

Reflections of a Drafter: Homer Kripke*

Professor Kripke: In 1945 after the war I began working for CIT Financial Corporation, a major finance company, and at that time chattel security law was like the condition described in the second verse of Genesis, “without form and void and darkness lay over the face of the deep.” We knew that we were developing chattel security law. The banks were giving us no help, because the banks had disabled themselves by two or three obsolete theories.

One was the theory that since installment credit, with which we were principally concerned, was time credit and that since the banks had *demand* deposits, they were unable to make *term* loans. That theory persisted for a long time after the war. It left the field of investment loans—both commercial and consumer—to the finance companies.

The second point was that neither the consumer nor the small businessman who might buy machinery on credit was a balance sheet risk and therefore not an acceptable bank risk, because they couldn’t see ability to pay on the consumer balance sheet. The banks failed to understand that the substitute for balance sheet assets on the part of the consumer was his job and the substitute in the case of the small businessman was his expectation of profits from the use of equipment that he was buying and from the depreciation on the equipment itself. So we had the field all to ourselves, and we frequently said what someone else here has already said today, that we existed only because the banks were so dumb.

Then in the early postwar period we heard that the American Law Institute and the Commissioners on Uniform State Laws were drafting this Uniform Commercial Code, and we wished it well and we waited with some interest to see what would happen. In 1948, after coming back from the Commissioners’ annual meeting, a finance lawyer sent to me the first draft of the first part of the Secured Transactions article of this Code, which was a chapter on inventory.

Now, Karl Llewellyn had in 1948 in an article expressed the insight, and at that time it was a genuine insight, that accounts receivable were merely an extension of inventory.¹ He drafted that into this first—or maybe Al Dunham drafted it—into this first draft of an inventory chapter. Having said in a definition that inventory included accounts, they forgot all about it. They wrote a reasonably intelligent first draft on tangible inventory, but it gave me nightmares as applied to accounts receivable, to which it was applicable under the definition.

Now, Al Dunham and I both happened to live in Westchester County, New York, at the time, I had met him socially, and I asked him whether Karl

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1. Llewellyn, *Problems of Codifying Security Law*, 13 LAW & CONTEMP. PROBS. 687 (1948).

Llewellyn was approachable to talk about this Code and this draft. Al assured me that Karl was, and I met with Dunham and Llewellyn, and later with Soia, up at Columbia Law School. I pointed out that this chapter simply would not do as to accounts receivable and that there were a fair amount of naivetés as to tangible inventory financing and how it worked. Karl was very ready to admit mistakes and he told me that he was particularly glad to have someone who knew something practical about the business, because he knew that all of the reportorial staff then lacked that information about secured chattel transactions. He impressed me into the Code work, and I've been at it ever since.

He also told me this story: that in an effort to make up for their own ignorance on the practical aspects of the subject, the reporters had prepared an elaborate questionnaire and sent it to the banks, inquiring how and under what conditions they used conditional sales and chattel mortgages and trust receipts, and what was their experience, and they got back this typical answer: "We don't know anything about that stuff because we only do business with people who come well recommended." That was only 33 years ago! It shows how fast the world has changed.

Well, at any rate, I was working with them on these drafts, but for some time I felt a stand-offishness, resting on the fact that I was employed by a finance company and they didn't quite trust me. I knew that the feeling existed when the Association of the Bar of the City of New York organized its first committee to consider the drafts of this Code as it came out, and Charlie Willard,² who was the first chairman of that committee, kept me off the committee and told me that Soia had told him not to let the finance companies capture the committee.

Well, Soia's attitude subsequently changed. She has on more than one occasion expressed the point that she and the others had come to learn that I was able to wear two hats, as she put it—to know when I was an advocate for my client and when I was trying to function as a member of the Code team.

Grant Gilmore has expressed a similar point of view very recently in writing when he contributed an appreciation to the New York University Law Review, April 1981 issue, which is dedicated to me, where they congratulate themselves on my retiring from New York University.³ In that appreciation Grant says that he early learned that he could tell readily, and that I knew, when I was speaking for my clients and when I was trying to speak for the Code group in an impartial fashion.⁴

We soon had occasion to deal with some of the real fundamentals of this issue. The academic drafting staff for a while posed the question: Should we abolish secured credit? Having posed it, they decided that it was out of the

2. Charles Willard, a member of Davis, Polk & Wardwell of New York City, later became a strong supporter of the U.C.C., a member of some of the drafting consultant groups, and a member of the Council of the American Law Institute.

3. *Dedication to Professor Homer Kripke*, 56 N.Y.U. L. REV. 1 (1981).

4. Gilmore, Remarks, in *id.* at 12.

question to think that they could draft a statute that could be enacted if they made any such provision. Having thus determined that there had to be secured credit, they adopted provision after provision facilitating it: the notice filing, the after-acquired property and the future advances provisions, the abolition of *Benedict v. Ratner*⁵ and so on, all of which led to the tremendous facilitation of the "floating lien." They also abolished all of the formalities of security agreements on the quite reasonable theory that if you were going to permit secured credit, there was no reason to leave obstacles in the path of the secured party in the hope that he might trip up and have his security disallowed in bankruptcy.

Now, as you probably know and can certainly guess, the commercial law bar representing general trade creditors was considerably concerned about this great facilitation of secured credit and the elimination of all the technical obstacles to the validity of it under state law and in bankruptcy. There was considerable debate on the subject, but the draftsmen stood firm. Then we encountered some other opposition on the subject. The bankruptcy academic specialists, notably Frank Kennedy and Vern Countryman,⁶ kept on writing articles to the effect that many of the provisions of Article 9 would be held to be invalid in bankruptcy and particularly the floating lien provisions would be held to be preferential. I think that I was the only person who stuck his neck out far enough to take the position that those provisions would be upheld in bankruptcy. They subsequently were upheld, as you know, in the *Portland Newspaper*⁷ and other cases.⁸

The famous Gilmore Committee, which was intended to reconcile the Code and the Bankruptcy Act as both came up for revision, started out on the assumption that the thing to do was to try to save revolving credits or floating liens in some fashion because they might be useful and they were surely going to be declared invalid in bankruptcy. Then when the *Portland Newspaper* and the *Grain Merchants*⁹ case in Indiana, and the third case came down upholding revolving credits,¹⁰ the committee had to switch its direction and try to put some limit on the doctrine by which the revolving credit had been upheld. And its deliberations led to the present preference section of the Bankruptcy Act.¹¹ Despite having won in state law on the proposition that secured credit ought to be facilitated because it is the means by which small business financ-

5. U.C.C. § 9-205 "repeals" the rule of *Benedict v. Ratner*, 268 U.S. 353 (1925).

6. See Kripke, *A Reflective Pause Between U.C.C. Past and U.C.C. Future*, 43 OHIO ST. L.J. 603, 607 n.18 (1982).

7. *Dubay v. Williams*, 417 F.2d 1277 (9th Cir. 1969), *aff'g In re Portland Newspaper Pub. Co.*, 271 F. Supp. 395 (D. Ore. 1967).

8. *In re King-Porter Co.*, 446 F.2d 722 (5th Cir. 1971); *Grain Merchants of Ind., Inc. v. Union Bank & Savings Co.*, 408 F.2d 209 (7th Cir.), *cert. denied*, 396 U.S. 827 (1969).

9. *Grain Merchants of Ind., Inc. v. Union Bank & Savings Co.*, 408 F.2d 209 (7th Cir.), *cert. denied*, 396 U.S. 827 (1969).

10. *In re King-Porter Co.*, 446 F.2d 722 (5th Cir. 1971).

11. 11 U.S.C. § 547 (Supp. IV 1980). See a summary of the Gilmore Committee's position in *REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES (Part I)*, H. DOC. 137 (Part I), 93d Cong., 1st Sess. 206-10 (1973).

es itself, we find ourselves today operating under the new Bankruptcy Code in which there is whole series of provisions which are intended to limit secured credit, permit the debtor-in-possession or the trustee in effect to disregard it, to utilize cash proceeds, to utilize cash security and the like. There are also supposed to be protective provisions to counterbalance those provisions, and we have a major problem ahead of us, I think, in determining whether the Bankruptcy Code will have nullified the clear intent of the draftsmen of the Uniform Commercial Code in that respect. The bankruptcy specialists may have won the last battle of the war, and if they have done so, I think that we will regret it. They seem to have won a new supporter in Grant Gilmore.¹²

Soia herself, having started out with the suspicion that I described, came completely around, I think. When the question of the validity of an important provision of the Code for secured credit came up, section 9-504, which was challenged as a violation of due process in permitting self-help peaceful repossession by secured creditors without a court proceeding, Soia wrote the brief for the Permanent Editorial Board in the leading case which settled the question in favor of the validity of 9-504, *Adams v. Southern California First National Bank*¹³ in the Ninth Circuit, which went to the Supreme Court, and in that brief she included a section (which I don't think she wrote herself) providing a Brandeis-type factual argument emphasizing that more credit for small business comes from lender-secured parties than comes from unsecured trade creditors.

I'd like to talk just for a minute in a general response to the question Professor Whaley posed to all of us by mail before this meeting: What did we do right and what did we do wrong in the drafting of the Code? In the first place, you have to realize that decisions were made not only by the reporters with the academic and industry advisory groups, but also by what might be described as the political arm of the American Law Institute and Uniform Commissioners process, General Schnader of Pennsylvania,¹⁴ who has been mentioned, and Judge Goodrich,¹⁵ then the director of the American Law Institute. There was a time when I, in common with all of the other draftsmen, would utter maledictions against these political directors under our breath, because they seemed to be pressing for the completion of the job in too much of a hurry, talking about a "superlative code" when we knew it still had "bugs," and we wondered whether they had ever read it. But as some-

12. See Kripke, *A Reflective Pause Between UCC Past and UCC Future*, 43 OHIO ST. L.J. 603, 608 n.23 (1982).

13. 492 F.2d 324 (9th Cir.), cert. denied, 419 U.S. 1006 (1974).

14. William A. Schnader ("General" because he had been Attorney General of Pennsylvania) was a First Vice-President both of the American Law Institute and of the Commissioners on Uniform State Laws. See *Reflections of a Drafter: Soia Mentschikoff*, 43 OHIO ST. L.J. 537, 541 (1982). He had been the Republican candidate for Governor of Pennsylvania in 1936, but had lost in a Roosevelt landslide. Pennsylvanians assert that the vital first enactment of the Code in Pennsylvania occurred because the legislature accepted General Schnader's assurances as to its merits without independent study.

15. Judge Herbert F. Goodrich had been a professor of law at the Universities of Michigan and Pennsylvania. He served as Director of the American Law Institute while he was a member of the United States Court of Appeals for the Third Circuit.

body has already said today, and as time has proved, they had a very keen sense as to just how long the drafting process could go on. They had a fixed yardstick: when the money would run out. But beyond that, there was a serious question of fatigue, not only among draftsmen and their advisors, but among the audiences of the two sponsor organizations who heard the material presented again and again.

And I recall expressing the hope that we could leave the draft of the Code on the shelf for five years, at least as to Article 9, so that we could test it in our minds as we encountered actual situations in practice before attempting to enact it. I realize, of course, now that if we had done that, it would have been the end of the thing, because the momentum had to be maintained if there was to be any hope for enactment. I think on the whole, despite the complaints we had at the time, the political direction of the Code proved to have been very good and more accurate in its sense of the situation than we had been ourselves.

I would like to tell one story about that very great human being, Judge Goodrich, and I'm the butt of the story. When a first draft of the entire Code first became available in 1949, I began reading parts other than Article 9, which I had been working on, and I encountered something that I thought was very wrong—I no longer remember what it was, but I think it was in Article 6—and I wrote the draftsman a long explanation about why it was very wrong. When the next draft came through, I was indignant to see that the material was unchanged. Since I was so sure that I was right, I wrote him an even longer explanation talking down to what I perceived as his difficulty in understanding, and again another draft came through with the material unchanged. And again I was sure that I was right and I wrote a third explanation, and no doubt this time with some asperity. This time an answer came back, not from the draftsman but from Judge Goodrich. He wrote me something which I looked up in Bartlett's *Familiar Quotations* and found to be a quote associated with Oliver Cromwell, but I can't remember at the moment whether Cromwell said it or whether it was said to him. At any rate, Judge Goodrich said to me, "I beseech you in the bowels of Christ, bethink yourself that *you* might be mistaken." And I hope that I have never forgotten that lesson.

I will also tell you a story about General Schnader, and it has some relevance to the informal legislative history of the 1972 amendments to Article 9. Three of the early draftsmen, Gilmore, Coogan and Kripke, as they rode the hustings and participated in lawyers' institutes to introduce the Code in state after state, were somewhat free in pointing out that Article 9 was less than perfect. For instance, we wrote successive articles examining critically section 9-313, the fixture section.¹⁶ We persisted despite rumors that we were making the political arm of the Code unhappy.

16. Coogan, *Security Interests in Fixtures Under the Uniform Commercial Code*, 75 HARV. L. REV. 1319 (1962); Gilmore, *The Purchase Money Priority*, 76 HARV. L. REV. 1333 (1963); Kripke, *Fixtures Under the Uniform Commercial Code*, 64 COLUM. L. REV. 44 (1964).

Then, at the American Bar Association Annual Meeting in Chicago in 1963, General Schnader summoned Coogan and me to his hotel room and told us that he wanted us to stop criticizing the Code. His reason was that admissions by draftsmen that the Code was not yet perfect and perhaps not yet finished made enactment difficult. We asked him when we would be free to function as scholars and he answered "1967," by which date he foresaw universal enactment except in Louisiana. His forecast was exactly right, and in the fall of 1966 the Permanent Editorial Board took steps to establish the Review Committee for Article 9.¹⁷

Ten distinguished committee members were chosen. Gilmore and Coogan, as distinguished elders, were made Consultants to the Committee, but you will notice that in that exalted status they did not have a vote. Arguably, I was punished worse, having been made the working draftsman as Associate Reporter, perhaps in order to take my lumps,¹⁸ but with Bob Braucher as Reporter as a restraining influence on my wild tendencies.¹⁹ Bob had an early occasion to prove his skills as a moderating influence when General Schnader hit the roof after my first communication to the Review Committee suggested an agenda based on a then current article.²⁰ Since the ten members of the Committee and the distinguished elders were not a chorus of stooges, I welcomed Bob's diplomatic skills throughout the Committee's deliberations. But, of course, I do not mean to suggest that Bob functioned only as diplomat. He was an outstanding UCC and commercial lawyer and statutory draftsman.

Another restriction designed to keep our zeal for change from getting out of hand, which Bob Braucher firmly enforced on me, was that we were not to open up any part of the Code other than Article 9. I would dearly have liked to redraft sections 2-326 and 2-702, because they impinged on Article 9, but this restriction stood.

Well, now, Mr. Whaley asked us to talk about what we did right and what we did wrong. I think we were right in protecting secured credit, as I've already indicated. I think we did right in rejecting Soia's efforts to write consumer protection into the Uniform Commercial Code. You can find in the drafts a time when there was a complete disclosure statute on consumer transactions in

17. See *Foreword to 1972 Official Text and Comments*, in ALI AND UCCUSL, UNIFORM COMMERCIAL CODE 1978 OFFICIAL TEXT WITH COMMENTS, at xxxvii (9th ed. 1978).

18. See Gilmore, Remarks, in *Dedication to Professor Homer Kripke*, 56 N.Y.U. L. REV. 9, 14 (1982): I . . . took, I must confess, a perverse pleasure in seeing Homer as draftsman take his lumps just as I had done twenty years earlier. It is a fact of life in any drafting project that the credit for anything that goes right belongs to the drafting committee; the blame for anything that goes wrong (as many things will) belongs to the draftsman individually.

19. Professor Robert Braucher of Harvard Law School was also at that time Reporter for the RESTATEMENT (SECOND) OF CONTRACTS, and it was recognized from the beginning that he could not carry the laboring oar on both projects, and that I would do so on the UCC project, under his supervision. He became a Justice of the Supreme Judicial Court of Massachusetts just before our labors were concluded in 1971. He had agreed to participate in this symposium, but he died in the latter part of 1981.

20. Kripke, *Suggestions for Clarifying Article 9: Intangibles, Proceeds, and Priorities*, 41 N.Y.U. L. REV. 687 (1966).

Article 9, and I opposed it at the time, and I was very concerned about doing so because I was afraid that I was being influenced by my representation of a finance company: but I was satisfied that the subject was not yet ready for codification, and that if we put it in the Code, the Code would never get enacted. We would be bogged down indefinitely in a fight between consumer spokesmen and finance company spokesmen on that subject, and the whole Code would be held up. As events proved, I was right because when (years later) we drafted the Uniform Consumer Credit Code (UCCC), even then it proved too soon to reach a consensus on consumer credit issues, and that Code bogged down in legislature after legislature. Even our efforts during the drafting period of the UCCC to bring consumer representatives in to the drafting process proved to have been a failure, because the representatives that Allison and others carefully selected were later repudiated by some more radical consumer spokesmen. As you know, that statute did not succeed the way this one did, and this one would never have succeeded if we had not made the wise decision to leave any very substantial consumer protection to other legislation.

Another subject has been raised, the subject of leasing, and I think Peter Coogan in his 1978 article on the next ten years of the Code²¹ suggested that we did not do enough on leasing. But we did provide a mechanism for filing as to leasing, protecting the parties against the possibility that the lease might be held to be a security transaction,²² but not requiring them to admit that it was a security transaction. I think it was a wise decision not to cover all of the other aspects of leasing. If we had, we would have run into people who were afraid of going too far, because they wanted to protect the tax aspects of leasing and were afraid of doing anything that might cause the Treasury to take an adverse view on the tax features of the leasing.

Today, now that the Treasury has gone so far in the new tax statute in permitting the use of leasing as a device for transferring tax benefits, tax law has necessarily separated itself from the Code concepts and the accounting concepts on leasing. As you know, there's an American Bar Association committee studying the possibility of codification of the law of leasing.²³ I have suggested to them in a book review, which will appear in the January 1982 issue of *The Business Lawyer*,²⁴ a reconceptualization of the idea of leasing, but with the tax problems off to one side, because clearly we can't conform to them. The time may be at hand for codifying the law of leasing. There is a time for these things.

Now, it is an ABA committee that is drafting that leasing statute and it was an ABA committee that drafted the Article 8 revision.²⁵ This fact suggests to me a step toward solution of a problem presented by the 1972 amendments

21. Coogan, *Article 9—An Agenda For the Next Decade*, 87 YALE L.J. 1012 (1978).

22. U.C.C. § 9-408.

23. See Mooney, *Personal Property Leasing: A Challenge*, 36 BUS. LAW. 1605 (1981).

24. Kripke, Book Review, 37 BUS. LAW. 723 (1982) (reviewing EQUIPMENT LEASING—LEVERAGED LEASING (B. Fritch and A. Reisman eds., 2d ed. 1980)).

25. Article 8 as it appears in the 1978 Official Text.

to Article 9, namely, that they have not been enacted in all states. This delayed amendment process is a very serious problem for the Code and indeed for all uniform laws. It results in loss of the uniformity that has been obtained. One reason that the 1972 amendments did not sail through, I think, is that the drafting group was too limited and there was insufficient reaction to the drafts as they came through. It wasn't for a lack of trying. I wrote a couple articles myself in *The Business Lawyer* discussing what we were doing in our drafts, and we published some of the drafts in that publication, but the reaction was too slow and too limited. I think we can learn something from the history of the American Law Institute in the drafting of the Federal Securities Code. There, in addition to several layers of draftsmen and advisors, we had as part of the machinery of the project the vast Committee on Federal Regulation of Securities of the American Bar Association, which followed the project closely. The draftsmen reported to the Committee annually. The Committee was so big that nearly every major law firm in the country had a representative on it, and every securities lawyer in the country was following that project closely. When it was finished, we had the opinion of the securities bar and we knew just where the dissents were and what the overall opinion was. If it had not been for the change of administration, I think that that Code would have gone to Congress with a very fair chance of enactment, with Congress being willing to accept the broad consensus of those most concerned. That Code is far too technical to permit the Congress to understand all of the issues and Congress is far too busy to have time to debate all of the issues.

We ought to learn the lesson that every time a select drafting group works on a technical statute in commercial or tax or corporation law, it ought to have behind it a substantial bar association committee which can interlock with the drafting group in the way that the Federal Regulation of Securities Committee interlocked with the drafting group on the Federal Securities Code. I hope that when that happens, we can train the legislatures to realize that they do not have the time or the competence to interfere with "lawyers' law," and they should be willing to accept almost automatically both original statutes and amendments thereto put forth by highly qualified select drafting groups. I think that is a lesson that could be learned from the comparative failure of the 1972 amendments as against the process of the Federal Securities Code, which had reached a broad consensus before it was ready for the formal legislative process.