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A SHORT HISTORY OF THE PREPARATION AND ENACTMENT OF THE UNIFORM COMMERCIAL CODE

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Any symposium on the Uniform Commercial Code should, it seems to me, begin with a short history of the preparation of the Code, showing who drafted it, how and by whom the drafts were reviewed, whether there was an opportunity for objectors to be heard and what consideration was given to the Code by its sponsors before its promulgation.

All of this is necessary background for considering what authority should be given to the Code as promulgated.

Even today, there is a very small minority of seemingly uninformed persons who refer to the Code as the work of "the law professors," intending this to indicate that the Code as promulgated was not a body of law prepared by practical lawyers in the light of reality. Nothing could be less justified than this type of sniping criticism.

The author has been a Commissioner on Uniform State Laws from Pennsylvania continuously since 1924. As President of the National Conference of Commissioners on Uniform State Laws (hereafter "the Conference") he proposed the preparation of the Code in 1940.¹ When the Conference came to the conclusion that a larger group was necessary to prepare such a huge code, he was designated to negotiate with The American Law Institute (hereafter "the Institute") to seek its cooperation in the project.² He was appointed by the then President of the Institute to act as Chairman of a Ways and Means Committee to raise the money necessary

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1. 1940 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 58. [Hereinafter all of the Conference's Annual handbooks will be cited merely as HANDBOOK.]

2. 1941 HANDBOOK 63.

to prepare the Code. Since 1943 he has been Chairman of the Conference's Commercial Code Committee. He was a member of the Editorial Board under whose jurisdiction the Code was prepared and he is now Chairman of the Permanent Editorial Board for the Uniform Commercial Code. Under the circumstances there will be very little in this history which is not a part of his personal experience and it would, indeed, be unnatural for him not to use the personal pronoun at times as the story unfolds.

Prior to 1940 the Conference had promulgated a number of commercial acts which attained very wide acceptance by state legislatures. These acts began with the Negotiable Instruments Law which was promulgated in 1896 and which by 1940 had been enacted by all the states and other American jurisdictions. The N.I.L. was followed by the Uniform Warehouse Receipts Act and the Uniform Sales Act, both promulgated in 1906, by the Uniform Bills of Lading Act and the Uniform Stock Transfer Act, both promulgated in 1909, by the Uniform Conditional Sales Act, promulgated in 1918, and by the Uniform Trust Receipts Act, promulgated in 1933. Of these acts, only the Uniform Warehouse Receipts Act was enacted by all the states prior to 1940, although the Uniform Stock Transfer Act attained that distinction later. By 1940 the Uniform Sales Act had been enacted by thirty-seven states, the Uniform Bills of Lading Act by thirty, and the Uniform Stock Transfer Act by thirty-one.

Each of these acts had a different draftsman and, to a certain extent, a different group of Commissioners who had the responsibility of going over the act with a fine tooth comb before it was referred to the Conference as a whole. Consequently, it is not surprising that there were inconsistencies between the several acts themselves or that by 1940 certain of the provisions of these acts had become, if not obsolete, at least not suitable to govern the business practices of the day. Thus, amendments were prepared to the Uniform Warehouse Receipts Act and to the Uniform Sales Act and adopted by the Conference in 1922. However, in the 18 years between 1922 and 1940, less than half of the states which had these acts on their books paid any attention to the amendments which had been promulgated by the Conference. The situation with regard to the N.I.L. was even worse. Committee after committee of the Conference had been appointed to consider necessary amendments to this statute, but by 1940 no committee had agreed on anything which should be promulgated by the Conference.

This was the background for my proposal made in my annual address to the Conference in 1940 that, instead of attempting to patch up the various uniform commercial acts, the Conference undertake preparation of one comprehensive commercial code.

At its 1940 session the Conference enthusiastically adopted the proposal conditioned only upon the finding of funds necessary to finance the project.³

3. 1940 HANDBOOK 114, 115.

The Conference is one of the most distinguished legal organizations in the United States. Almost all of its members are appointed by the Governors of the several states. The average number of Commissioners from each state is between three and four. The Conference had no substantial sum of money at its disposal for an undertaking such as the preparation of a uniform commercial code. Its expenses were met from year to year by relatively small appropriations made by the various state legislatures and grants from the American Bar Association and several state bar associations. The Conference had had no experience in raising money for any of its projects.

With all these factors in mind, it occurred to some of the members of the Conference that it might be possible to interest the American Law Institute in joining the Conference in the project. The Institute was a much larger body of lawyers—about 1200 in 1940—and had just completed its Restatement of the law. Some of the most important members of the Institute felt that, having completed that tremendous publication, the Institute's work was done and it should be dissolved. Others were of the opinion that there was ample work for the Institute to do in the future and that it would be a mistake to fold up such a fine organization at the conclusion of one important project. It was at this juncture that the proposal was made to the Institute that it join with the Conference in the preparation of a uniform commercial code.

The Director of the Institute, William Draper Lewis, enthusiastically embraced the idea, but the Institute's President, George Wharton Pepper, was less receptive.

The Conference had just about completed a Revised Uniform Sales Act, and President Pepper proposed that the Institute work with the Conference in considering the final draft of that act which of course would become a chapter or article in any uniform commercial code. He also insisted upon having the money in hand to cover the cost of this limited experiment. It was estimated that this would be in the neighborhood of \$15,000. The Conference advanced \$10,000 of this amount out of a surplus which it had accumulated, and the remaining \$5,000 was provided by a Philadelphia law firm.

While the two organizations were considering the revised Uniform Sales Act, negotiations continued for their joint undertaking of the complete project of drafting a uniform commercial code. It was not until 1944 that an agreement was signed between the Institute and the Conference for the joint undertaking of the project.

And even then, before the work could really be undertaken, a drafting organization had to be assembled and the money had to be provided which it was estimated the project would cost.

The drafting organization was such as to require any proposed provi-

sion of the Code to run the gauntlet of several expert bodies before it could be brought before the Institute and the Conference for consideration and final approval.

At the top of the drafting organization chart was an Editorial Board consisting of Judge Herbert F. Goodrich of the Third Circuit Court of Appeals and Director of the Institute and two representatives apiece from the Conference and the Institute.⁴ Next was a Chief Reporter whose duties were essentially those of the Editor-in-Chief of the Code. There was also an Assistant Chief Reporter. Then came Reporters, one for each Article of the Code. Each Reporter was required to submit his work to a group of advisers before it could go further. If the advisers were satisfied, then the draft could be presented to the Council of the Institute and either to the Commercial Acts Section of the Conference or to the Property Acts Section, as might be appropriate. Each of these bodies considered each draft in detail, often made amendments and sometimes recommitted the draft to the Reporter and his advisers for further study and revision.

There was no difficulty in finding a "Chief Reporter." The outstanding man in the United States to undertake this task was Professor Karl N. Llewellyn of the Columbia University Law School. Not only was Professor Llewellyn a student of commercial law as it appeared in the law books, but he was the type of law professor who was never satisfied unless he knew exactly how commercial transactions were carried on in the market place. He insisted that the provisions of the Code should be drafted from the standpoint of what actually takes place from day to day in the commercial world rather than from the standpoint of what appeared in statutes and decisions.

It was estimated that the preparation of the Code would cost approximately \$250,000. A Ways and Means Committee of the Institute was appointed to raise this sum from financial institutions, corporations, and law firms throughout the United States. The Committee was having unexpected success in raising funds when John G. Buchanan, a Pittsburgh lawyer, interested the Maurice and Laura Falk Foundation in possibly financing the project. Application was made, and the Falk Foundation granted \$50,000 a year for three years with the privilege of applying for an additional \$100,000 at the end of the second year. Just in case the Falk Foundation might not grant the \$100,000 at the end of the second year, the Ways and Means Committee obtained the Foundation's permission to continue its solicitation until at least \$100,000 more was raised. This sum was easily obtained. Many of the country's largest banks made generous subscriptions, as did a number of the country's largest and most prominent corporations. Business and financial concerns were interested

4. The other members of the original Editorial Board were Karl N. Llewellyn of Columbia University Law School, John C. Pryor of Burlington, Iowa, Harrison Tweed of New York City and the writer.

not only in having the law relating to commercial transactions updated but particularly were they interested in the prospect of having uniform state laws throughout the nation dealing with these subjects.

The final agreement between the Institute and the Conference was executed on December 1, 1944,⁵ and on January 1, 1945, Chief Reporter Llewellyn and his organization began the real work. It was estimated that the preparation of the Code would require five years from January 1, 1945. As will be seen later, this deadline was seemingly met, but objections to provisions of the Code required the Code's further consideration and it was not promulgated until September, 1951.

Parts of the Code came before the Institute and the Conference at the meetings of those bodies in 1946 and 1947. In May, 1948, at a joint meeting of the Institute and the Conference in Washington portions of the Code were fully considered. The volume of material to be considered was so great and the interest in discussing the various provisions of the Code was so keen that the Conference in 1947 and the joint meeting of the Institute and the Conference in 1948 divided itself into two parts so that two chapters of the Code might be simultaneously considered.

Let me state here that the consideration of the provisions of the Code by the Council of the Institute, by the Commercial Acts Section and the Property Acts Section of the Conference, and by the Annual Meetings of both bodies was by no means a perfunctory matter. There were vigorous debates and differences of opinion on the Code's many provisions, all of which had to be settled by majority vote when they came before the two sponsoring bodies for final adoption.

I can also state that what Professor Llewellyn believed should be the articles of an ideal commercial code⁶ were not the articles as they emerged from the crucible of debate when the Code was promulgated.

Joint sessions of the Conference and the Institute were held in Washington in May, 1949 and in St. Louis, Missouri, in September, 1949. At the latter meeting⁷ resolutions were passed adopting as a tentative final draft the text and comments of the Uniform Commercial Code as it came before the meeting, but permitting the Editorial Board, prior to January 1, 1950, to make such changes in the phraseology, style, and arrangement of the text and comments as would not materially affect the substance of the Code and providing that when the Editorial Board had completed its editorial work, the text and comments should be printed and copies sent for further criticism and comments to the members of the Institute and the Conference, to the members of the Board of Governors, the House of Delegates and the appropriate committees of the Section on Corporation,

5. 1944 HANDBOOK 98.

6. 1944 HANDBOOK 154.

7. 1949 HANDBOOK 180.

Banking and Business Law of the American Bar Association, to members of committees of State or local bar associations assigned to make a study of the Code, to governmental agencies and legislative committees which request copies, to the officers and appropriate committees of national associations of farmers, merchants, manufacturers, bankers, investment bankers, financing institutions, warehousemen, railroads and others affected by the Code's provisions, and to any other agencies or persons deemed appropriate by the Editorial Board. These directions were scrupulously obeyed.

Furthermore, at this meeting the Editorial Board was authorized to hold any hearings which might be deemed desirable and to submit any amendments deemed necessary or advisable in the light of criticisms or suggestions received from any source to the next joint meeting of the Institute and the Conference to be held at Washington in May, 1950, at which time the Code was intended to be presented for final adoption.

The plan to have the Code presented for final adoption in May, 1950 was found to be quite impractical as a number of demands were made by various organizations to have the Editorial Board hold hearings on certain provisions of the Code. It was deemed undesirable to have hearings held by a board of five members. Accordingly, the original agreement between the two sponsoring bodies was amended so as to make the Editorial Board consist of 15 members. This Board was known as the Enlarged Editorial Board.⁸

The Editorial Board, as well as the Enlarged Editorial Board, took the work of supervising the preparation of the Code very seriously. Frequent meetings were held to discuss problems which required resolution otherwise than by the reportorial staffs which had the various articles of the Code in charge.

Joint meetings of the Institute and of the Conference were held in Washington in May and September of 1950. At the May meeting, the Code was recommitted to the Editorial Board for the purpose of making such changes as might be indicated by hearings which it was contemplated should be held by the Board.

On January 27, 28 and 29, 1951, the Editorial Board held hearings in New York City at which Mr. Walter D. Malcolm, Chairman of the American Bar Association Committee on the Commercial Code, and numerous representatives of business and industry appeared voicing cer-

8. The new members of the Board, half representing the Conference and half the Institute, were Howard L. Barkdull of Cleveland, Ohio; Robert K. Bell of Ocean City, New Jersey; Lawrence Bennett of New York; Ben W. Heineman of Chicago; Albert E. Jenner of Chicago; Arthur Littleton of Philadelphia; Willard P. Luther of Boston; Kurt F. Pantzer of Indianapolis; R. Jasper Smith of Springfield, Missouri and Charles H. Willard of New York. All of the new members of the board were practicing lawyers.

tain objections to specific provisions of the Code. As a result of the hearings, the Board resolved to recommend a number of amendments and for the consideration of these amendments met on March 17 and 18, 1951.

At the joint meetings of the Conference and the Institute held in May 1951, it was decided to eliminate from the Code article 4 on bank collections because of what seemed to be insurmountable difficulties in having the article accepted by the Federal Reserve Banks and others. With the elimination of this article, the Code was again believed to be finally approved. However, during the summer of 1951, Mr. Malcolm, one of the nation's outstanding bank lawyers, voluntarily redrafted the article of the Code on bank collections and held numerous conferences with those who insisted in May that the entire article be dropped. His redraft was considered when the two sponsoring bodies met in New York City in September, 1951 and with some amendments was inserted in the Code.

Also, during the summer of 1951, a subcommittee of the Editorial Board met with a committee of the Bankers Association for Foreign Trade for several days in New York City and discussed thoroughly article 5 on letters of credit. Numerous changes were agreed to and recommended to the entire Editorial Board which in turn recommended that they be approved by the joint meeting of the Institute and the Conference at New York City in September.

Further, in an effort to satisfy the Warehousemen's Association, Merchandise Division, article 7 of the Code was rearranged in such a way as to place as many facets of the article as possible under the heading "Warehouse Receipts." Accordingly, at the joint meeting of the Conference and the Institute held in New York City in September, articles 4, 5 and 7 were again considered. At the conclusion of their consideration the Code was promulgated.⁹

The following week the Board of Governors and the House of Delegates of the American Bar Association unanimously endorsed the Code.¹⁰

Seemingly, the work of the Editorial Board had been concluded. However, in the fall of 1952, just as the Code was about to be introduced in a number of state legislatures, additional objections were made by interests which had remained silent during the years of the Code's intensive preparation. Accordingly, the Editorial Board was reactivated to consider these objections and any others which might subsequently be made.

The Board met on December 29, 1952, February 16, 1953 and May 21, 1953. On the first two dates, hearings were held. As a result of these meetings, the Board recommended certain further amendments. These amendments came before the Institute at its annual meeting in Washington

9. 1951 HANDBOOK 161.

10. 1951 REPORTS OF THE AMERICAN BAR ASSOCIATION 174.

in May, 1953 and were unanimously approved as were the official comments to the Code; and the amendments and comments were brought before the annual meeting of the Conference in Boston in August, 1953 for ratification and were likewise approved.

With the promulgation of the Code and the several amendments which were subsequently approved by the Editorial Board, the Institute had completed its participation in the project. The Institute is a tax-exempt organization and as such is prohibited from advocating the passage of legislation. The Conference, on the other hand, is an organization of state officials not subject to the restriction which prevents the Institute from actively seeking the passage of legislation.

The Conference delegated to its Commercial Code Committee the duty of following up the activities looking towards the passage of the Code in all of the states, the District of Columbia and the other jurisdictions which ought to have the same commercial laws as the states.

In 1953 the Code was introduced into the Legislatures of California, Connecticut, Illinois, Indiana, Massachusetts, Mississippi, New Hampshire and Pennsylvania. It had previously been introduced for only educational purposes in the Legislatures of California, Mississippi and New York.

Legislative or other study committees or commissions were authorized to examine the Code following the 1953 sessions and to report back to following sessions of the Legislature in New York, California, Connecticut, Illinois and Massachusetts.¹¹

Only Pennsylvania enacted the Code. Both Houses of its Legislature passed it unanimously early in 1953 and on April 6, 1953 Governor Fine approved it as Act No. 1 of the 1953 Session of the Pennsylvania Legislature.

As enacted in Pennsylvania in 1953, there were no variations in the Pennsylvania Code from the official text as recommended by the Editorial Board.

The Code became effective in Pennsylvania on July 1, 1954.

The New York Legislature, instead of enacting the Code as had been expected, referred it to the New York Law Revision Commission for study and recommendation and gave to the Commission an appropriation almost as large as the total cost of preparing the Code. The Law Revision Commission set up an elaborate organization and continued its study for several years. It made its report on February, 1957.¹² It found that the

11. It is an interesting fact that, except for the New York Law Revision Commission, no legislative study group ever reported adversely on the Code.

12. 1956 REPORT OF THE NEW YORK LAW REVISION COMMISSION, including a Report and four Appendices relating to the Uniform Commercial Code.

idea of assembling all important commercial law in a single statute was good but that the Uniform Commercial Code as promulgated was not suitable for passage by New York. It made scores of suggestions for change, many of which were of minor importance, but some of which were indeed important and helpful.

Immediately upon the publication of the New York Law Revision Commission's Report, the Editorial Board of the Code was reactivated for the purpose of considering in detail the criticisms made by the New York Law Revision Commission.

Incidentally, it should be stated that the action of New York in referring the Code to the New York Law Revision Commission for study stopped all enactments of the Code so that Pennsylvania was the only state in which the Code was effective. As previously related, the Code became effective in Pennsylvania on July 1, 1954 and operated to the satisfaction of all parties affected by it from that date forward.

The reactivated Editorial Board completed its work in the fall of 1956 and promulgated a revised Uniform Commercial Code which was enacted by Massachusetts, largely as a result of the persistent efforts of Walter D. Malcolm, in 1957, to become effective October 1, 1958.

Enactments by other states followed the action of the Massachusetts Legislature. At first the enactments amounted to a mere trickle—Kentucky in 1958, Connecticut and New Hampshire in 1959 and Rhode Island in 1960. After this, enactments occurred at an accelerating pace. Eight states enacted the Code in 1961 and four in 1962, this being an even-numbered year in which many states do not have general sessions of their legislatures. However, among the states which enacted the Code in 1962 was New York, by many deemed the most important commercial state in the country.

It should be noted that in 1959 (effective January 1, 1960) Pennsylvania re-enacted the Code adopting the revised version which the Editorial Board had promulgated in 1956.

In 1963, eleven states became Code states and Congress enacted the Code for the District of Columbia. Among the states enacting the Code in 1963 was California, one of the very important commercial states but whose Legislature riddled the Code with so many amendments as to render it doubtful whether the California Code is entitled to be designated as the *Uniform Commercial Code*.

In 1964, Virginia was the only state to enact the Code, but in 1965, thirteen states and the Virgin Islands became Code jurisdictions.

In 1966, five additional states joined the procession, and in 1967, two more came into the fold.

The Code is effective today in all jurisdictions which enacted it except

North Carolina, Mississippi, Idaho and Arizona, in all of which states it becomes effective in 1968.

In sum, the Code is now on the statute books of forty-nine states, the District of Columbia and the Virgin Islands. Louisiana is the only state which has not enacted the Code.

The enactment of the Code by forty-eight states and two additional jurisdictions in ten years has broken all records for the enactment of uniform legislation.

One discouraging spot must be recited as a part of the foregoing history.

No piece of legislation was ever considered as carefully by as many of the topflight lawyers of the country as the Uniform Commercial Code. The manner of its preparation and the large number of lawyers who were active in its consideration was no secret. Literature giving the facts on these matters was placed in the hands of the members of every legislature which was considering the Code.

One would have thought that an act so carefully prepared and reviewed by so many judges, lawyers and law professors would have been accorded due respect and that any legislature would have hesitated to make non-uniform amendments, particularly as the primary purpose of the Code is to make uniform the laws of the various American jurisdictions regulating commercial transactions.

Unfortunately, this has not been the case in the enactment of the Code by most of the legislatures. On the contrary, various legislative bodies have seen fit to make a total of approximately 775 non-uniform amendments. The behavior of the various legislatures varied widely—some states enacted the Code with practically no amendments; others seemed to take delight in making unofficial amendments which would *pro tanto* destroy the Code's uniformity.

Almost half of the amendments were to article 9 on secured transactions. This article was the one completely novel article of the Code which may well account for the feeling in many states that if the drafting of the Code had been committed to their respective legal draftsmen, a very much better job would have been done. However, the fact that the Code has been in force in Pennsylvania since July 1, 1954 to the apparent satisfaction of all segments of the commercial world is an almost complete answer to the amenders.

As the volume of business and finance increases in this country from month to month, the importance of having uniform laws to govern commercial transactions increases in almost the same proportions. As the states have done a superb job in enacting a statute of this size and importance in

FOR YOUR INFORMATION

| State | Adoption Date | Effective Date |
|----------------------|---------------|--------------------|
| Pennsylvania | 1953 | July 1, 1954 |
| Massachusetts | 1957 | October 1, 1958 |
| Kentucky | 1958 | July 1, 1960 |
| Connecticut | 1959 | October 1, 1961 |
| New Hampshire | 1959 | July 1, 1961 |
| Rhode Island | 1960 | January 2, 1962 |
| Wyoming | 1961 | January 2, 1962 |
| Arkansas | 1961 | January 1, 1962 |
| New Mexico | 1961 | January 1, 1962 |
| Ohio | 1961 | July 1, 1962 |
| Oregon | 1961 | September 1, 1963 |
| Oklahoma | 1961 | January 1, 1963 |
| Illinois | 1961 | July 2, 1962 |
| New Jersey | 1961 | January 1, 1963 |
| Georgia | 1962 | January 1, 1964 |
| Alaska | 1962 | January 1, 1963 |
| New York | 1962 | September 27, 1964 |
| Michigan | 1962 | January 1, 1964 |
| Indiana | 1963 | July 1, 1964 |
| Tennessee | 1963 | July 1, 1964 |
| West Virginia | 1963 | July 1, 1964 |
| Montana | 1963 | January 2, 1965 |
| Maryland | 1963 | February 1, 1964 |
| California | 1963 | January 1, 1965 |
| Wisconsin | 1963 | July 1, 1965 |
| Maine | 1963 | December 31, 1964 |
| Nebraska | 1963 | September 2, 1965 |
| Missouri | 1963 | July 1, 1965 |
| District of Columbia | 1963 | January 1, 1965 |
| Virginia | 1964 | January 1, 1966 |
| Virgin Islands | 1965 | July 1, 1965 |
| Utah | 1965 | January 1, 1966 |
| North Dakota | 1965 | July 1, 1966 |
| Iowa | 1965 | July 1, 1966 |
| Washington | 1965 | July 1, 1967 |
| Nevada | 1965 | March 1, 1967 |
| Hawaii | 1965 | January 1, 1967 |
| Kansas | 1965 | January 1, 1966 |
| Colorado | 1965 | July 1, 1966 |
| Florida | 1965 | January 1, 1967 |
| Texas | 1965 | July 1, 1966 |
| North Carolina | 1965 | July 1, 1967 |
| Minnesota | 1965 | July 1, 1966 |
| Alabama | 1965 | January 1, 1967 |
| South Dakota | 1966 | July 1, 1967 |
| Vermont | 1966 | January 1, 1967 |
| South Carolina | 1966 | January 1, 1968 |
| Mississippi | 1966 | April 1, 1968 |
| Delaware | 1966 | July 1, 1967 |
| Idaho | 1967 | January 1, 1968 |
| Arizona | 1967 | January 1, 1968 |

January 1, 1967.

record time, it will be a shame if, because of unauthorized non-uniform amendments, Congress should ultimately be compelled to enact a federal commercial code applicable to all transactions within the jurisdiction of Congress. This would probably force the various states to bring their commercial codes in line with the federal code as to any transactions which could not be reached by a federal code.

It will be interesting as the years go on to watch developments. I am completely confident that sooner or later the commercial world is going to insist on complete uniformity of law regulating commercial transactions within the United States. Whether that will be accomplished by having the states repeal their unofficial non-uniform amendments to the Uniform Commercial Code or by the enactment of a federal commercial code remains to be seen.