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WHY A COMMERCIAL CODE?*

BY KARL LLEWELLYN**

The Uniform Commercial Code has not quite reached its final form; the final draft is going through the press right now. Nonetheless, it has already been introduced for study in New York, Mississippi, and California, and will certainly come up for consideration in all of the state legislatures in 1953.

What is this animal, why is it, and how did it come to be? It is an effort to break up the Uniform Acts so familiar in this State, and, I think may fairly say, Acts which you, along with all of the other states which have adopted them, have found extremely useful. The Code is an effort to break up those Acts, to modernize them, to put them into a coherent and accessible form, to add to them a large body of material that should have been put into them before but has not, and to clarify the frequent case law disputes that have arisen.

I refer especially to the Uniform Negotiable Instruments Law, which is the foundation of banking practice. I refer to the Uniform Sales Act, which has served well, and to that large body of the law on sales of goods which never got around to being put into the Uniform Sales Act, and which exists as dissociated case law, difficult to find and not too easy to read when you do find it. I refer to the short-term secured financing covered by the Uniform Trust Receipts Act and the Uniform Conditional Sales Act, one dealing with certain phases of inventory financing, and the other with the financing of individual consumer purchases. I refer also to the problems which fell outside of the first Negotiable Instruments Law, such as the law of the sale of stock securities which the courts have held not to be within this sphere. I refer to the law of bulk sales which rests upon a statute developed not by the Commissioners on Uniform State Laws, but instead by the National Association of Credit Men. I refer finally to the law of documents and title, bills of lading, and warehouse receipts, also familiar in Tennessee and in long use.

All of this law is not only part of the law of a business community which reaches across state lines and which therefore falls into the field of what can properly be hoped to be uniform, but it is also a body of law which today has an amount of experience behind it wide enough and strong enough to warrant the reduction of that law to statutory form. It is moreover a body of law which today is extremely scattered, no longer has identity, is costly in time to the lawyer, and therefore costly in money to the business man.

It costs the business man first because of the uncertainty. There are

*Address delivered at the 1952 Convention of Tennessee Bar Association.

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fields in which no man, before the case has been brought up to the supreme court of the particular state in the particular instance, has any assurance as to what the law is. There are fields, therefore, in which the counselor is without a sound foundation for effective counseling. Uncertainty is expensive, but there is another aspect to it. This law of business, as we now have it, is a law which is not only obscure but misunderstood; it is felt to be strange, distant, and even dangerous by the ordinary business man. He tends to keep away from this law as far as he dares because it seems to him to be queer stuff. The queerness lies in two things: first, in the fact that this body of law is unfamiliar, and secondly, in the fact that a good portion of the law is out of date.

Where the law has become familiar—and there are two fields in which the relevant law has become familiar—we find that the business men concerned are pleased with it and are proud of it, and are willing to take the parts of it they least like and most differ with, because of the pleasure and pride they take in working with their law. It's a law that they know, that they stand on, and that belongs to them, which is the point of view any citizen in a country like ours ought to have towards the law.

The first area where this has worked out, and worked out properly, is that portion of banking operations which has to do with the handling of checks, bills and notes, at least so far as covered by the old Negotiable Instruments Law. A good many here no doubt have, from time to time, taught a course in the evening at the American Institute of Banking to bank clerks who were finding out why the law concerning their work is the way it is, and getting to understand the reason for the things that they do simply as a routine matter. If you have, you have discovered that at the end of such a course you are dealing with a body of men who love the law that is their law, and they are proud of it. The same is true of the warehousemen and their feeling for the particular body of law that lies within their sphere. We believe that this attitude of proud participation and support is an attitude this country needs on the part of everybody, and we feel that that is the kind of attitude which can be achieved by a statutory simplification and a modernization which makes the whole relevant body of material accessible. We believe that it can be achieved and should be achieved.

In addition to that, there are some things that have come to be in the law which we never have thought about, traps which any decent system of law must not put into the hands of a sharpy so that he may take advantage of the man who is trying in good faith but without legal skill to accomplish decent results. I will give you a picture of this kind of trap. It just happens under the law as it now stands—and it stands only because nobody ever got around to thinking and doing anything about it—that when you deliver goods in pursuance of a contract to deliver, you have no right to a receipt. If the fellow at the other end refuses to give you a receipt but insists upon

delivery, you come into default in your contract if you insist upon the receipt. Now, no decent business man would refuse to give a receipt. Look, however, at the opportunity this offers to the sharp. A man has made a contract for the purchase of goods, the time for delivery has come, the price has gone down, the contract has become extremely uncomfortable to the buyer. So what does he do when the goods arrive, having been advised by a lawyer as crooked as he? He refuses to give a receipt. The goods are taken away; the day for delivery has now gone by; the sale is in default; the seller has no rights under his contract of sale; a contract that was profitable has become a loss because of a trap in the law which penalizes good faith and makes bad faith profitable.

The Code is not full of corrections of things like that, but it is fair to state that I could go through the Code and show you at least forty such places where things that have made trouble in the courts, proving that they are not purely theoretical, and which have made trouble out of the courts as well, have been fixed up in the interest of simple operation. Correction of these flaws has made it a little more difficult to be dirty and very much safer to be honest and decent in the handling of one's business.

The question that faces a lawyer first of all, as he thinks about the Code, is: Do I have to learn all over again everything that I have already learned and upon which I have relied now these many years? Is the law which I have practiced to be upset by a new body of material? Must I start afresh? As to this, let me say three things. I wish you would let me say them very slowly, very loudly, and with all the cogency at my command. The first is that you don't know the present law, and if you are practicing on the assumption that you do, all I can say to you is "God pity your clients!" The amount of abysmal, unbelievable, utterly un-understandable, base ignorance on the part of the bar giving commercial advice which I have found in the highest quarters of the land, is a thing which has turned my hair—not white,—but taken it out—during the process of discussion of the problems of this Commercial Code. Shall I say it over again, or did I make it moderately clear? Shall I give you an illustration? In order to simplify things as best we could, we provided the same kind of law for the transfer of bonds and the transfer of stock. One of the things we provided was that where this stuff ran to a registered owner, a simple signature of the person concerned would serve as an endorsement. Whereupon the bar pointed out to us that this was something the bar wouldn't take, this was something that nobody would take. Yet at the time the bar was fighting us on this point, the very provision that we had incorporated into the Code, the very provision in dispute—was already the statutory law in 48 states out of 48. Do I begin to persuade?

Now, what we do believe is this: we believe that fresh language and gathering it all into one little place, gives a fair start for really knowing what the law involved is. We think that the Code is, on the whole, moderately

clear; we wish it were much clearer, but as statutes go, it really isn't bad. A great deal of what is wrong with it now has been put in during the past three years in an effort to pacify the bar; but on the whole, just between ourselves, they really aren't quite ready for the best kind of law. That is a fair statement, and all of you know it down in your own souls. You all have a hangover from law school; you feel that the proper way to draw a statute is to mark it out as if it was written for dumbbell judges whom you are trying to corral. Of course that isn't the way to write good law. The way to write good law is to indicate what you want to do, and you assume within reason that the persons the law deals with will try to be decent; then after that, you lay down the edges to take care of the dirty guys and try to hold them in, which means that every statute ought to have two essential bases, one to show where the law wants you to go, and one to show where we will put you if you don't.

Now most lawyers are still tending to think in terms of only putting in the second kind, presupposing a certain amount of bad faith or stupidity on the part of the courts. I am willing to admit a certain amount of bad faith and stupidity on the part of anybody today, but I am reasonable and I don't think general standards ought to be drawn with the assumption that there is going to be unreasonableness. When we weren't allowed to put in where we wanted to go in terms of statements of purpose, we at least got the thing set up so that we are allowed to state in accompanying comments where the particular sections are trying to go. The statements that go along with the text, the statements of purpose which we call Comments also have a very real purpose to the lawyer who is facing the new study. By adding to the text of the statute a reasonably complete body of comment indicating its purpose, with cross-references to other related sections of the Code, the text and comment provide the material with which a man who has never seen the Code before can work his way with effectiveness. The result is that you have what I believe is a completely unmatched piece of legislation in the relative ease with which a man who has never seen it before can bring it to bear, and bring it to bear with some effectiveness and speed, upon a completely novel problem. I think that is of tremendous importance to the courts, because I think especially on the financial side and on the side of winning the favors of business men who are buying and selling, that altogether too much of the financing has centered in groups in financial centers largely because only there was the skill of specialized counsel available to go through this ungodly, this terrifically complicated and delicate mess of law which distinguishes between a trust receipt, a chattel mortgage and a conditional sale, let us say, throwing in for good measure whether a deed of trust is any of these or something different. We believe that is the kind of thing that has greatly favored the concentration of a large quantity of financing in non-local financial centers. We believe that any legislation which opens up this

body of stuff and lends clarity to it with relatively simple procedures will render a service not only to the bar but to the country and especially to business.

The picture for the business man then is that the Code will make his law come home and be friendly and be understood. It will eliminate something of which he isn't fully conscious—the unnecessary tax on his business that legal uncertainty now imposes. For the lawyer, the job is not only to bring him up-to-date law, but law that is intelligible and available to him with relative speed in this day when government regulations and other bodies of new law are consuming all the time he has available and which at the same time will give him a way to use it without spending a lifetime of study on it.

Now comes the question of whence the product, and how did it come to be? The National Conference of Commissioners on Uniform State Laws, so long served by distinguished members of the Tennessee Bar Association, is the original source of the whole body of Uniform Acts that I have mentioned, and which, except for two, are the law in Tennessee. They have never put out an act on bank collections, nor an act on bulk sales. The rest of the well-known Uniform Acts are products of the Conference. The Conference has representatives from all of the states; it is as hard a working body as I have ever seen, and they have pride in their work. The Commissioners provide a degree of intelligent criticism such as I have never heard from anybody dealing with legislation. It is an amazing thing to see the difference between the operations of the American Law Institute for example, which is regarded as a very distinguished body, and the Commissioners. The difference is that the members of the Institute by and large appraise things from the angle of theory; they love a point of theory. They were trained I guess under the theoreticians, and they have come to enjoy points of theory; but you can't do anything with theory on the floor of the Conference of Commissioners. What the Commissioners present instead are questions like this: "I have a case where I have a plant . . .," or "Down my way, what they do is this . . ." You find the thing tested against the way it looks in the office when you are dealing with practical affairs, or the way it is going to look in court when you present a case. Since the men come from all over the country and are men of wide experience and shrewd observation, it means that you have a testing of the material in terms of its practicality, which I think is what we need.

The drafting committee submitted reports to a group of advisors between five and nine strong. The advisors always contain a couple of legal experts in the field, the kind of fellow who knows all the cases that ever were decided, beginning with something a little earlier than Coke, and coming down to the last advance sheet which appeared yesterday. There were a couple of those, but we didn't want any of them to be in on the drafting.

Then, we had in each group a couple of people whose function was to be lawyers. They weren't supposed to know anything about theory at all, except by accident. There has to be somebody to keep the experts from running wild, and that was the function of these advisors, and very well indeed did they perform.

After a session of three days or so over a piece of text it would go back to the reporting staff to be worked over for another six or seven weeks. Then we would be back, some of it done, some of it recanvassed, and always a new piece waiting to come. I can say there was session after session, running from three days to four days, at which we would sit down and do nothing all day and most of the evening except iron out problems of policy and of effectiveness, with attorneys for railroads, with attorneys for merchants. In addition to all of that, there was the steady flow of suggestions from interested people and especially from the teaching fraternity. Law teachers at an early date began to write articles examining the statutory subject matter and going about their own communities trying to find out how it would work. That material came in from correspondents and it came in also from publications. We had critics who were most friendly, and critics who were most nasty; and both were good, because each had a completely different kind of approach. We had critics who represented a single client and couldn't see anything except his interest; we had critics who had a sense of public welfare in addition to the experience gained in working in their particular field. We were left finally with the last body of people who were called in, the committees of the bar associations here and there, who were willing to pick at and study the draft either in detail or as a whole. I may say that nowhere did we receive finer, more constructive and suggestive criticisms than from the bar associations.

I hope that I have made you see the three things that are vital. First, that this Code has a value to the public. Second, that it has a value to every lawyer and to the bar. Third, that it is workable. Surrounding all that and underlying it like the bass drum under the mallet, is the proposition that it has been thought through, thought out, worked on and tested in detail.

I am ashamed of it in some ways; there are so many pieces that I could make a little better; there are so many beautiful ideas I tried to get in that would have been good for the law, but I was voted down. A wide body of opinion has worked the law into some sort of compromise after debate and after exhaustive work. However, when you compare it with anything that there is, it is an infinite improvement.

As I close I want to set before you a picture. You have here behind me an alcove, and I want you to see that alcove filled with bookshelves and the bookshelves filled with books; then I want you after you have spent just a second trying to visualize books which start at the floor and go to the ceiling all the way around, then I want you to look at this book in my hand. This

book contains more than the alcove of books, because in addition to bulk in the alcove, you have obscurity. Obscurity we have in the Uniform Commercial Code too, but the obscurity there, compared to the obscurity of the present law, is clarity itself. Just one more word, and that is this: if there were no question of uniformity in the picture, the Code still represents from the standpoint of the business man and of the commercial lawyer, and from the standpoint of the general community much of the better body of law on the subject matter involved than the existing law of any one of the states. It would be worth adopting without reference to uniformity.

ARTICLE TWO — SALES

The Uniform Sales Act was first recommended by the Commissioners on Uniform State Laws in 1906 for enactment by the several states. Since that time the Act has been adopted by thirty-four states, including Tennessee in 1919¹ with amendments in 1923.²

As early as 1917, however, the National Conference of Commissioners advocated a Federal Sales Act. This movement was encouraged by the American Bar Association and the Merchants' Association of New York, and in 1940 a proposed federal sales statute was presented to the Congress of the United States.³ This differed widely from the provisions of the Uniform Sales Act. As a result strong opposition developed to the passage of any federal legislation divergent in concept and scope from the Uniform Act then prevailing in three-fourths of the states.

Recognizing the deficiencies and obsolescence of the Uniform Acts relating to commerce, the Conference in 1940 decided, in preference to amending the Sales Act, to draft an entirely new commercial code, which would include a treatment on sales acceptable to those groups urging passage of federal legislation in this field. The preparation of the Act designated as Article Two of the Uniform Commercial Code, Official Draft, was begun in 1943 and completed in 1952.⁴

The Code is made up of ten Articles which cover the entire field of commercial transactions. Article Two, the Sales Article, was drafted in the main by Professor Karl Llewellyn of the University of Chicago Law School. This Article embodies a complete revision and modernization of the Uniform Sales Act in terms of up-to-date commercial case law, and consists of 104 sections, divided into seven major categories. Each section is followed by the

1. TENN. CODE §§ 7194-7270 (Williams, 1934). The UNIFORM SALES ACT of 1906 will be hereinafter designated U.S.A.

2. TENN. CODE §§ 7221-7225 (Williams, 1934).

3. The proposed Federal Act, H.R. 8176, 76th Cong., 3rd Sess. (1940), was the subject of an excellent symposium in 26 VA. L. REV. (1940).

4. The UNIFORM COMMERCIAL CODE, OFFICIAL DRAFT (Text and Comments ed. 1952) is hereinafter referred to as the Code, or abbreviated U.C.C.