

A Reflective Pause Between UCC Past and UCC Future

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Six months after the Uniform Commercial Code became effective in Pennsylvania in 1954, the Association of American Law Schools (AALS) met in New York and had a program on the Code. Although I was not yet then an academic, I was invited to speak on the occasion because I had participated actively in the drafting, particularly of Article 9. My principal conclusion at that time was expressed in two words: "It works." By that I meant that we had discovered no great bugs in its operations in Pennsylvania during the six months.

The AALS has now met again with a reflective look at the Code, a few days after the 27th anniversary of that other meeting. Also, I have recently passed the first anniversary of my own semi-retirement, and the two occasions have caused me to look back reflectively on the Code. I see three principal points that are worthy of some comment.

I. IN THE NICK OF TIME

It is curious that the proposed Code was received at best with indifference and to some extent with very active and determined opposition by the great banks and law firms in New York. It might never have succeeded if the lawyers and bankers from some cities of deeper civilization, Boston and Philadelphia, had not supported the effort. When one thinks back, it is hard to understand the shortsighted view of those New Yorkers.

After the war, we quite obviously were posed for a vast expansion of interstate and international business, new methods and types of financing, computerization and mechanization. It was completely obvious to many of us, and should have been obvious to those opponents, that unification of the law of chattel security and modernization of the law of sales were necessary, both in terms of their concepts and in terms of eliminating spatial variations in the law arising from state lines.

It may be that we could have lived with the old Uniform Sales Act and the old Negotiable Instruments Act. The latter was already reaching the stage of common law or something like the Statutes of Elizabeth, which were so far in the past that their text was disregarded. The Uniform Sales Act was rapidly reaching the same point. We might have been able to live with a continuation of the common law growth of the law, without the more rapid modernization and unification that the Code achieved, although the dependence of that old law on the concept of "title" would have been an increasing handicap.

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But as to chattel security law, the case was different. The common law courts or individual state legislatures could not in any reasonable period possibly have reached unification of the forms of security and standardization of rules that the Code achieved.

When one thinks of our present situation—the vast increase in the volume and speed of business, of travel and of communication; the mechanization of manufacturing processes; the increased equipment used in service industries like supermarkets, beauty shops, barber shops, cleaning establishments, hospitals, doctors' and dentists' offices; the vast amounts of new automated equipment; computerization of accounting and information retrieval; the automation of the business office and even of the secretary's desk; and increasing uses of credit—one can wonder whether we could have held together and achieved these positions if it had not been for the modernizations of chattel security of the Code. The Code came just in the nick of time.

II. THE SELECT COMMITTEE PROCESS

But it is not merely the Code as a uniquely successful codification effort that is worthy of comment. The process by which the Code and many other highly technical statutes have been drafted in recent years is equally worthy of notice. We have the National Conference of Commissioners on Uniform State Laws (NCCUSL) functioning regularly to codify fields of law for uniform state adoption; the American Law Institute producing in some situations model statutes; the American Bar Association drafting and maintaining the Model Business Corporations Act and now a proposed uniform leasing act;¹ and state and local bar associations drafting corporation laws and the like, all of which are worth noting as a process. Each of these, including those of the NCCUSL, have as their purpose not merely uniformity but the delegation of the process of drafting and codifying "lawyers' law" to select groups of lawyers with specialized knowledge, as distinguished from leaving it to the generally trained lawyers and non-lawyers of the legislatures, or leaving the process to the common law. Not only are our laws getting so complex that they cannot be left for development to the common law adjudicatory process, whether federal or split among fifty state jurisdictions, but they cannot even be left to the legislatures, Congress or the fifty state legislatures. Congress and the state legislatures are living in one of Toynbee's "times of troubles."² They are overwhelmed with financial and political questions, and they simply do not have the time to devote to "lawyers' law." As a minimum, extensive technical legislation like the U.C.C. has to be drafted by a select group before it is worked over by the legislature with particular focus on the political and other public aspects of the situation. This is what happened to the new Bankruptcy Code,³ which in the first instance was drafted by a specially

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

2. A. J. TOYNBEE, *A STUDY OF HISTORY* 12 (Somervell abr. 1947).

3. 11 U.S.C. §§ 101, 1103 (Supp. IV 1980).

created commission,⁴ then worked over for many years by the National Bankruptcy Conference and the National Conference of Bankruptcy Judges, and then its policy aspects debated (rather effectively, on the whole) by Congress.⁵

Every effort must be made to encourage this kind of lawmaking in complex legal fields.⁶

But more is needed. Business and financial practice will not accommodate us by standing still, and these codified systems of law are not completed for all eternity, but must move with practice. In the case of the Code itself, I believe, we had something less than a full realization of this point. Some of Karl Llewellyn's greatest admirers, who were the most enthusiastic in viewing the Code as his monument, were reluctant to countenance any changes for fear that removal or change of any of the bricks would undermine the edifice. I believe that this attitude in part slowed down the drafting and adoption of the 1972 amendments. This attitude is a mistake. Just as we could not depend on judicial development to bring the law up to date in 1952, so we could not do so in 1972, and it took the same kind of a select committee process to keep the statute up to date. Llewellyn's great monument must be viewed as an evolving corpus of law, not as a rigid, unchanging edifice, or it will not long survive the changes that once again may be impending. Karl would have been the first to say so.

We already have a revised Article 8, ready to go when circumstances again seem to make necessary the certificateless share of stock. We already have the elimination of paper shares of stock on periodic issuance by investment companies and under dividend reinvestment plans, and we have similar book entry without pieces of paper in the case of United States notes and bills. Articles 3 and 4 are in process of being rewritten to effectuate the checkless, paperless society of the electronic fund transfer. Article 6 is in the process of revision by an American Bar Association committee that will tender its completed draft to the Permanent Editorial Board for the Code. Another ABA committee is considering whether it will propose a uniform statute on leases, and if so, whether it will propose it as a new article of the Code.

The public notice provisions of Article 9 may also be in need of rethinking. Over fifty years ago John Hanna challenged Karl Llewellyn's then pending efforts in connection with his drafts of predecessor statutes to the Code to adopt widespread public filing requirements.⁷ On the other hand, Peter Coogan has recently challenged the Code's reliance on possession as an alter-

4. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H. R. DOC. NO. 137, (Parts I and II), 93d Cong., 1st Sess. (1973).

5. See e.g., BANKRUPTCY LAW REVIEW, H. R. REP. NO. 595, 95th Cong., 1st Sess. (1977) (accompanying H.R. 8200).

6. I have expanded on this point in Kripke, *Mr. Levenberg's Criticism of the Final Report of the Article 9 Review Committee: A Reply*, 56 MINN. L. REV. 805 (1972).

7. Hanna, *The Extension of Public Recordation*, 31 COLUM. L. REV. 617 (1931).

native to public filing.⁸ But these points of view do not collectively leave us with validation without public notice as the only permissible posture. Both authors agree on the fact that in the modern world public notice of the existence of encumbrances on assets realistically occurs through financial statements and reporting to and by credit agencies. But no one has carefully thought through the question how disclosure to such agencies would have to be regulated to use it as a proper vehicle for public notice.

Coogan also hints that we need to do some basic thinking: The floating lien floats over such broad categories and such rapidly changing collateral that it is more a priority than a lien under older conceptions. Why should the law permit a creditor to obtain an advantage by contracting for a floating lien when he could not validly contract for a priority distribution in insolvency? Some fundamental rethinking may be in order here.⁹

Article 2 on Sales has never been worked over since the inception of the Code. It is sufficiently general in its drafting (and, as some would contend, with sufficiently opposed rules embodied in its drafting) that courts are largely free to develop the law by a common law type of development.¹⁰ But Article 2 seems to be creaking in several areas: finding a modern scope for the law of warranty in the light of developments in strict liability in tort;¹¹ the limitation of remedies; damage questions; impossibility and frustration questions; protection of enabling buyers;¹² definition of the scope and operation of the "lost profit" concept of section 2-708(2);¹³ harmonization of the provisions governing seller's resale of goods under sections 2-706 and 2-708 with those governing resale by a seller or other secured party in section 9-504, and other lack of harmonization of Articles 2 and 9;¹⁴ and perhaps other situations.

Without prejudging any of these possible developments, it is important for lawyers to realize that occasions for the appointment of select committees will constantly arise, and that we must find new and better processes to ensure that the law stays uniform by the uniform and rapid adoption of updating amendments. Otherwise, whenever any of these problems arise, there will always be the suggestion that the laborious process of uniform state amendment be cut short by federal preemption of the field of law.

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

9. Professor Grant Gilmore has recently attacked the scope of the floating lien from another point of view. See note 23 *infra*.

10. Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199 (1963).

11. Rabin and Grossman, *Defective Products or Realty Causing Economic Loss: Toward a Unified Theory of Recovery*, 12 SW. L.J. 4 (1981).

12. Skilton, *Buyer in Ordinary Course of Business Under Article 9 of the Uniform Commercial Code (and Related Matters)*, 1974 WIS. L. REV. 1, 21-24 (1974); Jackson and Kronman, *A Plea for the Financing Buyer*, 85 YALE L.J. 1 (1975).

13. See Childres and Burgess, *Seller's Remedies: The Primacy of UCC 2-708(2)*, 48 N.Y.U. L. REV. 833 (1973). Compare Shanker, *The Case for a Literal Reading of UCC Section 2-708(2) (One Profit for the Reseller)*, 24 CASE W. RES. L. REV. 697 (1973).

14. See Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605, 619, 628 (1981); Jackson and Peters, *Quest for Uncertainty: A Proposal for Flexible Resolution of Inherent Conflicts Between Article 2 and Article 9 of the Uniform Commercial Code*, 87 YALE L.J. 907 (1978).

III. THE ISSUE UNDERLYING THE TENSION BETWEEN ARTICLE 9 AND BANKRUPTCY LAW

Grant Gilmore, with whose name Article 9 will forever be associated, has recently described in interesting fashion how at the beginning of his stewardship of the drafting process, some practicing specialists in the field, including the present author, appeared and volunteered their help.¹⁵ Grant's cheerful acceptance of this aid was not emulated at first by others among the academic drafting group, and I recall that when I wanted to get on the first committee of the Association of the Bar of the City of New York concerned with the Code, the chairman said that he had been warned by Miss Mentschikoff not to let the finance companies capture the committee. Although Soia Mentschikoff has since denied the statement attributed to her, there is no doubt in my recollection that the statement was attributed to her. Later, the drafting staff came to have a realization not only that lender credit is important to the economy and particularly to small business, but that asset-based financing of the kind practiced in those days by the finance companies is particularly important to smaller business, which cannot tap either the institutional private placement market or the public securities markets. Soia Mentschikoff, in particular, must have had a change of heart, because she prepared a brief for the Permanent Editorial Board in the leading case, *Adams v. Southern California First National Bank*,¹⁶ arguing that peaceful repossession under section 9-504 is not an unconstitutional deprivation of property without due process, and in the "Brandeis" part of the brief she cited figures showing that financial lender credit provides more funds to small business than does vendor credit.

After an academic discussion whether secured credit should be abolished altogether, Article 9 went to the other pole and ended up facilitating secured financing by notice filing, validation of the after-acquired property clauses and future advance clauses, and abolition of the "dominion" rule.¹⁷ These points are at the heart of the "floating lien." Others contended that many of these provisions would be knocked out by the Bankruptcy Act.¹⁸ While the current of decisions under the old Bankruptcy Act was to the contrary,¹⁹ these contenders seem to have won before the Congress what they lost in the state legislatures and the courts. The new Bankruptcy Code provides substantial encroachment on the position of secured credit by its automatic stay of the secured party's rights to enforce his collateral on default,²⁰ and by authorizing

15. Gilmore, Remarks, in *Dedication to Professor Homer Kripke*, 56 N.Y.U. L. REV. 1, 9 (1981).

16. 492 F.2d 324 (9th Cir.), cert. denied, 419 U.S. 1006 (1974).

17. U.C.C. § 9-205 (1977) (overruling *Benedict v. Ratner*, 268 U.S. 353 (1925)).

18. Kennedy, *The Trustee in Bankruptcy Under the Uniform Commercial Code: Some Problems Suggested by Articles 2 and 9*, 14 RUTGERS L. REV. 518 (1960); Kennedy, *The Impact of the Uniform Commercial Code on Insolvency: Article 9*, 67 COM. L.J. 113 (1962); Countryman, *Code Security Interests in Bankruptcy*, 75 COM. L.J. 269 (1970).

19. *DuBay v. Williams*, 417 F.2d 1277 (9th Cir. 1969); *Grain Merchants of Indiana, Inc. v. Union Bank & Sav. Co.*, 408 F.2d 209 (7th Cir.), cert. denied, 296 U.S. 827 (1969); *In re King-Porter Co.*, 446 F.2d 722 (5th Cir. 1971).

20. 11 U.S.C. § 362 (Supp. IV 1980).

the debtor's use of the collateral, including even cash collateral.²¹ How far the provisions of the statute for protection of the secured party will indeed provide protection remains to be seen, and the issue presents one of the most important questions as to the workability of the new Bankruptcy Code.²² It would indeed be a travesty if the single most important part of the Uniform Commercial Code's achievement in facilitating invigoration of the economy by financing small business were to be nullified through the provisions of the Bankruptcy Code.²³

I believe that this approach in the Bankruptcy Code is founded on an obsolete assumption that secured creditors are anxious to foreclose and take advantage of desperate but viable, well-intentioned debtors, and to the disadvantage of the unsecured creditor body who are largely trade creditors. Whatever truth there may have been in this assumption at some time, there remains little validity to it at the present time. Most of the finance companies have been taken over by banks, particularly large banks. Much of the commercial receivables business is now in the hands of bankers. No one who does asset-based financing wants to have to prove his skill as a liquidator by taking over the collateral and liquidating it successfully. He would far rather keep the debtor going if possible. His errors are far more likely to be those of undue indulgence of delinquency than they are of cutthroat enforcement of rights at the first sign of default. As for the unsecured creditors, they will be far more likely to salvage something if the secured creditor is encouraged to play along with the debtor and try to rehabilitate him, or to close him down promptly before additional losses when he cannot do so, than they will by our giving the debtor too much power to hold creditors, both secured and unsecured, at bay in the bankruptcy court. The great risk in this situation to both unsecured and

21. 11 U.S.C. §§ 363, 364(d) (Supp. IV 1980).

22. See, e.g., 11 U.S.C. §§ 361, 362(d), 363(c)(2)-(4) (Supp. IV 1980). On the adequacy of this scheme to protect secured party rights, see Reisman and Mooney, *Drafting and Negotiating the Equipment Lease*, in EQUIPMENT LEASING—LEVERAGED LEASING 1, 123-86 (B. Fritch and A. Reisman eds. 2d ed. 1980); Reisman, *The Challenge of the Proposed Bankruptcy Act to Accounts Receivable and Inventory Financing of Small- to Medium-Sized Business* (pts. 1 and 2), 83 COM. L.J. 169, 211 (1978).

23. Professor Grant Gilmore, for whom my admiration is unlimited, has recently astounded his old comrades among the Code draftsmen by repudiating many of the conclusions of his splendid article, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057 (1954). Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605 (1981). See also Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441 (1979). I do not go along, in general, with his changed viewpoint, still less with several of his positions attacking doctrines that he associates with the floating lien, and therefore not at all with his positions supporting the weakening of the creditor's security under the Bankruptcy Code. While I understand Coogan's policy concern, see text accompanying notes 7-8 *supra*, I do not understand what led Gilmore to his current view. Unfortunately, expression of my views will have to await another day, for the editor's deadline came upon me just as Gilmore's recent articles came to my attention.

secured creditors lies in the provisions of the Bankruptcy Code that permit the use of the new Chapter 11 as a device by which a debtor may hold off his creditors while he continues to lose money, pay himself or his principals continued salaries, and perhaps continue to bleed the business, before they can persuade a complaisant bankruptcy judge that the situation is hopeless and before further losses to all creditors and further deterioration are permitted.

Views will differ, of course, on this expression, but it remains one of the vital problems in today's relationship of the Uniform Commercial Code and the Bankruptcy Code.

