

CIRCUIT COURT OF THE UNITED STATES

FOR THE

PENNSYLVANIA DISTRICT.

APRIL TERM, 1796.

Present—IREDELL, Justice, and PETERS, District Judge.

SEARIGHT v. CALBRAITH *et al.* CALBRAITH *et al.* v. SEARIGHT.*Tender.—Foreign laws.*

A tender is necessary, though the creditor require payment, exclusively, in a certain species of coin.

The contracts of American citizens are affected by foreign laws, in two cases only: 1. When they reside and trade in a foreign country: 2. Where the contract, plainly referring to a foreign country for its execution, adopts and recognises the *lex loci*. IREDELL, J.

SEARIGHT agreed, in February 1792, to sell to Calbraith & Co., a bill of exchange for 150,000 *livres tournois*, drawn upon Bourdieu, Chollet & Bourdieu, of London, payable in Paris, six months after sight; for which Calbraith & Co. agreed to pay at the rate of seventeen pence the *livre* (making in the whole, 10,625*l.* Pennsylvania currency), in their own notes, dated the 1st of May, and payable the 1st of July 1792. The bill was, accordingly, drawn and delivered to Calbraith & Co., who indorsed it to George Barclay & Co., of London, by whom it was presented for acceptance; and on the 27th of March 1792, Bourdieu, Chollet & Bourdieu accepted the bill, "payable at the domicile of Messrs. Cottin, Jonge & Girardot, at Paris." George Barclay & Co. afterwards indorsed and forwarded the bill to G. Olivier, who, on the 6th of October 1792, presented it for payment to Messrs. Cottin, Jonge & Girardot; and those gentlemen tendered payment in *assignats*, which, by the then existing laws of France, were made a lawful tender, in payment of debts. Mr. Olivier refused to receive the *assignats*, by order of George Barclay & Co., declaring, at the same time, that he would receive no other money than French crowns; and thereupon, each party protested against the act of the other. The bill being returned, under protest for non-payment, Searight, on the one hand, instituted a suit to recover the sum which Calbraith & Co. had originally stipulated to pay; and on the other

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hand, Calbraith & Co. *instituted a suit to recover damages for the protest of the bill. And these suits were agreed to be tried together, by the same jury.

On the trial of the cause, evidence was produced, on both sides, to ascertain and fix the precise terms of the original contract for the sale and purchase of the bill of exchange; particularly, as to the stipulation of a rate for estimating the *livre*; as to the purchase being made for cash, or on credit; and as to the knowledge and view of the parties, relative to the existence of *assignats*, or the law of France making them a legal tender in payment of debts. And the great question of fact for decision, was, whether the parties contracted for a payment in gold and silver; or tacitly left the medium of payment to the laws of France, where the bill was payable? The law arising from the fact, was discussed at large, according to the different positions of the parties in interest.

For *Searight*, it was shown, by the decrees of the French government, that *assignats* were established as a circulating medium for the payment of debts, before and at the time of the contract for the bill of exchange (Decree of 16th and 17th April 1790, § 3; King's Proclamation of 19th April 1790); and this fact being known, it was contended, that the purchase of a bill, payable in France, must in itself import an agreement to receive in satisfaction, the lawful current medium of that country, unless the contract expressly provides against it, which, on the present occasion, was controverted and denied. In support and illustration of the general position, and its incidents, the following authorities were cited. 2 Burr. 1078-9, 1083; Davies 26-8; Dyer 82-3; 4 Com. Dig. 556, B. 7-8; 2 P. Wms. 88-9; 1 Ibid. 696; Prec. Ch. 128; 2 Vern. 395; 2 Atk. 382, 465; Skin. 272; 4 Com. Dig. 256, B. 8; 4 Vin. Abr. 258, O. 13; Holt 465; Davies 24; 10 Mod. 37; 2 Bro. Chan.; 1 Smith's Wealth of Nations, 41; 1 Dall. 257; 1 Bro. Ch. 376; Esp. N. P. 48, 26; 3 Wils. 211; Esp. N. P. 140-1; Doug. 628; 3 T. R. 683, 554; 3 Bl. Com. 435; Salk. 130, 126; 12 Mod. 192; Kyd 63.

For *Calbraith & Co.*, it was contended, that an express contract had been proved, to pay the bill in specie; that the very terms of the bill import the same understanding of the parties; that however binding the law of France may be on cases between French citizens, or between American and French citizens, it did not affect contracts between Americans; that, in legal contemplation, there had been neither a payment, nor a tender of payment; and that Searight had sustained no damage, nor shown any right to recover. 1 Pow. on Contr. 8; 2 Ibid. 158; Cun. B. of Ex. 258; Skin. 272; 3 Watson's Philip III., 136; 1 Ld. Raym. 735; *1 Lev. 111; *327] Esp. N. P. 169; Bull. N. P. 156; 6 Mod. 305; 3 Burr. 1353; 3 Black. Com. 435, 466; 6 Mod. 306; Davies 75-6.

IREDELL, Justice.—The contract for the purchase of the bill of exchange is sufficiently proved, as it is laid in the declaration, by the entry made, at the time, in the books of Calbraith & Co. The sole question, therefore, in the cause is, whether the tender of *assignats*, in payment of the bill, was a compliance with that contract? The notarial protest not only states the tender, but certifies that *assignats* were lawful money of France in pay-

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ment of debts. A notary should, indeed, certify all the facts that occur, in relation to the protest (not merely the refusal to pay, according to the demand), but it is doubtful, whether his assertion would be conclusive, as to the lawfulness of the money tendered. Connected, however, with other evidence, it is proper for the consideration of the jury.

It has been objected, that as Olivier's demand was, exclusively, for a payment in French crowns, no proof of a tender in any other mode, is necessary; but I do not concur in this opinion. After such a demand, it was, perhaps, unnecessary for the party to exhibit the *assignats* to Olivier; but the form of the demand, on one side, cannot dispense with the obligation, on the other side, to make a tender of payment, agreeable to his own sense of the law and the contract. The jury must, therefore, be satisfied, that although the money was not produced and counted, it was actually in the possession of the party making the tender.

On the principal question, I thought, at first, that the risk, as to the mode of payment, must be run by the holder of the bill; but the case in *Skinner* 272, sanctioned by the high authority of *Holt's* name, transcribed, without remark, into *Comyn's* excellent digest, and uncontradicted by any other adjudication, must be respected in every court of law, and completely effaces the first impressions of my mind. Upon examination, too, the doctrine of that book appears to be founded in just and legal principles. Every man is bound to know the laws of his own country; but no man is bound to know the laws of foreign countries. In two cases, indeed (and I believe, only in two cases), can foreign laws affect the contracts of American citizens: 1st. Where they reside or trade in a foreign country; and 2d. Where the contracts, plainly referring to a foreign country for their execution, adopt and recognise the *lex loci*. (a) The present controversy, therefore, turns upon the fact, whether the parties meant to abide by the law of France? And this fact, the jury must decide.

As to the damages, if the verdict should be for *Searight*, though it is true, that in actions for a breach of contract, a jury should, in general, give the whole money contracted for and interest; yet, *in a case like the present, they may modify the demand, and find such damages as they think adequate to the injury actually sustained. But if the jury should, in the first action (*Searight v. Calbraith & Co.*), find, either wholly or partially for the defendant; in the second action (*Calbraith & Co. v. Searight*), they should find for the defendant, generally. [*328]

PETERS, Justice.—The decision depends entirely on the intention of the parties, of which the jury must judge. If a specie payment was meant, a tender in *assignats* was unavailing. But if the current money of France was in view, the tender in *assignats* was lawfully made, and is sufficiently proved.

When the jury were at the bar, ready to deliver verdicts, the plaintiff in each action, voluntarily suffered a nonsuit. It was afterwards declared, however, that in *Searight v. Calbraith & Co.*, the verdict would have been,

(a) *Courtois v. Carpenter*, 1 W. C. C. 377; *Cambioso v. Maffet*, 2 Id. 104; *Willings v. Consequa*, 1 Peters C. C. 317.

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generally, for the defendants; and that in *Calbraith & Co. v. Searight*, the verdict would have been for the plaintiffs, but with only six pence damages.

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Present—IREDELL, Justice, and PETERS, District Judge.

SMYTHE v. BANKS.

Privilege of witness.

A witness is privileged from arrest, for a reasonable time, to prepare for his departure, and return to his home, as well as during his actual attendance upon the court.

CAPIAS. The defendant was a resident of Virginia, and had been sub-pœnaed as a witness in the case of *Sims's Lessee v. Irvine*, which was marked for trial at the present term, but was continued on the 20th of April. He was arrested on the 26th of April; and the following day, *Levy* moved, that he should be discharged from the arrest and process, on account of the privilege of a witness, *eundo, morando et redeundo*. 4 Com. Dig. 475; 2 Str. 1094, 986; Vin. Abr., tit. Priv.

BY THE COURT.—The witness is, undoubtedly, privileged from arrest for a reasonable time, to prepare for his departure, and return to his home, as well as during his actual attendance upon the court. But the privilege does not extend throughout the term at which the cause is marked for trial; nor will it protect him, while the witness is engaged in transacting his general private business, after he is discharged from the obligation of the *sub-pœna*.

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*MAXFIELD'S Lessee v. LEVY. (a)

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Jurisdiction.

A colorable and collusive conveyance to the lessor of the plaintiff in ejectment, for the purpose of bringing the suit in a federal court, will not give it jurisdiction; and the court will, on motion, dismiss the suit. (b)

This jurisdiction of a federal court is not *prima facie* general, but special.

THE opinion of the Court was delivered in this case, in the following terms:

IREDELL, Justice.—A motion was made for a rule to show cause why these ejectments should not be dismissed, upon an allegation that it appeared, by an answer to a bill in equity, for a discovery, in this court,

(a) An outline of this cause was given in 2 Dall. 381; but I comply with the subsequent request of the presiding judge (whose death was greatly lamented by the bench and the bar), in publishing the opinion of the court at large.

(b) A deed, executed for the purpose of giving jurisdiction to a federal court, will not avail in that respect. *Hurst's Lessee v. McNeil*, 1 W. C. C. 70.