

## The Frances.

by the collectors ; the action for the recovery of the penalties and forfeitures arising under the act is to be debt, and the proceedings generally are to be in conformity with the act of 2d March 1799, to regulate the collection of duties on imports and tonnage. But where a statute gives a particular form of action, that form must be pursued. Act of Congress of March 1st, 1809, § 8, 18 (2 U. S. Stat. 530, 532) ; act of March 2d, 1799, § 67, 68, 69, 88, 91 (1 Ibid. 677) ; 4 Bac. Abr. 654, tit. Statute K.

Saturday, March 12th, 1814. (Absent, Livingston, J.) MARSHALL, Ch. J., after stating the facts of the case, delivered the opinion of the court, as follows :—The rights of James Thompson depend entirely on his national commercial character ; which is decided by the opinion given in the case of *The Venus* (*ante*, p. 253). The sentence of condemnation pronounced in the circuit court, as to James Thompson's claim, is affirmed.

The original evidence is very strong to prove that the shipment made by Dalgleish & Frame was entirely a consignment. The whole letter of the 13th of July confirms this idea. It is scarcely credible, that the property of Dalgleish & Frame would have been placed on the list of consignments, without a note upon it, had it been shipped on joint account. The hurry of business will not excuse or account for this omission. The proposition of Dalgleish & Frame is stated to have been made on the 27th of June, and to have been accepted on the 1st of July. The letters of Thompson to Steele are written on the 13th and 17th of July, when this shipment is treated as being altogether a consignment. The hurry could not have been such as to account for a mis-statement of the fact. There is, too, something mysterious in the manner in which the papers, offered as additional proof, reached Mr. Steele. That they should not have been accompanied by a letter, nor bear any marks of coming from abroad, is singular. \*Further proof [348 is not admitted, and the sentence is affirmed.

Wednesday, March 16th. (Absent, Marshall, Ch. J.) WASHINGTON, J., as to the opinion of the court on the question of lien, referred to the opinion delivered in the case of *The Frances* (Irvin's claim, *post*, p. 418), which he said was precisely within the principle of the present case.

Sentence affirmed.

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The FRANCES, BOYER, Master : GRAHAM's claim.

*Prize.—Further proof.*

Where the affidavits produced on the order for further proof are positive, but their credibility impaired by the non-production of letters mentioned in the affidavits, a second order for further proof will be allowed, in the appellate court.

THIS case, like the preceding, was an appeal from the Circuit Court of Rhode Island : and the claim of John Graham, the appellant, was to certain other goods by the same ship, the *Frances*, captured and carried into Rhode Island, as stated in the case referred to, by the Yankee privateer.

*Harper*, for claimant : *Pinkney* and *Dexter*, for the captors.

The material facts of the case, and the substance of the argument on

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both sides, are stated in the following opinion of the court,(a) delivered March 12th, 1814, by—

MARSHALL, Ch. J.—John Graham, a merchant of New York, claimed sundry parcels of goods shipped on board the *Frances*, as his sole property. The goods were shipped by William Graham & Brothers, merchants, of Glasgow, on account and risk of John Graham, merchant, of New York. \*349] There are two bills of lading, each filled up with the name of John Graham. There are also two invoices, each headed with the name of William Graham & Brothers as shippers, and stating the goods to be shipped on account and risk of John Graham. The first of these invoices is marked in the margin thus, W. G. & I. P. and the other thus, [G.] There were also two lists of goods. The first headed, "List of goods shipped by the *Frances*, for Messrs. John Graham & Co., New York." This list is marked W. G. & I. P. The other is headed, "List of goods shipped by the *Frances*, for Messrs. Peter Graham & Co., Philadelphia." These goods are accompanied by two letters, dated the 15th and 16th of July, signed William Graham & Brothers, the first addressed to Messrs. John Graham & Co., and the last to Messrs. Peter Graham & Co. The letter to John Graham & Co. treats of their trade generally, and contains only the following allusion to this shipment: "You have herewith the ship *Fanny's* accounts, to which refer; also invoice of sundry goods per *Frances*; we hope they may go to a good market. We expect you will have about one hundred packages of English goods. There will be somewhat more to Philadelphia." The letter to Peter Graham & Co. is also a general letter on the subject of their trade. It contains the following passage respecting the shipments by the *Frances*: "We have shipped by *Frances* a few goods well selected; we could not get almost any cluster seeds."

The circuit judge directed the cause to stand for further proof. It appears from the affidavit of John Graham, that in the month of January, in the year 1809, he entered into a limited partnership with his brothers, William Graham and Peter Graham, who, as well as himself, are naturalized citizens of the United States. The business was to be conducted at New York, by himself, under the name of John Graham & Co.; at Philadelphia, by Peter Graham, under the name of Peter Graham & Co.; and at Glasgow, by William Graham, under the name of William Graham & Brothers. That, from the commencement of the partnership, he has been in the constant habit of carrying on extensive \*business, with the knowledge of his partners, on his private account, and also in connection with others. That the investment and disposal of the funds of the deponent, together with the management of the mercantile concerns of the firms composed as aforesaid, and the commission business, were the principal if not the sole business of William Graham & Brothers, at Glasgow. That, from the intimate knowledge they possessed of each others' affairs, and in consequence of their connection as brothers, the distinction between his firm and his private character was not always preserved. It was the less attended to, because the affairs of the company and his individual concerns were frequently the subjects of the same letter, and it became the more usual to address him by the style of the firm, because there are several other persons

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(a) LIVINGSTON, J., was absent, when this opinion was delivered.

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of the same name in New York. He adds, that in making shipments on the sole account of the deponent, William Graham has been in the habit of assorting the whole into invoices of small quantities, calculated to suit the generality of purchasers in the New York market, and also that the goods in any one of the said invoices might be sold entire, or transshipped to Philadelphia, or any other market, with the original invoice accompanying the same, as such original invoice would inspire more confidence in the buyers. This circumstance occasioned the lists of property shipped by the Frances, and one of them to be addressed to Peter Graham & Co. He swears, in the most positive and precise terms, that the property is entirely his own, and was purchased with his private funds in the hands of William Graham.

William Black deposes, that he has been long and intimately acquainted with John Graham, who is a man of fortune and character, and has been in the habit of transacting much of his own business in the said Graham's counting-house. That, from his knowledge of the affairs of the said Graham, he verily believes, that the said Graham, both before and since the war, has been in the habit of doing business on his private account, and has received many shipments in which neither of his brothers were interested. He has been concerned with the deponent, as part-owner of vessels, in which the deponent believes that neither William nor Peter Graham held any share. \*Isaac Belt and David Dunham, merchants of New York, [351 swear to facts similar to those stated by William Black.

Charles Graham, of a different family from the claimant, swears, that in the year 1811, there were, according to the directory, six persons of the name of John Graham, in New York, one of whom was the deponent's father; and that mistakes were frequently made respecting each other's letters which came through the post-office.

William Hill, principal clerk of William Graham & Brothers, deposes to the different concerns, and to the nature of the business transacted by William Graham & Brothers, as stated in the affidavit of John Graham. That they had under their care ships and vessels in which John Graham alone was interested. That since an early period in the year 1811, the concern of William Graham & Brothers have not shipped any goods whatever, for or on account of the said copartnership, to either of their said establishments, or in any other manner whatsoever. That vessels continued to arrive, particularly the Trident, the Fanny and the Cuba, to the charge of the said William Graham & Brothers, for the account and risk of John Graham, in which ships and cargoes the said copartnership, or the said William Graham, had no share or interest whatsoever. The deponent has seen sundry letters from the said John Graham to the said William Graham & Brothers, to invest the moneys arising from the freight and cargoes of those ships, in goods, in behalf of him, the said John Graham, so soon as the British orders in council should be revoked; and until then, to place the amount to his private credit in the books of William Graham & Brothers, which was done by the deponent as clerk. That this money was invested in the goods shipped by the Frances and other vessels, which were shipped on the sole account of John Graham, and were so entered on the books, by the instructions of William Graham. He states the practice of dividing shipments into small invoices, as is stated in the affidavit of John Graham.

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Peter Graham swears that he has not, and never had, any interest in the goods shipped by the Frances. That \*John Graham has been in the habit of transacting business on his own account, with the knowledge of his partners, and has frequently consigned his separate goods to Peter Graham & Co. William N. Steele, clerk of Peter Graham, deposes to the same facts; and founds his belief that Peter Graham had no interest in the goods shipped by the Frances, on his knowledge of the business of the house. William Graham states in detail, with great explicitness, the circumstances narrated in the affidavits of John Graham and of William Hill, his principal clerk, and avers most solemnly that the goods shipped by the Frances, were the sole property of John Graham.

The court below directed restitution of two-thirds of the cargo, as being the property of John and Peter Graham, and condemned one-third, as being the property of William Graham. From this sentence of condemnation, John Graham has appealed; and from so much of the sentence as directs a restitution of one-third as the property of Peter Graham, the captors have appealed.

It is certainly a rule in prize courts, dictated by good sense, and calculated to promote the purposes of justice, that letters accompanying the cargo, written in good faith, in the prosecution of a fair and honest business, should have great influence in ascertaining the real proprietors of it. The letters on board the Frances are of this description. They are such as would be written, if the goods were really the property of the company; but such as could scarcely have been written, if the goods were the sole property of John Graham. Had they been his sole property, it must have happened, that some expression would have been found in the letters indicating the fact. Men who write carelessly and without design, may not be very explicit; but it rarely happens, that they entirely conceal the truth. There will be some allusion to it.

If the goods were the sole property of John Graham, why address a letter to Peter Graham & Co.? The affidavits account rationally enough for making up separate invoices; but addressing a letter to Peter Graham & Co., at \*Philadelphia, by a vessel destined for New York, has very much the appearance of a shipment destined for the company at that place, and not for John Graham, of New York. The expressions of that letter favor the same idea. "We have shipped you, by Frances, a few goods, well selected." These cannot well be the goods of John Graham. The language is surely not such as would be used in that state of things. "We could not get almost any cluster seeds." These expressions have a necessary reference to some letter of orders from Peter Graham, mentioning cluster seeds among the articles directed to be shipped.

The affidavits produced on the order for further proof, are too positive to be disregarded, without considerable reluctance and hesitation. There are, however, certain rules of evidence, the authority of which is admitted in all courts. One of these is, that if a written paper be referred to, which paper is in the power of the party, it ought to be produced. The affidavits of William Graham and of William Hill state expressly, that letters had been received from John Graham, directing the disposition of cargoes shipped from America, on his own account, and ordering the proceeds to be invested in British manufactures, also on his own account, so soon as the

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British orders in council should be repealed. Why are not these letters produced? It is impossible not to perceive their necessity. Mr. John Graham must have copied these letters into his letter-book. Why has he not furnished some evidence of this fact. His letters must have been answered by William Graham, more explicitly than in that which was found on board the Frances. Why is no one of those letters produced? It is impossible to account for the fact, that no one of these letters is an exhibit in the cause. The court feels itself bound, judging on this evidence, according to the rules of law, to consider the goods as the property of the company.

But it is urged, on the part of the claimant, that if permitted to give further proof, he will produce the correspondence and such other proof as will be entirely satisfactory to the court. Several circumstances exist in this cause to induce the court to allow still further time for the production of such further evidence as may place the transaction beyond any doubt. The cause is ordered to stand for further proof.

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\*The FRANCES, BOYER, Master: DUNHAM & RANDOLPH's claim. [\*354

*Prize goods.—Further proof.*

A case of further proof. Goods, shipped by a British to an American house (partly in conformity with orders, and partly without orders), who had an option to accept or reject the whole invoice, in a limited time, remain the property of the shippers, until the election be made to accept them.

THIS is another case of goods by the Frances, captured by the Yankee, and condemned in the Circuit Court of Rhode Island, brought up to this court on appeal. (Reported below, 1 Gallis. 445.)

Messrs. Dunham & Randolph, merchants, of New York, claimed three bales and nineteen boxes of goods shipped by Alexander Thompson, of Glasgow, a British subject, and consigned to Dunham & Randolph. The bill of lading is in their names, and the invoice purports to be on their account and risk. A letter from Thompson to Dunham & Randolph, dated Glasgow, 11th July 1812, after describing the goods, and the labor he had employed in the business, and stating that the goods were sent partly in the Fanny and partly in the Frances, says, "I have exceeded in some articles, and have sent you others, not ordered." "I leave it with yourselves, to take the whole of the two shipments, or none at all, just as you please. If you do not wish them, I will thank you to hand the invoices and letters over to Messrs. Falconer & Co. I think twenty-four hours will allow you ample opportunity for you to make up your minds on this point; and if you do not hand them over within that time, I will of course, consider that you take the whole."

On the 15th of July, Alexander Thompson again wrote to Dunham & Randolph a letter, in which he mentions the information that a bill declaring war had passed the house of representatives. He then adds, "considering the circumstances of the times, I thought it best to inform Messrs. Falconer, Jackson & Co. fully of the conditions on which I have shipped you the goods by the Fanny and Frances." In a letter to Messrs. Falconer, Jackson & Co., of the same date, he explains, in full, the proposition he had