

July 1963

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### Recommended Citation

Maurice H. Merrill, *Uniformly Correct Construction of Uniform Laws*, 25 Mont. L. Rev. (1963).

Available at: <https://scholarworks.umt.edu/mlr/vol25/iss1/3>

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## Uniformly Correct Construction of Uniform Laws\*

By Maurice H. Merrill\*\*

Wide support could be mustered for the proposition that the necessity for judicial interpretation and application of statutory law has made draftsmanship one of the most hazardous of human vocations. Bishop Hoadly probably was not the first to discover that the interpretative process establishes the scope and the effect of the legislator's product.<sup>1</sup> It is a skilled scribe indeed who can write so clearly that all must agree as to the "plain meaning" of his product. Yet the acceptance of the legislative process as the principal device for the improvement of law requires the judges to make every effort to discover and to effect the purpose of the framers of statutes.

The need for concern with the purpose of draftsmen is true particularly of the measures enacting proposals for uniform state laws prepared by the National Conference of Commissioners on Uniform State Laws. By definition, these measures are intended to make uniform the laws of the enacting states. Hence it is highly desirable that the first construction of a provision in such an act be followed when the same question arises in other jurisdictions.<sup>2</sup> Otherwise, to quote the well-chosen words of the then Mr. Justice Hughes, "we shall miss the desired uniformity, and we shall erect upon the foundation of uniform language separate legal structures as distinct as were the former varying laws."<sup>3</sup> If this deference to the first judicial construction is to be an acceptable practice, however, every effort must be made to ensure that the original decision correctly embodies the purpose of the draftsmen. Long and careful attention is given to the task of framing these acts. Considerations of policy are debated with great care. The views of those whose interests are affected by the proposal are solicited and are taken into account in the formulation of policy and of phrasing. An erroneous interpretation, if it is followed elsewhere, defeats all this painstaking effort.

\*Reprinted from AMERICAN BAR ASSOCIATION JOURNAL, June 1963. The Uniform Commercial Code is the product of more than a decade of careful study and meticulous drafting by the National Conference of Commissioners on Uniform State Laws and the American Law Institute. Now adopted in twenty-three states, including Montana, the Code is well on its way to becoming the commercial law of the United States. Professor Merrill's article is a plea for a uniform judicial construction of the Code; nothing is gained, he points out, unless the first court to consider a point arising under the Code decides the point in accordance with the intent of the drafters, and it is of equal importance that subsequent decisions be in harmony. The article points out the various sources to which lawyers and judges may go in their efforts to obtain uniform interpretations.

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<sup>1</sup>See the Bishop's words as quoted in Gray, *THE NATURE AND SOURCES OF THE LAW*, 102, 125, 172 (2nd ed. 1921).

<sup>2</sup>See discussion, with citation of authorities, in Crawford, *STATUTORY CONSTRUCTION*, §§236, 347 (1940); Sutherland, *STATUTORY CONSTRUCTION*, §5211 (3d ed. 1943).

<sup>3</sup>*Commercial Nat. Bank v. Canal-Louisiana Bank*, 239 U.S. 520, 528, 60 L. ed. 417, 421, 36 S. Ct. 194, 197 (1916). In a comment inspired by this decision, 29 *HARV. L. REV.* 541 (1916), there is a recital of the extent to which the ideal of conformity in the construction of uniform laws had been ignored by the courts to that date.

Moreover, an erroneous reading invites departures from the principle of uniformity in construction. Counsel, convinced of the rightness of their client's cause, cannot be expected tamely to admit the propriety of an opposing decision from another jurisdiction. Earnest presentation of the allegedly erroneous foundation of the inconvenient precedent frequently will bring a decision sustaining orthodoxy as against heresy and, incidentally, bringing victory to the client. Right thus may triumph, but at the expense of uniformity.<sup>4</sup> Yet it will not do to accept the counsel of despair voiced by one judge: "Actual uniformity in the law . . . will remain a dream more or less iridescent; substantial uniformity is all that can be hoped for."<sup>5</sup> If the objectives sought by the uniform law program are to be attained, judges must heed rather the adjuration of Mr. Justice Thompson of Illinois, written more than forty years ago, that "the court of all the states should keep in mind the spirit and object of the law, and should give to the language of the act a natural and common construction, so that all might be more likely to come to the same conclusion."<sup>6</sup>

This need for uniform and correct interpretation and application is imperative, especially with respect to the decisions which the courts in the several states will be called upon to render in litigation arising under the new Uniform Commercial Code. The reasons are numerous. They readily should be apparent to everyone. The Code is of tremendous magnitude, covering all aspects of commercial law. One of the major factors leading to the project for its drafting was the extent of the disharmony in the decisions rendered under the various existing uniform acts on commercial subjects which the Code supplants.<sup>7</sup> The drafting work continued over more than a decade of careful study and meticulous examination.<sup>8</sup> Amendment of the product to cure the effect of errors in construction will be difficult.<sup>9</sup> The Code is well on the way to adoption throughout the United States. With every new adoption, this difficulty of curative amendment will increase. Uniformity of interpretation and application is of the utmost importance to the commercial community. Indeed it is of transcendent concern to us all, since our well-being is bound up so inextricably with the efficient functioning of the complex machinery of national and international trade.<sup>10</sup> In many areas, the Code

<sup>4</sup>See Merrill, *Nebraska Suretyship—IV*, 10 NEB. L. BUL. 261, 298 (1932), for an account of the diversity engendered by misconstruction in one area covered by the Uniform Negotiable Instruments Law. In connection with this discussion, note the *erratum* set forth at 10 NEB. L. BUL. 449 (1932). Cf.: "It is a cardinal principle in the interpretation of uniform laws that the courts of the different jurisdictions should follow the rule of uniformity so as to make their decisions harmonize. In the present case, it is impossible to follow this principle, as the authorities upon the question involved are not in harmony." *State Trading Corp. v. Rosen*, 126 Conn. 36, 9 A.2d 289, 290 (1939).

<sup>5</sup>Porter, J., in *Holiday State Bank v. Hoffman*, 85 Kan. 71, 78, 116 Pac. 239, 241 (1911).

<sup>6</sup>See *National City Bank v. National Bank of the Republic*, 300 Ill. 103, 107, 132 N. E. 832, 833, 22 A.L.R. 1153, 1156 (1921).

<sup>7</sup>See Witherspoon, *Why a New Commercial Code?*, 54 Com. L. J. 291, 292 (1949); Malcolm, *Background and Reasons for the Code Project*, 39 ORE. L. REV. 318, 319 (1960).

<sup>8</sup>See Braucher, *Legislative History of the Uniform Commercial Code*, 58 COL. L. REV. 798 (1958), for a comprehensive summary of the work.

<sup>9</sup>See Schnader, *The New Commercial Code*, 36 A.B.A.J. 179, 180 (1950).

<sup>10</sup>See Epton, *The Uniform Commercial Code*, 21 OKLA. B. A. J. 799, 800 (1950); Llewellyn, *Why We Need the Uniform Commercial Code*, 10 U. FLA. L. REV. 367 (1957).

deals with aspects of commerce not heretofore subjected to statutory guidance, at least on a uniform basis.<sup>11</sup> For all these reasons, it is imperative that the first decision on each point arising under the Code be in accordance with the intent of the body which drafted and promulgated it. It is of equal importance that subsequent decisions, in the same or in any other jurisdictions, be kept in harmony with the original, correct interpretation. This must be the primary aim of every court that is called upon to deal with the Code.

What special resources are available to aid in the proper construction of uniform laws? Frequently, of course, there will be a more or less extensive collection of law review articles written by persons having to do with the preparation of the drafts.<sup>12</sup> More significant, there are comments and annotations, in part prefatory to each draft and in part on a section by section basis, prepared by the several drafting committees. These commissioners' notes, as they are commonly termed, are prepared with great care. Frequently, in the course of debate in the Conference, if there is any doubt at all as to how particular language should be construed or applied, the drafting committee is advised to deal with this problem in the annotation. Sometimes there is positive direction from the Conference that this be done. The commissioners' notes are available in the pamphlets published by the Conference embodying the several acts, in the annual handbook of the Conference for the respective years in which the various drafts were approved and promulgated and in the very helpful set entitled *Uniform Laws Annotated*.<sup>13</sup>

Courts have resorted to these commissioners' notes for aid in the construction of uniform acts on various subjects. The list of uniform acts so treated, as to which citations are available, embodies those dealing with the subjects of contribution among tortfeasors,<sup>14</sup> fiduciaries,<sup>15</sup> conditional sales,<sup>16</sup> expert testimony,<sup>17</sup> property,<sup>18</sup> and divorce recognition.<sup>19</sup> These annotations have a stronger claim upon judicial attention than the explanations of voluntary, unofficial drafting groups concerning their proposals, useful as some courts have found such explanations

<sup>11</sup>The articles by Messrs. Schnader, *supra* note 9, and Witherspoon, *supra* note 7, emphasize this point.

<sup>12</sup>For the Uniform Commercial Code, see the extensive bibliography assembled in *Uniform Laws Annotated, Uniform Commercial Code, Volume 1, pages 2-7.*

<sup>13</sup>This work also is a quick source of citations showing what construction, if any, already has been made with respect to the problem at hand.

<sup>14</sup>*Shultz v. Young*, 205 Ark. 533, 169 S.W. 2d 648 (1943); *Rumph v. Lester Land Co.*, 205 Ark. 1147, 172 S.W. 2d 916 (1943); *Schott v. Colonial Baking Co.*, 111 F. Supp. 13 (W.D. Ark. 1953).

<sup>15</sup>*Colby v. Riggs National Bank*, 67 App. D.C. 259, 92 F. 2d 183, 114 A.L.R. 1065 (1937); *New Amsterdam Cas. Co. v. National Newark and Essex Banking Co.*, 117 N.J.Eq. 264, 175 Atl. 609 (Chan. 1934), *affd. on opinion below*, 119 N.J.Eq. 540, 182 Atl. 824 (Err. & App. 1936).

<sup>16</sup>*People's Savings and Trust Co. v. Munsert*, 212 Wis. 449, 249 N.W. 527, 250 N.W. 384, 88 A.L.R. 1306 (1933).

<sup>17</sup>*Tinney v. Cosby*, 112 Vt. 95, 22 A. 2d 145 (1941).

<sup>18</sup>*Ellingrod v. Trombla*, 168 Neb. 264, 95 N.W. 2d 635 (1959).

<sup>19</sup>*Dahlberg v. Englund*, 45 Wash. 2d 708, 277 P. 2d 717 (1955). The commissioners' notes were cited by the writers of the majority and the dissenting opinions, both. It must be conceded that the dissent used the notes with keener perception.

to be.<sup>20</sup> A closer analogue would be the definitive statement of a commission officially appointed to study and to report upon a particular problem. The reports of such bodies are resorted to with great frequency as guides to the construction of statutes enacted in response to their recommendations.<sup>21</sup> But the National Conference of Commissioners on Uniform State Laws is made up of delegates officially appointed and commissioned from each state. The commissioners from each state therefore have legal standing as advisers to the respective legislatures. When their drafts are adopted by the legislative bodies, their explanatory discussions, therefore, should have a standing equivalent to those of a commission officially appointed to draw a bill<sup>22</sup> or of a body, such as the New York Law Revision Commission, which drafts specific proposals for legislation,<sup>23</sup> or, indeed, of a committee of the legislature itself, in charge of a particular proposal.<sup>24</sup> The comments of all such bodies customarily are resorted to as guides for the interpretative process. Because of these considerations, the case for resorting to the commissioners' notes as guides to the construction of uniform acts is especially compelling.

Since the Uniform Commercial Code is the joint production of the National Conference of Commissioners on Uniform State Laws and of the American Law Institute, the authoritative discussions appended thereto are termed official comments rather than commissioners' notes. They represent the common labors of both organizations. They are especially detailed and helpful. Originally, one section of the Code specifically authorized consultation of the official comments "in the construction and application of this act" with the limitation that "if text and comments conflict, text controls."<sup>25</sup> For a variety of reasons, this provision was eliminated. One of the best of the reasons was that, because of the line of authorities already cited, this sort of provision is unnecessary surplusage. It is to be hoped that the judges will form the habit of consulting the official comments whenever they are confronted with a problem of construction under the Code. There are heartening signs that this is becoming an established judicial practice.<sup>26</sup>

<sup>20</sup>The explanations of bar committees which drafted revisions of particular statutes have been deemed "persuasive" although not necessarily "authoritative". *In re McCombs Estate*, 80 N.E. 2d 573 (Ohio Prob. 1948); *Houston Bank & Trust Co. v. Lee*, 345 S.W. 2d 320 (Tex. Civ. App. 1961) (DAP).

<sup>21</sup>*Connecticut Rural Roads Impr. Assn. v. Hurley*, 124 Conn. 20, 197 Atl. 90 (1938); *Weiss v. Leonardy*, 160 Fla. 570, 36 So. 2d 184 (1948); *Lewis v. Smith's Estate*, 130 Ind. App. 390, 175 N.E. 2d 390 (1959); *Morris & Essex Inv. Co. v. Director of Division of Taxation*, 33 N.J. 24, 161 A.2d 491 (1960); *County of Erie v. City of Buffalo*, 4 N.Y. 2d 96, 149 N.E. 2d 208 (1958).

<sup>22</sup>*In re Tarlo's Estate*, 315 Pa. 321, 172 Atl. 139 (1934).

<sup>23</sup>See Field, *The Commission and the Courts*, 40 CORN. L. Q. 656, 662, 663 (1955), and the cases discussed at that point.

<sup>24</sup>Two recent cases exemplifying the long and well-established resort to committee reports as aids to interpretation are *Territory v. Morita*, 41 HAW. 1 (1955) and *Sorlien v. North Dakota Workmen's Compensation Bureaus*, 84 N.W. 2d 575 (N.D. 1957).

<sup>25</sup>Uniform Commercial Code (1952 Ed.) §1-102 f.

<sup>26</sup>Representative instances are afforded by *In re Eton Furniture Co.*, 286 F. 2d 93 (3d Cir. 1961) [§ 3-401 (1)]; *Roto-Lith, Ltd. v. F. P. Bartlett & Co.*, 297 F. 2d 497 (1st Cir. 1962) [§ 2-207]; *Durkin v. Siegel*, 340 Mass. 445, 165 N.E. 2d 81 (1960) [§ 3-508]; *Industrial Packaging Products Co. v. Fort Pitt Packaging International, Inc.*, 399 Pa. 643, 161 A. 2d 19 (1960) [§ 9-303]; *Sterling Acceptance Co. v. Grimes*, 194 Pa. Super. 503, 168 A. 2d 600 (1961) [§§2-403, 9-307]; *First National Bank v.*

*Commissioners Can Aid the Court*

Another resource is available to judges faced by countervailing contentions of counsel as to the meaning of a uniform law. The court properly may summon to its aid in an *amicus curiae* capacity one or more of the state's commissioners on uniform state laws, or, for that matter, non-resident commissioners. There is sound precedent for such judicial use of neutral friends in aid of the administration of justice.<sup>27</sup> The public character of the commissioners' position makes it improper for them to tender to the judges their advice as to pending litigation, thus voluntarily ranging themselves on one side or the other. On the other hand, it manifestly is proper for them, as public servants, to respond to a request by the court for impartial assistance. The desirability that the court seek this aid as a matter of common practice is emphasized by the testimony of an eminent judge of long experience that counsel frequently fail not only to cite pertinent decisions elsewhere, but also to recognize the policy back of uniform legislation.<sup>28</sup>

The resources which the commissioners, when acting as invited *amici curiae*, could bring to the service of the courts are many. Those commissioners who have participated in the consideration of the particular statute will be familiar with the background and purpose of the language employed. They will be fully apprised of its "legislative history" within the Conference. In this respect they have a basis for especially authoritative advice to the courts. All commissioners will have a quicker path to the literature and the authorities in the field than is open to the ordinary lawyer or judge. Also, the debates and proceedings in the consideration of the draft by the Conference will be available to them. These produce light adapted to the solution of interpretative problems comparable to that afforded by the records of legislative proceedings. Unfortunately, they are not readily available to the general public, but the commissioners have access to them, and, through this access, may assist in the solution of difficult questions of construction.

In the interest of more effective use of uniform acts, and, in particular, of the Uniform Commercial Code, let us hope that judges will resort, more and more, to the special interpretative aids that are available to them.

*Anderson*, 7 Pa. D. & C. 2d 661 [§3-305]; *Girard Trust Corn Exchange Bank v. Warren Lепley Ford, Inc.* (No. 1), 12 Pa. D. & C. 2d 351 (C.P. 1956) [§2-401]; *De Graff v. Myers Foods, Inc.*, 19 Pa. D. & C. 2d 19 (C.P. 1957) [§2-318]; *Erb v. Stoner*, 19 Pa. D. & C. 2d 25 (C.P. 1958) [§§9-108, 9-204].

<sup>27</sup>*Williams v. Georgia*, 349 U. S. 375, 99 L. ed. 1161, 75 S. Ct. 814 (1955) (oral argument, when counsel appointed for appellant by court below could not appear); *Whitney v. Randall*, 58 Ida. 49, 70 P. 2d 384 (1937) (briefing of a question on which both parties took an identical position); *In re Arszman*, 40 Ind. App. 218, 81 N.E. 680 (1907) [approved, *State v. Gorman*, 171 Ind. 58, 85 N.E. 763 (1908)] (hearing on application for liquor license); *McCoy v. Briegel*, 305 S.W. 2d 29 (Mo. App. 1957) (child custody proceeding, appointment by court to present matters of fact and law deemed of interest).

<sup>28</sup>See Rossman, *Uniformity of Law: An Elusive Goal*, 36 A.B.A.J. 175, 178 (1950).

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# MONTANA LAW REVIEW

*Member, National Conference of Law Reviews*

Volume 25

Fall, 1963

Number 1

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Published semi-annually, Spring and Fall, by students of the School of Law,  
Montana State University, Missoula, Montana



