The Proposed Uniform (?) Commercial Code Should Not Be Adopted In Ohio

FREDERICK K. BEUTEL*

The proposed Uniform Commercial Code[1] is being considered for adoption, among others, in the State of Ohio. The purpose of this article is to point out as briefly as possible a few of the reasons why it would be a mistake for the legislature of Ohio, or any other state for that matter, to adopt this Code.

It is impossible in an article of this scope even to begin to state all of the defects in a code the size of this one. It would take a treatise of monumental proportions to explain its effect on the law and the changes which it seems to contemplate. However, in the brief space available here, an attempt will be made to point out some of the major reasons why this Code should not be adopted. They are approximately as follows:

The subject matter covered by the Code is exceedingly broad embracing within its terms the heart of what are now the successful Uniform Commercial Statutes. It is, therefore, too large a project to be dealt with experimentally.

The process by which it was created was not one calculated to reach a fair or expert balancing of the conflicting interests sought to be resolved by the commercial law.

Article 4 on Bank Collections is such a vicious piece of class legislation that it discredits the process by which the entire Code was created.

The peculiar vocabulary and erratic use of language would be certain to cause trouble if this draft were enacted.

Because it lacks unity, its adoption would be certain to create extensive confusion in a field which is now governed by established uniform statutes.

Article 9 on Secured Transactions represents a radical departure from any known system of law and is too experimental to be included at this time in a code for uniform adoption.

---

* Professor of Law, University of Nebraska. Author of BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENTS LAW (1948), UNIFORM COMMERCIAL LAWS (1950), BANK OFFICERS' HANDBOOK OF COMMERCIAL BANKING LAW (1939), and numerous articles on Commercial Law.

[1] Official Draft, Text and Comments published jointly by American Law Institute and National Conference of Commissioners on Uniform State Laws (1952). Hereinafter called the Code. It will be referred to in the notes by section number or as Code p.——. In order to save space, portions of the code discussed have only rarely been reprinted, but are cited in each instance where they are brought into question.

The entire Code should be returned to the Institue for unification, correction of obvious defects in draftsmanship, and for further studies on the unique problems which it will create.

THE SCOPE OF THE CODE

As indicated elsewhere[2] this is one of the most ambitious projects of codification ever attempted in the United States. The Code by its own provisions[3] is intended to repeal and replace seven current Uniform Laws and a number of widely adopted non-uniform statutes. The Uniform Laws to be repealed are the Negotiable Instruments Law, the Warehouse Receipts Act, the Stock Transfer Act, the Sales Act, the Bills of Lading Act, the Trusts Receipt Act, and the Conditional Sales Act. The first three of these have been adopted in every state in the union and in most of the territories.[4] The Bills of Lading Act has been enacted, with variations, by the Federal government[5] and by thirty-two states and territories;[6] the Sales Act in thirty-seven,[7] the Trusts Receipts Act by twenty-seven,[8] and the Conditional Sales Act by twelve.[9] But the latter has counterparts in numerous statutes adopted in those states which have not seen fit to take on the Uniform Act. All of these Uniform Laws have been adopted in Ohio[10] except the Trusts Receipts and the Conditional Sales Acts; and the Ohio statutes have provisions similar to and covering a broader field than the latter.[11]

The non-uniform but widely adopted statutes which this Code also intends to repeal include, among others, the American Banker's Association Bank Collections Code adopted in twenty or more states,[12] the Bulk Transfer Laws which appear in the statutes of almost all jurisdictions in slightly varying forms, and numerous statutes having to do with the rights of creditors and the relationships of banks to their depositors. The Ohio legislature, as will be seen later, has wisely refused to adopt the Bank Collections Code but has adopted many of the other statutes, including a good Bulk Sales Act.[13]

---

[2] Beutel, *The Proposed Uniform Commercial Code as a Problem in Codification,* 16 LAW & CONTEMP. PROB. 140 (1951); *id., The Proposed Uniform* [?] *Commercial Code Should Not be Adopted,* 61 YALE L.J. 334 (1952).

[3] § 10-102.

[4] See 5 UNIFORM LAWS ANN. 6 (1950 Supp.); 3 *id.* at 6; 6 *id.* at 6.

[5] 39 STAT. 538 (1916); 48 U.S.C. ch. 4 § 81 *et seq.* (1948).

[6] 4 UNIFORM LAWS ANN. 6 (1950 Supp.).

[7] 1 UNIFORM LAWS ANN. 6 (1950 Supp.).

[8] 9A UNIFORM LAWS ANN. 274 (1951).

[9] 2 UNIFORM LAWS ANN. 6 (1950 Supp.).

[10] OHIO GEN. CODE §§ 8106 ff., §§ 8457-8509, 13117-13124; § 8673-1 ff., § 8381 ff.; § 8993-1 ff.

[11] *Id.,* §§ 8560-8572.

[12] See BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENTS LAW (7th ed. 1948) 133.

[13] OHIO GEN. CODE § 11102 ff.

The first question that arises is whether it is sound policy for Ohio to repeal five major and almost unanimously adopted Uniform Laws and a host of lesser statutes intended to be replaced by this one Code. As indicated in detail elsewhere[14] sixty-three per cent of the Code by volume is a re-enactment (with a few additions of subject matter but in almost entirely new language) of the five major Uniform Laws which have already been adopted in Ohio. Articles 6 and 9, Bulk Sales and Security Transactions, constitute about eighteen per cent of the Code by volume and cover material similar to that found in Ohio in the Bulk Sales Law, the Chattel Mortgage, and Conditional Sales Acts. But as indicated below, the latter rules of law would be radically altered by the Code.

Article 4 on Bank Deposits and Collections which constitutes about nine per cent of the code, luckily for Ohio, as will be indicated later, has no counterpart in the laws of this state. Article 5, Documentary Letters of Credit, is new. The rest of the Code is made up of general definitions and other miscellaneous provisions. In fact over twenty per cent of the entire volume is scope notes and definitions, a defect which will be discussed in detail later. So over eighty per cent of the proposed Code is a restatement of Ohio statutes, the largest part of which are Uniform Laws now uniformly enacted throughout the entire United States.

Thus it will be seen that the Code as a whole contains little subject matter that is new. One of the draftsmen has said, "Most of the Code is merely restatement."[15] These uniform statutes which it recodifies have been well received by the courts; and although there has been considerable conflict over some sections, these particular areas are the exceptions. Even there the meaning of the statute is now becoming clearer and the tendency to conflict in decisions is dying out. Generally, it can be said that there is now uniformity over most of the field. The only question is whether or not this draft can consolidate and simplify the law, and is so much better than the statutes already enacted that it is worth at least fifty years of legislative and judicial travail and the conflicts and misunderstandings that are certain to follow to get the new Code enacted and as well understood as are the present statutes. After this is all done, if it can be done, would the result justify the effort? There is, therefore, no urgent need for adopting it in Ohio or any place else unless it is a great improvement on the current law. A detailed examination of its structure and a comparison of Code and Ohio statutes will show that this is not the case.

---

[14] Beutel, *The Proposed Uniform [?] Commercial Code Should not be Adopted*, 61 YALE L.J. 334, 336 (1952).

[15] Gilmore, *The Secured Transactions Article of the Commercial Code*, 16 LAW & CONTEMP. PROB. 27, 28 (1951).

THE PROCESS BY WHICH THE CODE WAS DRAFTED

Advocates of the proposed Uniform Commercial Code point out that it is a joint product of the American Law Institute and the Commission on Uniform Laws. In any advocacy of the Code there usually appear the names of many prominent scholars and lawyers running into the hundreds who were connected with the Code.[16] In fact there is here the revision of the common argument of guilt by association. This amounts to excellence by association. The chief draftsman of the Code also likes to state that it was created by democratic process and is therefore a fair and useful law. If the creation is a democratic process, it should have among those responsible for it a good cross reference of the society whose activities it intends to regulate. Unfortunately, this is not the case in the organizations responsible for creating the Code. The American Law Institute, its chief sponsor, is made up of a group of successful lawyers, the judges of the courts of appeal of the various state and Federal judiciary, and a collection of distinguished law professors. The Commission on Uniform Laws is a committee of the American Bar Association now entering its sixty-third year. It is made up of appointees of the governors of the various states usually serving gratuitously sometimes with part of their expenses appropriated by the states.[17] It is an open secret that the American Law Institute, the American Bar Association, and the Commission on Uniform Laws are controlled by the same group of prominent corporation lawyers who run the American Bar Association. All of the members, of course, are lawyers representing a divergent class of clients. Since these lawyers are the most successful in the profession, the preponderant number of them represent corporations, banks, manufacturing, big business, creditor classes, and other vested interests. Conspicious by their absence are the lawyers representing labor, farmers, debtors, and consumers. Unless it can be argued that the college professors or judges represent these, it is fair to say that they had little or no voice in the groups which are responsible for the Code.

But it is idle to assume that the members of the American Bar, the Institute, and the Commission on Uniform Laws drafted the Code. As in the case of the Restatement and, as indicated elsewhere,[18] the actual drafting was done by a small committee of law college professors, one or two responsible for each separate article[19] and under the direction of a chief draftsman, Karl Llewellyn,

[16] For such a list see Code p. 3 ff.

[17] For the early history of this body see BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENTS LAW (7th ed. 1948) Ch. IV.

[18] Beutel, note 2, *supra*.

[19] The names of the earlier draftsmen who have, in some cases, been replaced will be found in the Comments to the first section of each Article in the May 1949 Draft of the Code.

also a distinguished college professor. Also, as was the case with the Restatement,[20] there were a group of advisors for each article who had more or less intimate contact with the draftsmen in their day to day work.[21] Unlike the group of advisors responsible for the various Restatements of the Common Law, these committees were chosen not primarily for their knowledge of the subject being codified, but rather on the basis of proportional representation of the Commission of Uniform Laws and the ruling committees of the American Law Institute.[22]

Most of the greatest authorities in the subject matter of the Code are conspicuous by their absence from the advisory committees.[23]

Like the drafts of the Restatement the Code is an *ex cathedra* statement by the professional draftsmen of the law, but not as shown by the cases. Rather it is what they think the law ought to be. Unlike the Restatement it was not limited to codifying the existing decisions. The draftsmen were, so to speak, at large to create a law to regulate the commercial world. There was little or no impartial economic research into the workings of the present laws, and no limit upon the free rein of the draftsmen to state what the law ought to be except the impossibility of getting their drafts approved by the committees, the Institute assembled, and the Commissions on Uniform Laws. This process involved submitting the draft to the vote of the committees and then to the Institute and the Commissioners, but usually on very short notice, where a fully prepared draftsman debated against unprepared members who had little time to familiarize themselves with the draft under discussion. Again and again the Institute voted to approve drafts that had to be completely revised because, on careful study, they turned out later to be entirely impractical.[24] The draftsmen and the committees

---

[20] The names of these advisors are set out in the first part of each volume of the Restatement, for example see RESTATEMENT, CONTRACTS ix (1932).

[21] These men are listed in the 1949 Draft, *supra* note 19.

[22] Beutel *supra* note 2, 16 LAW & CONTEMP. PROB. 141, 142 ff (1951).

[23] For example the authors of the leading works on Sales, Williston, Vold, and Bogart are not on the committees on the Sales Article, and all of the authorities on Commercial Paper except William E. Britton are missing from the advisors on Article 3. Among those absent to name only a few are Aigler, Chafee, Stephen, and Townsend. In fact the chief draftsman of this Article was Dean William L. Prosser a well known authority on Torts with comparatively little experience in the field of commercial paper.

[24] A striking example of this is found in the case of section 1-107 of the 1950 draft which provided that the provisions of the Code were mandatory and could not be waived by agreement. This provision was sustained once or twice in debate before the Institute; but after it was shown by the writer to be impossible of application, see 16 LAW AND CONTEMP. PROB. 141, 161 ff. (1951), it disappeared from the Code.

also adopted the practice of submitting various drafts for formal or informal criticisms by committees of commercial agencies like warehousemen, stock brokers, bankers, railroads, and other associations. The draftsmen then dickered with these committees or their lawyers for changes.[25] But these sessions seem to have been informal, and so far as the writer knows there is no record of how far what might have been an originally fair draft was eventually twisted to serve the interest or to receive the support of particular pressure groups. But it is clear that the absence of representatives of consumers, labor, debtors, farmers, and bank depositors from membership of the sponsoring bodies was also apparent in the pressure group dealing with the draftsmen and advisory committees. The result is that the Code has been pushed far off of center from a fair resolution of the various clashing interests involved in various commercial transactions. The complete details of this shift to the right will only appear after long, complicated and tedious studies into the actual or possible workings of the Code, if and when it might be adopted. However, there has already appeared one striking example of the result of this alleged democratic dickering. This is found in Article 4 — Bank Deposits and Collections.

Article 4 — Bank Deposits and Collections is a Piece of Vicious Class Legislation

The history of the emergence of this article in its present form illustrates the worst features of the process by which this Code came into being. The following material which tells the story of how this happened is reprinted in part, with their permission, from another article by the writer in the Yale Law Journal. The original footnotes except those referring to sections of the Code have been omitted.

> Article 4 on Bank Collections constitutes eight per cent of the entire Code and needs careful scrutiny both as to its history and its substantive provisions. For a long time the statutes and decisions on bank collections have been in a very bad state. In the face of conflicting decisions and statutes on almost every aspect of the subject, bankers have been adopting the device of contracts to protect themselves against losses which might occur in the collection process. These fine print provisions placed on deposit slips, savings account books, notes and other forms used by the bank usually provide that the transaction involved is carried on in the risk of the consumer and that the bank is to be free of any resulting liability even for its own negligence. The courts have often cast a jaundiced eye upon these agreements but the law concerning their effectiveness has long been in a state of confusion. The Uniform Laws Commission has from time to time struggled with

[25] For a reference to this procedure see Code p. 7.

the problem of creating a uniform bank collections code. At one time they prepared such a statute but it failed of approval in the Commission itself because of opposition by the banks and their counsel. While the preliminary discussion of this process was still going on in the Uniform Laws Commission, the American Banker's Association through its counsel drafted a law covering the bank collection process designed to protect the banks throughout the process of collection, throwing the loss on the customers while giving the banks the rights of holders of due course in the paper involved. This was dressed up under the deceiving title of the Uniform Bank Collections Code and was sold by the banking lobby to about nineteen legislatures meeting over a period of about two years, who seemed to have adopted it under the misapprehension that it was a product of the Uniform Laws Commission. Thereafter, a number of authorities in the field of banking and negotiable instruments wrote articles exposing the true nature of this so-called collections code and adoptions by the legislatures thereafter practically ceased. [It is significant that it was never adopted in Ohio.]

The act has been declared unconstitutional in whole or in part by the courts of a number of states. The result is continuing confusion. About twenty-seven states have the common law or fragmentary adoptions on the subject, the rest have the American Banker's Association Bank Collections Code or something like it. It may be unconstitutional in whole or in part. Not a very pretty picture.

The draftsman of the Commercial Code realized this situation and set out to produce a uniform act fair to both the bankers and the customer to remove the confusion in this field. Mr. Leary, the original draftsman of this article, after careful research into banking and clearing house practices and the current machinery of collection, attempted to devise a code which would fairly state the obligation of the banks to their customers and properly distribute liability and risk of loss. By May of 1951 this draft had almost reached the final stage but it was met by opposition in the American Banker's Association and by their counsel and lobbyists who were constantly in attendance at the joint meetings of the Uniform Laws Commission and the American Law Institute. The result of the pressure was so great that in May, 1951 it was decided to omit Article 4 on Bank Collections from the Uniform Commercial Code, and to recommend the Code without it. Mr. Leary, with his ideas of fairness, was thus effectively side-tracked. The reduced Code was then finally adopted subject only to minor changes before the meeting of the American Bar Association in September of the same year. During the following summer months there occurred frenzied activity on the part of the bankers and their counsel with the result that late in August before the fall meeting of the Commissioners on Uniform Laws and the American Law Institute in connection with the American Bar Association there appeared a completely revised Article 4 in fragmentary form

which was mailed to members of the Institute and the Commission giving them less than three weeks to examine it before the meeting. It was then rushed through the final joint meeting with little or no debate and was approved by the Commissioners, the American Law Institute and the American Bar Association at the same time. It is fair to say that the great majority of the members of these organizations and those at the meeting had not even read the complete new Article 4 and that ninety per cent of the entire membership had no knowledge of its nature. Shocking as this seems, it was the usual procedure by which the draftsmen had been presenting the Code to the Institute and Commissioners, only in this instance their own technique was used against them.

This new Article 4 on Bank Deposits and Collections follows very closely the already discredited American Banker's Association Uniform Bank Collection Code. It even re-enacts the preference articles which have caused that act to be held unconstitutional and which are admittedly contrary to current federal legislation and not, therefore, applicable to National Banks.[26] However, it goes much further than the American Banker's Association Act in that it provides that all paper deposited with the bank, unless the contracts indicate otherwise, is left for collection[27] and is to be handled entirely at the risk of the customer.[28] The bank, on the other hand, has all the rights of a holder in due course when it is in any danger of suffering loss.[29] All liability of the bank for improper handling of paper so carefully and fairly set up in the earlier drafts is removed.[30] By a trick provision of Section 4-103 and subsection 4,[31] the bank is not bound to follow any of the collection procedures set out in the act. So long as it acts "reasonably," it is only liable for its own lack of good faith and due care;[32] but even due care is limited by other pro-

[26] § 4-214; *cf.* A.B.A. code provision, ILL. REV. STAT. c. 16a § 37 (3) (Cahill 1931), declared unconstitutional in People *ex rel.* Barrett, 362 Ill. 164, 199 N.E. 272 (1935); and *Explanation of Principal Changes,* August Revision (mimeo. 1951) § 4-214.

[27] § 4-201: Unless a contrary intent clearly appears, a depository bank takes an item for collection regardless of the form of indorsement or lack of indorsement and even though credit for the item is subject to immediate withdrawal as of right.

But see § 4-105 (a). Unless § 4-201 covers all business it is meaningless. See Comment to § 4-201 (December Revision 1951). The A.B.A. Code was ambiguous on this point, see Illinois Act, *supra,* note 26, § 26.

[28] § 4-211 (1), § 4-212.

[29] § 4-209, § 4-208.

[30] See § 4-103 (August 1951 draft), *Explanation of Principal Changes.*

[31] § 4-103 (4): The specification or approval of certain procedures by this Article does not preclude an agreement authorized by sub-section (1), nor constitute disapproval of other procedures which may be reasonable under the circumstances.

[32] § 4-103 (1): The effect of the provisions of this Article may be varied by general or special agreement except that no agreement can disclaim a bank's responsibility or limit the measure of damages for its own lack of good faith or failure to exercise ordinary care.

visions of the Code,[33] and it is not liable for the acts of any of its agents or associate banks.[34] Damages for the lack of due care and bad faith are carefully held to the minium;[35] and any action authorized by this Article is specifically made due care for which the bank is not liable.[36]

Among the more striking of the acts authorized on the part of the bank are the following. The bank is not bound to any notice from anybody except the person depositing the paper and need only follow his instructions.[37] The whole concept of payment in due course is abolished.[38] The bank can pay a known thief of properly endorsed paper without any liability and there is nothing the true owner can do about it except bring an injunction "or supply indemnity deemed adequate" by the bank.[39] There is grave doubt as to whether a law suit would do the true owner any good under the circumstances because the bank is allowed to supply indorsements of customers,[40] and is specifically protected against any form of notice of agency or trust which may appear on the face of the paper or indorsements.[41] The bank may also change by contract any of the rules set out in this act except the duty of due care.[42] Thus the Code appears to completely approve the type of surreptitious waivers consistently appearing in fine print on bank forms, in spite of the fact that many courts have refused to enforce "contracts" of this kind. Article 4 and the definitions of contracts found in the Code give them blanket approval.[43]

A careful examination of the wording of the act will show that this Article was drafted entirely with the purpose of protecting the banks so that they could carry on their business at the risk of the customer. In most instances they have succeeded, with the aid of their lawyers, in shift-

---

[33] § 4-103 (3): Action or non action approved by this Article or pursuant to a general agreement, or, in the absence of special instructions, consistent with a banking usage, is ordinary care.

See §§ 4-108, 4-202 (2), 4-203, 4-205 (2), 4-210, 4-211.

[34] § 4-202 (1): A collecting bank must use ordinary care in (a) presenting an item or sending it for presentment; and . . . (3) Subject to subsection (1) (a), a bank is not liable for the insolvency, neglect, misconduct, mistake or default of another bank. See §§ 4-106, 4-102 (2).

[35] §§ 4-103 (2), 4-202 (3), *supra,* note 34, 4-212 (5), 4-402, 4-403 (3), 4-404, 4-405, 4-407.

[36] § 4-103 (3), *supra,* note 33.

[37] § 4-203: Only a bank's transferor can give instructions which affect the bank or constitute notice to it and a bank is not liable to prior parties for any action taken pursuant to such instructions or in accordance with any agreement with its transferor.

[38] §§ 4-203, *supra,* note 37, 3-603.

[39] § 3-603 (1).

[40] § 4-205 (1).

[41] § 4-205 (2).

[42] § 4-103 (1), *supra,* note 32.

[43] *Ibid.* And see definition of Agreement and Contract § 1-201 (3) and (11).

ing many of the risks of the banking business to their customers, where fairness in bank collections would require that the bank be the insurer of the paper which it is to collect. A few examples will show the complete one-sidedness of the Code. Although the bank is supposed to be the agent of its customers for all paper placed in its custody by the customer either for deposit or collection,[44] the Code sets out specifically and in minute detail the warranties which the customer makes to the bank by the transfer of such paper.[45] But where the bank takes proceeds of the collection process on behalf of its customer no such warranties are required from the banker. On the contrary, it holds such paper to be collected at the risk of the customer.[46] Where the bank returns statements to the customer he must, at his peril, examine the statements not only for accuracy of signatures and alterations but also endosements; and failure to turn up defects such as forgeries and the like in endorsements within the prescribed time throws the loss on the customer even though information of this kind is wholly within the knowledge of the banker and beyond the reach of the customer.[47]

An extreme example of this one-sided draftsmanship is shown in the duties and liabilities surrounding stop-payment as here codified. The customer still has the right to stop payment if he does so in the proper form,[48] but the banker's liability for wrongfully ignoring stop payment is carefully limited to the actual loss caused thereby.[49] And though the Code does not bother to state the customers' rights, it specifically provides conditions under which the bank can sue the customer when it has wrongfully ignored a stop payment order.[50] In fact, this Article is so one-sidedly drawn in favor of the banking interests that any banker who insisted on exercising the rights given him by this Code would probably be under suspicion by the better business bureau.

---

[44] § 4-201, *supra*, note 27.

[45] § 4-207.

[46] § 4-211. See § 4-212.

[47] § 4-406, especially sub-section (1, c).

[48] §§ 4-403, 4-303.

[49] § 4-103 (2). See §§ 4-402, 4-403 (3).

[50] § 4-407: *Bank's Right to Subrogation on Improper Payment*

To prevent unjust enrichment, a bank which has paid a customer's item which it may not charge in full to his account may in an action

(a) against a prior holder who has received the payment, recover any part thereof due to its customer or any prior party in respect of the transaction in which the customer of the depository bank acquired the item; and

(b) against the drawer, maker or acceptor recover any amount which would have been due from him on the item if payment had been refused. The bank has no right to charge the customer's account in respect of such cause of action. The bank may bring either or both such actions but may have only one satisfaction and any right to consequential or punitive damages remains with the customer or holder.

> This Article is a deliberate sell-out of the American Law Institute and the Commission of Uniform Laws to the bank lobby in the hope of return for their support of the rest of the Code. That this would happen was forecast in the debate before the Institute two years ago when Mr. Schnader in a discussion with the writer said that it would be necessary to make certain concessions to the banking interests in order to get their support for the Code. And it is significant that Mr. Schnader was very active in pushing the present article through the meeting of the Commissioners and the Institute in September even over the apparent protest of the Editor-in-Chief himself. They not only made concessions to the bankers but delivered everything they asked for. The banks now have a piece of class legislation more favorable to their interests than the American Banker's Association Bank Collections Code which their lobby failed to put over on the legislatures. This one-sided piece of class legislation is now backed by the prestige of the American Law Institute and the Commission on Uniform Laws. Such a sell-out is beneath the dignity of both organizations and is a tremendous blow to their prestige as scientific bodies. It is doubtful if the majority of the members would have approved this article if they had known what they were doing; and, if they do so approve, it raises the question whether the American Law Institute has ceased to be a learned scientific body to become a plush pressure group dominated by reactionary financial interests.The existence of Article 4 alone is enough to condemn in its entirety the adoption of this Code.

This, then, is one concrete illustration of results which have been obtained under this convention system of drafting statutes by this highly un-democratic process. No number of big names or claims of experts can replace the cold facts that in Article 4, as well as in other portions of the Code, pressure groups have been more effective in getting what they want from the Institute and the Commissioners than from the legislatures. Since the original Bank Collections Code was not adopted in Ohio, there is no reason why this one should be.

It is, therefore, unfortunately, not safe to accept this Code merely on the prestige of the professional organizations offering it for adoption. Other defects of language and draftsmanship will also appear on further study.

The Peculiar and Erratic Language used in the Code

The language and style of the Code raises many difficulties. In the first place this is not a code in the sense in which the term is normally used because it is not a unified whole. It is really a collection of eight separate uncorrelated statutes with a few common sections in the front on interpretation, application, and definition, which are soon departed from by exceptions found later in the various individual Articles. It has been pointed out in detail else-

where that over one-fifth of the Code is devoted to creating new language,[51] or better, sets of languages. There may be some argument for definitions of terms and even for new ones. But why do we need the following sort of thing? In Article 1, "Purchase includes taking by sale, mortgage, pledge, lien, issue or re-issue, gift [of all things] or other voluntary transaction creating an interest in property"; but "Buying" is a much narrower term and "does not include a transfer in bulk or as security"; and in Article 8 although "a bona fide purchaser" is a "purchaser," the elements of the act of purchase are not synonymous with either "purchase" or "buying" as defined in Article 1.[52] One may give value, "by taking delivery,"[53] and a "merchant is a person ... having knowledge or skill" or one who "employs such a person."[54] These are only a few examples. As has been shown in detail elsewhere,[55] one has to learn eight such languages before he can understand this Code.

Out of over one hundred and fifty defined terms, two-thirds are used in different meanings in the various Articles.[56] Take the well-known legal and commercial concept of holder in due course for example. It appears under at least five different names, among them: "holder in due course,"[57] "holders to whom a negotiable document of title has been duly negotiated,"[58] "purchaser for value and without notice,"[59] "bona fide purchaser,"[60] "assignee who takes for value," and a long string of other words not particularly pertinent here.[61] Any good code would use but one term.

The elements which go to make up this concept, value, good faith, and notice, are also chopped into minute and contradictory bits.[62]

Value has three meanings ranging from the rule in *Clayton's*

---

[51] See Beutel, *supra,* note 2; Comment, *Creation of Contracts Under the Uniform Commercial Code,* 13 U. OF PITT. L. REV. 750 (1952); note, *Letters of Credit Under the Proposed Uniform Commercial Code: An Opportunity Missed* 62 YALE L. J. 227 (1953).

[52] Cf. 1-201 (32), 1-201 (9), 8-302, "Value" 8-303 (b) and (c), (c) Provides that "taking delivery pursuant to a pre-existing contract of purchase" is value. Here purchase in "contract of purchase" must be different from "purchase" as defined in 1-201 (32), see also definition of contract 1-201 (11) and (9), or the whole concept of "value" goes out of the window. It is pretty well shot anyhow by the provisions of this sub-section.

[53] 7-102 (g) (iii), 9-108 (1) (c).

[54] 2-104 (1).

[55] See Beutel, *supra,* note 2.

[56] This is spelled out in detail in Beutel, *supra,* note 2.

[57] 3-302, 4-104 (3), 4-209, 5-103 (3).

[58] 7-502 (1).

[59] 8-202 (1).

[60] 8-302

[61] 9-206 (2).

[62] See Beutel, *supra,* note 2, 61 YALE L.J. 334, 339 ff.

case,[63] considerations for contracts,[64] simple commercial credit, and various combinations thereof.[65]

Good faith also has three meanings,[66] but in Article 8 it is not required of a "bona fide purchaser of investment securities."[67]

Notice has so many definitions and variations that they defy classification. But its combined definitions well cover over five printed pages[68] in numerous sections of the Code. It seems to include "actual knowledge,"[69] subjective[70] and objective notice,[71] old-fashioned English common law constructive notice,[72] and it is not clear that even record notice may not sneak into this concept.[73] There are different kinds of notice for bankers,[74] brokers,[75] merchants,[76] purchasers of negotiable money paper,[77] documents of title,[78] stocks and bonds,[79] and security devices,[80] to name only a few.[81]

It should be noted that there is being discussed here only notice as an element of holding in due course. There are also many other kinds of necessary notice, like notice to creditors in bulk sales[82] and notice to purchasers of collateral.[83]

These are only meager examples of such statutory variations which have been set out at length and in detail elsewhere,[84] and it

---

[63] 3-303, 4-208, 4-209.

[64] 7-102 (g) (i)

[65] 8-303, 9-108, 3-303, 4-209.

[66] See Beutel, *supra,* note 2, 61 YALE L.J. 334, 341; 1-201 (19), 2-103 (b), 3-302 (b), 4-103 (1, 3 and 4), 7-501 (4), *cf.* 7-501.

[67] 8-302 *cf.* "notice" 8-304.

[68] 1-201 (25) (27), 3-304, 3-305 (2 e), 3-602, 3-206 (c), 7-501, 8-304, 8-202 (5), 8-203.

[69] 1-201 (25) (a).

[70] 1-201 (25) (c).

[71] 1-201 (25) (b), 3-304 (2) (4).

[72] 1-201 (25)-(27), 3-304 (2), 8-202 (8), 8-305. See also Beutel, *supra,* note 2, 61 YALE L.J. 334, 343.

[73] 8-304.

[74] 4-203.

[75] 8-304.

[76] 2-104 (3), 7-501 (4), *cf.* 1-201 (9).

[77] 3-304, 4-203.

[78] 7-501 (4) *query* if notice of any kind prevents holding in due course here.

[79] 8-304, 8-305.

[80] 9-206 (2).

[81] The effect of notice has been discussed by the author more in detail in the articles cited in note 2, *supra.* See also Beutel, *Comparison of the Proposed Commercial Code Article* 3 *and the Negotiable Instruments Law,* 30 NEB. L. REV. 531, 546 (1951).

[82] 6-107.

[83] 9-302, 9-402.

[84] See Beutel, *supra,* notes 2 and 81.

would be tedious to repeat them here. But the point is that these variations are cumulative and multiply like flies, because basic terms, like those mentioned above, are used in definitions of other terms which vary from article to article.

What would be the practical result of this kind of terminology if it became law and applied to business? One simple example involving the concept of credit as value will serve to indicate the problems of semantics here involved. A seller in a fraudulent transaction conveys some goods to a buyer. He then draws a negotiable draft on the buyer and takes it to a bank for collection with a document of title covering the goods attached. The bank gives credit, passes it on to a broker for credit, and the broker presents it to the buyer who refuses to pay.

The broker is not a holder in due course of the draft;[85] but is a holder to whom the document has been duly negotiated.[86] That means he has no rights in the money paper except as assignee of the bank, but has perfect "title to the goods,"[87] that is, if the buyer "acquiesed in " the sellers' "procurement of the document."[88] The bank would hold both documents free from any defenses,[89] so the broker, as an assignee of the bank, with the help of a few common law cases not codified here[90] could probably exert rights in both the paper and the goods.[91] But if the broker preceded the bank in chain of title, he would be in the predicament first indicated. On the other hand if the bank gave credit on a checking account, then it too would not be a holder in due course of the draft,[92] but only of the document and the goods.[93] If the seller got the order bill of lading without the buyer's acquiesence, then the buyer would have title to the goods, but not the document.[94] The document would not control the goods, which conclusion seems to be flatly contradicted by Section 2-505 (2). Now if a warehouse receipt were involved instead of a bill of lading, the buyer would have no title at all[95] provided, of course, no other section of the Sales Article contradicts Section 2-401.

This is the pretty mess resulting from a different set of rules for each kind of paper. This example involves mainly the question

---

85 3-303.

86 7-501, 7-102 (g) (i).

87 7-502 (1) (a).

88 7-503 (1).

89 4-209, 4-208.

90 Burnes v. New Mineral Fertilizer Company, 218 Mass. 300, 105 N.E. 1074 (1914); see 61 YALE L.J. 349 note 103.

91 4-209, 3-306, 3-201.

92 4-208 (a).

93 7-102 (g).

94 7-503 (1), 2-505.

95 2-401 (3).

of value as an element of holding in due course. The same situation exists on the elements of good faith and notice, and in many other places.

It might be said in passing that, under Section 20 of the Uniform Sales Act, as adopted in Ohio the title to the draft controls the entire transaction; the documents and title to the goods are for security only, and the question of two types of negotiation does not arise. The elements of holding in due course are also much more uniform under the present acts,[96] also adopted in Ohio. In the modern world where credit is the standard method of payment for goods and documents, it doesn't make sense to have a different rule as to each kind of paper and a distinction between various kinds of bank credit, credit for past bills, commercial credit, and the like. It is not uncommon to have goods, money paper, documents of title, and even securities involved in one transaction. Why must there be different rules for the transfer of each kind of paper for each party connected with the transaction depending upon whether or not he is a banker, broker, merchant, farmer,[96a] or just plain John Q. Public?

As has been shown at length elsewhere the proposed Code is much worse in this respect than are the present uniform laws[97] already adopted in Ohio; and incidentally, as already shown under Article 4 on Bank Collections, it is usually John Q. Public who gets the worst of it under this Code.

While still on the question of the use of language there is another defect which needs to be stressed. Any one slightly acquainted with the present uniform laws will be immediately struck with the new and shiny phraseology of the proposed Code. For some unexplainable reason, perhaps just vanity, the draftsmen insisted upon using new language and new outlines of the law, even where the Commissioners Comments say they are stating old rules and concepts, and where no change seems to have been intended. Unfortunately, codes are complicated bits of law and there are always new angles which the draftsmen could not foresee. In the case of the older language, litigation and commercial practice will have revealed its quality and usefulness. It also gradually takes meaning in the minds of the profession and the trade. The new language no matter how good is subject to the danger that the draftsmen may have overlooked vital situations where the change of verbiage will give queer results. It also suffers from the danger that it will be misunderstood, or be taken to intend a change. In fact, the usual

---

[96] See Beutel, *supra*, note 2, 61 YALE L.J. 334, 342 ff.

[96a] Note that farmers cannot sell to a "Buyer in ordinary course of business," 1-201 (9).

[97] *Id.*, 339 ff.

prima facie presumption is that a change was intended, else why repeal the old language and create new.

Now this Code, because of its novel language is fraught with the maximum of this danger. Every section and article of every current uniform law, including most of the definitions have been rewritten in new verbiage. Where the old expressions have been saved they are out of context and therefore subject to new interpretations. This guarantees the type of judicial conflict that followed the original adoption of the uniform statutes,[98] but in much larger quantities. It will also insure some weird changes in the law. Two examples will suffice.

In the illustration just given about the draft and bill of lading, part of the weird result in the title to the goods is due to this rewording of settled concepts. The present uniform acts provide that the holder in due course of a document of title gets among other things "such title to the goods as the person to whose order they were to be delivered by the terms of the document, had or had ability to convey."[99] And under Section 20 of the Sales Act, the seller had only a security right, so the purchaser of the paper in all the variations of the case just mentioned would get no more than security. But under the proposed Code the person who receives by "due negotiations" as holder in due course, Section 7-502, acquires thereby "(a) Title to the document and (b) Title to the goods." With the exceptions found in Section 7-503 "A document of title confers no rights in goods against a person who before issuance of the document had a legal interest in them, and who neither delivered or intrusted them to the person procuring the document with power of disposition or pursuant to a contract for sale, nor acquiesced in his procurement of the document."

Now this seems to say the same thing, but it doesn't. You will notice that the document either conveys the entire title or nothing, depending upon whether the facts fall within or without these exceptions. There is no conveying of part title or of security rights. If, as in the case just mentioned, where the buyer acquiesced in the procurement of the document, the facts fall within the exceptions, then the holder in due course of the document gets "title to the goods" which is a lot more than the seller had, only a security right.[100]

Section 2-505 probably intended the same result as Sales Act Section 20, but the plain meaning of the document of title provis-

---

[98] See BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENTS LAW (7th ed. 1948) Ch. V.

[99] Sales Act 33 (a); Warehouse Receipts Act 32 (a); Bills of Lading Act 41 (a).

[100] 2-505 (a).

ions,[101] which are controlling, provide otherwise. One might expect to find this case covered in Article 9 on Secured Transactions, but Section 9-309 says the sections just quoted control. Thus the new language destroys the main purpose of using documents of title, for security; but is creates a very nice windfall for bankers, financing houses, and brokers. Probably only some of the courts will swallow it; so there will be more confusion.

One more example should be dear to the technical heart of every teacher of bills and notes. Section 7-104 provides that "a bill of lading or other document of title is negotiable," among other things, if "it provides for delivery to bearer or to the order of a named person" — "Any other document is non-negotiable." Technically that, of course, means that the very common documents payable to a named person or bearer or to a named person or his order are not negotiable.

Two sections later[102] in providing for the "Essential Terms" of a warehouse receipt, the Code requires that the goods be deliverable "to bearer, or to a specified person, or to a specified person or his order." The required *negotiable* warehouse receipt "to the order of a named person" is not even provided for.

Now you may say that this is a mere quibble. Everybody knows that instruments payable to a named person or bearer are "payable to bearer" and that an instrument is "payable to the order of a named person" whether it is payable to his order or to him or his order and that all these forms are negotiable. But why is this so? Because the Negotiable Instruments Law Sections 8 and 9 and the Warehouse Receipts Act Sections 5 and 7 specifically so provide. But both these acts are expressly repealed.[103] Therefore, if you are to have any negotiable warehouse receipts payable to a named person or bearer, or to a "specified person or his order" you will have to do it by some process of reliance upon cases supported by repealed statutes.

Now in rebuttal it may be answered that the Section 7-104 was copied verbatim from Section 5 of the Warehouse Receipts Act, and that there have been no such troubles under this act. The answer is simple. The copying verbatim is true; but Section 7 of the W.R.A. provides that a non-negotiable receipt shall be marked "non-negotiable" and that if it is not the holder may treat it as negotiable. This section is absent from the Code, which is a "tight" statute. So the trade is going to have to learn the law all over or rely upon cases based upon repealed statutes. Probably, some courts will choose one and some the other alternative; so again, conflict is assured.

---

[101] 7-502, 7-503.

[102] 7-202.

[103] 10-102.

These are only two examples of thousands of unclear, unnecessary and unintended variations which the plain meaning of the changed language is going to create. Courts following the plain meaning of the proposed Code, as they should if it were enacted, will, therefore, come into conflicts with those who follow the law as it is now understood and probably was intended. Confusion is inevitable, and no amount of ingenious and improper interpretation will prevent it.

All this could have been avoided by the use of well-established statutory language.

A third objection to this Code is that it seems to go in for novelty, just for novelty's sake.

A good example of this, which is another iron-clad guarantee of complete confusion, is the now infamous Section 1-105 which created a unique doctrine of conflict of laws just for this Code. In spite of the fact that this section has been denounced by almost all authorities on conflicts, not directly connected with the drafting of the Code, including Rheinstein,[104] Rabel,[105] Cheatham,[106] and an assembly of Conflict of Laws teachers,[107] and although it is not needed at all, it still appears in all its glory in the Official Draft.

It would be redundant here to attempt to set forth all the arguments. It is enough to note that the section as set out in the margin[108] requires that the law of the forum, the Commercial Code,

---

[104] Rheinstein, *Conflict of Laws in The Uniform Commercial Code*, 16 LAW & CONTEMP. PROB. 114, 115 (1951); *id.* Book Review, 26 IND. L. REV. 576, 581 (1951).

[105] Rabel, *The Sales Law in the Proposed Commercial Code*, 17 U. OF CHI. L. REV. 427, 428 (1950).

[106] See Rheinstein, *supra*, note 104, 16 LAW & CONTEMP. PROB. 114, 115.

[107] *Id.*

[108] Section 1-105. Applicability of the Act; Parties' Right to Choose Applicable Law.

(1) Article 1 applied to any contract or transaction to which any other Article of this Act applies.

(2) The articles on Sales (Article 2), Documentary Letters of Credit (Article 5) and Documents of Title (Article 7) apply whenever any contract or transaction within the terms of any one of the Articles is made or occurs after the effective date of this Act and the contract

(a) is made, offered or accepted or the transaction occurs within this state; or

(b) is to be performed or completed wholly or in part within this state; or

(c) relates to or involves goods which are to be or are in fact delivered, shipped or received within this state; or

(d) involves a bill of lading, warehouse receipt or other document of title which is to be or is in fact issued, delivered, sent or received within this state; or

(e) is an application or agreement for a credit made, sent or received within this state, or involves a credit issued in this state or under which drafts are to be presented in this state or confirmation or ad-

shall apply to any commercial transactions that any way touches the state of the forum. Since a large proportion of important commercial transactions are either interstate or international, this would require a court of the forum to apply its own law to all aspects of such transactions. In suits involving international trade foreign law would be wiped out. In domestic interstate trade no lawyer could advise his client because he could not anticipate which state the transaction might touch, or where his opponent might decide to sue. It needs no citation of authorities to show what this provision would do to the established rules of conflicts as laid down by the courts of Ohio.

Until the Code is uniformly adopted, which is likely to never happen, or at best will take twenty-five to fifty years, confusion is assured. We have been told that as soon as the Code becomes uniformly adopted this difficulty will disappear. This overlooks the fact that, with the other possibilities of conflicting decisions already mentioned and yet to be mentioned, there would continue to be a gigantic problem of choice of law. It should also be noted that the Code itself in many places preserves the conflicting state laws; for example, liability for negligence in Sections 7-204 and 7-309. There are many others.[109]

---

vice of which is sent or received within this state, or involves any negotiation within this state of a draft drawn under a credit.

(3) The Articles on Commercial Paper (Article 3) and Bank Deposits and Collections (Article 4) apply whenever any contract or transaction within the terms of either of the Articles is made or occurs after the effective date of this Act and the contract

(a) is made, offered or accepted or the transaction occurs within this state; or

(b) is to be performed or completed wholly or in part within this state; or

(c) involves commercial paper which is made, drawn or transferred within this state.

(4) The Article on Investment Securities (Article 8) applies whenever any contract or transaction within its terms is made or occurs after the effective date of this Act and the contract

(a) is made, offered or accepted or occurs within this state; or

(b) is to be performed or completed wholly or in part within this state; or

(c) involves an investment security issued or transferred within this state. But the validity of a corporate security shall be governed by the law of the jurisdiction of incorporation.

(5) The Articles on Bulk Transfers (Article 6) and Secured Transactions (Article 9) apply whenever any contract or transaction within their terms is made or occurs after the effective date of this Act and falls within the provisions of Section 6-102 or Sections 9-102 and 9-103.

(6) Whenever a contract, instrument, document, security or transaction bears a reasonable relationship to one or more states or nations in addition to this state the parties may agree that the law of any such other state or nation shall govern their rights and duties. In the absence of an agreement which meets the requirements of this subsection, this Act governs.

[109] For example see 6-106 Bulk Sales, 9-102, 3-121.

The Code itself also provides for exception from this rule for the benefit of banks,[110] security debtors,[111] and others.[112] It also provides that the section can be contracted away by the parties.[113] Professor Gilmore[114] has suggested that this removes the objections. If this be sound, then there is no use of arguing about the merits of the Code because most of it also can be contracted away,[115] all of which puts a great premium upon sophistication and gives undue advantages to businesses able to hire council in advance of every transaction. A good code should minimize, not increase this inequality.

A fourth and very important objection to this Code is that it is fragmentary. Any good code is couched in general language intended to cover all cases. This collection of statutes goes into minute details about single situations covering only fragments of the law. Look at the Commissioners Comment[116] to Section 9-102, and you will find an index to special rules found in that one article. The index alone covers three pages.

Let us examine one example of the effect of *failing* to codify general law. Section 59 of the Negotiable Instruments Law states a simple general principle as follows: "Every holder is deemed *prima facie* to be a holder in due course." Now the cross references in the front of the Code refer to four sections which are supposed to state this rule 3-207, 3-306, 3-307, and 8-301; 3-207 has to do with the effect of negotiation by infants, etc., 3-306 the rights of one not a holder in due course, 3-307 covers the burden of establishing signatures,[117] and 8-301 covers the rights acquired by a bona fide purchaser of a security. None states the general principle. Now it should be noted that the principle as stated by the Negotiable Instruments Law, Section 59, should apply to all negotiable paper, money paper, documents of title, and securities. Yet the cross references in the first of the Code show no such section, and after fairly diligent search it has not been discovered. If it were found, it would have to be repeated at least three times because the general principles of negotiation are nowhere set out; but each type of negotiable paper has its own little separate article. It might have been placed in Article 1, but was not.[118] Now even with

---

[110] 4-102 (7).

[111] 9-103.

[112] 1-105 (6).

[113] 1-105 (6).

[114] Gilmore, *The Uniform Commercial Code, A Reply to Professor Beutel,* 61 YALE L.J. 364, 373 (1952).

[115] 1-102 (b).

[116] Code p. 693-696.

[117] For money paper the general principle of N.I.L. 59 might be reached by a backhanded interpretation of 3-201 (3).

[118] *Cf.* 1-202 on authenticity of documents.

Negotiable Instruments Law Section 59 on the books some courts have gone wrong on the proposition that a holder is *prima facie* the owner.[119] What will happen when this section is repealed and there is none to replace it?

The same is true of N.I.L. 24. "Every instrument is deemed *prima facie* to have been issued for consideration."[120]

All this and much more is well known general law, perhaps so well known that the draftsmen did not bother to put it down in the special statutes which they were constructing; but this is well known law not by virtue of the common law, but because of uniform statutes which this Code expressly repeals. Where are these and many similar general principles[121] to come from after repeal? Here again confusion is guaranteed by adoption of this Code.

This leads us to another major objection to this Code. It is based upon a peculiar realistic idea of the nature of law, that what the officials do and not the statutes is the law.[122] For example, Sections 7-204 and 7-309 provide for a standard of care on the part of warehousemen and carriers on issuing documents of title. They are somewhat complicated and far too long to reproduce here. But at the end of the sections it is provided that "This section does not repeal or change any existing rule of law which imposes a higher or different responsibility or invalidates contractual limitations which would be permissible under this Article." Now both the Uniform Warehouse Receipts Act and the Uniform Bill of Lading Act Sections 3 (b) impose both "higher" and "different" liabilities upon carriers and warehousemen; but the cases under these acts are split as to their result.[123] These acts are also repealed in their entirety by Section 10-102 of this Code. What is the "rule of law" that the Code is talking about? If it is the old uniform statutes they are repealed unless this particular section is taken to contradict the general repeal, in which case they are not repealed; but then they would contradict the plain words of the sections. If this was meant to be the law why did not the Code use the old uniform

---

119 Standard v. Orleans Flour Co., 93 Neb. 389, 140 N.W. 636 (1913); Eichinger v. Zimmerman, 243 N.Y. Supp. 155, 230 App. Div. 708 (1930); The Masonic Temple Craft v. Stauss, 152 Neb. 604, 42 N.W. (2d) 178 (1950); *contra*: BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENTS LAW (7th ed. 1948) 859 ff.

120 3-408 covers antecedent debts only.

121 For example N.I.L. 16 Conclusive presumption of delivery to Holder in due course, N.I.L. 46, place of indorsement.

122 See Llewellyn, *Bramble Bush* (1951) p. 13 ff. The author has changed his position in theory, see *id.* p. 8, but it still appears in practice throughout the code as indicated here.

123 Central Storage Warehouse Co. v. Pickening, 114 Ohio St. 76, 151 N.E. 39 (1926); *contra*: Healy v. New York Central, 153 App. Div. 516, 138 N.Y. Supp. 237 (1912) and cases cited Beutel, UNIFORM COMMERCIAL LAWS (1950) 228-245.

sections in question with such amendments as would remove the judicial conflict? That would be too simple! Probably what is meant by "rule of law" is the court decision in the various states just mentioned, unsupported by the repealed statutes upon which they are based. A pretty mess, but in accordance with the original juridical doctrine of realism.

As has been pointed out at length elsewhere[124] the Code is full of this sort of thing, being drafted on the theory that there is a common law or some kind of "law" outside the Code which will settle fundamental questions. No such general common law ever existed,[125] and the repealed statutes have been the basis of any other law for about fifty years. It is true that in each state there were decisions and common law before the adoption of the Uniform Statutes. As, for example, the pre-statutory Common Law of Ohio, which could form the background to fill the hiatus created by the repeal of the uniform statutes and the silence of the new Code. Disregarding the fact that many of the older Ohio decisions themselves rested upon repealed statutes and assuming that a local state common law could come to the rescue of the Code, each state would necessarily furnish its own background of common law, and the old confusion which existed before the enactment of the uniform laws would again be revived. The national adoption of the Code then would be more likely to result in chaos than uniformity.

A fifth and fundamental objection to the proposed Code is its unusual style. It is a characteristic of codes that they are couched in simple general language. If one will examine the Negotiable Instruments Law, the Sales Act, most of the uniform commercial statutes, and the other codes of the world, he will find that they consist mostly of short, concise sections in terse sentences. This Code, however, has long and complicated sections, often incorporating by reference whole sections as exceptions, in sentences that are a half page or more long. Just thumb through Article 9, and this will at once become apparent.

Section 9-312, set out in the margin,[126] which purports to state

---

[124] See Beutel, *supra*, note 2, 16 LAW & CONTEMP. PROB. 141, 154 ff.

[125] See BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENTS LAW (7th ed. 1948) Chs. I-III.

[126] Section 9-312. Conflicting Security Interests: General Rules of Priority. When conflicting security interests attach to the same collateral, such interests rank in the order of time of perfection with the following exceptions:

(1) An interest which attaches after filing takes priority from the time of filing, but in case of conflict this rule is subject to the rules stated in the following subsections.

(2) A secured party who has a perfected security interest and who makes later advances to the debtor on the same collateral and under the same security agreement takes priority as to the later advances from the time when his security interest was originally perfected.

general rules of priorities of conflicting security interests, is one of the worst examples of this sort of thing. In the original it is a page and a half long, divided into eight sub-sections, seven of which are exceptions to the first, which, in turn, is an exception to the rule stated. Many of the sub-sections are exceptions within exceptions to each other, and the last incorporates three other sections covering two and a half pages, which "supplement" whatever that means, "the rules stated in this section." It seems impossible to tell what it means, and there is doubt whether a logician or a grammarian could diagram it. All this seems unnecessary. Since they were creating a code, all they had to do was to state

(3) A secured party who has a perfected security interest and who acquires rights in after-acquired collateral under a term in the security agreement takes priority as to such rights from the time when his security interest was originally perfected, whether or not he makes advances on the after-acquired collateral, except as otherwise provided in subsection (4).

(4) A purchase money security interest has priority over a conflicting interest in the same collateral which is claimed under an after-acquired property clause if the purchase money security interest is perfected at the time the debtor receives the collateral or within ten days thereafter and, where the collateral is inventory, if before the debtor receives it the purchase money party also notifies any secured party who has made a prior filing covering inventory of the type concerned. Such notification must describe the inventory concerned, state that the interest is a purchase money security interest and specify its amount. If, however, the interest claimed under an after-acquired property clause is itself a purchase money security interest, the rule stated in subsection (5) applies.

(5) When there are conflicting purchase money security interests, the interest of a seller or of a secured party whose advance was used at his direction to pay a seller takes priority if he has perfected his interest at the time the debtor receives the collateral or within ten days thereafter. In any other case of conflicting purchase money security interests they rank equally.

(6) When the collateral is crops the interest of a later secured party who, in order to enable the debtor to produce them, makes a new advance, incurs a new obligation, releases a perfected security interest or gives other new value during the production season or not more than three months before the crops are planted or otherwise become growing crops, takes priority over the interest of an earlier secured party to the extent that the earlier interest secured obligations (such as rent, interest or mortgage principal amortization) due more than six months before the crops are planted or otherwise become growing crops.

(7) A security interest which secures an obligation to reimburse a surety or other person secondarily obligated to complete performance is subordinate to a later security interest given to a secured party who makes a new advance, incurs a new obligation, releases a perfected security interest or gives other new value to enable the debtor to perform the obligation for which the earlier secured party is liable.

(8) Section 9-313 on goods which are part of the realty, Section 9-314 on goods which are affixed to other goods and Section 9-315 on goods which are commingled or processed state rules of priority which supplement the rules stated in this section.

"Conflicting Security Interests shall take priority in the following order" and then list them.

Section 3-304 on notice to purchasers of money paper is another beauty; but this has been spelled out at length elsewhere[127] and there is no need to reproduce it here. There are many others of this ilk.[128]

Another example of this obscure and technically bad draftsmanship is found in Section 9-206. There has long been a conflict as to the negotiability of chattel notes, that is, notes otherwise negotiable containing a security agreement.[129] There has also been a conflict as to the effect of transfer of negotiable paper with collateral security agreements like mortgages, conditional sales, bailment leases, and the like. Some courts have held that the subsidiary contract was negotiable with the note,[130] others that the subsidiary contract being non-negotiable the note was likewise so,[131] and some that the note passed by negotiation and the subsidiary contract by assignment.[132] To meet this difficulty many lawyers have created the device of negotiability by contract which has been discussed at length elsewhere, and upon the effect of which the courts are also split.[133] Here was an excellent opportunity for the draftsmen to clear up the law. What have they done about it? Enacted Section 9-206, set out in the margin,[134] with the rule that in the case of

---

127 Beutel, *Comparison of the Proposed Commercial Code, Article 3 and the Negotiable Instruments Law,* 30 NEB. L. REV. (1951) 531, 546 ff.

128 For example see, 1-105, 2-401, 3-501, 4-207, 7-210, 7-308, 7-403, 8-202.

129 The discussion goes back to the Ames Brewster Controversy. For a collection of authorities see Beutel, UNIFORM COMMERCIAL LAWS (1950) 219 ff.

130 For authorities supporting this view see, 2 JONES, MORTGAGES (8th ed. 1928) §§ 1057 ff, 1063 ff; Britton, *Assignments of Mortgages Securing Negotiable Notes,* 10 ILL. L. REV. 337 (1915).

131 State National Bank of El Paso, Texas v. J. H. Contrell, 47 N.M. 389, 143 P. 2d 592 (1943); see note 152 A.L.R. 1222 (1944).

132 See Note, 29 NEB. L. REV. 606 (1950).

133 See Beutel, *Negotiability by Contract,* 28 ILL. L. REV. 205 (1933).

134 Section 9-206. Agreement Not to Assert Defenses Against Assignee; Modification of Sales Warranties by Security Agreement.

(1) An agreement by a buyer of consumer goods as part of the contract for sale that he will not assert against an assignee any claim or defense arising out of the sale is not enforceable by any person. If such a buyer as part of one transaction signs both a negotiable instrument and a security agreement even a holder in due course of the negotiable instrument is subject to such claims or defenses if he seeks to enforce the security interest either by proceeding under the security agreement or by attaching or levying upon the goods in an action upon the instrument.

(2) In all other cases an agreement by a buyer that he will not assert against an assignee any claim or defense arising out of the sale is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the Article on Commercial Paper (Article 3). A buyer who as part of one trans-

"consumer goods" (a concept which itself is not clear in the definition, Section 9-109) even a negotiable note secured by such goods is *not negotiable* if the holder attempts to enforce the security or levy on the goods. If he does *not* so levy, the note apparently is negotiable. (A nice trap for the unsophisticated, making the substantive right depend upon the choice of procedural remedy.) But in all other cases where negotiability by contract or a negotiable note is involved, the buyer will have been presumed to have signed a contract waiving defenses. On just what is the effect of the presumed waiver, and whether the security contract passes by negotiation, assignment, estoppel by contract, etc., the section is silent. In this, one of the commoner business transactions, it will take about fifty years of litigation to tell what this section means; conflicting decisions are assured in advance. It could all have been settled by providing that when a non-negotiable contract secures a negotiable note, both pass by negotiation, or better, that the note passes by negotiation and the contract by assignment.

This was suggested to the draftsmen at a conference of experts about six years ago; like many suggestions for improvements in these drafts, it fell on deaf ears. There is no excuse for this sort of thing, but the Code is still full of it.

Article 9 is too Experimental and too Crude

In theory Article 9 on Secured Transactions is an attempt to consolidate all security transactions to one system of law and to provide for a recording system to protect lenders and bona fide purchasers of the property given as security. It not only is intended to replace the Uniform Conditional Sales Act, Chattel Mortgage Acts, and the Uniform Trust Receipts Act, but also it attempts to govern any sort of commercial transaction which results in a lien on or pledge of goods, accounts, or commercial paper. It is obviously a grandiose experiment in attempting to codify the law governing all of the various commercial security transactions. In the words of the draftsman

> Article 9 deliberately cuts loose from all anchorage in the past. It cuts across what have been regarded as separate fields of law, introducing a completely new terminology, incidentally repeals much old law, and in the process creates, and attempts to solve, new problems of its own.[135]

---

action signs both a negotiable instrument and a security agreement makes such an agreement.

(3) When a seller retains a purchase money security interest in goods the sale is governed by the Article on Sales (Article 2) and a security agreement cannot limit or modify warranties made in the original contract of sale.

[135] Gilmore, *The Secured Transactions Article of the Commercial Code*, 16 Law & Contemp. Prob. 27, 28 (1951). Confirming this statement Comment

No economic data is offered to show that such sweeping changes in the law are necessary and there seems to be little if any research to indicate that the particular rules of law suggested here would be better than any of hundreds of others that might be used. To urge the adoption of such a new and untried statute is a rash shot in the dark to say the least.

As already indicated by many examples in this and other discussions, Article 9 is not well drafted. The many intricate changes in the law which it attempts raise problems of interpretation of gigantic scope. Already almost as much has been written about this Article as the rest of the Code combined[136] and still its concepts are hazy, its language complicated and obscure, and its impact upon the business world scarcely considered.

One example in addition to those already given will suffice to show the perils involved in adopting this kind of statute. Section 9-109, set out in the margin,[137] divides goods into four classifica-

No. 2, to Section 9-105, Code p. 708 says:

"2. *'Debtor'* (subsection (1) (d): the terms 'debtor' and 'secured party' (subsection (1) (i)), which are used in this Article to describe the parties to a security transaction, have been chosen in a deliberate effort to break away from existing terminology.

This Article abandons distinctions based on the form of the various security devices (see Comment to Section 9-101) and refers generally to 'security interests' (defined in Section 1-201). It is necessary to have a set of terms to describe the parties to a security transaction, but the selection of the set of terms applicable to any one of the existing forms (for example, mortgagor and mortgagee) might carry to some extent the implication that the existing law referable to that form was to be used for the construction and interpretation of this Article. Since it is desired to avoid any such implication, a set of terms having no common law or statutory roots has been chosen."

[136] Article 9 has been discussed, among others, in the following articles: Dunham, *Inventory and Accounts Receivable Financing,* 62 HARV. L. REV. 588 (1949); Llewellyn, *Problems of Codifying Security Law,* 13 LAW & CONTEMP. PROB. 687 (1948); Ireton, *The Proposed Commercial Code: A New Deal in Chattel Security,* 43 ILL. L. REV. 794 (1949); Kripke, *The "Secured Transactions" Provisions of the Uniform Commercial Code,* 35 VA. L. REV. 577 (1949); Kripke, *Chattel Paper as a Negotiable Specialty under the Uniform Commercial Code,* 59 YALE L. J. 1209 (1950); Gilmore, *The Secured Transactions Article of the Commercial Code,* Everett, *Securing Security,* Countryman, *The Secured Transactions Article of the Commercial Code and Section 60 of the Bankruptcy Act,* all in 16 LAW & CONTEMP. PROB. 27, 49 and 76 (1951). All of 13 LAW & CONTEMP. PROB. 553-702 (1948) was devoted to the problem; Brindbaum *Article 9—A Restatement and Revision of Chattel Security,* [1952] WISCONSIN L. REV. 348; note *id* 730.

[137] Section 9-109. Classification of Goods: "Consumer Goods"; "Equipment"; "Farm Products"; "Inventory."

Goods are

(1) "consumer goods" if they are used or bought for use primarily for personal, family or household purposes;

(2) "equipment" if they are used or bought for use primarily in business

tions — "consumers' goods," "farm products," "inventory," and "equipment." The latter seems to be a catch-all for goods not found in the other three classifications. All of these terms are highly technical and most af them are not used in the ordinary sense in which they are understood in commerce and trade. Yet this classification becomes the basis of later determining the conflicting rights of purchasers and debtors, the nature of rights and actions to be taken on default and the determination for the place of filing.[138] In regard to this latter alone it should be noted that there are at least six different places and one alternative provision provided for filing,[139] and the debtor must choose the right place to file at the peril of failing to perfect his rights[140] or losing them to subsequent purchasers or other creditors.[141] Now it should be noted that the definitions of the various classes of goods seem to depend upon the intention of the debtor in dealing with them. For example, if a farmer wants to borrow money on grain stored on his farm, the grain seems to be "farm products," if he intends to feed it to his stock; "inventory," if he intends to sell[142] or re-sell it; "consumers' goods," if he intends to grind and use it for personal or family use; and apparently "equipment" if he bought it from a neighbor and is just holding it, not having yet made up his mind what he intends to do with it.

The creditor will either have to know or guess the farmer's intention before he can choose the proper recording office.[143] Now if the farmer has multiple intentions on a bin full of fungible goods or may change his mind about their disposition, the only thing a lawyer could advise his client, the creditor, would be to record in every available place. The average creditor who relies upon the

(including farming or a profession) or by a debtor who is a non-profit organization or a governmental subdivision or agency or if the goods are not included in the definitions of inventory, farm products or consumer goods;

(3) "farm products" if they are crops or livestock used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool-clip, maple syrup, milk and eggs), and if they are in the possession of a debtor from whose raising, fattening, grazing or other farming operations they derive or in which they are used. If goods are farm products they are neither equipment nor inventory;

(4) "inventory" if they are held or are being prepared for sale or are to be furnished under a contract of service or if they are raw materials, work in process or materials used or consumed in a business. If goods are inventory they are neither farm products nor equipment.

138 See Comment 1 to 9-109.

139 9-401.

140 9-302.

141 9-301.

142 *Cf. contra*: Comment 4, Code p. 718.

143 See 9-401.

normal commercial use of the terms will immediately be in hot water. It should be also noticed that when Article 9-401 signifying the places of recording is examined there appears a fifth category into which goods are divided, namely, "crops," which does not seem to be defined. Perhaps an ordinary banker, lender, or other businessman would assume that a loan on corn in storage might be a lien on a crop,[144] which under Section 9-401 would have to be recorded "in the county where the land... is located." But the discussion above would show that a court might hold how wrong he would be. But the rightness or wrongness of the interpretation is not important, it is a pity that it is necessary at all. In fact the Comment to Section 9-109 suggests that these are lines "for the courts to draw."[145] So it seems that if you record under this act you may get a law suit, and if you don't you are almost sure to lose your lien. Not a happy condition for a recording act, especially when it could be easily avoided by requiring all types of liens to be registered in one place. This one example is sufficient to show the difficulties certain to accompany such a sweeping change of the law as is contemplated by Article 9.

Now the writer is hardly one to object to experimentation,[146] but at the same time it seems wise that changes of as radical a nature as those required by this Article should be enacted and observed on a small scale. Then the law should be re-written before it is offered for national adoption by the forty-eight states.

If the legislature of Ohio wants to indulge in such experimentation, it might adopt Article 9 as a separate statute and then, after five or ten years' observation of its results, decide what it wants to do about the rest of the Code. But even such a step would not seem wise as long as Article 9 remains in its present form.

Conclusion

As has been indicated above Articles 4 and 9 of the proposed Code in their present form are entirely unacceptable and should not be adopted either as separate statutes or as part of a unified commercial code. The rest of the Code, although it makes no radical changes in the substantive law, is drafted in such unique and unusual terminology that to adopt it would require a complete judicial reinterpretation of the law.[147] Any state, therefore, which

[144] So also The New Standard Dictionary (1946).

[145] Comment 4 to 9-109 Code p. 718.

[146] See Beutel, *An Outline of the Nature and Methods of Experimental Jurisprudence,* 51 Col. L. Rev. 415 (1951).

[147] Lest someone might argue that since the chief detailed specific objections in this paper are to Articles 4 and 9 that therefore the rest of the Code is above or beyond criticism, the diligent reader is referred to my three other articles on the subject cited *supra,* notes 2 and 81 where I have set out at length many more specific objections to other Articles of the Code, not only my own but those of many learned authorities not cited here.

adopts this Code in its present form will destroy the uniformity which has been built up slowly and carefully over fifty years of successive adoption of the commercial laws. If one important state makes such an adoption, there could never be any hope of establishing uniformity again except by repeal of the Code and re-enactment of the uniform statutes in the adopting state or, perhaps, by enactment of the Commercial Code in all the other states. If past experience is any indication of the expectation of such adoption, it would probably take fifty to one hundred years to get uniform enactment of this new Code.

If there were any grave defects in the present uniformly adopted statutes, or, if there were a crisis in the commercial law, such drastic steps might be necessary, but no such condition seems to obtain. A commercial code, adopting the present standard terminology with such changes in language as experience has shown to be necessary and such additions as careful study might indicate would be advisable, could be drafted.

The adoption of such a code by any one state would not run the danger of dislocating of the law and creating conflicting decisions destroying uniformity which is involved in this draft. It would, therefore, be wise for the legislature of Ohio, and any other state legislature, to refrain from adopting this Code until it has been returned to the Institute and been put in a more practical form. If the legislature so desires it could adopt portions of this Code as experimental statutes, but to adopt the whole would be to invite chaos in the Commercial Law.