CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1808.

General Rules.

1. Ordered, that all parties in this court, not being residents of the United States, shall give security for the costs accruing in this court, to be entered on the record.

2. Ordered, that upon the clerk of this court producing satisfactory evidence, by affidavit or acknowledgment of the parties or their sureties, of having served a copy of the bill of costs due by them respectively in this court, on such parties or sureties, and of their refusal to pay the same, an attachment shall issue against such parties or sureties, respectively, to compel payment of the said costs.

Fitzsimmons *v.* Newport Insurance Company.

Marine insurance.—Breach of blockade.

Persisting in an intention to enter a blockaded port, after warning, is not attempting to enter it. *Quære?* Whether a foreign sentence of condemnation be conclusive evidence, in an action against the underwriters?

Error to the Circuit Court of the district of Rhode Island, in an action upon a policy of insurance on the brig John, warranted American property, from Charleston, South Carolina, to Cadiz, captured by a British ship of war, on the 16th of July 1800, carried into Gibraltar, and there condemned on the 26th day of August following. The cause of condemnation, set forth in the sentence, was, that the brig was "cleared out for Cadiz, a port actually blockaded," and that the master "persisted in his intention of entering that port, after warning from the blockading force, not to do so, in direct breach and violation of the blockade thereby notified."

On the trial in the court below, the jury found a special verdict, stating, among other things, that the blockade of Cadiz was not known at Charleston, when the John sailed from thence, and that the first notice the master had was from the blockading squadron, who brought to the brig, and, warned the master not to proceed to, nor attempt to enter, the port of Cadiz, and indorsed his register; but the master had no notice of such indorsement upon his register, until after the condemnation. The mate and some

of the seaman were taken out, and a prize-master and British seamen put on board. She was detained by the *blockading squadron, from the 16th to the 27th of July, when the master was ordered on board the [*186 admiral's ship, and told, "We have thoughts of setting you at liberty, and in case we do, and deliver you your vessel and papers, what course will you steer, or what port will you proceed for?" To which the master answered, that in case he got no new orders, he should continue to steer by his old ones. The admiral then said, "that will be, I suppose, for Cadiz." To which the master replied, "certainly, unless I have new orders." Upon which the admiral said, "that is sufficient; I shall send you to Gibraltar for adjudication." Whereupon, the brig, without being liberated, was sent into Gibraltar, and condemned, on the grounds stated in the sentence. The libel and proceedings in the vice-admiralty were found by the special verdict. An appeal was prayed and granted from the vice-admiralty court, but it did not appear to have been prosecuted. The judgment in the court below was for the original defendants. This cause was several times argued, having been pending in this court ever since the year 1803.

It was now argued by *Dallas* and *C. Lee*, for the plaintiff in error, and by *Rawle*, for the defendants.

Argument for the *plaintiff* in error. 1. The plaintiff is entitled in the present action to support his claim, by the truth of the case, in opposition to the falsehood of the sentence. 2. The cause expressly assigned for condemning the vessel, is not a lawful cause of condemnation, tested by the law of nations, or by the treaty between this country and Great Britain.

I. The question of conclusiveness of a foreign sentence of a court of admiralty, in a case of insurance, has never yet been settled in this court. It is *res integra*. In a question of principle, and where this court is bound by no authority or precedent, it will take the path which leads to justice.

*1st. How does it stand upon general principles? By what [*187 principle are we bound to enforce a foreign judgment? Not that of comity and reciprocity; for that would often be to sanction gross error and palpable injustice; but upon the principle of public policy and convenience, and this can extend no further than is necessary to quiet the title to the thing acquired under such a sentence. So far as the title to the thing itself is concerned, a foreign sentence must be considered as conclusive, but no further. A foreign municipal judgment, when brought into our courts to be enforced, is only *primâ facie* evidence; but when set up as a defense, it is conclusive, because it is the decision of that tribunal to which the plaintiff has chosen to resort. It is, therefore, conclusive against him, but not in his favor. Judgments upon attachments, which change the property of the thing attached, are conclusive as to the title of the thing, but not as to the question of debt between the principal creditor and debtor.

Why should a sentence of condemnation as prize, be conclusive, in a suit for indemnity against capture? Public policy is not concerned in the question whether the insurer or the assured should bear the loss. The underwriter promises indemnity against capture and its effects, if the property be neutral. The assured warrants the neutrality, but not the acquittal in a foreign prize court. He is bound to sue, labor and travel for the benefit of the underwriter, in this case, as well as in others. But the loss by capture

and condemnation is the very peril insured against ; and all the assured is bound to do, is to prove that his property was really neutral ; he does not take upon himself the risk of the injustice of foreign courts, any more than the injustice of any other department of a foreign government. What is it, but the injustice of belligerent nations, which makes a difference between a war risk and a peace risk upon neutral property ? And what consolation is it to the assured, that his property is lost by the injustice of a court, rather than by that of the executive power ? All that is re-
*188] quired of him is good faith ; he does not *answer for the good faith of a foreign tribunal ; a tribunal, too, whose decisions are professedly not founded upon the principles of abstract right, but upon the will of the sovereign.

The capture alone gives the right to abandon, and consequently, to recover for a total loss. The subsequent claim and litigation is, in truth, by and for the benefit of the underwriter. The assured is only bound to prove the neutrality, in the suit between the underwriter and himself. The doctrine that all the world are parties to a suit upon a question of prize, is a mere fiction, and is never applied to any question but that of the title to the thing itself.

2d. How does the principle stand upon precedents of other nations ? Upon a question of general law, or the law of nations, we are not to look to the practice of one nation only. We are as much bound by the precedents of France, as we are by those of England, since our revolution. In France, we are told by Emerigon, the sentence of a foreign prize court is not conclusive upon collateral cases. It only protects the title to the property acquired under it. In England, a system has been raised ; but like an inverted cone, it rests only on a single point. The case of *Hughes* v. *Cornelius*, reported in 2 Show. 232 ; T. Raym. 473 ; and Skin. 59, is the only basis upon which the fabric is erected. This case only decides, what we admit, that a foreign sentence is conclusive as to the title in the thing itself. This is the only reported case, prior to the revolution ; and thus the question remained until the case of *Bernardi* v. *Motteux*, Doug. 575, which was decided in the year 1781. The point of that decision was, that a sentence of condemnation by a foreign court of admiralty was not conclusive evidence of a breach of the warranty of neutrality, if the sentence does not appear to have proceeded
*189] upon that ground. *Park, p. 365, has given the result of all the cases, and deduces this general doctrine.

1. " That wherever the ground of the sentence is manifest, and it appears to have proceeded expressly upon the point in issue between the parties ;" or—

2. " Wherever the sentence is general, and no special ground is stated, there it shall be conclusive and binding ; and the court here will not take upon themselves, in a collateral way, to review the proceedings of a *forum* having competent jurisdiction of the subject-matter."

3. " But if the sentence be so ambiguous and doubtful, that it is difficult to say on what ground the decision turned ;" or—

4. "If there be color to suppose that the court abroad proceeded upon matter not relevant to the matter in issue, there, evidence will be allowed in order to explain." And—

5. " If the sentence, upon the face of it, be manifestly against law and justice, or be contradictory, the assured shall not be deprived of his indem-

nity; because, to use the words of Mr. Justice BULLER, any detention by particular ordinances or decrees, which contravene, or do not form a part of the law of nations, is a risk within a policy of insurance."

The counsel for the plaintiff commented at large upon the cases of *Salouci* v. *Johnson*, Park 362; *Lothian* v. *Henderson*, 3 Bos. & Pul. 516; *Geyer* v. *Aguilar*, 7 T. R. 681; *Garrels* v. *Kensington*, 8 Ibid. 230; *Calvert* v. *Bovill*, 7 Ibid. 526; *Kindersly* v. *Chase*, in the cockpit, decided by Sir W. GRANT, Park 363 (5th ed.); *Mayne* v. *Walter*, Ibid. 363; *Pollard* v. *Bell*, 8 T. R. 134; *Bird* v. *Appleton*, Ibid. 563; *Price* v. *Bell*, 1 East 663; *Bearing* v. *Christie*, 5 Ibid. 398; *Baring* v. *Clagett*, 3 Bos. & Pul. 212; and *Christie* v. *Secretan*, 8 T. R. 192; from all which they drew the conclusion, that according to English precedents, which, however, they denied to be authorities in this court, except the *case of *Hughes* v. *Cornelius*, a foreign sentence of condemnation is not conclusive evidence of the want of [*190 neutral character, unless it proceeds upon a ground warranted by the law of nations, or by treaties between the countries of the captor and the captured.

3d. As to domestic precedents, they are not decisive. In New York, the law is finally settled against the conclusiveness. 1 Caines' Cas. 7; 2 Ibid. 217; 3 Caines 213, 240. But in the supreme court of Pennsylvania, the question is still *sub judice*, as it is in most of the other states.

II. The cause expressly assigned for condemnation is not a lawful cause, either under the law of nations, or the treaty between this country and Great Britain. The capture itself was a total loss, and gave the right to abandon. At the time of abandonment, there was no restitution. The sentence is not a decree of enemy property, nor generally as lawful prize, but it is a condemnation on special grounds. 1. That she was cleared out for Cadiz, a port actually blockaded: 2. That the master persisted in his intention of entering that port, after warning from the blockading force, not to do so, in direct breach and violation of the blockade.

It is not stated, that the blockade was known at the time of her sailing, nor that any attempt was made to enter Cadiz, after notice. The special verdict finds that the blockade did not exist, at the time of her sailing; and that after being verbally notified of the blockade, the vessel was, at no time, at liberty, so that she could have attempted to enter the port. That although the register was indorsed, yet the master had no knowledge of it, until after his arrival at Gibraltar. The offence charged is persisting in an intention to do what he had no power to do. This intention is inferred from the conversation between the master and the admiral, which is detailed in the special verdict, and which, on the part of the latter, was insidious, and calculated to *entrap. From the effect of such conversations, it was the duty of the court to protect the master. *The Mercurius*, 1 Rob. 7. The answer [*191 of the master was honest, simple and proper; "that in case he got no new orders, he should steer by his old ones." This was no more than his duty. Those new orders, if given by the admiral, would have been obeyed, and would have justified the master in his deviation.

But even an intention to violate a blockade, unless followed by some act, such as sailing with that intent, &c., is no cause of condemnation under the law of nations. *Maley* v. *Shattuck*, 3 Cr. 488; *The Betsey*, 1 Rob. 280; *The Spes and Irene*, 5 Ibid. 76; *The Shepherdess*, Ibid. 235; Vattel, lib. 3,

§ 117; *The Vrow Judith*, 1 Rob. 128; *The Columbia*, Ibid. 130; *The Vrow Johanna*, 2 Ibid. 91; *The Neptunus*, Ibid. 92, 95, 96; *The Appollo*, 5 Ibid. 256; *The Columbia*, 1 Caines Cas. 7; 1 Rob. 130; 3 Caines 226.

If the intention be not a cause of condemnation under the law of nations, much less is it under the British treaty, art. 18 (8 U. S. Stat. 126), the words of which are, "And whereas, it frequently happens, that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded or invested, it is agreed, that every vessel so circumstanced may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, after notice, she shall again *attempt* to enter; but she shall be permitted to go to any other port or place she may think proper." If condemned, without an attempt, the sentence of condemnation is not warranted by the treaty, and therefore, does not falsify the warranty of neutrality. *Pollard* v. *Bell*, 8 T. R.; 434; *Bird* v. *Appleton*, Ibid. 562; *Price* v. *Bell*, 1 East 663; *Baring* v. *Christie*, 5 Ibid. 398; 1 Caines Cas. 7; 3 Caines 226.

Argument for the *defendants* in error.—This court can only decide what the law is, not what it ought to be. *We contend for three points. *192]
1. That the vessel was justly condemned for attempting to break the blockade. 2. That the sentence is conclusive evidence of the fact. 3. That the condemnation was the consequence of the improper act of the master, for which the underwriters are not liable.

1. The first point is not denied, if the fact be that there was an attempt to break the blockade.(*a*) A verbal notice to the master was as good as if it had been in writing, because he could himself see that a blockade *de facto* existed. An attempt is a conclusion from a variety of facts and circumstances. 1 Bos. & Pul. 185. A persisting in the intention, after warning; a public open avowal of that intention, when he had the offer of his liberty to go to any port but Cadiz, amounted to an attempt to break the blockade. The British squadron could not have suffered him to go off, with such declarations. He had no right to demand orders from the British admiral, nor had the latter a right to give them. He could not direct him to what port to go. The master was bound to act according to his best discretion in such a case. The only orders which the British commander could give were, not to go to Cadiz. It was a continuance (after notice) of the original attempt to enter the port, which was made before notice. 1 Rob. 123; 5 Ibid. 256.

2. The sentence is conclusive evidence against the plaintiff. *This point is not now to be decided on principles of policy or comity, *193]
but upon principles of law, long established and settled. It has been the fashion to consider this as a modern principle, fabricated upon national motives of interest since the revolution. But it rests on principles of a much earlier date. It is found in existence, at earlier periods, when the

(*a*) *Rawle* offered to read the depositions and evidence contained in the proceedings of the vice-admiralty, which were referred to by the special verdict, and of which a copy was thereto annexed. But THE COURT stopped him, saying that the proceedings in the vice-admiralty court were only matter of evidence to the jury, into which this court could not look.

commerce of England was in its infancy. It is the application only which is modern.

In the *Case of Copyhold Leases*, 4 Co. 29 *a*, it was decided, that the sentence of the ecclesiastical court, dissolving the marriage, was conclusive evidence that the first marriage was void, and that the issue of the second marriage was legitimate. So, in *Kenn's Case*, 7 Co. 42, 43, it was holden, "that the sentence" of the ecclesiastical judge "should conclude, so long as it remained in force." So, in Buller's N. P. 244, it is said, "In an action upon a policy of insurance, with a warranty that the ship was Swedish, the sentence of a French admiralty court, condemning the ship as English property, was holden conclusive evidence. This case is taken from The Theory of Evidence, published in 1761, and, consequently, was before our revolution. It seems to be the first case noticed in the books, where the principle was applied to a case of insurance. The case of *Fernandes* v. *De Costa*, Park 177–78, was in the 4th George III., long before our revolution. In that case, the sentence of the French prize court was holden to be conclusive evidence in favor of the underwriter. The counsel cited also *Jones* v. *Bow*, Carth. 225, where the sentence of the spiritual court was holden to be conclusive. Also, the *Duchess of Kingston's Case*, 11 State Trials, and the case of *Moses* v. *Macferlan*, 2 Burr. 1005; and *Walker* v. *Witter*, Doug. 1; *Galbraith* v. *Nevil*, Ibid. 5, in note; Lord Kaim's Principles of Equity, 369–75.

Thus stood the cases, before the revolution. The principle of law was fixed and general; and all the later decisions are but applications of the principle to particular cases. Once admit the case of *Hughes* v. *Cornelius* to be law, and the whole doctrine, to the extent *to which it has been carried in England, flows as a necessary consequence. As between [*194 the parties, it is admitted to be conclusive, and as to the title to the thing, the question is at rest. The plaintiff in this case was party to the suit in the vice-admiralty at Gibraltar. He is bound by the sentence, at all events, however it might be with regard to another person. As to him, it has passed *in rem judicatam*. If the property in the thing has passed, why not the title to its value? The title is as much gone from the underwriter, as it is from the assured. He is equally precluded from the chance of recovery, and from the benefit of the abandonment. By the sentence, the property is changed. It is not by an act of arbitrary power, or of superior force, or by an act of legislation, but by the judgment of a court of competent, peculiar and exclusive jurisdiction. For among nations, the court of the captor is as much a court of peculiar and exclusive jurisdiction of the question of prize, as the ecclesiastical courts are in England of ecclesiastical causes.

It is the adjudication of a court to whose jurisdiction he has submitted, by putting in his claim, and before which he was bound to support the neutrality of the property, in order to give him a right to recover against the underwriters. They do not undertake to support the neutrality of the property. That is entirely his business, and if he fails to do so, and by that means the property is lost, the loss must fall upon him.

It is of less importance which way the question is decided, than that it should be settled. When the law is once ascertained, merchants and underwriters will make their contracts accordingly, and provide against the effect of foreign sentences, if they think proper.

The warranty of neutrality necessarily refers to the decision of foreign

prize courts. Neutrality is a question incident to that of prize, which can be tried only in a foreign court, because it can only be tried in a court of the belligerent captor, and our own courts are the courts of a neutral nation. Courts of prize are courts of the law of nations, and their decisions upon
*195] questions arising under the law of nations, are to be *considered as the judgments of domestic courts. The question of neutrality is always expected to be agitated in a foreign tribunal. The underwriters do not take upon themselves the risk of condemnation for want of the neutral character, and it is to protect them from that risk, that the warranty of neutrality is inserted. But if the sentence is conclusive to prevent them from all chance of recovering the property, and not conclusive in their favor against the claim of the assured, the warranty of neutrality would afford them no protection from the risk against which it was the understanding of the parties that they should be protected.

The counsel then went into an examination of the cases of *Rapalje* v. *Emory*, 2 Dall. 51, 231 ; *Penhallow* v. *Doane*, 3 Ibid. 85, 88, 116 ; *Vasse* v. *Ball*, 2 Ibid. 290 ; *Vandenheuvel's Case*, 2 Caines Cas. 226, and *Maley* v. *Shattuck*, 3 Cranch 488, to show that the general inclination of the courts in this country was in favor of the conclusiveness of a foreign sentence.

They also examined the cases of *Bernardi* v. *Motteux*, Doug. 575 ; *Barzillai* v. *Lewis*, Park 358 ; *Salouci* v. *Woodmass*, Ibid. 360; *Geyer* v. *Aguilar*, 7 T. R. 681; *Christie* v. *Secretan*, 8 Ibid. 192; *Kindersley* v. *Chase*, Park 363, note *o* (5th edit.) ; *Lothian* v. *Henderson*, 3 Bos. & Pul. 499 ; *Baring* v. *Royal Ex. Ins. Co.*, 5 East 99 ; *Mayne* v. *Walter*, Doug. 363 ; *Pollard* v. *Bell*, 8 T. R. 434 ; *Bird* v. *Appleton*, 5 Ibid. 562 ; *Price* v. *Bell*, 1 East 663, and *Bolton* v. *Gladstone*, 5 Ibid. 155, not only to show how far the doctrine has been extended in England, but to prove by the declaration of the judges, that the principle, as applied to insurance cases, was adopted and undisputed, before our separation from Great Britain.

3. The condemnation was the consequence of the improper act of the master, for which the underwriters are not answerable. Underwriters are not liable for a loss proceeding from negligence or misconduct of the master,
*196] unless it amount to barratry. Park 24 ; 1 Emerigon 364, 373, *401, 441 ; 2 Valin 79 ; 7 T. R. 160 ; 4 Dall. 294 ; and the case of *Gray* v. *Myers*, MS.

Argument, *in reply*.—1. The master of the vessel made no attempt to enter Cadiz, after notice. He never had the power, because he never had the possession of his vessel, after the warning. An attempt consists of an act as well as of an intent. But here, there is evidence of an intent only. All the cases cited show some act done with the intent to enter.

2. As to the question of conclusiveness ; all the cases cited from 4 and 7 Co., Carthew and 2 Burrow, were domestic sentences. The case cited from Bull. N. P. and The Theory of Evidence, is of no authority. It does not appear when, nor where, nor by whom, it was decided. The book is anonymous, and refers only to the case of *Hughes* v. *Cornelius*, 2 Shower 232, which does not support it. The case of *Fernandez* v. *De Costa* is not against us. There, the sentence was supported by an answer in chancery, of the plaintiff, and left to the jury by Lord Mansfield, with the other evidence ; and the plaintiff was permitted to give evidence to show the ship

was Portuguese, as warranted. The case of *Rapalje* v. *Emory* was a foreign attachment, and the only decision upon it was to give validity to the title of the property condemned. In the case of *Vasse* v. *Ball*, the court did not decide the sentence to be conclusive, but went into an examination of its merits.

The common-law courts have exclusive jurisdiction of questions of insurance, and wherever the question of neutrality is necessarily involved in a question of insurance, they have as complete jurisdiction to try the question of neutrality, as a court of prize has. That court which has jurisdiction of the principal question, has necessarily jurisdiction of all incidental questions. The underwriter takes upon himself the risk of unlawful capture, and the court which is to decide upon his liability in the particular case, must necessarily decide whether the capture were lawful or not; and if found to be unlawful, the plaintiff must recover.

*3. No words of the master could amount to such conduct as would exonerate the underwriters. He did no act whatever. [*197

February 8th, 1808. MARSHALL, Ch. J. (all the seven judges being present), delivered the opinion of the court as follows, viz:—This suit is instituted to recover from the underwriters the amount of a policy insuring the brig John, on a voyage from Charleston to Cadiz. The vessel was captured on her passage, by a British squadron, then blockading that port, was sent into Gibraltar for adjudication, and was there condemned by the court of vice-admiralty as lawful prize. The assured warrants the ship to be American property; and the defence is, that this warranty is conclusively falsified by the sentence of condemnation.

The points made for the consideration of the court are, 1. Is the sentence of a foreign court of admiralty conclusive evidence, in an action against the underwriters, of the facts it professes to decide? If so, 2. Does this sentence, upon its face, falsify the warranty contained in the policy? If not, 3. Does the special verdict exhibit facts which falsify the warranty?

The question on the conclusiveness of a sentence of a foreign court of admiralty having been more than once elaborately argued, the court reluctantly avoids a decision of it at present. But there are particular reasons which restrain one of the judges from giving an opinion on that point, and another case has been mentioned, in which it is said to constitute the sole question. In that case, it will, of course, be determined.

*Passing over the consideration of the first point, therefore, the court proceeded to inquire whether this cause could be decided on the second and third points. Admitting, for the present, that the sentence of a foreign court of admiralty is conclusive, with respect to what it professes to decide, does this sentence falsify the warranty contained in this policy, that the brig John is American property? The sentence declares "the said brig to have been cleared out for Cadiz, a port actually blockaded by the arms of our sovereign lord the king, and that the master of said brig persisted in his intention of entering that port, after warning from the blockading force not to do so, in a direct breach and violation of the blockade thereby notified." [*198

The sentence, then, does not deny the brig to have been American property. But it is contended by the counsel for the underwriters, that a

ship warranted to be American is impliedly warranted to conduct herself, during the voyage, as an American, and that an attempt to enter a blockaded port, knowing it to be blockaded, forfeits that character. This position cannot be controverted.[1]

It remains, then, to inquire, whether the sentence proves the brig John to have violated the laws of blockade? that is, whether the cause of condemnation is alleged in such terms as to show that the vessel had forfeited her neutral character, or in such terms as to show its insufficiency to support the sentence? The fact of clearing out for a blockaded port, is in itself innocent, unless it be accompanied with knowledge of the blockade. The clearance, therefore, is not considered as the offence; the persisting in the intention to enter that port, after warning by the blockading force, is the ground of the sentence. Is this intention (evidenced by no fact whatever) *199] a breach of blockade? This question is to be decided by *a reference to the law of nations, and to the treaty between the United States and Great Britain.

Vattel, lib. 3, § 177, says, "All commerce is entirely prohibited with a besieged town. If I lay siege to a place, or only form the blockade, I have a right to hinder any one from entering, and to treat as an enemy whoever attempts to enter the place, or carry anything to the besieged, without my leave." The right to treat the vessel as an enemy is declared, by Vattel, to be founded on the attempt to enter, and certainly this attempt must be made by a person knowing the fact.

But this subject has been precisely regulated by the treaty between the United States and Great Britain, which was in force when this condemnation took place. That treaty contains the following clause: "And whereas, it frequently happens, that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded or invested; it is agreed, that every vessel so circumstanced may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, after notice, she shall again *attempt* to enter; but she shall be permitted to go to any other port or place she may think proper." This treaty is conceived to be a correct exposition of the law of nations; certainly, it is admitted by the parties to it, as between themselves, to be a correct exposition of that law, or to constitute a rule in the place of it.

Neither the law of nations nor the treaty admits of the condemnation of the neutral vessel, for the intention to enter a blockaded port, unconnected with any fact. Sailing for a blockaded port, knowing it to be blockaded, has been, in some English cases, construed into an attempt to enter that port, and has, therefore, been adjudged a breach of the blockade, from the *200] departure of the vessel. *Without giving any opinion on that point, it may be observed, that in such cases, the fact of sailing is coupled with the intention, and the sentence of condemnation is founded on an actual breach of blockade.[2] The cause assigned for condemnation would be a justifiable cause, and it would be for the foreign court alone to determine

[1] Maryland Ins. Co. *v.* Woods, 6 Cr. 29; Schwartz *v.* Insurance Co. of North America, 3 W. C. C. 117.

[2] The Circassian, 2 Wall. 135; The Bermuda, 3 Id. 514; The Admiral, Id. 603.

whether the testimony supported the allegation that the blockade was broken. Had this sentence averred that the brig John had broken the blockade, or had attempted to enter the port of Cadiz, after warning from the blockading force, the cause of condemnation would have been justifiable, and without controverting the conclusiveness of the sentence, the assured could not have entered into any inquiry respecting the conduct of the vessel. But this is not the language of the sentence. An attempt to enter the port of Cadiz is not alleged, but persisting in the intention, after being warned not to enter it, is alleged as the cause of condemnation. This is not a good cause, under the treaty. It is impossible to read that instrument, without perceiving a clear intention in the parties to it, that after notice of the blockade, an attempt to enter the port must be made, in order to subject the vessel to confiscation. By the language of the treaty, it would appear, that a second attempt, after receiving notice, must be made, in order to constitute the offence which will justify a confiscation. "It is agreed," says that instrument, "that every vessel so circumstanced" (that is, every vessel sailing for a blockaded port, without knowledge of the blockade) "may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, after notice, she shall again *attempt* to enter."

These words strongly import a stipulation that there shall be a free agency on the part of the commander of the vessel, after receiving notice of the blockade, and that there shall be no detention nor condemnation, unless, in the exercise of that free agency, a second attempt to enter the invested place shall be made. It cannot be necessary to state that testimony which would amount to evidence of such second attempt. Lingering about the place, as if watching for an opportunity *to sail into it, or the single circumstance of not making immediately for some other port, or possibly, obstinate and determined declarations of a resolution to break the blockade, might be evidence of an attempt, after warning, to enter the blockaded port.[1] But whether these circumstances, or others, may or may not amount to evidence of the offence, the offence itself is attempting again to enter, and "unless, after notice, she shall again *attempt* to enter," the two nations expressly stipulate "that she shall not be detained, nor her cargo, if not contraband, be confiscated." It would seem as if, aware of the excesses which might be justified, by converting intention into offence, the American negotiator had required the union of fact with intention to constitute the breach of a blockade. [*201

The cause of condemnation, then, as described in this sentence, is one which, by express compact between the United States and Great Britain, is an insufficient cause, unless the intention was manifested in such manner as, in fair construction, to be equivalent to an attempt to enter Cadiz, after knowledge of the blockade. This not being proved by the sentence itself, the parties are let in to other evidence.

However conclusive, then, the sentence may be, of the particular facts which it alleges, those facts not amounting, in themselves, to a justifiable cause of condemnation, the court must look into the special verdict, which

[1] As to what amounts to an intent to violate a blockade, see the cases collected in Bright. Fed. Dig. 853.

explains what is uncertain in the sentence. The special verdict shows that the vessel was seized on her approaching the port of Cadiz, without previous knowledge of the blockade; that she never was turned away, and "permitted to go to any other port or place;" that she was "detained" for several days, and then sent in for adjudication, without being ever put into the possession of her master and crew, so as to enable her either "again to *attempt* to enter" the port of Cadiz, or to sail for some other port; that while thus detained, the commander of the blockading squadron drew the master of the John into a conversation, which must be termed insidious, since its object was to trepan him into expressions which might be construed into evidence of an intention to sail for Cadiz, should he be liberated;
*202] *that availing himself of some equivocal, unguarded, and, perhaps, indiscreet answers on the part of the master, the vessel was sent in for adjudication; and on those expressions, was condemned.

This court is of opinion, that these facts do not amount to an *attempt* again to enter the port of Cadiz, and therefore, do not amount, under the treaty between the United States and Great Britain, to a breach of the blockade of Cadiz. The sentence of the court of vice-admiralty in Gibraltar, therefore, is not considered as falsifying the warranty, that the brig John was American property, or as disabling the assured from recovering against the underwriters in this action, and the testimony in the case shows that the blockade was not broken.

The judgment of the circuit court is to be reversed, with costs, and it is to be certified to that court, that judgment is to be entered on the special verdict for the plaintiff.

Judgment reversed.

Marshall *v.* Delaware Insurance Company.

Marine insurance.—Abandonment.—Loss by capture.

The right of the insured to abandon and recover for a total loss, depends upon the state of the fact, at the time of the offer to abandon, and not upon the state of the information received.[1]

The technical total loss arising from capture, ceases with a final decree of restitution, although that decree may not have been executed, at the time of the offer to abandon.

Marshall *v.* Delaware Ins. Co., 2 W. C. C. 54, affirmed.

Error to the Circuit Court for the district of Pennsylvania, in an action for a total loss, on a policy of insurance on the Brig Rolla, her cargo and freight.

The material facts stated, were, that the Brig Rolla, a neutral vessel, while prosecuting the voyage insured, was captured by a belligerent cruiser, and libelled as prize of war. On the 9th of July 1806, a final sentence in favor of the vessel and cargo was passed, and on the 19th of the same month, about one o'clock P. M., restitution was made. On the 17th of July,
*203] the assured, in *New York, received information of the capture, and immediately gave orders to his agent in Philadelphia, to abandon to

[1] Alexander *v.* Baltimore Ins. Co., *post*, p. 370; Olivera *v.* Union Ins. Co., 3 Wheat. 183; Humphreys *v.* Union Ins. Co., 3 Mason 429. And see Ritchie *v.* United States Ins. Co., 5 S. & R. 501; Dorr *v.* New England Marine Ins. Co., 4 Mass. 221.