

# Why The Uniform Commercial Code Should Be Adopted In Ohio

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There are at least five reasons why the Uniform Commercial Code should be adopted in Ohio, — and also in every other state. I shall first state the reasons and then enlarge upon them.

First: The existing so-called uniform commercial acts are out-moded, to a certain extent obsolete, and are no longer appropriate for the guidance of modern business.

Second: Uniformity of law regulating business practices is not a luxury but a necessity. The volume of interstate transactions today renders this a truism.

Third: There are only two alternatives in the search for uniformity. Either the states will modernize their commercial acts by the prompt adoption of the Commercial Code or there will inevitably be a demand for a Federal commercial code applying to all interstate transactions.

Fourth: Uniformity cannot be obtained by the amendment of the existing so-called uniform commercial acts which have become completely non-uniform as the result of sporadic amendments and diverse court decisions interpreting identical acts.

Fifth: The Commercial Code, although not perfect, contains better rules of law than are now contained in the commercial acts in force in any state in the union.

Now, let me elaborate.

## I.

The existing uniform commercial acts, some of which were enacted by every state in the union and others of which have been widely adopted, were, generally speaking, prepared in what might be called a pre-historic business era.

The Negotiable Instruments Act, which has been unanimously enacted, was prepared by the National Conference of Commissioners on Uniform State Laws more than fifty years ago; it was promulgated in 1896.

The Uniform Sales Act and the Uniform Warehouse Receipts Act were prepared just about fifty years ago; they were promulgated in 1906.

The Uniform Stock Transfer Act and the Uniform Bills of Lading Act followed the last mentioned acts by only three years.

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Of these acts, three have been universally adopted,—the Negotiable Instruments Act, the Stock Transfer Act and the Warehouse Receipts Act.

I have been serving as a member of the National Conference of Commissioners on Uniform State Laws since 1924. When I became a member of the Conference, there was a committee on amendments to the Negotiable Instruments Act. That committee was in continuous existence until the Uniform Commercial Code project took shape.

Amendments to the Sales Act were promulgated by the National Conference in 1922. Although the Sales Act has been enacted in 37 states, only 11 states paid any attention to the amendments.

Amendments to the Warehouse Receipts Act were also offered in 1922. Although every state has enacted the Warehouse Receipts Act, only 17 states saw fit to amend it as recommended by the National Conference.

During the half century of the history of these four acts, not only have there been non-uniform amendments made in various states, but there have also been diverse decisions galore which have rendered anything approaching uniformity in this field non-existent.<sup>1</sup>

During the past fifty years, the tempo of business transactions has been revolutionized. Successively, we have had the development of the automobile and the truck, we have seen the telephone become a necessity for the conduct of business, and we have come to regard the airplane as a conventional carrier of freight and mail, domestic and foreign. It would have been a miracle if the draftsmen of the Negotiable Instruments Act, the Sales Act, the Stock Transfer Act, the Warehouse Receipts Act and the Bills of Lading Act could have foreseen the changes in business practices which these inventions wrought.

No such miracle occurred.

The old laws, by reason of sporadic amendments, divergent decisions and just plain unsuitability to govern transactions conducted in today's world, no longer "fill the bill."

## II.

The development of commerce among the states during the first half of this century has been such that two alternatives,—

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<sup>1</sup> In a panel discussion before the American Bankers' Association on September 20, 1953 (copies of which can be obtained from Thomas B. Paton, Secretary, Committee on State Legislation, 12 E. 36th St., New York 16, N.Y.), Mr. Walter D. Malcolm of Boston, Chairman of the Commercial Code Committee of the American Bar Association Section on Corporation, Banking and Business Law, stated that "\*\*\*By actual count, there are 80 sections of the Uniform Negotiable Instruments Law that have different meanings in different states as a result of different court decisions.\*\*\*".

and only two,—exist. Either the states will rapidly enact the Commercial Code or else there will be a demand that Congress enter this field and adopt a commercial code relating to all interstate commercial transactions.

It is simply inconceivable that the thousands of concerns which today are transacting millions of dollars worth of business in every state of the union should be subjected to differing rules governing their sales and collections and security just because the United States still continues to have,—and happily so,—forty-eight state governments in addition to a federal government.

Prior to 1940 when the Commercial Code project was first suggested, a serious campaign had begun for the enactment of a Federal Sales Act. Because the National Conference of Commissioners on Uniform State Laws is constituted exclusively of members who are state officials,—and for other reasons,—they felt and still feel that it would be a serious mistake to have the federal government extend its jurisdiction over interstate commerce by legislating in the field of the uniform acts which the Commercial Code replaces. Accordingly, the National Conference persuaded those who were behind the drive for a Federal Sales Act to desist and instead to cooperate with the National Conference in the preparation of what was then called the Revised Uniform Sales Act, but which is now, with only slight modification, Article 2 of the Uniform Commercial Code.

If the states prove their inability to make the law uniform in the field covered by the Code, I predict that the time is not far distant when the business interests of the nation will insist that they be relieved of the needless tremendous expense involved in keeping posted on forty-eight sets of laws relating to simple commercial transactions rather than only one.

To those believing that there should be no further concentration of power in the federal government and that the states should retain their present fields of activity, this ought to be a forceful reason why Ohio and every other state which has not yet done so should speedily enact the Commercial Code.

### III.

Uniformity simply cannot be attained by the amendment of the existing uniform commercial laws.

I have already demonstrated that this is so when I pointed out that although 37 states have enacted the Sales Act which was promulgated in 1906, only 11 have adopted the amendments which the National Conference asked all states to adopt in 1922, and that although every state has adopted the Uniform Warehouse Receipts Act, promulgated in 1906, only 17 states have enacted amendments proposed by the National Conference in 1922.

To those who predict a long period of time before the Commercial Code will be universally enacted, I answer that whatever their prediction may be in this regard, they should quadruple it if their prescription for attaining uniformity is to have amendments proposed to the eight uniform commercial acts which are replaced by the Commercial Code.

#### IV.

The Commercial Code contains better rules of law than are now contained in the various uniform commercial acts as miscellaneously amended and differently interpreted throughout the country.

This statement is the consensus of the opinion of those who have made a careful study of the Code's provisions and who have "no axes to grind."

More literature has been published regarding the Commercial Code during the course of its preparation than ever appeared in connection with any proposed piece of legislation.<sup>2</sup> With very few exceptions, the reaction of the authors who had given careful study to the Code was favorable. Indeed, I point to the fact that in Part I of this publication's symposium on the Commercial Code in Ohio,<sup>3</sup> the authors of three papers dealing with specific articles of the Code, — all of whom I understand are highly qualified to pass judgment, — reached the conclusion that Ohio should have on its statute books the three articles with which they dealt, namely Articles 3, 8 and 9.<sup>4</sup>

Necessarily, in a project of the magnitude of the Commercial Code, differences of opinion arose, not only as to specific provisions but also as to policy and style.

It is regrettable that a law professor of the experience of Professor Beutel, who contributed the first article in Part I of this publication's symposium,<sup>5</sup> should have deemed it necessary to cast personal reflections on the hundreds of lawyers who unselfishly devoted their time to the consideration of the Code's provisions. The reputations of the men whom Professor Beutel attacks are such that the professor's angry words backfire.

Indeed, Professor Beutel is a member of the American Law

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<sup>2</sup> An up-to-date bibliography listing every article relating to the Code is now being prepared under the auspices of the American Law Institute and will soon be available. Requests should be addressed to the American Law Institute, 133 South 36th Street, Philadelphia 4, Pennsylvania.

<sup>3</sup> 14 OHIO ST. L.J. 1-116 (1953).

<sup>4</sup> See also, for example, the March 1952 issue of the WISCONSIN LAW REVIEW, which has articles dealing with every article of the Code and the February 1953 issue of the TENNESSEE LAW REVIEW, which contains articles dealing with Articles 2, 3, 4, 5, 8 and 9.

<sup>5</sup> 14 OHIO ST. L.J. 3 (1953).

Institute, and, as such, availed himself of the opportunity open to everyone of the Institute's more than one thousand members to participate actively in the many sessions when the Code's provisions were debated in open meeting. He made the same arguments which he repeated in his article.<sup>6</sup> He received the respectful attention of his fellow members, but in most cases they exercised their privilege of voting against his proposals.

Having participated in the discussions through all the years that the Code came before the Institute, and having failed to make his point with his fellow members, he now avails himself of all that is left, — personal attack on those who took a leading part in the work and a plea to have no state enact the Code.

It is particularly regrettable that Professor Beutel thought it also necessary to attack the great men, — living and dead, — who are responsible for the preparation of the Restatement of the Common Law by the American Law Institute.

As anyone familiar with the history of that project realizes only too well, it was "sparked" by some of the country's greatest lawyers and law professors. I mention only a few of the names: Elihu Root, William Draper Lewis, George Wharton Pepper, Samuel Williston, Francis H. Bohlen, Learned Hand and Herbert F. Goodrich.

And, of course, Professor Beutel knows as well as anyone else that there is no "clique" which runs as one, the American Bar Association, the American Law Institute, and the National Conference of Commissioners on Uniform State Laws.

Indeed, in the consideration of any piece of legal work by any of these organizations there is no "clique" which dictates the result; never in my experience has there been any such thing.

For the benefit of any persons who might be misled by Professor Beutel's unwarranted and bitter statements I shall briefly describe the manner in which the Code was prepared.

First of all, after the project was first suggested in 1940, a prospectus was prepared on the basis of which the American Law Institute sought contributions necessary to finance the work. This prospectus made it entirely clear that there would be no attempt to amend specifically the various uniform commercial acts but that all of them would be integrated into one commercial code. That prospectus contained the following:

"The American Law Institute and the National Conference of Commissioners on Uniform State Laws have undertaken jointly to restudy the entire field of American commercial law, and to formulate a comprehensive 'Commercial Code' with appropriate annotations and commentaries.

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<sup>6</sup> *Id.*

"They plan to include provisions which will cover a commercial transaction from start to finish, no matter how complicated, or how simple, it may be. The sale, bill of lading, draft, trust receipt, or warehouse receipt, the payment by check or other form of paper, the passage of check, draft, or other paper through various banks for collection, and other cognate matters will be covered by this one act or code."

With this proposal before them, two foundations and 97 banks, industries and law firms contributed in excess of three hundred sixty thousand dollars to finance the Code's preparation.

At the top of the Code's "organization chart" was an Editorial Board composed of Judge Herbert F. Goodrich of the Third Circuit Court of Appeals and Director of the American Law Institute, as Chairman, Professor Karl N. Llewellyn, then of the faculty of the Columbia University School of Law and now of the University of Chicago Law School, Carl F. Pryor, a practicing lawyer of Burlington, Iowa, Harrison Tweed, a practicing lawyer of New York City and the author, who is also a practicing lawyer.

Prior to its organization, the Editorial Board had selected Mr. Llewellyn as the chief draftsman of the Code. Draftsmen were selected for the various articles. All of them were men well-qualified to do the work. All draftsmen had groups of advisers also selected because they knew the respective fields in which the draftsmen were working.

When a draftsman had a draft ready to submit, it was presented to his advisers who met with him for days at a time and went over the draft line by line.

In this way, drafts were revised and re-revised until they were ready to be presented to the appropriate section of the National Conference and to the Council of the American Law Institute. Both of these groups included lawyers and judges from every section of the United States, — rural and urban. Seldom did a draft emerge after a thorough going over by either of these groups without requiring almost a complete rewriting.

The next bodies which considered the drafts were the memberships of the National Conference and the American Law Institute. Because of the magnitude of the project and the desire to complete it within a reasonable time, joint meetings of the Institute and the National Conference were held for a number of years both in the spring and in the fall.

Many were the changes in text which resulted from debates on the floor.

Finally, after the Code was tentatively approved by the Conference and the Institute, it was submitted for study to a very large committee of the Section on Corporation, Banking, and Busi-

ness Law of the American Bar Association of which Mr. Walter D. Malcolm of Boston was Chairman.

No man has labored more arduously and more unselfishly in helping to produce a Code which would be workable and acceptable than Mr. Malcolm.

Through his committee, the Code was submitted to the various business groups which would be most affected by its provisions. They made many splendid suggestions which were accepted by the Editorial Board, which had been enlarged from five to fifteen for the purpose of holding extended hearings on the Code's provisions. They also made a number of suggestions which were rejected.

In his article in the Winter 1953 symposium,<sup>7</sup> Professor Beutel attacked particularly Articles 4 and 9 of the Code,—the former as being "vicious class legislation" and the latter as being "experimental and crude."

Article 4 did have a rather hectic history, but not the kind which the professor suggests. It was originally drafted by Mr. Leary, who is now a partner of mine. Mr. Leary's work was able and conscientious, and much of his work is reflected in the Article 4 which Professor Beutel denounces.

Professor Beutel demagogically tries to create the impression that the impact of Article 4 is on the poor and unsuspecting depositors of little checks. Of course, the fact is that most bank collections which will be affected by the provisions of Article 4 are made by the tremendous business corporations which receive in the course of their dealings payments by check from every part of the United States which they deposit in their local banks for collection.

The difficulty with Article 4 was that for a long time it did not seem possible to obtain the approval of the Federal Reserve System, without which any article on bank collections would be doomed. To obtain agreement on this article seemed so hopeless that in May, 1951 it was determined to eliminate it entirely from the Code. Mr. Malcolm, who in the course of his work as chairman of his committee had become intensely interested in the production of a successful and complete Code, felt that a commercial code without a chapter on bank collections would be woefully defective.

Accordingly, he voluntarily undertook to redraft the article and to obtain agreement among the various contending elements. To the surprise of everyone, he succeeded; and in September, 1951, he presented to a joint meeting of the National Conference and the Institute a redraft which, with some modifications which were made at the meeting, was reinserted into the Code.

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<sup>7</sup> *Id.*

The charge that I was helpful in attaining this objective is true, and I am proud of it.

The consideration of an article on bank collections is not one which depends on liberal or conservative views. The important thing is to state rules which are definite and which can be readily understood and applied by the many thousands of bank employees who handle millions of checks every day.

That result has been obtained in Article 4 as it now stands.

I should like to quote two paragraphs from a publication issued by the Federal Reserve Bank of the Third District (Philadelphia) in June, 1953:<sup>8</sup>

"Article 4 of the Uniform Commercial Code is a statement of the principal rules now governing bank collection processes, with ample provision for flexibility to meet the needs of the increasing volume and other changes that are bound to come with the years. It affects the rights of banks, owners and other parties to 'items' which enter bank collection channels. Items are defined as instruments for the payment of money even though not negotiable. Questions as to the negotiability of the items, endorsements, and the like are covered by Article 3 on 'Commercial Paper,' but in the event of conflict, Article 4 governs. Many of the principles and rules of the Bank Collection Code, Deferred Posting and other statutes are retained, and Article 4 should not adversely affect bank collection practices and procedures.

"Flexibility in the bank collection process is made possible by permitting the effect of Article 4 to be varied by agreement, although a bank cannot, of course, disclaim its responsibility for its own lack of good faith or failure to exercise ordinary care. Thus, Federal Reserve regulations and operating circulars, clearing house rules, and similar official or quasi-official rules may, standing by themselves, vary in effect the provisions of Article 4, whether or not specifically assented to by all parties interested in the items handled. The owner and depository bank may enter into agreements of a more limited effect with respect to a single item or to all items handled for a particular customer."

As far as Article 9 is concerned, every unbiased critic of whom I know has pronounced it the greatest advance made by the Code.

In its draftsmanship, the Institute and the conference were aided by some of the ablest experts in the field of secured financing in this country, who labored almost endlessly to perfect it. If it is experimental, the people who know most about this field are happy to make the experiment. If it is crude, the people who are expert in the field have only to regret that they did not call in Professor Beutel to assist them.

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<sup>8</sup> Supplement to "BUSINESS REVIEW," June, 1953.



The article by Messrs. Friedheim and Goldston in Part I of this symposium sufficiently answers the professor.<sup>9</sup>

Finally, I come to a reason for the adoption of the Code by Ohio which does not apply to every state.

Ohio is Pennsylvania's neighbor. For several hundreds of miles, eastern Ohio and western Pennsylvania are separated only by a line. The business of eastern Ohio and western Pennsylvania should certainly not be conducted differently because of a surveyor's line.

Pennsylvania is the third state in the union in population, in bank deposits, in retail sales and so on.

Certainly, if the Commercial Code were what Professor Beutel says it is, there would have been some group in Pennsylvania objecting to having the state's commercial transactions thrown into the chaotic state of confusion which the professor predicts.

The Code was studied for several years before its introduction into the Pennsylvania Legislature by a very able committee of the Pennsylvania Bar Association, drawn from various sections of the state. It also received the careful attention of the Legislative Committee of the Pennsylvania State Bankers' Association as well as of other groups vitally affected.

It was introduced into the Legislature in January, 1953 and several months later passed both houses unanimously. Governor Fine approved it on April 6, 1953. It will become effective on July 1, 1954.

It simply taxes the imagination to believe that any piece of legislation as badly drafted and as viciously intended as the professor from Nebraska alleges could have slipped through the legislature of the third largest state in the union without a dissenting vote!

<sup>9</sup> 14 Ohio St. L.J. 69 (1953).