

## "Value"—A Plea for Uniformity in New York Commercial Law

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## "VALUE"—A PLEA FOR UNIFORMITY IN NEW YORK COMMERCIAL LAW

"VALUE" is a key-word in the solution of many problems of commercial law. Innocence and good faith, linked with this ingredient of value, combine to place the litigant in a favored position before the courts. To begin no earlier than the classic case of *Price v. Neal*,<sup>1</sup> one may detect the surge of a growing movement which has lifted the *bona fide* purchaser to a high plane and has mantled him with a protective armor which it is difficult to penetrate. The maxim, "Where the equities are equal, the holder of the legal title prevails,"<sup>2</sup> has become one of the safest standards to follow at law and in equity and in its application "value" stands forth as an essential element in the determination of equality of equities.<sup>3</sup> But what is "value" and who are "purchasers for value"? However debatable may be the current theories of certainty or uncertainty of law<sup>4</sup> it seems that the stuff that

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<sup>1</sup> 3 Burr 1354 (1762); see also *National Park Bank v. Ninth National Bank*, 46 N. Y. 77 (1871); *Springs v. Hanover Bank*, 209 N. Y. 224, 103 N. E. 156 (1913).

*Italics used throughout this paper are the present writer's.*

<sup>2</sup> "The true principle, it is submitted, upon which cases like *Price v. Neal* are to be supported, is that as between two persons having equal equities, one of whom must suffer, the legal title shall prevail." Ames, *The Doctrine of Price v. Neal* (1891) 4 HARV. L. REV. 297, 299.

In the following discussion of value, the writer is assuming that the requirements of legal title and good faith are satisfied. Of course, value may be present in a given transfer and yet the absence of title or the presence of notice may defeat the rights of the holder or purchaser for value. *Corn Exchange Bank v. The Nassau Bank*, 91 N. Y. 73 (1883).

<sup>3</sup> *Title Guaranty & Trust Co. v. Haven*, 196 N. Y. 487, 493, 89 N. E. 1082 (1909).

<sup>4</sup> See writer's articles, *Men or Laws* (1932) 2 BKLYN. L. REV. 11; *How Do Judges Decide Cases?* address before the Mount Vernon Lawyers' Association, March 1, 1933, reprinted in the *Westchester Law Journal*, March 2, 1933; *To Hunch or Not to Hunch*, N. Y. L. J., Feb. 6, 7, 1933.

makes for value and enters thereby into the makeup of a purchaser for value should be, and can be, defined with reasonable accuracy.<sup>5</sup> Value should be so defined, because it is imperative that commercial transactions move forward to permanent execution unhampered by doubts and disputes as to the meaning of "value"; "value" can be so defined because, after all, "value" merely calls for a classification of things and relations of factual content, the presence or absence of which may easily be detected in the run of the mine cases.

The scope of the present paper is limited to the field of commercial law and that part thereof which centers about documents of title and goods passing through the channels of commerce. It is further narrowed to the discussion of value in commercial transactions wherein creditors take any of the above instruments or goods in settlement of or as security for antecedent debts. The main objective will be to determine whether the creditor so receiving personal property from his debtor (by way of payment of or security for past debts) comes or should come within the charmed circle of purchasers for value. One more restriction, the examination is confined to New York statutory law and aims primarily to discuss inconsistencies of the local law in the tests of "value" as applied to creditors, which seem to the writer to be unfortunate and indefensible.<sup>6</sup>

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<sup>5</sup> Cf. Rothschild, *Men and Law* (1932) 1 BKLYN. L. REV. 1; Bachrach, *Reflections on Brief Writing*, N. Y. L. J., Jan. 16-20, 1933.

For an excellent review of the pending controversy anent the certainty and uncertainty of law, read Cardozo, *Address Before the New York State Bar Association* (1932) 55 REPORTS OF THE N. Y. STATE BAR ASS'N 263.

<sup>6</sup> This statement would probably be denied by Jerome Frank, who seems to be of the opinion that efforts to make the law more predictable or more certain are "doomed to failure." FRANK, *LAW AND THE MODERN MIND* 361, 362. Of special interest in connection with the matter of "value" herein considered is Frank's unwillingness to concede that rules governing commercial or business transactions can be "authoritatively prescribed in advance." He likewise takes exception to Dean Pound's modest assumption that "there is nothing unique in a bill of exchange." FRANK, *id.* at 208-209. Cf. Kennedy, *Men or Laws*, *supra* note 4; Clark, *Restatement of the Law of Contracts* (1933) 42 YALE L. J. 643.

<sup>6</sup> Cf. Whitney, *Value and the Doctrine of Bona Fide Purchaser* (1933) 7 ST. JOHN'S L. REV. 182, 204: "It would seem that the present common and statutory law prevailing in New York State in reference to the standard of value required under the doctrine of bona fide purchase, differing as it does in respect to differing kinds of property, is in the main both economically sound and legally and equitably defensible."

In so far as Professor Whitney's generalization applies to the subject matter of this paper, it will be later considered.

## THE PROBLEM.

Today, more than ever before, creditors are faced with the formidable task of collecting debts from delinquent debtors.<sup>7</sup> Confronted with the alternative of a payment in cash at a remote period or taking present security or payment in the form of goods, negotiable paper, stock certificates, warehouse receipts, or bills of lading, the business sagacity of the creditor prompts him to accept available commercial documents or goods in discharge of or as security for overdue accounts. Taking these documents or goods in good faith from the debtor who is the apparent owner, the creditor is later confronted with the unpleasant discovery that the debtor's title is defective and that the prior owner claims a right to pursue his property into the hands of the creditor and to recapture the property or its value. Assuming that the debtor has a title, voidable though it may be, what is the position of the creditor with relation to the property so transferred to him? Is he to be classed as a *bona fide* purchaser and therefore divorced from latent equities which attach to the property while it remains in the hands of the debtor? Or, does he fail in his claim as a "purchaser" because he gave no "value" by merely receiving property to secure or to discharge past indebtedness due from the debtor?

## THE ANSWER.

In any state which has adopted without change the Uniform Negotiable Instruments Law, the Uniform Bills of Lading Act, the Uniform Sales Act, the Uniform Warehouse Receipts Act, and the Uniform Stock Transfer Act,<sup>8</sup> it seems

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<sup>7</sup> Internationally, nationally and individually the collection and readjustment of indebtedness are among our most pressing problems. DENNIS, IS CAPITALISM DOOMED? (1932) 282-294; EPSTEIN, INSECURITY, A CHALLENGE TO AMERICA (1933) c. XXXV; SELDES, THE YEARS OF THE LOCUST (1933) *passim*; TUGWELL, THE INDUSTRIAL DISCIPLINE (1933) c. VII.

The problem of debt settlement is by no means exclusively an economic one; it is at once reflected in legislation. Note the mortgage moratorium acts, the refinancing of farm mortgages under the Agricultural Adjustment Act, etc. The constitutionality of the "New Deal" legislation opens up limitless questions of novel and grave character.

<sup>8</sup> These five uniform acts, which form the basis of the present criticism of New York law, have been widely adopted by the states. The Uniform Nego-

that the stated problem may readily be answered. Whether the creditor receives from his debtor a negotiable instrument, bill of lading, goods, warehouse receipt or stock certificate in payment of or as security for an antecedent debt, the creditor by his act of cancelling or securing the existing debt is deemed to have given "value." Regardless of the quality or kind of personal property so transferred to the creditor by the debtor, the swing of statutory law and the decisions interpreting the statutory definition of "value" found in the uniform acts elevate a creditor to the position of a purchaser for value without further consideration given by him than the acceptance of the personal property in discharge of or as security for an indebtedness owing from the debtor to the creditor.<sup>9</sup> This uniformity and standardization of value, independent of the accidental nature of the thing given (whether a chose in action or in possession) has been accomplished by the simple expedient of writing into the five uniform acts a *single* formula of value. The key-principle in all these uniform acts is to the effect that an antecedent or pre-existing debt constitutes value whether the personal property is taken in satisfaction of or as security for the debt. The definition of value in the Uniform Sales Act may be used to illustrate the general tenor of the statutory definitions of value found in the uniform acts:

" 'Value' is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents of title are taken either in satisfaction thereof or as security therefor." <sup>10</sup>

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tiable Instruments Law has been passed in fifty-five states and territories; the Uniform Sales Act, in thirty states and territories; the Uniform Bills of Lading Act, in twenty-eight states and territories; the Uniform Warehouse Receipts Act, in fifty states and territories; and the Uniform Stock Transfer Act, in twenty-three states and territories. Revised Table of States, Supplement, 1932, Uniform Laws Annotated.

<sup>9</sup> BRANNAN, NEG. INST. LAW (4th ed. 1926) 222-245; Standard Bank v. Lowman, 1 F. (2d) 935 (W. D. N. D. 1924); Southern Pac. Co. v. Bank of America, 23 F. (2d) 939 (N. D. Ill. 1928); General Motors Accept. Corp. v. Baker Mfg. Co., 119 Iowa 155, 201 N. W. 774 (1925); Roland M. Baker Co. v. Brown, 214 Mass. 196, 100 N. E. 1025 (1913). See also National City Bank v. Wagner, 216 Fed. 473 (C. C. A. 7th, 1914).

<sup>10</sup> UNIFORM SALES ACT §25; see substantially similar definitions of "value" in UNIFORM BILLS OF LADING ACT §53, UNIFORM WAREHOUSE RECEIPTS ACT §58, and UNIFORM STOCK TRANSFER ACT §22.

It seems clear, from a reading of these definitions of value, from the declarations of policy by the Commissioners of Uniform State Laws<sup>11</sup> and from the decisions construing the uniform legislation<sup>12</sup> that these five uniform acts set forth *one* standard definition of value.

New York has enacted into its statutes the Uniform Negotiable Instruments Law,<sup>13</sup> the Uniform Bills of Lading Act,<sup>14</sup> the Uniform Sales Act,<sup>15</sup> the Uniform Warehouse Receipts Act,<sup>16</sup> and the Uniform Stock Transfer Act.<sup>17</sup>

Thus the movement to render uniform the law touching sales, negotiable instruments and mercantile documents of title has received strong support from New York, the marketplace and trading post of the nation; the persuasive example of the Empire State has been no small factor in the success of this movement for uniformity of commercial law. If this were the whole story, one might conclude that New York would, in accordance with provisions of value contained in the five uniform acts, hold that a creditor gives "value" when he cancels or secures a debt by taking a negotiable instrument, warehouse receipt, goods, bill of lading or stock certificate. And this generalization would be sound were it not for the fact that the New York Legislature strangely eliminated from two of the five uniform acts the definition of value and substituted no definition in lieu thereof. Rather signifi-

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The definition of "value" in the Uniform Negotiable Instruments Law is somewhat different. Section 25 reads as follows: "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt is value; and is deemed such whether the instrument is payable on demand or at a future time." Despite the difference, the creditor receiving a negotiable instrument has been held to give value. BRANNAN, *op. cit. supra* note 9. Indeed, Williston, in drafting the Sales Act, borrowed this definition of value with some clarifying changes from the Negotiable Instruments Law. WILLISTON, SALES (2d ed. 1924) §620.

<sup>11</sup> UNIFORM BILLS OF LADING ACT, 4 Uniform Laws Annot. 78; UNIFORM STOCK TRANSFER ACT, 6 Uniform Laws Annot. 26; UNIFORM WAREHOUSE RECEIPTS ACT, 3 Uniform Laws Annot. 93; UNIFORM SALES ACT, 1 Uniform Laws Annot. 448.

<sup>12</sup> *Supra* note 9. Incidentally, it may be observed that there are other attacks upon the formalism of consideration in consensual undertakings. Finn, *The Forging of Good Unilaterals Out of Bad Bilaterals* (1933) 3 BKLYN. L. REV. 6.

<sup>13</sup> N. Y. Laws 1897, c. 612; N. Y. NEGOTIABLE INSTRUMENTS LAW.

<sup>14</sup> N. Y. Laws 1911, c. 248; N. Y. PERSONAL PROPERTY LAW §§187-241.

<sup>15</sup> N. Y. Laws 1911, c. 571; N. Y. PERSONAL PROPERTY LAW §§82-158.

<sup>16</sup> N. Y. Laws 1907, c. 732; N. Y. GENERAL BUSINESS LAW §§90-143.

<sup>17</sup> N. Y. Laws 1913, c. 600; N. Y. PERSONAL PROPERTY LAW §§162-182.

cantly, the omission occurred in the Uniform Sales Act and the Uniform Bills of Lading Act, which were passed by the Legislature in the same year. The remaining three acts—the Uniform Negotiable Instruments Law, Warehouse Receipts Act and the Stock Transfer Act—were enacted without the omission of the clause defining “value.”

The writer has elsewhere summarized this situation in New York:

“What is the result? A creditor is a purchaser for value in New York today if he takes a negotiable instrument or warehouse receipt or stock certificate either (1) to secure or (2) to pay off a pre-existing debt. But a creditor is not a purchaser for value if he takes goods or a bill of lading under the same circumstances. So a creditor’s right to be considered a holder for valuable consideration depends upon the accidental and, it is submitted, immaterial character of the property which is involved in the particular transaction.”<sup>18</sup>

It is now intended to consider the reasons prompting the Commissioners of Uniform Laws to erect a single standard of value in the uniform commercial laws and to weigh against these reasons the abortive treatment of value in the New York statutes which destroys uniformity within and without the state and makes for confusion and injustice.

#### A BIT OF REALISM.

One hears much these days about the functional approach and realistic jurisprudence.<sup>19</sup> These forward looking processes of attacking legal problems sweep aside syllogistic logic, verbalism and word-magic<sup>20</sup> and grip the case at hand

<sup>18</sup> Kennedy, *Creditors as Purchasers for Value*, N. Y. L. J., Dec. 17, 1930, at 1430.

<sup>19</sup> For bibliography of articles developing the realistic viewpoint, see Goodrich, *Our Black Letter Balance* (1932) 7 AM. L. SCHOOL REV. 385, 393.

<sup>20</sup> While the functionalists and the realists have been bitter in their attacks upon verbalism and word magic (see FRANK, *op. cit. supra* note 5, cc. VII, X) there is a growing evidence that they may fall victims of the same vice of

by balancing the clash of interests and evaluating economic factors and commercial practices. While these new schools of legal thought may claim credit for exposing the limits of the doctrine of *stare decisis*<sup>21</sup> one suspects that they not only overemphasize the factor of change or growth in the law<sup>22</sup> but that they are also unaware of the fact that change and evolution were quietly going on long before they arrived on the juristic scene. "There were brave men before Agamemnon," Cardozo reminds us, "and before the dawn of the last decade there were those who strove to see the truth of the judicial process, to see it steadily and whole, and to report what they had seen with sincerity and candor."<sup>23</sup>

Williston, at the turn of the century, may not have been familiar with Vold's "functional perspective,"<sup>24</sup> nor with Llewellyn's definition of sales "as a tool of credit economy"<sup>25</sup> but he set for himself the task of criticizing decisions "where they seemed opposed to principle and to the convenience of trade."<sup>26</sup>

Realism and the functional approach—rather than conceptualism or *stare decisis*—are easily detected in the growth and development of the definition of "value" so as to include creditors who take goods or instruments of title as security

verbalism in another form. The taking over of speculative theories from social sciences dressed up in terms that the lawyer cannot pronounce and does not understand is not productive of solution of legal problems. For example, see FRANK, *op. cit. supra* note 5, c. VIII.

<sup>21</sup> "I cannot doubt that the teachings of the neo-realists were and still are of great value to jurisprudence in ridding *stare decisis* of something of its petrifying rigidity \* \* \*." Cardozo, *op. cit. supra* note 4.

<sup>22</sup> "Many students get the impression that it is sufficient if they functionally approach, whether or where they arrive. \* \* \* I have talked with young disciples of functionalist teachers who have acquired such a strong antipathy to conceptualism, that they are unhappy if a court decides two cases the same way, if there is any slight difference in the facts." Scott, *Confessions of a Law Teacher* (1928) HANDBOOK OF ASS'N OF AM. L. SCHOOLS 24.

For a practicing attorney's estimate of the functional approach, see Wickersham, Book Review (1933) 19 A. B. A. J. 660: "It [the functional approach] represents a school of thought which, to the writer, seems one of the unfortunate developments of the time. The academic mind delights in uncertainties. The *practical* work of the everyday lawyer calls for definite standards by which the activities of business, commerce and industry are to be conducted."

<sup>23</sup> *Op. cit. supra* note 4.

<sup>24</sup> VOLD, SALES, Preface; Bacon, Book Review (1933) 18 TEMPLE L. Q. 128.

<sup>25</sup> LLEWELLYN, CASES ON SALES, Introd., xv.

<sup>26</sup> WILLISTON, SALES (1st ed. 1909) Preface.

for or in payment of antecedent debts.<sup>26a</sup> The Commissioners who drafted the single standard of value in the uniform acts were well aware of the fact that they were departing from judicial precedents when they declared that "an antecedent debt \* \* \* constitutes value." But "mercantile convenience" prompted them to recommend a "single rule" regardless of the kind of property transferred to the creditor.<sup>27</sup> Williston also conceded that common-law cases generally distinguished between chattels and negotiable paper and held that a creditor taking chattels even in absolute payment of a pre-existing debt did not thereby become a purchaser for value.<sup>28</sup>

What then is the basic reason for this overthrow of precedents and the advocacy of one standard of value to be uniformly applied in commercial transactions? It is found in the realistic conclusion that a creditor who receives property from his debtor changes his position following the receipt of this property and it is manifestly unfair to deprive him of this property on the ground that he did not give fresh value. Whether the creditor takes goods or documents of title in payment of or as security for antecedent indebtedness this change or alteration of position is almost certain to follow. Obviously, if the creditor receives the property in payment of his debt, he rests content on the assumption that the debt has been paid. If he takes the property as security for the debt, he is likewise lulled into repose in the confident belief that the indebtedness is protected.<sup>29</sup>

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<sup>26a</sup> The shortcomings of realistic jurisprudence are most pronounced in attempting to "free" the courts from the chains of precedents. Realism admittedly has a proper place in the shaping of legislation.

<sup>27</sup> "In regard to property other than negotiable instruments the law of many states does not regard an antecedent debt as value; but it seems desirable to have a single rule for what constitutes valuable consideration and mercantile convenience supports the one adopted." Commissioner's Note, 1 Uniform Laws Annot. 448, 449.

<sup>28</sup> The admission of Williston that the precedents are against the statutory rule of value did not deter him from advocating a change. As the draftsman of the Sales Act, it was his influence that made possible this change. WILLISTON AND McCURDY, *CASES ON SALES* 430, 431.

<sup>29</sup> "Practically such a past consideration has always a present operation. It stays the hand of the creditor." *Leask v. Scott*, 2 Q. B. D. 376 (1877). See also WILLISTON, *op. cit. supra* note 26, §620; Whitney, *op. cit. supra* note 6, at 195, 196.

The equity of the change-of-position argument is not limited to the present problem of value; it is soundly applied in matters of estoppel, is visible in current agitation for the reliance-theory of contract, and forms a substantial

Certainly in these days of kaleidoscopic change in personal fortunes and of rapid rise and fall of business ventures, it seems an empty gesture to give back the debt to the creditor and to assure him that he has suffered no change of position. Credit is replacing corporeal wealth as the medium of exchange<sup>30</sup> especially in the sale of goods<sup>31</sup> and refinements in the definition of value suitable for over-the-counter transactions during the corner-grocery epoch cannot be satisfactorily applied to an era which emphasizes forward contracts involving future transactions and credit economy.

#### CRITIQUE OF NEW YORK LAW.

Whether considered realistically in terms of mercantile expediency or conceptually in terms of abstract justice, there seems ample warrant for the standardized definition of value found in the five unabridged uniform acts set forth. Moreover, it is submitted that there is no good reason why New York should lag behind the procession of states by stubbornly refusing to write into the New York Sales Act<sup>32</sup> and the New York Bills of Lading Act<sup>33</sup> the omitted section defining value, especially after its unequivocal indorsement of this same measure of value in the Uniform Negotiable Instruments Law,<sup>34</sup> Uniform Warehouse Receipts Act<sup>35</sup> and Uniform Stock Transfer Act.<sup>36</sup>

In a recent article in this REVIEW,<sup>37</sup> Professor Whitney comments upon the failure of the New York Legislature to include this definition of value in the Sales Act and the Bills of Lading Act. While accepting the present writer's conclusion that the omitted section on value should be enacted into

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part of quasi-contract law. *Knights v. Wiffen*, L. R. 5 Q. B. D. 660 (1870); *Dixon v. Kennaway & Co.* [1900] 1 Ch. 833; *Contracts Restatement*, §90; KEENER, QUASI-CONTRACTS 59-72; WOODWARD, QUASI-CONTRACTS 38-48.

<sup>30</sup> POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW 191, 192.

<sup>31</sup> LEWELLYN, CASES ON SALES, *Introd.*, xv; VOLD, SALES 3.

<sup>32</sup> *Supra* note 15.

<sup>33</sup> *Supra* note 14.

<sup>34</sup> *Supra* note 13.

<sup>35</sup> *Supra* note 16.

<sup>36</sup> *Supra* note 17.

<sup>37</sup> Whitney, *supra* note 6.

the Bills of Lading Act of New York,<sup>38</sup> he contests the advisability or economic soundness of inserting the same definition of value in the Sales Act of New York.

An extract from his interesting article will make clear his reasons for this novel distinction:

"It is obvious that *chattels*, as such, do not, and need not possess such a high degree of negotiability as *negotiable* instruments, *negotiable* warehouse receipts and *negotiable* stock certificates. Therefore, where the transfer of chattels is effected without the use of negotiable documents of title, it would seem that there is not the same commercial necessity for protecting the innocent purchaser and hence the standard of value required from him should be somewhat higher in order to entitle him to keep the goods against the original defrauded owner. *From this economic point of view the omission of our Legislature to adopt in the Sales Act the same definition of value as found in the other Uniform Acts relating to negotiable instruments and negotiable documents of title, seems defensible. But by the same economic test the omission of the definition of value contained in the Uniform Bills of Lading Act seems indefensible.*"

Is the stated distinction between the transfer of "chattels" and the transfer of "negotiable documents of title" a practical or equitable basis upon which to erect the variable standard of value proposed by Professor Whitney? Is it "socially advantageous" to hold that a creditor *is* a purchaser for value when he takes "negotiable documents of title" but that he *is not* a purchaser for value when he takes chattels? The contention is made that, viewed legally or economically, there is no valid reason for this compromise and that the definition of value omitted from the Sales Act, as well as the discarded definition of value in the Bills of Lading Act, should be enacted into New York law.

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<sup>38</sup> The current statutory situation in New York wherein the distinction is taken between a bill of lading and a warehouse receipt is difficult to justify. Both documents are of the same essential nature and the test of value in relation to creditors should be the same. WILLISTON, *op. cit. supra* note 10, §405.

If the change of position by the creditor is the realistic ground for the enlargement of the area of value, as heretofore suggested,<sup>39</sup> the creditor's change of position is the same whether he receives chattels or negotiable documents of title by way of settlement of the debt. If the creditor stands by in the belief that the debt has been paid and later the debtor fails or departs, it is somewhat naive to inform him that he did not *give* value because he *received* a chattel rather than a negotiable document of title. The pertinent fact is that he *suffers a loss* in either case and it is beside the point to attempt to placate him by a gratuitous lecture on the negotiability of documents of title. Indeed, Professor Whitney himself forcibly states the case for the creditor elsewhere in his article in true pragmatic fashion :

“Although the parties may thus be restored to their original positions as far as *legal* liabilities are concerned, the innocent purchaser frequently cannot be put back to his original position so far as its *business* aspects are concerned, for the debt may have been collected had it not been settled for by the transfer of the goods. When that transfer is later rescinded by operation of law and the goods restored to the original defrauded party, the fraudulent buyer may have become insolvent, or have concealed his assets. In such a case the loss is thrown from the original innocent victim of the fraud to another equally innocent party, who has an equal stake in the outcome. Moreover, the general social effect of the rule that antecedent debt is not value, is evil since it impairs the security of transactions.”<sup>40</sup>

It is further submitted that the stated distinction between chattels and negotiable documents of title confuses the totally distinct concepts of “negotiability” and “value.” Concededly, the transfer of a chattel is not the transfer of a negotiable thing. It is also true that the lack of negotiability of the subject matter transferred to the creditor may prevent

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<sup>39</sup> *Supra* notes 27-29.

<sup>40</sup> *Supra* note 6.

the transfer of *title* or spell notice and thereby defeat the status of the creditor as a purchaser for value. But why conclude that in this situation the creditor did not give *value*? In the given case, even a purchaser paying *cash* would be similarly defeated, yet it would not be asserted that he did not give *value*.<sup>41</sup> The vice of the alleged distinction between the transfer of chattels and the transfer of negotiable documents of title is that *value* furnished by the creditor is to be weighed *not* by what the creditor *gives*, but rather by the quality of the thing *received*. Negotiability of the subject matter may, and does, enhance and expedite the transfer of *title* to the creditor or negative notice, but negotiability does not change the quality of value contributed by the creditor. The creditor is "out of pocket" in the same degree whether he gets a chattel or a negotiable document of title; economic and equitable considerations argue for a *single* standard of value.<sup>42</sup>

#### A PLEA FOR UNIFORMITY.

The law of New York has long suffered from a "value-complex" which persists in assaying value in terms of the

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<sup>41</sup> *Supra* note 2.

<sup>42</sup> Professor Whitney seemingly assumes that the definition of value in the uniform acts (other than the Sales Act) requires the creditor to take a *negotiable* instrument or *negotiable* document of title in order to be classed as a purchaser for value. He says that "where the transfer of *chattels* is effected without the use of *negotiable* documents of title, it would seem that there is not the same commercial necessity for protecting the innocent purchaser \* \* \*." He therefore concludes that "*the omission of our Legislature to adopt in the Sales Act the same definition of value as found in the other Uniform Acts relating to negotiable instruments and negotiable documents of title seems defensible.*"

This assumption that the definition of value in the uniform acts relates only to *negotiable* documents of title is apparently incorrect. The UNIFORM BILLS OF LADING ACT §53, provides that an "antecedent obligation \* \* \* constitutes value where a *bill* is taken either in satisfaction thereof or as security therefor." So, also, the Uniform Warehouse Receipts Act, §58, provides that an "antecedent obligation \* \* \* constitutes value where a *receipt* is taken either in satisfaction thereof, or as security therefor." Cf. Whitney, *supra* note 3, at 183. It is not necessary, therefore, for a creditor to receive a *negotiable* bill of lading or a *negotiable* warehouse receipt in order to be a purchaser for value. See also Uniform Warehouse Receipts Act §58, defining "receipt" as meaning "warehouse receipt" and Uniform Bills of Lading Act, §53, defining "bill" as "bill of lading," thereby including within the definitions *non-negotiable* as well as *negotiable* bills of lading and warehouse receipts. See also UNIFORM BILLS OF LADING ACT §§1, 2, 4; UNIFORM WAREHOUSE RECEIPTS ACT §§1, 2, 4.

definitely discredited case of *Coddington v. Bay*.<sup>43</sup> Unless the creditor gives up something besides his debt, there is an unwillingness to concede that he has satisfied the requirements of value. Even after the passage of a statute aiming to cure this "cracker-barrel" concept of value, the courts are coldly receptive of the "new deal" in commercial law and hold fast to the old formula.<sup>44</sup> As the writer has elsewhere stated it:

"Conservatism is a deeply-imbedded characteristic of the law. Reforms come forth slowly and with expressions of regret for the passing of the old order. Even after they are accomplished there is a tendency to look back with longing glances and in some instances to revive the abandoned principles by artificial and forced construction of statutory changes."<sup>45</sup>

The time has arrived for New York to recognize that its concept of value is a "stubborn bit of archaic form" which

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All the foregoing sections establish the fact that the Uniform Bills of Lading Act and the Uniform Warehouse Receipts Act are not limited to *negotiable* documents of title. Non-negotiable documents of title are also included. If Professor Whitney's suggestion as to a variable standard of value is adopted, the Uniform Acts which he indorses will have to be materially amended, not only in the section relating to value, but in other sections as well. For example, see UNIFORM BILLS OF LADING ACT §33; UNIFORM WAREHOUSE RECEIPTS ACT §42; UNIFORM SALES ACT §20 (4).

The present writer believes that the text of the uniform acts should remain unchanged; that the definitions of value therein extend to non-negotiable as well as negotiable documents of title; and that this extension was so intended by the Commissioners for the purpose of erecting one standard of value throughout the five stated uniform acts.

Admittedly, a non-negotiable document of title may be more readily recaptured from the creditor (or any purchaser) by reason of defects in the title of the debtor-transferor (UNIFORM BILLS OF LADING ACT §38; UNIFORM WAREHOUSE RECEIPTS ACT §47). But the transferee of a non-negotiable bill of lading or warehouse receipt has rights of limited character and these rights should be and are available in favor of a creditor who takes a non-negotiable bill or receipt in payment of or as security for an antecedent debt. UNIFORM BILLS OF LADING ACT §33; UNIFORM WAREHOUSE RECEIPTS ACT §42; *Rummell v. Blanchard*, 216 N. Y. 348, 110 N. E. 765 (1915); see also UNIFORM SALES ACT §20 (4), 34.

<sup>43</sup> 20 Johns. 637 (N. Y. 1822).

<sup>44</sup> "The New York rule [that mere credit given for an antecedent debt was not value] was so well established that the inertia of *Coddington v. Bay* carried it along for some distance before the external force of the Negotiable Instruments Law acted upon it." *Kelso & Co. v. Ellis*, 224 N. Y. 528, 537, 121 N. E. 364 (1918). See de Sloovere, *Steps in the Process of Interpreting Statutes* (1932) 10 N. Y. U. L. Q. REV. 1, 6-7.

<sup>45</sup> *Kennedy, Garnishment of Intangible Debts in New York* (1925) 35 YALE L. J. 689.

stands out "like a pile of ancient rock, weathered and denuded, but not yet worn down to the level of the plain where men dwell and work."<sup>46</sup>

Uniformity is the great desideratum in the field of uniform legislation and particularly so in the acts dealing with commercial law. Commerce is no longer local; it transcends state lines; the contract or sale which originates in New York frequently terminates in some out of the state point. For the purpose of effecting this interstate uniformity we find the Commissioners writing into the uniform acts this significant section:

"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."<sup>47</sup>

In dealing with this section, just as in its treatment of value, one may detect a strange inconsistency in the statutes in New York. Accepting the mandate that New York should aim to effectuate uniformity, the foregoing section was inserted in three uniform acts, but omitted without apparent reason in the passage of the Sales Act.<sup>48</sup>

Even conceding that the minority view of value prevailing in New York has merit behind it, the attitude of the Legislature is not free from criticism. Provincialism can be carried too far in a situation where country-wide transactions are involved. To quote Judge Cardozo: "Our past decision ought not to stand in opposition to the uniform convictions of the entire judiciary of the land."<sup>49</sup> Parity of reason argues for the abandonment of past legislative action which stands opposed to the uniform convictions of the overwhelm-

<sup>46</sup> POLLOCK, *ESSAYS IN THE LAW* (1922) 199.

<sup>47</sup> UNIFORM WAREHOUSE RECEIPTS ACT §57; UNIFORM BILLS OF LADING ACT §52; UNIFORM STOCK TRANSFER ACT §19; UNIFORM SALES ACT §74.

While no such provision is expressly set forth in the Uniform Negotiable Instruments Law, the courts have read into the law the objective of unifying the statutory law throughout the states. See cases collected in 5 Uniform Laws Annot. 8-10.

<sup>48</sup> The "uniformity" section is in the Bills of Lading Act (PERS. PROP. LAW §238); the Stock Transfer Act (PERS. PROP. LAW §180); and the Warehouse Receipts Act (GEN. BUS. LAW §141). It was omitted from the Sales Act (Laws 1911, c. 571).

<sup>49</sup> *Klein v. Maravelas*, 219 N. Y. 383, 386, 114 N. E. 809 (1916).

ing number of state legislatures of the land. High judicial authority pleads the case for liberalism of approach to the solution of common problems of commercial law :

"It is apparent that if these uniform acts are construed in the several states adopting them according to *former local* views upon analogous subjects, we shall miss the desired uniformity and we shall erect upon the foundation of uniform language separate legal structures as distinct as were the former varying laws. \* \* \* We think that the principle of the Uniform Act should have recognition to the exclusion of any *inconsistent doctrine* which may have previously obtained in any of the states enacting it."<sup>50</sup>

#### THE REMEDY.

The present difficulty in the status of value in the commercial law of New York is traceable to the unwarranted omission of the standard definition of value in the Sales Act and in the Bills of Lading Act. The remedy is to put back into the statutory law the omitted sections. It has been suggested that "the desired result may \* \* \* be gradually brought about by judicial decision and interpretation alone without the aid of statute."<sup>51</sup> The recalcitrant and uncertain attitude of the courts of New York in the past, offers scant hope for complete or speedy reformation by judicial infiltration.<sup>52</sup>

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<sup>50</sup> Hughes, *J.*, in *Commercial Nat. Bank v. Cahal-Louisiana Bank etc., Co.*, 239 U. S. 520, 36 Sup. Ct. 194 (1916). In support of the argument against the provincialism of local law, see Pound, *A Comparison of the Ideals of Law* (1933) 47 HARV. L. REV. 1, 10-12.

<sup>51</sup> Whitney, *supra* note 6, at 203.

<sup>52</sup> *Supra* note 44. In *Kelso Co. v. Ellis*, 224 N. Y. 528, 537 (1918), the Court admits "the habit of bench and bar to look to cases rather than statutes for principles of commercial law until attention is sharply directed to the extent that the movement for uniformity of laws through legislation has been successful in New York and many other states."

Professor Whitney quotes the following statement of Cardozo, *J.*, in *Baldwin v. Childs*, 249 N. Y. 212, 163 N. E. 737 (1928) as suggestive of a possible change in the meaning of value by judicial action: "How far the rule in this state as to the meaning of 'value' has been changed by the *revision of statutes* in cases not affected by the federal rule *we do not now consider*. If it survives it has been subjected to many inroads." (Whitney, *supra* note 5, at 283.) The statement is dictum in that the Federal Bills of Lading Act alone was before the court. Moreover, even in New York, while "the meaning of value has been changed by the *revision of statutes*" (see *supra* notes 13, 16, 17), the difficulty

The realists who crave for action are more likely to obtain it by recourse to the Legislature. Moreover, it may be questioned whether the courts should bring in through the back door a doctrine of value which the Legislature has turned away from the front door.<sup>53</sup> If the courts were to do so, they would be ignoring the mandates or implications of the statute, a step which Justice Cardozo admits the judges have the power, but not the right to take.<sup>54</sup>

The more orderly, prompt and satisfactory solution is the simple expedient of replacing the omitted sections of value in the Sales Act and the Bills of Lading Act. By so doing, New York will at once render uniform the standard of value within the state and will also pay tribute to the settled policy of sister states in this important item of commercial law.

WALTER B. KENNEDY.

Fordham University Law School,  
November 21, 1933.

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is that "the meaning of 'value'" was *not* changed when the Sales Act and the Bills of Lading Act passed the New York Legislature (*supra* notes 14, 15).

<sup>53</sup> Cardozo warns that the province of the judge as a legislator is closely circumscribed. "He [the judge] legislates between gaps." NATURE OF THE JUDICIAL PROCESS 113. But the omission of the definition of "value" is more than a gap; it is an intentional elimination from the Uniform Sales Act and Uniform Bills of Lading Act of the definition of value.

For an example of the extreme deference which the courts sometimes pay to legislative policy, see *Hutchinson v. Ross*, 262 N. Y. 381, 395, 187 N. E. 381, 385 (1933), wherein the Court cites a legislative act passed after the litigated event as some evidence of public policy; de Sloovere, *op. cit. supra* note 44.

<sup>54</sup> CARDOZO, *op. cit. supra* note 53, at 129.