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## The Uniform Commercial Code Comes of Age

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*Symposium: Selected Problems Under the  
Uniform Commercial Code*

FOREWORD

THE UNIFORM COMMERCIAL CODE  
COMES OF AGE

Roy L. Steinheimer, Jr.\*

I

ONCE upon a time back in the elegant and well-ordered Victorian age, a new organization known as the National Conference of State Boards of Commissioners for Promoting Uniformity of Legislation in the United States undertook the task of drafting a Negotiable Instruments Law (NIL) for adoption by the legislatures of the various states. The law was finally prepared and recommended by the Commissioners for adoption in 1896, and, by December of 1900, fifteen states had adopted it. In that month, Dean Ames, of the Harvard Law School, loosed a blast at this new law in an article in the *Harvard Law Review*.<sup>1</sup>

Codification is with us a new art, and it is not surprising, although it is unfortunate, that the commissioners did not realize, as continental codifiers realize, the extreme importance of the widest possible publication of the proposed code, and the necessity of abundant criticism, especially of public criticism, from practising lawyers and judges, professors and writers, merchants and bankers. It is far from an agreeable task to offer criticisms at this late hour.† Nor would the following criticisms be offered now but for the writer's conviction that the Negotiable Instruments Law ought not to be enacted by any state which has not yet acted in the matter, unless changed in important respects, and that those states in which it has been adopted should remedy its defects by supplemental legislation.<sup>2</sup>

Dean Ames then proceeded to a detailed criticism of various sections of the NIL, with more or less telling effect, and concluded that "its adoption by fifteen states must be regarded as a misfortune, and its

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\* Professor of Law, University of Michigan. A.B. 1937, University of Kansas; J.D. 1940, University of Michigan. Editorial Board, Vol. 38, *Michigan Law Review*.—Ed.

1. Ames, *The Negotiable Instruments Law*, 14 HARV. L. REV. 241-42 (1900).

† [Footnote by Dean Ames] "The writer, although interested in the subject of Bills and Notes both as an author and a teacher, saw the Negotiable Instruments Law for the first time after its enactment by four state legislatures."

2. *Id.* at 241.

enactment in additional states, without considerable amendment, should be an impossibility."<sup>3</sup>

Dean Ames' blows had found their mark. Judge Brewster, President of the group which by this time was known as the National Conference of Commissioners on Uniform State Laws, felt it necessary to answer his criticisms in an article published in the *Yale Law Journal*.<sup>4</sup> The merits of this answer were somewhat obscured by its obviously condescending tone. After reporting that a subcommittee of the Conference of Commissioners on Uniform State Laws had discussed the NIL with Dean Ames and had concluded that no change in the act was necessitated by his criticisms, Judge Brewster continued with these comments:

It is with diffidence that I undertake to reply to legal criticisms from such a source and upon such a subject. The Dean of the Harvard Law School has so long been, not merely an expert, but an authority, on this subject, that I would not rashly volunteer to attack his positions. But, sometimes the point of view is quite as important as extensive knowledge and I am constrained to believe that so keen a controversialist is somewhat affected by the "*gaudium certaminis*" which the most open-minded advocate cannot wholly resist. Then too, if it is a question of experts, nearly all of them disagree with the Dean, on the main points at issue, as I shall try to show. If it is a question largely of practice and experience as a trier of cases, Professor Ames has none—while on the other hand, on all questions of custom and convenience, the practical knowledge of the hundred lawyers, and more, who framed the Negotiable Instruments Law, and the hundred bankers who adopted it, would seem to quite offset the mere conclusions of erudition.

One who, like Professor Ames, can approach the consideration of a legal subject from the purely academic point of view, unembarrassed by any preconceptions derived from practice at the bar, has a certain advantage in that the matter may present itself to his view in scientific arrangement and symmetry from the first. Yet on the other hand, the want of just that everyday familiarity with commercial affairs and business men, which every lawyer in considerable practice necessarily acquires, sometimes unfits the mere scholar or book lawyer to see things as others see them, and may make him give undue weight to what is really of little or no importance. Accustomed to deal only with theoretical questions and to measure law by ideal standards, such a man may demand a fulness of expression which amounts to prolixity, and discern obscurities where to the ordinary lawyer or merchant everything would seem plain and simple.<sup>5</sup>

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3. *Id.* at 257.

4. Brewster, *A Defense of the Negotiable Instruments Law*, 10 *YALE L.J.* 84 (1901).

5. *Id.* at 84-85.

The first blows having been struck by the antagonists, the controversy continued through a replication by Dean Ames<sup>6</sup> and a rejoinder by Judge Brewster,<sup>7</sup> both of which seemed to generate more heat than light. Dean Ames, in the course of his replication, did, however, demonstrate his ability to punch his way out of a corner rather adeptly. Caught by Judge Brewster in an inconsistency between statements made in his earlier writings and what he had said in his criticism of the NIL, Dean Ames extricated himself by admitting the "youthful indiscretion" of his earlier statements. However, he went on to point out that, even in his callow days, he would not have gone as far as the NIL had and concluded by thanking Judge Brewster for reminding him of an additional objection to the NIL.<sup>8</sup> Once more Dean Ames was on the offensive and carrying the fight to his opponent.

In Judge Brewster's rejoinder, his earlier air of condescension had changed to one of obvious irritation and impatience with his adversary, as evidenced by this rather unique argument:

The eleven subsections taken, most of them word for word, from the English Bills of Exchange Act, and all so identical therewith that the critic's [Dean Ames'] objections apply to the acts equally, need no justification at this late date. They have been the satisfactory law of England and her colonies for twenty years. On them criticism is barred by the natural statute of limitations and the universal approval of the commercial world. One might as well criticise the Bill of Rights or the Lord Chancellor's Wig.<sup>9</sup>

Fortunately at this stage of the controversy an obscure, dispassionate, and wise individual—Mr. Charles L. McKeehan, Lecturer on Bills and Notes in the Law Department of the University of Pennsylvania—courageously stepped between the "arm-weary" antagonists. In his self-appointed role as referee, he stopped the fight and quickly proceeded to shed more light on the merits of the controversy than had either of the principal antagonists.<sup>10</sup> Meanwhile our

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6. Ames, *The Negotiable Instruments Law. A Word More*, 14 HARV. L. REV. 442 (1901).

7. Brewster, *The Negotiable Instruments Law—A Rejoinder to Dean Ames*, 15 HARV. L. REV. 26 (1901).

8. Ames, *The Negotiable Instruments Law. A Word More*, 14 HARV. L. REV. 442, 446-47 (1901).

9. Brewster, *The Negotiable Instruments Law—A Rejoinder to Dean Ames*, 15 HARV. L. REV. 26 (1901). At another point, Judge Brewster swung wildly in this fashion: "It is the Dean against the world. Therefore so much the worse for the world. This eccentric heresy of the Professor makes his illustrations . . . utterly meaningless." *Id.* at 32.

10. McKeehan, *The Negotiable Instruments Law (A Review of the Ames-Brewster Controversy)*, 50 U. PA. L. REV. 437, 499, 561 (1902).

statute, the NIL, unsullied by Dean Ames' proposed amendments, was adopted by the legislatures of all of our states and lived happily almost forever after.

## II

This little episode in legal history stirred the emotions of academicians and set a "style among law teachers for the next forty years"<sup>11</sup> and beyond. The style was never more evident than with the advent of the Uniform Commercial Code (Code).<sup>12</sup> The output of written material dealing with the Code has been prodigious,<sup>13</sup> and, as would be expected, has often pointed to flaws in the statute. Most of these suggested flaws could best be described, in the words of Judge Brewster, as "like spots on the sun. It takes an expert to see them, and he must use glasses at that."<sup>14</sup> On the other hand, some of the defects, in the words of Dean Ames, "must inevitably be followed, sooner or later, by additional legislation to remedy the evils which they . . . introduce."<sup>15</sup>

Whatever its flaws, it seems that the Code has finally come of age. During what might be called its adolescence—the decade from 1952 to 1962—the Code was the subject of constant, critical examination by all interested segments of the business, professional, and academic community. Numerous amendments to the Code were made; some were important; some were more politic than vital. It was evident that the National Conference of Commissioners on Uniform State Laws had taken to heart Dean Ames' admonitions regarding proper codification procedures. It is doubtful that the good Dean, even in his fondest dreams, could have envisioned the publicity which has attended the development of the Code. By 1962, the Code had been adopted in eighteen states but was effective in only eleven states and had been effective in only two of those eleven states for a period of more than two years. At this writing, the Code has been adopted in forty-nine of our fifty states<sup>16</sup> and this almost unanimous acceptance demonstrates the over-all merits of this magnificent

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11. BRANNAN, *NEGOTIABLE INSTRUMENTS LAW* 79 (7th ed. Beutel 1948).

12. For an example of the classic pattern, see Beutel, *Proposed Uniform [?] Commercial Code Should Not Be Adopted*, 61 *YALE L.J.* 334 (1952), and Gilmore, *Uniform Commercial Code: A Reply to Professor Beutel*, 61 *YALE L.J.* 364 (1952).

13. A quick check indicates that, from 1950 to date, there have been at least forty symposia and 300 leading articles published about the Uniform Commercial Code. In addition, there are more than 150 student notes and comments.

14. Brewster, *A Defense of the Negotiable Instruments Law*, 10 *YALE L.J.* 84, 97 (1901).

15. Ames, *The Negotiable Instruments Law. A Word More*, 14 *HARV. L. REV.* 442, 449 (1901).

16. Louisiana, with its civil law background, is the lone holdout.

statute. But the fact remains that the Code has been in effect and operation in only five of these states for a period of more than five years. At this point, therefore, the Code deserves the opportunity to prove itself in the rough and tumble of the market place for a decent period of time. The time for instant amendment of the Code on the basis of endless hypotheticals has passed. The words of Mr. McKeehan uttered in connection with the Ames-Brewster controversy seem to be appropriate:

It is easy to lose one's perspective and sense of proportion in such a matter. The flaws in the act, few though they be, when grouped together and considered alone, seem formidable. Yet, when a survey is made of the entire statute, when one regards the many salutary provisions which settle disputed questions or introduce needed changes, when one studies the admirable simplicity and accuracy of most of its provisions and considers the comparative unimportance of most of the flaws which have been discovered, then the shortcomings of the [act] . . . shrink to their real size and (though still apparent) do not seem likely to seriously impair its usefulness. . . . [T]he act having been started on its course and legislatively adopted in a number of states before these errors were discovered, it was decided, and no doubt wisely decided that it was unnecessary and impolitic to start the work of amendment at that stage of its career. The readiness of several state legislatures to adopt the act in spite of the criticisms that have been made upon it and the very small amount of litigation that has arisen under it in jurisdictions where it has been in force for several years, have thus far vindicated the soundness of the Commissioners' decision.<sup>17</sup>

At this juncture, the real value of the wealth of written material on the Code, including the excellent articles in this symposium, lies not in triggering instant amendment of the Code, but rather in focusing the attention of judges and lawyers on potential problems under the Code so that such persons will be better able to handle these problems properly if and when they arise. This complex statute will never be flawless, but constant tinkering could well do more harm than good. Most of the defects so far discovered can certainly be handled by intelligent interpretation of the statute as it now stands.<sup>18</sup>

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17. McKeehan, *supra* note 10, at 589-90.

18. Again the observations of Mr. McKeehan in connection with Ames-Brewster controversy are apropos:

Professor Ames has rendered substantial service to the Negotiable Instruments Law. He has pointed out the difficulties and possible dangers that lurk in some sections of it, and a careful study of his criticisms by those courts which will be called on from time to time to construe these sections, will serve to avoid some confusion and several unfortunate decisions. After all, many, if not most, of the flaws in the act can be overcome by a careful interpretation.  
*Id.* at 590.

All of this is not to say that the Code should be abandoned to the stresses of the market place for the next half century, as was the NIL. Orderly review of the Code's effectiveness in operation is called for. Changing technology may necessitate eventual revision of the provisions dealing with commercial paper, bank collections, and investment securities; the experiment in codification of principles and practices relating to letters of credit should be closely watched; and the secured transactions provisions should be the subject of long-range review in light of developments in the market place.

It is the announced intention of the National Conference of Commissioners on Uniform State Laws to provide this kind of surveillance of the Code and a Permanent Editorial Board has been established for this purpose. Unfortunately, the operations of this Board to date have been haphazard and disappointing. If the Board is to accomplish its objectives over the long pull, it will be necessary to structure its operations more carefully. Orderly procedures for ongoing study of the Code and for periodic overhaul of the statute must be established and given appropriate publicity.<sup>19</sup> If the work of this Board is properly organized and executed, hip-shooting legislators will hopefully be discouraged from riddling the Code with ill-considered and non-uniform amendments.

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19. Perhaps the recent establishment of the special Article Nine Review Committee is a step in the right direction.