

The FRANCES, BOYER, Master: DUNHAM & RANDOLPH's claim. (a)

*Prize.—Enemy's property.*

If a British merchant purchase, with his own funds, two cargoes of goods, in consequence of, but not in exact conformity with, the orders of an American house, and ship them to America, giving the American house an option, within twenty-four hours after receipt of his letter, to take or reject both cargoes; and if they give notice, within the time, that they will take one cargo, but will consider as to the other; this puts it in the power of the British merchant, either to cast the whole upon the American house, or to resume the property, and make them accountable for that which came to their hands. The right of property in the cargo, not accepted, does not, *in transitu*, vest in the American house, but remains in the British subject, and is liable to condemnation, he being an enemy.<sup>1</sup>

The Frances, 1 Gallis. 445, affirmed.

IN this case, further proof was ordered, at the last term. (See 8 Cr. 354.)

*Pinkney*, for the claimants.—The property vested in Dunham & Randolph by the shipment. It was made in consequence of, although not strictly in conformity with, their orders; and delivery to the master of the vessel was tantamount to a delivery to themselves. The invoices and bills of lading all stated the goods to be shipped on their account and risk.

But if the property did not pass by the shipment, there is no reason why it should not pass *in transitu*, so that it be, before capture. It is true, that it cannot vest *in transitu*, so as to defeat a vested belligerent right. But if the transfer take place, according to the original terms of the contract, before a belligerent right has accrued, it is not within the principle nor the spirit of the rule. If the further proof shows that the property had absolutely vested in Dunham & Randolph, before the capture, it must be restored.

The further proof shows that the invoice, stating the shipment to be made for their account and risk, was \*sent to them; and that Dunham & Randolph wrote a letter, before the capture of the Frances, [\*184 accepting the goods by the Fanny, and saying that they would consider as to those by the Frances.

The question then is, whether the whole of both cargoes did not thereby vest, *eo instanti*, in Dunham & Randolph? The documentary evidence is clear and positive; it behooves the captors to show how it is qualified. The condition upon which the property was to vest in the claimants, was performed, before the capture. They agree to take the goods by the Fanny, and were instantly bound to take both shipments. They could not afterwards refuse that by the Frances. Their letter, agreeing to take the goods by the Fanny, was dated the 22d of August. The Frances was not captured until the 28th.

*Emmett*, on the same side.—The surplus of goods, beyond the other, was chiefly, if not entirely, in the Fanny, and accepted by Dunham & Randolph, so that there can be no question, on the ground that the goods by the Frances were not ordered. Dunham & Randolph's letter of 19th of September explains the cause of their partial acceptance.

(a) February 18th, 1815. Absent, TODD, Justice.

<sup>1</sup> The Frances, 2 Gallis. 391.

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*Dexter, contrà.*—This court has decided, that this was a condition precedent, and that the transfer could not take place until the condition was performed.

The first question is, whether, if the goods were accepted by Dunham & Randolph, either in fact or in law, the property could pass *in transitu*. The general principle is, that it could not. The question always is, in whom was the right of property at the time of shipment? The simplicity and celerity with which the trial of captures must be conducted, require that the question should be limited to the time of shipment. For the <sup>\*185]</sup> same reason, prize courts have rejected equitable liens. If it were not so, further proof would be required in every case. *The Twende Venner*, 6 Rob. 329, n. This rule is reasonable. Possession is evidence of ownership. Change of title *in transitu* is only an exception to the general rule. The exception should be confined to the cases in which it has been held necessary, as where possession could not be delivered, &c. The papers on board are always sufficient for the captors. In a prize court, the documentary evidence is all important. This point is settled in the case of the claim of Magee & Jones, in *The Venus*, at this term.

As to the further proof produced in this cause, it is of very little importance. Dunham & Randolph did not comply with the condition upon which the property was to vest in them. They agreed to take a part only, and therefore, were not entitled to any. It is immaterial, whether this bound them to take the whole or not. It did not bind Thompson. He had a right to refuse to let them have any part, as they had not accepted the whole, or he might insist upon their taking the whole. It was at his option, to call upon them to account, as his factors, for the whole. If Thompson had such a right, the captors have such a right, for by the capture they succeeded, *jure belli*, to all the rights of Thompson.

The time was past when they accepted the goods by the Fanny; they were in the custody of the law, under the seizure of the revenue officers. Dunham & Randolph could only accept them conditionally; *i. e.*, if they should be restored; but if they should be condemned, they could not receive them.

It is not credible, that they should have received them absolutely, at the time they were under seizure. They did not *bonâ fide* accept them. It is not to be believed, that they would take upon themselves the risk of their condemnation. It was probably done as a cover, for the benefit of Thompson. The goods not being according to order, they were not bound to accept them. Thompson made a new proposal to them. They did not accept it, but offered new terms on their part, to which Thompson did not assent; so that there was no agreement. The property never passed.

<sup>\*186]</sup> *Emmett, in reply.*—There are two questions in this cause: 1. The first is a question of fact, did Dunham & Randolph accept the goods? 2. The second is a question of law, can such an acceptance change the title *in transitu*?

1. Dunham & Randolph, relying on the justice of the United States, and that they would protect goods, the property of citizens of the United States, shipped on the faith of the declarations of their agents respecting the effect of the repeal of the orders in council, did *bonâ fide* accept them. This

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appears from their letter of the 19th of September. They had no motive to make the goods appear American rather than British ; for in each case, they would be equally liable to condemnation. They relied entirely upon the justice of the government.

The acceptance of the goods by the Fanny was absolute. The language used in regard to those by the Frances was intended to deceive the enemy, in case of British capture.

Thompson had no right to annex the condition to the acceptance. The goods were ordered by Dunham & Randolph. Thompson had agreed to execute the order, and was bound so to do. In shipping the goods, he was executing an order, not making a bargain. Dunham & Randolph had a right to take to their own account the goods ordered, and receive the residue as a consignment, to sell for the account of Thompson. If the question were now open, I should say, that these goods never belonged to the shipper. They were purchased by the agent of Dunham & Randolph, by their order, and for their account.

2. In point of law, what was the effect of the acceptance ? The acceptance was good for both cargoes, or it was good for neither. Thompson either had, or had not, a right to annex the condition. If he had not, then the goods were the property of Dunham & Randolph *ab initio*. If he had a right to annex the condition, they \*had no right to reject it. They were bound to take all or none ; if they took part, they were bound [ \*187 to take the residue. Their reservation of a right to consider as to the goods by the Frances, was void.

The only remaining question is, whether belligerent property can change *in transitu*. Belligerent rights, in derogation of the common law, are to be construed strictly. They are not to be extended further than the state of war requires. *The Vrow Anna Catharina*, 5 Rob. 161. The rules of war are not to be changed for the convenience of captors. It is true, that the captors are to judge by the ship's papers ; but here the ship's papers all showed the truth of the case ; and nothing but a single letter cast any doubt upon it.

The rule extends no further than that a neutral title shall not originate during the voyage. If the title originated anterior to the war ; if the shipment was made before the war, and not in contemplation of war ; and if the condition, upon which the title was to change, was annexed before the war ; such a contract could not be in violation of the belligerent rights. Thompson had not an option to hold Dunham & Randolph to the acceptance, or not, as he pleased. If they did an act which bound them, he was bound also. The acceptance must be considered absolute, and the condition not in derogation of belligerent rights.

March 2d, 1815. (Absent, Todd, J.) JOHNSON, J., delivered the opinion of the court, as follows :—This claim is interposed to obtain restitution of three bales and nineteen boxes of goods captured in the Frances. As early as the 23d of July 1811, these claimants, anticipating a repeal of the orders in council, gave an order to Alexander Thompson, of Glasgow, to ship him a variety of articles. In July 1812, upon the repeal of the orders in council, Thompson ships the articles ordered ; and originally intending [ \*188 to ship to \*the claimants, a consignment on his own account, inter-

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mingles with the goods ordered, a variety of others, not contained in the order of the claimants. These goods are shipped by two vessels, the Fanny and the Frances; and by a letter dated the 11th of July 1812, Thompson advises the claimants of these shipments; and after descanting on the merits of the articles, and declaring his reason for blending other goods with those shipped to their order, and his subsequent determination to make them an offer of the additional goods, he continues in these words: "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, Jackson & 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." "You will see, I think, the reasonableness of your taking the whole or none of the shipment."

The Fanny reached the waters of the United States in safety; and being seized by a revenue-cutter, was carried into New London, where she has been finally restored. The Frances was captured on the 28th of August, by the privateer Yankee, and carried into Rhode Island. On the 22d of August, after the arrival of the Fanny, the claimants write to Falconer, Jackson & Co., and accept of the shipment by the Fanny; but with regard to that by the Frances, they write in the following words: "His letter also speaks of another shipment of thirty-one packages *per* Frances, which, on arrival, we shall then hand in our determination." On the first of September following, they again write to Falconer, Jackson & Co., intimating their acceptance of the shipment by the Frances. On this state of facts, it is contended, that the claimants are entitled to restitution; that they either had an original interest in the goods shipped, or had acquired one, before the capture.

In the ordinary course of mercantile transactions, a delivery to a shipmaster is a delivery to the consignee. \*But it is evident, that this <sup>\*189]</sup> delivery may be absolute or qualified, and that the effect of it must vary accordingly. A voluntary agent has the option either to enter upon his agency, in strict conformity with the instructions of his principal, or with such reservations or conditions as he may think proper to prescribe; and the only consequence is, that, in the latter case, he leaves his principal at liberty to adopt or repudiate his acts. The shipper who purchases goods on his own credit, or with his own funds, is not acting in the ordinary capacity of a factor. If he were, the goods, even before shipment, would be the property of the individual on whose order the purchase is made. Such shipments are in the nature of a mercantile credit, and the shipper always retains the uncontrolled exercise of discretion in extending it. There was, therefore, nothing inconsistent with the relative rights of the parties, in Thompson's imposing upon the consignees the condition of taking all or none of the two shipments; and the consequence was, that the delivery was not absolute, but qualified; and until the condition performed, the goods remained the property of the shipper; and had they suffered shipwreck, the loss would have been his.

But it is contended, that the condition was performed, and that this case forms an exception from the rule, that, as to the exercise of belligerent

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rights, there shall be no transfer *in transitu*. The acceptance of the cargo by the Fanny was on the 22d, the capture of the Frances on the 28th of August. It is contended, that the acceptance of the Fanny's cargo was conclusive as to both shipments; and that, although partial in terms, it must, in law, have effect as to the whole, since such was the condition imposed by the shipper; and that it was, in fact, the intention of the claimants that such should be the effect of the acceptance; but the reservation was intended only as a *ruse de guerre* to guard against the effects of hostile capture.

There is certainly nothing illegal, in resorting to devices to elude hostile capture; and where it can be clearly shown, that property is really neutral or friendly, its being covered under hostile habiliments, for the purpose \*of evasion, will not necessarily subject it to condemnation. But the evidence must be less equivocal than that relied on in this case. The property was already captured and libelled, as liable to American capture, when the claimants' letter of the 19th September was written. To receive such evidence, under such circumstances, to so critical a point, would be to surrender every belligerent right to fraud and imposition. The letter of the 22d of August must, therefore, be taken on its plain import, and such effect given to it as its words imply. This letter contains an express exclusion of the goods under consideration; but it is contended, that as Thompson's letter left them no latitude, but obliged them either to choose or refuse the whole, their acceptance of part cast on them the property in the whole.

But we are of opinion, that such was not the effect of this act of the claimants. The consequence of such a doctrine would be, that where a property is to be acquired upon a condition performed, the condition may be rejected, and yet the property acquired. It certainly put it in the power of the shippers, either to cast the whole property upon the claimants, or resume the property, and make the consignee accountable for that which had come to his hands. Falconer, Jackson & Co., upon the arrival of the Frances, had she not been captured, would have had an undoubted right to demand the shipment made by her, on the ground of the claimants' not having accepted it within the time limited; and it would have been in vain for the claimants to have contested their right, whilst they held the letter of the 22d of August, and Thompson's instructions on the subject of the acceptance. If, then, it rested with Thompson, or his agent, to retain the property in this shipment, or cast it upon the claimants, the consequence is, that the legal interest still remained in the shippers.

This conclusion on the state of interest in the parties, renders it unnecessary to consider the argument urged to except this case from the rule relative to changes of property *in transitu*: and we hope it will be, at all times, recollect, that the reasoning in this case is not founded on the implied admission of the distinction taken by the claimants' counsel on this subject.

Decree affirmed.