Insuring Maritime Trade with the Enemy in the Napoleonic Era

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Abstract

During the late eighteenth and early nineteenth centuries, England and France were continuously at war. Although there were free-traders in the eighteenth century who thought trade with enemies made commercial sense, the law by the end of the century clearly held that trading with the enemy was illegal. Yet since trade with European nations had become crucial to the British economy, special licenses were issued by the Crown that overrode the legal prohibition. These licenses proliferated in the early 1800s and were supplemented by simulated papers to permit ships to evade capture and condemnation by the enemy. The use of simulated papers was acknowledged in courts of law, and marine insurance policies expressly authorized journeys that used simulated papers. Courts protected merchants by allowing them to recover under these insurance policies. The rationale was that this was necessary to protect British commerce. At first, the benefits of such policies applied only to British merchants, but in the early 1810s, the courts construed the insurance policies to benefit alien neutrals, and eventually alien enemies. The irony of these developments was that the end result in practical effect came close to the free trade views that had been crowded out by eighteenth century case law.

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INTRODUCTION

Historians often mention the familiar saying, plus ça change, plus c’est la même chose,¹ and with good reason. History does indeed repeat itself. On December 23, 2010, the New York Times ran a story headlined, “With U.S. Leave, Companies Skirt Iran Sanctions.” The article opened with the following:

Despite sanctions and trade embargoes, over the past decade the United States government has allowed American companies to do billions of dollars in business with Iran and other countries blacklisted as state sponsors of terrorism, an examination by The New York Times has found. At the behest of a host of companies . . . a little-known office of the Treasury Department has granted nearly 10,000 licenses for deals involving [foreign] countries that have been cast into economic purgatory, beyond the reach of American business.²

More than two centuries earlier in England, it had been clearly established that trading with the enemy was unlawful, and although prior to 1800 occasional dispensations were given in the form of special licenses, these were rare. Yet by 1810 the number of special licenses authorizing trade with foreigners in enemy nations reportedly exceeded 18,000. This Article examines that phenomenal pattern of change, together with the legal rationalizations and somersaults that accompanied it.

During the late eighteenth and early nineteenth centuries, England and France seemed to be continuously at war. The upheaval naturally affected the maritime trade between England and the continent. Even though English law clearly held that during times of war trading with the enemy was prohibited, there were isolated free-

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1. “The more things change, the more they stay the same.”

2. Jo Becker, With U.S. Leave, Companies Skirt Iran Sanctions, N.Y. TIMES, Dec. 24, 2010, at A1. According to the NEW YORK TIMES, most of the special licenses were issued under broadly interpreted exemptions for agricultural and humanitarian aid, or because they were deemed to serve American policy goals. Stuart Eizenstat, who handled sanctions policy for the Clinton administration, was quoted as saying that, “when you create loopholes like this that you can drive a Mack truck through, you are giving countries something for nothing, and they just laugh in their teeth.” Id. In its online version, the NEW YORK TIMES also itemized more than 100 examples of special licenses that had been issued after exemptions were granted. Jo Becker, Licenses Granted to U.S. Companies Run the Gamut, N.Y. TIMES, Dec. 24, 2010, http://www.nytimes.com/interactive/2010/12/24/world/24-sanctions.html. In the United States, the Trading with the Enemy Act by its terms is operative “[d]uring the time of war.” 12 U.S.C. § 95a (2000). Although the United States is not formally at war with Iran, it has instituted economic sanctions against Iran that prohibit domestic businesses from trading with Iran. Iran Sanctions Act of 1996, 22 U.S.C. § 8512 (2010). See also the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–06 (2000) (granting certain economic powers to the Secretary of State during national emergencies); Antiterrorism and Effective Death Penalty Act, 8 U.S.C. § 1189 (2011) (granting the Secretary of State the authority to classify certain groups as terrorist organizations); 18 U.S.C. § 2339 (2011) (making it a crime to harbor or conceal terrorists); and International Security and Development Cooperation Act, 22 U.S.C. § 2349aa-9 (2011) (restricting trade with countries that associate with organizations that have been classified as terrorist organizations).
trade voices in the eighteenth century claiming that trade with enemies made commercial sense. As early as 1747, for example, Attorney General Dudley Ryder and Solicitor General William Murray (later Lord Mansfield) spoke in opposition to a bill introduced in the House of Commons to prohibit English insurance on French ships at a time when England and France were at war. Murray asserted that, “To carry on trade for the mutual benefit of both nations is not aiding and assisting the enemy, nor is it such a correspondence as was intended to be prohibited by his majesty’s declaration of war, especially when it is such a trade as must always leave a large balance in ready money here in England.” Ryder agreed, arguing that, “The trade of insuring we possess without a rival; but it will soon be established in other countries, and our own merchants may deal with foreign insurance-companies.” Yet the bill passed overwhelmingly. Lord Campbell, in his mid-nineteenth-century biography, sardonically observed that Mansfield’s views “would furnish a defence of the Dutch doctrine, that a besieged city should sell gunpowder and balls to the besieging army.”

By the end of the eighteenth century, there was no disagreement about where the law stood. In *Potts v. Bell*, Chief Justice Lloyd Kenyon of the Court of King’s Bench declared that the reasons that had been argued and the authorities that had been cited “were so many, so uniform, and so conclusive, to shew that a British subject’s trading with an enemy was illegal, that the question might be considered as finally at rest…” Referring to “a long string of authorities” from the Admiralty Court, Kenyon acknowledged that there was but one authority in the common law books to the same effect, but that authority was strong, and it could be taken for granted that the illegality of “[t]rading with an enemy without the King’s license” had become “a principle of the common law.”

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5. *Id.* at 365.
6. *Potts v. Bell*, (1800) 101 Eng. Rep. 1540 (K.B.); 8 T.R. 547. *See also In re Hoop*, (1799) 165 Eng. Rep. 146 (Adm.); 1 C. Rob. 196 (“By the law and constitution of this country, the sovereign alone has the power of declaring war and peace—He alone therefore who has the power of . . . permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war.”).
7. The Court of King’s Bench, the Court of Common Pleas, and the Court of Exchequer were the three common law courts in England in the eighteenth century. Although the three courts originally had separate jurisdictions, by the mid-eighteenth century, their jurisdictions largely overlapped. Their relative popularity with parties depended on differences in costs, ease of procedural rules, and the pull of certain judges. By the latter part of the eighteenth century, the Court of King’s Bench had become dominant. “Appeals” were heard by the Court of Exchequer Chamber (distinct from the Court of Exchequer), and the court of last resort was the House of Lords. There were also specialty courts, such as the Admiralty Court, which heard all cases dealing with prize or those arising on the high seas. “Appeals” from this court were heard by the Privy Council. *Nisi prius* cases were civil jury cases in London and at the local assizes. See generally J. H. Baker, *An Introduction to English Legal History* (2002).
9. Kenyon did not identify the one authority. In the report of *Bell v. Potts* in *The Times*, May 10, 1800, at 3, the source was said to be *Rolle’s Abridgement*. (Note, *The Times* in this Article refers to the London Times.)
10. *Potts*, 101 Eng. Rep. at 1547; 8 T.R. at 561. Thus the plaintiff could not recover on insurance covering goods purchased in an enemy country (Holland) after the ship carrying the goods had been captured by the French. For British insurance law generally, see James A. Park, *A System of the Law of Marine Insurances; with Three Chapters on Bottomry; on Insurances on Lives; and on
Yet strict adherence to the legal prohibition against trading with the enemy would have severely damaged British commerce. It was for this reason that the British license system mushroomed. It had existed before the Napoleonic Wars, but on a much smaller scale. A license was a grant from the Crown that allowed its holder to trade with the enemy, a royal prerogative that exempted the holder from prosecution. To supplement the license system, simulated papers were used to evade capture and condemnation by the enemy. These complementary devices facilitated trade with the enemy notwithstanding the legal prohibition. If stopped by a British cruiser, a merchant ship’s captain would produce the license showing that it was authorized to trade with the enemy. If captured by an enemy ship, the same captain would produce the simulated papers indicating that his was a neutral or friendly ship, not British. The use of simulated papers was acknowledged in courts of law, and marine insurance policies expressly authorized journeys that used simulated papers. Indeed, the underwriters sometimes refused to insure unless false papers were used.

As the Chief Justice of the Court of Common Pleas observed in 1811:

[A]t present it was quite necessary [for a ship to carry simulated papers]: several brokers and other witnesses proved, that since . . . 1806, a ship could not safely proceed to the Baltic without simulated papers: that no policy would now be underwritten without liberty to carry simulated papers; that some underwriters had refused to subscribe policies, because the simulated papers were not well arranged; that no ship could sail to Russia without simulated papers, but that some policies on that voyage did, and others did not contain an expression of the liberty to use them.11

I. BACKGROUND TO THE LICENSE SYSTEM

After several years of protracted warfare against Britain and a major naval defeat at Trafalgar in October 1805, Napoleon decided that purely military affronts were insufficient to defeat his enemy.12 In the first decade of the nineteenth century, he issued a number of edicts that were meant to ruin Britain economically.13 The first was the Berlin Decree, issued in November 1806, which declared a blockade on the British Isles and forbade any of his Continental allies or dependent countries to import goods from Britain.14 This “Continental System,” as it was called, implemented Napoleon’s plan to starve out Britain by cutting off all her trade.15

13. See generally id. at 83–87 (discussing French customs policy at the beginning of the nineteenth century).
14. Id. at 88–90.
15. See generally id. at 92–93, 98. One historical viewpoint of the Continental System was that Napoleon knew his French navy was no match for that of Britain, and the language of the Berlin Decree (and of other decrees that followed) was merely for show. Heckscher claims, however, that the real aim was to close the continental markets to British goods using this “self-denying ordinance.” Conversely, the British response, though purportedly a blockade of France in retaliation for the decrees, was really to ensure that the French market was well-stocked with British goods. Id. at 93, 98. Another viewpoint is provided in 2 Captain A.T. Mahan, THE INFLUENCE OF SEA POWER UPON THE FRENCH REVOLUTION AND EMPIRE: 1793–1812, at 272–357 (4th ed. 1892). Though historical interpretations of the motivations for Napoleon’s decrees and the Continental System vary, this Article is not meant to enter that debate;
response, Britain’s Privy Council passed a number of its own economic measures, termed Orders in Council. The most important ones were issued in January and November 1807 and April 1809. The January 1807 Order declared all ports of France and her colonies in a state of blockade, and also forbade any neutral states from trading with France and her colonies. The November 1807 Order extended the blockade to include any ports that excluded the British flag, and it also declared that any American ships bound for France or her allies were to stop first at a British port to pay taxes if they wished to circumvent the blockade. Failure to do so would risk condemnation of the ship in the British Admiralty’s prize court. The Berlin Decree was followed by the second Milan Decree in December 1807, a direct response to the November 1807 Order in Council. The second Milan Decree expressly expanded the Continental System from imports on land to shipping at sea by providing that any ship that submitted to British inspection, called at a port in Britain, or paid duties to Britain, became English property, and thus lawful prize upon capture by the French.

Understandably, the November 1807 Order was highly unpopular among Americans and was partially revoked by the April 1809 Order, which opened trade with the north of Europe. This meant that the only blockaded ports were those of Holland, France and her colonies, and southern Italy. For both British and American merchants to avoid the Orders in Council, a special license permitting trade with France and allied enemies was necessary.

Before 1800, licenses were rarely granted. By 1807, however, 1,600 licenses were granted each year, and in 1810, more than 18,000 licenses were granted.

rather, we describe the historical events only to provide the context in which the license system and simulated papers existed.

16. Several were passed, but only a few merit mention. The Orders were often criticized as being contradictory, “obscure[s] and rambling,” even incomprehensible, but the economic objective remained consistent. HECKSCHER, supra note 12, at 114–15.


18. Sloane, supra note 17, at 224; HECKSCHER, supra note 12, at 116–17. “The intention of this regulation was presumably, above all, to raise the prices on the products of the enemy colonies and the enemy parts of the European mainland in all ports where they might compete with goods of Great Britain or her colonies.” This Order, coupled with its French counterpart, put neutrals in a very difficult position, for the Order also said that the mere possession of a French certificate of origin declaring the goods to be non-British was enough to warrant confiscation of the goods by the British, whereas the French ordinance stated that the lack of a certificate of origin was grounds for confiscation. “The only effect of all this was the establishment of a system of double ship’s papers, which gradually attained an immense scope; and thus in reality the consequence was that the laws of both sides were broken.” Id.

19. HECKSCHER, supra note 12, at 124; Sloane, supra note 17, at 225.

20. Sloane, supra note 17, at 225; see also 21 PARL. DEB., H.C. (1st ser.) (1812) 1042–44 (discussing British concerns that the November 1807 Order would endanger trade between Britain and America).

21. Sloane, supra note 17, at 225.

22. JOSEPH PHILLIMORE, REFLECTIONS ON THE NATURE AND EXTENT OF THE LICENSE TRADE 7–9 (3d ed. 1812).

23. Mr. Brougham’s Motion Relating to the Orders in Council and the License Trade, 21 PARL. DEB., H.C. (1st ser.) (1812) 1105 [hereinafter Brougham’s Motion]. Lord Brougham (born Henry Peter Brougham, 1778–1868), was a precocious student, author of voluminous Whig pieces in his youth, and a reformer during his entire political life. It was largely through his efforts, and his well-known oratory skills, that the Orders in Council were repealed. He was appointed Lord Chancellor in 1830 and initiated
According to one historian, “the number of licenses issued rose from [4,910] in 1808, to no fewer than [15,356] in 1809, and [18,356] in the year 1810.”

Some contended the government was too enmeshed in the details of private commerce. The case-by-case nature of license approval resulted in little consistency in who received or was denied a license. In one instance, an application was made for a license unsuccessfully three times, but on the fourth try, it was granted. Furthermore, this system engendered a vicious cycle in which licenses were issued, ships were captured, and courts had to decide whether the ships had been fairly captured as prize or had been authorized to carry on trade with the enemy, thereby hampering the insurance recovery process and impeding trade. As one pamphleteer declared, “[I]t may fairly be computed, that of the last two hundred vessels detained for the adjudication of the High Court of Admiralty . . . , at least three-fourths have been proceeded against, on the sole ground of their carrying on the commerce of the enemy, under the protection of British licenses.”

At the very least, the indispensability of licenses created a black market for them both in England and abroad. According to a petition from Hull traders to Parliament, “numbers of British licences have been publicly sold on the continent,” and “by means of those licences, and even under the protection of British convoys, our enemies have been supplied, to a great extent, with naval stores, conveyed directly into their own harbours.” Allegations flew that the license system propagated fraud. Brougham cited Sir William Scott, the Admiralty judge, who described the trade as “a system of simulation and dissimulation from beginning to end.” Brougham also claimed that in 1810, Scott “revealed the extent of this legalized trading with the enemy when he said: ‘It is a matter perfectly notorious that we are carrying on the whole trade of the world under simulated and disguised papers.’” But to Brougham, “it would be still more accurate to say that it is a system which begins with forgery, is continued by perjury, and ends in enormous frauds.” In fact, according to one Member of Parliament, Samuel Marryat,

The License trade abounded with frauds. There was not a consul in the world whose signature was not forged; and there were men in London,
who, if they received a letter to-day, would be able in a few days to produce two or three letters so completely similar in hand-writing, water-mark, &c. that he who had wrote the original, could not distinguish it from the copies.\footnote{32}

There were, however, differing opinions on whether the licensing system had indeed hurt trade.\footnote{33} One view was that the Orders in Council authorizing the licenses had nothing to do with the increase in the number of licenses that were issued, because licenses had existed prior to the establishment of the Orders.\footnote{34} Then-foreign secretary Lord Castlereagh asserted that “[t]he licenses connected with the system of blockade [created by the Orders in Council] did not form a fifth of the whole licence system of the country.”\footnote{35} According to government officials, the remainder would have been issued regardless of the Orders in Council’s existence “to serve as a form of dispensation from the prohibition of trading with the enemy.”\footnote{36} One historian said that, “as it was generally considered to be equally self-evident that this trade with the enemy should be forbidden by law and encouraged in reality, the government . . . had the better of the argument.”\footnote{37} And Alexander Baring, while admitting that some fraud existed, claimed that the majority of trade carried on by Americans was “bona fide neutral.”\footnote{38}

One of the chief complaints of British traders had been that the allegedly neutral Americans were actively engaging in fraud to circumvent Britain’s Orders in Council that required that American ships bound for the continent first stop in London. Yet according to Baring, a number of factors made it very difficult for the Americans to trade directly with the enemy.\footnote{39} For one, the distance between America and the continent made it hard to secure current news about who was at war with whom, so it was difficult to be confident that forged licenses were up-to-date.\footnote{40} Furthermore, the cost to a French exporter would far outweigh any benefits of shipping under an American flag (duties, risk of capture, risk of trusting someone for the time for a ship to cross the ocean, commissions, etc.).\footnote{41} Thus, the French had “at the breaking out of the present war, very little shipping to transfer” to America.\footnote{42}

\footnotesize
\begin{itemize}
    \item 32. \textit{Id.} at 1149.
    \item 33. \textit{Id.} at 1119.
    \item 34. \textit{Id.} at 1144–45.
    \item 35. Mr. Brougham’s Motion on the Present State of Commerce and Manufacturers—and for the Repeal of the Orders in Council, 12 PARL. DEB., H.C. (1st ser.) (1812) 540 [hereinafter Repeal of Orders].
    \item 36. \textsc{Heckscher}, \textit{supra} note 12, at 206–07.
    \item 37. \textit{Id.} at 207.
    \item 38. \textsc{Alexander Baring}, \textit{An Inquiry into the Causes and Consequences of the Orders in Council; and an Examination of the Conduct of Great Britain towards the Neutral Commerce of America} 41 (1808). Alexander Baring (1773–1848) came from the prestigious Baring financing empire, but gave up the family business to enter politics and served as a Member of Parliament for various locales. In his early years, he was an advocate of free trade, and his experience in living and working in America informed his views of the American trade during the debates over the Orders in Council. \textsc{John Orbell}, \textsc{Oxford Dictionary of National Biography} 815–18.
    \item 39. \textsc{Baring, supra} note 38, at 30.
    \item 40. \textit{Id.} at 34.
    \item 41. \textit{Id.} at 32–33.
    \item 42. \textit{Id.} at 33.
\end{itemize}
Still, based on the printed reports of cases, pamphlets, and the voluminous Parliamentary Debates, it is safe to conclude that the use of licenses and simulated papers increased sufficiently during the early 1800s to warrant concern among policymakers. Certainly trade was impacted enough to cause petitions to Parliament seeking relief to proliferate.

II. SIMULATED PAPERS

A brief note in *The Times* on March 5, 1814, described the following special verdict in the case of *Meyer v. Pigou*:

[T]hat in August, 1810, all British commerce was prohibited by the Powers of the Baltic and Gulf of Finland, and it was only carried on by simulated papers and clearances, importing that it proceeded from neutral countries, under British licenses, and that this course was as well understood by the defendant as by the plaintiff.43

A. Widespread Availability of Simulated Papers

Accessible printed sources reveal clearly that simulated papers were widely available.44 The sheer volume of cases in which insurance policies permitted the use of simulated papers shows just how prevalent the use of simulated papers was in England during the Napoleonic wars.45 There were even circulars advertising the services of those who specialized in creating simulated papers, as, for example, the following:

Liverpool, _____.

Gentlemen—We take the liberty herewith to inform you, that we have established ourselves in this town, for the sole purpose of making

43. *Law Report: Court of King’s Bench, Friday, March 4, Times*, Mar. 5, 1814, at 2. The *Meyer* case was unreported. According to *The Times*, an appeal was to be made in the House of Lords, and it was for this purpose that the special verdict was found. No further record of the case has been located.

44. Records in the National Archives would undoubtedly illuminate and expand the matters addressed in this Article. Although it has not been possible for the authors to explore relevant National Archives holdings, we hope that it will be undertaken by future researchers. Also, according to Brougham, the House of Commons collected a “load of papers—these eight or nine hundred folios of evidence—together with the bulk of papers and petitions” before the Members of Parliament. Repeal of Orders, *supra* note 35, at 487.

simulated papers [Hear, hear!] [sic] which we are enabled to do in a way which will give ample satisfaction to our employers, not only being in possession of the original documents of the ships’ papers, and clearances to various ports, a list of which we annex, but our Mr. G____ B_____ having worked with his brother, Mr. J_____ B_____, in the same line for the last two years, and understanding all the necessary languages.

Of any changes that may occur in the different places on the continent, in the various custom house, and other offices, which may render a change of signatures necessary, we are careful to have the earliest information, not only from our own connections, but from Mr. J _____ B_____, who has proffered his assistance in every way, and who has for some time past made simulated papers for Messrs. B____ and P____, of this town, to whom we beg leave to refer you for further information. We remain, &c.

Though precise numbers are unavailable and there are conflicting accounts of how extensive the abuse of the licensing system was, one could safely conclude that simulated papers were widely used. One Member of Parliament, Mr. Whitbread, noted that he possessed “papers which had been left in the hand of a bankrupt, who had dealt in these simulated papers; and the clerks of that very bankrupt had since advertised, that all persons who were desirous of obtaining simulated papers might be immediately supplied by them.” Further, barrister Thomas Carr, in the case of *Flindt v. Scott* (1814), asserted: “The whole trade of the country is carried on by perjury, swearing these instruments are genuine, though all manufactured by one man in London.”

One example of the lengths to which ship owners or captains would go to maintain the pretense was the case of *The Mercury, Roberts*. There, the ship originally sailed from Havana and was bound for Charlestown. Upon interrogation by a British cruiser, the papers and the Master’s testimony all confirmed the story of an American ship being homebound with no further destination. Thus, the British
cruiser released the ship. Instead of heading home, however, the ship anchored at Charlestown and, without unloading any cargo, took on a new set of papers and set sail for either Hamburg or Spain. The ship was again intercepted by the British. All the papers were in order, and the Master’s testimony was in agreement. The ship surely would have been released again, except that the cruiser that stopped it happened to be the same one that had stopped it the first time. The commander of the cruiser recognized the ship and captured it as prize. The author of the pamphlet, James Stephen, assumed that because of the slim odds of uncovering such fraud, this case could be only the tip of the iceberg. According to Stephen, even underwriters were complicit in indirectly trading with the enemy. They would issue a policy that was perfectly valid on its face. Then, after issuing the policy, the underwriter would execute a second (illegal and unenforceable) agreement with the ship or cargo owner, that in the event of capture and a decision from a judicial body that the ship had been bound for a hostile port, the underwriter would not take advantage of such a judgment or argue that there had been a breach of the warranty of neutrality. For such a second agreement, the cost of insurance had a built-in premium of approximately one percent on top of the originally agreed-upon insurance rate.

B. Case Law

By the end of the eighteenth century, as Chief Justice Kenyon explained in Potts v. Bell, the law was clear that trading with the enemy during times of war was illegal, unless licensed by the King. That black letter law did not change, but the attitudes of the judges about how to construe licenses and whether to protect aliens (both neutrals and enemies) altered in the early nineteenth century. Although according to the law of nations, the use of simulated papers was illegal, many nations used them, and these papers were expressly permitted in insurance policies. Indeed, underwriters often demanded they be used, and would sometimes refuse to write policies when the quality of simulated papers was poor. For a ship to be fully protected, it would need a license to trade with the enemy from the Board of Trade in London (in case a British cruiser stopped it), simulated papers attesting to neutral

51. Id. According to Heckscher, citing Stephen, neutrals—especially the Americans—were the great beneficiaries of the Napoleonic Wars; during times of war, America’s foreign exports spiked with a “quite unique excess of re-exports, i.e., the exports of foreign products” and during intermittent and short-lived times of peace, foreign exports dropped. Eventually, Britain would deal with this circuitous trade, first through the judges who ruled against American ships in prize cases, and second by passing the several Orders in Council. HECKSCHER, supra note 12, at 103–04, 107, 110.

52. STEPHEN, supra note 49, at 51.

53. Id. at 81, 86.

54. Id. at 81–83.

55. See supra text accompanying notes 6–10.


57. See, e.g., Ruppenthal, supra note 30, at 16–19 (discussing the license system and the use of simulated papers).

58. See supra text accompanying note 11. See also the Appendix for a copy of a standard Lloyd’s marine insurance policy issued on August 4, 1810, with handwritten interlineations that include “liberty to carry use and exchange any simulated papers clearances and documents whatsoever.” Hagedorn v. Oliverson, (1813) 105 Eng. Rep. 461 (K.B.); 2 M. & S. 485.

ports of departure and destination, and an insurance policy to cover the loss in the event of capture (with permission to carry simulated papers). 60

In *Steel v. Lacy*, 61 the Chief Justice of the Court of Common Pleas, Sir James Mansfield, elicited useful information from special jurors who said that since the Berlin Decree’s issuance, 62 a ship could not safely sail the Baltic without using simulated papers. 63 The court, however, declined to decide the issue of the legality of using simulated papers and instead nonsuited the plaintiff because there was no proof that the Berlin Decree had been adopted in Denmark. 64 Yet Chief Justice Mansfield hinted that, in his opinion, using simulated papers was improper: “I give no opinion on what might be the case, if the same point was to arise on proper evidence; but there must be pretty strong evidence of the necessity of simulated papers, to induce the Court to give sanction to them.” 65

The question of whether simulated papers could be used without permission to lessen the risk of a voyage was decided in the negative at trial in *Horneyer v. Lushington* 66 and subsequently confirmed by the full Court of King’s Bench. 67 That case involved a ship that had sailed from Gothenburg (Sweden) to Riga (Russia). At the time, Sweden and Russia were at war, so simulated papers were obtained stating the ship had actually sailed from Bergen (Norway). 68 The papers were obtained without consulting the underwriters, who therefore did not insert in the policy that the ship had leave to carry simulated papers. 69 Upon landing at Riga, the ship was condemned as prize for carrying simulated papers, contrary to the law of nations. 70 The Attorney General insisted that the papers were used to ensure the safety of the

61. *Steel*, 128 Eng. Rep. at 113–14; 3 Taunt. at 285–86. The voyage in question was from London to Riga: the ship was captured off the coast of Elsinеur (Denmark) in 1808 and carried into a Danish port and condemned as prize for, among other reasons, using simulated papers. The policy had not given leave to carry the papers, so the underwriter refused to pay.
62. Napoleon had issued this decree on November 21, 1806, which directly forbade any European country allied with or dependent on France to import British goods. HECKSCHER, supra note 12, at 88–89, 93.
63. In late eighteenth and early nineteenth century England, special merchant jurors at trial frequently relied on their own knowledge and expertise, often educating the court in the process. JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 22 (2006). Relying on the jury’s answer, counsel for the plaintiff in *Steel v. Lacy* said: “It is clear law that the assured need not disclose that to the underwriter, which is notoriously known to all men. It is notorious that a ship cannot go this voyage without simulated papers; it was in proof that underwriters would not insure without them. The Defendants knew the voyage they were insuring: they knew that without these papers the vessel must have been condemned . . . . The taking these papers on board, (to sail without which would be absolute destruction,) certainly does not of necessity increase the risk, nor have the jury found that it did . . . . Sir W. Scott has declared that, under the present circumstances of Europe, if trade with the continent is to be carried on at all, it must be carried on by the aid of simulated papers.” *Steel*, 128 Eng. Rep. at 116; 3 Taunt. at 292–93.
65. *Id.* at 118; 3 Taunt. at 298.
69. *Id.* at 1315; 3 Camp. at 87.
70. Among other reasons, the ship was condemned for “having violated the laws of neutrality in bringing to a Russian port a cargo the property of an enemy concealed under false documents.” *Id.* at 1314–15; 3 Camp. at 86.
ship, for without the papers the ship would certainly have been condemned. He asserted that “it must have been perfectly well understood between the parties that simulated papers were to be used; and for that reason no express liberty to use them appears upon the face of the policy.” Otherwise, the underwriters never would have issued the policy. Lord Ellenborough, however, held:

[T]he underwriters are not liable in this case, as the assured must be considered the efficient cause of the loss, by an act which is in itself illegal, and for which no liberty is given in the policy . . . . By this [foreign court’s] sentence, the ship and cargo are condemned for a breach of the law of nations, in carrying fabricated papers . . . . The liberty to carry simulated papers is now frequently expressed in policies of insurance; and ought to have been so in this instance.  

Thus, notwithstanding the illegality of using simulated papers, under the law of nations, Lord Ellenborough thought that if an insurance contract permitted their use, a plaintiff could recover for a loss of ship or cargo.  

Indeed, if the policy gave leave to carry simulated papers, the underwriter could not escape liability by showing that the papers contained errors. In Bell v. Bromfield, the ship was confiscated and condemned as prize for carrying simulated papers, which the insurance policy had given leave to do, but the papers were written badly. The underwriters claimed that if the ship used them, they had to be error-free. Lord Ellenborough disagreed. The foreign court’s ruling was based on the existence of simulated papers, not their flawed nature. He said that “the main stress of the argument is that there was a simulation. Then if the simulation of papers be the ground . . . of the condemnation, the underwriter cannot object to bear the loss which has accrued on that account; he having agreed that the assured should carry simulated papers.”

III. THE EXISTENCE OF WAR  
Naturally, no “trading with the enemy” issue arose unless the foreign nation involved in a business transaction occupied “enemy” status. Not infrequently this presented difficult threshold questions for the courts. How was it known or determined that hostilities between England and another country had reached

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71. Id. at 1315; 3 Camp. at 88.
73. See Oswell v. Vigne, (1812) 104 Eng. Rep. 771 (K.B.) 771; 15 East 70, in which the policy did not contain leave to carry simulated papers and the ship was captured and condemned for having such papers onboard. Because the plaintiff-insured lost in Oswell v. Vigne, he sued his broker for failing to obtain permission to carry simulated papers in Fomin v. Oswell, (1813) 105 Eng. Rep. 147 (K.B.); 1 M. & S. 393. In Fomin, verbal instructions had contained an order to insert a clause granting leave to carry simulated papers, but the written instructions did not. The ship was captured and condemned for carrying simulated papers. The owners were unable to collect on the insurance because the policy did not grant them permission to have carried simulated papers.
75. Id. at 882–83; 15 East at 364–65.
76. Id. at 885; 15 East at 370.
sufficient intensity so that the two countries were “at war”? Was a declaration of war necessary? And even if war status existed, did that invalidate all unlicensed trade?

In the Bristow v. Towers report from the December 27, 1794, issue of The Times, counsel for the plaintiff argued that the government should decide when its trade with another country was impermissible and make it known to British subjects, for example by a legislative announcement or an order of the King in Council. He claimed that “the mere commencement of a war with an enemy, did not make the trade carried on with that enemy illegal, unless it was carried on in violation of the subject’s allegiance, by aiding the King’s enemies.”

Alternatively, a court might take judicial notice of the fact that, absent a special license, trade was prohibited with another country because of overt hostile engagements. But in Potts v. Bell, plaintiff’s counsel, Edmund Wigley, argued that “[h]ostilities . . . may exist without open war”; further, that “[a] declaration of war generally contains a prohibition to trade with the enemy; but a proclamation for marque and reprisals only, does not; and it is only from the prohibition of the King, by virtue of his prerogative, that the illegality arises.” Opposing counsel, Vicary Gibbs, disagreed, claiming that “[t]he Court will take notice of the existence of open war between this and any other country, if it be necessary, . . . but it is sufficient to state, as here, that hostilities existed at the time, which is equivalent to open war.”

Chief Justice Kenyon said nothing to this point in his brief opinion.

A decade later, whether a court could take judicial notice of war status remained unresolved. In Rucker v. Ansley, a license was issued on July 6, 1810, to ship brokers “on behalf of themselves and British or neutral merchants.” The license authorized specified exports on a Russian ship “to any port in Sweden or the Baltic not under blockade,” and to import in return grain needed in England. The ship was seized in Riga, a Russian port. At trial, Serjeant Best, counsel for the underwriter-defendant, argued that the interested parties were alien enemies domiciled at Riga, who were not protected by the insurance policy on the ship and cargo. For the plaintiff, the Attorney General argued “that Riga was not in a state of hostility with Great Britain.” Serjeant Best said the court should take judicial notice of the state of war, but Chief Justice Ellenborough said no—“I am not bound

77. Sir William Holdsworth stated that according to Blackstone, “The King has the sole prerogative of making peace and war. . . . To make it clear that the war is not the unauthorized act of private persons, but is regularly begun, a declaration of war is necessary.” Holdsworth protested that this view, though once generally held, “had become antiquated in Blackstone’s time.” 10 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 374 (1938).

78. Law Report: Bristow v. Towers, TIMES, Dec. 27, 1794, at 3, reporting the case from July 1, 1794. Lord Kenyon commented, “I suppose it must be done by the whole legislative body. I do not know whether the King has ever assumed that right.”

79. Id.

80. Id.

81. Id. at 1542; 8 T.R. at 552–53 (citing M. HALE, PLEAS OF THE CROWN 162 (1716)) (a general marque or reprisal “dooth not make the two nations in a perfect state of hostility between them”).

82. Id. at 1542; 8 T.R. at 553.


84. Id. at 961; 5 M. & S. at 26.

85. Id.

86. Id. at 962; 5 M. & S. at 28.

to know the secrets of councils; or with whom the country considers itself at war or at peace, except by its manifest acts." He said that Serjeant Best must prove the war status “independently of the acts of State” and that “it is incumbent on [him] to show, that Russia is in a state of hostility with us; and not upon the plaintiffs, to show, that it is neutral.”

Addressing the jury, Serjeant Best said that the jurors must of their own knowledge know whether Russia was, at that moment, at war with England, but Lord Ellenborough interjected that “[i]t must be a legitimate knowledge; not a persuasion, or a belief: it must be that which, if detailed in evidence, would be legal proof.” The Attorney General said that even though Russia and England might be in a “feverish state,” no letters of marque had been issued against Russia, which was “the strongest evidence that the country [Russia] was not considered hostile.” In the end, Lord Ellenborough said that it was for the jury to say whether “Russia’s allowance of no commerce in English ships did not constitute a decided hostility towards England.” Ellenborough told the jury that, “[i]f a country puts itself in a decided state of hostility, there need not be reciprocity to constitute war.” The jury, however, found for the plaintiff,” apparently taking the view that war status had not yet been established, so that the license was unnecessary.

The possibility of taking judicial notice of war status continued to be debated. Serjeant Best reportedly remarked in the Common Pleas case of Steinishurg v. Vaux in December 1811 that, “[a]s to the question of our being at peace or war, the right to take judicial notice of that from notoriety, when there was no regular declaration, was now sub judica, and would be shortly determined by the twelve Judges.” Whether this determination occurred is not known. Consensus was not always achieved on questions taken up informally by the twelve judges, and even when there was agreement, the results of twelve-judge deliberations in non-criminal cases were not ordinarily made public. Perhaps the question of judicial notice was shelved when war in the Baltic died out.

88. Id.
89. Id. This provoked Serjeant Best to grumble that “he should be puzzled to prove that we were at war with France.”
90. Id.
91. Id.
92. Id.
94. Id. Afterwards, Serjeant Best was successful in a motion for new trial by offering to prove the issuance of Orders of Council in December 1807 commanding general reprisals against Russia and publishing a declaration of causes of war in that country. See Law Report: Rucker v. Ansley, TIMES, Nov. 9, 1811, at 3; Jan. 29, 1812, at 3. In a report in THE TIMES of an intermediate phase of Rucker v. Ansley, Lord Ellenborough observed that the courts were dependent on the evidence presented by the parties, “and if evidence were produced in one case that led to one conclusion, and withheld in another, whereby the Court came to another conclusion, so that the verdicts varied every day, it might be lamented, but it could not be prevented.” TIMES, Nov. 8, 1811, at 3. He said he wished “proclamations were transmitted to us by some means,” adding, in frustration, “I don’t know how the case stands as to Hamburgh at this moment.” Id.
95. TIMES, Dec. 7, 1811, at 3.
96. See generally James Oldham, Informal Lawmaking in England by the Twelve Judges in the Late Eighteenth and Early Nineteenth Centuries, 29 LAW & HIST. REV. 181 (2011).
IV. PROTECTION OF ALIENS: NEUTRALS AND ENEMIES

Despite the insistence in the early nineteenth century that trading with the enemy was illegal, courts began to adopt a different attitude towards licensed trade with the enemy. There was a major shift in interpretations of how to construe licenses. Alien enemies could be the beneficiaries of insurance policies on these voyages, so long as the license did not preclude alien enemies from benefiting from that trade.\(^97\)

A preliminary question, however, is whether the language of special licenses became standardized so that consistent judicial interpretation was feasible. For several reasons, this did not happen. Licenses were issued not only by the Privy Council and the Board of Trade in London, but also by provincial authorities throughout the globe.\(^98\) In such circumstances, uniform drafting of license language was unrealistic.\(^99\) Indeed, in *Hagedon [Hagedorn] v. Vaughan*, Lord Ellenborough expressed the wish that “licenses were more advisedly and distinctly framed,” to which the Attorney General responded “that the object of the Council Board, was to give the merchant as large a licence as he wanted, and the merchant was permitted to draw them up.”\(^100\)

We should note, however, that even though special licenses did not acquire standardized language, certain interpretative questions did recur. Many licenses, for example, were issued to named persons “and others.” This open-ended

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\(^{97}\) Hagedorn v. Bazett, (1813) 105 Eng. Rep. 319 (K.B.); 2 M. & S. 100. A license had been issued to J.H.P. Hagedorn “on behalf of himself and other British merchants or neutral merchants,” but the property was owned by Hagedorn, Hamburg merchants (then neutrals), and Russians (then enemies of Britain). Because the ownership of the goods was divisible, the insurance was recoverable in proportion to the ownership of the goods. Thus, the ship having been captured, the British and Hamburg merchants could recover on the policy while the Russians could not. *See also* Blackburne v. Thompson, (1812) 104 Eng. Rep. 775 (K.B.); 15 East 81 (finding that trade to ports declared to be not hostile did not require the use of a license); Hagedorn v. Bell, (1813) 105 Eng. Rep. 168 (K.B.); 1 M. & S. 450 (holding that the insured was entitled to recover for a loss though the destination was occupied by enemy troops). In the latter case, the only question was whether goods that had been shipped on account of Hamburg merchants were insurable and recoverable. At the time, Hamburg had been captured by French troops, but France allowed the Senate of Hamburg to exercise full sovereign civil authority, and no declaration of war against Britain had ever been issued. Lord Ellenborough held that there had been no overt act on the part of Hamburg to create a state of war, and the Orders in Council treated Hamburg, at worst, as a neutral, so the trade was insurable. *See also* Hagedorn v. Reid, (1813) 170 Eng. Rep. 1416 (N.P.); 3 Camp. 377 (holding that recovery was permitted only where claimant could prove that cargo belonged to the British or neutral merchants). In this case, the license had been granted on the same terms as in *Hagedorn v. Bell*, but there was no proof offered at trial to show the goods were owned by a British or neutral merchant. Such proof was necessary, especially because the goods were loaded in a hostile port (Gluckstadt, Denmark), raising the likelihood that they belonged to an enemy.

\(^{98}\) According to Sir John Nicholl, “The Governor of Jamaica has power given to him to licence trading with the Spanish West India Settlements; which he has exercised accordingly. The Governor of Gibraltar has the same power with respect to Spain.” Potts v. Bell, (1800) 101 Eng. Rep. 1540 (K.B.) 1544; 8 T.R. 547, 556. Although before the nineteenth century the King had to stamp all licenses with his sign manual, it became impractical (if not impossible) once war with France broke out and the number of licenses issued ballooned. See Flindt v. Scott, (1814) 128 Eng. Rep. 856 (C.P.) 864; 5 Taunt. 674, 693–94 (tracing the development of who had authority to issue licenses).

\(^{99}\) Compare license at issue in *In re Hendrick*, (1810) 12 Eng. Rep. 125 (P.C.); 1 Acton 322, with that at issue in Jonge Johannes, (1802) 165 Eng. Rep. 606 (Adm.) 607 n.(b); 4 C. Rob. 263, 264 n.(b). For more samples of licenses, see GALPIN, supra note 17, at apps.

\(^{100}\) TIMES, Nov. 13, 1811, at 3 (in this report, the case is unnamed, but a brief report in THE TIMES on November 12, 1811, identifies the case by name).
expression understandably invited counsel to invoke the maxim of *ejusdem generis*, sometimes successfully and sometimes not.\textsuperscript{101}

In the early 1800s, both the common law courts and the Court of Admiralty were conservative, resisting expansive interpretation of license language or even recognition of an alien enemy’s right to recover at all.\textsuperscript{102} The first court to break new ground was the Admiralty Court, presided over by Sir William Scott. In 1810, in *Cousine Marianne*, Scott said, “this Court has never yet restored the property of the enemy, except in those instances where the words, ‘to whomsoever the property may appear to belong,’ are introduced into the licence. Where those words occur they have been held to exclude all enquiry into the proprietary interest.”\textsuperscript{103} Therefore, if the license did not specify to whom the property had to belong, it could belong to an alien enemy and still be sanctioned under British law.

A year later in *Usparicha v. Noble*,\textsuperscript{104} the Court of King’s Bench held that if a Spanish merchant domiciled in England had received a license to trade with enemy Spanish merchants (who had interests in the cargo), he could recover on an insurance policy on a ship lost through capture by a French privateer and condemned by a French consular court sitting in Spain.\textsuperscript{105} This was the beginning of the expansion in the common law courts of alien enemies’ maritime rights.\textsuperscript{106} According to Lord Ellenborough:

The legal result of the licence granted in this case is, that not only the plaintiff, the person licensed, may sue in respect of such licensed commerce in our Courts of Law, but that the commerce itself is to be regarded as legalized... The Crown may exempt any persons and any branch of commerce, in its discretion, from the disabilities and forfeitures arising out of a state of war: and its licence for such purpose ought to receive the most

\textsuperscript{101} See, e.g., Feise v. Bell, (1811) 128 Eng. Rep. 227 (C.P.) 228; 4 Taunt. 4, 7 (holding that a license granted to “Feise and Co.” should be given broad interpretation to include both British and enemy Russian merchants); Mennett v. Bonham, (1812) 104 Eng. Rep. 924 (K.B.); 15 East 477 (holding that a license granted to British merchants “and others” did not include the Russian merchant who owned the goods); Flindt v. Scott, (1814) 128 Eng. Rep. 856 (C.P.) 856; 5 Taunt. 674, 674 (“Licences to trade with an enemy are to be construed liberally... therefore, although the agent, in obtaining the licence, did not represent to the privy council that he applied on behalf of an hostile trader, the concealment did not vacate the licence, or vitiate the policy.”).

\textsuperscript{102} See *In re Jonge Klassina*, (1804) 165 Eng. Rep. 782 (Adm.) 784; 5 C. Rob. 297, 301 (declining to restore cargo despite the hardships associated with the loss: “If trade with the enemy is generally unlawful, it is not in the power of this Court to admit it, beyond the degree which is fairly described in the terms of the licence”); *In re Cosmopelite*, (1801) 165 Eng. Rep. 516 (Adm.) 517–18; 4 C. Rob. 8, 11 (“Licences being then high acts of sovereignty, they are necessarily *stricti juris*, and must not be carried further than the intention of the great authority, which grants them, may be supposed to extend.”); Brandon v. Neshitt, (1794) 101 Eng. Rep. 415 (K.B.) 418; 6 T.R. 23, 28 (finding not “a single case, in which the action had been supported in favour of an alien enemy”); Bristow v. Towers, (1794) 101 Eng. Rep. 422 (K.B.) 429; 6 T.R. 35, 49 (deferring to *Brandon v. Neshitt*).

\textsuperscript{103} *Cousine Marianne*, (1810) 165 Eng. Rep. 1134 (Adm.) 1134; Edw. 346, 346. However, in this case, because the phrase “to whomsoever the property may appear to belong” was not in the license, the alien enemy could not recover. Notably, Sir William Scott hinted there had been previous cases in which Admiralty had restored cargo to alien enemies when the magic words were inserted in the license.


\textsuperscript{105} Spain and France were allied against Britain at the time. *Id.*

\textsuperscript{106} There was no indication that the ship was condemned for carrying simulated papers, per se, but the French condemned it. It is also unclear whether the Board of Trade was aware of the Spanish ownership of the cargo. *Id.*
liberal construction . . . For adequate purposes of State policy and public advantage, the Crown . . . has been induced in this instance to license a description of trading with an enemy’s country, which would otherwise be unquestionably illegal. Whatever commerce of this sort the Crown has thought fit to permit . . . must be regarded . . . as legal.

Because the plaintiff, Usparicha, had been domiciled in England for a lengthy period of time, his legal status was the equivalent of that of a British merchant, which afforded him the protection of the law in recovering on the insurance policy.

The Court of Common Pleas also expanded protection of beneficiaries of insurance policies, beginning with protection for British citizens residing in hostile countries. In *Fayle v. Bourdillon*, a license to import goods from Russia had been granted to Benjamin Fayle and Co., the plaintiff-consignee of the goods. The three partners with an interest in the cargo were all British subjects, but two of them resided in hostile countries (Sweden and Germany). The voyage was on a neutral vessel and, on the return trip from St. Petersburg, the ship was lost and the underwriters refused to pay the insured. The court declined to answer the question of whether alien enemies could recover under insurance policies, even though counsel for the underwriters claimed that the owners of the goods (British citizens) had become alien enemies by virtue of trading from and living in hostile countries, and that the license did not cover such trade. Rather, Chief Justice James Mansfield held that because the plaintiffs applied for the license, because they had an interest in the policy (by being consigned the bills of lading), and because the terms of the license were very broad and did not specify a particular owner, the voyage was covered by the license and thus insurable. Moreover, the purpose of the voyage was to procure these goods from these enemy countries, and the Board of Trade must have understood that either British citizens or alien enemies would have had to put the goods onboard the ship when it sailed from a hostile port. Thus, the license had intentionally been written very broadly and generally to protect the voyage. As Chief Justice Mansfield explained:

The words of the licence are as general as it is possible for them to be . . . . Under this licence goods are imported from Russia, consigned to Fayle and Co.; they . . . are the consignees, and are the very persons who applied for this licence and obtained it. The transaction exactly corresponds with this licence, and probably this was the very sort of trade the licence was meant to legalize . . . . [I]t seems to have been the very intention of government to encourage the importation of these goods from Russia, Prussia, and Denmark; and probably they form the very bulk of this trade from those countries to this, therefore there may be very good reasons for making this licence so general.

107. *Id.* at 402; 13 East at 342.
109. The policy gave leave to carry simulated papers, but the case did not turn on their existence.
110. *Id.* at 219; 3 Taunt. at 553.
111. *Id.*
It did not take long for the Court of Common Pleas to answer the question left undecided in *Fayle*, that is, whether alien enemies could be insured by English policies. In *Feise v. Bell*, decided one month after *Fayle*, Chief Justice Mansfield held that if the license was granted to British merchants “and others,” the others did not also have to be British merchants, but could be anyone.112 In that case, a license to trade with Russia was given to Godfrey Feise and Co. (British merchants), “on behalf of themselves and others,” and the goods were co-owned by Feise and Russians, even though Russia was then at war with England.113 At trial, Mansfield overrode the objection that “and others” was *ejusdem generis* and meant British merchants, certainly not foreign merchants, or worse, alien enemies, and he ruled in favor of the plaintiff.114 On argument before the full Court of Common Pleas, Mansfield’s trial decision was affirmed *per curiam*. Despite the objection that allowing recovery for the plaintiffs would indirectly aid the enemy, the court said:

> [The] object [of the license] was to facilitate the export of . . . British manufactures . . . to find a market for them abroad, to effect which the goods must be necessarily consigned to foreigners. . . . It seems to me that a construction in favour of such a permission will rather aid than obstruct the object of the licence, by promoting the commerce of the country.115

Although the King’s Bench in *Usparicha* had concluded that licenses were to be construed liberally, Lord Ellenborough balked in *Mennett v. Bonham*.116 There, the plaintiffs were British merchants living in London, acting on behalf of a Russian alien enemy residing in St. Petersburg at the time of the voyage. The plaintiffs had received a license to trade with Russia “on behalf of themselves and others,” but had not disclosed that the principal was a Russian. The insurance policy gave leave to carry simulated papers. The ship had been confiscated and condemned as prize by the Russian government. The plaintiffs’ attorneys relied on *Usparicha* in their arguments, saying that licenses should be construed liberally, and that this particular license had exempted the plaintiffs from any condemnation of property by their home governments.117 Yet the majority relied on *Conway v. Gray*,118 in which the

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112. *Feise v. Bell*, (1811) 128 Eng. Rep. 227 (C.P.); 4 Taunt. 4 (Chief Justice Mansfield said the object of the license was to promote the commerce of the country. The case does not indicate under what circumstances the ship was captured.) A comparable case, *Feise v. Newnham*, (1812) 104 Eng. Rep. 1063 (K.B.); 16 East 197, was decided on agency principles. There, the King’s Bench held that if a license was granted to Favenc “and others,” Favenc, as an agent, could procure the license for Schnekonig, his principal and a Prussian alien residing in Britain at the time. By the principal-agent relationship, Schnekonig was covered by the license and thus the beneficiary of an insurance policy, even though Schnekonig’s name appeared nowhere in the license.

113. *Feise*, 128 Eng. Rep. at 227; 4 Taunt. at 5. The case was decided during the Anglo-Russian War, fought from 1807 to 1812.

114. *Id.* at 227–28; 4 Taunt. at 5.

115. *Id.* at 228; 4 Taunt. at 7. Mansfield added that “it is perfectly notorious that in a great commercial city, such as this metropolis, there are and must be many merchants who are not natives of the country where they carry on their merchandize, and there is nothing in this license which intimates that it is to be restrained to such as are.” *Id.*


117. *Id.*

118. *Conway v. Gray*, (1809) 103 Eng. Rep. 879 (K.B.); 10 East 536. In *Conway*, two of the three plaintiffs were British merchants, one of whom lived in America. The third plaintiff was an American merchant who had consigned the goods to his British counterparts. The invoice and bills of lading were dated December 23, 1807, one day after the American government issued an embargo on all ships in its
court had held that a citizen could not benefit under an insurance policy for losses caused by his own government, and held that the license was not intended to protect an alien enemy. Backtracking on his previous language in *Usparicha*, Ellenborough said that surely the government had not intended to issue a license authorizing trade with the enemy that would benefit enemies under insurance policies. Thus, “and others” must mean fellow British merchants by *ejusdem generis*—“[W]here [a license] is used to cover a trade by . . . an enemy from this country to a hostile port, such an use of it should have been within the contemplation of the Government issuing it; . . . that the Government should not be hoodwinked as to the real object of the parties obtaining it.”119 Furthermore, because the Russian government confiscated the Russian plaintiff’s ship, *Conway* was applicable, so that the plaintiff in *Mennett* could not recover in any case.120 This was so, even though the plaintiff had obtained a license from the British government (an act illegal in his home country), thus implying an intent to dissent from the acts of his home government (which would seemingly be governed by *Usparicha*). Counsel for the plaintiff in *Mennett* also distinguished *Conway*, because the plaintiffs had not there acted in any way to indicate hostility toward their home countries.121 But according to Lord Ellenborough, if *Conway* and *Usparicha* conflicted, he would prefer *Conway*.122 Justice Bayley agreed. Justice Le Blanc, however, dissented, primarily for the reasons given by Chief Justice Mansfield in *Fayle* and *Feise*,123 and it was not long before the authority of *Mennett* was cast into serious doubt.

While the King’s Bench vacillated, the Court of Common Pleas, building upon its own precedent and *Usparicha*, continued to expand insurance protection for aliens. In *Morgan v. Oswald*,124 a license for a ship to import goods from Russia had been granted to Henry Siffkin only, but the cargo was owned by three Russian merchants, Russia then being at war with England. Upon the ship’s loss, the insured sought recovery under the policy. Unlike previous cases,125 this license did not provide for foreign ports, so the ship never sailed. The British partners abandoned the ship and attempted to collect on the insurance policy because they had advanced payment of the goods. However, the court said that the plaintiffs could not recover because “each [subject] is a party to the public authoritative acts of its own Government; . . . a foreign subject is as much incapacitated from making the consequences of an act of his own State the foundation of a claim to indemnity upon a British subject in a British Court of Justice, as he would be if such act had been done immediately and individually by such foreign subject himself.” Id. at 882; 10 East at 545. Because a citizen of a country impliedly consented to all of the acts of his own government, he could not seek to recover on an insurance policy for a loss that his own government had caused. Thus, “the party who himself prevents the act from being done has no right to call upon the underwriters to indemnify him against the loss he may sustain from such act not being done.” Id. at 883; 10 East at 546.

119. Revealing a fundamental anxiety about these cases, Ellenborough added that “[m]any public inconveniencies might arise from permitting an indiscriminate intercourse to alien enemies between our own ports and those of the enemy.” *Mennett*, 104 Eng. Rep. at 930; 15 East. at 494.

120. See id. at 930; 15 East. at 495 (“The loss, therefore, in this case having been occasioned by a Russian condemnation, must conclude every Russian subject, and the Russian assured, for whose benefit this action is brought, cannot recover upon either ground of objection.”).


122. Id. at 930; 15 East. at 495.

123. Id. at 930; 15 East at 496.


125. See, e.g., Feise v. Waters, (1810) 127 Eng. Rep. 1072 (C.P.) 1072; 2 Taunt. 248, 249 (explaining that a license was given to Thomas Baker and sons to import, but they did not have an interest in the goods involved and so could not receive the benefit of the license).
contain specific language regarding who had to own the cargo or the ship. The general language did not require that the property be owned by Siffkin or for “Siffkin to import,” but rather, “to Siffkin for a ship to import.”

Although previously, there had been cases from Admiralty that strictly interpreted licenses, times had changed and so had Sir William Scott’s decisions. Justice Gibbs, in Morgan, even interrupted the defendant-underwriter’s counsel, claiming that Admiralty decisions had since changed—that when the country’s trade “remained in its original state, and the licensed trade was the exception to the general rule, licenses were to be construed strictly, but that since the licensed trade has become the general trade, and the unlicensed trade the exception, licenses are to be construed liberally.”

After hearing the arguments, Chief Justice Mansfield stated:

A ship sent to Russia to take in goods, must necessarily be supposed to take in Russian goods, and it must be naturally supposed that those Russian goods are the property of Russian subjects. . . . It therefore seems to follow, that they may be put on board by a Russian subject; . . . then it necessarily follows, that, according to the case of Usparicha v. Noble, all the rights attach which are necessary for the enjoyment of the right of importing; therefore, . . . it necessarily follows, that a Russian subject, licensed to import goods into Great Britain, has a right to insure them. . . .

126. Compare Morgan, 128 Eng. Rep. at 221; 3 Taunt. at 557, with Defflis v. Parry, (1802) 127 Eng. Rep. 2 (C.P.) 3; 3 Bos. & Pul. 3, 3. In Defflis, the license had been granted to British merchants (Bridge and Smith) or their agents “or the bearers of their bills of lading on board six ships.” The plaintiffs’ agents purchased eight casks of madder and had them delivered to the ship, and the captain signed one bill of lading for the whole cargo, which was indorsed by the agents and sent to Bridge and Smith. The court held that this general bill of lading was sufficient to protect the whole cargo from confiscation. 127. See, e.g., In re Jonge Johannes, (1802) 165 Eng. Rep. 606 (Adm.) 606–07; 4 C. Rob. 263, 263–66. A license permitted Bridge and Smith, or their agents, or the bearers of their bills of lading, to import cargo in three neutral ships. On the way to Stockholm, the ships were captured and the cargo lost. When Bridge and Smith attempted to recover, the court denied their request because they had consigned the goods to third parties and so did not meet any of the criteria of the license. Sir William Scott held that “a material object of the control which the government exercises over such a trade is that it may judge of the particular persons who are fit to be entrusted with an exemption from the ordinary restrictions of a state of war. . . . I do not feel that these goods can be restored by me, without my taking upon myself to say, what I hardly conceive I am upon any principle warranted to declare, that when a license is granted to one person, it may be extended to the protection of all other persons who may be permitted by that person to take advantage of it.” Id. at 607–08; 4 C. Rob. 264–68. See also In re Hoffmung, (1799) 165 Eng. Rep. 275 (Adm.) 276; 2 C. Rob. 162, 162–64, in which Scott said, “If it is indubitable that the King may, if he pleases, give an enemy liberty to import[,] . . . but I apprehend, that unless there are very express words to this effect to be found in the license, I am to consider its meaning as not going to that extent, but as giving such a liberty only to subjects of this country: it is a license ‘to British subjects’ to import, and as I understand it, they are to import on their own account; and if it appeared that the importation was on the account of other than British merchants, I should hold, that under the terms of the license it could not be considered as a legal importation.”

128. See, e.g., In re Hendrick, (1810) 12 Eng. Rep. 125 (P.C.) 128; 1 Act. 322, 330 (affirming appeal from Sir William Scott’s decision construing license in favor of plaintiff); In re Vrow Cornelia, (1810) 165 Eng. Rep. 1134 (Adm.), 1135; Edw. 349, 350 (“In the use and application of licences, the Court will not limit the parties to a literal construction. It is sufficient that they shew under the difficulties of commerce that they come as near as they can to the terms of the licence.”), aff’d, 12 Eng. Rep. at 181; 2 Act. 66. Members of Parliament later commented on Sir William Scott’s liberal interpretation of licenses that resulted in the restoration of previously condemned ships to neutrals: “[T]he conduct of the British High Court of Admiralty had been marked with liberality, almost amounting to injustice towards ourselves; and which had rendered the eminent individual at the head of that court as popular in America as he was in England.” Brougham’s Motion, supra note 23, at 1122.

Lord Ellenborough and the Court of King’s Bench, in the case of
*Usparicha v. Noble*, and other cases, and certainly the Court of Admiralty
also, now are of opinion, that licenses ought to be construed liberally, and I
think, upon very good ground.130

Thus, “under this licence, Russian subjects were at liberty to import their goods
into this country; and if a Russian subject had a right to import those goods, he had
therefore a right to insure them, and to bring actions to enforce that contract.”131
While *Morgan* was before the Court of Common Pleas, two related cases based on
the same ship and license were pending before the King’s Bench.132 Once *Morgan*
was decided, the King’s Bench followed suit in both cases pending on its docket.*Robinson v. Touray* and *Robinson v. Cheesewright*, after which Common Pleas never
looked back.133

Given the nature of the Napoleonic wars, not all of the nations that Napoleon
subjugated were formal enemies of Britain. This introduced another variant for
courts to deal with if such a quasi-enemy captured and condemned a British-insured
ship. For instance, if a foreign power forbade trading with Britain (though without a
formal declaration of war), an alien could still recover under a policy, even if his own
government had done the seizing.134 In *Simeon v. Bazett*, the ship was bound from
London to Prussia, a license to trade with Prussia was issued to British merchants,
and the insurance policy allowed the use of simulated papers.135 Because Prussia was
under Napoleon’s control at the time, ships from England were routinely confiscated.
Simulated papers were therefore made to state that the ship had sailed from

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130. *Id.* at 224; 3 Taunt. at 566–67. Mansfield echoed Justice Gibbs’ sentiment about what was
“normal” during wartime, and he specifically deferred to Sir William Scott’s lead in construing licenses
more liberally: “This species of license has been considered as an exception out of the general law, but it is
now used to carry on a very great part of the trade of the country; and unless it were so carried on, a very
great part of the trade must be lost; and for preserving it, the licenses ought to be construed liberally. And
though certainly this Court is not bound to follow the authorities in the Court of Admiralty in general, yet
as that Court has primary, and even exclusive jurisdic tion in several subjects of capture and marine law,
from which the Courts of common law have taken all their doctrine relating to these subjects, I think it
would be of most mischievous consequence, if hereupon we differed from them.” *Id.* at 224; 3 Taunt. at
567.

131. *Id.* at 225; 3 Taunt. at 569.

(1813) 105 Eng. Rep. 83 (K.B.); 1 M. & S. 220. Chief Justice Mansfield noted in *Morgan*, “This question is
also before the Court of King’s Bench, and it would have been desirable if the Judges of both courts could
have met and settled the point; but the term drawing to an end, we think it best to decide as well as we

the plaintiff were confident that it was “clearly established that licences to trade were to be expounded
liberally, the opposite doctrine had been long since abandoned, first by the court of admiralty, and since by
the courts of Westminster-hall. The policy of the government in granting these licences, was, to encourage
British commerce.” *Id.* at 374; 4 Taunt. at 372. Justice Chambrè responded to the defendants’ assertion
that licenses were to be construed strictly: “All the cases in Edwards’s Leading Decisions shew, that the
opinion of the Judge of the Admiralty Court is directly the reverse; he gives them the most liberal
construction.” *Id.* at 375; 4 Taunt. at 376.

5 Taunt. 711 (holding that two Prussians were not barred from recovering on insured exported goods that
were confiscated by their own government).

Gothenburg, Sweden. The cargo, though British property, had been consigned to
Prussian merchants and the policy had been taken out on their order and account,
and their own government confiscated the ship. The insurers resisted payment. The
court said that because England was not at war with Prussia, the license was
immaterial because there was nothing to exempt from the prohibition against trading
with the enemy. But this case still did not fall under Conway because, unlike the
underwriters in Conway, who had not contemplated an American embargo, the
trading circumstances had long been known to merchant and underwriter alike. In
fact, they had built in a premium of forty guineas percent to compensate for the
higher risk of confiscation by the Prussian government.

Though the Court of Common Pleas had been fairly consistent in following
Admiralty’s lead, the Court of Exchequer Chamber in Flindt v. Scott finally brought
all of the discordant common law cases together and established that alien enemies
could indeed recover on policies, even if the licenses were granted to British
merchants. There, the policy covered a voyage from London to Archangel with
leave to carry simulated papers. The policy was taken out by a British agent on
behalf of himself and Zuckerbecker, Klain, and Co. (Russians abroad in Russia, with
whom England was then at war). Upon arriving at Archangel, the ship was seized by
the Russian government for carrying simulated papers. The plaintiff (Flindt) had
applied for a license without disclosing that he was operating on behalf of Russian
principals. The license granted “the petition of Flindt and Co. of London, merchants,
on behalf of themselves and others.” The King’s Bench had decided in favor of the
defendant-insurer, saying that the now-familiar “and others” was ejusdem generis and
applied to British merchants only (consistent with its own precedent in Mennett), and
two of the three justices said that the case was more in line with Conway than with
Usparicha. Justice Le Blanc again was the lone dissenter. So eager was the court
to side with the defendants that Justice Bayley said, “I think we may throw out of our
consideration the decisions in the Admiralty Courts, and confine ourselves to the
construction of the licence by the rules of the common law.” And according to its
own precedents, the Court of King’s Bench surmised that the Crown surely had not
meant to provide British insurance to an enemy or to allow an enemy to be immune
from the acts of his own government.

Upon a writ of error to the Exchequer Chamber, counsel for the underwriter
stated that trading with the enemy was illegal and cited the early cases of Brandon v.

136. Id.
137. Id. at 319; 2 M. & S. at 98–99.
138. The premium was 100£ on 250£ worth of goods. The court summarized as follows: “Here the
cause of loss arose from the course of commerce, which was carried on by means of simulated papers and
clearances, when all direct commerce between Great Britain and the ports in the Baltic was prohibited;
and such a course of commerce is found by the verdict to have existed before the time of effecting the
insurance, and to have been well known by merchants and underwriters and their agents, to which classes
of persons the plaintiffs and defendant respectively belonged… The perils therefore likely to result from
such a trade were in the contemplation of the parties at the very time of effecting the policy, and were so
expressed in the policy.” Id. at 319; 2 M. & S. at 99.
139. Flindt v. Scott, (1814) 128 Eng. Rep. 856 (C.P.) 866–67; 5 Taunt. 675, 699–700. Thus, the King’s
Bench cases culminating in Mennett v. Bonham were overruled.
140. Id. at 857; 5 Taunt. at 676 (emphasis added).
142. Id.
Before counsel for the plaintiff could respond, however, Chief Justice Mansfield interjected, “We consider it as settled... contrarily to what was at first held, that these licences are to receive the most liberal construction, because, even if the court of admiralty had not decided it, yet every one might discern that they were granted merely for the benefit of the country.”

To finalize matters, the Exchequer Chamber, in a unanimous opinion by Chief Baron Thomson, reversed the King’s Bench ruling and held in favor of the plaintiff. There was “no doubt” that during times of war, the sovereign could authorize trade between British citizens and alien enemies, “[a]nd these licences to trade, however they may have been formerly construed strictly, are now in all courts construed more liberally, and favourably to trade, in order to effectuate the benefits intended to result from them.” Also, the terms of the policy “sufficiently indicate that the cargo... might legally comprehend the property of enemies,” and Cousinne Marianne directly controlled. Thomson then turned Conway v. Gray on its head by granting the alien enemy the standing of a British citizen under this insurance policy. He said that the underwriters knew all the circumstances and agreed to this bargain; thus, “[t]he effect of the licence is, to convert this Russian, though an alien enemy, as it were, into an alien friend, and so far to separate him from the acts of his government, as concerns the subject matter of this licence.” The tug-of-war battle between the King’s Bench and the Court of Common Pleas was finally settled. And less than one year later, the Napoleonic Wars would end, making any further argument moot.

CONCLUSION

The license system allowed the use of simulated papers to flourish. Though these papers were ostensibly illegal, courts protected merchants by allowing them to recover under insurance policies, as long as those policies expressly allowed the use of simulated papers. The rationale was that this was necessary to protect British commerce.

Initially, the benefits of such policies applied only to British merchants, but in the early 1810s, first the Admiralty Court, then the common law courts, expanded the construction of insurance policies to benefit alien neutrals, and eventually alien enemies. The irony of these developments was that the end result in practical effect...
came close to the forthright arguments advanced by Murray and Ryder in parliamentary debate in 1747, described at the outset of this Article. Commercial revenues from international trade, protected and facilitated by marine insurance coverage, were essential to the British economy, especially while funding the war effort in the Napoleonic era. Judicial rationalizations emasculated the proscription against trading with the enemy, but this was a small price to pay in a country long accustomed to the practical advantages of creative legal fictions.

152. See supra notes 2–3 and accompanying text. In the report in THE TIMES of the case of Gamba v. Le Mesurier, (1803) 102 Eng. Rep. 887 (K.B.); 4 East 407, the plaintiffs were Frenchmen who insured a ship and goods before war broke out between France and England. The ship was captured by an English ship during wartime, and after the war ended, the plaintiffs sued the underwriters to recoup their loss. Counsel for the plaintiffs, Charles Warren, invoked the 1747 opinions of Ryder and Murray, but opposing counsel, Serjeant Best, argued that the opinion of Lord Mansfield in his legislative character “was not to be set up against his opinion in his judicial character.” It was well-known that Lord Mansfield, as a judge, was of the view that actions such as that in Gamba could not be maintained; indeed, Justice Buller had stated that Lord Mansfield had told him so in confidence. Warren protested that betraying a confidence was hardly fair, but Lord Ellenborough thought that what Buller said was “full as likely” to be Mansfield’s true opinion as was the report of what he said in the House of Commons in 1747. And in any event, Ellenborough, in 1803, “professed not to have a particle of doubt,” nonsuiting the plaintiffs. See Gamba and another v. Le Mesurier, TIMES, Nov. 16, 1803, at 3.
In the name of God, Amen. Mr. J.P.H. Hagedorn—as well in his own Name, as for and in the Name and Names of all and every other Person or Persons to whom the same doth, may, or shall appertain, in Part or in All, doth make Assurance, and cause himself and them, and every of them to be Insured, lost or not lost, at and from Gluckstadt and any port or ports in
the River Elbe all or to any port or ports in the United Kingdom with liberty to carry use and exchange any simulated papers clearances and documents whatsoever and with leave to seek join and exchange convoys load unload and reload goods and specie of Heligoland or elsewhere. . . .

[dated 4 August 1810]

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