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LEADING DECISIONS
IN THE
HIGH COURT OF ADMIRALTY,
ON
Vessels failing under British Licences.

[Price 2 s.]

REPORTS

OF THE

LEADING DECISIONS

IN THE

HIGH COURT OF ADMIRALTY,

IN CASES OF

VESSELS SAILING UNDER BRITISH LICENCES.

BY THOMAS EDWARDS, LL.D. ADVOCATE.

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R E P O R T S
OF
D E C I S I O N S
IN THE
H I G H C O U R T O F A D M I R A L T Y,
In Cases of Vessels sailing under British Licences.

GOEDE HOOP, PIETERS.

*Nov. 7th,
1809.*

THIS was a leading case, and became of importance, as it furnished the Court with an opportunity of stating generally the principles by which its decisions would be governed in questions arising on the capture of vessels sailing under *British* licences. The ship was chartered at *Marennes*, to proceed in ballast to *Rochelle*, and there to take on board her present cargo; she arrived at *Rochelle* on the 1st of *April* 1809, and completed her lading on the 13th *May*, but did not sail until the 29th *June*, on which day she was captured, as the licence had expired. The excuse set up was, that the ship was detained after her cargo was on board by an embargo, which had been imposed by the *French* Government; and that for some days after it was taken off, she was prevented from sailing by contrary winds.

Expired licence
—Parties having
used due diligence,
but prevented by
accidents not within
their control from
carrying their
intentions into
effect within the
time—entitled to
protection.

CASES DETERMINED IN THE

JUDGMENT.

The
GOEDE HOOP.

Nov. 7th,
1809.

Sir William Scott.—This was the case of a vessel under Oldenburgh colours, which was captured in the prosecution of a voyage from Rochelle to Hull, and brought to Plymouth. There was a licence on board granted to Henry Nodin, on behalf of himself and other British merchants, for four vessels under particular colours which are enumerated, to proceed with cargoes of brandies from Charente, Bourdeaux, or any port of France not blockaded, to any port of Great Britain, and permitting the masters to receive their freights, and depart with their vessels and crews. The licence is dated 15th November 1808, and is to remain in force six months from that period; now the ship was taken the 29th of June last, and, therefore, according to the literal construction of the licence, after the time had expired, during which it was to continue in operation.

This question has led to some discussion on the rules of interpretation to be applied to licences generally, and as those rules will of necessity embrace a great variety of cases, it is extremely desirable that they should be settled now, as far as this can be done by the authority of this Court. These licences owe their origin to the general prohibition, which declares it to be unlawful for the subjects of this country to trade with the enemies of the King without his permission; for a state of war is a state of interdiction of communication: that is a law which is not peculiar to this country, but one which obtains very generally among the States of Europe. In former wars this prohibition was attended with very little inconvenience, as the greater part of the countries in the neighbourhood remained neutral, and presented to the belligerents various channels of communication, through which they

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they obtained from each other such commodities as they stood in need of. While the world, therefore, continued in that state, of course licences would be granted only in very special cases, where it appeared that there was a necessity to have a direct communication with the enemy; and being matter of special indulgence, the application of them was *strictissimi juris*. At the same time, when I so describe them, I do not mean to say, that there ever was a period in which a rational exposition, allowing a fair and liberal construction of the intention of the grantor, would not have been received. There never was a period, for instance, in which it could have been contended, that the words "six months" were subject to such a strict and literal interpretation, that a failure, arising from circumstances which the party could not control, would have the effect of vitiating the licence, where he could shew that he had used all due diligence, and was prevented from completing the voyage within the time by embargoes in foreign ports, or by the fury of the elements. These are accidents which prejudice no person, and therefore I presume the time never existed when the party would not have been at liberty in this Court to alledge such facts, and when he would not have been entitled to a virtual protection from Its decisions, although the terms of the licence were not literally complied with. While he was baffled by these obstructions, the intervening time was, as it were, annihilated, and he was to be put again in possession of the time so lost. That interval, in which he was not at liberty to act was, in fair construction, no time as to the operation of the licence. It was a construction founded on the intention of the grantor, that where a party had acted with good faith, and had complied with the terms prescribed, as nearly as controuling circumstances

CASES DETERMINED IN THE

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circumstances would permit, he should have a fair indulgence respecting those points in which he had been prevented from a literal performance, by obstructions which he could neither foresee nor obviate. This was the rule of interpretation when licences were even matters of special indulgence.

But it has happened, that in consequence of the extraordinary and unprecedented course of public events, these licences have, in a certain degree, changed their character, and are no longer to be considered exactly in the same light. It is notorious, that the enemy has in this war directed his attacks more immediately against the commerce of this country than in former wars; and a circumstance of still greater weight is, that he has possessed himself of all those places that in former wars remained in a state of neutrality. To what part of the continent can we now look for a country, which is not either under the actual dominion of *France*, or in that state of subjection to it, which operates with all the effect of dominion? It is a state of things in which it has become impossible for *England* to carry on its foreign commerce, without placing it on a very different footing from what its convenience required in former wars. To say that you shall have no trade with the enemy, would be in effect to say, that you shall not trade at all, because that commerce which is essential to the prosperity of the country, cannot be carried on in those small and obscure nooks and corners of *Europe*, if any such can be found, which are still independent. The question then comes to this, How is the foreign commerce of the country to be maintained? It must be either by relaxing the ancient principle entirely, and permitting an unlimited intercourse with the ports of the enemy, and where the ports of other nations are put

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put under blockade (as they are by the Orders in Council) for other reasons than those of a direct hostile character, they become liable to be considered and treated in like manner, so far as the purposes of blockade require; or it must be by giving a greater extension to the grant of licences. As to the relaxation of the general principle, by which an open and general intercourse with the enemy would be allowed, the consent of both parties is requisite to make that effectual, and even if the enemy permitted it, the legislature would probably not think proper to proceed to that length, and for reasons, I presume, connected with the public safety. It has therefore tolerated a resort to the other mode of permitting a trade by licences, which, though they are so denominated, are likewise in effect expedients adopted by this country to support its trade, in defiance of all those obstacles which are interposed by the enemy. They are not mere matters of special and rare indulgence, but are granted with great liberality to all merchants of good character, and are expressed in very general terms; requiring, therefore, an enlarged and liberal interpretation. At the same time, they are not free from control; restrictions dictated by prudent caution are annexed, and where they are so annexed, those restrictions must be supposed to have an operative meaning. It is not, therefore, in the power of this Court to apply such an interpretation to a licence, as would be in direct contradiction to its express terms, or to say that effect should be given to one part, and not to another. If the permission is for a ship to go in ballast, it would be impossible for the Court to say, that it shall go with a cargo; for that would be not an interpretation, but a contravention of the licence. But where it is evident that the parties have acted with perfect

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1809.

perfect good faith, and with an anxious wish to conform to the terms of the licence, I presume that I am only carrying into effect the intention of the grantor, when I have recourse to the utmost liberality of construction, which it is in the power of this Court to apply. As a general rule, therefore, it is to be understood, that where no fraud has been committed, where no fraud has been meditated, as far as appears, and where the parties have been prevented from carrying the licence into literal execution, by a power which they could not control, they shall be entitled to the benefit of its protection, although the terms may not have been literally and strictly fulfilled. If I assume too much in laying down this rule, it must be rectified in the superior Court; but looking to the intentions of the Government, not only to what they are, but to what I am led to suppose they must be; looking to the extreme difficulty of carrying on the commerce of the country in the struggle which it has to maintain, not only against the power, but against the craft of the enemy; looking to the frequency and the suddenness with which He lays on or takes off his embargoes, according to the exigency of the moment; looking to the various obstructions that present themselves in obtaining vessels, in consequence of the small remainder that there is of neutral navigation in *Europe*; looking also to this circumstance, that all this intercourse must be carried on by the subjects of the enemy, that it must be a confidential transaction to be conducted by an enemy shipper at great risk and hazard to himself; looking to the total change which has taken place in the nature and character of these licences, if that denomination is to be continued: I say, looking to all these considerations, where there is clearly an absence of all fraud, and of all discoverable

belonging

induce.

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1809.

inducement to fraud, I must go to the utmost length of protection that fair judicial discretion will warrant, though there may, under such circumstances, have been a considerable failure in the literal execution of the terms of the licence. There may be great inconvenience in the whole system of licences, as indeed it is scarce possible, in the present state of the world, that there should not be great practical inconvenience in any mode of conducting its commerce. That is a question of policy with which this Court has nothing to do: It has only to enforce the just execution of legitimate orders issued by competent authority.

Having laid it down, therefore, as a general principle, that where there is clear *bona fides* in the holder, this Court, though it certainly will not contravene the terms of a licence, will give it the most liberal construction—I come now to apply that rule to the case before me. The principal ground of objection is, the delay which took place in the sailing of the vessel; but I must observe, that having called on the Counsel for the Captors to point out what particular fraud could have been intended by this procrastination, I have only been answered by a sort of general suggestion, that such an extension of the period allowed might afford an opportunity of bringing the licence into use a second time. But that any such use was made, or intended to be made, of the licence, in the present instance, has not been suggested, and, therefore, it is to be taken as a case clear of that act or intention of fraud. It is objected to the master, that he did not produce his licence to the captors, and that, on his arrival at *Plymouth*, he delivered certain papers and documents to his agents there. But it is impossible not to take into consideration the difficulties under which such persons labour; they are persons

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exposed to great harassments both on the one side and on the other. They know that they are embarked in transactions of great confidence and mystery, requiring the utmost care and circumspection, and they are to pick their way, in fear and silence, walking, as it were, at every step, over burning plough-shares. That, under such circumstances, there should have been something of reserve in the conduct of this neutral master, is not very much matter of surprize, or of serious judicial animadversion. As far as can be collected from the contents of the papers, no fraud seems to have been meditated in keeping them back; and I dwell the less upon this objection, because it is one which the captors have no right to take in this case, as it appears that they have not done their duty in bringing in the papers in a regular manner. It is the known duty of the prize-master to take possession of the ship's papers, and, upon his arrival, to make an affidavit and bring them in; but here they were left in the custody of the master of the ship. When the ship comes into port, does the prize-master demand them?—no, that was not done; they are brought in some days afterwards by a person of the name of *Smith*, who describes himself as the agent of the agents of the captors. If, therefore, any papers were kept back, it is a fault of which the captors have no right to complain; there is an end of any objection that can proceed from that quarter, as to an unfairness in the production of the papers. But these papers are such as the master could not have any interest in withdrawing; and, therefore, there is not much in the substance of the objection. The account given by the master is, “that the vessel failed from *Marennés*, in *France*, in the month of *March* last, “where she was chartered to proceed in ballast to *Rochelle*, there to take on board her present cargo; that “the

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GOEDE HOOP.

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1809.

“the said ship failed from *Marennés*, aforesaid, on the “28th of *March* last, and arrived at *Rochelle* on the 1st “of *April* following; and in the same month began to “take on board her present lading, and completed “the same on the 13th of *May* following. That the “said ship failed from *Rochelle* aforesaid, being her “last clearing port, previous to the capture on the “29th *June* last, having been detained from sailing “after her cargo was on board, by means of an embargo by the *French* Government, and for some “days by contrary winds.” It is said, that this was a very long time, and so it is; and it is a long time which the Court is under the necessity of allowing on account of the immense difficulties which are to be overcome. You cannot generally send ships from *England*, and they must therefore be procured as they may in ports of the enemy. This ship was chartered in an enemy's port, and as there must have been a good deal of previous correspondence, it is not surprising that a considerable time elapsed before the business was concluded. The ship failed from *Rochelle* on the 21st *June*, and was taken on the same day. Now, the whole labour of the argument has been employed to shew, that some fraud or other must be presumed, from the length of time which elapsed after the expiration of the licence. But what is the natural presumption in this case? why, that the party would not countenance an unnecessary delay, which must be contrary to his own direct interest. This furnishes a very strong ground to suppose, that it was by accident that the ship was prevented from completing her voyage within the time expressed in the licence. If it could be shewn, that the licence had been used before, and that the delay in the present instance arose from its previous use, or that there was any other fraudulent purpose

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1809.

purpose to be answered, most certainly, I should then call for more particular explanations; but as no fraudulent motive has been pointed out, I must suppose that the party was not dilatory in furthering the completion of his own mercantile adventure. The only thing suggested is the fact that the time limited by the licence had expired. That has been accounted for by the intervention of an alledged embargo. Shall I, under these circumstances, order the fact of the embargo to be established by further proof, when it is so probable in itself, and load this table with *French* decrees and ordinances, which would, after long delay, in all probability, lead to the same conclusion at last? Looking to the local circumstances of the country in which the transaction originated, and to the conduct of the *French* Government at that particular period, I think it my duty to stand upon the presumption, that the embargo did exist, and to hold the parties entitled to restitution, paying the captors their expences, which I cannot refuse, where the parties are acting in apparent contravention of the literal terms of their licence. In such cases His Majesty's Officers have a right to be satisfied, and they are entitled, in justice, to be protected in their expences. It is an inconvenience not arising from capture, but from the present state of affairs, and from which the Court cannot relieve the claimants, however it may regret that they should be subjected to it. The licence, I observe, is only to bring a cargo of brandy, and as there are other goods on board, those goods must be condemned, as the permission is limited to the brandy.

CATHERINA MARIA, BRATHERING.

Nov. 7th,
1809.

THIS was the case of a vessel under *Mecklenburgh* colours, which was captured on a voyage from *Rostock* to *Liebau*, with a cargo of wine and brandy.

Licence to proceed in ballast to a port of the enemy for the purpose of bringing a cargo from thence to this country, will not protect the vessel carrying a cargo to the port of the enemy.

7th Jan. 1807.

JUDGMENT.

Sir *William Scott*.—I can have no doubt that this vessel is liable to condemnation under the Order in Council, which prohibits all trade between ports from which the *British* flag is excluded. Protection is indeed contended for by virtue of a licence found on board at the time of capture, permitting a vessel, bearing any flag except the *French*, to sail in ballast to any port in the *Baltic* or the *White Sea*, for the purpose of bringing a cargo from thence to this country. But that will certainly not enable the vessel to carry a cargo to the port of the enemy. The ulterior branch of the voyage, the voyage to this country, is that alone wherein the vessel is permitted to carry a cargo by the terms of this licence, and having been captured with a cargo on board during her voyage to the *Russian* port, it cannot be said that she is to derive protection from it. There would be an end of the Orders in Council, by which the trading between the ports of the enemy is prohibited, if their effect could be taken off by proceeding to such ports with cargoes, with the ostensible purpose of an ulterior voyage to this country. It has therefore been made a general condition of these licences, that a vessel on her voyage to the enemy's port shall go in ballast, unless she is proceeding from some open port. And although it has been argued, that the first branch of the voyage is of subordinate consideration, I cannot take upon myself to overlook this

this

The
CATHERINA
MARIA.

Nov. 7th,
1809.

this consideration, and to say, that a licence permitting a vessel to proceed to an enemy's port in ballast shall extend to the protection of a vessel proceeding thither with a cargo. If, as it has been observed, the object of obtaining naval stores from *Russia* is of such high importance to this country as to overcome every other consideration, the terms of these licences may, upon proper representation, be altered by His Majesty's Government; but it is not within the competence of this Court to make such alterations, or to relieve the claimants, by giving to the terms of a licence an interpretation evidently not within its meaning.

Then again it has been urged, that the *French* authorities at *Restock* compelled the master to take this cargo on board. I must observe, in the first place, that this suggestion comes out in a manner not much calculated to inspire implicit confidence in the mind of the Court; but were it otherwise, such an excuse can never be admitted. What is to become of these Orders in Council if the enemy, by the mere introduction of a force which the master of a merchant vessel cannot resist, is to defeat their operation? force would in all cases be employed, and in many cases collusively. In every instance in which the necessities of this country might require the introduction of *Russian* produce into the ports of *England*, the enemy would derive a concurrent advantage by the transfer and circulation of his own commodities. I am under the necessity of considering the vessel, therefore, as captured on a voyage which by no latitude of interpretation can be brought within the terms of the licence by which alone it could be protected, and the plea, that the cargo was taken on board by compulsion, being in its own nature inadmissible, the cargo cannot be exempted from the fate of the ship.

CARL, BERLIN.

Jan. 29th,
1810

THIS was the case of a vessel in ballast, which was captured on a voyage from *Louisa* to *Cronstadt*. A claim was given by a *British* house of trade, setting forth, that in the month of *August* 1808, and also in the months of *February* and *May* 1809, they had procured licences to protect various ships engaged in importing cargoes from *Russia* to this country; that the licences were forwarded, soon after they were procured, to their agent at *Peterburg*; but that, owing to the difficulty of procuring vessels in the *Russian* ports, some of the licences obtained in *August* 1808 remained at the end of the season in the hands of their agent, and among others the licence on board this vessel; that in *May* or *June* 1809 they were informed by their agent, that he had engaged the ship *Carl*, then in the port of *Louisa*, to proceed from thence in ballast to *Cronstadt*, to take on board a cargo which he had purchased for their house, for the purpose of proceeding with it to a *British* port; that they were subsequently informed by their agent, that not having then received any of the licences procured by them in *February* and *May* 1809, he had, in order to save the season, sent to *Louisa* one of the licences procured in *August* 1808, with a view to protect the ship from capture on her way from *Louisa* to *Cronstadt*. The claim further set forth, that it was the fixed intention of the *British* merchants, and also of their agent, that one of the licences, procured in *February* and *May* 1809 (copies of which were annexed to the claim) and which had actually been

Vessel proceeding to the port of shipment in ballast, the licence having expired, but with an endorsement, setting forth that a new licence had been obtained, and would be applied to this vessel on her arrival at the port of shipment—restoration.

The
CARL.

Jan. 29th,
1810.

been forwarded previous to the capture, should be used to protect the ship *Carl* on her voyage from *Cronstadt* to *England*; but which of the licences would have been so appropriated they could not set forth, as it must have depended on the time of their coming to hand.

JUDGMENT.

Sir *William Scott*.—In any view of the case there can be no doubt that the captors were fully justified in detaining this vessel, as the licence found on board had expired several months before this transaction took place. The licence permits a vessel under any flag, except the *French*, to bring a cargo to this country from any port in the *Baltic*; and there is an endorsement on the back of it in these words: "The annexed licence came to the hands of the undersigned, a *British* subject, now in this country upon commercial business, too late in the season to make the intended use of it; but having bought the *Louisa*-built ship *Carl*, which I have ordered here to take in a cargo of *Russian* produce for *England*, I have provided her with the documents for a free passage in ballast from *Louisa* to *Cronstadt*, not doubting to provide her with a new licence for *England*, having advice of such documents taken out and obtained by my friends. I trust, therefore, under these circumstances, a free passage, and even protection, will be given, by all *British* or allied cruisers to the said ship." Dated *St. Peterburg*, 10 (22 *May*) 1809. Such a statement the captors were justified in disregarding; for certainly this Court, in considering the application and use of these licences, has never laid it down that time is an ingredient of no consequence.

And

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1810.

And here I cannot help expressing my surprise, that the licences taken out for this particular trade are limited to the period of six months, as well on account of the length of the voyage, as the known fact that the ports of *Russia* are very ill supplied with shipping, a difficulty which is frequently to be removed by obtaining vessels from other ports in the *Baltic*. These considerations do, in my apprehension, form a ground for this Court to exercise an equitable discretion in distinguishing this class of cases from some others which have been alluded to in the argument. For this Court will consider it a part of its duty to attend to the local circumstances and situations of the different countries in which these licences are to be carried into effect. Where there is evidently no fraud in the transaction, the Court will, in considering this class of cases, hold the rule less strictly than it would do relatively to transactions taking place in countries where the opportunities of carrying adventures into effect are more obvious. Now, in the present case, I ask, whether there is any thing like an indication of a fraudulent intention; it is surely one symptom of fairness, that the agent shipper puts on board this acknowledgement of the infirmity of the licence, and refers to one subsequently to be obtained in *England* for protection. I certainly see something of negligence in the house here, in not making immediate application at the Council Office for a licence expressly for this particular ship, the moment it was known to them that she was to be sent to *Cronstadt* with this expired licence on board.

But looking to the importance of this commerce, and the difficulty of maintaining it under the deficient supply of navigation in the ports of *Russia*, if I were to fasten down upon the parties penal consequences for

The
CARL.

Jan. 29th,
1810.

for every trifling irregularity, it would be to put this important branch of the commerce of the country into a state of thralldom that must amount to an utter extinction of it. Under these considerations I think I am not stepping beyond the equitable discretion which this Court is bound to exercise, in saying, that these licences convey a virtual protection to this vessel; and I shall therefore restore, on payment of the captor's expences.

Feb. 20th,
1810.

Licence to proceed to this country—deviation to the River Yadhe—condemnation.

EUROPA, SCHMIDT.

THIS was the case of a vessel under *Bremen* colours, which was captured in the river *Yadbe*, on a voyage from *Archangel*, with an asserted destination to *Leith* for orders. In his answer to the seventh interrogatory, the master stated that he had been under the necessity of putting into the *Yadbe*, in consequence of the ship having struck upon a sand, and lost an anchor and cable; and that the voyage was to have ended at some port in *England*, which he was to be informed of at *Leith*, where he was to have called for orders respecting the port he was to proceed to for the purpose of delivering his cargo.

JUDGMENT.

Sir *W. Scott*.—This ship, which had sailed from a *Russian* port, with a professed destination to *London*, was captured in the river *Yadbe*. The excuse set up is, that the vessel had sustained damage, and was in want of repair; but this certainly is an excuse, which if it were to rest only on the averment of the master, could not safely be relied on. Supposing it

The
EUROPA.

Feb. 20th,
1810.

It to be true that the original destination to this country has been altered in consequence of a *vis major*, it is impossible to consider the fact as sufficiently established by the mere averment of the persons on board. For although the demand of further evidence may press hard in particular instances, the situation in which this Court would be placed in receiving such excuses in other cases, from the very persons who, if there be any fraud in the case, are the parties to that fraud, renders the precaution indispenfible. The master of this vessel says, that on his arrival at *Leith* he was to write to a respectable merchant of this town for further orders; and if this statement is correct, that gentleman is probably in possession of correspondence which will afford the claimant an opportunity of proving his case by evidence not coming solely from the master himself. The master says, that "he intended to look for convoy off the coast of *Norway*, and not succeeding, edged off for *Heligoland*; but before reaching that place a gale of wind came on which forced the vessel towards the *Yadbe*, and being thick weather she struck upon a sand, and afterwards came to an anchor, but her cable parting she steered for the *Yadbe*, in order to go to *Eckwarden* to repair the damage she had sustained, and to get an anchor and cable." All the witnesses state that there had been a gale of wind; but I have to regret that there is no information before the Court respecting the actual state of the vessel, and I shall, therefore, allow further proof of the destination to this country from such evidence as the *British* merchant, vouched by the master, may be able to supply; and also a commission of inspection to ascertain the condition of the ship.

Ultimately condemned, upon failure of evidence of a destination to this country.

SPECULATION, EBERHARD.

JUDGMENT.

Feb. 16th, 1810.

Licence on board, but not intended to be applied to this vessel—no ulterior destination to this country—intention to sell the ship in the enemy's port—condemnation.

SIR W. Scott.—This ship, under *Lubec* colours, was captured on a voyage from *Copenhagen* to *Riga*, in ballast, with a licence on board, which does not appear to refer in any manner to this vessel as it is not indorsed, and the name of the ship is not to be found in the body of the licence. The Court is extremely unwilling to be rigorous in respect to the application of licences to the vessels which they are intended to protect. But they must, in some specific manner, be so applied; and I cannot take the mere averment of the fact by the *British* claimant to be sufficient. In this case a licence was found on board at the time of capture, and *prima facie* it might be taken as intended to be applied to this vessel: but the fact may be otherwise. For instance, the licence may be going for the protection of some other vessel, to which it is to be applied, and it would be impossible to say, that the mere circumstance of its being on board the vessel that conveys it shall be sufficient for her protection also.

There is nothing in the present case to shew that this licence was intended by any of the parties to be applied to this vessel. All that appears is, that the owner of the ship at *Hamburg* is sending this licence to his correspondent at *Riga*, telling him that he would send instructions for its application; and directing him to let this ship on freight, or in failure of that, to put her up to sale. His words are these: "I hereby take the liberty of enclosing you a licence at your disposal, having to-day an opportunity for sending you the present. I hope it will soon reach you, and I will write further to you on this subject by post." And in another letter on board, addressed to the same person, he says, "The bearer

The SPECULATION.

Feb. 16th, 1810.

" bearer hereof is Captain *Eberhard*, commanding the ship *Speculation*; have the goodness to procure him as good a freight as possible, in order that this undertaking may render me a good profit. If I could get 9,500 or 10,000 R. D. *Hamburg* banco nett for the ship, I should be inclined to sell her again, for which purpose I hereby empower you to do so." Here, then, are very slender grounds whereon to infer that this licence would have been applied to this vessel by the correspondent of the owner at *Riga*. But if we had got that length would that be sufficient? I am of opinion that it would not. Licences are granted by the Government of this country on a prospect of reciprocal advantage to the government which grants it, and the foreigner who receives it. The permission of going from one port of the enemy to another requires that the vessel shall be going thither for the purposes of *British* trade. Now it cannot be argued that such was the intention of the parties in the present case, because no such voyage was in contemplation, for, on failure of obtaining a freight, there was the alternative purpose of selling the ship at *Riga*. There must, in all these cases, be an intention conformable to the objects for which the licence has been granted. Parties are not to take advantage of the permission to proceed to the port of the enemy, without an engagement that the vessel is proceeding thither for the purposes of a trade immediately connected with this country; for surely licences cannot be presumed to be granted for the purpose of carrying on the enemy's trade, without any ulterior view to *British* use and advantage. Here, therefore, is a total failure not only in the application of the licence to this particular vessel, but also in its effect, supposing it had been so applied to a vessel proceed-

The SPECULATION.

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proceeding to the port of the enemy for sale. Then comes the question, whether, throwing the licence out of the case, this vessel would be subject to condemnation; and it is argued, that being a prize vessel, purchased by a neutral of the enemy, she is entitled to all the privileges of a neutral vessel, and at liberty to proceed in ballast from one enemy's port to another. If that were the only circumstance in the case, it might be so; but it is to be remembered that this vessel was purchased by the neutral in a blockaded port, where a traffic cannot be allowed in ships more than in goods, and consequently the transfer is illegal. In the next place, if this vessel was proceeding to Riga to be sold, I am of opinion that this would be in itself a trading in contravention of the order 7th January, and therefore the ship would be liable to confiscation.

March 13th, 1810.

The words, "to whomsoever the property may appear to belong," not being inserted in the licence, Enemy's property not protected under it.

COUSINE MARIANNE, DEBOER.

THIS was the case of a vessel under Prussian colours which was captured on a voyage from Bourdeaux to London, and claimed as protected, under a licence permitting Messrs. Wombwell and company and other British merchants, to import a cargo of enumerated goods into Plymouth for payment of the duties, and then to proceed on to a port in the Baltic. The words, "to whomsoever the property may appear to belong," not being inserted in this licence, the question was, whether certain parts of the cargo, which belonged to French merchants, were protected under it.

JUDGMENT.

Sir W. Scott.—The question in this case is, whether the property of these goods, vested in the British consignee

The COUSINE MARIANNE.

March 13th, 1810.

signee at the time of capture, for 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;—but they are not to be found in the licence on board this vessel, and the Court, therefore, is not at liberty to depart from the general rule.

It is a settled principle in this Court that in order to constitute an effectual transfer of the property there must be either an order for the goods, or an acceptance of them by the consignee, prior to the capture. If the capture takes place, where no order has been given, and before the goods have been accepted, they must be considered as the property of the persons who have so consigned them. In this case, therefore, the Court has called for evidence to shew, whether any order had been given by the British merchants, or any act done by them in the nature of an acceptance before the capture. It is not pretended by the claimants, that any specific order was given for these goods, but an affidavit is now introduced purporting that the manufacturers at Valenciennes knew the quality of the goods wanted by the house here, and that it was understood they were to make their shipments, without waiting for orders. I certainly cannot conceive that any such understanding could impose upon the parties here an obligation to accept goods to any quantity, as well as of the specific quality; but what makes this account the more unsatisfactory is, that the shipment is not made by the manufacturers at Valenciennes, but by a house at Paris; and how are the parties here to be bound by their act? The course of trade referred to in this affidavit does not apply to the house at

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Paris, but to the manufacturers at *Valenciennes*. If, however, the shipment had been made by the manufacturers themselves, the question would still remain for the consideration of the Court, whether a general order to ship goods of a certain quality would impose upon the parties a legal obligation to accept goods of that description to any quantity. In order to shew that the parties here have a vested interest in the property, it must be shewn that they were under a legal obligation to accept these goods on their arrival. Now I have no idea that these shippers, putting their character as alien enemies out of the question, could have compelled the *British* merchants to a specific payment for these goods. There might exist an expectation on their part that they would be accepted and paid for; but there was no legal obligation on the *British* merchants, and therefore unless it had been shewn that there was some act done by them in the nature of an acceptance of the goods prior to the capture, I cannot but be of opinion that the legal property still remains in the enemy, and consequently, that this portion of the cargo must be condemned, as not being protected under the words of this licence.

VROW CORNELIA, DYKSTRA.

March 14th,
1810.

THIS was a question on the effect of an attested copy of the original licence under which the brandies on board this vessel were to have been imported into *Hull*, from *Charente*; the vessel having failed from *Bordeaux*. There was a further question, whether the licence being for a cargo of brandy, and the original having been used for 289 puncheons, which were shortly after forwarded from *Charente* to *Hull*, in the *Johannes Von Letten*, this copy of the licence could enure to the protection of the goods on board this ship, being the other part of the original cargo intended to have been brought in one vessel from *Charente* when the licence was obtained. The claimants shewed that the cargo was purchased on their account, and ready to be shipped when the licence was applied for, but that they were unable to make the shipment at *Charente*, as the foreign vessels in that port were under sequestration, and the *Goede Verwagting*, which was chartered for the purpose, had been prevented by the *French* decrees from going thither. That under these circumstances they sent on this portion of the cargo over-land to *Bordeaux*; where it was shipped in the *Vrouw Cornelia*, and the sequestration being in a few days after taken off from the *Johannes Von Letten*, then at *Charente*, they availed themselves of the opportunity to ship the remainder direct from that port.

Licence to bring a cargo in one vessel—sufficient to protect the same cargo shipped on board two vessels, one of them having only an attested copy on board, and having taken in her portion of the cargo in another port.

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CORNELIA.

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JUDGMENT.

Sir *W. Scott*.—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; and where that is done, the Court will not prevent them from having the entire benefit intended by His Majesty's Government. If I did not adopt this rule, I should inflict a severe wound upon *British* commerce, than which nothing can be farther from my inclination; and if the cruisers expect a more rigid construction of licences from me, they will find themselves disappointed. Wherever I am satisfied that there is no bad faith in the parties, and no undue extension of the terms of a licence beyond the meaning of the Council Board, any little informalities, or any trifling deviations, shall not injure them.

It appears that in the present instance the licence was granted to import these brandies into this country from *Charente*; but, for the reasons stated in the affidavits, it is shewn that there was an impossibility of bringing out the cargo from that port, and consequently this portion of it was very warrantably forwarded from *Bordeaux*, to be exported from thence; for it is known that in the present state of *France*, a merchant is often unable to tell from what port he can ship his cargo.

It was put upon the parties to prove that the goods ordered from *Charente* are the same goods that were put on board this vessel at *Bordeaux*; and it is said that there is reason to suspect that this is not the case, as the charge of warehouse rent is not in the invoices. I should have been startled

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startled if it had. It is not usual to introduce such a charge there, and I do not see what motive there could be to attempt an imposition on the Court in this part of the case. The only question, therefore, to which it is necessary for me to direct my attention is, whether there has been any fraud upon the Government, in the application of the licence or in the use of it.

Mr. *Corlafs* and his partner, in *Yorkshire*, are great dealers, and there are other dealers concerned in this transaction, but not to the same extent. These, through *Corlafs*, order a particular quantity of brandy, and he says he has usually half the quantity in the ship, and this assertion I have no reason to question; they make application for a licence for this conjoined cargo, of which *Corlafs* has the superintendance, he having what is equal to all the rest, and the formal business is done through *Hodgson*, whom I suppose to be a broker. Application is thus made to the Council Board, and they obtained a licence for the cargo to be imported into this country in the *Goede Verwagting*, or any neutral vessel. What is the fair construction of this licence? Certainly, that they might import a cargo sufficient in bulk, to stow the *Goede Verwagting* full, or any other neutral merchant ship. If they, under cover of this licence, had imported in two vessels what no one mercantile vessel in the port of *Charente* could hold, it might be considered as a fraud; but the whole quantity, it has been shewn, is not beyond the capacity of vessels frequently sailing from that port. Upon the faith of this licence thus obtained, orders were given by *Corlafs* to his agents in *France*, for a particular quantity of brandies for others and for himself, sufficient

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ficient to fill up the measure of the vessel, and under such a licence he had a right to have what would fill up any such a vessel as the *Goede Verwagting*.

It appears that the *Goede Verwagting*, under the present difficulties of commerce, could not get admission at *Charente*, in consequence of which delay the licence expired. In this distress, the parties apply for a new licence to import the brandies in another ship; not for a ship of any particular dimensions, for they must be content with what they could get, and they send a ship which, having only a copy of the licence, could not proceed to the place of destination. It then became necessary to adopt other means; and what do they do? They take the *Johannes Von Letten*, and in that they put a cargo consisting of a portion of these goods, under the protection of the licence itself, and they provide a certificate that the *Vrouw Cornelia* put to sea from *Bordeaux*, having on board a copy of this licence, with 300 puncheons, another portion of the intended cargo, and so forth. Thus documented these vessels openly avow that *two* are to be sent; and thus the parties establish their good faith and integrity by the most ingenuous disclosure of the whole transaction.

The application to the Council Board was for permission to bring a cargo, and if a proper ship could not be got, which is a matter likely to occur under the present difficulties of commerce, it is fit that they should be at liberty to put that cargo on board two ships; to say that this is a fraudulent use of a licence is not correct. The *quantity* the Government looked to; *that* is the matter to be considered; and if the quantity in two ships be only equal to what might have

have come and was intended to have come in one, where is the fraud? If you do not prove that the quantity has exceeded the intention of the grantor, you prove nothing. Under these circumstances, I think the parties are perfectly entitled to the restitution of the property, as I do not see any objection to the propriety of their conduct.

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JOHAN PIETER, SCHWARTZ.

Licence expired in consequence of embargo in enemy's port—on proof of the identity of the transaction held to be a subsisting licence, after government had ceased to grant such.

THIS ship was captured on a voyage from *Charente* to *Newcastle* with a cargo of brandies, having sailed from *Charente* on the 23d *Feb.* 1810. Claims were given in by *British* merchants for the ship and cargo, as protected by a licence on board the vessel, bearing date 27th *April* 1808. In the claim for the cargo it was stated that the ship had been chartered by the *British* claimants, and sent out in *April* 1808, for the purpose of bringing away a cargo of brandy on their account from *Charente*, where she arrived in the month of *June* following, but was immediately placed under an embargo, by which she was detained till *Feb.* 1810, and the cargo which had been ordered by them, and was at the time of her arrival ready to be put on board, was continued in warehouses until *Feb.* 1810, when it was permitted to be laden.

On behalf of the Captors—it was contended, that the licence having expired it could not be held to protect the voyage, unless it could be shewn that this was the identical transaction in contemplation when the licence was obtained, and that its progress had been interrupted by obstacles not within the control of the parties themselves—That the goods were not even put on board till a very long period after the expiration of the licence, and in that respect the case differed from those which had hitherto presented themselves to the notice of the Court.

JUDGE-

JUDGMENT.

Sir *W. Scott*.—The leading principle which the Court has laid down for itself, in considering these cases of licences, is this, that where there appears to have been no fraud, either actual or meditated, the Court will strain every nerve to relieve the parties from those difficulties to which they are subjected by the caprice and violence of the enemy, and the unprecedented state of all commercial transactions. In doing this it is content to take the question upon the evidence arising from the case itself, without calling upon the parties to disclose the whole course of their commercial correspondence with the enemy. Where the Court is satisfied of the identity of the transaction, and that all fair diligence has been used in order to its completion within the time prescribed, it will look no further. It will not call upon the parties for the production of unnecessary and oppressive proof. If the embargo is shewn to have existed, it will not call upon them to explain from what motives the government of *France* has from time to time varied its policy with regard to the small portion of foreign commerce that it retains.

In the present case, I think, there is as much evidence to found a presumption of fairness, as the Court is in the habit of requiring in ordinary cases. It is unnecessary for me to go through all the evidence from which I draw this conclusion; and I shall content myself with expressing my perfect conviction that these are the identical goods intended to be brought to this country at the time when the licence was obtained, and that the integrity of the transaction cannot be impeached.

I have only, therefore, to determine, whether it is in the power of the Court to consider this as a subsisting licence,

The JOHAN PIETER. March 30th, 1810.

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licence, after His Majesty's government has ceased to grant licences of this description, and I think it ought to be so considered.

Where a party has, through his own laches, suffered his licence to expire, he has no right after Government has changed its policy, to call upon the Court to give it new life, and to awaken it from that state in which it had slept for months and years. But where a licence has been fairly acted upon as far as the party was enabled to proceed, the Court is not called upon to put the transaction in motion, but to protect its progress; and, I think, such a case is fully entitled to that protection which it would have derived from the licence at the time when it was put in operation, and was impeded by extraneous circumstances. This is no novel principle: it is the application of the common and known rule of law, *nunc pro tunc*. The Court will accept that as done now which would have been done before, but for insurmountable difficulties; and I shall, therefore, restore the ship and cargo, subject to the captor's expences.

JONGE FRÉDERICK, CLOASSEN.

May 10th,
1810.

THIS was the case of a vessel under *Prussian* colours, which had sailed from *London* for *Ostend*, under a licence to proceed with a cargo of *British* manufactured goods, &c. to any port between the *Island of Walcheren* and *Boulogne*. On her way to *Ostend* the ship was driven by stress of weather into *Nieuport*, where her licence was destroyed to prevent seizure by the officers of the *French* Government, and application was made for permission to land and dispose of the cargo there, but it was refused. Under these circumstances, the agents of the *British* merchants received directions from *England* to send back the ship with her cargo to this country, and on her return she was captured and brought in for adjudication. In the claim it was stated, that the *British* merchants, in order to avoid any inconvenience that might arise from the destruction of the licence at *Nieuport*, had applied for another licence, permitting the vessel to return with the cargo she had carried out; and this second licence was annexed to the claim.

Licence to proceed from this country with a cargo, sufficient to protect the vessel returning with the same cargo, having been prevented from delivering in the enemy's port.

JUDGMENT.

Sir *William Scott*.—I have no doubt that the licence to return is unnecessary in this case, the master having found it impossible to dispose of his cargo in the port of the enemy to which he was destined when the first licence was obtained. Because the permission of His Majesty's Government having been granted to export this cargo, the original licence must be sufficient for the protection of the ship and cargo, not only *eundo*

The JONGE FREDERICK.

May 10th, 1810.

but *redeundo*, where the original purpose has been defeated by the elements or the act of the enemy. At the same time, in order to entitle himself to this benefit, it is absolutely necessary that the claimant should shew, that these are the identical goods that were carried out, and that no others were taken on board in the enemy's port. But as there is no particular reason for any suspicion of fraud in this case, the Court will content itself with an affirmance on oath that no other goods were taken on board the vessel.

Restored.

March 15th, 1810.

EUROPA, SUNDBERG.

Naval stores—condition of licence to touch at *Leith* for convoy, not complied with—licence invalidated—but the naval stores protected on other grounds—the remaining part of cargo condemned.

THIS was the case of a vessel under *Dantzic* colours, which was captured on a voyage from *Riga* to *London* with a cargo of hemp and iron. The ship and cargo were claimed as protected under a licence, and it was argued on the part of the captors, that the vessel having been captured to the westward of the *Texel*, she had violated an important condition of the licence, by which it was provided, that if any part of the import cargo should consist of naval stores, and be destined to any port south of *Hull*, the vessel should proceed to *Leith* or *Dundee*, for convoy, and consequently, that requisition not being complied with, the parties could not claim protection for their property under the licence.

For the Claimants it was contended—That a licence for the hemp was unnecessary, as it was fully protected by

by the Order in Council of the 4th *February* 1807, and that the licence applied only to the iron, which did not come within the description of naval stores.

The EUROPA.

March 15th, 1810.

JUDGMENT.

Sir *William Scott*.—I am perfectly clear, that if this case stood upon the licence alone, the ship and cargo must be condemned, as there has been a violation of a fundamental condition of the licence, without which it cannot have effect, unless it were shewn, that from stress of weather, or some other insurmountable obstacle, the condition could not be complied with. Where that, indeed, is the case, the Court would take upon itself to do that which it must presume the Government would have done under the known rule of law, that no persons can be bound to impossibilities. No impossibility is suggested in the present case; but I think there is a good deal in the argument, that the Order of 4th *February* 1807 is sufficient for the protection of the hemp, and consequently of the vehicle that conveys it, as that Order permits the importation of hemp and other enumerated articles, in neutral vessels, from any port not under blockade. I can by no means accede to the position, that because the parties had recourse to the protection of a licence, therefore the Order in Council is superseded. Suppose they had overlooked the Order in Council, it is not the less imperative upon the Court, and I cannot overlook it. The hemp, therefore, must be restored; but as a substantive condition of the licence has been violated, it is vitiated *in toto*, and cannot enure to the protection of the other part of the cargo, which is not within the Order in Council, and therefore I shall condemn the iron.

D

May 17th, 1810.

CORNELIA, ROOSE.

JUDGMENT.

Licence to bring a cargo to this country sufficient to protect the voyage in ballast to the port of shipment.

SIR William Scott.—This is the case of a Prussian vessel which was captured on a voyage from Boulogne to Varel in ballast, and asserted to be going thither for the purpose of bringing a cargo to this country, under a licence permitting a vessel bearing any flag, except the French, to proceed with a cargo of enumerated articles to any port of this kingdom north of Dover. The question for my determination is, whether or not this permission is to be considered as a sufficient protection for the vessel on her way to the port of lading in ballast, this licence being expressed in terms which look only to the voyage from the port of lading to this country, as it does not contain the usual clause, permitting the vessel to proceed to the port of lading in ballast. I confess that I should be inclined to hold that it is a sufficient protection under such circumstances; but it would only be indirectly, and by an extension of the terms of the licence, that the ship could be so protected, and therefore I must have the clearest proof that she was actually proceeding to the port of Varel, for the express purpose specified in the licence.

Subsequently condemned on failure of proof of the intention of proceeding to Varel for the purpose of bringing a cargo to this country.

SARAH MARIA, MARSTRAND.

May 30th, 1810.

JUDGMENT.

SIR William Scott.—This is the case of a vessel laden with wheat, and bound on a voyage from Marennes to London, and claimed as protected under His Majesty's licence, which expired on the 28th January 1810, the vessel not having cleared out from the French port until the 24th March.

Corn licence—time extended.

I must here take the opportunity of observing, that it is not merely from a tenderness for the hardships to which British merchants are exposed, but from a due attention to the policy of the Government, under the known fact of an existing scarcity of grain in this country, that the Court is disposed to give the utmost effect to these corn licences, and to expect, that on the part of the captors no unnecessary difficulties will be thrown in the way of restitution, when the most satisfactory information has been offered them by the merchants of this country. The Court has, in other instances, extended the time for licences, on account of impediments arising in the ports of the enemy; and His Majesty's Government has in these cases felt the same necessity. Successive Orders in Council have extended the periods for the expiration of licences for the importation of grain, where impediments have arisen to prevent their being carried into effect sooner. This is a fact of which the captors can hardly have been ignorant. Nor can I construe the intention of His Majesty's Government so narrowly as to suppose, as has

The SARAH MARIA.

May 30th, 1810.

been suggested, that the impediments in the contemplation of the Government were solely those attending the clearing out of the vessels from the enemy's ports. The indulgence must embrace also the difficulty of procuring ships for the purpose, and all other insurmountable impediments, of whatever description. In the present case the cause of the delay has been explained; but as this licence is out of date, it is suggested that it may have been used before, and it has been urged against the claimants, that they have not negatived that imputation. I shall certainly not require that to be done; where there is nothing to raise a suspicion of such an abuse of the indulgence, I will not lay such an *onus* upon the *British* merchant. This is the first case in which I have had an opportunity of delivering my sentiments on this subject, and I wish them to be attended to by captors. As it is the first case of this class, I shall give the captors their expences; but I wish it to be understood, that I will not do it in any future case arising under the same circumstances.

HENRIETTA, TORBIORNSEN.

THIS was the case of a *Danish* vessel, proceeding with a cargo of *Rye* from *Fannoe* to *Leith*, under a licence allowing her to import permitted articles into any port of this country north of *Dover*, but ultimately with the intention of going on to *North Bergen* with her cargo, after paying the tonnage duties at *Leith*, and obtaining permission to go there if it could be had.

July 31st, 1810.

Licence to import into this country—sufficient for the voyage to a *British* port, with an ulterior destination to a port of the enemy after paying tonnage duties.

JUDGMENT.

Sir *William Scott*.—I am inclined to think that this is a fair case on the part of the master, and that it would be narrowing the construction too much to say, that a destination to *Leith* to pay tonnage duties is not a good execution of the licence. The licence authorizes the importation of a cargo into *Leith* from the port of the enemy, and the master says he intended to go on to *Bergen* after payment of the duties at the *British* port; but this intention must be understood with reference to the authority and permission of the Government of this country subsequently to be obtained. I do not see how that ulterior purpose can vitiate the licence for the voyage to *Leith*; it is but fair to suppose, that on the arrival of the vessel there, application would have been made to Government for a fresh licence to proceed to *Bergen*. It might not be possible for the parties in a foreign port to obtain the exact kind of licence that would authorize the continuous voyage to *Bergen*, and therefore they divide the voyage, and proceed first to a *British* port, avowing the

CASES DETERMINED IN THE

The HENRIETTA.

July 31st, 1810.

the purpose of going on to Norway at the bottom of the licence. Had the vessel been captured on the ulterior branch of the voyage, with only this licence on board, the case would have been different; but she is actually proceeding to the port of Leith at the time of capture, and under a sufficient protection for that branch of the voyage. I shall, therefore, restore, allowing the captors their expences.

August 1st, 1810.

NICOLINE, NIELSON.

JUDGMENT.

Licence to carry corn from Denmark to Norway—Military stores concealed—Condemnation.

SIR William Scott.—The question in this case is, Whether this ship is entitled to protection from the licence on board? for if not, as Danish property, the vessel will be subject to condemnation. No principle, applicable to questions of this nature, is better founded in reason and justice than that all persons trading under the protection of licences, are bound to act with the purest good faith, and the obligation is in no degree diminished where the privilege is granted to an enemy. Now, what is the case here? The vessel is permitted, by the licence on board, to proceed with a cargo of corn only, from Denmark to Norway, first touching at Leith to pay tonnage duties; but it turns out that a quantity of fire-arms of different descriptions have been found stowed away under the cargo. It is impossible to suppose, that by granting a licence to carry corn, it was ever intended by His Majesty's Government to permit the transport of articles of this noxious description from Denmark to the ports of Norway, which are crowded with privateers.

HIGH COURT OF ADMIRALTY.

The NICOLINE.

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teers. I have no doubt that this breach of good faith amounts to a total defeasance of the licence, and consequently that the ship and cargo must be condemned.

WOLFARTH, HARTING.

August 1st, 1810.

THIS was the case of a Prussian vessel, which was captured on a voyage from Stettin to St. Peterburg, for the purpose of bringing a cargo of tallow and hemp to this country from the latter port, under a licence which was on board the vessel at the time of the capture, and which enabled her to go there only in ballast. The master had a quantity of beech wood on board, which, in his deposition, he described as ballast, but the cabin-boy, in his evidence, stated it to be half a cargo.

Licence to go to the enemy's port in ballast—Cargo on board—Condemnation.

JUDGMENT.

Sir William Scott.—This is conduct which it becomes this Court to watch with the utmost jealousy. If the condition of the licence is such, that the vessel is to proceed to the enemy's port in ballast, it is obvious that she cannot be permitted to carry thither any thing that comes fairly within the description of cargo. Here is a certificate of origin on board, which in itself is sufficient to give that character to the commodities on board, and to say, that indulgence is to be shewn in this case merely because the amount of the cargo is only equal to half the tonnage of the ship, is to say, that the Orders in Council shall be carried into effect to the extent of a moiety only.

Ship and cargo condemned.

August 1st,
1810.

EMMA, MALLGREN.

JUDGMENT.

Touching for orders at interdicted port, not known to be such at the time of sailing—Restitution.

SIR *W. Scott*.—This is the case of a vessel which was captured on a voyage from *Riga* to *Gottenburg* for orders, and I am certainly by no means disposed to relax the rule prohibiting vessels with licences to this country from going into any interdicted port for orders. When the capture took place, the ports of *Sweden* had become interdicted ports to this vessel, under the order 7th *January*; but it does not appear, that at the time when the vessel failed, the parties at *Riga* had any knowledge of the exclusion of the *British* flag from the ports of *Sweden*; that exclusion did not take place till the 24th of *April*, and this vessel failed from *Riga* on the 24th of *May*. There was, indeed, something of a rumour prevalent at *Riga* at the time that such was the state of things in *Sweden*, but not in such a shape as would necessarily induce an actual belief of it; and I shall, therefore, permit evidence to be brought in for the purpose of shewing whether the fact was publicly known at *Riga* when the ship failed.

Ultimately restored, as it was not shewn that the fact of the exclusion of the *British* flag from the ports of *Sweden* was known at *Riga* when the ship failed.

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FRAU MAGDALENA, HANSEN.

Oct. 24th,
1811.

JUDGMENT.

SIR *William Scott*.—This was the case of a *Danish* vessel captured on a voyage from *St. Peterburg* to *London*, under a licence, but with directions to touch at *Neustadt* for orders. A claim has been given for the ship as coming to *London*, and for part of the cargo only as consigned to a house of credit in this town. In support of this assertion, a letter of advice is referred to, by which the *British* claimants say, that they were empowered to dispose of this portion of the cargo, and that they believe the voyage was to end in a port of this country. But that is matter of belief only. In point of fact they know nothing of the transaction, but from the letter on board, which is not sufficient; for it can be matter of no great difficulty for the foreign shippers to write a letter to that effect to their correspondents here, and to countermand it afterwards, if they should be able to dispose of their cargo elsewhere. It is said, that all the evidence in the case supports the averment of an actual destination to *London*. That is not so; the master was to call at *Neustadt* for orders, which might have been of a contrary tenor, directing him to deliver his cargo in that port.

Touching at interdicted port for orders—Licence violated—Condemnation.

It has been repeatedly decided, in cases of blockade, and this class of cases must be decided by analogy to the rules of blockade, that a vessel cannot be permitted to touch at an interdicted port for orders, under a licence for a direct voyage to this country.

This

The FRAU MAGDALENA

Oct. 24th 1811

This is a rule which the Court has felt it necessary rigidly to adhere to, except in those cases where the vessel had quitted the intermediate port with the identical cargo she had carried in, and was actually proceeding for *England* at the time of capture. In those cases the presumption that there was an intention of delivering at the intermediate port was repelled by the fact, that the ship had come out again with the same cargo, and the Court therefore relaxed the rule. The rule is founded not only upon the presumption, that at the intermediate port the vessel might receive another destination; but that she might actually deliver her cargo in that very port. The Court cannot enquire, nor has it the means of ascertaining whether there was any *mala fides* in the contemplation of the parties; it can merely look to the fact whether the vessel was going to an interdicted port or not, and if so, the presumption of law must be, that she was going thither for the purpose of violating the licence. The fact may, in some cases, be otherwise, and the rule may at times operate with severity upon innocent persons; but it is a sacrifice which must be made to the general security.

In the present instance the parties may, for any thing that appears, have *intended* to act honestly, but they are doing that which in express terms the law of this country prohibits, and I must therefore hold this ship and cargo subject to condemnation.

HOPPET, HALBERG.
JUDGMENT.

SIR William Scott.—This vessel was proceeding, at the time of capture, on a voyage from *St. Petersburg* to *London*, under a licence permitting her to come to this country after touching at a *Swedish* port for orders; and it is the first licence of the kind that has come before the Court. The general principle maintained by this Court has been, that a vessel proceeding under licence from an interdicted port to a port of this country, is not at liberty to touch at another interdicted port for orders. But for reasons which have approved themselves undoubtedly to the Government of this country, licences have been granted, containing the express permission to call at *Swedish* ports for instruction. It is the clear duty of this Court to uphold the intention of His Majesty's Government, by granting to the claimants immediate restitution; and as the voyage has been defeated by the seizure, I shall not allow the captor his expences, who with this licence staring him in the face, had certainly no right to interrupt this course of the transaction.

Touching at interdicted port for orders— Licence expressly permitting it— Restitution.

BOURSE, alias GUTE ERWAGTUNG.

JUDGMENT.

Licence to sail under any flag except the French, held to exclude French ownership—Condemnation.

SIR William Scott.—This is the case of a vessel navigating under Prussian colours, but in reality belonging to French owners. The ship was captured on a voyage from Bourdeaux to London, under a licence permitting her to sail under any flag except the French; and the question is, Whether the ship is entitled to protection? The cargo, which belongs to other parties and is not involved in the question, has been restored by consent. It has always appeared to me, that the exception of the French flag only is not very clear and intelligible; but if I am called upon to construe it, I am inclined to hold, that a vessel being French property was intended to be excluded from the benefit of the licence, although not accompanied with the formal characteristic of the French flag. Wherever, therefore, these words "bearing any flag except the French," have presented themselves to the notice of the Court, it has felt the necessity of giving them a more substantive meaning, as excluding French interests, and has held, that where French interests clearly appear, the vessel cannot be protected by the mere absence of the French flag. If otherwise, the whole French navigation might be conducted with the utmost safety, nothing else being requisite but that a foreign flag should be substituted for the French. It does not appear to me, that it could be the intention of the State to give that accommodation to the public enemy. If I am wrong in this supposition, the error must be corrected by superior authority. In the present case the vessel is navigating under the Prussian flag, but the property is proved to be French, and I shall therefore condemn the ship.

JONGE CLARA, STEVENS.

August 7th, 1811.

JUDGMENT.

SIR William Scott.—This is the case of a vessel taken on a voyage from Bourdeaux to London, with a cargo of wine, feeds, cream of tartar, verdigrease, capers, and other goods. A claim is given in for the ship and cargo, as protected under the licence on board, permitting this vessel, under any flag except the French, to export from London and Poole, to any port in France between L'Orient and the river Garonne, any articles which by law might be exported, except cotton wool, and to import in return a cargo of grain, meal, flour, burr-stones, feeds, French cambricks, lawns, olive oil, and wine; upon condition that the vessel importing the wine, should have exported to France under the same licence, British or East India manufactured goods, sugar and coffee, and that the cargo so to be imported, should consist of two-thirds in bulk of grain, meal, flour, and feeds, and in no case of more than one-third in bulk of wine. The ship is the property of a person at Embden, and it is contended by the captors, that in consequence of the annexation of that place to France, this vessel is now liable to be considered as the property of a French subject. But I observe that the ship is described by name in the licence which was granted for its protection while engaged in British commerce, and it can hardly be contended, that a sudden and unexpected change in the political relations of the country to which she belonged should deprive her of that protection if the parties have acted fairly under it. It is a known fact, that many vessels belonging to countries annexed

Licence to sail under any flag except the French, held to protect the property of persons in countries unexpectedly annexed to France while engaged in British commerce—Construction of the terms of the licence as to the quality of the cargo—Non-enumerated articles condemned without freight.

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JONGE CLARA.

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to France have obtained licences, and that no alteration was made in that respect until February of the present year.

But it has been further urged on the part of the captors, that this licence has been violated in many respects; that the quality of the outward and return cargoes were not such as are permitted by the licence, and that it had expired before it was made use of. It is said, that by this licence the parties were bound to carry out *British* or *East India* manufactured goods, sugar or coffee, to the amount at least of one-third of the tonnage; and that in point of fact, the outward cargo consisted of salted cod-fish and herrings. In my apprehension, these goods are sufficiently within the spirit and meaning of the licence; they are not in a state of nature; they were cured in this country; they are articles which have received the aid of *British* industry, and in which the commerce of the country is deeply interested. Indeed, if any doubt could arise upon the subject, the custom-house clearance, where the nature of the articles composing the outward cargo must have been fully understood, would put the question at rest.

Another objection started is, that the vessel has some goods on board which are not permitted by the licence, which provides, that the return cargo shall consist of grain, meal, flour, and feeds; and in no case of more than one-third of wine: And it is thence contended, that in conformity with the terms of the licence, the cargo must necessarily consist of two-thirds of the first descriptions, and that this condition is a *sine qua non*, and that where it is not complied with the licence is vitiated *in toto*. I cannot think so; as it appears to me, that the restriction is thrown loose by the words "in no case," which immediately follow; because, supposing

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supposing the parties were not to be permitted to substitute any other articles, those words, which qualify and mitigate the preceding imperative words, would be nugatory. I am therefore inclined to hold, that the terms of the licence are sufficiently satisfied, if the quantity of wine does not exceed one-third of the tonnage. There are other goods on board which are not within the enumeration of the licence, and they must of course be condemned, but the penal consequences will not go to affect the licence. It would fall extremely hard upon the commercial interests of the country, if the innocent goods of one merchant should be confiscated on account of the misconduct of another. Such a position would carry the doctrine of infection beyond what is done even in cases of contraband, where the penalty attaches only to the property belonging to the same owner.

I cannot admit that this licence has been vitiated on any such grounds as those which I have adverted to; but there is a farther objection, which is, that this licence was granted on the 2d October 1810 for four months, and it appears that the ship was captured so late as the 4th July 1811. This certainly is a circumstance which requires the fullest and most satisfactory explanation, for parties are bound to adhere to the terms of the licence under which they claim protection, unless they can shew that they were prevented from so doing by some unavoidable impediment. Licences are granted upon the exigency of the moment, and it is obvious, that strong reasons of policy may operate with His Majesty's Government to cause or to prevent the granting of them at different times; and it is the business of the Government, and not of the private merchant, to say at what periods this permitted intercourse with the ports of the enemy shall take place.

Wherever

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Wherever the licence has been out of date, the Court has not shewn a disposition to be pedantically narrow on this point, or to notice a trifling excess; but here I think it highly necessary to call upon the parties for some explanation of the delay. In former cases the Court has held the embargo of the enemy to be a sufficient excuse, thinking it hard, that through the act of the enemy the *British* merchant should lose the benefit intended him by his own Government, which would be in effect to place him at the mercy of the enemy. But then the embargo must be satisfactorily proved. The Court cannot so construe a licence, as to allow a ship to proceed to the enemy's port, and to remain there an unlimited time at the discretion of the parties. Now it is certainly unfavourable to this case, that no charter-party is exhibited, binding the master to return, and I observe also, that the papers on board seem to represent the lading of the vessel as having taken place so late as *May* and *June*; a delay which must be fatal to the case, unless it can be shewn that there was an embargo. The master says, that he was under an embargo from *January* to the middle of *June*, but this cannot be considered as a matter proved upon his mere averment. The utmost indulgence I can shew the claimants, is to allow them to establish that fact by other evidence, and such evidence they must possess, as I conceive it to be impossible that the merchants in this country should not have received some intimation of the cause of the detention of the vessel during so many months.

On a subsequent day the Court, upon the production of the further proof, restored the ship and the wine, but refused freight and expences to the neutral master upon the non-enumerated goods condemned, as the vessel was not privileged to carry them.

MINERVA, DAVIDSON.

October 29th,
1811.

THIS was the case of a vessel under *Danish* colours, with a cargo of deals, lathwood, staves, &c. captured on a voyage from *Christiansand* to *Jersey*. A licence was obtained for this vessel by name, by which it was provided that she should go to *Leith*, there to take convoy to the *Downs* or *Portsmouth*, and from thence to take convoy for *Jersey*. The vessel had not gone to *Leith*, but was steering to *Yarmouth* to take convoy there; and the question, therefore was, whether the Court, under such circumstances, could say that the licence had been sufficiently complied with.

JUDGMENT.

Sir *W. Scott*.—This is the case of a vessel which is claimed as protected under a licence; the cargo is asserted to belong to *British* merchants, but I do not observe that it is so set forth in the claim. It is a licence which is granted for this particular ship to carry a cargo from *Christiansand* to *Jersey*, on the condition that she shall touch at *Leith* for convoy. The licence is granted to these *British* merchants on a condition for which they are responsible; they stipulate with Government for a due observance of the terms of the licence, and if the terms are departed from in any essential point, the Court cannot protect the parties from the inevitable consequences. The question then is, has this licence been virtually and substantially carried into execution? Certainly not. Here is not

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The MINERVA,

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a mere departure from a subordinate regulation, it is a fundamental condition of the licence, without which it would not have been granted. The Court is not called upon to enquire into the reasons of this regulation, but it is highly probable that His Majesty's Government may think it proper that vessels with cargoes of this description on board should take convoy at Leith, that they may be subject to British inspection in that part of their navigation which brings them into the neighbourhood of the ports of the enemy. It is evidently introduced for that purpose, and being so can never be considered as a condition to be waved, at the option of the party who has accepted it. The condition is fundamental, and the breach of it must be fatal. It is not for me to relax those terms on which the publick wisdom has deemed the conveyance of such articles to be consistent with the publick safety.

SILIVAN, WACKLIN.

Nov. 12th, 1811.

THIS was the case of a Russian vessel with a cargo of pitch and tar, which had sailed from Uleaborg in Finland, on the 16th of July 1811, for London, and was captured on the following day. A claim was given by the consignees in this country for the cargo as Swedish property, stating that they had received a letter from the owners, dated 11th July 1811, directing them to apply to His Majesty's Government for a licence permitting the ship St. Ivan to proceed from a port in Sweden to the port of London with a cargo of pitch and tar. Application was accordingly made by them at the Council Office, and a licence was granted, dated 30th July 1811, which was annexed to the claim, together with a letter addressed to the consignees by the owners, dated 11th July 1811, stating that they had ordered the master to sail without waiting for the licence, in order to avoid delay.

Licence obtained subsequently to the date of the capture—no protection.

JUDGMENT.

Sir W. Scott.—This ship, which is clearly Russian property, was captured on the 17th of July 1811 on a voyage from Uleaborg to London with a cargo of pitch and tar. The ship is claimed as protected under a licence, dated 30th July 1811, which is many days after the capture; the question therefore is, whether the licence, which is annexed to the claim, can by any means have a retroactive effect so as to protect this ship and cargo, and I am clearly of opinion that it cannot.

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ST. IVAN.
NAV. T. C.
Nov. 12th,
1811.
(a) 48 G. 3.

The statute (a) which authorizes the Council to grant such licences as His Majesty was in the habit of granting, can be carried no further than the term licence, which is an instrument in its very nature prospective, pointing to something that has not yet been done, and cannot be done at all without such permission. Where the act has been already done, and requires to be upheld, it must be by an express confirmation of the act itself, or by an indemnity granted to the party; but a licence necessarily looks to that which yet remains to be done, and can extend its influence only to future operations. It is true that it has been held in this Court as well as in the Courts of Common Law (for there have been decisions expressly upon this point) that the King may, for reasons of State, release a prize as against the interest of the captors. The captors bring in their prizes subject to such interposition on the part of the Crown, but it is of very rare occurrence, and speaking with all due reverence ought to be of rare occurrence, and only under very special circumstances; as for instance, where the detention of the vessel may be detrimental to the general interests of the country. In such cases there can be no serious doubt of the authority or of the intentions of the Crown. The order for release recites the capture and detention, and proves the knowledge and intention of the Crown acting upon those facts. But the Council has no such power, and could have no intention to go beyond the powers conveyed to it by the act of Parliament, the act of Parliament which extends only to the granting of licences.

In the present instance, when the licence was applied for, it was totally withdrawn from the knowledge of the Council that the ship had failed, still less that she had been taken; for the licence is

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1811.

is granted "Upon condition that the vessel shall clear out from the port of *Oregrund* on or about the first day of *September* 1811." The licence, therefore, is clearly out of the question, although the parties seem with great sincerity to have relied on it for protection, as I observe the master, in his instructions, is told to proceed to *Hans* to join convoy, and that there he will receive the licence expected from *England*. But whatever may have been their expectations or intentions it cannot avail them, and it only remains for me to consider, whether the cargo can be protected on any other ground. As to the ship, there can be no doubt what must be its fate, as *Russia* is at war with this country. The cargo, which is documented as *Russian* property, the master says was to be delivered in *London* on account of the owner of the vessel, as he believes, upon the information he derived from the owner in *Finland*, and in this he is confirmed by all the ship's papers. It is true, a claim has been given on behalf of the house of *Falcke* and Co. of *Stockholm*, in opposition to the ship's papers and the depositions; such claims, in opposition to the original evidence, have been in some few instances, and under very strong circumstances admitted, but with the utmost jealousy and caution, and never without an explanation in the claim. Here, on the contrary, no explanation, no evidence is offered in support of this *Swedish* claim; it rests upon the mere broad assertion of *Swedish* property. Under such circumstances I am bound to say the claim cannot be admitted; and the cargo, therefore, as *Russian* property, must follow the fate of the ship.

CASES DETERMINED IN THE

HECTOR, EELS.
Nov. 28th, 1811.

Condition to touch at Leith, if destined to any port of this kingdom south of Hull, not held to include the ports of Ireland.

of hauls or hauls alike to Dubon and guidberg
And I am confirmed in this view of the subject
by the circumstance that late licences which have
been granted for the ports of Ireland, in which another
mode is adopted for securing the delivery of the
cargo at the ascertained port of destination, namely, by
a clause which makes it imperative on the parties to
go north about (a). It is likewise to be observed, that
in this licence the words, *this kingdom*, appear to be
placed in some degree of opposition or exception to
the words *United Kingdom*, which has been used in
the antecedent part of the sentence.

JUDGMENT.

Sir W. Scott.—It has been held that the words, *this kingdom*, since the union, must generally be considered to mean this United Kingdom, for the kingdom of England, as a separate kingdom, has ceased to exist. If, therefore, this licence was to be construed on a strict technical sense of the words, Ireland would certainly be included. But as this Court has been accustomed to construe licences with reference to the probable intention of His Majesty's Government in granting them, and considering that this is a mode of expression not likely to be employed, if the ports of Ireland were intended to be included, I think I must understand the condition as applying only to vessels destined to ports of England south of Hull. It would be an awkward and indirect mode of prescribing

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prescribing the conduct of vessels bound to Ireland to distinguish ports of that island as South of Hull. And I am confirmed in this view of the subject by the circumstance that late licences which have been granted for the ports of Ireland, in which another mode is adopted for securing the delivery of the cargo at the ascertained port of destination, namely, by a clause which makes it imperative on the parties to go north about (a). It is likewise to be observed, that in this licence the words, *this kingdom*, appear to be placed in some degree of opposition or exception to the words *United Kingdom*, which has been used in the antecedent part of the sentence.

(a) In the case of the *Success, Smith*, December 1811, the licence contained the following clause; "If to Ireland, the vessel shall go North about; if to any port of *this kingdom*, South of Hull, then to stop at Dundee or Leith for convoy."

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