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British orders in council should be repealed.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.

*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

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made to Dunham & Randolph, and directs how those gentlemen are to act for him, should Dunham & Randolph reject the consignment.

*355] *This property was condemned in the courts below, and from the sentence of condemnation, the claimants appealed to this court.

Pinkney, for the appellants.—This is a mere question of fact as to property. Were or were not the goods the property of the enemy? We contend, that they were not. All the documentary evidence shows the property to belong to Dunham & Randolph. The condition mentioned in Thompson's letter of 11th July, was a condition subsequent. The property vested in the claimants, liable to be divested, if rejected by them within twenty-four hours after receiving the letter. The greater part of the goods, if not the whole, was shipped by order of the claimants, long before the sailing of the vessel. The delivery to the master of the ship was an execution of the order. The shipper had no longer any control over the property, except, in case of the insolvency of the consignees, in which event, he might stop it *in transitu*. Every circumstance connected with the transaction appears to be perfectly fair; and if the evidence now before the court is not sufficient to support the claim of the appellants, it is a case for further proof. The claimants had accepted the shipment by the *Fanny*, before the capture of the *Frances*, and thereby rendered certain what was before optional. They thereby bound themselves to take the shipment by the *Frances*.

Hunter, contra.—The goods in question were not shipped according to order, as appears by Thompson's letter of 11th July. They belonged to the shipper, until the consignees had elected to take them; and they could not make their election, before the arrival of the *Frances*. At whose risk were the goods, while at sea? Thompson had no power to impose the risk on the claimants. If the goods had arrived at Boston, they might have been *356] attached as the property of the shipper. If attached *as the property of the claimants, they might have said the goods were not their property; or if they had been sued as garnishees of Thompson, they might have said, they owed him nothing. They were not bound to accept the goods.

If the property, at law, belonged to Thompson, *à fortiori*, in a case of prize. It is a rule of prize courts that, in time of war, no future election shall be allowed to change the right of property at sea, *in transitu*. The question is, in whom is the legal estate? At whose risk were the goods passing at the time of capture? *The Packet de Bilbao*, 2 Rob. 111, 133; *The Danckebaar Africaan*, 1 Ibid. 90, 107; *The Jan Frederick*, 5 Ibid. 115, 128; *The Vrouw Margaretha*, 1 Ibid. 283, 336; *The Josephine*, 4 Ibid. 21, 25; *The Aurora*, Ibid. 180, 218; *The Carl Walter*, Ibid. 170, 207; *The Carolina*, 6 Ibid. 337; *The Copenhagen*, 1 Ibid. 243, 289. These cases all go to prove that, during war, property cannot change *in transitu*.

Dexter, on the same side.—In this case, there was no contract to change the property. To constitute a contract, the assent of both parties is necessary. The goods were not shipped according to the order of the claimants, and a condition was annexed. The property never vested in the claimants: It was only to vest in them, on condition that they failed to deliver over the goods to Messrs. Falconer & Co.

Pinkney, in reply.—The further proof which the claimants would offer,

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will show that almost all the excess of goods beyond the order, was on board the Fanny. Here was a direct consignment to the claimants; the goods were delivered to their agent, the master of the vessel; the documents were all sent to the consignees; no change of property *in transitu* was necessary; the property was already vested in the claimants: and, upon its arrival, they might have asserted their right to it. So far as the goods comported with the order, the contract was *certainly executed: there can be no doubt [357 about those goods; the claimants might have maintained trover or replevin for them.

This was not the sort of shipment described by Sir W. Scott, in the cases cited. Thompson, the shipper, was a naturalized citizen of the United States: this appears in other cases before this court; and that fact constitutes part of the further proof which we wish to introduce. There was no knowledge of the war, in this case. The transaction was not shaped by the expectation of war; Thompson did not believe that war would take place, and he gives his reasons. The shipment was directed on the 11th of July; between that and the 15th, the intelligence of the war was received.

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:—It has been argued for the appellants, that, by the invoice and bill of lading, and the true construction of the letter of Alexander Thompson, the property was vested in Dunham & Randolph, liable to be divested by their rejecting the consignment, within twenty-four hours after receiving the letters; that the condition annexed to the transfer, is subsequent, not precedent. The court cannot concur in this reasoning.

It has been very truly urged for the captors, that to vest this property in Dunham & Randolph, a contract is necessary; and that to form a contract, the consent of two parties is indispensable. In this case, no such contract appears. Had Thompson, in execution of the orders of Dunham & Randolph, consigned to them, unconditionally, such goods as they had directed, the contract would have been complete; and the goods would, on being shipped, have become the property of Dunham & Randolph. But Thompson has not done this. With the goods which were ordered, he has consigned other goods, expressly stipulating that Dunham & Randolph shall not take the goods they had ordered, unless they consent to take the whole quantity put on board both vessels. This, then, is a new proposition, on which Dunham & Randolph *are at liberty to exercise their discre- [358 tion. They may accept or reject it; and until they do accept it, the property must remain in Thompson. The sentence of condemnation, therefore, in this case, was warranted by the evidence before the circuit court.

But the claimants pray an order for further proof; and say, that, before the capture of the Frances, the Fanny had arrived, and Dunham & Randolph had consented to take both cargoes. This application is opposed, on the principle, that were the fact even true, as alleged by the claimants, belligerent property cannot change its character *in transitu*. Reserving any opinion on the law of the case, until the facts alleged shall be substantiated, if it shall be in the power of the claimants to substantiate them, the cause is ordered to stand for further proof.¹

¹ For a further decision on this claim, see 9 Cr. 183.