

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

Prize.—Question of fact.

THIS was likewise a case of goods by the Frances, condemned in the Circuit Court of Rhode Island. They were claimed by Duncan Kennedy, an American citizen, who appealed to this court. The case was submitted to the court, without argument.

Saturday, March 12th, 1814. (Absent Livingston, J.), MARSHALL, Ch. J., delivered the opinion of the court, as follows :—Duncan Kennedy, surviving partner of the house of George Stayley & Co., merchants, of New York, *359] claims eight boxes of merchandise, part of the cargo of the ship Frances, as his property. *The invoice is headed—

“Glasgow, 8th July, 1812.

“Messrs. George Stayley & Co.

Receive from James Smith.”

A letter from James Smith to George Stayley & Co., in speaking of the goods, terms them “our goods,” and does not, in any manner, indicate that they are the goods of Stayley & Co. He concludes his letter with saying, “As it is to be hoped the trade will now open, I shall expect your instructions, saying what goods are best suited for the market.” The bill of lading is filled up with the name of George Stayley & Co., “on account and risk as per invoice.”

There are several letters from George Stayley, in Glasgow, to his father ; but none of them indicate an opinion, that the property of the goods was in George Stayley & Co. The sentence, condemning these goods, must be affirmed.

Sentence affirmed.

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

Prize goods.—Change of property.

An intention, clearly proved, of a consignor of goods, to vest the right of property in the consignee, is not sufficient to effect such a change of property, until the goods are received by the consignee, or some evidence is given of his agreement to take them on his own account ; until that time, the goods are at the risk of the shippers ; and if they are enemies, the goods, if captured, are good prize.

No difference, though the consignee were the agent of a third person, who had directed him to order the goods, unless it appears that he actually did order them.

THIS, like the former cases of the Frances, was an appeal from the United States Circuit Court for the Rhode Island district.

William French, the appellant, a citizen of the United States, claimed fourteen boxes of merchandise shipped on board the Frances, by James Auchincloss, of Paisley, in Scotland, to A. & J. Auchincloss, of New York, on their account and risk, with orders to remit the proceeds to the shipper *360] for payment. The claimant *alleged, that the goods had been previously ordered by him through A. & J. Auchincloss, to be imported on his account and risk.

Further proof was ordered by the court below, to consist of the original order for the merchandise, and all the letters and correspondence relating to

The Frances.

it, and of all the proofs of property in the claimant. Under this order, the claimant produced a letter, dated Baltimore, 20th February 1812, signed by himself, and addressed to A. & J. Auchincloss, requesting them to order from their friends in Scotland, goods not exceeding in value 1000*l.* sterling, to be shipped so soon as the orders in council should be revoked. On the 20th of September 1812, A. & J. Auchincloss wrote a letter to the claimant, advising him of the capture of the *Frances*, with the goods, said to be shipped on his account, to their address, and desiring him to take the necessary steps to have his property cleared.

To these letters were added affidavits of the claimant, tending to prove the property in him, together with an affidavit of Darius Hodson, that he forwarded the above last-mentioned letter to the claimant, at Providence, by his request; and that, when he took it from the file, it was a whole sheet directed to the claimant from New York, by J. Auchincloss, jun.; but that, in order to save postage, he, the deponent, tore off the outside leaf, not thinking, at the time, of its being of any importance. Upon this proof, the claim was rejected in the court below, and the property condemned to the captors.

In this court, the cause was argued by *Jones*, for the appellant, and *Dexter*, for the captors; and on—

Tuesday, the 15th of March 1814 (absent, Marshall, Ch. J.), WASHINGTON, Ch. J., delivered the following opinion of the court:—*This is [^{*361} the claim of William French to a part of the cargo of the *Frances*, shipped by James Auchincloss, of Paisley, in Great Britain, to A. & J. Auchincloss, of New York, on their account and risk. By the correspondence between the consignor and consignees, which was exhibited to the court below, under an order for further proof, it is somewhat doubtful, whether these goods were to be sold as the property of the consignor, or of the consignees. In the letter from the former to A. Auchincloss, dated the 17th of July 1812, he says, “You will lose no time, to transmit, immediately on the receipt of the invoice by the *Fanny*, as well as by the *Frances*, to the full amount of the invoices; as thereby, and no other way, is your credit and John’s to be restored here. Also remit, as I have often told you, to clear off your old debt: and, for God’s sake, let us have no more failing in the family. You will observe, that the goods *per Fanny* and *Frances* are principally bought upon a credit of three, four and five months; this the consequence of failing.”

In another letter, of the same date, from the same to the same, he says, “By this ship, the *Frances*, I have shipped you fourteen boxes of different kinds of goods, which I beg you will lose no time to dispose, as by early remittances, you will undoubtedly strengthen your credit.” In another part of this letter, he says, “I beg you will lose no time to remit largely, say 3 or 4000 pounds. Remember the old cash account with the Paisley Banking Company.” These letters, so far as they throw light upon this transaction, intimate very strongly that A. & J. Auchincloss were to dispose of these goods upon their own account, and as the purchasers of them. But to produce a change of property from the shipper to the consignee, it was essentially necessary, that the goods should have been sent, in consequence of some contract between the parties by which the one agreed to sell, and the

The Frances.

other to buy. Had the language of these letters been more explicit than it is, to prove that the intention of the consignor was to vest the right of property in the consignee, it would not have been sufficient to effect such a change, until the goods were received, or some evidence given of the agreement of the consignee to take them on his own account. No order from

*362] A. & J. Auchincloss to the *consignor of this cargo, authorizing the shipment of it, was produced, or offered to be produced, in the court below; and this court, therefore, is warranted in believing that none such was ever given. Indeed, no interest whatever in these goods is asserted to have existed in A. & J. Auchincloss, but the same is claimed by William French, a citizen of the United States, who, under the order for further proof, produced, in support of his claim, a letter from himself to A. & J. Auchincloss, dated the 20th February 1812, in which he requests them to order from his friends in Scotland, a quantity of goods, enumerated in the letter, not to exceed 1000*l*. sterling, to be shipped as soon as the orders in council should be revoked, and adding, that he should consider the goods at his risk, from the time they should be shipped; also an invoice of these goods, sent by A. & J. Auchincloss to William French, together with a letter from them, dated the 20th of September 1812, advising him of the capture of the Frances, with the goods shipped on his account, and recommending it to him to take the necessary steps to vindicate his right to the property. This letter made its appearance in the court below, with the outer leaf, on which the post-mark would have been placed, had there been any, torn off. To do away with the suspicion which this circumstance might well excite, the affidavit of Darius Hodson was produced, in which he states that he forwarded this letter to the claimant, at Providence, having first torn off the outer leaf, with a view to lessen the rate of postage.

The affidavit of the claimant is added, which is fully to the purpose of supporting his interest in these goods, so far as his order to A. & J. Auchincloss can vest such an interest in him. But passing over those observations which might fairly be made upon the mutilated state of the letter from A. & J. Auchincloss to the claimant, and the suspicious manner in which that circumstance is attempted to be explained, it may be observed, that the claim of William French is in no respect stronger than if it had been made by A. & J. Auchincloss. Admit, that he wrote to A. & J. Auchincloss the letter of the 20th February 1812, and received from them that of the 20th of September, the inquiry still remains to be answered, where is the order *363] for this *shipment from A. & J. Auchincloss as the agent of the claimant? The truth is, that in whatever light this question is viewed, these goods were at the risk of the shippers, until they should be received by the consignee; and consequently, were, by the capture, made good prize, as property belonging to the enemy.

Sentence affirmed.