**Church Vs. Hubbart**

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**SooperKanoon Citation** : sooperkanoon.com/78323

**Court** : US Supreme Court

**Decided On :** 1804

**Appeal No.** : 6 U.S. 187

**Appellant** : Church

**Respondent** : Hubbart

**Judgement** :

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U.S. Supreme Court Church v. Hubbart, 6 U.S. 2 Cranch 187 187 (1804)

**Church v. Hubbart**

**6 U.S. (2 Cranch) 187**

*ERROR TO THE CIRCUIT COURT OF*

*THE DISTRICT OF MASSACHUSETTS*

## SYLLABUS

The words in one policy of insurance, "the insurers do not take the risk of illicit trade with the Portuguese," and in another, "the insurers are not liable for seizure by the Portuguese for illicit trade," are substantially the same.

The right of a nation to seize vessels attempting an illicit trade is not confined to its harbors, or to the range of its batteries. Its power to secure itself from injury, may certainly be exercised beyond the limits of its territory. This right does not appear to be limited within any marked boundaries. If the means used by a nation for this purpose 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.

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 sanction of an oath is required for their establishment unless they can be verified by some other high authority, which the law respects no less than the oath of an individual.

Consuls are officers known to the laws of nations, and are entrusted with legal powers. But they are not entrusted 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.

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 would be unjust and unreasonable. The court will never require such testimony.

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.

A certificate of the proceedings of a foreign court under the seal of a person who styles himself the Secretary of Foreign Affairs of Portugal is not evidence.

If the decrees of the 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 *prima facie* evidence of the verity of what was so certified.

Interpreters are always sworn, and the translation by a consul, not on oath, can have no greater validity than that of any other respectable man.

In the Circuit Court of Massachusetts, John Barker Church, Jr., instituted an action against the defendant on two policies of insurance, whereby he had caused to be insured $20,000 the cargo of the brigantine *Aurora,* 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 memorandum: "the insurers are not to be liable for seizure by the Portuguese for illicit trade." In the body of the other policy was inserted the following: "N.B. The insurers do not take the risk of illicit trade with the Portuguese."

The *Aurora* cleared out for the cape of Good Hope, the plaintiff being on board as supercargo. She proceeded to Rio Janeiro, where she remained some days, and under a permit some of the cargo was sold, and afterwards sailed for Para on the coast of Brazil, and in company with another vessel came to anchor about four or five leagues from the land. The destination of the vessel after she left Rio Janeiro was by order of the plaintiff kept secret, and it was said by the master at the time that the anchoring off the River Para was for wood and water, which were actually wanted.



The plaintiff went on shore in a boat, asserting that he left the *Aurora* for the purpose of procuring a pilot, to take the vessel up for wood and water and to sell the cargo if permitted. Mr. Church was arrested when on shore, and imprisoned, and the *Aurora* and the vessel in her company were taken possession of by a body of armed men and carried into Para.

It was in evidence, that the trade to Para was prohibited, although by bribery of the Portuguese officers cargoes were frequently sold there, the vessels which brought

them alleging on arrival a pretense of want of repairs, want of water, or something of that kind.

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The vessel and cargo were condemned by the governor of the capital of Para, as having been seized for illicit trade. The defense against the claims of the plaintiff on both policies was that the loss occurred from a prohibited or illicit trade, for which the defendant, as an insurer, was not liable according to the exception in both policies.

To prove that the trade to Para was illicit, the defendant offered a copy of a law of Portugal, passed 18 March, 1605, entitled "a law by which foreign vessels are prohibited from entering the ports of India, Brazil, Guiana, and Islands, and other provinces of Portugal." The terms of this law expressly prohibit the trade, and subject the vessel and cargo, violating its provisions, to seizure and forfeiture, and the persons engaged in the same to the punishment of death. [Page 190 intentionally omitted.]

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The law was certified in the following term:

"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 18 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 12 April, 1803."

"WILLIAM JARVIS"

Another law was produced, made on 8 February, 1711, which provides for the punishment of the officers of the government who shall suffer the law of 1605 to be violated and for the detection and punishment of offenders. This law was certified in the same manner.

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To establish the defense that the *Aurora* and cargo were seized and condemned for illicit and prohibited trade, the defendant offered in evidence "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), 1. because it cannot be supposed than an involuntary want to 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 appears by these papers and by the information

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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; 2. 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; 3. and finally because in the space of eight or ten days from the time they passed the cape of St. Agostinho till 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 28 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

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ought to be understood as having the same disposition as that of the schooner *Four Brothers,* with which he sailed and fell into conversation."

"Therefore I command that in conformity to the law made on 5 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 practiced. Palace of Para, 27 June, 1801."

"D. FRANCISCO DE SOUZA COUTINHO"

"On 27 June, 1801, the 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 Alvares 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 folio 43; as it is justly declared and adopted for the same incontestable 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 beside 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 hereunto 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. "

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"Therefore they declare him to have incurred the transgression of the order folio 1 to 107, and decree of 28 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, 27 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, 27 January, 1803."

"D. JONO DE ALMEIDA DE MELLO DE CASTRO"

These proceedings were certified as follows:

"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 27 January, 1803."

"In testimony whereof, I have hereunto set my hand and affixed my seal of office in Lisbon this 16 April, 1803."

"WILLIAM JARVIS"

To the admission of this evidence the plaintiff objected,

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but the objection was overruled by the circuit court, and the plaintiff took a bill of exceptions, upon which the case was brought before this Court, the jury in the circuit court having found for the defendant.

The opinion of Mr. Justice Cushing, which came up with the record, was the following:

"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.

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 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 government 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

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the governor's sentence on account of prohibited trade, in part at least."

"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. "

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MR. CHIEF JUSTICE MARSHALL 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 defense 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 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 offense 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,

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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.

In this case, the unlawfulness of the voyage was perfectly understood by both parties. That the

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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 construction as is contended for by the plaintiff. If the danger did not commence till the vessel was in port or till 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 the 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

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admitted, because the belligerent has a right to prevent the injury done to himself by the 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 further, 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

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right given to our own revenue 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 were 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 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.

Consuls, it is said, are officers known to the law of nations, and are entrusted with high powers. This is very true, but they do not appear to be entrusted 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

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court is certified 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 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 *prima 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 nothing. 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 proceeding mentioned to go to the jury unless they be authenticated according to law.*