

## "Value"—A Reply to Professor Kennedy

Frederick A. Whitney

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## “VALUE”—A REPLY TO PROFESSOR KENNEDY

IN a recent article reviewing the common law decisions of this state as to what constitutes “value” under the doctrine of *bona fide* purchase,<sup>1</sup> I came to the conclusion that there seems to be an inverse ratio between the kind and degree of value required of the innocent purchaser and the negotiability of the property transferred to him in return therefor, and in stating that conclusion I said: “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 defrauded owner.”

In commenting on that statement, in a reply article printed in this Review,<sup>2</sup> Professor Kennedy said:

“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.

“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,

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<sup>1</sup> Whitney, *Value and the Doctrine of Bona Fide Purchaser* (1933) 7 St. JOHN'S L. REV. 181.

<sup>2</sup> Kennedy, “*Value*”—*A Plea for Uniformity in New York Commercial Law* (1933) 8 St. JOHN'S L. REV. 1.

*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."

Apparently Professor Kennedy is overlooking the fact that there are two kinds of innocent purchasers for value: the innocent purchaser for value who comes within the doctrine of bona fide purchase, and the innocent purchaser for value who does not. A glance at the title of my article "Value and the Doctrine of Bona Fide Purchase" would have shown Professor Kennedy that the statements contained in my conclusion were made in reference only to such an innocent purchaser for value as would come within the doctrine.

Not every innocent purchaser for value comes within the protection of the doctrine of bona fide purchase. For example, it may readily be conceded that "hard cash" is the highest form of value that a transferee can give for property. Let us assume that he innocently purchases chattels from a thief, who had stolen them, and gives the thief hard cash for them. He has given the thief the highest form of value and done so innocently. He is an innocent purchaser for value of the chattels, yet he does not come within the doctrine of bona fide purchase, because he is not protected in his possession or ownership of the chattels so purchased as against the true owner.<sup>3</sup>

By the term "Doctrine of Bona Fide Purchase" is meant the doctrine that *under some circumstances* it is equitable, or commercially or socially desirable to protect an innocent purchaser for value. The mere fact that he gave

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<sup>3</sup> Bassett v. Spofford, 45 N. Y. 387 (1871); Newton v. Porter, 69 N. Y. 133 (1877).

“value” even as that term is defined in the Uniform Acts will not bring him within the charmed circle. For example, the Negotiable Instruments Law declares that “an antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time.”<sup>4</sup> However, the statute did not contemplate that *every holder* who has given such value *comes within the charmed circle* of the doctrine of bona fide purchase. If he gave such value for a *non-negotiable* instrument,<sup>5</sup> or for a *negotiable* one with knowledge of defenses against it,<sup>6</sup> or after its maturity,<sup>7</sup> he is not protected under the doctrine.

One is not an innocent purchaser for value within the doctrine of bona fide purchase, even although he gave “value,” unless there are additional circumstances such as to give him ORIGINAL RIGHTS rather than mere *derivative* rights. One may give the highest form of value, to wit, hard cash, and still stand only in the shoes of his transferrer, *i. e.*, subject to all equities and defenses; for example, the innocent purchaser of stolen chattels from a thief,<sup>8</sup> or the innocent purchaser of chattels from a bailee<sup>9</sup> or factor<sup>10</sup> who had neither indicia of ownership nor authority to sell. In all such cases, no matter what he gave by way of value, he does not come within the doctrine of bona fide purchase. Likewise, under the Uniform Acts (the Stock Transfer Act,<sup>11</sup> the Bills of Lading Act,<sup>12</sup> and the Warehouse Receipts Act<sup>13</sup>) an antecedent or pre-existing debt may constitute value even if given for a *non-negotiable* stock certificate, bill of lading or warehouse receipt, but the draftsmen of those Uniform Acts never intended that a transferee who gave such value for a non-negotiable document should acquire original rights, *i. e.*,

<sup>4</sup> NEGOTIABLE INSTRUMENTS LAW (1909) §51.

<sup>5</sup> Allen v. Henry, 16 App. Div. 557, 44 N. Y. Supp. 956 (4th Dept. 1897).

<sup>6</sup> Crandall v. Vickory, 45 Barb. 156 (N. Y. 1865); Hall v. Wilson, 16 Barb. 548, 553 (N. Y. 1853).

<sup>7</sup> Bacon v. Burnham, 37 N. Y. 614 (1868); *In re Clover*, 154 N. Y. 443, 48 N. E. 892 (1897).

<sup>8</sup> *Supra* note 3.

<sup>9</sup> Smith v. Clews, 114 N. Y. 190, 21 N. E. 160 (1889); Green v. Wachs, 254 N. Y. 437, 173 N. E. 575 (1930).

<sup>10</sup> Freudenhim v. Gutter, 201 N. Y. 94, 94 N. E. 640 (1911) and cases cited therein.

<sup>11</sup> UNIFORM STOCK TRANSFER ACT §22.

<sup>12</sup> UNIFORM BILLS OF LADING ACT §53.

<sup>13</sup> UNIFORM WAREHOUSE RECEIPTS ACT §58.

come within the charmed circle of the doctrine of bona fide purchase.<sup>14</sup> He is merely an assignee of a non-negotiable chose-in-action and does not come within the doctrine of bona fide purchase, although he gave the value defined in the Uniform Acts. Thus Professor Kennedy's comment that "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 a *negotiable* document of title in order to be classed as a purchaser for value" is misleading since it is obvious that my intention was that the creditor must take a *negotiable* document of title rather than a non-negotiable one *in order to be such an innocent purchaser for value as to come within the protection of the doctrine*. Of course one may innocently give value for a non-negotiable document and still not come within the charmed circle. The point I was making is that one is not such an innocent purchaser for value as to come within the doctrine unless he receives a *negotiable* bill of lading or a *negotiable* warehouse receipt.

Strangely enough, Professor Kennedy seems to have had in mind such an innocent purchaser for value as acquired original rights but he appears to be laboring under the impression that all that is necessary to bring the creditor within the charmed circle is that he have given value innocently and in good faith, for he writes: "Innocence and good faith, linked with this ingredient of value, combine to place the litigant in a *favored* position before the courts." And again: "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." And still further on in stating the problem he says: "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?" Surely Professor Kennedy does not contend that a creditor who receives a non-negotiable bill of lading or warehouse receipt in return for giving up an old debt will come within the charmed circle.

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<sup>14</sup> UNIFORM SALES ACT §31.

Even if we were to adopt the uniform definition of value urged by Professor Kennedy, he would still be what he is today, a mere assignee of a non-negotiable chose-in-action and nothing more. The adoption of the uniform standard of value will not bring all creditors within the doctrine of bona fide purchase as Professor Kennedy seemingly assumes. It is therefore submitted that the conclusion reached in my article that where the property transferred is a document of title, as a general rule, only one who has received a *negotiable* document can be such an innocent purchaser for value as to come within the protection of the doctrine, seems to be the correct one.

FREDERICK A. WHITNEY.

St. John's University School of Law,  
April 9, 1934.