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THE PROPOSED FEDERAL SALES ACT

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THE proposed Federal Sales Act, drafted about eighteen years ago by Professor Williston in conjunction with the Committee on Commerce, Trade and Commercial Law of the American Bar Association, shows signs of awakening from its Rip Van Winkle sleep. In 1922 it was recommended by the Bar Association for enactment by Congress. The bill was introduced in Congress and has since enjoyed a more or less peaceful slumber in committee.[1] Three years ago it was aroused somewhat when it was subjected to examination by a committee of the Merchants' Association of New York. That committee, made up of lawyers and merchants, after a careful study under the chairmanship of Hiram Thomas of the New York Bar, recommended certain changes[2] which were embodied in a draft introduced in Congress on July 12, 1937, in substitution for the pending bill.[3] The bill then resumed its habitual state. A renewed effort to galvanize it into effective life occurred at the recent meeting of the Association of American Law Schools at Chicago where it was the subject of a round table discussion.[4] The sense of the round table seems to have been that revision of the pending bill is desirable before it is enacted into law, although no vote of any kind was taken.

Most teachers of the law of sales, who observe the law in action as they study cases decided under the Uniform Sales Act (on which the proposed federal bill is modeled), will probably agree that improvements are desirable in some respects, although they will differ on details. Lawyers who have an extensive practice in the field of sales will have

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1. The first introduction appears to have been H. R. REP. No. 4213, 67th Cong. 4th Sess. (1923). It was reintroduced many times. It reached hearings at times and favorable committee action but progressed no further. See McCurdy, *infra* note 4, at 587.

2. REPORT OF SPECIAL COMMITTEE ON FEDERAL SALES BILL OF THE MERCHANTS' ASSOCIATION OF NEW YORK (1937).

3. H. R. REP. No. 7824, 75th Cong. 1st Sess. (1937).

4. December 28, 1939.

The Virginia Law Review has devoted its March, 1940, issue to a symposium on the bill. Articles appear by Hiram Thomas and Professors Llewellyn, McCurdy, Bogert and Isaacs under the following titles: *The Federal Sales Bill as Viewed by the Merchant and the Practitioner* (Thomas); *The Needed Federal Sales Act* (Llewellyn); *Uniformity and a Proposed Federal Sales Act* (McCurdy); *The Proposed Federal Sales Act* (Bogert); *The Sale in Legal Theory and in Practice* (Isaacs). The first four writers addressed the round table at the Chicago meeting of the Association of American Law Schools, December 28, 1939. A short statement by Professor Williston appears which endorses Professor McCurdy's views. The proposed Act is reprinted and there is a study of the constitutionality of the bill by the editor. (1940) 26 VA. L. REV. 537 *et seq.*

valuable suggestions to offer. Another body which should participate in the revision is the Commission on Uniform State Laws. In order to preserve uniformity in both interstate and intrastate sales law the duty will fall upon that body to draft the necessary amendments to the Uniform Act in order to conform it to the federal law and to sponsor adoption by the states. But the redraft should not be based solely on the views of the teachers in the law schools and those of members of the bar and bench and of the Commissioners on Uniform State Laws.

Of prime importance are the ideas of that group in the community upon which the incidence of the law will fall—the merchants. Whatever one's views may be as to the duty of the judges to adhere to the precedents in expounding the common law and to preserve the symmetry of concepts, "let the chips fall where they may", everybody will agree I think—well, almost everybody—that when a statute is drafted due regard should be had as to how it will work—whether or not its provisions will meet the needs, yes, and the desires, of the group whose rights and duties are to be defined and regulated. Of course, if any of the desires of the group conflict with the best interests of the community as a whole then the statute must be framed to that extent in the interest of the whole.

Lord Wright, (who, besides being a well-known English judge and legal scholar, is chairman of the English Law Revision Committee) says:

"The origin and early development of the commercial law were the spontaneous product growing naturally (as it were) out of experiences and needs of merchants. Hence even today it has a character of its own, in many respects different in substance and in detail from the ordinary Common Law. Its method of approach to its problems is different both historically and in modern practice from that of the Common Law. . . . The lawyer must seek to approach Commercial Law, so far as he can, with the eyes of a businessman and ask what is the viewpoint of the business man in the matter in hand and how does the business man give effect to it. . . . Above all, he must never forget the essential spirit of Commercial Law, which, though not deficient in ingenuity, above all things never aims at ingenuity for its own sake. Its aim is to appreciate the practical needs of the position and to meet these needs by a solution which itself is practical."[5]

Views must be gathered, then, from all these quarters and submitted to a clearing house which can sift and evaluate them and translate into a redraft of the bill those which will best accomplish the objectives. Of course Congress will in the end be the ultimate clearing house but a

5. Introduction to THAYER, CASES AND MATERIALS IN THE LAW MERCHANT (1939) xii, xxi (reprinted above by permission of the President and Fellows of Harvard College).

great deal of time can be saved if an intermediate clearing house can do the spade work. The Committee of the Merchants' Association of New York, which has already subjected the bill to detailed study and which is made up of lawyers and business men, would seem to be a logical body to undertake this work. The committee will, I am informed, welcome the criticisms of the law school men and those of other interested persons and organizations. Thus a bill will finally be presented to Congress representing the best thought of the country as a whole.

The merchants of the country, it should be remembered, are both buyers and sellers of goods; hence they are bound to have the interests of both buyers and sellers at heart and are not likely to advocate a one-sided law. Producers of raw materials perhaps, selling much and buying little, might draft a seller's law. Retail buyers, buying much and selling little, might draft a buyer's law. But not the middlemen who manufacture and distribute. They will enjoy, for example, the benefits of the implied warranty of merchantableness one day when they buy goods and be liable under it the next day when they sell. Hence any fears that the merchants have sinister motives in wanting a hand in making up their sales law seems totally unfounded. Nor is it credible that the merchants of one section of the country have anything to put over on those of another. Sectionalism is not a phenomenon of trade.

What do the merchants want of their code of sales law? They want a law that encourages efficient operations in the distribution of goods. They want a code adapted to practical affairs, not enmeshed in theory; a code comprehensive enough to cover the run-of-the-mill types of transactions occurring in hundreds and thousands a day. They want no obscurity of language to invite controversy and litigation.[6] None of these objectives, so far as I can see, runs counter to the interests of society. There is nothing in them tending to socialism, irreligion or likely to destroy the government. Nor will their realization contribute to economic royalism. Be it said to the glory of the law as it now stands in the Uniform Sales Act and in the cases interpreting it that these objectives have been accomplished to a considerable degree. But here and there in the Sales Act is obscurity, or a concept is enthroned which doesn't work too well in some applications to commonly recurring situations; the remedies particularly should be framed to meet the practical needs of the parties and less should be made to depend on the abstract

6. MERCHANT'S REPORT, *supra* note 2. Prof. Williston's Brief (p. 1) in support of H. R. REP. No. 4213, 67th Cong. 4th Sess. (1923), says: "In mercantile matters the certainty of the rule is often of more importance than its substance. If parties know beforehand what their legal position is, they can provide for their particular wants by express stipulation." Prof. Williston does not favor adoption of the pending Act in its present form. See note 4, *supra*.

question as to whether or not title has passed;[7] the case law developed around some of the newer types of transactions might well be codified for the sake of completeness in coverage. Furthermore, some conflict in the cases interpreting the Act has already developed in spite of the command in Section Seventy-four that "This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the laws of those states which enact it."

Because of these things there is a growing feeling that if a federal sales law is to be adopted its provisions should be designed to clear up the obscurities, correct the unsatisfactory provisions, add the new developments and resolve the conflicts. It is believed by many that the adoption of a federal act adapted to present day needs will lead the states which have accepted the Uniform Act to make amendments conforming their local acts to the federal law. And not the least by-product will be the inducement to the sixteen states which have not adopted the Uniform Act to fall in line so that we may have at last a uniform national law of sales.

Why a Federal Sales Act?

It has been recognized for many years that uniformity in the law governing the sale of goods is desirable in commerce among the states. It is confusing and exasperating to a seller to find that the interpretation of his duties under a "c and f" contract is different in Pennsylvania than in New York.[8] It is equally confusing and exasperating to a buyer to find that he enjoys the protection of a warranty of fitness when he makes a purchase from a Minnesota seller under certain circumstances but has no such protection when he makes a purchase under the same circumstances from a seller in Rhode Island.[9] It will not salve the exasperation of either seller or buyer to be informed that delicate ques-

7. See Llewellyn, *Through Title to Contract and a Bit Beyond* (1938) 15 N. Y. U. L. Q. REV. 159.

8. Pennsylvania held that a "c.i.f. Pittsburg" contract was equivalent to an "f.o.b. Pittsburg" contract, *i.e.*, that the seller bore the risk of deterioration in transit. Pittsburg Provision and Packing Co. v. Cudahy Packing Co., 260 Pa. 135, 103 Atl. 548 (1918). Thus putting the case under Rule 5, § 19 of the Uniform Sales Act. But the analogy to the ordinary "c.i.f." contract is strong and, in fact, the merchants regard the seller's duty as completed at the point of shipment. New York held in accordance with the merchant's view in Segall v. Finlay, 245 N. Y. 61, 156 N. E. 97 (1927). The cases might perhaps be reconciled because of differences in the facts. See WILLISTON, SALES (2d ed. 1924) 621, 624 *et seq.*

9. Compare Iron Fireman Coal Stoker Co. v. Brown, 182 Minn. 399, 234 N. W. 685 (1931) with Matteson v. Lagace, 36 R. I. 223, 89 Atl. 713 (1914), both governed by the Uniform Sales Act.

tions of conflict of laws may produce prolonged and expensive litigation.[10]

Insofar as interstate transactions are concerned, conflicts like these, which have arisen under the Uniform Act itself can be settled by a federal act.[11] Furthermore conflicts which exist between the common law states, of which there are sixteen, and the states operating under the Uniform Act will be settled by a federal law.[12] Twelve of the non-conforming states are in the southern tier bordering (except West Virginia) the tidewater of the Atlantic Ocean and the Gulf of Mexico, including "the great ports of Norfolk, Charleston, Savannah, New Orleans and Galveston, not to mention others".[13] These states are rapidly growing in commercial importance and are doing a larger interstate and foreign business every year. As matters stand now conflicts of two kinds are possible—conflict in the common law of these states as to commerce among themselves and conflict between the common law of any one of them with the provisions of the Uniform Act in force in other states with which it trades.

Small hope can be held out that the non-conforming states will soon be taken into the fold as matters stand if the experience of the last fifteen years is any criterion. The Uniform Act was first offered for adoption in 1906. The urge to adopt it gained momentum until 1919 and then began to subside. Since 1925 only five states have fallen into line and none at all since 1933.[14] For seven years the Uniform Act in its voyage through the state legislatures has been as "idle as a painted ship upon a painted ocean."[15]

Such conflict as now exists in the law of those states which differently interpret the Uniform Act and between the non-adopting states and the adopting states cannot be settled by the federal courts as long as *Erie R. R. Co. v. Tompkins*[16] stands in the way. When a case is brought in the federal courts involving an interstate transaction it must first

10. "Almost insoluble problems in the conflict of laws are frequently presented. Is a transaction to be governed by the law of the State where it was to be performed, or by the law of the State which the parties to the transaction intended to adopt? These questions will become immaterial if one uniform rule is established for all interstate transactions." Williston, *loc. cit. supra*, note 6.

11. The cases cited in notes 8 and 9, *supra*, arose under the Uniform Sales Act. Of course any useful code must be of reasonable brevity and will call for interpretation. But commonly recurring situations should be governed by a codified uniform rule.

12. The following states have not adopted the Uniform Act: Arkansas, Colorado, Florida, Georgia, Kansas, Louisiana, Mississippi, Missouri, Montana, New Mexico, North Carolina, Oklahoma, South Carolina, Texas, Virginia, and West Virginia.

13. Thomas, *supra* note 4, at 538.

14. See McCurdy, *supra* note 4, at 577-8.

15. Congress adopted it for the District of Columbia in 1937. 1 U. L. A. 5 (Supp. 1939).

16. 304 U. S. 64 (1938).

be determined whether the law of this state or of that one governs. Having determined that point, which may be a matter of some nicety, the court must then apply it. Thus conflicts will be perpetuated.[17] Adoption of a federal bill will, at one stroke, do away with problems of conflict of laws and bring about uniformity in the rule when the shipment is from one to another of the forty-eight states.[18] Not only will the federal courts then be applying a uniform rule but the state courts will also be bound by the federal law on interstate shipments.[19] Any conflict that developed among the federal circuits or among the state courts on interpretation of the federal law would be settled by the Supreme Court. As matters stand now there is no court of last resort for the settlement of conflicts.[20]

Besides having the advantages indicated above, advocates of a federal law maintain that it will be of assistance in negotiating with merchants in other countries.[21] One can imagine the puzzlement of a foreign merchant contemplating trade relations with the United States who asks a consul, let us say: "What is the American law of sales in this regard?" and receives the answer: "There is no American law of sales." Our concept of an indestructible union of indestructible states is not too well understood abroad and it is quite incomprehensible to foreign merchants that a great commercial nation has no national law governing such an important activity. It would be disconcerting furthermore to such merchants to learn that trade with New York is governed by one set of rules in certain respects and trade with Philadelphia by another and trade with New Orleans by a third.[22] Obstacles of this kind to the smooth conduct of foreign trade relations will be removed by the adoption of a federal act. Perhaps no foreign merchant will actually turn down the opportunity to make a profitable contract because we have no national law of sales but he will doubtless feel more confidence in dealing with those "strange Americans" if he can be referred to a single written code for assurance as to his rights and duties.[23] Furthermore

17. Thomas, *supra* note 4, at 539.

18. See note 10, *supra.*

19. Baldwin v. Childs, 249 N. Y. 212, 163 N. E. 737 (1928).

20. The Supreme Court, of course, is itself bound by the rule of Erie R.R. v. Tompkins, 304 U. S. 64 (1938). Compare remarks of the Court concerning the *desideratum* of uniformity in interpretation of the Uniform Acts in Commercial National Bank of New Orleans v. Canal-Louisiana Bank & Trust Co., 239 U. S. 520 (1916). How successfully can such a policy prevail under the *Erie* rule?

21. Thomas, *supra* note 4, at 540. Llewellyn, *supra* note 4, at 558-9.

22. See note 8, *supra.*

23. Thomas says he has been "told by merchants of wide experience in foreign trade that our lack of such a national law is often a serious obstacle in their negotiations with the merchants from those countries [continental Europe and Latin-America], that the

the federal act will provide the rules to cover contracts of a type much used in deep-water trade, such as c.i.f., f.a.s. and their variants, which are not now specifically covered in the Uniform Act at all.

In order then to provide a national law for the governance of foreign trade and in order to clear up the obscurities of the Uniform Act, correct the unsatisfactory provisions, fill in the gaps and resolve the conflicts it is quite generally agreed that the adoption of *a* federal act would be an excellent thing. But there are objections in some quarters to adoption of *the* federal bill now pending on the ground that it will destroy uniformity between interstate and intrastate transactions.

If the federal act merely incorporates the provisions of the Uniform Act with clarification of language in those sections which have been found to be open to differing interpretations and adds provisions to cover the transactions not now covered no harm can be done to the large measure of uniformity which has been achieved among the states which have adopted the Uniform Act. On the contrary a greater measure of uniformity will be secured, as has been indicated above. But if any considerable changes in substance are made in the federal bill as adopted the seller who ships goods from New York to Albany and from New York to Chicago would find the transactions governed to some extent at least by two different sets of rules, one for his interstate shipment and another for his intrastate one. This would not be a desirable state of affairs if it long existed. Professor McCurdy in a painstaking study of the pending federal bill points out that there are ten sections which make substantial changes in the provisions of the Uniform Act.[24] If these are adopted there will at once be an impairment of uniformity as between interstate and intrastate sales law.

Proponents of the bill admit that this impairment of uniformity presents a difficulty which cannot lightly be dismissed. But they are loath to perpetuate in a federal law rules which experience has shown do not work to the satisfaction of either buyers or sellers and which hamper

foreign merchants would be quite satisfied to proceed under the provisions of such a law even though different from their own but are puzzled by the lack of uniformity in the laws of our states and are reluctant to accept opinions of counsel in lieu of the written law." Thomas, *supra* note 4, at 540, n. 12.

Although adoption of a federal act will do away with questions of conflict of laws in interstate transactions it cannot do away with such questions as to international transactions. Only general adherence by the commercial countries to an international code of sales can accomplish that. Such a code has in fact been proposed and an international commission of European authorities has drafted one. See Rabel, *A Draft of an International Law of Sales* (1938) 5 U. OF CHI. L. REV. 543, 545. The text of the draft is printed in THAYER, CASES AND MATERIALS IN THE LAW MERCHANT (1939). The text of the draft and Rabel's commentary deserve careful study.

24. See note 4, *supra, passim.*

trade by inviting controversy and litigation. Furthermore they believe that such impairment of uniformity as would immediately be brought about would not long continue. They predict that the prestige of the federal act and the pressure of the business community operating under a satisfactory national law will bring the state legislatures to adopt conforming amendments to their Uniform Acts.[25] Furthermore the same prestige and the same pressure will spur to conforming action the sixteen states which for thirty-four years have remained without the pale of uniformity. Thus a greater measure of uniformity than ever before will be secured with improvement in sales law everywhere.

The bill now pending does not make any very startling changes in sales doctrine. One who is familiar with the Uniform Act will not feel himself in strange surroundings when he reads it. The purpose of those who drafted it was not to write a new statute but to revise the old one in the light of modern needs. The criticisms and advice of those who are competent and interested will lead to further improvement. We have had nearly thirty-five years of experience under the Uniform Act. Even though that Act is one of the most successful, if not the most successful, of the uniform acts it would seem that once in thirty-five years is not too often to examine and bring up to date the law which governs the most widespread and important activity of our age—the distribution of goods from producer to consumer.

25. Thomas, *supra* note 4, at 557; *cf.* McCurdy, *supra* note 4, at 572, 636.

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