispense with their laws, does not alter them, or legalize the trade they prohibit. As they may be executed, at the will of the governor, there is always danger that they will be executed, and that danger the insurers have not chosen to take upon themselves.

That the law of nations prohibits the exercise of any act of authority over a vessel in the situation of the Aurora, and that this seizure is, on that account, a mere marine trespass, not within the exception, cannot be admitted. To reason from the extent of protection a nation will afford to foreigners, to the extent of the means it may use for its own security, does not seem to be perfectly correct. It is opposed by principles which are universally acknowledged. The authority of a nation, within its own territory, is absolute and exclusive. The seizure of a vessel, within the range of its cannon, by a foreign force, is an invasion of that territory, and is a hostile act which it is its duty to repel. But its power to secure itself from injury may certainly be exercised beyond the limits of its territory. Upon this principle, the right of a belligerent to search a neutral vessel on the high seas, for contraband of war, is universally *admitted, because the belligerent has a right to prevent the injury done to himself, by the [*235 assistance intended for his enemy: so too, a nation has a right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right, is an injury to itself, which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same, at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.

In different seas, and on different coasts, a wider or more contracted range, in which to exercise the vigilance of the government, will be assented to. Thus, in the channel, where a very great part of the commerce to and from all the north of Europe, passes through a very narrow sea, the seizure of vessels on suspicion of attempting an illicit trade, must necessarily be restricted to very narrow limits; but on the coast of South America, seldom frequented by vessels, but for the purpose of illicit trade, the vigilance of the government may be extended somewhat farther; and foreign nations submit to such regulations as are reasonable in themselves, and are really

necessary to secure that monopoly of colonial commerce, which is claimed by all nations holding distant possessions.

If this right be extended too far, the exercise of it will be resisted. It has occasioned long and frequent contests, which have sometimes ended in open war. The English, it will be well recollected, complained of the right claimed by Spain to search their vessels on the high seas, which was carried so far, that the *guarda costas* of that nation seized vessels not in the neighborhood of their coasts. This practice was the subject of long and fruitless negotiations, and at length, of open war. The right of the Spaniards was supposed to be exercised unreasonably and vexatiously, but it never was contended, that it could only be exercised within the range of the cannon from their batteries. Indeed, the *right given to our own revenue
*236] cutters, to visit vessels four leagues from our coast, is a declaration that, in the opinion of the American government, no such principle as that contended for has a real existence. Nothing, then, is to be drawn from the laws or usages of nations, which gives to this part of the contract before the court, the very limited construction which the plaintiff insists on, or which proves that the seizure of the Aurora, by the Portuguese governor, was an act of lawless violence.

The argument that such act would be within the policy, and not within the exception, is admitted to be well founded. That the exclusion from the insurance of "the risk of illicit trade with the Portuguese," is an exclusion only of that risk, to which such trade is by law exposed, will be readily conceded. It is unquestionably limited and restrained by the terms "illicit trade." No seizure, not justifiable under the laws and regulations established by the crown of Portugal, for the restriction 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.

To prove that the Aurora, and her cargo, was sequestered at Para, in conformity with the laws of Portugal, two edicts and the judgment of sequestration have been produced by the defendants in the circuit court. These documents were objected to, on the principle, that they were not properly authenticated, but the objection was overruled, and the judges permitted them to go to the jury. The edicts of the crown are certified by the American consul at Lisbon, to be copies from the original law of the realm, and this certificate is granted under his official seal.

Foreign laws are well understood to be facts which must, like other facts, be proved to exist, before they can be received in a court of justice. The principle *that the best testimony shall be required which the
*237] nature of the thing admits of; or, in other words, that no testimony shall be received, which presupposes better testimony attainable by the party who offers it, applies to foreign laws, as it does to all other facts. The sanction of an oath is required for their establishment, unless they can be verified by some other such high authority that the law respects it not less than the oath of an individual.

In this case, the edicts produced are not verified by an oath. The consul has not sworn; he has only certified that they are truly copied from the originals. To give to this certificate the force of testimony, it will be necessary to show, that this is one of those consular functions to which, to use its own language, the laws of this country attach full faith and credit. Con-

suls, it is said, are officers known to the law of nations, and are intrusted with high powers. This is very true, but they do not appear to be intrusted with the power of authenticating the laws of foreign nations. They are not the keepers of those laws : they can grant no official copies of them. There appears no reason for assigning to their certificate respecting a foreign law any higher or different degree of credit, than would be assigned to their certificates of any other fact.

It is very truly stated, that to require, respecting laws or other transactions in foreign countries, that species of testimony which their institutions and usages do not admit of, would be unjust and unreasonable. The court will never require such testimony. In this, as in all other cases, no testimony will be required, which is shown to be unattainable. But no civilized nation will be presumed to refuse those acts for authenticating instruments which are usual, and which are deemed necessary for the purposes of justice. It cannot be presumed, that an application to authenticate an edict by the seal of the nation, would be rejected, unless the fact should appear to the court. Nor can it be presumed, that any difficulty exists in obtaining a copy. Indeed, in this very case, the very testimony offered would contradict such a presumption. The paper offered to the *court is certified [*238 to be a copy, compared with the original. It is impossible to suppose, that this copy might not have been authenticated by the oath of the consul, as well as by his certificate. It is asked, in what manner this oath should itself have been authenticated, and it is supposed, that the consular seal must ultimately have been resorted to for this purpose. But no such necessity exists. Commissions are always granted for taking testimony abroad, and the commissioners have authority to administer oaths, and to certify the depositions by them taken. The edicts of Portugal, then, not having been proved, ought not to have been laid before the jury.

The paper offered as a true copy from the original proceedings against the Aurora, is certified, under the seal of his arms, by D. Jono de Almeida de Mello de Castro, who states himself to be the secretary of state for foreign affairs, and the consul certifies the English copy which accompanies it, to be a true translation of the Portuguese original.

Foreign judgments are authenticated, 1. By an exemplification under the great seal : 2. By a copy proved to be a true copy : 3. By the certificate of an officer authorized by law, which certificate must itself be properly authenticated. These are the usual, and appear to be the most proper, if not the only, modes of verifying foreign judgments. If they be all beyond the reach of the party, other testimony, inferior in its nature, might be received. But it does not appear that there was any insuperable impediment to the use of either of these modes, and the court cannot presume such impediment to have existed. Nor is the certificate which has been obtained, an admissible substitute for either of them.

If it be true, that the decrees of the colonies are transmitted *to [*239 the seat of government, and registered in the department of state, a certificate of that fact, under the great seal, with a copy of the decree, authenticated in the same manner, would be sufficient *primâ facie* evidence of the verity of what was so certified ; but the certificate offered to the court is under the private seal of the person giving it which cannot be known to this court, and of consequence, can authenticate noth-

ing. The paper, therefore, purporting to be a sequestration of the Aurora and her cargo in Para ought not to have been laid before the jury.

Admitting the originals in the Portuguese language to have been authenticated properly, yet there was error in admitting the translation to have been read, on the certificate of the consul. Interpreters are always sworn, and the translation of a consul, not on oath, can have no greater validity than that of any other respectable man.

If the court erred in admitting as testimony papers which ought not to have been received, the judgment is, of course, to be reversed and a new trial awarded. It is urged, that there is enough in the record, to induce a jury to find a verdict for the defendants, independent of the testimony objected to, and that, in saying what judgment the court below ought to have rendered, a direction to that effect might be given. If this was even true, in point of fact, the inference is not correctly drawn. There must be a new trial, and at that new trial, each party is at liberty to produce new evidence. Of consequence, this court can give no instructions respecting that evidence.

The judgment must be reversed with costs, and the cause remanded, to be again tried in the circuit court, with instructions not to permit the copies of the edicts of Portugal and the sentence in the proceedings mentioned to go the jury, unless they be authenticated according to law.(*a*)

(*a*) In the argument of this case, a question was suggested by CHASE, J., whether a bill of exceptions would lie to a charge given by the judge to the jury, unless it be upon a point on which the opinion of the court was prayed; and doubted, whether it would, within the statute of Westminster.

MARSHALL, C. J., thought that it would, and observed, that in England, the correctness of the instruction of the judge to the jury at *nisi prius*, usually came before the court, on a motion for a new trial, and if, in this country, the question could not come up by a bill of exceptions, the party would be without remedy.[1]

[1] See Smith *v.* Carrington, 4 Cr. 62.