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From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law

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From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law

CHARLES A. BANE*

*History . . . is a part of the rational study [of law], because it is the first step toward an enlightened scepticism, that is, towards a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or tame him and make him a useful animal.***

Oliver Wendell Holmes, Jr.

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** O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 186-87 (1920).

I. INTRODUCTION

If each man were physically able to satisfy independently all of his needs—food, shelter, and the like—perhaps the practice of trading would never have developed. But because such independence is impossible, man early developed the practice of limiting his efforts to those things he was capable of doing well, and trading the fruits of those efforts for the things he was incapable of achieving on his own. Eventually, some men discovered they could earn their livelihood by trading for profits the goods of others. Inevitably, disputes arose among those traders.

In the United States, commercial disputes are usually settled by reference to the Uniform Commercial Code. This article traces the development of the commercial law, which found its ultimate distillation in the Code. The examination begins in thirteenth century England, where merchants governed their conduct by the customs that developed in their occupation—the law merchant—and then proceeds to investigate how two great common-law judges aided in incorporating the law merchant into the common law of England. The focus then shifts to the newly independent United States of America, where the law merchant was accepted as part of the common law. A problem peculiar to the young nation, a political system with many independent subdivisions, led to great confusion among merchants transacting business in more than one state. The answer was obvious, but slow in coming: a codification of American commercial law, adopted as law by all of the states. This article reviews the efforts of those who sought codification, such as Justice Joseph Story, and those who eventually achieved it. Of those achievers, particular recognition is given to Karl Llewellyn and Soia Mentschikoff, who together as craftsmen of the law, and as husband and wife, joined the successful cooperative effort to tame the dragon of commercial law.

II. THE ENGLISH ORIGINS OF AMERICAN COMMERCIAL LAW: THE LAW MERCHANT AND THE COMMON LAW

The thread of American commercial law begins in ancient England, where merchants and traders developed the customs that formed the law merchant. The principal virtue of the law merchant was its flexibility; merchants were free to change their customs to promote more efficient business practices. This same flexibility prevented the law merchant from being readily integrated into the more rigid common law. This integration required the efforts of

two great common-law judges: Lords Holt and Mansfield.

A. *The Law Merchant: Of Piepowder Courts, Staple Towns, and Mercantile Customs*

The earliest recorded judicial institution that determined issues of commercial law was the piepowder court, which made its appearance in England in the middle of the thirteenth century and existed for more than three centuries thereafter to settle disputes between merchants. English society in the thirteenth century was rural and agrarian; what trade there was took place at local fairs. The piepowder courts were established at these fairs; their name evolved from an Anglicization of the Norman-French term "pie poudres," meaning powdered or dirty feet and referring to the shoes of the itinerant merchants who traded goods at the fairs.¹ The authority to hold a piepowder court was part of the royal franchise to a lord or borough to hold a fair. Court was held before the lord's steward of the market, or if it was a borough fair, before the mayor or bailiff of the borough. The court's jurisdiction was confined to disputes arising at the fair; this included matters of debt, contract, trespass, and violations of the Assizes of Bread and Beer.² The proceedings were held in a shed and were highly informal, probably resembling more a street corner argument than a modern trial. It was justice on the spot, with no delays. In Colchester in 1458, a merchant-creditor sued in a piepowder court at eight o'clock in the morning to recover a debt. He won a default judgment at noon and attached the debtor's goods by four o'clock that afternoon.³

The piepowder courts applied rules of decision derived from the customs and usages of the merchants. These rules became known as the law merchant.⁴ In accordance with the law merchant, the piepowder courts enforced informal oral and written agree-

1. For a more detailed description of the piepowder courts, see 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 536 (7th ed. 1956). Many merchants came from abroad because the Magna Carta assured them safe and secure conduct in and out of England. *Id.* at 540.

2. *Id.* at 536. An assize was one of the many royal franchises created by technical common-law language. The grant to hold an Assize of Bread and Beer was the right to hold a fair with the corresponding power to hold a court of very limited jurisdiction. These courts established standards for price, weight, and measure of bread and beer—two essential elements of the medieval diet. *Id.* at 275.

3. 23 SELDEN SOCIETY, *SELECT CASES CONCERNING THE LAW MERCHANT I*, at 122, 122-25 (1908).

4. See 2 SELDEN SOCIETY, *SELECT PLEAS IN MANORIAL AND OTHER SEIGNORIAL COURTS I*, at 130, 131-32 (1888).

ments at a time when the common-law courts, bound by the forms of action, were enforcing only written agreements under seal.

As trade and commerce began to expand beyond the local fairs, merchants looked for more efficient alternatives to the pie-powder courts. The result was the Statute of the Staple,⁵ promulgated in 1353 and described as the most important of all medieval English commercial statutes.⁶ The Statute established courts in fifteen staple towns in England, Ireland, and Wales, which became known as Courts of the Staple.⁷ The mayor of the staple town, along with two constables, presided over the court and exercised jurisdiction over all matters relating to the staple. The Statute required the mayor to have knowledge of the law merchant and expressly provided that the staple courts were to apply the law merchant and not the common law.⁸ The juries that were used were composed exclusively of merchants. One staple court lawsuit was based on a claim that wool delivered was not true to the sale sample; jurisdiction was held to rest in the staple court because sales by sample were regulated according to the custom of merchants—the law merchant.⁹

In the fifteenth century, the bill of exchange came into use for transactions among merchants. This trading device had come upon bankers slowly:

“Exchange” was at first the simple process of changing coins of one currency against those of another, but there soon grew up an organisation of international bankers having agents or correspondents in the principal commercial centres, and these firms, instead of actually delivering coins of one type in exchange for coins of another, would write a letter of exchange to their correspondents, effecting the transfer purely on paper.¹⁰

5. Statute of the Staple, 1353, 27 Edw. 3.

6. Beutel, *The Development of Negotiable Instruments in Early English Law*, 51 HARV. L. REV. 813, 826 (1938).

7. Statute of the Staple, ch. 1. Staple towns were self-governing communities created to encourage the trading of regularly produced commodities such as lead, tin, leather, wool, and cloth. Beutel, *supra* note 6. The Statute also simplified the collection of debts, Statute of the Staple, ch. 9; created standards of weights and measurements for commercial goods, *id.* ch. 10; and provided safe conduct in and out of the realm for all foreign merchants from friendly countries, *id.* ch. 2.

8. Statute of the Staple, ch. 8; see J. HOLDEN, *THE HISTORY OF NEGOTIABLE INSTRUMENTS IN ENGLISH LAW* 14 (1955); Burdick, *What is the Law Merchant?*, 2 COLUM. L. REV. 470 (1902).

9. *Wm. of Dunstable v. Robert le Bal[ancer]* (Assize at Romsey 1278), reprinted in 46 SELDEN SOCIETY, *SELECT CASES CONCERNING THE LAW MERCHANT II*, at 28 (1930) (brackets in original).

10. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 666-67 (5th ed. 1956).

The bill of exchange was originally a continental creature and thus was not recognized by the xenophobic English common-law courts, which left its enforcement to the Courts of the Staple under the law merchant, and with respect to foreign trade, in the admiralty courts.¹¹ In 1437 a court resembling a staple court, the Mayor's Court of London, recognized the right of a bearer of a bill of exchange to sue "according to the law merchant."¹²

When Sir Edward Coke became Chief Justice of the King's Bench in 1613, the common-law courts began to assert a general jurisdiction over commercial matters—at the expense of the jurisdiction of the piepowder and staple courts.¹³ A new pleading practice sprang up in the common-law courts in the 1600's which urged that prevailing customs among merchants could be the basis for a legal duty. The pleadings alleged the custom, the facts of the case, and that the rights and duties of the parties arose by virtue of the custom.¹⁴

Two obstacles stood in the way of common-law actions based on mercantile custom. First, the custom had to exist from time immemorial to be recognized as a source of law. This requirement was easily met because the customs of merchants were found to be very old. The second requirement was more difficult: the custom had to be limited in its application—it had to apply to only a particular class of persons or to a particular place. As Coke put it: "[A] custome cannot be alledged generally within the kingdome of *England*; for that is the common law."¹⁵ To overcome this obstacle, the pleadings would allege that the parties were merchants and that the custom was that of a particular place (usually London). This new form of action became known as an action on the case upon the custom of merchants.

Merely pleading that the rights and duties of the parties were governed by mercantile custom was not enough to secure a judgment. Throughout the seventeenth century the common-law courts refused to take judicial notice of mercantile customs. The custom not only had to be pleaded, it had to be proved, and it had to be

11. See *id.* at 668.

12. *Burton v. Davy* (Mayor's Ct. of London 1437), reprinted in 49 SELDEN SOCIETY, SELECT CASES CONCERNING THE LAW MERCHANT III, at 117, 117 (1932).

13. While the piepowder courts were fading in England, the Colony of New York enacted a statute in 1692 which gave the colonial governor authority "to have and to hold a court of Pypowder." An Act for the Settling of Fairs and Markets, ch. 26, 1 N.Y. Colonial Law 296, 298 (1692).

14. J. HOLDEN, *supra* note 8, at 31.

15. 2 E. COKE, COMMENTARY UPON LITTLETON *110b (italics in original).

proved de novo in each individual case.¹⁶ The courts and the bar received some assistance from treatises on the law merchant—but these were written by merchants, not lawyers, and thus were not regarded as treatises on the law.¹⁷

B. *Merging the Law Merchant into the Common Law: Holt and Mansfield*

In the eighteenth century two renowned common-law judges, Lord John Holt and William Murray, Lord Mansfield, turned their talents to the law merchant. Their work brought about the solution to the problems of common-law actions based on mercantile custom; under these two judges, the law merchant was integrated into the common law of England.

1. LORD HOLT

The first of these two innovators came to the King's Bench in 1689 and held office until shortly before his death in 1710. Under Holt the common law courts, when hearing commercial cases, began to take judicial notice of some of the more notable mercantile customs.¹⁸ For those cases in which he did not take judicial notice of a particular mercantile custom, Holt often used the ancient institution of the special jury,¹⁹ composed of merchants, to advise him on mercantile customs in England's rapidly developing trade and commerce activities. Once, he invited all prominent London merchants to advise him on a question concerning acceptance of a bill of exchange.²⁰

Holt was the first common-law judge to recognize the title to a bill of exchange in a bona fide transferee for value. In a memorable case appropriately entitled *Anonymous*,²¹ A lost a bank bill payable to A or bearer. It was found by a stranger who sold it to the unsuspecting C. Holt ruled that A could not maintain trover²²

16. "[A]lthough we must take notice in general of the law of merchants; yet all their customs we cannot know but by information." *Anonymous*, Hardres 485, 486, 145 Eng. Rep. 560, 561 (Ex. 1668).

17. T. PLUCKNETT, *supra* note 10, at 660.

18. *Id.* at 664.

19. In unusually complex litigation, English courts could draw a jury from a limited list of persons who held property and positions of a higher degree than those who were allowed to sit as general jurors. This was known as a special jury. Danzig, Hadley v. Baxendale: A Study in the Industrialization of the Law, 4 J. LEGAL STUD. 249, 272 & n.97 (1975).

20. *Mutford v. Walcot*, 1 Ld. Raym. 574, 575, 91 Eng. Rep. 1283, 1284 (K.B. 1700).

21. 1 Salk. 126, 91 Eng. Rep. 118 (K.B. 1698); see J. HOLDEN, *supra* note 8, at 64-65.

22. Trover was a common-law form of action originally used to recover damages against

against *C* to recover the value of the bill because the course of trade had established that a bona fide purchaser for value of a bill payable to bearer takes a property right in the bill.²³

Although Holt was innovative in most areas of commercial law, he was often conservative in some of the relatively new areas of trade and commerce. For example, Holt refused to accept the seventeenth-century mercantile custom that recognized promissory notes as negotiable instruments.²⁴ On two occasions Holt faced the question whether a bona fide transferee for value of a promissory note took good title; both times he answered in the negative. In *Clerke v. Martin*,²⁵ Holt denounced promissory notes as being "innovations upon the rules of the common law . . . unknown to the common law, and invented in Lombard-Street, which attempted in these matters of bills of exchange to give laws to Westminster-Hall."²⁶ In *Buller v. Crips*,²⁷ John Smith endorsed to a third party a promissory note made payable to "John Smith, or order." The third party brought an action against the drawer of the note, relying upon the custom of merchants which recognized the third party's right to collect on the note. Holt was advised by two London merchants that they frequently made such notes and looked upon them as bills of exchange. But Holt concentrated on the technical differences between a promissory note and a bill of exchange and refused to recognize the promissory note as negotiable.²⁸ This was intolerable for English bankers and merchants. In 1704 they succeeded in having promulgated the Promissory Notes Act, which made promissory notes "assignable . . . in the same manner as inland bills of exchange . . . according to the custom of

a person who had found another's goods and converted them to his own use. It ultimately became the remedy for any wrongful interference with or detention of another's goods. BLACK'S LAW DICTIONARY 1351 (rev. 5th ed. 1979).

23. 1 Salk. at 126, 91 Eng. Rep. at 118-19.

24. The promissory note, the precursor to the modern checking system, was an invention of seventeenth-century goldsmiths. They accepted money from their customers on deposit, giving in return a note promising to pay the deposit on demand. Merchants regarded these notes as negotiable. T. PLUCKNETT, *supra* note 10, at 669.

25. 2 Ld. Raym. 757, 92 Eng. Rep. 6 (K.B. 1702).

26. 2 Ld. Raym. at 758, 92 Eng. Rep. at 6.

27. 6 Mod. 29, 87 Eng. Rep. 793 (K.B. 1703).

28. Holt characterized the promissory note as nothing more than "a piece of paper, which is in law but evidence of a parol contract." *Id.* He opined that if a promissory note were assignable, it would allow anyone but the payee to assign the right to an action against the drawer of the note. The bill of exchange, on the other hand, had two specific purposes: expediting trade and hindering the exportation of money from the realm. As long as legal bills of exchange were available to merchants, Holt insisted, promissory notes were unnecessary. 6 Mod. at 29-30, 87 Eng. Rep. 793-94.

merchants."²⁹

2. LORD MANSFIELD

The second eighteenth-century judge who contributed to the development of commercial law needed no parliamentary impetus to effect reforms. Lord Mansfield was born as William Murray in 1705 into the Scottish peerage and served as Chief Justice of the King's Bench from 1756 to 1788. His contribution to commercial law is immeasurable—it prepared English law for the Industrial Revolution and its reforms.

Mansfield took decisive action to bring the law merchant into the common law. His primary technique was to use a special jury of merchants to find the appropriate mercantile custom or usage and then to use that finding as a rule of law for subsequent cases.³⁰ Mansfield was not bothered by technical questions of whether the custom was long-standing and limited in scope; indeed, he may have been assisted in his task of incorporating the law merchant into the common law by Coke's declaration that if a custom was general within England, it was the common law.³¹

Lord Mansfield used the special jury to create a channel of communication between the judge and merchant. He treated his corps with respect and dignity, and he often invited them to dine with him. Each of them in turn regarded it as an honor to be one of Lord Mansfield's jurymen. Businessmen found they could obtain speedy justice before the King's Bench because of Mansfield's efficiency and diligence. Commercial cases flowed into his court, almost draining rival courts. Mansfield's zeal sometimes led him to hold court on holidays, when courts would customarily adjourn. At one session Mansfield announced his intention of sitting on Good Friday, which prompted Serjeant Davy, a prominent lawyer, to re-

29. Promissory Notes Act, 1704, 3 & 4 Anne, ch. 9; see *Mandeville v. Riddle*, 5 U.S. (1 Cranch) 290, 367 app. (1803); J. HOLDEN, *supra* note 8, at 79-80.

30. See, e.g., *Hankey v. Jones*, 2 Cowp. 745, 98 Eng. Rep. 1339 (K.B. 1778); *Buller v. Harrison*, 2 Cowp. 565, 98 Eng. Rep. 1243 (K.B. 1777).

31. See *supra* text accompanying note 15. Fifty-six of Lord Mansfield's *Judge's Note Books* were found at Scone Palace in 1967. They contain, among other things, voluminous trial notes, which are being analyzed and prepared for publication by Professor James C. Oldham of Georgetown Law School. These notes may illuminate Mansfield's thought processes beyond those shown in his published opinions.

The notebooks reveal that the two most common causes of action before the Chief Justice were first for goods sold and delivered, and second for money received. In addition, actions on promissory notes outnumbered those on bills of exchange. E. HEWARD, *LORD MANSFIELD* 52-53 (1979).

mark that "your Lordship will be the first judge to have done so since Pontius Pilate."³²

Mansfield set forth his views on the necessity of upholding the negotiability of bills of exchange and promissory notes in *Peacock v. Rhodes*:³³

The holder of a bill of exchange, or promissory note, is not to be considered in the light of an assignee of the payee. An assignee must take the thing assigned, subject to all the equity to which the original party was subject. If this rule applied to bills and promissory notes, it would stop their currency. The law is settled, that a holder, coming fairly by a bill or note, has nothing to do with the transaction between the original parties I see no difference between a note indorsed blank, and one payable to bearer. They both go by delivery, and possession proves property in both cases.³⁴

Mansfield valued certainty in the law merchant, even at the expense of flexibility. In *Edie v. East India Co.*,³⁵ he accepted a previously settled rule that a bill not endorsed "to order" could still be negotiable despite evidence that the custom of merchants on the matter had changed:

Since the trial, I have looked into the cases, and have considered the thing with a great deal of care and . . . I am very clearly of opinion, that I ought not to have admitted any evidence of the particular usage of merchants in such a case. . . . for the law is already settled.³⁶

Likewise, in *Pillans v. Van Mierop*,³⁷ where Mansfield tried to abolish the requirement of consideration for a contract, Mansfield

32. E. HEWARD, *supra* note 31, at 62. The quality of Mansfield's decisions was greatly enhanced by having many of his cases reported by Sir James Burrow. Burrow's Reports were a departure in law reporting: he used a modern-type headnote and made sharp divisions between the facts, arguments of counsel, and the opinion of the court. P. WINFIELD, *THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY* 190 (1925).

33. 27 Dougl. 633, 99 Eng. Rep. 402 (K.B. 1781).

34. *Id.* at 636, 99 Eng. Rep. at 403 (footnotes omitted); *cf.* *Miller v. Race*, 1 Burr. 452, 457, 97 Eng. Rep. 398, 401 (K.B. 1758) (Mansfield noted that bank notes are "treated as money, as cash, in the ordinary course and transaction of business"); *Grant v. Vaughan*, 3 Burr. 1516, 97 Eng. Rep. 957 (K.B. 1764) (a bill of exchange made payable to A or bearer was intended to be readily assignable, even without endorsement).

35. 2 Burr. 1216, 97 Eng. Rep. 797 (K.B. 1761).

36. *Id.* at 1222, 97 Eng. Rep. at 800. Justice Foster in the same case concurred with Mansfield: "This custom of merchants is the general law of the kingdom, part of the common law; and therefore ought not to have been left to the jury, after it has been already settled by judicial determinations." *Id.* at 1226, 97 Eng. Rep. at 802.

37. 3 Burr. 1663, 97 Eng. Rep. 1035 (K.B. 1765).

said: "The law of merchants and the law of the land, is the same: a witness cannot be admitted, to prove the law of merchants. We must consider it as a point of law."³⁸

Consistent with his view of the law merchant as part of the common law, Mansfield refused to abide by the verdict of a special jury in *Medcalf v. Hall*,³⁹ where the defendant-drawer delivered to the plaintiff-payee a draft on B & Co. at 1:00 p.m. The offices of B & Co. were only one-half mile away and were open until 5:00 p.m., but the payee did not present the draft until the following morning, by which time B & Co. had failed. Had the payee exercised due diligence in presenting the draft? Mansfield told the jury that it had been presented within a reasonable time.⁴⁰ The jury disagreed and returned a verdict for the drawer. Mansfield ordered a new trial, but the jury again found for the drawer. Another new trial was ordered, but at this point the understandably disgruntled plaintiff gave up.

Despite Mansfield's intractability in *Medcalf*, he rarely refused to follow the findings of his special jury as to the customs of merchants and incorporate them into the common law. This practice has prompted some legal scholars to criticize Mansfield's approach. One critic complained that the expression *lex mercatoria* had "frequently led merchants to suppose, that all their new fashions and devices immediately become the law of the land Merchants ought to take their law from the courts, and not the courts from merchants"⁴¹ An American court, in following banking custom on a checking matter, gave a persuasive answer to this type of criticism: "[H]istorically the law of negotiable instruments is an outgrowth of the Law Merchant in which law, far more than accommodating itself to business necessities, was rather the product of those business practices. No harm lurks in this blending of law and the needs of modern day commerce."⁴²

The majority of Mansfield's contemporaries valued his efforts

38. *Id.* at 1670, 97 Eng. Rep. at 1038.

39. 3 Dougl. 113, 99 Eng. Rep. 566 (K.B. 1782).

40. *Id.*; cf. *Tindal v. Brown*, 1 T.R. 167, 99 Eng. Rep. 1033 (K.B. 1786) (holding that what is reasonable notice to the endorser of nonpayment by the drawer of a promissory note is a question of law).

41. Christian, Note to 1 W. BLACKSTONE, COMMENTARIES *75 (E. Christian 14th ed. 1803) (1st ed. London 1765), quoted in Baker, *The Law Merchant and the Common Law before 1700*, 38 CAMBRIDGE L.J. 295, 299 n.19 (1979). Professor Baker believes that Mansfield's contribution to the law merchant has been exaggerated, and that history has given insufficient credit to Holt and Mansfield's other judicial predecessors.

42. *Duke v. Sun Oil Co.*, 320 F.2d 853, 861-62 (5th Cir. 1963).

to modernize commercial law. Within two years of his retirement as Chief Justice in 1788, three treatises on the law relating to bills and notes dealt with his decisions. One of these, Stewart Kyd's treatise on *The Law of Bills of Exchange*⁴³ was written in 1791 for both lawyers and "men of business." At least three editions were published in England and two in the newly established United States of America. On the other hand, Sir William Blackstone's treatment of the law merchant in his famous *Commentaries* is unsatisfactory, considering that he was living and writing in the eighteenth century during a time of great developments in commercial law. In late editions of the *Commentaries*, when Mansfield's work was nearly done, Blackstone devoted only five pages to bills of exchange (which he said were commonly known as draughts) and promissory notes, under the rubric of "debts upon simple contract."⁴⁴ He covered sales in only six pages, under "contract," but devoted several pages to the almost obsolete market overt.⁴⁵

It is surprising that Blackstone ignored Mansfield's work, for the two men were contemporaries who knew and respected each other. Blackstone had praised Mansfield's work in prize cases,⁴⁶ and Mansfield had supported Blackstone for the Vinerian Professorship at Oxford University where Blackstone delivered the lectures that were to form the basis for his *Commentaries*.⁴⁷ Perhaps Blackstone was simply unaware of the efforts of Mansfield and Holt to incorporate the law merchant into the common law; Blackstone regarded the law merchant not as a part of the common law, but as part of the law of nations and enforced in England as such. In dealing with "Offenses against the Law of Nations," Blackstone said that "in mercantile questions, such as bills of exchange and the like; . . . the law-merchant, which is a branch of the law of nations, is regularly and constantly adhered to."⁴⁸ And again:

[T]he affairs of commerce are regulated by a law of their own, called the law merchant or *lex mercatoria*, which all nations agree in and take notice of. And in particular it is held to be part of the law of England, which decides the causes of

43. S. KYD, *THE LAW OF BILLS OF EXCHANGE* (London 1791). For an interesting and up-to-date discussion of treatises such as Kyd's, see Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632 (1981).

44. 2 W. BLACKSTONE, *COMMENTARIES* *466-70.

45. *Id.* at *446-51.

46. 1 W. HOLDSWORTH, *supra* note 1, at 26.

47. E. HEWARD, *supra* note 31, at 80.

48. 4 W. BLACKSTONE, *COMMENTARIES* *66 (footnote omitted).

merchants by the general rules which obtain in all commercial countries⁴⁹

III. THE LAW MERCHANT IN AMERICA: OF RECEPTION STATUTES AND JUSTICE JOSEPH STORY

As part of the British Empire, the American colonies had, of course, been subject to the English common law, and by extension, the law merchant. After the American Revolution the newly formed United States did not repudiate the English common law. Instead of adopting a civil law system as existed in the nations of continental Europe, the new states chose to retain the common law and thus preserve the continuity and predictability of their fledgling judicial systems. Beyond merely retaining the common law, the American courts, aided by farsighted judges such as United States Supreme Court Justice Joseph Story, molded the law merchant to fit the particular needs of the newborn United States of America.

A. *Receiving the Common Law*

The thirteen new United States moved quickly to adopt the English common law as the foundation for the law of their respective states. New York, settled by the Dutch, might have been expected to be sympathetic to a civil code. But under the urging of Alexander Hamilton, New York adopted a constitution in 1777 which received the English common law as it existed on April 19, 1775 as the basis of the law of New York.⁵⁰ Other states, in their constitutions or by statute, adopted similar provisions that usually received the common law as it existed on July 4, 1776.⁵¹ States that followed the original thirteen colonies into the union all (with the exception of Louisiana) enacted similar reception provisions.⁵²

49. 1 *id.* *273.

50. N.Y. CONST. art. XXXV. April 19, 1775 was the date of the Battle of Lexington.

51. Pennsylvania chose May 15, 1776, the date on which the Continental Congress advised the colonies to establish their own independent governments. See PA. CONST. sched. 1, § 2. The Ordinance of 1787 adopted the common law for the Northwest Territory. See generally R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 38-72 (1938).

52. Florida's reception statute, originally enacted when Florida was a territory, has been carried over into the Revised Statutes. FLA. STAT. § 2.01 (1981). See generally J. SMITH, *CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS* 469-506 (1965).

For a short time after 1776, English cases decided after the reception dates could not be cited in several of the new American states. In an Anglophobic mood following the Revolution, New Jersey and Kentucky, among others, enacted statutes which prohibited any court of the state from reading or considering any English case decided after July 4, 1776. *Id.* at

The law merchant was considered to be a part of the common law within the meaning of the reception statutes.⁵³ One state later admitted to the union, South Dakota, expressly provided that the common law included the law merchant: "In this state the rules of the common law, including the rules of the law merchant, are in force, except where they conflict with the will of the sovereign power"⁵⁴

The reception statutes were the mechanism for transferring the common law of England to the new United States,⁵⁵ but for the contents of that common law, American lawyers relied heavily on Blackstone's *Commentaries*.⁵⁶ All editions, and especially the 1783 edition, were widely circulated in the United States. In 1803 an American edition was published, edited by St. George Tucker of William and Mary College.⁵⁷

America's expanding commercial activities precluded a rote reliance on Blackstone's work, for Blackstone gave only cursory treatment to the law merchant.⁵⁸ The United States in the early

493.

53. See *Cook v. Remick*, 19 Ill. 598 (1858); *Stagg v. Linnenfelser*, 59 Mo. 336 (1875); *Nash v. Harrington*, 1 Aik. 39 (Vt. 1825); cf. *Patterson v. Carrell*, 60 Ind. 128, 131 (1877) ("The *lex mercatoria*, the law merchant, is a part of the common law, and governs bills of exchange, but the *lex mercatoria* did not, at common law, apply to promissory notes." (citation omitted)). Some states received as part of the common law the Promissory Notes Act, 1704, 3 & 4 Anne, which ensured the negotiability of promissory notes. See *supra* text accompanying note 29.

54. 1890 S.D. Sess. Laws ch. 105 (codified at S.D. CODIFIED LAWS ANN. § 1-1-24 (1980)).

55. At times, something was lost in the translation from English legalese to American. Wisconsin wanted to give its cities the right to administer the Assize of Bread, but in some cases this came out as the "size of bread." L. FRIEDMAN, A HISTORY OF AMERICAN LAW 460 (1973).

56. *Id.* at 145.

57. This edition was intended as a textbook. It was used not only by those studying law on their own (such as Abraham Lincoln), but also by those in law schools; as late as 1826 Professor Stearnes of Harvard Law School made the whole of Tucker's edition required reading for his students.

58. The first American treatment of the law merchant came in Chancellor James Kent's *Commentaries*, published in four volumes between 1826 and 1830. The books were based on lectures Kent delivered at Columbia University following his retirement from judicial office in New York. There are obvious similarities between Kent's *Commentaries* and Blackstone's *Commentaries*; indeed, Kent modeled his work on Blackstone's. The topics covered are also very similar, but Kent's treatment of the law merchant was more extensive. In his discussion on contracts of sale, Kent devotes 68 pages to the law of sales, covering such matters as implied warranties, duties of mutual disclosure, and passing of title by delivery. See 2 J. KENT, COMMENTARIES *468-536. In his treatment of personal property, Kent discusses negotiable paper, dealing with such matters as the essential qualities of negotiable paper, rights of a holder, acceptance of a bill, endorsements, demand and protest, responsibility of drawer and endorser, and measure of damages. He cites the few American cases decided, but largely relies on English cases and treaties, as well as a few continental treatises. See 3 *id.* at *71-

part of the nineteenth century had no national currency; private bank notes were the medium of exchange. Bills of exchange were widely used as commercial instruments, especially in the East. Promissory notes were everywhere and people were quite familiar with the basic rules on endorsements.⁵⁹ The courts carefully preserved the fundamental virtue of these instruments: their negotiability. But new mercantile customs were springing up in America that did not fit easily into the English law merchant. American courts, however, could not emulate Mansfield's technique for incorporating a mercantile custom into the common law; American trade, spread out over several states, was varied and diverse, whereas Mansfield's commercial class was insulated and homogeneous.⁶⁰ A Justice of the United States Supreme Court believed he had an answer to this confusion: codification.

B. *Justice Joseph Story*

A remarkably industrious man, Joseph Story carried on four professions at the same time: Justice of the United States Supreme Court, Professor of Law at Harvard University, President of the Bank of Salem (in Massachusetts), and author of nine legal treatises.⁶¹ Two of the treatises, *Commentaries on the Law of Bills of Exchange*⁶² and *Commentaries on the Law of Promissory Notes*,⁶³ comprised the first comprehensive study of American negotiable instruments.

In these two treatises, Story explicitly acknowledged his debt to his English predecessors. In *Bills of Exchange* he noted, "I have availed myself freely of all the English Treatises extant upon the

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59. L. FRIEDMAN, *supra* note 55, at 236-38.

60. See *supra* text accompanying note 21. American courts tended to accept American mercantile customs only as bearing upon the intent of the parties. See, e.g., *The Reeside*, 20 F. Cas. 458 (C.C.D. Mass. 1837) (No. 11,657) (Story, J.); *Clark v. Baker*, 52 Mass. (11 Met.) 186 (1846); *Gordon v. Little*, 8 Serg. & Rawl. 532 (Pa. 1822); see M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 188-97 (1977).

61. Story's activities at the bank undoubtedly contributed to his expertise in the law of negotiable instruments. By the standard of the day, his various occupations did not conflict with his judicial responsibilities. See G. DUNNE, *JUSTICE STORY AND THE RISE OF THE SUPREME COURT* 141-43, 268-69 (1970).

62. J. STORY, *COMMENTARIES ON THE LAW OF BILLS OF EXCHANGE* (4th ed. Boston 1860) (1st ed. Boston 1843).

63. J. STORY, *COMMENTARIES ON THE LAW OF PROMISSORY NOTES* (6th ed. Boston 1868) (1st ed. Boston 1845). In addition to his commentaries on bills of exchange and promissory notes, Story also published treatises on bailments, bankruptcy, conflict of laws, agency, equity jurisprudence and pleadings, partnership, and the United States Constitution.

same subject, and especially of the work of Mr. Baron Bayley . . . and that of Mr. Chitty . . ."⁶⁴ In defining a bill of exchange, he cited Blackstone, Bayley, Kyd, and one American commentator, James Kent.⁶⁵ In *Promissory Notes*, Story recognized the extent of English mastery of the field:

[I]n the Courts of Justice in England, for every single suit litigated upon a Bill of Exchange, twenty will probably be found upon Promissory Notes,—so vast is the circulation, and so extensive and complicated are the transactions growing out of the latter, which require almost a daily modification of the law to adapt it to the new exigencies of business. Hence it is, that Westminster Hall has, during the last century, become the great repository of the law on this subject; and the decisions there made, have acquired a commanding influence and interest throughout the commercial world.⁶⁶

Justice Story, anticipating many great commercial law scholars, believed commercial law should be codified. In a letter to Henry Wheaton, the Supreme Court Reporter, he said,

I have long been an advocate of codification of the common law, at least of that part, which is most reduced to principles & is of daily & extensive application. . . . What would be our gain, if our principles of shipping, insurance, and bills of exchange were reduced to a code, as they are in a most admirable form in the French Code of Commerce?⁶⁷

In 1836, during a hiatus from his duties as Supreme Court Justice, Story completed a study commissioned by the Massachusetts Legislature on the feasibility of codifying the state's common law.⁶⁸ Story was made chairman of an impressive board of commissioners which drew up an elaborate report, concluding that a general codification of all the common law in Massachusetts was impractical. But codifying the commercial law was a different matter:

In regard to commercial contracts . . . the general principles which define and regulate them, and even the subordinate details of those principles, to a very great extent, are now capable of being put in a regular order, and announced in determinate propositions in the text of a code. Among these contracts, the

64. J. STORY, *supra* note 62, Preface at viii.

65. *Id.* at 3-4; see also *supra* note 58.

66. J. STORY, *supra* note 63, Preface at ix.

67. Letter from Joseph Story to Henry Wheaton (Oct. 1, 1825), reprinted in G. DUNNE, *supra* note 61, at 258.

68. 2 W. STORY, *THE LIFE AND LETTERS OF JOSEPH STORY* 241 (Boston 1851).

Commissioners would especially recommend as the subjects of a code the following titles, viz.: the law of agency, of bailments, of guaranty, of suretyship, of bills of exchange, of promissory notes, of insurance and of partnership . . . [and] bills of lading, and other contracts of affreightment, including therein the law of freight⁶⁹

Not content to simply suggest a codification of American commercial law, Story tried to develop some uniformity in judicial treatment of commercial matters by creating a federal law merchant. In *Swift v. Tyson*,⁷⁰ a diversity action involving a bill of exchange, the issue was whether a preexisting debt was valid consideration for the bill. The defendant-acceptor contended that under the law of New York, where the bill was accepted, it was. Writing for the Court, Story first determined that New York law was not binding on the Supreme Court. Relying on, inter alia, Lord Mansfield's decision in *Pillans v. Van Mierop*,⁷¹ Story held that, as a matter of federal common law, a preexisting debt could not be valid consideration for the bill.⁷²

In disregarding state law in federal diversity actions, Story wrestled with section 34 of the Judiciary Act of 1789, which provided, "The laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."⁷³ In a complicated semantic maneuver, Story resolved the conflict with the Judiciary Act by holding that the word "laws" in the Act did not extend to state court decisions, which according to Story "are, at most, only evidence of what the laws are, and are not of themselves laws."⁷⁴ He further stated,

It never has been supposed by us, that [section 34 of the Judici-

69. A Report of the Commissioners appointed to consider and report upon the Practicability and Expediency of reducing to a Written and Systematic Code the Common Law of Massachusetts, or any part thereof, made to his Excellency the Governor, January, 1837, reprinted in W. STORY, THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 698, 730-31 (Boston 1852).

70. 41 U.S. (16 Pet.) 1 (1842). *Swift* was overruled by *Erie R.R. v. Tompkins*, 304 U.S. 64, 78-80 (1938).

71. 3 Burr. 1663, 97 Eng. Rep. 1035 (K.B. 1765); see *supra* text accompanying note 37.

72. 41 U.S. at 18-20. Horwitz argues that Story was motivated by a desire to move commercial disputes solely into the federal courts to remove them from "an uncongenial anticommercial environment often found in state courts." M. HORWITZ, *supra* note 60, at 19-20.

73. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 92 (codified at 28 U.S.C. § 1652 (1976)).

74. 41 U.S. at 18.

ary Act] did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law [T]his section, upon its true intendment and construction, is strictly limited to local statutes and local usages . . . and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence.⁷⁵

IV. CODIFYING AMERICAN COMMERCIAL LAW

Codification of American commercial law, despite the efforts of Justice Story, was not to occur for another fifty years. And then it came not through the rickety federal law merchant developed under the ill-fated *Swift v. Tyson*,⁷⁶ but by uniform statutes enacted by the states.

A. *A Short History of American Uniform State Laws: The National Conference of Commissioners on Uniform State Laws and the Uniform Commercial Code*

The need for modernization and codification of commercial law was perhaps greatest in the law of bills of exchange and promissory notes. Bills and notes were the oil for running the American business machine, but they generated almost endless possibilities for disputes. Courts were clogged with questions of negotiability and transfer. In the *Century Edition of the American Digest*, covering cases up to 1896, the subject of bills and notes took up virtually one entire volume of more than 2,700 pages.⁷⁷

Given the confusion in the law of bills and notes, it is not surprising that the first uniform law was the Negotiable Instruments Law, drafted under the auspices of an organization now known as the National Conference of Commissioners on Uniform State Laws. The conference was organized at the urging of the American

75. *Id.* at 18-19.

76. *Swift* was overruled in 1938 by *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), which held that Story's decision that state common-law decisions were not binding on federal courts in diversity actions was unconstitutional, because (1) it denied equal protection under the law by discriminating against noncitizens of the forum state, *id.* at 74, and (2) it impinged the independence and authority of the states by invading rights which are "reserved by the Constitution to the several States." *Id.* at 80.

77. See 7 CENTURY EDITION OF THE AMERICAN DIGEST 2-2707 (1899).

Bar Association and held its first meeting in 1892. Commissioners were in attendance from Delaware, Georgia, Massachusetts, Michigan, New York, New Jersey, and Pennsylvania.⁷⁸ One of the first actions of this initial conference was to recommend uniform state legislation that would (1) abolish days of grace on all bills and notes, and (2) provide that all bills and notes falling due on a Sunday or legal holiday should be payable and presentable on the next following secular or business day.⁷⁹ These were matters of great concern to bankers and merchants who, it was said, could "never be certain on what day commercial paper . . . is really due if made payable without the State."⁸⁰

The commissioners at the 1895 conference authorized their Committee on Commercial Law to prepare a draft of a uniform statute on commercial paper,⁸¹ based upon an English statute on the same subject.⁸² The Committee subsequently authorized John Crawford of New York to prepare the uniform statute, which substantially resembled the English statute. The final draft of the statute, eventually known as the Uniform Negotiable Instruments Act, was approved by the Commissioners at their sixth conference in 1896.⁸³ Through the efforts of the Commissioners, the Act was subsequently adopted by all of the states, territories, and insular possessions of the United States.⁸⁴ The Act has been judicially recognized as a codification of the law merchant;⁸⁵ section 196 of the Act stated, "In any case not provided for in this act the rules of the law merchant shall govern."⁸⁶ One purpose of this provision

78. NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, 1892-1901 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *Report of Proceedings of the First Conference of the State Boards of Commissioners for Promoting Uniformity of Law in the United States* (1892), at 5 [hereinafter cited as 1892-1901 NATIONAL CONFERENCE]. The first chairman of the Conference, Henry R. Beekman of New York, held a somewhat expansive view of its importance: "It is probably not too much to say that this is the most important juristic work undertaken in the United States since the adoption of the Federal Constitution *Id.* at 4.

79. *Id.* at 8.

80. *Id.* at 7.

81. 1892-1901 NATIONAL CONFERENCE, *supra* note 78, *Fifth Annual Conference of Commissioners for the Promotion of Uniformity of Legislation in the United States* (1895), at 13.

82. Bills of Exchange Act, 1882, 45 & 46 Vict., ch. 61.

83. 1892-1901 NATIONAL CONFERENCE, *supra* note 78, *Sixth Annual Conference of Commissioners for the Promotion of Uniformity of Legislation in the United States* (1896), at 8.

84. Randegger, *UCC - Code of Commerce*, FALL 1978 UNIFORM LAW MEMO 11, 12.

85. *See, e.g., Aikins v. Peterson*, 12 Wis. 2d 209, 107 N.W.2d 137 (1961).

86. UNIF. NEGOTIABLE INSTRUMENTS ACT § 196 commissioners' note (superseded in those states enacting U.C.C. § 1-103). This section was later revised to read: "In any case not

was stated in the Commissioners' Note to the section: "to leave room for the growth of new usages and customs so that none of these acts should put the law merchant in a straightjacket and thus prevent the further expansion of the law merchant."⁸⁷

In the early 1900's, the Commissioners authorized the preparation of four more uniform acts. Professor Samuel Williston drafted all four: Sales (1906), Warehouse Receipts (1906), Bills of Lading (1909), and Stock Transfers (1909).⁸⁸ These acts received wide acceptance by the states, though none matched the popularity of the Uniform Negotiable Instruments Act.⁸⁹

In 1940, William A. Schnader, President of the Conference, spoke at the Conference's 50th Annual Meeting.⁹⁰ He noted that there had been substantial changes in methods of transacting business since the approval of previous uniform acts and that many of these acts had been adopted piecemeal. Schnader focused on the duplication and inconsistencies in the provisions governing negotiable instruments, bills of lading, warehouse receipts, stock trans-

provided for in this act the rules of [law and equity including] the law merchant shall govern." *Id.* § 196 (brackets in original). This was to bring the section into harmony with other uniform acts. The English statute was phrased slightly differently: "The rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques." Bills of Exchange Act, 1882, 45 & 46 Vict., ch. 61, § 97(2).

87. UNIFORM NEGOTIABLE INSTRUMENTS ACT § 196 commissioners' note.

88. Randegger, *supra* note 84, at 12.

89. NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, 1940 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS, *Proceedings of the Fiftieth Annual Meeting of the National Conference of Commissioners on Uniform State Laws* 396-97 (1940) [hereinafter cited as HANDBOOK, FIFTIETH CONFERENCE]. By 1940 the Warehouse Receipts Act had been adopted in 49 jurisdictions, the Sales Act in 35, the Stock Transfers Act in 28, and the Bills of Lading Act in 29. *Id.* The bill of lading had become primarily a railroad document; accordingly, in 1916 Congress had enacted a Bills of Lading Act to apply to foreign and interstate commerce transactions. Bills of Lading Act of 1916, ch. 415, 39 Stat. 538.

Among the Commissioners active in the early twentieth century were Woodrow Wilson, Roscoe Pound, John W. Davis, Louis D. Brandeis, and John W. Wigmore. NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, 1902-1905 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1902), at 30-31; NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, 1906-1908 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1906), at 15-16; NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, 1910-1912 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1910), at 15-17; NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, 1922-1924 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1924), at 8-11. The draftsman of the Uniform Trust Receipts Act, approved by the Commissioners in 1933, was Karl Llewellyn, a longtime Commissioner from New York. Randegger, *supra* note 84, at 14-16. A later Commissioner from Illinois was Soia Mentschikoff, who served from 1965 to 1970. WHO'S WHO IN AMERICA 2285 (41st ed. 1980-1981).

90. HANDBOOK, FIFTIETH CONFERENCE, *supra* note 89, at 35.

fers, sales, and trust receipts. He recommended against attempts to revise and update the individual acts, which would have required 371 separate legislative battles. Instead, he advocated the preparation of "a great uniform commercial code . . . which would bring the commercial law up to date, and which could become the uniform law of our fifty-three jurisdictions, by the passage of only fifty-three acts . . ." ⁹¹ This was the genesis of the Uniform Commercial Code.

On the day following Schnader's address, Karl N. Llewellyn, Chairman of the Uniform Commercial Acts Section of the Conference, presented his Section's report to the Conference. Llewellyn, a professor of law at Columbia University, had been drafting as Reporter (expert draftsman) a revised Uniform Sales Act. He reported that the revised sales act was being drafted so that it could be a separate uniform act or a chapter in a possible uniform commercial code. ⁹² Before the Conference's 1940 meeting concluded, the Executive Committee had approved "the preparation of a Commercial Code . . . as soon as funds are available in an amount deemed by the Executive Committee to be adequate." ⁹³

There was some urgency about the project. The Merchants Association of New York City was pressing for federal commercial legislation following the 1938 United States Supreme Court decision in *Erie Railroad v. Tompkins*, which overruled *Swift v. Tyson*. ⁹⁴ The New York merchants were not alone in regarding *Erie* as foreclosing any possibility of achieving a uniform commercial law through the federal courts. ⁹⁵ But the disruption of World War II and an initial difficulty in raising funds slowed progress on the commercial code. Nevertheless, the revised Uniform Sales Act was completed in 1944. That same year, the Maurice and Laura Falk Foundation made the first of its generous grants, eventually totaling \$250,000, for the commercial code project. ⁹⁶

Work on the Code began in earnest in 1945 as a cooperative effort of the Conference and the American Law Institute (ALI).

91. *Id.* at 58. Schnader further stated that the drafting of such a code would be akin to the American Law Institute's restatements of decisional law. These two organizations would one day join in a cooperative effort to draft and have enacted the Uniform Commercial Code. See *infra* text accompanying note 97.

92. HANDBOOK, FIFTIETH CONFERENCE, *supra* note 89, at 90.

93. *Id.* at 114.

94. See *supra* note 76.

95. See Randegger, *supra* note 84, at 13.

96. *Id.* at 14.

They were committed to completing it within five years.⁹⁷ Karl Llewellyn served as Chief Reporter for the entire project, with Soia Mentschikoff as Associate Chief Reporter.⁹⁸ Drafting proceeded at full speed with an editorial board reviewing progress throughout the year. At least once a year the entire conference and the ALI reviewed the drafts. Preliminary copies of Code sections were also submitted for comment to a special Uniform Commercial Code Committee of the American Bar Association Corporate Law Section. Walter Malcolm, a Boston lawyer and chairman of that ABA committee, made a singular contribution to the Code when he re-drafted its bank collections provisions to overcome objections from the Federal Reserve Banks and other critics, and then negotiated successfully to win their approval of the revised sections.⁹⁹ The Reporters sought advice from state and local bar associations and consulted with lay advisors from various associations or groups of merchants, businessmen, bankers, warehouse operators, and farmers.¹⁰⁰ These efforts culminated in 1951, when the Conference, the ALI, and the American Bar Association House of Delegates approved the completed Code.¹⁰¹

The Conference and the ALI debated whether the Code should be presented to Congress for enactment; indeed, the Code was drafted so that it could have been suited for national legislation with only a few changes. But the sponsoring organizations concluded that congressional enactment would be only a partial remedy; it was doubtful that federal authority over interstate commerce would reach the multitudinous commercial transactions covered by the Code. Further, the Commissioners, dedicated to uniform *state* laws, were biased in favor of state enactment.¹⁰² The sponsors then considered an attempt to achieve uniform state enactment through an interstate compact, but concluded that there were no advantages to this method over legislative enactments by the individual states.¹⁰³

97. Schnader, *The New Commercial Code: Modernizing Our Uniform Commercial Acts*, 36 A.B.A. J. 179, 180 (1950).

98. Randegger, *supra* note 84, at 15. Llewellyn and Mentschikoff were married in 1946.

99. *Id.*

100. See Mentschikoff, *The Uniform Commercial Code—An Experiment in Democracy in Drafting*, 36 A.B.A. J. 419 (1950). Note the echoes of Lord Mansfield's special juries composed of merchants.

101. A.B.A. SECTION OF CORPORATION, BANKING AND BUSINESS LAW, UNIFORM COMMERCIAL CODE HANDBOOK 5 (1964).

102. Dunham, *A History of the National Conference of Commissioners on Uniform State Laws*, 30 L. & CONTEMP. PROB. 233, 238, 241 (1965).

103. *Id.* at 243. The Conference saw little advantage in the compact method, because it

The leadership of the Conference pressed on for individual state enactment, concentrating first on the larger, more commercially active states, but with the ultimate goal of enactment by all states—thus bringing under the Code all commercial transactions within the nation. The Code was introduced in 1953 in the legislatures of several states, including California, Mississippi, and New York, ostensibly for educational purposes.¹⁰⁴ Under the prodding of William Schnader, Pennsylvania enacted the Code in 1953 without a single dissenting vote.¹⁰⁵

Objections developed. Some consumer advocates characterized the Code as a “lawyers and bankers relief act” and objected to the absence of consumer credit protections.¹⁰⁶ Certain New York bankers strongly objected to the Code, and when it was introduced in New York in 1953, the legislators sent it to the New York Law Revision Committee for comment and analysis. The Commission spent three years in hearings; the Code’s editorial board followed every hearing, and drafted amendments to meet objections and explained why others were unnecessary.¹⁰⁷ The result was the *Uniform Commercial Code—1957 Official Edition*. Herbert F. Goodrich, Chairman of the Code’s editorial board and Director of the American Law Institute, wrote in a foreword to that edition:

Further re-examination of work which covers as wide a field as this could, of course, go on indefinitely. There comes a time when one must say that the advantage of what little will result from further examination is greatly outweighed by the desirability of bringing to a conclusion what has been a long and careful piece of work.¹⁰⁸

The Conference made available to legislatures a team of experts (Llewellyn, Mentschikoff, and University of Wisconsin law professor Charles Bunn, who helped edit the final version of the

believed most state legislatures involved in such a compact would impose restrictions on how long they were obligated to have identical laws. Also, they saw “constitutional difficulty in the attempts of legislatures to bind their successors as to the content of legislation for any period of time.” *Id.* Furthermore, the United States Constitution requires congressional approval of interstate compacts. U.S. CONST. art. I, § 10, cl. 3.

104. Randegger, *supra* note 84, at 16.

105. Uniform Commercial Code, Pub. L. No. 1, 1953 Pa. Laws 3; *see* Randegger, *supra* note 84, at 16.

106. Randegger, *supra* note 84, at 16. This was a deliberate omission, approved after careful consideration. Dunham, *supra* note 102, at 248. The Conference has since drafted and approved a separate Uniform Consumer Credit Code (U3C).

107. Randegger, *supra* note 84, at 16.

108. Goodrich, *Foreword to ALI & NAT’L CONFERENCE OF COMM’RS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE* at v (1957 official ed.).

Code) to answer questions about the Code. Largely through their efforts, and the efforts of the Commissioners, Massachusetts adopted the Code in 1957; Kentucky in 1958; Connecticut and New Hampshire in 1959; seven states, including the large commercial states of Ohio, Illinois, and New Jersey in 1961; New York in 1962; and so on until all states were in line by 1967, with Louisiana as the lone holdout.¹⁰⁹

B. *A Brief Survey of the Uniform Commercial Code*

The Uniform Commercial Code is, according to Soia Mentschikoff, "a 'private' law codification centering around the movement of goods by way of sale and the incidental services of railroads, warehousemen, bankers, finance companies, and the like in connection with that movement."¹¹⁰ In some articles, the Code preserves much of what had gone on before; in others, the provisions were new and imaginative, designed to solve through black letter principles problems that had defied judicial resolution.

In the first category, preserving the traditional, are Articles 2 (Sales), 3 (Commercial Paper), 6 (Bulk Transfers), and 7 (Warehouse Receipts, Bills of Lading and Other Documents of Title). But even these traditional areas are refined where necessary or desirable. For example, the Sales Article makes a distinction for the

109. *Table 1* in ALI & NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE at xxxv (1972 official ed.). Upon enactment, the preceding uniform commercial laws were repealed. For example, in Illinois the Code repealed the following acts or parts of acts:

- i. Negotiable Instruments Law
- ii. Uniform Warehouse Receipts Act
- iii. Uniform Sales Act
- iv. Bulk Sales Act (Chattels in Bulk)
- v. Uniform Stock Transfer Act
- vi. An Act concerning contracts for the conditional sale or lease of railroad, street car and motor vehicle equipment and rolling stock and providing for the recording thereof.
- vii. Uniform Trust Receipts Act
- viii. An Act to regulate the foreclosure of chattel mortgages on household goods, wearing apparel and mechanic's tools.
- ix. Factors Lien Act
- x. An Act relating to the assignment of accounts receivable.
- xi. An Act to regulate assignment of notes secured by chattel mortgages and to regulate the sale of property under a power of sale contained in chattel mortgages.
- xii. Uniform Bills of Lading Act

Uniform Commercial Code § 10-102, 1962 Ill. Laws 2101.

110. S. MENTSCHIKOFF, *COMMERCIAL TRANSACTIONS* 3-4 (1970).

first time between the legal effects of the acts of a "merchant" (as defined) and the acts of a consumer or other person not knowledgeable in the field.¹¹¹ And the Article on Commercial Paper, superseding the Negotiable Instruments Act, abandons the term "bill of exchange" and substitutes "draft."¹¹² Although a "note" is defined, the Article does not preserve the traditional dichotomy of provisions for bills and notes.

Several articles have no prior uniform acts; the Code here creates provisions accommodating the best of prior case law and the legitimate practices of those who will have to carry on their commercial activities under the Code. This is the case with Article 4 (Bank Deposits and Collections) and Article 5 (Letters of Credit). Article 8 (Investment Securities) contains some provisions from the preceding Negotiable Instruments Act and the Uniform Stock Transfer Act, but gaps are filled to accommodate modern practices.¹¹³

Article 9 (Secured Transactions; Sales of Accounts and Chattel Paper) is considered by many to be the signal achievement of the Code. Taking the confused state of prior law relating to chattel mortgages and conditional sales, the Reporters reduced to black letter principles a Code which permitted easy and effective financing secured by accounts receivable and chattels, including inventories.¹¹⁴ These types of financing had been difficult to implement before the adoption of the Code, because by their very nature, inventories and accounts receivable had to be retained by the borrower and disposed of in the usual course of trade or business. The law, moreover, had looked with complete disfavor on any security arrangement in which the borrower retained the power to dispose of mortgaged assets. In *Benedict v. Ratner*,¹¹⁵ the United States Supreme Court held that under the laws of New York, a lender's lien on accounts receivable that permitted the borrower to retain complete control of the accounts was void as an attempt to defraud

111. U.C.C. § 2-104 (1), (3).

112. *Id.* § 3-104(2)(a). The term "draft" was commonly used for bills of exchange in Blackstone's time. See *supra* text accompanying note 44.

113. Article 8 of the Code requires that a security be represented by an "instrument." U.C.C. § 8-102(1)(a)(i). In 1977 revisions of Article 8 were recommended that would permit dispensing with stock certificates, reflecting developments in computers and telecommunications. See U.C.C. §§ 8-101, -102 (Reasons for 1977 Change).

114. For an excellent description of the state of this prior law, see U.C.C. § 9-101 comment.

115. 268 U.S. 353 (1925).

the borrower's creditors.¹¹⁶

England overcame these problems by statutorily authorizing a "floating lien."¹¹⁷ The use of floating liens in this country had been hampered because trust receipts and field warehousing, the only two methods that could be adapted to such a lien, dealt only with goods in existence at the time of the financing arrangement and could not extend to after-acquired property.¹¹⁸ A device for securing interests in inventory and in accounts receivable resulting from sales of the inventory, with the borrower in complete control of the terms of the financing, was sorely needed.¹¹⁹ Section 9-205 of the Code established this kind of security: "A security interest is not invalid or fraudulent against creditors by reason of liberty in the debtor to use, commingle or dispose of all or part of the collateral"¹²⁰ This provision was coupled with an express provision in section 9-204 that the security interest could include after-acquired goods and extend to future advances to the borrower as well as to his present obligations. With these two provisions, the authority for effective inventory and accounts receivable financing was complete.¹²¹

The Code was drafted to accommodate changes in customs or usages of trade. Article 1, "General Definitions and Principles of Interpretation," provides that "[a] course of dealing between parties and any usage of trade . . . give particular meaning to and supplement or qualify terms of an agreement."¹²² Section 1-102 of the Code states that one of the underlying purposes and policies of

116. *Id.* at 360. After *Ratner*, the United States Court of Appeals for the Second Circuit applied the same doctrine to a chattel mortgage on inventory when the borrower retained the power of disposition. *Brown v. Leo*, 12 F.2d 350 (2d Cir. 1926). But not all courts were persuaded by *Ratner*; the Fifth Circuit in *Second Nat'l Bank v. Phillips*, 189 F.2d 115, 117 (5th Cir. 1951) said, "Fortunately in this circuit the *Ratner* case has never been a fetish."

117. Companies Act, 1929, 19 & 20 Geo. 5, ch. 23.

118. After-acquired property is collateral which the debtor does not own at the time of the financing arrangement, but which may be acquired at some future date. See U.C.C. § 9-204.

119. For a description of the problems of pre-Code chattel financing, and a discussion of the solutions afforded by the Code, see Bane, *Chattel Security Comes of Age: Article 9 of the Uniform Commercial Code*, 1 DE PAUL L. REV. 91 (1951).

120. U.C.C. § 9-205.

121. There are some arguments against easy financing with inventory and accounts receivable. Commentators fear that lenders might demand a lien on the borrower's inventory and accounts receivable, no matter what the size of the loan, and that, as a result, no assets of the borrower would be free of the lien and available to unsecured creditors. See Gilmore, *The Secured Transactions Article of the Commercial Code*, 16 L. & CONTEMP. PROB. 27, 36, 43-44 (1951). In the opinion of the author, these fears have not been realized.

122. U.C.C. § 1-205(3).

the Code is "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties."¹²³ This open-minded attitude reflected the drafting philosophy of Karl Llewellyn. As Professor Grant Gilmore noted,

[Llewellyn's] instinct appeared to be to draft in a loose, open-ended style; his preferred solutions turned on questions of fact (reasonableness, good faith, usage of trade) rather than on rules of law. He had clearly in mind the idea of a case-law Code: one that would furnish guide-lines for a fresh start, would accommodate itself to changing circumstances, would not so much contain the law as free it for a new growth.¹²⁴

The Permanent Editorial Board for the Uniform Commercial Code was established in 1961 to maintain a constant review of the Code. The Permanent Board was to revise the Code to accommodate new needs or to reflect changes learned from the actual operation of the Code, and to review nonuniform amendments added by some of the states to determine if they should be added as part of the uniform provisions of the Code. William A. Schnader was Chairman of the Permanent Editorial Board, Karl Llewellyn a member, and Soia Mentschikoff a consultant to the Board. The first report of the Board in 1962 resulted in minor changes to twenty-five code sections, which were incorporated into the 1962 official edition of the Code.¹²⁵

Article 9 is regarded as particularly watchworthy, in view of the originality of its provisions, the nonuniform amendments added in some jurisdictions, and the wealth of comment on it from various lawyers and legal scholars. Accordingly, an Article 9 Review Committee was established in 1966 under the Permanent Editorial Board. The Reporter was Robert Braucher, later Associate Justice of the Massachusetts Supreme Judicial Court; Homer Kripke was named Associate Reporter and Soia Mentschikoff as Associate Reporter *Ex Officio*.¹²⁶ The Final Report of the Article 9

123. *Id.* § 1-102(2)(b).

124. Gilmore, *In Memoriam: Karl Llewellyn*, 71 *YALE L.J.* 813, 814 (1962).

125. Randegger, *supra* note 84, at 19.

126. *See Report No. 3 of the Permanent Editorial Board for the Uniform Commercial Code* (Dec. 15, 1966), reprinted in *ALI & NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE* at xxvii, xxix (1972 official text).

Karl Llewellyn died in 1962. "Despite the numbers of persons involved in the drafting of the Code, the extent to which it reflects Llewellyn's philosophy of law and his sense of commercial wisdom and need is startling." S. MENTSCHIKOFF, *supra* note 110, at 4 n.3.

For a series of reminiscences (or "reflections") by some of the original drafters of various articles of the UCC, see 43 *OHIO ST. L.J.* 535-84 (1982). Various problems that arose in

Review Committee was published and approved by the Permanent Editorial Board in 1971. The Report, commenting on the operative effect of Article 9, said: "[T]he outstanding result of Article 9 in practice has been that it has been gratifyingly successful; that no errors with serious consequences have been disclosed; and that the demands for change have been in relatively narrow areas."¹²⁷

V. CONCLUSION

From the days when dusty-footed traders settled their disputes before the bailiffs of the staple courts, merchants have sought an integrated, sensible, and efficient body of commercial law for the use and regulation of commercial transactions. In America the problems of merchants striving to conduct business in a net of conflicting state laws increased each time a new state joined the union. In bringing order out of the commercial chaos, the sophisticated legal theoreticians and pragmatic businessmen who drafted the Uniform Commercial Code did more than follow in the footsteps of Holt, Mansfield, and Story to spin the wheels of industry. With the enactment of the Code, Holmes's prophecy of the uses of history has been fulfilled: the dragon of commercial law has been tamed and made a useful animal.

the drafting stages are discussed by Soia Mentschikoff, *id.* at 537, Fairfax Leary, *id.* at 557, and Homer Kripke, *id.* at 577. Other contributors are Peter Coogan, *id.* at 545, and Allison Dunham, *id.* at 569. Several of the contributors discuss problems, arising since the enactment of the original Code, which are being considered by the 348 Committee of the Permanent Editorial Board for the Uniform Commercial Code. Expected contributions from Robert Braucher and Grant Gilmore were frustrated by their untimely deaths.

127. ALI & NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE 869 app. (General Comment on the Approach of the Review Committee on Article 9) (1978 official text). A large majority of states have adopted the Review Committee's proposed revisions of Article 9.