

THE  
AMERICAN LAW REGISTER.

---

AUGUST 1873.

---

IS THERE A GENERAL COMMERCIAL LAW ADMINISTERED BY THE COURTS OF THE UNITED STATES IRRESPECTIVE OF THE LAWS OF THE PARTICULAR STATE IN WHICH THE COURT IS HELD?

THIS question arose in the case of *Watson v. Torpley*, 18 How. 517, which was an action against the drawer on a bill of exchange protested for non-acceptance, and suit brought in the Circuit Court of the United States for the state of Mississippi before the time fixed for payment by the bill. The court, by Mr. Justice DANIEL, there says:—"It is a rule of the commercial law, too familiarly known to require the citation of authorities, or to admit of question, that the payee or endorsee of a bill upon its presentment and upon the refusal of the drawer to accept, has the right to immediate recourse against the drawer. It has been suggested that the instruction by the judge at the Circuit may have been founded upon a statute of the state of Mississippi of 1836, wherein it is declared that 'no action or suit shall be sustained or commenced on any bill of exchange until the maturity thereof.' The answer to the above suggestion is this: that if such be a just interpretation of the statute of Mississippi, that interpretation and the consequences deducible from it we must regard as wholly inadmissible. In the case of *Swift v. Tyson*, 16 Pet. 1, Mr. Justice STORY, delivering the opinion of the court, said: 'It has never been supposed by us that the 34th section of the Judiciary Act did apply or was intended to apply to questions of a more general

nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation ; as for example to the construction of contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions with ourselves ; that is, to ascertain upon general reasoning and legal analogies what is the true exposition of the contract, or what is the just rule furnished by commercial law to govern the case.

“The general and commercial law being circumscribed within no local limits, nor committed for its administration to any peculiar jurisdiction, and the Constitution and laws of the United States having conferred upon the citizens of the several states, and upon aliens, the power or privilege of litigating and enforcing their rights acquired under and defined by that general commercial law, before the judicial tribunals of the United States, it must follow by regular consequence, that any state law or regulation, the effect of which would be to impair the rights thus secured, or to divest the Federal courts of cognisance thereof, in their fullest acceptation under the commercial law, must be nugatory and unavailing. A requisition like this would be a violation of the general commercial law, which a state would have no right to impose, and which the courts of the United States would be bound to disregard.”

The section of the Judiciary Act referred to in the foregoing opinion, and so familiar to the profession, reads as follows : “The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in courts of the United States in cases where they apply.”

*Swift v. Tyson, supra*, was an action on a bill of exchange, by an endorsee against the acceptor ; the defence asserting failure of consideration between original parties, that the bill was taken by the plaintiff in payment of a pre-existing debt, which it was urged that the courts of New York held did not constitute a valuable consideration in the sense of the general rule applicable to negotiable instruments. The bill was accepted and payable in New York, the suit brought in the Circuit Court for the Southern District of that state, and it was contended that under the 34th section of the Judiciary Act the decisions of the courts of New York should constitute the rule of decision in the cause. These decisions

are not based upon any statute of New York, but on the interpretation by the courts of that state of a rule of commercial law.

*Swift v. Tyson*, so far from furnishing any support for the opinion so emphatically announced in *Watson v. Torpley*, in very terms excludes the case there presented, holding merely that decisions of the state courts are not embraced in the term "laws of the several states" and in the act, and that upon a question of general law the courts of the United States, while regarding the decisions of state courts with the highest respect, do not consider themselves as conclusively bound by them.

The following cases are sometimes referred to as sustaining the position taken in *Watson v. Torpley*:

*Carpenter v. Prov. Wash. Ins. Co.*, 16 Pet. 511; *Foxcraft v. Mallett*, 4 How. 379; *Robinson v. Commonwealth Ins. Co.*, 3 Sum. 220; *Gloucester Ins. Co. v. Younger*, 2 Cur. 338. But upon examination these cases will be found to be entirely unaffected by any law peculiar to the state in which they arose, nor is the question under consideration discussed or adverted to in either: in them the doctrine of *Swift v. Tyson* is but reiterated, limiting the conclusive operation of the adjudications of the highest court in a state upon the courts of the United States held therein, to those which affect the title to lands, or the construction of the local statutes or usages of the state.

It is nevertheless true that there may be excerpted from these cases, and perhaps some others, general expressions seeming to assert the existence of a general commercial law administered by the Federal courts without regard to the laws of particular states.

As by Mr. Justice STORY, in *Carpenter v. Providence Wash. Ins. Co.*, *supra*, "The questions under our consideration are questions of general commercial law, and depend upon the construction of a policy of insurance, which is by no means local in its character, or regulated by any local policy or customs."

And in *Gloucester Ins. Co. v. Younger*, *supra*, Mr. Justice CURTIS says: "But the insurers insist that the contract in question was made and was to be executed in the state of Massachusetts; and that by nature of the law of that state the insurers had, under this policy, a right to take possession of the vessel when an offer of abandonment was made, and seasonably repair and restore it to the insured, and thus perform their contract.

"It must be admitted that the law of the place of this contract

determines the rights which the insurers have upon an offer to abandon. But this being a question not of mere local municipal law, but arising under the law merchant, though this court must consider with unaffected respect the decisions of the Supreme Court of Massachusetts, yet they are not binding on our judgments, and we have no right to conform to them when we believe they do not announce the true rule. The laws of the place of contract being the general law merchant, I am bound to declare that, in my opinion, it does not confer the right claimed by the underwriters."

This is correct doctrine, and though we think, inaptly expressed, is yet susceptible of explanation that entirely consists with the text. The law merchant, or general commercial law, is the law of the contract in question, because it is, as a part of the common law, the law of the state of Massachusetts when the contract was made and to be performed, and has not been changed by any statute of that state; and not because there is any general commercial law known to the courts of the United States as a part of our Federal system.

It is true, these cases have not adverted to the source of the rule by which the law-merchant becomes applicable in the courts of the United States, nor was there any apparent reason why they should do so, for in them, the questions raised being unaffected by statute, were properly to be decided in conformity with the general law.

An examination of all the cases will develop that *Watson v. Torpley* was without precedent authority, and remains without subsequent confirmation, and in that case, though the question was within the record, its decision seems not to have been considered by the court as necessary to the cause; it was made without the benefit of argument from counsel, and *Swift v. Tyson* relied upon and largely quoted from, furnishes no foundation for the superstructure thus professedly erected upon it. Whatever weight may properly attach to the case as authority in inferior tribunals, yet the question certainly remains one which the Supreme Court of the United States may, without impinging upon the settled doctrines of the court, in a proper case, re-examine and decide in conformity with principle, and it is in this light we propose submitting a few remarks upon the question rather than the case.

Perhaps every state in the Union has deemed it expedient to affirm or vary rules of the commercial law; this has arisen sometimes from the conception that the various changes and modifica-

tions which that branch of our law has undergone in the process of its assimilation to the ever-varying exigences of commercial transactions in the course of the past century, were not, or might not be considered as in force in a particular state by reason merely of its adoption of the common law, that term being used in America to designate a system of laws that antedates the introduction, or the announcement at least, of many of the most wise and useful of the rules of the commercial law in their present application. Again: there is an unfortunate conflict of decisions upon some of the most important questions of commercial law, entering into the most ordinary transactions of life, and these, in the absence of any tribunal to which such differences could be referred, it has doubtless been thought fit to settle by statute; moreover, on peculiar views of policy, in some instances, fixed rules of the commercial law have been boldly abrogated, and other rules, deemed more conformable with the institutions of the state and the interests of the people, have been established by statute.

Statutes, however, can constitute but a small part of the laws of any state. No statute that was ever penned could be enforced unless we presupposed an existing system of laws and of procedure. Besides the statutes of a state, and as a part of its laws, every state possesses its local customs and usages of merchants, and that noble heritage of laws which sprang from the genius of the race, is inscribed in their history, and of which no circumstance short of their own consent or subjugation can ever divest them. Such are the laws of the states.

We are thence led to inquire, what are the laws of the United States? "There can be no common law of the Union. The Federal Government is composed of sovereign states, each of which may have its local usages, customs and common law. There is no principle which pervades the Union and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our Federal system only by legislative adoption. If a common-law right is asserted in a court of the United States, such court must look to the laws of the state in which the case arose:" *Wheaton v. Peters*, 8 Pet. 591; *Kendall v. United States*, 12 Id. 524; *Scott v. Lunt*, 7 Id. 596; *Van Ness et al. v. Pacord*, 2 Id. 137.

With respect to the construction of the 34th section of the Judiciary Act, it has repeatedly been held "to be no more than

what the law would have been without it, to wit: that the *lex loci* must be the governing rule of private right under whatever jurisdiction private life comes to be examined." *Hawkins v. Barney's Lessee*, 5 Pet. 464; *Weyman v. Southard*, 10 Wheat. 1. What, then is this system of general commercial law independent of the law of the states? When and where did it originate? What legislative body is competent to alter it? What tribunal speaks authoritatively upon it? These inquiries must admit of answer with respect to every system of laws and every principle having the authority of law.

The supposed existence of such a system of general commercial law is a purely American idea, one not to be found in the writings of the learned commentators foreign or domestic, and only in decisions of the Federal courts have we the intimation. If a subject of Great Britain should sue a citizen of Pennsylvania in the Circuit Court of the United States for that state, upon a contract made and to be performed in Philadelphia, and if the case of *Watson v. Torpley* is sound in principle, the laws of Pennsylvania affecting the contract might be disregarded by the court, and the English cases possibly looked to as authority upon the mooted question. But let the case be changed, and upon the same contract the citizen of Pennsylvania sues the British subject in the courts of that kingdom, it does not even suggest itself to the mind as a question that there might be a hopeless endeavor on the part of those courts to find in the shadowy region which has been termed general commercial law some rule whereby the contract should be adjudicated but on the contrary and obviously, inquiry would there be made upon all questions affecting the validity, the construction and the obligation of the contract, into the laws of Pennsylvania. An unquestionably when a contract made and to be performed in England is sued in the courts of the United States, it is to be decided in all of these respects, in conformity with the laws of England—statute and other.

The rule of the *lex loci* is not peculiar to the commercial law, is of general application, is a part of the body of our law, is coincident with obvious justice, is well understood and has ever been found adequate for convenience in affairs.

It is the peculiar honor of our commercial law that it is progressive, continually adjusting itself to meet new questions arising out of newly devised transactions, and to conform with changed usage, and more enlightened views of general convenience. After Lord

HOLT had repeatedly decided that an action could not be sustained in the name of the assignee of a note payable to order, the question continued to be presented to him until at length he said, "I perceive a disposition on the part of the merchants of Lombard Street to dictate the law upon this subject to this court, and I tell them that it will not be endured." Parliament, however, afterwards yielded to the demand by the enactment of 3d and 4th Anne, ch. 9. Acquiescence up to that time in the decisions of Lord HOLT and the almost universal re-enactment of those statutes by the legislatures of our several states, whether or not proving the correctness of those decisions, afterwards controverted by Lord MANSFIELD, do at least make apparent what was then understood to be, and had the authority of law. This is but a single illustration showing to how great an extent the commercial law, as now administered, is the creature of statute and of local usages; otherwise there could exist no correspondence between the progress of a people in commercial affairs and the adaptation of the law to the requirements of that progress.

Indeed the courts of the United States are constantly accustomed to *act* with reference to state laws, upon the doctrine of the *lex loci*, without question. A few only of the very numerous cases of this class are here cited: *Boyce v. Edward*, 4 Pet. 111; *Brabston v. Gibson*, 9 How. 263; *Ish v. Mills*, 1 Cr. C. 567; *Bainbridge v. Wilcox*, Baldw. 536.

Although the 34th section of the Judiciary Act has no reference to causes in admiralty, we nevertheless find that it was the constant practice of the Federal courts to enforce state statutes in matters maritime before the sanctionary rule of 1844, and continuously down to the period of the prohibitory rule of 1850.

While we think that the laws of the states of execution and performance furnish the only true rule, in fact the only intelligible rule deducible from the common law, for the determination of the validity of the contract, its construction and the obligation of parties to it, and should deprecate as unwise and inexpedient the establishment, whether by the courts or by legislative authority (though certainly immeasurably more to be regretted in case of the former than of the latter), of any rule of decision by which the character of questions here referred to should be decided in disregard of those laws, yet we think it fairly admits of question

whether Congress may not, under the Constitution, possess such power.

The Constitution provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states; that the judicial power shall extend to controversies between the citizens of the different states and between citizens and aliens, to all cases of admiralty and maritime jurisdiction; also, that Congress shall have power to regulate commerce between the several states, with foreign nations and the Indian tribes.

In a number of cases it was long contested whether the power to regulate commerce included the power to regulate the navigation, by means of which the commerce was carried on; that having been affirmatively settled, no other important question relative to the extent of the power so conferred seems to have been brought before the courts, and the learned commentators seem quite exclusively to have confined their treatises to that province of the power. We confess, however, it seems to us by no means free from doubt, whether that provision taken in connection with the others cited, has not conferred upon Congress the power to pass all such laws affecting commercial contracts between citizens of the different states, and between citizens and aliens as may seem to them fit, that such laws may affect the validity of the contract, its construction and the obligation of parties under it—in other words, to declare, as between the parties designated, a general commercial law, which shall be the *lex loci* throughout the United States. And such power if once exercised would doubtless be deemed exclusive.

It is from the same constitutional provisions that the power of Congress over all matters maritime is derived; it has not perhaps been questioned that Congress may enact any rule of decision in matters maritime, however variant from the general maritime law, and though this power lay dormant for many years, yet it was definitely exercised in the passage of the Act of 1851, which we believe has passed unchallenged by the profession. This is, however, aside from the present discussion, and is only suggested here as likely to become a topic of no small interest when the question with which this article is entitled shall again have passed into decision by the Supreme Court of the United States.

And in conclusion it is submitted, that the conception of any