Swift v. Tyson and the Brooding Omnipresence in the Sky: An Investigation of the Idea of Law in Antebellum America

William P. LaPiana

Follow this and additional works at: http://digitalcommons.nyls.edu/fac_articles_chapters

Recommended Citation
Swift v. Tyson and the Brooding Omnipresence in the Sky: An Investigation of the Idea of Law in Antebellum America*

by William P. LaPiana**

I. INTRODUCTION

The nature of legal thought in antebellum America has become an increasingly popular subject of scholarly inquiry. The results of these inquiries are sometimes quite contradictory. All of them, however, must begin by acknowledging that the belief in law as a system of principles which could claim the status of science appears again and again in the rhetoric of certain antebellum lawyers. The attempt of this "speaking aristocracy" of the bar to create a professional science is explained most fully in Book II of Perry Miller's The Life of the Mind in America.¹ The usefulness of Miller's analysis for understanding American legal history before the Civil War has been severely challenged by more recent works, especially Morton Horwitz's The Transformation of American Law.² Horwitz views the judges of the period as practitioners of legal instrumentalism, adherents of a will theory of law which legitimized their manipulation of its doctrines in favor of economic development and growth, often at the expense of the least powerful people in society. To put it crudely, seen in this light all the talk of science and ordered principles was simply a self-serving sham. In fact, Horwitz portrays Joseph Story, perhaps the most self-consciously scientific lawyer of his day, as indulging in just this sort of double talk.³

Horwitz's description of what was really behind the judicial activity of the pre-Civil War era has in turn stimulated other scholars. His

---

* Due to the specialized nature of the sources used, the author has certified to the Suffolk University Law Review the accuracy of a substantial amount of the bibliographical information.

** Assistant Professor of Law, University of Pittsburgh School of Law; A.B., A.M.; J.D. Harvard University. This article is dedicated to the memory of Stephen W. Botein, patient teacher, creative scholar, warm and good friend.

3. Id. at 248-249.
emphasis on judges' making of law to deliberately further certain social ends especially seems to have stirred debate. Randall Bridwell and Ralph U. Whitten, for example, emphasize the consensual aspects of the common law and the congruence between Story's thought and judicial behavior and his belief in law as something greater than the will of judges. They use their reading of history to argue in favor of a view of federalism and the Constitution which severely limits the power of the judiciary.

More recently, the antebellum years have been assigned an important role as the pre-Classical period of American law in a division of all American legal history into pre-Classical, Classical, and post-Classical periods. Many of those who utilize this classification scheme devote themselves to the elucidation of the legal "consciousness" of the three periods and disclaim any attempt "to link social and economic factors with doctrinal development."

Each of these approaches has served to increase understanding of American law before the Civil War. To some degree, however, they are each mutually exclusive. Horwitz on one side and Bridwell and Whitten on the other have widely differing views on the jurisprudence of the period and consequently on the role judges played, or thought they played. To put it simply, Horwitz sees nineteenth century judges as positivists, consciously and happily making law. Bridwell and Whitten, on the other hand, see the same judges as servants of a view of law which exalts its customary aspect, a view which makes them not the creators of rules but rather the enforcers of privately arranged understandings. The elucidators of consciousness eschew the attempt to do more than describe the structure of legal thought, an operation which often seems to isolate the historical actors from any sort of social or intellectual context.

The goal of this paper is to create a more complete and rounded view of antebellum American law through the examination of one small part of it, Joseph Story's famous decision in *Swift v. Tyson* and the state courts' treatment of the point of negotiable instruments

law involved in that case. Story's opinion is a useful entree to the world in which it was created. It illustrates a possible connection between changing law and a changing economy. The decision also reveals much about its author's jurisprudence and links it to the broad sweep of antebellum intellectual history.

In *Swift* Story decided a point of negotiable instruments law in such a way as to promote the circulation of negotiable paper, clearly aiding mercantile interests in society and giving short shrift to opposition to the doctrine of negotiability which itself expressed certain anticommercial attitudes. Because of the nature of the federal system, Story had to decide which state's law would apply to the facts of the case. Under section 34 of the Judiciary Act of 1789, which required the courts of the United States to use as "rules of decision in trials at common law" the "laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide . . .," it was arguable that the law of New York State should be used. While the rule given by the New York decisions was not clear, Story assumed that it would require him to decide against negotiability and those interests many assume he wished to promote. Story went on, however, to free himself from New York precedents. He held that the word "laws" in section 34 did not include the decisions of state courts, and stated, "They are, at most, only evidence of what the laws are, and are not of themselves laws." Not bound, therefore, by the New York cases, the Supreme Court was free "to ascertain, upon general reasoning and legal analogies . . . what is the just rule furnished by the principles of commercial law to govern the case."9

8. For a thorough discussion of *Swift* and of the very real mercantile problems tied up with the question decided see T. Freyer, *Forums of Order: The Federal Courts and Business in American History* 1-98 (1979) [hereinafter *Forums of Order*]; see also M. Horwitz, *supra* note 2, at 218-20 (discussing anticommercial attitudes of opposition). Two contemporary authors have discussed *Swift* as principally a case about commercial law and not about federalism. T. Freyer, *Harmony and Dissonance: The Swift and Erie Cases in American Federalism* 17-43 (1981) [hereinafter *Harmony and Dissonance*]; Note, *Swift v. Tyson Exhumed*, 79 YALE L.J. 284-310 (1969). The analysis in this paper differs from both commentators in its attempt to place Story's jurisprudence squarely within the context of antebellum thought and to describe more fully the nature of the general principles of law which Story and his contemporaries saw as governing the question presented in the *Swift* case. In this way, it is hoped that this paper will contribute to elucidating what Professor Freyer in his excellent study describes as the "ambiguity" shrouding "the theoretical underpinnings of the idea of general commercial law." *Harmony and Dissonance*, *supra*, at 43; cf. Note, *supra*, at 294 n.50 (no idea of "some entity called The Common Law" exists in Story's opinion).

This general law existing above and beyond the decided cases has been an object of derision. Holmes mocked it as a "brooding omnipresence in the sky" and John Chipman Gray found the key to the entire *Swift* opinion in Story's "restless vanity." The most important point in the discussion that follows is the assertion that the jurisprudence of Story's opinion accurately reflects one facet of the legal thought of his time which in turn was in harmony with antebellum notions of science taken in a broad sense. A secondary point is that the opinion also reflects the institutional role of the pre-Civil War judge, a role which allowed and even demanded a sort of judicial activism, even though this activism was not the sort that "made" law. Each assertion is buttressed by a detailed examination of the state court opinions dealing with the substantive issue decided in *Swift*. This examination reveals widespread agreement with Story's jurisprudence of commercial law and equally widespread disagreement with some of his conclusions. It also reveals that the state of the "law" on the question decided in *Swift* was a matter of dispute, both before and after Story's opinion, and hints that it will be most difficult to elucidate a clear relationship between the opinions of the courts and broader social and economic trends.

II. STORY'S LEGAL SCIENCE

A. Law as a System of Principles

Story defined the common law in this way: "It is rather a system of elementary principles and of general juridical truths, which are continually expanding with the progress of society, and adapting themselves to the gradual changes of trade, and commerce, and the mechanic arts, and the exigencies and usages of the country." Law is a system of principles and thus law is a science because every science is a system of principles. Bacon said so, and the prestige of Bacon in antebellum America was immense. Allegiance to "Bacon-
ianism' was "a mark of scientific orthodoxy."" Of course, Baconianism meant different things to different people, but according to one scholar, who considered most scientists' use of the term, it "implied a kind of naive rationalistic empiricism—a belief that the method of pure empiricism consistently pursued would lead to a rational understanding of the universe." Such a view of science could easily encompass the common law. What are individual cases but the data to be observed? What is to be drawn from an observation of all cases but legal principles, the ordering of which will lead to a rational understanding of the legal universe? One of the new nation's first law teachers, James Wilson, made the common law's status as a Baconian science explicit for his auditors. A science, according to Wilson, is "best formed into a system, by a number of instances drawn from observation and experience, and reduced gradually into general rules." Wilson argues that the workings of the human mind demand such a course:

The natural progress of the human mind, in the acquisition of knowledge, is from particular facts to general principles. This progress is familiar to all in the business of life; it is the only one, by which real discoveries have been made in philosophy; and it is the one, which has directed and superintended the insaturation of the common law. In this view, common law, like natural philosophy, when properly studied, is a science founded on experiment.

Progress is made in the field of natural philosophy by observing the phenomena of the material world; law progresses by observing the "phenomena" of men and society. The consequence is the regime of principles: "Hence, in both, the most regular and undeviating principles will be found, on accurate investigation, to guide and control the most diversified and disjointed appearances."

Wilson's observations were echoed again and again in the public pronouncements of numerous antebellum lawyers. Story himself paid

15. 2 J. Wilson, Works of the Honorable James Wilson, L.L. D. 43 (1804).
16. Id. at 43-44. For the story of the creation of Wilson's lecture course see C. Smith, James Wilson, Founding Father, 1742-1798, 308-09 (1956).
17. J. Wilson, supra note 15, at 43-44.
tribute to Bacon many times in writings discussing the general nature of law and its growth. He stated that the triumph of Lord Bacon's method of induction, "that is, . . . a minute examination of facts, or what may properly be called experimental philosophy," made possible the liberation of his age from the bondage of intellectual timidity of the sort which imprisoned Galileo and led to the initial rejection of Newton. The effects could be found in every branch of knowledge. Medicine had been freed from "vague conjecture and bold pretension" by "instructed skill, patient observation, and accurate deduction." Chemistry was no longer "an occult science, full of mysteries and unedifying processes, abounding in theories, and scarcely reducible to any rational principle." Rather, it grew into a science because the "laws of chemical action have been examined and ascertained with great accuracy, and can now be demonstrated with as much clearness and facility, as any of the laws which belong to mechanical philosophy." Through the use of observations "every irregularity and perturbation of the motions of the heavenly bodies [has been found] to depend upon the same eternal law of gravitation." Nor was law deprived of the benefits of the "induction of philosophical inquiry." The patient accumulation and ordering of the experience of many nations has transformed commercial and maritime law especially. The glory of the process moved an apologetic Story to a striking use of metaphor:

Industry and patience first collected the scattered rays, emitted from a thousand points through the dim vista of past ages; and philosophy reflected them back with tenfold brilliancy and symmetry. If, indeed, a professional mind might indulge in a momentary enthusiasm, it would perceive, that in this process had been realized the enhancement and wonder of the kaleidoscope, where broken and disjointed materials, however rude, are shaped into inexhaustible varieties of figures, all perfect in their order and harmonies, by the adjustment of reflected light under the guidance of philosophy.

Story seems to have been one of many adherents of the view that a careful study of decided cases would reveal true principles through

20. Id. at 354.
21. Id. at 354, 483.
22. Id. at 356.
23. Id. at 99.
the process of induction.\textsuperscript{24} Exactly what those principles are is not easily understood. It was conventional to praise the principles of the common law as embodying all that is moral and right. As John Milton Goodenow put it, "natural justice and right reason are the foundation of all our private rights," which the common law upholds, and "natural justice and reason are the same in all countries and in all ages."\textsuperscript{25} Given such principles, the rule or rules deciding any given case should be easily deduced. As one New York State judge stated in 1855:

The common law consists of those principles and maxims, usages and rules of action which observation and experience of the nature of man, the constitution of society and the affairs of life have commended to enlightened reason, as best calculated for the government and security of persons and property. Its principles are developed by judicial decisions as necessities arise from time to time demanding the application of those principles to particular cases in the administration of justice.

The authority of its rules does not depend upon positive legislative enactment, but upon the principles which they are designed to enforce, the nature of the subject to which they are to be applied, and their tendency to accomplish the ends of justice.\textsuperscript{26}

A generation earlier, New York Senator John C. Spencer, speaking as a judge of New York's highest court, described the flexibility of the common law as consisting not of the alteration of its principles "but in the application of old principles to new cases, and in the modification of the rules flowing from them, to such cases as they arise, so as to presume the reason of the rules and the spirit of the law."\textsuperscript{27}

Yet Story himself acknowledged the possibility of the discovery of new principles. His was an age, in his eyes, of wonderful change. He noted that the Baconian method, "the habit of nice observation of facts (the almost constant attendant upon scientific acquirements) has led to surprising conjectures, which have ended in the dem-

\begin{footnotesize}
\textsuperscript{24} See D. Mayes, An Introductory Lecture Delivered to the Law Class of Transylvania University on the 5th of November 1832, 6-7 (1832) (available at Library of Congress); Dixon, Art. III-Codification, and Reform of the Law—No.1, 14 Am. Jurist 283 (1835); Noyes, Art. III—The Legal Rules Governing the Enjoyment and Use of Light, 23 Am. Jurist 58-59 (1819).

\textsuperscript{25} J. Goodenow, Historical Sketches of the Principles and Maxims of American Jurisprudence 36 (1819 & photo. reprint 1972).

\textsuperscript{26} People v. Randolph, 2 Parker's Crim. Rptr. 174, 177 (1855).

\textsuperscript{27} Rensselaer Glass Factory v. Reid, 5 Cow. 587, 628 (N.Y. 1825).
\end{footnotesize}
onstration of equally surprising truths." 28 In turn, these newly estab-
lished principles were put to practical use in the arts, giving society
inventions ranging from the cotton gin to the steamboat. Along with
these material changes, the expansion of commerce greatly changed
America. Whole new categories of transactions between man and
man became common. Story observed, "Policies of insurance, bills
of exchange, and promissory notes, and shipping contracts, and
charter-parties, are the growth of thriftier trade, and more extensive
mercantile enterprise. They have grown up almost in our own day." 29
A willingness to admit the discovery of new principles casts some
doubt on the fundamental nature of legal principles in general, es-
pecially when these new principles are concerned with trade and
commerce and seem designed to further the interest of those involved
in commerce at the expense of other segments of society.

Yet commercial law was widely considered to be a particularly
fine example of law as a science of principles. Expressions of the
principled nature of the commercial law can be gathered from the
beginning of the nation to the period contemporary with Story’s
decision. In his law lectures given in the winter of 1790-1791, James
Wilson described the law of merchants, as he called it, to be part
of the law of nations. It was a "system which governed a wide
variety of mercantile transactions." More importantly, however, Wil-
son stated "this system has, of late years, been greatly elucidated,
and reduced to rational and solid principles, by a series of adju-
dications, for which the commercial world is much indebted to a
celebrated judge [Lord Mansfield], long famed for his comprehensive
talents and luminous learning in general jurisprudence." 30 A decade
later, William Cranch, judge of the federal circuit court for the
District of Columbia, and Supreme Court reporter, wrote an elaborate
essay published in an appendix to his fifth volume of reports, en-

28. Developments of Science and Mechanic Art, in MISCELLANEOUS WRITINGS supra note 12, at 496.
29. Chancery Jurisdiction, in MISCELLANEOUS WRITINGS, supra note 12, at 154. At least
one observer of the American legal scene, however, drew the opposite conclusion from the
law’s response to these changed conditions:
The circumstance that the law of insurance, being of recent introduction into English
jurisprudence, is governed by principles of a more enlightened policy, and a sounder
morality, than pervade the older branches of the law, goes far to show that the common
law has not that happy facility in adopting itself to the new relations, and enlarged
knowledge of the community, for which it is so much extolled by its admirers. Verplanck’s
Essay on Contracts, 2 N.Y. REV. & ATHANEUM MAG. 109 (1826).
deavoring to show that promissory notes were negotiable under the common law. He believed that the principles of the law of merchants had always been part of the common law, but had been in abeyance for the long period in which little commerce took place and legal questions primarily involved land law and pleas of the Crown. Once again, Lord Mansfield played a key role in linking the principles governing the world of commerce with the mechanism of the common law. William Cranch observed,

His sagacity discovered those intermediate terms, those minor propositions, which seemed wanting to connect the newly developed principles of commercial law, with the ancient doctrines of the common law, and to adapt the accustomed forms to the great and important purposes of substantial justice, in mercantile transactions.31

James Sullivan, attorney general of Massachusetts, was also an admirer of Lord Mansfield. Sullivan included in his 1801 work entitled The History of Land Titles in Massachusetts some general observations which included his views on commercial law. Sullivan noted that since "contracts arose from commerce" they should be governed "by the jus gentium, the law of nations, known and established over the commercial world."32 He observed that although there are no acts of any particular legislature dealing with insurance policies, bills of exchange, charter parties or freight, "we find the same forms of contract, the same manner of construction, and the same remedies, all over the world."33 He did admit that the English Parliament passed an act dealing with negotiable notes—the famous Statute of Anne—but noted that it "ought, in a government made up of a system of principles, to have been done by the judicial power. Had Mansfield then been on the bench, he would probably have done it."34 Once again, the regime of principles was given life by the judges. In the United States, however, the Constitution gives the government of the United States the power of regulating commerce between the states. Unfortunately, the first Congress in the Judiciary

31. Dunlop v. Silver, 5 U.S. (1 Cranch) 367, 375 app. (A) (1801); see M. Horwitz supra note 2, at 221-22 (discussing Cranch's place in history of negotiability and circumstances surrounding writing of essay). Peter S. Du Ponceau also believed that commercial law was part of the common law, at least in theory. P. Du Ponceau, A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States 122 (1972).
33. Id.
34. Id.
Act tied the hands of the federal courts by requiring that the law of the several states be regarded as the rules of decision. Sullivan seemed to believe, therefore, that the United States courts could not give effect to a uniform interpretation of the universal principles. The problem could be solved, however, through the passage by Congress of a statute directing "that all courts within the United States shall give to all personal contracts made within the United States a uniform construction, according to the tenor of the contract, and such as is usual in, and agreeable to the proceedings of commercial nations." Although the Massachusetts attorney general and the Massachusetts justice apparently did not agree on the scope of the justice's power as a federal judge, they did agree on the nature of the law he was to serve.

Uncritical admiration of Mansfield was not, however, universal. In 1831, the anonymous author of an article on Mansfield's opinions on commercial law published in The American Jurist criticized the judge for depending too much upon mercantile usage for resolution of the problems which confronted him, and for omitting explanations of his reasoning. The author opined that such judicial behavior did a disservice because it encouraged the bar to lose itself in particulars and lose sight of "those broad and luminous principles, which, if pursued and always kept in view, raise the law into the rank of a liberal science." William Kent also emphasized the role of principles in deciding questions of commercial law. The younger son of the great Chancellor Kent was one of the first professors in the law school founded at the University of the City of New York in 1838. In his inaugural address, he too expressed the belief that "the law of commerce is not confined and local, but, the production of many countries and ages, [and] is in most respects common to them all, and uni-

35. Id. at 353-54.
36. Art. VI—Opinions of Lord Mansfield on Commercial Law—His Judicial Character, 6 AM. JURIST 65, 70, 82 (1831).
37. Id. at 66. A similar opinion as to usage in general was expressed in the same journal four years later: "This mode of establishing a law (by usage) seems to us to be peculiarly unfortunate . . . . It is to be regretted that any part of the system should thus be the result of accident, rather than settled by an analogy to other rules, and on due consideration of men skilled in the science of the law." Dixon, Art. III—Codification and Reform of the Law—No. 1, 14 AM. JURIST, 280, 295-96 (1835).

The American Jurist was edited in Boston by lawyers who had been Story's students at Harvard. It "generally praised the judge [Story] and circulated his ideas." R. Newmyer, Supreme Court Justice Joseph Story, Statesman of the Old Republic 168-231 (1985).
form . . ."38 In dealing with problems of commercial law, therefore, "we may apply in our discussions for the aid of universal reason, of all ages and countries."39 In fact, the continental part of commercial law has passed through the same development as the common law and is as much a science as its Anglo-American cousin. It too has grown through the logical deduction of decisions from earlier ones which in turn became the source of "new deductions and principles."

Thus finally grew up a science—to a casual observer, vague and undefined, but known to those who thoroughly studied it, to excel every other system in the rigidly logical connexion and dependence of its parts. Now all such parts of commercial law, as are of continental origin, have become amalgamated in one system, and subject as much to the operation of the rule last alluded to [of scientific development], as the most ancient and peculiar portions of the common law.40

In his Course of Legal Study, David Hoffman spoke his piece on the lex mercatoria, as he called it, admitting that its relationship to the law of nations and to the common law had been explained in many different ways. He had his own definition, however, which emphasized both usage of merchants and the organizing role of principle:

The lex mercatoria of any particular country, as for example England, may perhaps be defined, as a system of principles or rules peculiarly regulating mercantile transactions, derived principally from the customs of merchants in different nations, from the usages, either general or local, of the merchants of England, which customs or usages of foreign or English merchants have been judicially sanctioned; and lastly from express legislative provision.41

American law merchant theories, therefore, would be based on American practices, as well as principles whose existence transcends national boundaries, although the exact mix of these two elements was never precisely described. Given the emphasis on practical results, perhaps no precise formula was possible or desired. Story best summed up the general attitude in an 1839 case decided on circuit. Confronted

39. Id.
40. Id.
with a question involving the appropriate rate of exchange between a foreign currency and the dollar to be used in settling a mercantile debt, Story set out the relationship between usage and principle stating:

In all cases which respect the daily transactions of commercial men, I feel a great desire not to interfere with the known and settled habits of business; and should rather incline to follow the usage, if any, than to form a new rule of my own. No settled usage has been shown; and, therefore, the rule must be settled upon principle.

His final decision is given "upon just principles of law, applied to the contract." 42

B. Principles for a Commercial Nation

In spite of all the talk of just principles, the frank acceptance of "usage" coupled with the palpable practical benefits commercial interests received from Story's opinion in Swift seem to explain the decision so well that his jurisprudential explanation for the decision has been scorned as either naive or simply a smokescreen for an exercise in judicial lawmaking based upon a will theory of law. 43 The analysis has been supported by asserting that anyone who, like Story, writes a treatise on the subject of conflict of laws must in the end believe in a will theory of law. 44 It is true that the basic idea of Story's treatise, Commentaries on the Conflict of Laws, is that nations are sovereign within their territory and that they are not obligated to enforce the laws of other nations. They do so only through the operation of comity, a recognition of those foreign laws for the sake of the functioning of international society, limited by the paramount importance given the interests of the final nation and of its people. "The true foundation," Story wrote, "on which the administration of international law must rest, is, that the rules, which are to govern, are those, which arise from mutual interest and utility, from a sense of the inconvenience, which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return." 45 In short, the entire field of study seems to be based upon practicality, something quite different

43. M. Horwitz, supra note 2, at 245-52.
from the existence of some body of law above and beyond institutions and states. Even the idea of justice is invoked in a practical way which seems to equate it with the avoidance of inconvenience.

Yet Story does not abandon the idea of general principles of substantive law which judges can and must articulate. In the first place, many of the conflicts he describes are of what he calls "positive" rules—rules created by government. The difference between these rules and those promulgated by 43 courts is clear in his discussion of the opinion of the Supreme Court of Louisiana in *Saul v. His Creditors*. The Louisiana court grappled with the distinction between "personal" and "real" statutes; the former often held by learned commentators on the subject of conflict of laws to follow the citizen or subject wherever he goes, the latter to be restricted to operation within the jurisdiction promulgating them. It is generally said, according to the Louisiana court and Story, that laws setting the age of majority are personal. Yet the court considered the following two cases. In the first, a twenty-four year old domiciliary of country A where the age of majority is twenty-one years makes a contract in Louisiana, where the age of majority is twenty-five years. Both jurisdictions would hold that contract to be valid. But suppose, as was the fact, that the age of majority in Louisiana was twenty-one years and the law of country A set the age at twenty-five. If the twenty-four-year-old domiciliary of country A made a contract in Louisiana

would it be permitted, that he should in our courts, and to the demand of one of our citizens plead, as a protection against his engagements, the laws of a foreign country, of which the people of Louisiana had no knowledge? And would we tell them, that ignorance of foreign laws, in relation to a contract, made here, was to prevent him from enforcing it, though the agreement was binding by those of their own state? Most assuredly we would not.

Story finds the resolution of the two hypotheticals inconsistent with the proper functioning of a court.

The case first put seems founded upon a principle entirely repugnant to that, upon which the second rests. In the former, the law of the domicil of origin is allowed to prevail; in the latter, that of the domicil

46. *Id.* at 73 n.1.
47. 5 Mart. (n.s.) 569 (La. 1827).
of the contract. Such a course of decision certainly may be adopted by a government, if it shall so choose; but then it would seem to stand upon mere arbitrary legislation and positive law, and not upon principle.

The difficulty is in seeing how a court, without such positive legislation, could arrive at both conclusions. General reasoning would lead us to the opinion, that both cases ought to be decided the same way; that is, either by the law of the domicil of origin or by that of the domicil of the contract. 50

Bound by reason, courts cannot have the same freedom to make rules as governments do.

A slightly different situation is discussed in the chapter dealing with "foreign contracts." There Story again finds a mistaken court, but also finds that authorities agree upon a general rule which properly reflects principle and which therefore should be followed. 51 In Grimshaw v. Bender, the Massachusetts supreme judicial court held that damages for dishonor of a bill of exchange drawn in England on a Boston firm but payable in England and accepted in England by a member of the firm were governed by Massachusetts law. 52 Story criticized this conclusion as violating "the general principle of law, . . . that a contract or acceptance is to be deemed made, where the contract or acceptance is perfected . . ." which in this case is England. 53 That principle is asserted not only by learned commentators but also by "modern authorities"—cases from the United States Supreme Court, South Carolina and England. 54 In addition, a New York case, Foden v. Sharp, found in a very similar situation that the English rule of damages should be followed because the bill had been drawn and accepted in England. 55 Story noted "[t]his decision, being in entire harmony with the general principles on this subject, will probably obtain general credit in the commercial world." 56

The commercial world should give general credit to this and other principles because they are a part of a body of law appropriate to that world. At the heart of the belief in an appropriate body of law is Story's explanation of why laws differ from nation to nation.

50. J. Story, supra note 45, at 74.
51. J. Story, supra note 45, at 265.
52. 6 Mass. 157, 161-62 (1809).
53. J. Story, supra note 45, at 266.
54. J. Story, supra note 45, at 266.
55. J. Story, supra note 45, at 266.
56. J. Story, supra note 45, at 266.
Some variations are caused by the physical world. "Climate, and geographical position, and the physical adaptations springing from them, must at all times have had a powerful influence in the organization of each society, and have given a peculiar complexion and character to many of its arrangements."\(^{57}\) One rule resulting from these factors is that which governs the age of majority. Story notes that most writers prefer that the law of a person's domicil of birth control questions of capacity because "each state is presumed to be the best capable of judging from the physical circumstances of climate or otherwise, when the faculties of its citizens are morally or civilly perfect for the purposes of society."\(^{58}\) Other differences are attributable to "peculiarities of religious opinion or conscientious doubt."\(^{59}\) Rules governing marriage are often of this sort, as are many rules of personal disqualification, at least those "not arising from the law of nature." "Hence, the disqualifications resulting from heresy, excommunication, Popish recusancy, infamy, and other penal disabilities, are not enforced in any other country, except that, in which they originate."\(^{60}\) None of these rules can be reconciled with

---

57. J. Story, supra note 45, at 1. The importance ascribed to the influence of climate can be seen in cases dealing with the common-law presumption that no male under the age of fourteen years is capable of committing the crime of rape. The Ohio Supreme Court explained the origin of the presumption in terms of climate:

Now, in the moist and cold climate of England and most of the countries of northern Europe, it is so seldom that an infant under the age of fourteen is capable of emission [of semen], that it is assumed as a fact that, prior to that age he is never capable; and hence, under that age, no one can be convicted of rape. . . . It is an admitted law of physiology, that climate, habit, and condition of life, have much influence in hastening or retarding the age of puberty.

In our climate, the age of puberty is frequently earlier than in that of England or the more northern States of this Union. Therefore, the Court holds that in Ohio the rule is an infant under fourteen is presumed incapable of committing rape but the presumption is rebuttable by proof that he has arrived at puberty.

Williams v. State, 14 Ohio 222, 226-227 (1846).

A similar case in New York, decided in 1855, comes to the same conclusion on identical reasoning, stating the fact that "in this state, having a population composed of almost every variety of races and a climate as various as its population," males frequently come to puberty before the age of fourteen requires a modification of the common-law presumption. The "principle of presumptive evidence . . . that when experience shows a uniform connection or inconsistency between any two facts, upon proof of one of those facts, the existence or the absence of the other will be conclusively presumed, according to the uniform result of such experience" is not changed, only the rule which requires the presumption of impossibility is changed. People v. Randolph, 2 Parker's Crim. Rptr. 174, 178-179 (1855).

58. J. Story, supra note 45, at 70.

59. J. Story, supra note 45, at 107-08.

60. J. Story, supra note 45, at 97.
one another. None is entitled to unquestioning enforcement by a foreign state in preference to its own laws and policies.

Differences also arise from the economic character of nations. Story observed:

Nations inhabiting the borders of the ocean, and accustomed to maritime intercourse with other nations, would naturally require institutions and laws, adapted to their pursuits and enterprises, which would be wholly unfit for those, who should be placed in the interior of a continent, and should maintain very different relations with their neighbors, both in peace and war.61

These nations are the commercial world, and they have, or should have, a body of law which is appropriate to the carrying on of commerce. The importance of appropriate rules is clearly shown in Story's discussion of the principle that items of personal property have no fixed situs but follow the person, that is, they are governed by the law of the domicil of their owner and not by the law of the place where they happen to be. After reviewing the reasoning of several European jurists in support of this rule, Story concludes that the rule must be grounded "in an enlarged policy growing out of their [items of personal property's] transitory nature and the general convenience of nations."62 The competing rule, making items of personal property subject to the law of their actual situs, would make it most difficult for the owner to deal with personal property which might be in transit or otherwise involved in trade which carries it from place to place. Story reasoned that the resulting evils would affect "the subjects and the interest of all civilized nations."

But in maritime nations, depending upon commerce for their revenues, their power, and their glory, the mischief would be incalculable.

A sense of general utility, therefore, must have first suggested the doctrine; and as soon as it was promulgated, it could not fail to recommend itself to all nations by its simplicity, its convenience, and its enlarged policy.63

Clearly, then, the commercial nature of certain nations makes certain rules appropriate for them. Law must then reflect the needs of these commercial societies since "it is obvious, that the law must fashion itself to the wants, and in some sort to the spirit of the

61. J. Story, supra note 45, at 2.
62. J. Story, supra note 45, at 311.
63. J. Story, supra note 45, at 312.
age." Other sorts of societies have other sorts of spirits, however, and their law would presumably be different from that of commercial societies. Story has been described as a creature of the American Enlightenment, and in his description of the sources of differences among nations, between their spirits, he reflects the ideas of one of the most important figures of enlightenment, Montesquieu. In *The Spirit of Laws*, Montesquieu essayed an explanation of nationhood.

At the beginning of his work, he explained the relationship between law and society in terms which Story would echo in his work on conflicts:

Law in general is human reason, inasmuch as it governs all the inhabitants of the earth; the political and civil laws of each nation ought to be only the particular cases in which this human reason is applied.

They should be adapted in such a manner to the people for whom they are made, as to render it very unlikely for those of one nation to be proper for another.

They should be relative to the nature and principle of the actual, or intended government; whether they form this principle, as in the case of political laws, or whether they support it, as may be said of civil institutions.

They should be relative to the climate, whether hot or cold, of each country, to the quality of the soil, to its situation and bigness, to the manner of living of the natives, whether husbandmen, hunters, or shepherds; they should have a relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, number, commerce, manners, and customs. In fine they have relations amongst themselves, as also with their origin, with the object of the legislator, and with the order of things on which they are established, in all which different lights they ought to be considered.

This is what I have undertaken to perform in the following work. These relations I shall examine, which form all together that we call the Spirit of laws.

Montesquieu had great influence in the Revolutionary generation, and it is tempting to see Story's echo of his thought as yet another

sign of the jurist’s deep personal attachment to the legacy of the American Revolution. In addition, Montesquieu “was vague as to the process of change and did not offer any scheme of legal development.” His stopping short of a theory of legal evolution may play some role in the lack of a sense of historical development in antebellum legal thought noted by Perry Miller and generalized to the entire early nineteenth century intellectual scene by Dorothy Ross. Ross draws an important distinction between a “static” sort of historical consciousness which emphasizes “long-standing and universal” processes as opposed to a view which sees change as “the product of merely local, temporary condition.” She traces the strength of the former to its link to the ideology of republicanism and to Protestant religion both of which helped to invest America with millennial significance. Thus it is possible to see antebellum expressions of belief in the progress of nations or peoples through various stages of development culminating in the passage from a feudal to a modern, liberal, and commercial society as compatible with a belief in universal principles and in a divine hand behind the historical process. Without a clear idea of the link between legal change and specific concrete changes in society, the sovereignty of relatively unchanging universals is easier to sustain.

This sustainable belief also helps to elucidate the link between law and science. Baconian science was devoted to the discovery of the principles behind the functioning of the universe. The principles were real and true because, in the end, they were expressions of the Creator. The result of Baconian science, properly done, was a better un-

68. Story’s concern with the perpetuation of the proper understanding of the American Revolution and of the republic it created is the pervading theme of R. Newmyer, supra note 37.
69. P. Stein, supra note 66, at 17.
71. Ross, supra note 70, at 917.
derstanding of God: "Since the natural world was a Divine construct, its investigation could only advance the cause of belief."

It is not unreasonable to see a similar attitude in antebellum treatment of what today is considered social science. The social world, no less than the natural, is created by God. Differing societies may be organized along different lines, but all are subject to some set of laws, an understanding of which reveals the Creator. In short, for Protestant, commercial, enterprising America there was a truth governing the questions which came before the courts that was incumbent on the judges to articulate.

C. Fallible Lawmakers

The truths of commercial law were to be understood through scientific investigation. Decided cases which both applied principles and summed up results of prior investigations into the nature of the principles were the subject of investigation. Inductive science and deductive application were bound together, but they always served the greater truth. Judges were investigators who sought to serve truth by determining "just principles" and then applying them to a concrete case. It was not an easy task. In fact, it seems to have been commonplace to admit that judges could fall into error and to warn against reliance on a case rather than on the principles upon which the decision should rest. In 1832, Daniel Mayes told his students at Transylvania University just as Story would some ten years later, that decisions are only evidence of the law. An author in the American Jurist stated much the same thing in arguing for a limited sort of codification of the common law, noting that it is no wonder that decisions conflict with each other since precedents can be overlooked and judges sometimes simply lack capacity. But the most interesting statement of this idea comes in a lecture by William Curtis Noyes to the Law Association of New York in 1840 on the subject of "The Legal Rules Governing the Enjoyment and Use of Light."

The question of acquiring rights to light through prescription was

74. T. Bozeman, supra note 13, at 75-86.
75. T. Bozeman, supra note 13, at 64-70 (cogently discussing the relationship between induction and deduction). Bozeman shows that the formula Richard Whately put forth in his 1826 Elements of Logic, that Bacon intended "merely to direct [deduction] to its proper use, that is, as an interpreter of principles established inductively" became an important part of American scientific thought. T. Bozeman, supra note 13, at 64-70.
76. D. Mayes, supra note 24, at 6-7.
77. Dixon, supra note 24, at 283.
an important one in the growing towns of early nineteenth century America. Noyes pleaded for a principled resolution of the issue and added a comment which says a good deal about attitudes toward cases as sources of law:

I may be permitted to remark here, for the encouragement of bold and independent thought and investigation on the part of the members of our profession, that this history furnishes a salutary example of the danger of following cases implicitly, without an inquiry into the principles upon which they are based.

The greatest and wisest judges frequently fall into error, and it is our province to point them out and thus to correct and amend them. Let your minds be well stored with legal principles, and there is little danger of being lost or long led astray among the mass of cases, with which we are and I fear will continue to be overburdened.

Scrutinize every case with rigor, take no man's mere opinion for law, apply to it the infallible test of principles, and if it will not stand this trial, it may safely be disregarded and eventually will find its appropriate place among "cases overruled." 79

This willingness to draw a distinction between the decision in a particular case and the common law may be one result of the efforts by lawyers and judges to harmonize the undoubted existence of the common law as part of American jurisprudence with the fact of the Revolution and to find an appropriate role for English decisions rendered after that event. Sitting on circuit in 1808, John Marshall drew a distinction between principle, which in context seems to be "the law," and authority, which is clearly made up of cases. English cases decided after the Revolution "lose that title to authority, which was conferred by the appellate character of the tribunal which made them, and can only be considered as the opinions of men distinguished for their talents and learning, expounding a rule, by which this country, as well as theirs, professes to be governed." 80 His contemporaries who sat as state court judges in Virginia held much the same views. Judge St. George Tucker cited a post-Revolutionary English case in an opinion in the supreme court of appeals not as authority but "as an apposite case decided by able Judges upon the same law which as to this point prevails in this country." 81

78. M. Horwitz, supra note 2, at 42-47.
concurring opinion in the same case, Judge Spencer Roane also looked to modern English cases, again, not as authority, but "merely as affording evidence of the opinions of eminent Judges as to the doctrines in question, who have at least as great opportunities to form correct opinions as we have. . . ."\textsuperscript{82} Chancellor Creed Taylor, however, expressed this attitude most succinctly: "[I]t was the common law we adopted, and not English decisions."\textsuperscript{83}

Senator John C. Spencer, rendering an opinion in 1825 as a judge of the New York Court for the Correction of Errors, then the highest court of the state, described the authority of English cases in much the same way. Referring to the New York Constitution's declaration that the common law continued to be the law of the independent state subject to legislative alteration, he stated that in the absence of such alteration he felt himself "as much bound to adhere to that law, as if it were engrafted in the Constitution in so many words."\textsuperscript{84} He cautioned, however, "that when the judges of England have applied the principle of the common law erroneously" New York judges were free to "correct the application, and restore those principles to their original purity."\textsuperscript{85}

In the decade before the Civil War, the Georgia supreme court reiterated this view. In an opinion dealing with a complicated question of will construction, Judge Ebenezer Starnes turned to the common law for direction. He first recognized that Georgia had adopted the common law as of May 14, 1776.\textsuperscript{86} But that conclusion did not end the inquiry. Judge Starnes observed:

\begin{quote}
We have also recognized the rule, with a proper qualification, that in the effort to determine what was the Common Law at that period, we should consult the decisions of Courts in England, previously made; and that such decisions are to be regarded as the proper exponents of the Common Law, as it was adopted by our Legislature.

The qualification on which we insist, is this: These decisions are to be received as evidence of the Law, and not the Law itself; and hence, to be conclusive of any question, they should be clear and well settled.\textsuperscript{87}
\end{quote}

\textsuperscript{82} Id. at 162-63.
\textsuperscript{83} Marks v. Morris, 14 Va. (4 Hen. & M.) 463, 463 (1809).
\textsuperscript{84} Rensselaer Glass Factory v. Reid, 5 Cow. 587, 632 (N.Y. 1825).
\textsuperscript{85} Id.
\textsuperscript{86} Robert v. West, 15 Ga. 122, 133-34 (1854).
\textsuperscript{87} Id.
On the level of theory, then, the distinction between cases and the law played a useful role in allowing the common law to function while preserving the reality of American independence. Of course, Story and the state court judges involved in these cases surely were aware of the practical effects of their decisions. The cases dealing with the questions presented in Swift, for instance, are replete with language showing judicial concern with the law's effect on the business of banking, on the circulation of negotiable paper and its important role as a substitute for currency, and on commercial conduct in situations involving bankruptcy. Mercantile usage also has a role to play and judges may not totally ignore it nor do they do so. All these factors, however, are considered within a system of principles which make up the commercial law, principles which are found in cases the proper understanding of which is the peculiar responsibility of judges.

How the judges carried out their responsibilities is the subject of the rest of this paper. The search for principles which would properly describe the role of antecedent debt in the law of negotiable instruments occupied several state courts. They provided both the precedents Story used in Swift as well as a testing ground for his resolution of the problem. How they carried out these roles illustrates the judges' understanding of the legal world of principle.

III. THE SEARCH FOR PRINCIPLES TO Govern ANTECEDENT DEBT

A. The Problem

The question in Swift turned on a much disputed point of the law of negotiable instruments. Its resolution was most important because in a world which lacked sufficient specie and dependable currency, negotiable paper played an important part in providing the credit necessary for the carrying on of commerce. The critical feature of negotiable instruments in this world was their immunity from challenge in the hands of a bona fide holder. The bona fide holder would obtain payment of the instrument without any concern for the circumstances of its creation. Simply stated, commercial paper played the role of currency and that role was played most effectively if the holder of a promissory note or bill of exchange (the most common sorts of negotiable paper in Story's day) could ignore the provenance of the paper.\textsuperscript{88}

\textsuperscript{88} Forums of Order \textit{supra} note 8, at 1-52.
Clearly, then, the great goal was to be a bona fide holder. To reach that happy status, one had to give valuable consideration in exchange for the paper. In the run-of-the-mill transaction—an exchange of the paper for goods or cash, or even for an extension of credit—the requirement was easily met. What was not clear was whether an antecedent debt was good consideration. If in exchange for indorsing negotiable paper the indorsee considered as paid a debt the indorser owed him because of previous dealings between them, the antecedent debt was the consideration given for the paper. Why should such a transaction be singled out for unfavorable treatment? The most prominent antebellum American court to condemn antecedent debt to lowly status explained its holding in terms of the rationale of the bona fide holder rule. According to New York's highest court, the rule itself is anomalous. The court noted that dishonesty is evil and usually no justification existed for saddling a defrauded obligor on a negotiable instrument with the obligation to pay a remote indorsee. If, however, that remote indorsee gave up something valuable in exchange for the paper, the equities as between the remote holder and the person who is being asked to pay him are balanced because, in a sense, they have both been cheated. Since someone will be hurt, the court reasoned that it might as well encourage the circulation of negotiable instruments, which itself is useful to society, by hurting the obligor. In the antecedent debt situation, the remote holder who is trying to collect on the paper does not have so great a claim on the court's indulgence. Denying him the right to collect on the instrument will leave him no worse off than he already is—he will still be the creditor of the person who passed the paper to him and can still collect his debt from that person's other assets (if indeed there are any). Therefore, the court found no justification for hurting the person obligated to pay and would not consider the holder to be bona fide.

It does not take much imagination to see that the appeal of this argument would be strengthened by the type of fact situation in

90. Id. at 645.
91. Id.
92. See id. at 644-46 (discussing balancing of equities in facts at hand).
93. See id. at 647 (circulation of bills and notes cannot be impeded).
94. Id. at 648.
95. Id. at 647.
96. Id. at 647-48.
which the antecedent debt question was likely to arise. On the verge of bankruptcy, a merchant finds himself with negotiable paper which itself is valuable because the obligors are themselves financially healthy. The soon-to-be bankrupt negotiates this paper to certain creditors whom he favors for one reason or another—they might be relatives or friends or have agreed to a kickback. The consideration for the paper so transferred is the reduction of outstanding debts. The favored creditors then try to collect and discover either that the original transactions were tainted or that the notes were not even the property of the bankrupt, or, perhaps more likely, the status of the notes is unclear and these creditors' complicity in the bankrupt's scheme is strongly suspected. One way to frustrate the preference given these creditors is to proclaim that an antecedent (sometimes referred to as preexisting) debt is not good consideration.

The practice of making accommodation loans added a further complication to the questions of negotiability raised by the problems of pre-existing debt. In antebellum America, the use of accommodation paper was a widespread technique for making loans. A negotiable instrument could be drawn, indorsed, or accepted by one party solely to enhance the credit of another. A promise by $X$ to pay to the order of $Y$ could be used as collateral by $Y$ to raise cash or further credit. Rather than representing actual payment for goods or services, the instrument had been created solely for the purpose of increasing $Y$'s apparent worth. Such transactions were not considered to be for good consideration. Yet, should that circumstance operate to the detriment of the rights of someone to whom this accommodation paper was indorsed? The question was made more difficult by the apparently prevalent practice of "cross accommodation" in which two parties simply exchanged mirror image notes, each guaranteeing the other's promise to pay a sum, thus creating capital out of nothing. Should disapproval of the practice extend to denying the negotiability of such instruments, even where they had been indorsed to an innocent third party who had provided goods or services in exchange? Since outstanding loans were often extended on the collateral of fresh paper, much of which was accommodation paper, the question of the validity of an antecedent debt as valuable consideration was intimately tied up with the practice of accommodation.⁹⁷

---

Clearly, the resolution of the legal questions surrounding the status of antecedent debt as consideration was important for every person engaged in business. The issues involved in reaching that resolution, however, resonate beyond the world of legal treatises and discussion of abstruse points of commercial law. At stake were larger questions going to the economic structure of society, the allocation of the costs of economic development, the morality of business practices, in short, a whole host of problems bearing on the definition of a just and good society. Questions involving the doctrines of negotiability and of bona fide holder status clearly pose these larger problems since the application of the doctrine will often require a victim of fraud to make good on a promise extracted from him by means which exceed the bounds of acceptable practice.98

There were other objections to negotiability which seem to be related to more specific aspects of antebellum thought. Some opponents of the doctrine found negotiability unnecessary for a nation which did not draw its wealth from commerce as England did.99 Use of this argument resonates throughout antebellum thought, touching off many sympathetic vibrations. Conflict between proponents of a commercial and those of an agrarian America is a prominent theme in discussion of the debates over the ratification of the Constitution of 1789 and the disagreements of the first administration under that document, debates in which Alexander Hamilton and Thomas Jefferson came to assume almost totemic stature.100 Indeed, legislative and judicial hostility to negotiability during the first half of the nineteenth century was most tenacious in the agricultural south and west.101 The appellate opinions rendered in these disputes involving antecedent debt and negotiability reflect of all these larger concerns.

98. See M. Horwitz, supra note 2, at 212-26 (discussing rise of negotiability). Horwitz finds "a sound basis, . . . for the widespread suspicion among noncommercial groups that negotiable instruments were becoming the vehicle through which oppressive agreements could be enforced in American courts at law." M. Horwitz, supra note 2, at 220.

99. M. Horwitz, supra note 2, at 218. A variation on this argument acknowledged the relevance of English commercial law but found the particular opposing position as actually going beyond English precedent and thus totally inappropriate for a nation less commercial than England. Coddington v. Bay, 20 Johns. 637, 656 (1822); Carlisle v. Wishart, 11 Ohio 172, 188 (1842).

100. A good example of this mutual hostility is the debate over the Judiciary Act of 1801 with its frank Federalist arguments that expanded federal court jurisdiction was needed to protect commercial interests. See Holt, The First Federal Question Case, 3 L. & Hist. Rev. 169, 183 (1983) (discussing issues over debate on Judiciary Act of 1801).

101. M. Horwitz, supra note 2, at 225.
A full consideration of the role of these larger concerns is far beyond the scope of this paper. What is discussed here is the more narrow world of legal discourse in which these questions were addressed by courts. Whatever broader agendas lawyers and judges may have had, they almost always limited their discussions to the meaning of precedents which defined the general commercial law.

B. Swift v. Tyson

The facts in Swift involved both rank speculation in wilderness lands and strong hints that underhanded dealings had taken place on the eve of bankruptcy. 102 Nathaniel Norton and Jairus Keith had drawn a bill of exchange on George Tyson for $1540.30. 103 Tyson had accepted the bill, meaning that he had agreed to pay it at maturity. 104 Norton had indorsed the bill over to Swift in payment of a debt due him from Norton and Keith. 105 It appeared that Tyson had given the bill to Norton and Keith in part payment of the purchase price of some land in Maine which turned out not only to be worthless but also not theirs to sell. 106 In addition, the circumstances surrounding the giving of the promissory note of Norton and Keith to Swift and the fact that after indorsing the bill to Swift the two erstwhile real estate salesmen disappeared, all hinted that Swift, Keith, and Norton had attempted to manufacture Swift's status as bona fide holder in order to allow him to collect the bill in spite of the hanky panky surrounding the land deal. 107 Perhaps in return Swift gave Norton and Keith enough cash with which to make their escape. 108

In any event, the case turned on whether an antecedent debt was good consideration which would support bona fide holder status. The bill of exchange had been drawn and accepted in New York. Tyson's counsel argued that the law of New York should govern the question and that the New York courts did not find a preexisting debt to be good consideration. 109 Accepting arguendo that reading of New York law, Story addressed a question of more importance.

103. Id. at 14.
104. Id.
105. Id. at 14-15.
106. Id. at 15.
107. Id.
108. Forums of Order, supra note 8, at 59-61.
to his court, namely whether the New York decisions applied? Section 34 of the Judiciary Act of 1789 required the courts of the United States to use as "rules of decision in trials at common law" the "laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide. . . ."10 Story held that the word "laws" in this statute did not include the decisions of state courts, stating, "[t]hey are, at most, only evidence of what the laws are; and are not of themselves law."11 Not bound, therefore, by the New York cases, the Supreme Court was free "to ascertain upon general reasoning and legal analogies, . . . what is the just rule furnished by the principles of commercial law to govern the case."12

This commercial law, according to Story, is "not the law of a single country only, but of the commercial world," taking as his authority a decision of Lord Mansfield which in turn paraphrases Cicero.13 He then stated the commercial law on this point, noting that the "true result" is that an antecedent debt is good consideration.14 Story observed that if the rule was otherwise, it would greatly hamper the circulation of paper, a result to be deprecated. Story noted:

It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of and as security for pre-existing debts.15

More specifically, the contrary rule would cripple the entire banking system by calling into question "that large class of cases, where new notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them, which have arrived at maturity."16 Only after these factors were established, did Story cite the Supreme Court's own precedents and numerous English cases in support of his holding, finally concluding with the statement that in American courts, "the same doctrine seems generally but not universally to prevail."17

10. Id. at 18.
11. Id.
12. Id. at 19.
14. Id. at 19-20.
15. Id. at 20.
16. Id.
17. Id. at 22.
It should be noted that Story's "true result" includes both the taking of negotiable paper in payment of and as security for a preexisting debt within the category of "good consideration." Story's statement about the legal effect of the taking of a negotiable instrument as security for a preexisting debt was pure dictum. In his separate opinion Justice John Catron said so in no uncertain terms, "I never heard this question spoken of as belonging to the case, until the principal opinion was presented last evening; and therefore I am not prepared to give any opinion, even was it called for by the record."\(^{118}\)

Were Story's assertions about the nature of general commercial law merely the production of his vanity, or an idiosyncratic view of the nature of law, the reception of *Swift* by state courts might be assumed to have been unremittingly hostile. At the very least, those who disagreed with Story might have couched their disagreement in part in jurisprudential terms. Such was not the case. A survey of the state cases dealing with the antecedent debt issue both just before and after the decision by the Supreme Court in *Swift v. Tyson* reveals state courts dealing with the questions on Story's chosen ground of general commercial law, whether the meeting be friendly or hostile. Almost all the discussion takes place within the intellectual world Story so happily and prominently inhabited.

### C. Antecedent Debt in the States

#### 1. New York

This phenomenon can be seen in the New York cases which preceded *Swift*. Because these contradictory New York precedents play such an important role in all considerations of the question, it is necessary to discuss them in some detail. The principal New York case was decided first by James Kent as Chancellor in January 1821 under the style *Bay v. Coddington*.\(^{119}\) The case was then appealed to the court of errors where Kent's decree in the Court of Chancery was affirmed in 1822 by a vote of 22 to 7.\(^{120}\) The facts of the case were straightforward. Thomas Bay entrusted a boat which he owned to Randolph and Savage, who were partners, in order that they might

---

118. *Id.* at 23.
sell it and remit the proceeds to him after deducting their charges.\textsuperscript{121} The partners were indeed able to sell the vessel and, pursuant to Bay's instructions, took in payment the promissory notes of the purchasers.\textsuperscript{122} Randolph and Savage, however, had fallen on hard times. After receiving the notes in payment for Bay's boat they committed an act of insolvency.\textsuperscript{123}

The defendants, Jonathan J. and Joseph C. Coddington, were accommodation indorsers on much of the debt of Randolph and Savage.\textsuperscript{124} Should Randolph and Savage not be able to meet those obligations the Coddingtons would have to make good on them. Eventually they were burdened with more than $17,000 of the partnership's debt.\textsuperscript{125} In order to give their accommodation indorsers some succor, Randolph and Savage delivered to them the notes they had received on the sale of Bay's boat.\textsuperscript{126} The notes, which, of course, belonged to Bay, had been indorsed in blank and were perfectly negotiable on their face.\textsuperscript{127} Bay brought a bill in chancery praying that the notes be decreed to be his and that the defendants be required to pay him their value.

Bay's case was a strong one. First, Randolph and Savage were his agents or trustees and, in Kent's words, "it was a gross and fraudulent abuse of trust" to deliver the notes to anyone but Bay.\textsuperscript{128} Second, the Coddingtons were not actually creditors of Randolph and Savage—their relationship would cost them dearly, but their legal responsibilities were wholly gratuitous. Of course, as Kent duly noted, one who took negotiable paper from a defalcating agent or from anyone who was committing fraud by circulating the paper could prevail against the true owner so long as the paper was taken "in the usual course of trade, and for a fair and valuable consideration, without notice of the fraud."\textsuperscript{129}

In their pleadings, the Coddingtons maintained that they did not know that the notes belonged to Bay. Since the case was heard on

\textsuperscript{121.} Id. at 638.
\textsuperscript{122.} Id.
\textsuperscript{123.} Id.
\textsuperscript{124.} Id.
\textsuperscript{125.} Id. at 638, 644.
\textsuperscript{126.} Id. at 638.
\textsuperscript{127.} The accounts of the facts of the case in the two reports differ on the payees and indorsers of these notes. In any event, the notes were clearly negotiable when they were delivered to the Coddingtons.
\textsuperscript{128.} Bay v. Coddington, 5 Johns. Ch. 54, 56 (N.Y. Ch. 1821).
\textsuperscript{129.} Id.
the pleadings only, presumably that assertion was taken as fact. They did not, however, meet the other two criteria. First, they had taken the notes after they knew that Randolph and Savage were insolvent. As Kent vividly put it: "[The notes] were seized upon by the Coddingtons, as \textit{tabula in naufragio}, to secure themselves against contingent engagements . . . ." Thus, they had not taken the notes "in the usual course of trade." Second, they did not take the notes "in payment, in whole or in part, of any then existing debt, or for cash or property advanced, or debt created, or responsibility incurred on the credit of the notes . . . ." By Kent's sights they had not, therefore, taken the notes for a valuable consideration. Without the giving of valuable consideration by the taker, the entire reason for the bona fide holder rule fails. The court noted:

It is the credit given to the paper, and the consideration bona fide paid on receiving it, that entitles the holder, on grounds of commercial policy to such extraordinary protection, even in cases of the most palpable fraud. It is an exception to the general rule of law, and ought not to be carried beyond the necessity that created it.

Kent therefore declared that the Coddingtons were not entitled to the notes and referred to a master the task of computing the exact amount due Bay.

The Coddingtons appealed Kent's decision to the Court of Errors. Their counsel first quoted several English cases upholding the concept of negotiability, emphasizing the most sweeping language on the rights of the holder. He then correctly described the two branches of Kent's holding below: first, that the notes had not been received in the course of trade; second, that the Coddingtons had not given consideration for the notes. In light of the English precedents, the

130. \textit{Id.} at 55.
131. \textit{Id.} at 57.
132. \textit{Id.}
133. \textit{Id.} at 59.
134. \textit{Id.}
135. The Court of Errors was the highest court of the state until the Constitution of 1846 abolished it and created instead the Court of Appeals, still the highest court of New York. The Court of Errors was unusual among the highest courts of the states in its membership. It was composed of the president of the senate of the state, the senators, the chancellor, and the judges of the supreme court. \textit{S} \textit{A} \textit{M} \textit{E} \textit{R} \textit{I} \textit{A} \textit{N} \textit{E} \textit{R} \textit{C} \textit{H} \textit{A} \textit{R} \textit{T} \textit{E} \textit{R} \textit{S}, \textit{C} \textit{O} \textit{N} \textit{T} \textit{I} \textit{T} \textit{I} \textit{O} \textit{N} \textit{S} \textit{A} \textit{N} \textit{D} \textit{O} \textit{R} \textit{G} \textit{I} \textit{C} \textit{I} \textit{A} \textit{L} \textit{L} \textit{A} \textit{W} \textit{S} 2646-47 (F. Thorpe, ed. 1909). \textit{S} \textit{e} \textit{e} \textit{g} \textit{e} \textit{n} \textit{a} \textit{l} \textit{g} \textit{e} \textit{n} \textit{a} \textit{l} \textit{y} \textit{F}. \textit{B} \textit{E} \textit{R} \textit{G} \textit{A} \textit{N}, \textit{H} \textit{I} \textit{S} \textit{T} \textit{Y} \textit{O} \textit{F} \textit{T} \textit{H} \textit{E} \textit{C} \textit{O} \textit{U} \textit{R} \textit{T} \textit{O} \textit{F} \textit{A} \textit{P} \textit{P} \textit{E} \textit{L} \textit{S}, 9, 12-14, 19-35 (1985).
137. \textit{Id.} at 641.
first was irrelevant to the question of the bona fide holder status of the appellants. The second was badly phrased by the Chancellor. Whether or not the Coodingtons had given "a new and distinct" consideration for the notes was not the proper question. Only a "valuable" consideration need be given, Lord Mansfield being cited in support. And clearly, "an indemnity against responsibilities" was "valuable." Bay's counsel expressed surprise at the contention that the Coodingtons were bona fide holders because the facts showed that they had cooperated with Randolph and Savage in committing fraud. He devoted all of his brief argument to emphasizing the fiduciary aspects of the case.

This appeal to the individual equities of the situation moved appellants' co-counsel to lay bare the policy problems involved, asserting, "The question, who had the greatest equity, does not apply in this case." Counsel further argued that if that inquiry were to decide the matter, there was more than enough hardship on both sides to go around. The important thing, however, was not any personal hardship. Rather, counsel argued that the case must be decided on general rules of law, and the general rule applicable here was as important as it was clear:

The great object and policy of the law is to make the circulation of negotiable paper as nearly as possible the same as money. It is not a question about goods, but money; and it is on the analogy to cash that the principle as to negotiable paper stands. The true and only inquiry is, whether the holder came fairly and honestly by the paper. The principle is not to be limited and narrowed by the fact of his advancing money for the notes, or by his taking them in the course of trade, as it is called.

The arguments of the Coodingtons' counsel did not move a majority of the court. Kent's decree was affirmed by a vote of 22 to 7. Because of the nature of the Court of Errors, however, it is difficult to say exactly what rule was promulgated by that vote of 22 to 7. Three separate opinions were given, two by justices of the Supreme Court, one by a senator. All were in favor of affirmance, although each took a slightly different approach to the matter.

138. Id. at 639-41.
139. Id. at 642-43.
140. Id. at 643.
141. Id.
142. Id. at 642-43.
143. Id. at 658.
144. None of the seven dissenters, all senators, gave an opinion.
Justice John Woodworth began in a way which may have given hope to the Coddingtons. Like their counsel, he recognized that both parties were equally innocent and that the matter could not be decided on the simple basis of making the guilty party bear the loss. "The question is one of strict law," Woodworth wrote, echoing appellants' counsel, "in the decision of which the community at large, and more especially the commercial part, have a deep interest." Any "fluctuation" in the rules governing commercial paper would disrupt mercantile affairs. Woodworth believed, therefore, that it was his task as judge to consider all the cases cited in the arguments before the court in an attempt to accurately state the applicable rule.

The conclusions that Woodworth drew from his examination gave the appellants no comfort. In every instance in which an innocent holder of commercial paper prevailed against the claim of the true owner, according to Woodworth, the holder had given money or property in exchange for the paper, or had taken the paper in satisfaction of an existing debt, or had incurred some new responsibility by taking the paper. These were the sorts of transactions which constitute the giving of value required by the general rule. When measured by this standard, the Coddingtons' cause failed. At the time they took the notes that rightly belonged to Bay, their obligations on behalf of Randolph and Savage were still contingent. "No responsibility was incurred in consequence of taking the notes; they were received as an indemnity . . . ." In short, they gave up nothing, and having given nothing, they could gain nothing from the notes. Woodworth was quite sure, however, that the satisfaction of an existing debt is the giving of valuable consideration. In this he agreed with Kent's opinion given in the court below.

Chief Justice Ambrose Spencer too believed that Kent had decided the case correctly, but his reasoning was not as fully in harmony with the Chancellor's as was Justice Woodworth's. He began as did his judicial brother, announcing that the court's task was to "ascertain a principle, from decisions in cases as nearly analogous as can be found." His analysis, however, was not as clearly articulated. First, because Spencer considered the "real principle" governing these mat-

146. Id.
147. Id. at 647.
148. Id. at 645-48.
149. Bay v. Coddington, 5 Johns. Ch. 54, 59 (N.Y. Ch. 1821).
ters to be rooted in the idea that the holder who gives value is as entitled to be protected from loss as is the true owner of the paper, he stressed the deceitful conduct of Randolph and Savage and the injured innocence of Bay. Even admitting that the Coddingtons came into possession of the notes perfectly innocently, what equities could they have against Bay? "[M]erely having had the good fortune to get the notes, without any new consideration, or renouncing any lien, their equity to hold the notes bears no comparison with that of the respondent to demand them." 151 Second, Kent's emphasis on the notes not having been taken in the usual course of trade was well taken, since taking in the usual course of trade is necessary to give the holder rights against the true owner of paper. In his definition of the usual course of trade, however, Spencer deviated slightly, but significantly, from Kent's analysis. "Now, I understand, by the usual course of trade, not that the holder shall receive the bills or notes thus obtained, as securities for antecedent debts, but that he shall take them in his business, and as payment for a debt contracted at the time." 152 The emphasized language clearly casts doubt on the assertion by both Kent and Woodworth that the satisfaction of an existing debt would allow a holder to prevail against a rightful owner.

The seeds of doubt sown by the Chief Justice were nurtured by the author of the third and final opinion, Senator John Vielie. Vielie began by acknowledging his adherence to the same method of legal reasoning advocated by the judges: the true rule governing the question is to be "extracted" from the English cases which are in turn based on a "commercial policy" dedicated to promoting negotiability and protecting the bona fide holder. 153 The rule itself was explained by the senator four times in the course of his brief opinion. First, he stated that taking paper as indemnity for existing debts would not confer bona fide holder status; in all those cases in which the holder has prevailed against the defrauded owner "value has been paid, or a new credit has been given in consideration of the transfer itself." 154 Second, he stated that the reason for the rule—promoting negotiability—applied only "where money or goods are obtained upon credit of the paper itself, and not where the transfer is founded upon a previous credit" because in the latter case the holder loses

151. Id. at 650.
152. Id. at 651 (emphasis supplied).
153. Id. at 653-59.
154. Id. at 655.
nothing if the rights of the defrauded owner are upheld. Third, he stated "that no cases can be found where a fraudulent transfer of negotiable paper was held to divest the true owner of his title, except where the receiver himself was not only innocent, but directly prejudiced by the credit given to the paper itself. Finally, he took "the true test . . . to be, that when the holder is left in as good a condition, after a retransfer [to the true owner], as he would have had no transfer taken place there, the title of the owner shall prevail."

In context, Vielie's fourth formulation seems to be aimed at the claim that taking paper as security for an existing debt will confer bona fide holder status. The paragraph begins with a discussion of indemnities and the reference in the quoted phrase to the holder's being left in as good a condition as before the transfer to him would seem to refer to his retention of the original debt. The first three statements, however, are far more sweeping. Asserting that the holder must give and the transferor receive a new credit, that the transfer must not be founded upon a previous credit, and that the holder must incur a direct prejudice by giving credit to the paper gives strong support to the conclusion that the satisfaction of a preexisting debt will not support bona fide holder status.

It seems reasonable, then, to believe that after the Court of Errors' decision in Coddington a conscientious attempt to ascertain New York's law on the question of antecedent debt could lead to the conclusion that the holder who took commercial paper either in satisfaction of an existing debt or as security for an existing debt could not receive the benefits of bona fide holder status. Eventually, however, the position that the holder who took paper in satisfaction of an existing debt would prevail over a rightful owner carried the day in New York.

155. Id.
156. Id. at 656. Vielie cited Solomon v. Bank of England, 104 Eng. Rep. 319 (K.B. 1791) in support of this statement. This was an action of trover for a banknote on which the bank refused to pay. Id. at 319. All parties admitted that the note had been fraudulently obtained in the first instance. Id. at 320-21. It is unclear from the report whether the plaintiff-holder had given any consideration at all to his transferors before the bank informed him of the note's questionable provenance. After the receipt of such notice, of course, the holder could not obtain bona fide status no matter what sort of consideration he then gave. Id.
158. Id. at 656-57.
159. Id. at 656.
160. See infra notes 205-24 and accompanying text (discussing case of Stalker v. M'Donald).
All four jurists, however, agreed that the proper way to go about resolving the dispute was to ascertain the legal rule that applied to it, a rule that they all found in English cases. The jurists certainly disagreed on how to read those cases, but there does not seem to have been any dispute about their applicability to the question at hand. None of these men seem to have been sympathetic to that aspect of the codification movement which expressed distinct hostility to English law.  

They all accepted the existence of a system of principles the correct explication of which would yield correct answers to real questions. It is clear, however, that there is some disagreement as to what those correct answers were. Coupled with the encouragement of multiple opinions by the unusual nature of the Court of Errors, this disagreement led to the ambiguous New York precedents which confronted Story twenty years after the decision in Coddington. Eight cases decided by the New York supreme court between 1832 and 1840 illustrate the confusion sown by the Coddington opinions. In 1832, the New York court, speaking through Justice Jacob Sutherland, gave a new trial to Gilbert Howell who had been sued by the indorsee of a promissory note on which he was accommodation indorser. The bank rejected the note, however, and one of the drawers then used the note to pay a debt he owed to the plaintiffs. Sutherland admitted that since the drawer of the note had fraudulently put it into circulation, the jury verdict for the plaintiffs meant that they were innocent holders. They would not be able to recover, however, unless they were also bona fide holders for valuable consideration. He then read all three opinions given in the Court of Errors in Coddington as establishing the proposition that the satisfaction of an antecedent debt is not valuable consideration, a conclusion he found to be consonant not only with authority but also with "every consideration of justice and equity."

---

163. Id. at 171.
164. Id.
165. Id. at 172.
166. Id.
167. Id. at 173.
The next year, Chief Justice John Savage spoke for the Court in *Rosa v. Brotherson.*\(^{168}\) In *Rosa,* the plaintiff sued the maker of a promissory note transferred by the payee to the plaintiff in payment of an existing debt.\(^{169}\) At trial, the defendant set up a defense against the payee.\(^{170}\) The trial judge charged the jury that they were obliged to find for the plaintiff unless they believed that he had received it with notice of defendant's defense, and a verdict for the plaintiff was the result.\(^{171}\) In explaining the court's granting the defendant a new trial, Savage laid down a broad reading of the holding in *Coddington.*\(^{172}\) Claiming to find support in the opinions of both Woodworth and Spencer, he held that one who received a promissory note "in payment of a precedent debt or responsibility incurred, takes it subject to all the equities existing between the original parties."\(^{173}\) To put it more starkly, for Chief Justice Savage at least, antecedent debt was good for nothing.

Judge Savage reiterated his interpretation of *Coddington* in *Ontario Bank v. Worthington,* decided in 1834.\(^{174}\) In that action, Horace Putnam had drawn a bill of exchange on the defendant which defendant's agent agreed to accept (that is, promised to pay) so that Putnam could use the credit created by the acceptance to buy beef for resale in upstate New York.\(^{175}\) Instead, Putnam negotiated the note to associates of his who used it to make good on a note of Putnam's on which they were liable.\(^{176}\) The bill had thus been taken either in payment of or to secure an already existing debt.\(^{177}\) Since Putnam was already heavily indebted to Worthington at the time the bill was

---

168. 10 Wend. 85 (N.Y. Sup. Ct. 1833).
169. *Id.* at 85.
170. *Id.*
171. *Id.*
172. *Id.* at 86.
173. *Id.* at 87-88.
175. *Id.* at 594.
176. *Id.*
177. Savage referred to the bill having been taken "in security of an antecedent debt." *Id.* at 600. The facts as recited in the opinion suggest that the bill was taken in satisfaction of Putnam's note. Savage's statement, however, seems to have been representative of New York law which was described as tending to characterize such a transaction as the giving of security unless the contrary was clearly shown. See *infra* text accompanying notes 246-60 (discussing similar Maine cases). Such a rule, of course, was unfavorable to the acquiring of bona fide holder status since even the more liberal position exemplified by Kent and Woodworth found the taking of paper as security ineffectual in cutting off defenses.
drawn, he could defeat any attempt by Putnam to force him to make good on the acceptance of the bill.

The verdict for the plaintiff in the court below was overturned and Worthington received a new trial in part because plaintiff could not be a bona fide holder immune from Worthington's defenses.\(^{178}\)

So much might be expected from the results in the two previous cases, but this time Savage elaborated on the reasons for the rule, making the familiar argument that one who gives nothing for paper loses nothing when his rights are subordinated to those of a rightful owner or a defrauded drawer or indorser.\(^{179}\) Savage reasoned that it is the plaintiff's own failure to inquire into the circumstances surrounding the paper that leaves him unable to resist defenses to its collection.\(^{180}\) Perhaps most importantly, Savage observed, the rule comports well with the usual state of things in the world of commerce.

It is well known that when debtors are failing, creditors seize upon anything which affords a hope of payment; it gives them another chance; but their condition has not been thought to give them greater equities than other bona fide creditors. In such a case the maxim is *melior est conditio possedentis*. It is the fact of parting with property or incurring responsibility upon the defendant's credit, and that alone, which gives the superior equity.\(^{181}\)

Savage stated his view of *Coddington* one more time in *Payne v. Cutler*.\(^{182}\) Cutler had given notes to Joseph Payne in payment for a boat sold to him by Joseph.\(^{183}\) According to Cutler, the boat turned out to be "unsound, badly made, and of less tonnage than he [Joseph Payne] represented it to be, and actually good for nothing."\(^{184}\) Joseph indorsed the notes to Samuel and Abraham Payne in settlement of his account with them.\(^{185}\) Cutler resisted payment of the notes, alleging that Samuel Payne was present at the sale of the boat and knew

---

179. Id. at 600-01.
180. See id. at 600 (discussing when notes or bills taken in usual course of trade).
181. Id. at 600. Savage's reference is to the maxim *melior est conditio possedentis ubi neuter jus habet* (the condition of the possessor is the better where neither of the two has a right).
182. 13 Wend. 605 (N.Y. Sup. Ct. 1835).
183. Id.
184. Id.
185. Id.
of its deficiencies, and offered proof of both the boat's condition and Samuel's complicity.\textsuperscript{186} His evidence was refused and referees found in favor of the plaintiff, Abraham Payne, to whom Samuel had assigned his interest in the notes at the time of the dissolution of their partnership.\textsuperscript{187} Once again, Savage spoke for the court and invoked \textit{Coddington} for the proposition that the holder of negotiable paper is insulated from the defenses existing between the original parties only where "he has advanced money or property, or incurred liability upon the credit of the note."\textsuperscript{188} Savage reasoned that these notes were taken by the indorsees in payment of an existing account, and therefore no property was advanced nor liability incurred in reliance on them.\textsuperscript{189} Cutler, therefore, had the right to offer his defense of failure of consideration.\textsuperscript{190} The report of the referees was set aside and Cutler got another chance.\textsuperscript{191}

\textit{Payne v. Cutler} marked the high water mark of opposition to the bona fide holder rule in the New York supreme court. In 1837, a reconstituted court decided \textit{Smith v. Van Loan}.\textsuperscript{192} Van Loan had made a promissory note to one Lewis Wheeler to pay him for services performed.\textsuperscript{193} Wheeler in turn transferred the note to the plaintiff.\textsuperscript{194} There were some problems related to the pleadings in the cause, but the substantive issue raised by the defendant called directly into question the role of antecedent debt in the doctrinal structure defining the concept of negotiability.\textsuperscript{195} Van Loan claimed that Wheeler owed him a sum almost exactly equal to the amount of the note.\textsuperscript{196} Since

\begin{itemize}
\item \textsuperscript{186} \textit{Id.}
\item \textsuperscript{187} \textit{Id.} at 605-06.
\item \textsuperscript{188} \textit{Id.} at 606.
\item \textsuperscript{189} \textit{Id.}
\item \textsuperscript{190} \textit{Id.}
\item \textsuperscript{191} \textit{Id.} at 605-06.
\item \textsuperscript{192} 16 Wend. 659 (N.Y. Sup. Ct. 1837). Greene C. Bronson and Esek Cowen became associate justices on January 6 and August 31, 1836, respectively. 1 \textit{LEGAL AND JUDICIAL HISTORY OF NEW YORK} 371 (A. Chester, ed. 1911) (reprint 1983). Bronson had been attorney general of the state and Cowen a circuit court judge. \textit{See} in 14 Wend. at v, and 15 Wend. at iii (listing attorney general and Judges of New York Supreme Court of Judicature). Justice Samuel Nelson was promoted to chief justice on Savage's resignation after May term 1836. 15 Wend. at iii. Nelson was appointed to the United States Supreme Court in 1845 by President John Tyler where he served until 1872. Gatell, \textit{Samuel Nelson}, in 2 \textit{THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1978: THEIR LIVES AND MAJOR OPINIONS}, 817-42 (1980).
\item \textsuperscript{193} \textit{Smith v. Van Loan}, 16 Wend. at 660.
\item \textsuperscript{194} \textit{Id.}
\item \textsuperscript{195} \textit{See} \textit{id.} at 660 (proof that note not given for money but for work and labor could not change form of remedy).
\item \textsuperscript{196} \textit{Id.} at 660.
\end{itemize}
Wheeler transferred the note to Smith in payment of an antecedent debt. Van Loan argued that Smith took the note subject to all the equities between the original parties and that he could therefore set off Wheeler's debt to him against the amount the note obligated him to pay.\textsuperscript{197} The referees to whom the case had been sent refused to hear Van Loan's evidence supporting his argument and found for Smith.\textsuperscript{198} Van Loan moved before the supreme court to set aside the referee's report.\textsuperscript{199}

Justice Bronson wrote the court's opinion denying the motion. That part of the opinion dealing with the pleading questions and the rules for assertion of set-offs under New York's revised statutes is not of particular interest for the antecedent debt question. What is of interest is Bronson's explanation of Rosa. By examining the original papers in the action, Bronson concluded that the apparent holding in that case should be limited in application to situations where the paper being sued upon had been fraudulently put into circulation; for example, where accommodation paper was used to accomplish some other end than that anticipated by the accommodation indorser, or where a note was satisfied but instead of returning it to the obligor the obligee negotiated it, which was the case in Rosa, or where the consideration for the note had partially failed, as in Payne.\textsuperscript{200}

In other words, only where the party being sued had some equity entitling him to resist payment of the note did the question of the bona fide holder status of the plaintiff become relevant. Here Van Loan did have a claim against Wheeler, but it did not amount to a defense to the collection of the note.\textsuperscript{201} Read carefully, Bronson's opinion really did not rehabilitate antecedent debt; it only reasserted

\begin{flushleft}
\begin{orator}
197. \textit{Id.}
198. \textit{Id.}
199. \textit{Id.}
200. Payne v. Cutler, 13 Wend. 605, 606 (N.Y. Sup. Ct. 1835). Savage stated the rule as follows:
It is the doctrine of this court, that the partial failure of consideration may be given in evidence to reduce the amount to be recovered upon a promissory note between parties to it. The argument against it is, that any consideration is sufficient to support the note; and that if there is any consideration, however small, that is sufficient to justify a recovery for the whole amount. This is fallacious. It may be technically sufficient, but is not the best calculated to do justice between the parties with the least expense.
\textit{Id.} at 606.
201. See Smith v. Van Loan, 16 Wend. at 662 (discussing relevant portions of the revised statutes). For procedural reasons, Van Loan could not assert the set-off against Smith. \textit{Id.}
\end{orator}
\end{flushleft}
the possibility of its serving as valuable consideration for a transfer of commercial paper sufficient to allow the transferee to recover so long as the obligor did not have some ground for resisting making good on his promise. By questioning *Rosa* with its sweeping condemnation of antecedent debt, however, Bronson planted a fertile seed of doubt.

In the years after the decision in *Smith v. Van Loan* the New York supreme court further muddied the waters with a series of decisions giving bona fide holder status to banks which had taken paper to refinance existing debt. In each of three cases decided in 1839 and 1840 a bank had taken paper of questionable provenance, discounted it, and used the avails to pay debts owed it by the person presenting the paper. In two cases the trial judge had charged the jury that valuable consideration had not been given, and in the third the trial judge ruled the bank a bona fide holder. The banks were victorious in all three appeals, either winning new trials or seeing a favorable verdict left undisturbed, each court laying down the holding that the extinguishing of an outstanding debt was the giving of value. In one case, Chief Justice Samuel Nelson cited in support of his opinion Justice Woodworth's opinion in *Coddington*, recognizing for what seems to be the first time Woodworth's narrow holding regarding paper taken as security for antecedent debt and foreshadowing the Court of Errors' next pronouncement on the issue in *Stalker v. M'Donald*. All three decisions would seem to be most favorable for the banks of the Empire State. As was brought out in the first of the trio, *Bank of Salina v. Babcock*, the banking business rested on the perpetual satisfaction of outstanding debts:

It was proved that the course of business at the Bank of Salina with such of their customers as had large dealings with the Bank and resided at a distance, as was the case with [the parties from whom the note was received], was to discount notes from time to time as they were received and to credit the proceeds on the books, and whenever a credit stood upon the books sufficient to pay such notes as had come to maturity, to charge the notes, cancel them and send them home.

---


203. Bank of St. Albans v. Gilliland & Raymond, 23 Wend. 311, 313-14 (N.Y. Sup. Ct. 1840); see infra notes 205-22 (discussing *Stalker v. M'Donald*, 6 Hill 93 (N.Y. Sup. Ct. 1843)).

Should the bank not be able to depend on bona fide holder status, the entire circulation of paper could come to a halt. Clearly, Story believed as much when he decided Swift. The New York supreme court seems to have taken a similar view, and as such, there matters stood when Story wrote his opinion in Swift.

It did not take long for the highest court of New York to pass its judgment on Story’s interpretation of commercial law. In 1843, the New York court of errors decided Stalker v. M’Donald. The case involved facts almost identical to those in Coddington and of the sort which probably raised the most doubts about the validity of an antecedent debt as good consideration. A commission merchant on the verge of bankruptcy delivered to a creditor as security, notes made payable to the firm but actually representing the proceeds of sales of a consignor’s goods. The consignor won a verdict in the New York City superior court which was affirmed by the supreme court. By the time the creditor’s writ of error reached the highest court of New York, Swift v. Tyson had been decided. Delivering the principal opinion in the court of errors, Chancellor Ruben Walworth acknowledged that “the object of this writ of error appears to be to induce this court to overrule its decision in the case of Coddington v. Bay . . . and to make our decision conform to the opinion of Mr. J. Story in the recent case of Swift v. Tyson . . . .” That the court refused to do, voting with but one dissent to affirm the lower courts.

Walworth’s subsequent rejection of Swift did not rest upon the mere assertion of the inability of a decision of the United States Supreme Court on something other than the “Constitution and laws of the U.S. and upon the construction of treaties” to bind the highest court of New York. He made no attack on the power of Story’s Court to decide the issue and thus set down the rule that would be

206. Id. at 94.
207. Id.
208. Id. at 95.
209. Id. Walworth’s contemporary reputation was great. The last chancellor of New York, he held the office from 1828 until it was abolished in 1846. He was credited with a deep understanding of the law, and with accomplishing a simplification of equity procedure. Legal and Judicial History of New York 337-38 (A. Chester ed. 1911) (reprint 1983). A modern scholar, however, describes him as “an extremely irascible and unpopular individual”, which qualities led to the withdrawal of his nomination to the United States Supreme Court for the seat eventually occupied by Samuel Nelson. Gatell, supra note 192, at 823.
followed in the federal courts. He did make it perfectly clear, however, that however distinguished an expositor of commercial law Joseph Story might be, the New York courts had given decisions which were evidence of what the general law was. He deemed it important to properly elucidate that general law because:

On a question of commercial law . . . it is desirable that there should be, as far as practicable, uniformity of decision, not only between the courts of the several States and of the U.S., but also between our courts and those of England, from whence our commercial law is principally derived, and with which country our commercial intercourse is so extensive.211

The rest of the opinion was devoted to a careful examination of the precedents from which the general law must be drawn. Walworth first considered the relevant New York cases in order to show that New York had not deviated from the rule of Coddington in spite of Story's statements to the contrary.212 He made a special point of showing that Bank of Salina and Bank of Sandusky were consistent with Coddington.213 These cases, which Story maintained had "greatly shaken" the New York rule involved the very situation Story raised as a horrible hypothetical.214 Story had maintained that following the New York rule in Swift would call into question the common practice of banks' accepting new notes as substitutes for old which had matured.215 Walworth, on the other hand, read these two cases approving that common practice as harmonizing perfectly with the New York rule on the invalidity of antecedent debt as valuable consideration.216 In his view, the banks in those cases really surrendered something for the notes which were subject of the suits.217 Walworth could assume such a confident tone in dealing with the New York precedents because his statement of the principle established by Coddington and the cases which followed finessed the questions raised by the ambiguities of Vielie's and Spencer's opinions and Savage's distinct hostility to antecedent debt. According to the Chancellor, all the cases

211. Id. at 95.
212. Id. at 95-96.
213. Id. at 98-99.
214. Id. at 98; see also Swift v. Tyson, 41 U.S. (16 Pet.) 1, 17 (1842).
216. Id. at 104.
217. Id. at 98-99.
fully established the principle that to protect the holder of a negotiable security which has been improperly transferred to him in fraud of the prior legal or equitable rights of others, it is not sufficient that it has been received by him merely as a security or nominally in payment of a pre-existing debt, where he has parted with nothing of value, nor relinquished any security upon the faith of the paper thus improperly transferred to him without any fault on his part.218

A formulation like "received . . . nominally in payment" covers a multitude of judicial sins since it suggests that whether or not paper has been taken in satisfaction of an antecedent debt is really a question of fact. Indeed, in Stalker, the question of whether the paper had been taken as security was left to the jury which first heard the case.219 In any event, Walworth had managed to limit disagreement between New York and Joseph Story to the validity of the dictum in Swift rather than the holding.

Walworth brought to the battle all his erudition. He reviewed the earliest English cases dealing with negotiability, most of which Story had not treated individually, in order to firmly establish the rule that valuable consideration must be given by one who desires to be a bona fide holder. He then took up the most recent cases which Story had described as "the latest decisions, which our researchers have enabled us to ascertain to have been made in the English Courts upon this subject."220 Examining each case at length, Walworth showed that none of them directly held that anything other than the absolute discharge of an antecedent debt could be valuable consideration.221 Turning Story's own weapons against him, the New York chancellor had driven the Justice's dictum from the field.222

218. Id. at 98.
219. Id. at 94. The superior court charged the jury that:
[I]f the notes in question were the property of the defendants in error [the consignors] at the time of the transfer [to the consignees' creditor], and were not taken by [the creditor] upon any consideration parted with by him on the credit thereof, nor in payment of the note or [the consignees], but as a mere pledge or collateral security for that note, then the [consignors] were entitled to recover; . . .

Id. at 94, 113. In his opinion, Senator Lott stated that the argument that the creditors had parted with something of value "was rebutted by the verdict of the jury." Id.

220. Id. at 104. The cases were: Ex parte Bloxham, 8 Ves. Jr. 531 (ch. 1803); Bosanquet v. Dudman, 1 Stark. 1 (K.B. 1814); Heywood v. Watson, 4 Bing. 496 (C.P. 1828); Bramah v. Roberts, 1 Bing. N.C. 469 (C.P. 1835); Percival v. Frampton, 2 Cre. M. & R. 180 (Ex. 1835).

221. Stalker v. M'Donald, 6 Hill 93, 100-10 (N.Y. Sup. Ct. 1843).

222. The only other opinion in the court of errors was by Senator John A. Lott who was also in favor of affirmation. He limited himself to restating the rule of Coddington and arguing that on the facts of the case the creditors gave up nothing when they took the notes. Id. at 113.
Both judges expounded the commercial law out of the same sources. Both judges saw the need for uniform law in great commercial matters and neither seems to have doubted that the uniform law could be found in the correct reading of decided cases. Neither saw the nature of federalism as an important issue. In the end, they differed only over the accuracy of Story’s dictum regarding negotiable paper taken as security for antecedent debts.

B. Other States

As might be expected, courts of other states dealt with situations like those in Swift, Coddington, and Stalker. It is difficult to come to an exact conclusion about the respective authority of the two lines of cases because of the broad range of fact situations involved, the confused state of the New York law, and the abundance of dicta. Story, of course, made a prime contribution to the confusion by using Swift to proclaim the status of antecedent debt as valuable consideration whether the instrument being sued upon had been given in payment of or as collateral security for that antecedent debt. Justice Catron’s separate opinion called attention to Story’s strategy and opined that a mere dictum would not persuade the courts of the various states, “whereas, if the question was permitted to rest until it fairly arose, the decision of it either way by this Court, probably, would, and I think ought to settle it.”

224. Stalker v. M'Donald, 6 Hill 93, 95 (N.Y. 1843).
debt in 1836, producing an opinion in the case of Brush v. Scribner which Story cited with approval in Swift v. Tyson.226 Plaintiffs, the firm of Brush & Cook, had received from one Stevens a note made by Abraham Scribner, payable to the order of John Scribner, the defendant, and endorsed by him in blank.227 Brush & Cook applied the note first to pay Stevens’ debt to them in the amount of $112.85 for goods previously sold and paid the balance of the note ($213.65) in cash and goods.228 The note was accommodation paper, that is, John Scribner had endorsed it to enable it to be discounted at a Connecticut bank for the benefit of Abraham.229 John had given it to Stevens for delivery to the Connecticut bank and Stevens had misappropriated the note to his own use.230 Since there was no valuable consideration for the creation of the note—the usual case with accommodation paper—the defendant could avoid paying the plaintiff if the latter were not a bona fide holder.231 If the payment of an antecedent debt was not good and valuable consideration then Brush & Cook were not bona fide holders to the extent of $112.85.232 The trial judge left to the jury the question of whether the note was taken as security for or in “satisfaction and extinction” of the previous debt, instructing them that if they found the latter situation to be the case, plaintiffs were entitled to the verdict.233 The jury so decided and defendant moved for a new trial on the grounds that the judge’s instructions were incorrect.234 Before the high court, counsel for both sides cited New York cases in support of their respective positions.235

Faced with the confusion of the New York cases, the Connecticut court went back to first principles and produced an elaborate review of all the English decisions bearing on the question, beginning with an anonymous chancery case decided at the end of the seventeenth

226. Swift v. Tyson, 41 U.S. (16 Pet.) at 22 (citing Brush v. Scribner, 11 Conn. 387 (1836)). Story also stated, without providing any citation, that Massachusetts had always adhered to the rule of Swift. Id.
228. Id.
229. Id.
230. See id. at 388 (defendant’s contentions as reported in facts).
231. Id. at 388-89.
232. Id. at 389.
233. Id.
234. Id.
It was clear to Chief Judge Thomas S. Williams that by the late eighteenth century Lord Mansfield had settled the law of negotiability on principles which were conducive to free circulation of instruments and thus favorable to the expansion of trade. Any limitation of those principles by depriving antecedent debt of the status of good consideration would cause great problems in the carrying on of day-to-day transactions. "Before this court lend their aid to such an event, they must be clearly satisfied that the law requires it." And the law examined is English. The same cases that Chancellor Walworth and Justice Story carefully considered a few years later figure as prominently here as in those later opinions. Williams, however, managed to read them all as supporting the status of antecedent debt as valuable consideration through the simple technique of resolving all ambiguities in favor of negotiability.

The discussion could not avoid New York law, however, because the note involved was drawn in that state (although it was to be discounted in Connecticut). Williams pointed out the unsettled state of the New York precedents, reading Kent’s decision in Coddington as not necessarily deciding that antecedent debt was not valuable consideration, and correctly noted that some opinions in the case in the court of errors did intimate that conclusion and that various lower court decisions had considered those opinions in the highest court to have settled the matter. Williams concluded that "if this case was to be decided by the laws of New York, and the reports of those [lower court] cases are to be considered as evidence of them," the defendant would get his new trial. The choice of law question had not been raised at trial below, however, and because the appellate court felt that justice had been done, it denied the new trial. The court did note that the New York cases had been "alluded to" below, but only "as evidence of the common law." In other words, the case had first been fought out in terms of general law.

---

236. Id. at 390-391.
237. Id. at 391.
238. Id. at 393.
239. Id. at 394.
240. See id. at 394-95 (citation of English cases as support of antecedent debt as granting bona fide holder status).
241. Id. at 404-05.
242. Id. at 406.
243. Id. at 407-08.
244. Id. at 407.
which law, according to the Connecticut court, New York decisions did not properly reflect.\textsuperscript{245} 

There Connecticut law rested. The courts of three other states, however, took note of the decision in \textit{Swift} when reconsidering their own precedents. In Maine, Justice Ether Shepley of the Supreme Judicial Court addressed the question of antecedent debt and the New York precedents contemporaneously with the federal courts' deliberations in \textit{Swift v. Tyson}.\textsuperscript{246} In 1839 in his opinion in \textit{Homes v. Smyth}, Shepley stated that according to "the principles admitted in all the cases" a holder in due course for valuable consideration is immune to challenges based on the equities as between the original parties to the note.\textsuperscript{247} He found that the New York cases dealing with antecedent debt were in perfect accord with those principles because in that state, as in England, a note taken for an antecedent debt is not payment for it unless expressly so stated.\textsuperscript{248} Almost always, a New Yorker who accepted a note for an antecedent debt did not extinguish thereby the original obligation owed him.\textsuperscript{249} "The law of this, and of some of the other states," Shepley next observed, "is known to be different, and negotiable paper, received for a preexisting debt, is payment of it, unless the contrary be made to appear."\textsuperscript{250} In short, to allow the original equities to defeat the collection of the note would not destroy the debt owed the New Yorker, but would leave the down east creditor with nothing. In New York, therefore, all notes received for antecedent debts are really received for collateral security unless otherwise agreed by the parties. Shepley noted that the New York courts, therefore, "are deciding in accordance with the principles admitted in all the cases, when they hold, that in the hands of an indorsee, who takes it for a pre-existing debt, the same defense may be made as between the original parties" because in Maine taking the disputed paper would destroy the antecedent debt. Adherence to the New York precedents by the Maine court would violate principle by putting losses on innocent parties.\textsuperscript{251}

\textsuperscript{245} Id. at 404-08.
\textsuperscript{246} Homes v. Smyth, 16 Me. 177 (1839).
\textsuperscript{247} Id. at 180.
\textsuperscript{248} Id.
\textsuperscript{249} Id.
\textsuperscript{250} Id.
\textsuperscript{251} Id.
In the subsequent case of *Norton v. Waite*, one insolvent New Yorker transferred to his New York creditor a draft drawn in Maine. Justice Shepley noted that from the reports "in the daily papers" the United States Supreme Court in the case of *Swift v. Tyson* had regarded the question of whether the indorsee is subject "to the equities existing between the original parties" as one "to be decided by the general mercantile law, and not by the law of the State where the transfer was made." Shepley did not discuss *Swift*, however, because he found that even if New York law were to apply, the plaintiff would still collect on the note because there was proof that it was accepted in true payment of the antecedent debt. In accord with his earlier opinion and the general principles on which it was based, therefore, the creditor plaintiff was a bona fide holder in Maine or in New York.

Shepley's two opinions clearly state that the principle of general commercial law involved in these cases is that payment of an antecedent debt is good consideration and that all the cases, even those from New York, acknowledge it. He left open, however, the question disposed of in Story's dictum, since by Shepley's reasoning collateral security was involved in neither case. The Maine Supreme Court faced the matter squarely in *Bramhall v. Beckett* in 1850. The case was submitted to the high court on an agreed statement of facts which stipulated that the note was given without consideration as an accommodation note. On the same day, it was indorsed by the payee to the plaintiffs as collateral security for a debt he owed them. The court noted, "[n]othing was paid and no claims given up by the plaintiffs for the note; nor was there any agreement for any extension of the old debt, nor any other consideration for the indorsement, except that it was made for said collateral security." Interestingly, the losing counsel in *Swift* argued for the defendant and prevailed.

---

252. Norton v. Waite, 20 Me. 175, 177-78 (1841). The case apparently was heard in the July term of 1841, but clearly Shepley's opinion was written after the United States Supreme Court's decision in *Swift* in January 1842. Interestingly enough, the plaintiff in this case was Nathaniel Norton, a key figure in *Swift v. Tyson*.
254. Id. at 177-78.
255. Id. at 178.
257. Id. at 205, 207.
258. Id. at 205.
259. Id.
Judge Howard's opinion is brief, adopting Chancellor Walworth's reading of the English cases considered by Story. He found the New York doctrine concerning notes given as collateral security to be in harmony with English and American authorities and with principles of commercial law. He provided a clear statement of the rule that reflects those doctrines and authorities as the law of Maine:

We hold, however, upon general principles, as well as upon authority, that the indorsee of an accommodation bill or note, who has given no consideration for it, and who does not claim through a party for value, is not entitled to protection against the equities of the accommodation maker, acceptor, or indorser; but in the language of Eyre, C.J., (1 Bos. and Pul. 650,) he is in privity with the first holder, and will be affected by everything which would affect the first holder.

If he received a bill or note as collateral security merely, for a pre-existing debt, without parting with any right, extending any forbearance, or giving any other consideration, the transaction will not constitute a commercial negotiation in the usual course of business and trade, and he cannot be regarded as the holder for a valuable consideration.260

Pennsylvania was also willing to adopt Chancellor Walworth's erudition in preference to that of Joseph Story, but was most concerned with its own precedents. In 1824, the supreme court of the commonwealth decided Petrie v. Clark.261 In an opinion by Judge John Bannister Gibson, the court held that the receiving of a note as security for an antecedent debt which is not thereby discharged is not a present and valuable consideration and leaves the holder subject to the equities between the original parties to the note.262 The maker of the note involved in Petrie had given it to one of two co-executors in payment for goods purchased from the estate.263 The note was indorsed in the blank by the payee (who was the defendant's surety for the purchase money) and delivered to the co-executor who then delivered it to an agent of the plaintiff to secure his personal debt.264 In simple terms, the co-executor had defrauded the estate and much of the case is taken up with a consideration of English cases on the rights of purchasers from executors.265

260. Id. at 211.
262. Id. at 386.
263. Id. at 377.
264. Id.
265. See id. at 386-89 (opinion replete with references to English cases).
situation was egregious and Judge Gibson had no difficulty in finding that equity and commercial law were congruent, although his discussion of commercial law is cursory. He cited two English cases on the general subject of negotiability, but in the end rested on "reason and convenience." 266

Judge Gibson’s magisterial statements in Petrie were affirmed as settling the point "without making a parade of learning and research by the citation of numerous authorities, foreign and domestic, ancient and modern," 267 in Depeau v. Waddington. 267 Although Judge Rogers believed "there would be no great difficulty in proving that it would have been better not to have restrained the negotiability of paper bona fide pledge as a collateral security for a debt . . . ; the law is settled." 268 Finally, in Kirkpatrick v. Muirhead the court definitively rejected Story’s dictum in Swift. 269 Judge Bell noted the difference of opinion between Story and Walworth and suggested that Shelpley’s attempted reconciliation might be correct, thus preserving the unity of the system. 270 It was enough for him, however, that the Pennsylvania decisions "have recognized the difference between payment and security only; ruling that the former protects the bona fide holder against all defenses founded in fraud or latent equities practised upon or existing between the original parties; while the latter leaves the door open to every inquiry which would have been pertinent had there been no transfer of the paper." 271 In the end, therefore, the matter was settled in Pennsylvania by Gibson’s early elucidation of a general commercial law strengthened by Walworth’s more elaborate researches.

The decision in Swift lead the Ohio Supreme Court to overrule its precedents on the antecedent debt question in Carlisle v. Wishart, decided in December term of 1842. 272 The facts of the case are given in the report in the most general terms. Wishart made a promissory note for $666.66 dated August 23, 1838 and due in six months payable to Joseph S. Benham or order; that is, the note was clearly negotiable. 273 Before it matured, Benham endorsed it to Carlisle in

266. Id. at 388-89.
268. Id. at 232.
270. Id. at 124.
271. Id. at 125.
273. Id. at 172.
payment of an antecedent debt. At trial, Wishart gave evidence to show that the consideration given for the note had failed. The judge admitted the evidence over the plaintiff's objection and instructed the jury that "inasmuch as the note had been transferred, in payment of a pre-existing debt, the defendant could make any defense that he might have made in case Benham, the payee of the note, had sued the same." The jury believed the defendant's evidence and found for him. Plaintiff moved for a new trial.

The very generality of the statement of facts (drawn up by the judge writing the opinion) indicates that Carlisle v. Wishart was designed to be a test case on the antecedent debt question. In fact, in 1838, in Riley v. Johnson, the court had taken the harshest view of antecedent debt, stating "whoever receives a note, negotiable on its face, in payment of a precedent debt, takes it subject to all its equities between the original parties," citing both Coddington and Rosa. The case was a most appealing one, however, since the state of the case and the conduct of the creditor plaintiff and of Johnson, the endorser debtor, indicated "that the whole business was previously arranged between them; and this impression is strengthened by the subsequent absconding of Johnson, totally insolvent."

The arguments of counsel in Carlisle are extensively reported and present a thorough examination of the entire antecedent debt question. Carlisle's counsel, Daniel Peck, first analyzed the New York cases, pointing out the "misunderstanding" of Coddington which led the Supreme Court of New York to take the extreme position of Rosa and its modification by Smith v. Van Loan and generally by the "bank cases." He correctly predicted that the court of errors would eventually restrict Coddington to the transfer of notes as security for preexisting debts. He next analyzed Brush v. Scribner as both a correct statement of the law and as a correct reading of the New York precedents.

274. Id. at 173.
275. Id.
276. Id.
277. Id.
278. See id. at 172 (very general statement of facts as described in report of case).
280. Id. at 530.
282. Id. at 174-76.
283. Id. at 175.
284. Id. at 175-76. He then pointed out an interesting example of forum shopping. Id. at
Finally, he arrived at Story’s opinion in *Swift* itself. The opinion is fully analyzed, although the dictum regarding notes pledged for security is glossed over, as one might expect given the facts of the instant case. The treatment of Story’s reading of section 34 of the Judiciary Act shows no difficulty with the concept of general commercial law. Peck paraphrased that portion of the opinion: “The section does not extend to contracts, or other instruments of a commercial nature; the true interpretation of which are to be sought, not in the local tribunals, but in the general principles and doctrines

178. There were two notes involved in *Riley v. Johnson*, which he described as an “agreed case.” *Id.* Having lost on one note in the state courts, plaintiff sued on the other in the United States Circuit Court and “obtained a verdict, under the charge of Justice McLean, that the payment of a preexisting debt was a sufficient valuable consideration to protect the holder, without fraud or notice.” *Id.* Defendant moved for a new trial, and the court divided, no doubt in order to allow certification of the motion of the Supreme Court, where it failed, seemingly on authority of *Swift.* *Id.*

The case referred to is *Riley v. Anderson*, 20 F. Cas. 801 (C.C.D. Ohio 1841) No. 11,835. McLean’s opinion in *Riley v. Anderson* reads like a prototype for Story’s in *Swift.* It discussed the New York cases decided up to that point as the most prominent American precedents and then noted that *Bank of Salina* and *Bank of Sandusky* had “shaken, if not overruled, the above decisions.” *Id.* at 802. By comparison, Story stated that the same two cases had “greatly shaken, if they [had] not entirely overthrown those decisions.” *Swift v. Tyson*, 41 U.S. (6 Pet.) 1, 17 (1842).

McLean did not deal with section 34 but did state that the decision of the Ohio Supreme Court in the earlier *Riley* case did not need to be followed by the federal court which was bound only by “the construction of a statute” since “it constitutes a rule of property and as the rule should be the same in the courts of the United States.” *Riley v. Anderson*, 20 F. Cas. at 802. However, “for the same reason on all questions of a general and commercial character, the rule established by the federal courts should be followed by the local tribunals.” *Id.* Finally, “[t]he case under consideration must be considered as resting upon general principles,” with which the New York cases do not comport. *Id.*

McLean’s statement about general principles of commercial law was perfectly consistent with his opinion for the Supreme Court in *Bank of the United States v. Dunn* in which he wrote, “The liability of parties to a bill of exchange or promissory note, has been fixed on certain principles, which are essential to the credit and circulation of such paper. These principles originated in the convenience of commercial transactions, and cannot now be departed from.” *Bank of the United States v. Dunn*, 31 U.S. (6 Pet.) 51, 59 (1832).

McLean’s statement that the federal courts are bound only by state court interpretations of statutes is not necessarily supported by Story’s analysis of section 34 of the Judiciary Act of 1789 in *Swift.* At least one scholar sees McLean (whom he describes as “the most nationalistic of Jackson’s appointees”) as a critical actor in the “transformation” of *Swift* from a case establishing a correct principle of the general law to one justifying the creation of federal common law on a multitude of subjects. Hollingsworth, Comments on Charles A. Heckman’s Paper “The Relationship of Swift v. Tyson to the status of Commercial Law in the Nineteenth Century and the Federal System,” and Donald Roper’s Paper, “James Kent and the Emergence of New York’s Libel Law,” 17 AM. J. LEGAL HIST., 256, 258-61 (1973); see also HARMONY & DISSONANCE, supra note 8, at 46-99 (discussing how *Swift* doctrine became part of Constitution).

of commercial jurisprudence." Peck further stated that state courts should, moreover, look to the Supreme Court of the United States for the elucidation of principles:

Inasmuch as the Supreme Court follows the state courts in the decision of all local questions, it is but right, so far as the general principles of the common law are concerned, especially commercial law, that the state courts should be governed by the Supreme Court; and this should be done, if not as a matter of absolute authority, at least good policy would require it. Otherwise, we will have the same question decided differently in the different courts, in the same state, and it will lead to various shifts and devices to sue in the court which will give the most favorable judgment. This would lead to injustice and confusion.

In Peck’s analysis, good policy would, therefore, require that the court look to "the Supreme Court of our own country" "for the rule of decision on such questions." In other words, the Supreme Court is the best authority to consult in the task of understanding the principles of the law which good sense require to be uniform throughout the nation. Questions of commercial law allow for less tolerance of differing judicial elucidations of principles. But that was not the only ground for a decision in plaintiff’s favor. "At this time, bills of exchange and notes, in some form, constitute, in a great measure, the currency of the country, and, in various ways, represent the wealth of the land." Peck reasoned that such currency, therefore, should be treated like money, and the rule of Coddington, at least in its extreme form, would end the circulation of accommodation paper.

Defendant’s counsel, Thomas Alexander, tried to distinguish both Brush and Swift by claiming that both cases involved the paying of value for the indorsement of the note, the former because the indorser paid a debt of less value than the note, receiving the balance in goods and the latter because Swift canceled a note of both Norton and Keith for an indorsement by Norton alone, thereby surrendering his claim against Keith. The greater part of this argument, however,

286. Id. at 180.
287. Id. at 181.
288. Id.
289. Id.
290. Id. at 181-82.
291. Id. at 188-89.
was directed to proving that the English cases establish the rule that an antecedent debt is not a valuable consideration which will support the status of bona fide holder. Alexander then explicitly stated the relevance of the English cases:

Then why should we, in Ohio, extend a law founded on commercial policy further than England? Their interests are, in the main, commercial, ours, agricultural. It is from England that Ohio and her sister states derive their notions of commercial law, and is it reasonable, or can it be good policy for us to go farther in that direction than England? 292

Here, then, is opposition to Story's decision in Swift (Alexander's attempt to distinguish the opinion notwithstanding) which, like other opposition, accepts the idea of a commercial law appropriate for commercial nations. While the distinction between the economies of Ohio and England is a real point of difference with Story's entire approach to the matter—a point that was made in New York as well and to the same effect: why go farther than England from whence we receive our commercial law 293—there seems to be no question that the concept of general principles was real and that the task for the court was the proper understanding of the principles.

Peck's argument of commercial uniformity persuaded the court. Judge Wood first noted that New York seemed on its way to modifying the extreme view of Coddington. Turning to Swift he noted,

It is believed that the law, as thus settled by the highest judicial tribunal in the country, will become the uniform rule of all, as it now is of most of the states. And, in a country like ours, where so much communication and interchange exists between the different members of the confederacy, to preserve uniformity in the great principles of commercial law, is of much interest of the mercantile world. 294

The holding in Riley subjecting one who takes negotiable paper in payment of an existing debt to all the equities between the original parties was overruled "and the reverse now holden to be the law. 295

Two other states which addressed the antecedent debt question after the decision in Swift v. Tyson also approached the problem in terms of the general commercial law. In 1844, the Alabama supreme

292. Id. at 188.
293. See Coddington v. Bay, 20 Johns. 637, 656 (1822) (noting that commercial law rule should not be extended further than English rule).
295. Id. at 192.
court found itself in total agreement with Story in *Swift* and the Connecticut court in *Brush*, holding the payment of an antecedent debt to be within the usual course of trade and thus resulting in the status of bona fide holder.296 "It appears to us," Justice Ormond wrote, "there is no sensible distinction between receiving a bill in payment of a preexisting debt, and purchasing it with money or property."297 For Ormond such a view merely expressed one of "the well established principles of the law-merchant."298 Apparently, however, Story's dictum was not expressive of well-established principle, and the court indicated that in all likelihood it would not be followed.299

The Supreme Court of Arkansas in 1852 resolved the question in much the same way. *Bertrand v. Barkman* is full of drama.300 Deathbed "loans," promissory notes being brought from city to city for discount, bearers of the notes being chased from Memphis to Baltimore to Louisville to New Orleans all made an appearance. In the end, however, the question for decision was the bona fide holder status of one who took a note as no more than collateral security.301 Justice Christopher C. Scott for the court declared it to be the law that in order to be a bona fide holder in due course the person taking the note must either give money or property for it "or have received it absolutely and unconditionally in payment of preexisting debt, and relinquished some available security or some valuable right..."302 He admitted that there had been confusion on this point, but cited *Swift* as authority for the holding.303 On this point, he found *Swift* to be "in accordance with what we think is the overwhelming current of decisions."304 Story's dictum did not fare so well, however, and Scott adopted Walworth's view of the authorities. He cited cases from other states which he considered to agree with Walworth and found them all consonant "with the very reason of the rule itself..."305 If negotiable paper is negotiable because it is supposed to circulate like currency, then negotiability

297. Id. at 644.
298. Id. at 644-45.
299. Id.
301. Id. at 160
302. Id. at 159.
303. Id. at 162.
304. Id. at 161.
305. Id.
should be promoted only when paper serves that role. When it is "paid" for something, all well and good; but when given as collateral security it is not performing the role of "the medium of the transfer of rights and the extinguishment of obligations, and the facilitator and expander of trade and commerce." Justice Scott may not have sufficiently appreciated the role of credit in the economy, but he did appreciate correct expositions of authorities and came down on Walworth's side because his reading of the cases comported with the reason for the rule. The commercial rule had a rationale of policy which its principles must express. A court's statement of those principles must be mistaken if they do not serve the properly understood rationale.

On the other hand, New Hampshire's law dealing with the possibility of antecedent debt serving as valuable consideration was settled before Story's opinion in Swift. In three cases decided in 1839, 1840, and 1841, Chief Justice Joel Parker held the taking of negotiable paper in satisfaction of an existing debt, but not the taking of it as collateral security for that existing debt, to be the giving of valuable consideration, and also greatly restricted the defenses which could be asserted by those who made themselves liable on accommodation paper. While there is nothing startling in these results, Parker reached them without any explicit consideration of a body of commercial law and without much discussion of the American and English cases which were usual foundation for decisions in this area. Instead, property law concepts provide the framework for analysis. In Parker's view, when a note is taken as collateral security the endorsee receives "legal title" to the note but the "general property of the note" remains in the endorser. Payment of an antecedent debt, however, does pass "general property" since that is no different than giving goods for the note.

The separation of legal title from beneficial ownership is a fundamental concept of Anglo-American property law. Parker seems to be alone in using it in this commercial law context. A generation

306. Id.
307. Id. at 162.
308. Id.
309. Id.
later, in fact, Justice William N.H. Allen refused to extend the "peculiar doctrine" of Jenness and Williams, saying "It is a New Hampshire idiosyncrasy, rejected by the rest of the world, and will not be followed beyond the limit fixed by the cases asserting it." Parker's independent way of reasoning was also exemplified by his treatment of the problem of accommodation paper used for a purpose other than that contemplated by one of the original parties.

Clement v. Leverett could be described as an archetypical case. Leverett and his business partner accepted, that is, promised to make good on, two bills of exchange made by Gordon Burley payable to his own order. Burley was to have the bills discounted for Leverett. By accepting the bills, Leverett and his partner told the world that they either, in Parker’s words, "had funds of Burley in their hands, or they were indebted to him to that amount [of the bills]." Such may or may not have been the actual state of affairs. Perhaps Burley was merely doing a favor by "accommodating" Leverett. Although someone might be unwilling to discount an instrument on the sole basis of Leverett’s credit-worthiness, they might be more favorably inclined toward an instrument which represented Leverett’s statement that Burley was good for the cash. In any event, Clement, to whom Burley took the bills, was willing to give cash for them only if Burley and a surety for Burley were his principal debtors. Burley found someone willing to be his surety and the two men gave their note to Clement for a "loan" to them of $2200. They also gave Clement as security for the joint note the bills accepted by Leverett. The agreed facts state that "it was expected that the bills were to pay the note." The bills were thus collateral security for the note. The precedent established in the preceding two years by Jenness and Williams would suggest that the general property of the notes would remain in Burley and that Leverett could resist Clement’s demand that he make good on the acceptance by asserting Burley’s

315. Id. at 318.
316. Id.
317. Id. at 319.
318. Id. at 318.
319. Id.
320. Id.
321. Id.
breach of faith. Instead of discounting the notes for Leverett’s benefit Burley used them as collateral for a loan to himself.\textsuperscript{322}

Parker, however, asserted that “there is another principle [besides the basic property law enunciated in the prior cases], of earlier application, and of paramount influence in this case.”\textsuperscript{323} Parker reasoned that by accepting the bills, Leverett and his associate made themselves Burley’s debtor and the debtor of anyone to whom Burley might transfer the bills.\textsuperscript{324} By leaving the bills in Burley’s possession they gave him the opportunity to make such a transfer.\textsuperscript{325} Since Leverett had no defense against Burley, the status of the bills as collateral security was irrelevant. Clement was the only innocent party and was a bona fide holder.\textsuperscript{326}

For this last assertion Parker cited two treatises and eleven cases making a marked contrast with the prior cases where his statements of the principles of property were more or less \textit{ex cathedra}.\textsuperscript{327} The treatises were Story and Livermore on agency, and all the cases dealt with the same subject. Only the first case listed (whether for its importance or because it is the earliest cannot be said), \textit{Collins v. Martin}, explicitly addressed the concept of negotiability.\textsuperscript{328} The precise holding of that case, however, dealt with the authority of bankers as agents.\textsuperscript{329} Parker reached results similar to those reaches by other courts, but in his own way, without making extensive reference to cases dealing with general commercial law.

Parker’s independent approach to the problems of antecedent debt was not the product of ignorance. After extensive experience in both legal practice and practical politics he had been appointed to the New Hampshire high court in 1833 and became chief justice in 1838. In 1848, he left the bench to accept the Royall professorship at Harvard Law School, ending the search for a permanent replacement for Story who died in 1845.\textsuperscript{330} As a practitioner, judge, and teacher,
Joel Parker was devoted to legal principle and found in its careful and logical exposition the heart of legal education. His goal, according to a recent student of his thought, "was to show that the law was a complete and homogenous organism, with all its parts linked and capable of being understood in the dry light of reason."331 At least one of his students carried away just that impression:

The lecturer's hour was given to the clearest statement of legal principles, the keenest dissection of cases, and oftentimes to the warmest discussions of what he deemed heresies of the law... Judge Parker fought for a principle of law as other men fight for life, or family, or for a nation.332

Parker was also an independent thinker who seems to have had no qualms about expressing his own views. While on the bench he carried on an intense controversy with Joseph Story over the interpretation of a portion of the Bankruptcy Act of 1841.333 After retiring from Harvard in 1868 he was so stung by the criticisms leveled at the old regime during the early years of Langdell that he produced a pamphlet on the school, the tone of which is often biting.334 The one recent study of his thought describes him as "an incisive logician, sure of his law, history, and analysis."335 In short, while Parker was devoted to the idea of law as a system of principles, he had utmost confidence in his own view of what those principles were and of which principles governed which questions. His "peculiar" approach to the problems presented by antecedent debt was—not the product, at least in his terms, of his "will" but rather of his own, correct, understanding of an existing system of principles.

Story's efforts in Swift, therefore, had mixed success. However persuasive his reasoning in situations involving the satisfaction of antecedent debt, his dictum regarding instruments taken as security for existing debts generally met the fate Justice Catron had predicted for it. If the reasoning used in the state court cases that considered the problems involved in Swift is to be believed, Story failed to persuade because most judges found the dictum to be contrary to the general commercial law as established ultimately by English cases.

331. P. Paludan, supra note 330, at 111.
332. Hale, supra note 329, at 261.
333. C. Warren, supra note 330, at 115-17; P. Paludan, supra note 330, at 137.
335. See P. Paludan, supra note 330, at 137.
No surprise was expressed at his jurisprudence. The existence of general law, of which cases were only illustrative, was not questioned.

IV. Conclusion

Story's opinion in *Swift* was a product and an illustration of antebellum legal thought. Whatever its relationship to federalism, it seems clear that Story's approach to section 34 reflected a view of the nature of law widespread in his time. Law was a system of principles which could be discovered through the investigation of the cases which reflected the principles. Judges had the responsibility of correctly elucidating principles through the investigation of precedents and of applying them to the cases before them. The process was much like that involved in the investigation of the natural sciences: inductive discovery of principles and deductive application. All judges, however, were not good scientists. They could and did make mistakes in finding and applying principles and created confusion in the law.

Confusion in the commercial law was especially to be deprecated. As a practical matter the efficient carrying on of commercial activity among nations—and among the states of the Union—required certainty. Attaining that certainty was not difficult, however, because there was a body of principles appropriate to commercial nations. Intelligent judges who could properly induce the principles from the best authorities, which in turn seem to have been based on varying combinations of reasoning and careful understanding of commercial usage.

The validity of antecedent debt as valuable consideration sufficient to create bona fide holder status was an important question which could not be left unsettled. However practical it might be to overlook variations among the states on matters purely local, true principles of commercial law had to be vindicated if America was to be true to its spirit as a progressive, commercial nation. What was at stake was an important question of commercial law, a clear understanding of which had been made more difficult by an ambiguous line of precedents emanating from the courts of the leading commercial state of the Union. The reasoning of the New York cases was confused, but nevertheless they were still influential. Story was trying to clarify a confused principle by doing what a judge was supposed to do: use wisdom and understanding to weigh the precedents, to sift the authorities and make an accurate statement of the principles. It was an important role and was often poorly done, but it was not the making of law. Story's view of section 34 of the Judiciary Act was based on these ideas of judging and of the nature of law.
Of course, it is perfectly possible that Story was completely cynical in *Swift* and was doing no more than trying to fasten pro-business principles on populist state courts. There is some indication that those who opposed the position Story took in *Swift* had different views of America’s “spirit.” In the eyes of some of the New York judges the expansion of negotiability was a threat to accepted morality. Similar to those arguments was the assertion that however accurate Story’s elucidation of the principles of the commercial law, America was not as dedicated to commerce as England and therefore Story’s assertion was irrelevant. We might describe that language as recognizing that decisions about the extent of the bona fide holder rule are decisions about who will bear economic losses; yet that is not what the judges said. Again, the practicalities of the banking business seem to have had some influence on the cases, but the nature of that influence cannot be definitively understood from the language of the decisions. The cases simply bring the facts within the language of the principle that payment of an existing debt is good consideration.

In the end, we can never know the true motivation of judges who made decisions about the legal status of antecedent debt; we can only know what the historical actors have said. In this instance, their statements are compatible with a belief in general law, at least general commercial law the principles of which are based in part on usage, in part on the “right,” and which are only evidenced by cases. For none of them was the primary question in *Swift* one of federalism, one of the power of Story’s court. His dictum in *Swift* was resisted on the grounds that it did not comport with principle, that his reading of the authorities was wrong.

Finally, this view of adjudicating, reflecting the idea of law as a system of principles, also seems to comport with general beliefs about the workings of the world. Montesquieu’s ideas of law and the Baconian view of science provide a link between Story the judge and Story the person; between his beliefs about law and his beliefs about the nature of the world in which he lived. After Story’s death in 1845, ideas about the world and ideas about law began to change. On the way to the world we live in belief in transcendent but knowable principles, in systems evidently appropriate for whatever type of

336. See also G. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 121, 141-42, 268-69 (1970) (Story president of the Merchant’s Bank of Salem while he sat on Court and probably had first hand knowledge of practicalities involved).
society we inhabit, was left behind. We cannot begin to understand *Swift v. Tyson* and the judge who wrote it unless we distance ourselves from our world and enter sympathetically into his.