

Reflections of a Drafter: Allison Dunham*

Most of the remarks that you've heard this afternoon have been about banks, and I will tell a series of anecdotes about banks also.

One is in connection with Karl Llewellyn. He would do this empirical research that Fax Leary described.¹ He sat in a bank in New York in the foreign department for a couple weeks in order to get a feel for the way banks did things. When he came out we all said to him, "Well, what did you discover?" And he said, "I discovered the only thing dumber than the domestic bank is a foreign bank."

There is another aspect of banks some of you may have seen. Grant Gilmore and I in desperation at one time wrote what we called a mock Article 9 and Commercial Code.² We started with definitions as the Code did, and my favorite definition was the definition of good faith. We said if a person is in good faith, that is if he acts honestly and with reasonable adherence to standards of the industry and so on, then he's not a bank.

Soia mentioned that we had started out on a functional approach,³ and Peter talked about farmers and the like also,⁴ and indeed Grant and I did start in a functional approach. We had a part on agriculture and then another part on industry and inventory financing and another part on machinery and so on. We were getting nowhere with our advisors, and finally we shifted our approach and abandoned the so-called functional approach for a number of reasons. Now, Grant may have had a different version because memories are different, but my recollection of how we got off the functional approach and went to the approach we did was that we were instructed to come up with a draft over the summer that would be salable. And it happened that both Grant and I were in Chicago in the summer. He was teaching at the University of Chicago in the summer school, and I then from Columbia was teaching in the Northwestern Law School. Neither of our families were present and we agreed that over the weekend we would come up with a draft. This was the 4th of July holiday weekend and it was the hottest weekend in the Chicago area in 1948 or '49—I've forgotten the year—that was then imaginable. And we assembled in the Northwestern Law School all closed up for the holiday and went up on the third floor, took all of our clothes off, except our underwear, and produced a hot weather draft that survived thereafter.

We abandoned the attempt to define for farmers and so on. Actually for farmers it would be very easy to produce a Code. In the mock Commercial

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1. *Reflections of a Drafter: Fairfax Leary*, 43 OHIO ST. L.J. 557, 559 (1982).

2. Dunham and Gilmore, *Uninformed Commercial Code*, 45 PHI DELTA PHI Q. 85 (1949-50).

3. *Reflections of a Drafter: Soia Mentschikoff*, 43 OHIO ST. L.J. 537, 540 (1982).

4. *Reflections of a Drafter: Peter Coogan*, 43 OHIO ST. L.J. 545 (1982).

Code that we produced we also wanted to add a very simple two-section statute on farm loans. Section 1 is, it shall be a crime not to loan money to farmers; Section 2, it shall be a crime to collect it if you do. And I think if you look at much of the farm legislation in the U.S., that is basically what the statutes say.

I participated in drafting only Article 9. Thereafter I became a teacher of future interests and estates and did not concern myself with commercial law, or with Article 2 in particular. Then I became associated with the uniform commissioners as executive director, and I got back into Article 9 when a banker in Denver made a representation to me as executive director that the commissioners ought to draft a uniform real estate security act; by which he really meant that the commissioners should, if they could, seek the repeal of the Mechanic's Lien Act.⁵

The banker told me a story that brings me back to Article 9. He had a bill that he had presented to the Colorado legislature, trying to make the bank loans on security of real estate construction, in particular, easier. He, in effect, was repealing the Mechanic's Lien Act, and he hired a lawyer in Denver to go handle the bill and get it through. And the lawyer said, "We're proceeding along fine." And then suddenly they hit a roadblock and it didn't pass to their surprise. So then he hired another lawyer to find out why it didn't pass, and the lawyer came back and said, "Well, the reason it didn't pass is because another vice-president of your bank in charge of commercial loans decreed that it would not pass."

Now, why were the commercial people interested in the mechanic's lien? Very simple; the lumber yards could give good credit and sell their accounts receivable if they could assure the bank that the accounts receivable were secured by mechanics' liens. And that brought it back to reality.

After various changes in hats, I became chairman of a drafting committee to draft a coordinated transaction, real estate transaction act,⁶ which, as many of you know, is modeled after the UCC, particularly Articles 2 and 9. Time passed and I retired, but I wanted to continue working, and I discovered that my work in a prairie province in Canada became a specialty; it was noncompetitive with Canadian lawyers. I was granted a work permit because no Western lawyer knew anything about the Commercial Code and, therefore, I could work. I got my work permit and became a consultant.

During my first conference after I arrived in Alberta, I discovered that I was asked to participate in a project that was primarily an exercise in helping a prestigious group in Alberta answer the question whether Alberta should follow the Ontario Law Reform Commission, which had adopted the position that Ontario should adopt Article 9 of the Commercial Code and also a new Sale of Goods Act.

5. COLO. REV. STAT. ch. 101, § 15 (1935).

6. Uniform Land Transaction Act.

I concluded that I should, before I attempted to exercise any judgement on this, acquaint myself with Article 2, which I hadn't read for many years, since the 1940's.

Now, this is not the time to make a comparison of academic styles of the two countries or of drafting or in the politics of enactment, other than to note an irony. The Ontario Law Reform Commission in its report on the sale of goods said, "In August 1975 the National Conference of Commissioners approved the Uniform Land Transactions Act and recommended it for enactment by the states. The Uniform Act deals with contractual transfers of real estate, including transfers for security, and with what Articles 2 and 9 of the Uniform Commercial Code do in the realm of personal property."⁷ Note this: "What is significant in the present context is the fact that the ULTA, which is the Uniform Land Transactions Act, follows closely the structure and concepts of the corresponding provisions in the Uniform Commercial Code. This *seems* to indicate"—I want to emphasize that—"both the adaptability of the Code and the pervasive feeling that it is operating well and has not lost its essential relevance."⁸

Now, the irony is, as you will note, that in many places in the Code, particularly in the commentary on unconscionability, the commentary attempts to give respectability to this new invention, unconscionability, by asserting that the doctrine came from equitable principles often applied in specific performance actions for the sale of the land. As I recalled the debates on the UCC, the opposition to unconscionability attempted to demolish this analogy by saying land is unique. In 1975 the commissioners approved an attempt to make land law and commercial law the same. After the commission had approved it, there was an attempt in the real property section of the American Bar Association to disapprove ULTA on the ground that it was an attempt to import into land law alien doctrines from the law of sale of goods, which, according to the argument, were unique to commercial law.

And now in 1975, the Ontario Law Revision Commission uses ULTA to prove that the principles of the Commercial Code *must* be all right because the commissioners recently reaffirmed them after ten or more years of experience.

This is, of course, good lawyering: seeing a principle established by precedent wherever you can. But it also tells us something about the significance of the UCC, and the significance is that no discussion of reform of law in the English speaking world—I hope I'm not heard in Quebec and New Brunswick—can take place without reference to the Uniform Commercial Code. This is the fact, whether one likes it or not. Now, that is proof of something, and I like to think that it proves the merits of the approach and the innovations therein expressed.

7. Ontario Law Reform Commission, Report on Sale of Goods (1979).

8. *Id.*

Indeed in drafting ULTA we found ourselves asking the question, could we, given the propensity of the modern judiciary to be free-wheeling, by which they mean innovative and creative, could we, given that propensity, even if we wanted to, restrict or repeal the doctrine? For example, in the debates among my committee and its advisors and consultants on ULTA, we sometimes asked ourselves, granting that some courts misuse the concept of unconscionability, could we repeal it? In substance we did not know how to shorten this chancellor's foot against his will.

Enough of this rambling. I have reread, as I have indicated, Article 2, and I want to note two things about the attempt to move the Uniform Commercial Code to Canada or, if you prefer, as I do, to ask a legislative body in 1982, here or anywhere else, whether some words used in the 1940's and early 1950's should now be used and adopted by the legislative body in 1982.

The words I want to talk about are "good faith," perhaps also "unconscionability." And to permit me to talk about real property, I want to talk about firm offers, and if there's time I will add something about the Canadian approach to the so-called perfect tender rule.

First as to good faith. The Ontario report regards good faith as a logical complement to the doctrine of unconscionability.⁹ It also notes that the term is defined more broadly in the article on sales than it is in the other articles. And it also noted that ULTA contains no definition at all of good faith. But ULTA does provide that every contract or duty imposes an obligation of good faith in its performance or enforcement.¹⁰ The report also noted that neither does the Restatement (Second) of Contracts contain a definition of good faith, and then makes the point that it does not regard either ULTA or the Restatement as clear as the UCC article on sales, whether the concept is honesty in fact or whether it includes observance of reasonable commercial standards.

Now, the recommendation of the Ontario Law Reform Commission is that good faith should be defined as including both elements and that it is applicable to every right and duty that is created by a contract of sale of goods so as to impose an obligation of good faith in its enforcement or performance whether you are a merchant or not.

A chapter of the report entitled "Freedom of Contract and Minimum Behavioral Standards: The Doctrines of Unconscionability and Good Faith," states that the issue is whether the contracting parties should have complete liberty to set the terms of their contracts, even if these are unfair or one-sided, or whether they should be held to basic moral standards. The report concludes that the pendulum has swung, and is continuing to swing away from undivided freedom of contract. And the Uniform Committee of Canada and the Ontario Commission concluded that the basic standard should be higher than honesty in fact, but, said the Ontario Commission, some guidance to the

9. *Id.*

10. Uniform Land Transaction Act § 1-301 (1977).

courts is necessary if we are to avoid a new period of uncertainty. So the Ontario Committee proposed to give the courts some guidance.

The Canadian Sale of Goods Committee of their commission on uniformity, which, incidentally, is heavily weighted in favor of the prairie provinces as against Ontario (If you are interested in understanding the Canadian politics and you see something about the western provinces and Ontario, read New York in place of Ontario and the U.S. West in place of the prairie provinces, and you'll come approximately to understand it.) said, "It seems to a majority of the committee that the doctrine of unconscionability and good faith is in such a form capable of turning debt into a discretionary remedy."¹¹ So it cut the reference out to enforcement of the contract in good faith, and accordingly, the scope was limited to the performance of contracts. It argued that unlike unconscionability, good faith is not suggested as a general principle by the present trends.

Second, it said, "There is no manifest defect in present contract law which would justify such a principle. And besides," it said, "the general subsections of 1-104 in the Code make it possible to vary present contract law if need arise by application of the equitable principles."¹²

Third, it said, "The doctrine in its present form is inherently vague, with no reference to trade practice or course of dealing, and presents the real danger that that principle could be used as a substitute for carefully reasoned argument."¹³

Now, there is a problem in good faith application of the definition of good faith to real estate. In ULTA section 3-201 and the following sections, we have provided a basic rule for priority. If you know real property, it is a notice res form and it proposes that a person who is a subsequent purchaser, if he's without knowledge at the time he records, has prior rights. But how can that be read against the general provision in both the Commercial Code and in ULTA as to whether he must also act in good faith?

For example, suppose a lawyer in one of the many states that has retained the filing of security interests under article 9 specializes in advising clients who sell big-ticket consumer items, such as big TV's or home computers. The lawyer advises his client to record or file notice of the client's security interests. Then suppose the client, as a consumer, goes out and buys a secondhand big-ticket item from his neighbor, and the seller of that item tells him he must pay cash before he can take the property, and since it's after 4 o'clock, the client can't go to the recording office to search for prior filings. Is the client-consumer of the big-ticket item in good faith, or did he intend thereby to defraud a possible holder of paper on the item?

11. See *Draft Uniform Sale of Goods Act*—Sale of Goods Committee Report in CANADA UNIFORM LAW CONFERENCE PROCEEDINGS 185 App. S (63 ed. 1981).

12. *Id.*

13. *Id.*

Section 3-301 provides that he must be a purchaser without knowledge, but it is also provided in Article 3 and elsewhere in ULTA that every contract or duty within the act imposes an obligation of good faith in its performance.

Now, a similar problem but in a narrower situation arises in Article 9 and in Article 2 of the code. If a statute or a contract gives rights on condition, is the holder of the right entitled to assert that right on the happening of the condition, or is he entitled to assert it on the happening of the condition but only if he asserts the right in good faith, and only honesty in fact is required, or is he entitled to assert the right only if he is in good faith and acts invidiously? In other words, does good faith include an element of intention?

Now, this, I think, brings us to the time for several anecdotes. One problem in drafting codes is to put them together. When we did Article 9 and the Land Transaction Act, we were conscious of the fact that we might leave something to fall between Article 9 and the Land Transaction Act, and a good illustration came from Pennsylvania. Article 9-104 provides that one of the exceptions on assignments or sales of accounts receivable is a sale or transfer of an interest in land.

There was a situation in Pennsylvania where the debtor assigned his rents under a real property lease, and then sold them to another assignee, and the question came up as to priority.¹⁴ If this was an assignment of accounts receivable, you've got one rule. If it was a general intangible, whatever that may mean, you've got another rule. Pennsylvania said it's neither. It is an interest in land and, therefore, *no* code is applicable and the old common law rule "first assignee in time, first in right" applies, and, therefore, we should have a security interest that is good.¹⁵

When we came to draft Article 3 of the Land Transaction Act, we decided specifically to state that assignments of rent, whether by way of sale or by way of additional security, were covered by the Real Estate Act,¹⁶ not because we had a belief for treating these as land or not land, but we wanted to be sure that they were covered by some statute.

Now, to return to banks, one test, I think, of whether the drafting is good is whether it is necessary to change the law every time a new technology comes in. I regard it as a fault of a draft if a new concept requires new law. Now, this may tell us something about the importance of banks. I again use real estate as an illustration.

Illinois concluded that if the real estate title industry would insure the title, Illinois could adopt a time-sharing scheme without any statutory law at all. I think most states thought they had to have condominium statutes before they could have condominiums. Illinois said good common law concept can adopt it. Now, that tells us something about banks. If the banking industry

14. *In re Bristol Associates, Inc.*, 505 F.2d 1056 (3d Cir. 1974).

15. *Id.* at 1059-62.

16. Uniform Land Transaction Act § 3-102(a) (1978).

tells us that it will or will not loan on security, if it tells us that it will not, we have to change the law if we want the security to obtain whether or not the good principle is adopted.

When I first presented to the American Law Institute, I had never been involved with the conference, the commissioners, or the Law Institute before. One of my ancient colleagues at Columbia who had made numerous presentations said, "Before you present at the American Law Institute, you should know something about the Institute." He said, "The Institute members are heavily from Pennsylvania. Pennsylvania lawyers regard the Pennsylvania common law as Constitutional law, unchangeable, and there will be a lawyer who will stand up and speak all the time and say to you, 'But in Pennsylvania we do it this way.'" He said, "You can shut him up if you get four or five cases, whether they're relevant or not is immaterial, and you meet him with an answer, 'Oh, sir, you are speaking of O'Reary against Smith,' and you describe the case. He doesn't know the case but it will shut him up." And I think that worked very well.

Fairfax Leary mentioned something about the NIL.¹⁷ I formed a generalization from all of my work for the conference that lawyers remember more NIL and evidence law even though they never had a court case involved in the NIL in their life. The NIL teachers must have been better indoctrinators than anyone else, because every lawyer says, "I want to do that."

When we were working on consumer credit I also discovered how lawyers work themselves through law school. It turned out that all lawyers who had graduated from law school sold Wear-Ever aluminum. Now, that's door-to-door selling. And they all put themselves through law school, and when they came to draft all these consumer protection statutes they knew more about door-to-door selling than anyone else.

Now, one of the great omissions in the Code, which may be good or it may be bad, is that the Code does not deal with consumer protection very much. It may be that—and I hope it's the case—that we are over the hump on desire to engage in consumer protection, because I think that the statutes which are drafted with no thought of protecting people against their own folly are on the whole better than any attempt to draw lines.

In Article 9 we drew a line between consumers and other people. In the article on real property security we invented a category of a protected person, meaning a homeowner. Now, that is a very indefinite provision and we are always reminded of the indefiniteness as we were in Article 9, but I think there is a place for indefiniteness. Given the propensity of lawyers to be careful, indefiniteness in some places makes you not do as much as you think you could do, and that's good.

I'll close with another banking anecdote. When I was at Columbia—I'd like to make two points on deferred posting—I taught in the evening division

17. *Reflections of a Drafter: Fairfax Leary*, 43 OHIO ST. L.J. 557 (1982).

extension, today euphemistically called continuing education, and I taught two things: I taught the letters of credit, and I taught banking law. In letters of credit I was describing the necessity of a foreign bank getting certified as to whether the issuer of the letter of credit was good. Most foreign countries tended to use the Chase. And after class one of my students came up to me and said, "Professor Dunham, we don't do it that way in my country. I come from Liberia, I work in a bank in Liberia, and if a letter of credit is presented to us, we insist on a guarantee by the First National of Akron, and we will not accept Chase Bank. That's for obvious reasons."

The second point on deferred posting; I was describing this 48-hour or midnight rule, and one of the students said, "Oh, we don't do it that way in my bank in Connecticut. We bunch everything together and then post on Saturday morning, only once a week." Well, I suspect that all of those systems worked very well. In short, you don't really need very much law if you agree.