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Ralph W. Aigler
University of Michigan Law School

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By Ralph W. Aigler*

In 1715 the case of *Jenys v. Fawler, et al.*[1] came before Lord Raymond at the Guildhall. It was an action by the indorsee of a bill of exchange against the acceptor who offered to prove by witnesses who were acquainted with the drawer's signature and who believed that the signature of the drawer appearing on the bill in suit was not genuine, that the bill really was a forgery. The Chief Justice refused to admit the testimony "from the danger to negotiable notes, and because a man might with design write contrary to his usual method." This indicates that the rejection was based primarily upon the fact that the witnesses proposed to testify that they did not "believe" the signature to be genuine. The court is reported, however, as being "strongly inclined that even actual proof of forgery would not excuse the defendants against their own acceptance which had given the bill a credit to the indorsee."

That case afforded at least some basis for a conclusion that an acceptor is deemed by his acceptance to admit the genuineness of the drawer's signature, or, as it might be put, that an acceptor is bound at his peril to know the signature of the drawer. In *Price v. Neal*[2] in which the drawee in two bills of exchange was suing the one to whom the bills had been paid, one with and the other without acceptance, to recover back the money so paid on the ground that the drawer's signatures had turned out to be forgeries the attorney for the plaintiff felt the difficulty of the *Jenys* case, and he pointed out that in the earlier case the offered proof was objectionable because it merely went to the belief of the witnesses while in the present case the forgery had been fully proved. It was concluded, however, in that well known case that the drawee could not recover back his money. In considering that case there is a temptation to explain the decision on the ground that drawees by acceptance or payment admit the signature of the drawer to be genuine, or, what amounts to much the

*Professor of Law, University of Michigan.

[1] 2 Strange 946.

[2] 3 Burr. 1354 (1762).

same thing, such drawees are bound to know the signature of the one drawing the order. While these may very well be proper conclusions to draw from the decision it is certainly not sound to predicate the decision upon such propositions.

The basic ground on which recovery is claimed in cases such as *Price v. Neal* is mistake; the drawee has paid the money on the mistaken belief that the order is genuine. That the doctrine denying recovery on such facts is an exception to the general rule allowing recovery of payments made under mistake of fact is generally agreed.[3] As to the ground for making the case an exception there is as conspicuous disagreement.[4] That matter has been so fully considered elsewhere that there is no disposition to cover the ground again here.

The refusal of Lord Mansfield in that case to apply to such situation the usual rule as to recovery of money paid under mistake of fact was based, if we may accept his own language in rendering judgment,[5] upon the broad ground that under the facts it was not

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[3]See WOODWARD ON QUASI CONTRACTS, ch. V.; Williamson Bank v. Bank, 66 W. Va. 545, 66 S. E. 761.

[4]WOODWARD ON QUASI CONTRACTS, §§ 82-87.

[5]The attorney for the plaintiff for whom a verdict had been returned subject to the opinion of the court as to his right to recover on the facts, argued that it was a case of money paid by mistake. On behalf of the defendant it was denied that there had been a payment by mistake; rather, it was insisted, it was owing to the plaintiff's negligence; and it was urged that the defendant, instead of being a party to a fraud, had acted innocently and had paid full value for the bills. "Lord Mansfield," the reporter states, "stopt him from going on; saying this was one of those cases that could never be made clearer by argument.

"It is an action upon the case, for money had and received to the plaintiff's use. In which action, the plaintiff cannot recover the money, unless it be against conscience in the defendant, to retain it; and great liberality is always allowed, in this sort of action.

"But it can never be thought unconscientious in the defendant, to retain this money, when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration, which he had *bona fide* paid, without the least privity or suspicion of any forgery.

"Here was no fraud: no wrong. It was incumbent upon the plaintiff to be satisfied 'that the bill drawn upon him was the drawer's hand', before he accepted or paid it: but it was not incumbent upon the defendant to inquire into it. * * * Whatever neglect there was, was on his [plaintiff's] side. * * * It is a misfortune which has happened without the defendant's fault or neglect. * * * there is no reason to throw off the loss from one innocent man upon another innocent man. * * *"

against good conscience for the defendant-holder, to whom the drawee, supposing the bills to be genuine, had paid the money called for, to retain it. It is now generally considered that back of Lord Mansfield's conclusion was a perhaps subconscious, at least unformulated, appreciation that in the conduct of such business affairs it is desirable that a point be fixed at which the parties might be warranted in considering the transaction closed. This is the ground, it is generally agreed, upon which the doctrine must rest.[6] A contrary decision would have meant that for a period of time, indefinite in extent, the one to whom the money has been paid would have to be prepared to meet a demand to refund. It is not surprising that such suspense with the inevitable tendency to slow up commercial transactions should have been deemed undesirable.

While litigation in the United States involving the so-called doctrine of *Price v. Neal* and its related problems has been very frequent, in England there have been surprisingly few cases reported. The difference no doubt is due partly to the more common use of checks among Americans, but more largely, it is believed, to the traditional conservatism of the English business man and banker. The well known speed of the American with the accompanying willingness to take chances not infrequently leaves him with a forged document on his hands.

In a case[7] in 1814 wherein the plaintiff who had discounted for defendant a forged navy-bill sued in assumpsit for money had and received to his use upon failure of the consideration, *Price v. Neal* was urged by the defendant as a bar to the recovery. It was pointed out that the situations were very distinguishable, Gibbs, C. J., saying that in *Price v. Neal* "the bill was paid by the person who of all others was the best judge whether the acceptance was his handwriting or not."[8] During the next year the same judges had occasion to examine *Price v. Neal* and the true ground of the decision therein.[9] A bill of

[6]See Professor Woodward in 19 ILL. L. REV. 277.

[7]Jones v. Ryde, 5 Taunt. 488. See also Bruce v. Bruce, in note to Jones v. Ryde.

[8]This is obviously a misstatement. The intention must have been to state that the drawee who paid the bills of all others was the one best in position to judge whether the order was genuine.

[9]Smith v. Mercer, 6 Taunt. 76.

exchange with a forged acceptance by the drawee purporting to be payable at plaintiff's banking house in which the drawee kept his account was presented by defendant (through an agent) to plaintiff for payment. Payment was made. A week later, when plaintiff discovered the acceptance to be a forgery, notice was given defendant and repayment demanded. Recovery was denied. Dallas, J., considered *Price v. Neal* applicable, saying, "If an acceptor is then bound to know the drawer's hand-writing, is it less the duty of a banker to know the hand-writing of his customer? In degree, it is more so, for he sees it. probably, every day. I consider therefore the payment of this bill as a want of due caution on the part of the Plaintiffs." He then injected a consideration not mentioned in *Price v. Neal,* the effect of the delay in making parties to the bill aware of the fact of forgery, whereby injury may have resulted. He said: "The ground, therefore, on which I rest my opinion, and to which I wish to confine it, is the want of due caution in having paid the bill, the effect of which has been to give time to different parties, which the Plaintiffs were not authorized to do." Heath, J., agreed that the plaintiff should not recover, being persuaded apparently by the argument that if the ostensible acceptor himself had paid he could not have recovered back, therefore the plaintiff bank which in paying acted for him, could stand no better. Gibbs, C. J., said he concurred both with Dallas and Heath and emphasized the delay in getting notice to prior parties due to the payment by plaintiff. He said: "I have put the case on the express point that by the acts of the Plaintiffs the Defendants are put in a worse situation; but I do not mean thereby to express my dissent from the larger ground on which the case has been put by my Brothers *Heath* and *Dallas.*" etc.[10] In *Wilkinson v. Johnston*[11] plaintiff paid what purported to be an accepted bill for the honor of one of the indorsers. The same day it was discovered that the signatures of the drawer, acceptor, and the indorser for whose honor plaintiff has paid were forgeries, and notice was at once given defendant to whom payment had been made. It was held that plaintiff should recover the payment thus made by mistake, Abbott, C. J., pointing out that unlike *Price v. Neal* the recipient of the payment here was

[10]There was a dissenting opinion by Chambre, J.

[11]3 B. & C. 428 (1824). See Goddard v. Bank, 4 N. Y. 147.

at least partially to blame, and there had been no delay so as to effect a possible alteration in the situation of any of the other parties.[12]

The next case to be considered is one of profound significance in the development of this doctrine in the English courts, for the emphasis seems to be shifted from the imperative duty upon the drawee to recognize the signature of the drawer to the prejudicial effect of delay in taking action against prior parties. In *Cocks v. Masterman*[13] plaintiffs, who were bankers, paid to the presenter a bill of exchange which purported to have been accepted by one of plaintiff's customers

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[12]"Now, if we compare the facts of the present case with those of the two cases before mentioned [Price v. Neal and Smith v. Mercer], we shall find some important difference. The plaintiffs were not the drawees or acceptors of the bills, nor the agents of any supposed acceptor. They discovered the mistake in the morning of the day they made the payment, and gave notice thereof to the defendants in time to enable them to give notice of the dishonor to the prior parties, which was accordingly given. The plaintiffs were called upon to pay for the honor of *Heywood & Co.*, whose names appeared on the bills among other indorsers. The very act of calling upon them in this character was calculated in some degree to lessen their attention. A bill is carried for payment to the person whose name appears as acceptor, or as agent of an acceptor, entirely as a matter of course. The person presenting very often knows nothing of the acceptor, and merely carries or sends the bill according to the direction that he finds upon it; so that the act of presentment informs the acceptor or his agent of nothing more than that his name appears to be on the bill as the person to pay it; and it behooves him to see that his name is properly on the bill. But it is by no means a matter of course to call upon a person to pay a bill for the honor of an indorser; and such a call, therefore, imports on the part of the person making it, that the name of a correspondent, for whose honor the payment is asked, is actually on the bill. The person thus called upon ought certainly to satisfy himself that the name of his correspondent is really on the bill; but still his attention may reasonably be lessened by the assertion, that the call itself makes to him *in fact*, though no assertion may be made *in words*. And the fault, if he pays on a forged signature, is not wholly and entirely his own, but begins at least with the person who thus calls upon him. And though, where all the negligence is on one side, it may perhaps be unfit to inquire into the quantum, yet where there is any fault in the other party, and that other party cannot be said to be wholly innocent, he ought not, in our opinion, to profit by the mistake, into which he may by his own prior mistake have led the other; at least, if the mistake is discovered before any alteration in the situation of any of the parties, that is, whilst the remedies of all the parties entitled to remedy are left entire, and no one is discharged by laches."

See WOODWARD ON QUASI CONTRACTS, § 89.

[13]9 B. & C. 902 (1829). See Canal Bank v. Bank of Albany, 1 Hill (N. Y.) 287, where, however, the forgery was of an indorsement.

and made payable at plaintiff's bank. During the following day it was discovered that the acceptance was a forgery, and notice having been given defendants to whom payment had been made, repayment was demanded. Recovery was denied, Bayley, J., said:

"* * * It was insisted that the plaintiffs were not entitled to recover because they, being bankers, ought, before they paid the bill, to have satisfied themselves that the acceptance was genuine. On the other hand it was said that the plaintiffs, having given notice of the forgery to the defendants on the day next after the bill had been paid, were entitled to recover back the money, on the ground that they had paid the money under a mistaken supposition that the acceptance was the genuine acceptance of *Sewell & Cross,* and the case of *Wilkinson v. Johnson* was relied on. That case differs from the present in one material point, viz. that the notice of the forgery was given on the very day when payment was made, and so as to enable the defendant to send notice of the dishonor to the prior parties on that day. In this case we give no opinion upon the point, whether the plaintiffs would have been entitled to recover if notice of the forgery had been given to the defendants on the very day on which the bill was paid, so as to enable the defendants on that day to have sent notice to other parties on the bill. But we are all of opinion that the holder of a bill is entitled to know, on the day when it becomes due, whether it is an honored or dishonored bill, and that, if he receives the money and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back. The holder, indeed, is not bound by law (if the bill be dishonored by the acceptor) to take any steps against the other parties to the bill till the day after it is dishonored. But he is entitled so to do, if he thinks fit, and the parties who pay the bill ought not by their negligence to deprive the holder of any right or privilege. If we were to hold that the plaintiffs were entitled to recover, it would be in effect saying that the plaintiffs might deprive the holder of a bill of his right to take steps against the parties to the bill on the day when it becomes due."

The cases so far considered leave the scope of the doctrine of *Price v. Neal* in some doubt. It seems clear that if the payor discovers the forgery as late as the next day, though he then proceeds with all possible dispatch, he cannot recover the payment made under mis-

take as to the genuineness of the order. It need not appear that prejudice has resulted from the day's delay; it is sufficient that there *may* have been prejudice. If the mistake is discovered on the very day and steps taken promptly, there is a possibility that an English court might allow recovery. In *Cocks v. Masterman* that question was not before the court and it was left open. *Wilkinson v. Johnson* may be some authority to the effect that on such facts recovery should be allowed. But the decision in that case was based at least in part on the ground that the payor was not a drawee or acceptor, that the presenter was to be considered as vouching for the genuineness of the instrument.

In *London and River Plate Bank v. Bank of Liverpool*[14] a claim to recover back money paid a presenter on a mistaken belief that the indorsements were genuine was treated as falling within the principle of *Price v. Neal* and *Cocks v. Masterman.* The learned judge who wrote the opinion considered the underlying principle of *Price v. Neal* to be: "that if the plaintiff in that case so conducted himself as to lead the holder of the bill to believe that he considered the signature genuine, he could not afterwards withdraw from that position." *Cocks v. Masterman* makes clear this principle when it is laid down therein that a holder of a bill is entitled to know at once, when it becomes due and is presented for payment, whether it is going to be paid or not; if the money is paid and any interval of time elapses in which the holder's position may be altered, the principle applies and there can be no recovery. "That rule", the court said, "is obviously, as it seems to me, indispensible for the conduct of business. A holder of a bill cannot possibly fail to have his position affected if there be any interval of time during which he holds the money as his own, or spends it as his own, and if he is subsequently sought to be made responsible to hand it back."[15] This of course comes close to a judicial expression that the point after which there can be no undoing of the transaction of payment is the moment of payment (or accept-

[14] [1896] 1 Q. B. 7.

[15] This is clearly the ground of business policy or expediency stated above as the commonly accepted explanation for denying the usual recovery of money paid by mistake.

American courts have generally allowed a recovery where the mistake is as to the genuineness of indorsements.

ance), but no doubt the question as to this point is still open in England. In *Imperial Bank of Canada v. Bank of Hamilton,*[16] the Privy Council, without approving or disapproving the point of view based on the effect of delay, refused to apply it to the facts presented, there being no party against whom rights might be prejudiced by delay in giving notice.

In this country the cases involving the problem of *Price v. Neal* are legion.[17] In a few states it has been held that the result in that case was unfortunate and its authority has been denied.[18] And in Pennsylvania by statute in 1849, the contrary was provided.[19] By a leading text writer the view of Lord Mansfield has been severely

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[16][1903] A. C. 49, 72 L. J. R. 1.

[17]It should be stated here that the writer in referring to the problem of Price v. Neal and the doctrine of that case means to include only those situations involving the right of a drawee to recover back payments made in reliance upon a supposedly genuine order, whether the payment follows acceptance or is independent thereof. Obviously there would also be included those situations in which acceptance of a supposedly genuine order is sought to be enforced, for the problem would seem to be essentially the same. There is no intention to include those related problems in which there has been a mistake by the drawee as to other factors, for example, the genuineness of the body of the instrument, its indorsement, etc. Not infrequently these problems are grouped together as involving the doctrine of Price v. Neal. There is a common question, in that in all it is a matter of money paid by mistake.

[18]First Nat. Bank v. Bank, 15 N. D. 299; Am. Express Co. v. Bank, 27 Okl. 824 (but see Cherokee Nat. Bank v. Trust Co., 33 Okl. 342, *infra,* note 25); First Nat. Bank v. Bank (Tex. Civ. App.) 146 S. W. 1034.

The situation in Texas is not clear. In Rouvant v. Bank, 63 Tex. 610 (1885), though recovery in favor of the drawee was allowed on the ground that there had been a careless taking of the instrument, the court affirms the general proposition that "a bank, in accepting and paying a draft drawn by a customer, is generally held to know the signature, and, if a forged draft is accepted and paid, the bank, as a general rule, will not be heard to assert a mistake as to the signature. City Bank v. National Bank, 45 Tex. 218; Price v. Neal, 3 Burr. 1354; Levy v. Bank of U. S., 1 Binn. 27." A number of years later in a case in one of the intermediate appellate courts approval was given to the criticism of Price v. Neal in MORSE ON BANKS AND BANKING, to the effect that the old doctrine promulgated by Lord Mansfield was fast fading into a deserved oblivion. First Nat. Bank v. Bank (Tex. Civ. App.), 146 S. W. 1034 (1912). This case in turn was approved in Texas State Bank v. Bank (Tex. Civ. App.) 168 S. W. 504 (1914).

[19]See Bank v. Bank, 78 Pa. 233; Colonial Trust Co. v. Bank, 50 Pa. Super. Ct. 510; Union Nat. Bank v. Bank, 249 Pa. 375, 94 Atl. 1085.

criticized.[20] No attempt will be made here to cite the numerous cases affirming the rule.[21]

Perhaps the first reported decision on this problem in this country is *Levy v. Bank of the United States.*[22] A forged check on defendant bank was offered for deposit therein by plaintiff and credit entered on the books to plaintiff. This was between eleven and one o'clock; between three and four o'clock of the same day the forgery was discovered and the amount charged back to plaintiff; the action was for balance claimed to be due on deposit, including the amount of the forged item. The conclusion was that the drawee had in effect paid the check and being bound to know the drawer's signature could not recover. In two early cases in Massachusetts the conclusion in *Price v. Neal* was approved.[23] The great weight of Justice Story's approval was given in *United States Bank v. Bank of Georgia,*[24] that learned judge saying, "The case of *Neal v. Price* has never since been departed from; and in all the subsequent decisions in which it has been cited, it has had the uniform support of the Court, and has been deemed a satisfactory authority." Sometimes the doctrine is stated with a qualification—the drawee cannot recover from an innocent presenter, "if such recovery would result in loss to the payee [presenter]."[24a] This qualification is of doubtful soundness; it would seem to be an echo of the rejected explanation for the rule of *Price v. Neal,* that recovery should be denied because by the delay consequent upon payment or acceptance recovery against prior parties may have been prejudiced.

The problem arising so frequently, one might reasonably expect

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[20] MORSE ON BANKS AND BANKING, § 464.

[21] Many of the cases are cited in WOODWARD ON QUASI CONTRACTS, § 80. See also 7 C. J. 688, note 5; MORSE ON BANKS AND BANKING, § 463, *et seq.*

[22] 1 Binney (Pa.) 27 (1802).

[23] Young v. Adams, 6 Mass. 182 (1810); Gloucester Bank v. Salem Bank, 17 Mass. 32 (1820). In the earlier case Sewall, J., said that the main reason for the decision in Price v. Neal was the special negligence of the drawee, by which the loss was suffered; consequently he should not throw it back upon the innocent holder. In the later case Parker, C. J., said "there seems to be nothing in the doctrine here laid down, so unreasonable as to make the case a questionable one."

[24] 10 Wheat. 333 (1825).

[24a] See Security, etc., Bank v. Bank, (Cal. App.) 241 Pac. 945.

to find some provision regarding it in a measure so comprehensive as the Uniform Negotiable Instruments Law. If the subject is covered in that statute, it must be by section 62. It is there provided that an acceptor by his acceptance "engages that he will pay" according to the tenor of his acceptance; and admits, *inter alia,* the genuineness of the signature of the drawer. According to this it seems clear that if a drawee accepts, he cannot defend an action upon such acceptance on the ground that the order was a forgery; and equally clearly it seems that if the acceptor has paid the forged instrument, he can not recover back his money. But what of the drawee who has *paid* without the intermediate acceptance step? Truly it would be an odd result if an acceptor of a forged order could be compelled to honor his acceptance while a payer-drawee could undo his payment by recovering the amount paid. Accordingly it has been held that a drawee by *payment* as well as by *acceptance* admits the authenticity of the drawer's signature. In other words, section 62 has been deemed an enactment of the rule of *Price v. Neal.*[25] The contrary was held in Massachusetts in 1924.[26] The ultimate result, however, in that state was not affected by this view, it being concluded that under Sec. 196 of the N. I. L., providing that "In any case not provided for in this act the rules of the law merchant shall govern", *Price v. Neal* applies.[27] There is an interesting related question arising under Sec. 62 as to the effect of payment by a drawee of an altered order.[28]

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[25]National Bank of Rollo v. Bank, 141 Mo. App. 719; Title Guarantee & Trust Co. v. Haven, 126 App. Div. (N. Y.) 802 (*semble*); Cherokee Nat. Bank v. Trust Co., 33 Okl. 342, 125 Pac. 464; First Nat. Bank v. Bank of Cottage Grove, 59 Ore. 388; First Nat. Bank v. U. S. National Bank, 100 Ore. 264.

This view was expressed by Dean Ames in 4 HARV. L. REV. 442.

In Oklahoma this view resulted in a departure from the earlier case of American Express Co. v. Bank, 27 Okl. 824, 113 Pac. 711. See *supra,* note 18.

[26]South Boston Trust Co. v. Levin (Mass.) 143 N. E. 816.

[27]In those states like Massachusetts, which had approved Lord Mansfield's decision, the result is clear either way. In North Dakota, Price v Neal was repudiated despite the N. I. L. On the other hand, in Oklahoma, as pointed out above, the court felt bound by the statute and in the interest of uniformity to get into line despite an earlier decision the other way.

[28]The provision in that section to the effect that the acceptor engages to pay according to the tenor of his acceptance was held in National City Bank v. Bank of Republic, 300 Ill. 103, 132 N. E. 832, to bind an acceptor (certifier there) to pay to a subsequent taker in due course, although the name of the payee had been erased and another fraudulently inserted. In 24 COL. L.

The prevailing view, that the drawee cannot recover money paid on forged orders, may be, as asserted by many courts, a desirable basis for business transactions of the sort involved. The rule seems to work, though it would be rash to maintain that business would not have progressed quite as well had *Price v. Neal* gone the other way and thus started a line of decisions in that direction. In *First Nat. Bank v. Brule Nat. Bank*[29] it was said by Whiting, C. J., that when "a holder of a bill of exchange uses all due care in taking of a bill or check and the drawee thereafter pays same, the transaction is absolutely closed—*modern business could not be done on any other basis.*"[30] And in *Bank of Williamson v. McDowell County Bank*,[31] Poffenberger, J., said, speaking of *Price v. Neal*:

"* * * There are some cases in which the rule itself is criticised and it is said to have been denounced as unsound and unreasonable by some of the text writers, but I give it my unqualified approval; *believing it to be indispensible in commercial transactions.*[32] But for it, a vast amount of time would be wasted in demanding inquiries and guaranties of holders, so palpably necessary to safety, that they ought to be, and are in fact, everywhere made without demand. Lack of this rule would not only impede commercial transactions, but also introduce unnecessary and grave elements of uncertainty and danger, and render the whole commercial system unstable and treacherous as well as too slow to meet ordinary business demands."

Considering these extravagant pronouncements it is just a little remarkable, in view of the fact that since 1849 the doctrine of *Price v. Neal* has been inapplicable in Pennsylvania, that business in the old Keystone state has gone so well. And there is no striking evidence that in North Dakota since *First Nat. Bank v. Bank of Wynd-*

REV. 477, Professor Woodward urges soundly, it is believed, that the willingness of the courts to apply to cases of *payment* of forged orders the statutory rule as to acceptances need not carry over to cases of alteration, for in the former the conclusion is in harmony with generally accepted principles outside the statute while in the latter the result would be to work a change in the law.

[29]41 S. Dak. 87.

[30]Writer's italics.

[31]66 W. Va. 545, 66 S. E. 761 (1909).

[32]Writer's italics.

mere,[33] when the rule of *Price v. Neal* was rejected, the use of checks and bills of exchange has been seriously impaired.[34]

In most of the states following the doctrine of Lord Mansfield denying recovery there is recognized an important limitation. In *Price v. Neal* attention is given to the fact that the recipient of the money, the defendant, had not in any degree been at fault or negligent. It now seems to be generally agreed that if there was a lack of reasonable caution on the part of the defendant in taking the forged instrument he can not in equity and good conscience retain the money. In a leading case in Massachusetts[35] it was said:

"* * * It is presumed that the bank knows the signature of its own customers, and therefore is not entitled to the benefit of the rule which in cases of forgery permits a party to recover back money paid under a mistake of fact as to the character of the instrument by which the fraud has been effected. This presumption is conclusive only when the party receiving the money has in no way contributed to the success of the fraud, or the mistake of fact under which the payment has been made. In the absence of actual fault on the part of the drawee, his constructive fault in not knowing the signature of the drawer and detecting the forgery will not preclude his recovery from one who took the check under circumstances of suspicion without proper precaution, or whose conduct has been such as to mislead the drawee or induce him to pay the check without the usual security against fraud * * *. To entitle the holder to retain money obtained by a forgery, he should be able to maintain that the whole responsibility of determining the validity of the signature was placed upon the drawee, and that the vigilance of the drawee was not lessened and that he was not lulled into a false security by any disregard of duty on

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[33]15 N. D. 299 (1906).

[34]If one knew a banker who had had experience in, let us say, Ohio and who had then moved to Pittsburg where he continued his business, it would be interesting to inquire what, if any, differences were observable in the way checks and bills generally are handled in the two states. This situation may well be one of those numerous instances in the law in which whether the rule is one way or the opposite is of precious little consequence in the commercial world or in the happiness of the people, the really important consideration being that there be some rule according to which people may adjust their transactions and according to which litigation may be settled.

[35]Bank of Drawers v. Bank of Salem, 151 Mass. 280.

his own part, or by the failure of any precautions which from his implied assertion in presenting the check as a sufficient voucher the drawee had a right to believe he had taken."

This view has been applied in many cases,[36] and much may be said in its favor. It must be conceded that somewhere somebody was willing to take the instrument from the forger; if no one would have anything to do with forgers, it is obvious that there would be no occasion to invoke the doctrine of *Price v. Neal.* Of course misplaced confidence and clever misrepresentation are the usual explanations for the forged instruments starting on their journey. It would hardly be urged that one should necessarily, as a matter of law be held lacking in care in taking a negotiable instrument from one who turns out to be a forger, and no case seems to have gone so far.[37] If the defendant who seeks to retain the money, actively participated in perpetrating the fraud, or if he did anything to mislead the drawee or to throw him off his guard, there ought to be no question as to a retention of the money under such circumstances being unconscientious.[38]

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[36]Hutchison Hardware Co. v. Bank, 26 Ga. App. 321, 105 S. E. 854; Bank of Quincy v. Ricker, 71 Ill. 439; Bank of Marshalltown v. State Bank, 107 Ia. 327; Deposit Bank v. Bank, 90 Ky. 10; Ellis v. Life Ins. & Trust Co., 4 Oh. St. 628; Ford & Co. v. Bank, 74 S. C. 180; Peoples Bank v. Franklin, 88 Tenn. 299 (but see Farmer's Bank v. Bank, 115 Tenn. 64); Canadian Bank of Commerce v. Bingham, 30 Wash. 484 (see also, same case in 46 Wash. 657); Bank of Williamson v. Bank, 66 W. Va. 545, 66 S. E. 761.

See also Bergstrom v. Hotel Co., 171 App. Div. (N. Y.) 776; First Nat. Bank v. U. S. Nat. Bank, 100 Ore. 264, 197 Pac. 547; Security etc. Bank v. Bank (Cal. App.) 241 Pac. 945.

Contra: Howard v. Bank, 28 La. Ann. 727; Farmer's Nat. Bank v. Bank, 30 Md. 11; Salt Springs Bank v. Bank, 62 Barb. 101; Bank of St. Albans v. Bank, 10 Vt. 141. See also Farmer's & Merchant's Bank v. Bank, 115 Tenn. 64.

[37]Morse in his well known book on BANKS AND BANKING, § 466, appears to think that under the guise of this exception the rule itself is being discarded. He ascribes the willingness to allow recovery by the drawee on the ground that the defendant omitted to exercise the requisite care to the lack of sympathy thought to be felt by many courts towards Price v. Neal "without any actual change in the abstract doctrines of the law," he says, "which are clear, just and simple enough, the gradual but sure tendency and effect of the decisions have been to put as heavy burden of responsibility upon the payee as upon the drawee, contrary to the original custom."

[38]Bank of Quincy v. Ricker, 71 Ill. 439; Rouvant v. San Antonio Bank, 63 Tex. 610.

Such complicity ought to overbalance any argument in the interest of business expediency denying the normal recovery of money paid by mistake. So also, as indicated above, if the defendant was careless in taking the instrument thus aiding in the ultimate result, the collection of the amount. The most common charge of carelessness in this respect is in dealing with a party unknown and unidentified.[39] It has been considered that presentation in the usual channels in the course of banking with a general indorsement should lead to the same result.[40] This would seem to be going too far. How should a holder present an order except in the usual channels? And whatever guarantees an indorsement may amount to on a sale or other transfer of the instrument, these guarantees have no operation in favor of the payer who honors the order and in no sense takes as a purchaser or transferee.[41] It is occasionally said or held that if the presenter took the bill "for collection", not as purchaser, the drawee is not entitled to place any reliance upon the supposed care of such presenter in taking the instrument from an identified or known person and, accordingly must bear the full burden of determining at peril the genuineness of the drawer's signature.[42]

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[39]Hutchison Hardware Co. v. Bank, 26 Ga. App. 321, 105 S. E. 854; First Nat. Bank of Drawers v. Bank of Salem, 151 Mass. 280; Ellis v. Ohio Ins. & Trust Co., 4 Oh. St. 628 (*Cf.* Bank v. Bank, 58 Oh. St. 207); Canadian Bank of Commerce v. Bingham, 30 Wash. 484 (S. C., 46 Wash. 657); Bank of Williamson v. Bank, 66 W. Va. 545, 66 S. E. 761.

In First Nat. Bank v. U. S. Nat. Bank, 100 Ore. 264, 197 Pac. 547, the defendant was not deemed negligent because of failure to detect forgery of signature of a drawer a customer of defendant as well as of plaintiff, nor is presenter affected by possible negligence of prior holders. *Ibid*; First Nat. Bank v. Bank, 107 Ia. 327, 77 N. W. 1045.

[40]Ford & Co. v. Peoples Bank, 74 So. Car. 180. The court points out that Daniel in his work on NEGOTIABLE INSTRUMENTS (vol. 1, secs. 672, 673; vol. 2, sec. 1361) takes the view that the indorsement engages that the bill is genuine. It is also declared that in Germania Bank v. Boutell, 60 Minn. 189, the contrary view is taken, at least as to the indorsement being a guaranty to the drawee that the drawer's signature is genuine. "* * * but we think that the weight of reason and authority is against that view, at least to the extent that an unrestricted indorsement is calculable to mislead the drawee into a belief that the paper was what it purported to be."

[41]See Dean Ames in 41 HARV. L. REV. 297, 302; First Nat. Bank v. U. S. Nat. Bank, 100 Ore. 264, 197 Pac. 547.

[42]Security, etc. Bank v. Bank (Cal. App.) 241 Pac. 945. See comment on case in 24 MICH. L. REV. 607.

As lack of reasonable caution in taking the forged instrument may be sufficient to offset the argument of business expediency and so allow a recovery, so a showing of carelessness in fact, beyond the constructive fault involved in the mere fact of payment, by the drawee is held to neutralize the lack of care on the part of the defendant-holder, and the parties are deemed to stand so far as recovery of the payment made by mistake is concerned as if both had been free of negligence.[43]

Regarding the effect of negligence in these problems, it was said by the Oregon court in a recent case[44] that "Instead of saying that the negligence of the holder creates an exception to the rule of *Price v. Neal,* it is perhaps a more accurate statement of the rule itself to say that, if there is freedom from both negligence and bad faith on the part of the holder, the drawee cannot recover payment made on a forged check; but, if the holder is chargeable with negligence or bad faith, the rule does not apply against an innocent drawee."

It is important to notice that while the drawee under *Price v. Neal* may fail in an action against the presenter who was not at fault, there may nevertheless be a good case for recovery against some earlier holder who was guilty of bad faith or was careless in taking the instrument.[45]

Not infrequently it is stated that the holder who seeks to resist refunding the money to the drawee must have been a "bona fide holder" or a "holder in due course". A very recent case in Illinois is a

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[43]Ellis v. Life Ins. & Trust Co., 4 Oh. St. 628; Bank of Williamson v. Bank, 66 W. Va. 545, 66 S. E. 761.

In First Nat. Bank v. U. S. Nat. Bank, *supra,* the court said: "The holder must refund to a drawee who is not guilty of actual fault if the holder was negligent in not making due inquiry concerning the validity of the check before he took it, and if the drawee can be said to have been excused from making inquiry before taking the check because of having had a right to presume that the holder had made such inquiry" (citing cases).

In Canadian Bank of Commerce v. Bingham, 30 Wash. 484, 46 Wash. 657, where it was considered that drawee and holder had both been careless it was concluded that drawee should recover because it appeared that its carelessness had not prejudiced the defendant in any way.

[44]First Nat. Bank v. U. S. Nat. Bank, *supra.*

[45]First Nat. Bank v. Bank, 22 Neb. 769; First Nat. Bank of Marshalltown v. Bank, 107 Ia. 327; First Nat. Bank of Portland v. U. S. Nat. Bank, 100 Ore. 264.

striking example of this.[46] The defendant bank had collected on a forged check from the drawee bank (plaintiff); but since the defendant still held on deposit to the credit of the person from whom the forged document had been taken a portion of the proceeds, it was held that to that extent the defendant had to refund. The court distinctly proceeded on the ground that in order for defendants in such situations to resist the demand for reimbursement they must stand as holders in due course of the instruments in question, and reliance was placed upon the provision in Sec. 54, N. I. L. to the effect that notice to a transferee of an infirmity before paying the full amount agreed prevents such transferee from being a holder in due course as to payments made thereafter.

It may very well be that recovery by the drawee cannot be resisted by one who has by his own acts thrown the drawee off guard or facilitated the fraud; it is quite a different thing to say that only holders in due course are protected against recovery. Yet the decision in the Illinois case may be perfectly sound. Apparently the depositor to whose credit defendant held the undrawn fund was either the forger himself or one through whose assistance the forger realized on the spurious check. In that case there would seem to be good sense in allowing the drawee to recover the amount still held to the credit of the forger or his confederate.[47]

But suppose the defendant is a bank which has received the forged item from a depositor who has had no connection whatever with the furtherance of the fraud and no withdrawals at all have been made, surely under the prevailing view such defendant would not be required to refund. Yet it is not, according to the general American view, a holder in due course. Indeed in the earliest American case applying *Price v. Neal* it appeared that the drawee had paid the forged order only by giving the holder-presenter credit therefor in his account with the drawee. It was nevertheless held that the drawee had to bear the loss.[48]

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[46]First State Bank & Trust Co. v. Bank (1924) 145 N. E. 382. See also Northwestern Nat. Bank v. Bank, 107 Mo. 402; Dep. Bank v. Bank, 10 Ky. L. Rep. 350.

[47]See Com. & F. Bank v. Bank, 30 Md. 11.

[48]Levy v. U. S. Bank, 1 Binn. 27.

The protection of holders in due course, while due to special considerations growing out of the nature and function of negotiable paper, after all is quite analogous to the protection given in other situations to bona fide purchasers of property. The law by which the rights and duties of parties with reference to negotiable instruments are determined is very largely an interesting mixture of familiar principles of contract and property law, modified not infrequently to meet the special problems of the mercantile world. In the protection of the holder in due course the instrument is obviously dealt with as a piece of property, and to come within the favored class one must take for value before maturity, not in bad faith, etc.[49] But in determining whether a drawee shall be allowed to recover back money paid on a forged order the whole problem is one of equitable relief, often involving a delicate weighing of equitable considerations on each side. It may well be some test of the merit of the defendant's position that he is or is not technically a holder in due course. It is submitted, however, that his status in that regard should not finally settle the merit of his position in the action to recover back the money claimed to have been paid him by mistake.[50]

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[49]It is unfortunate that the expression "holder in due course" is so frequently used loosely. It is a technical expression signifying a person as to whom certain things are true and to whom certain special indulgences are shown.

[50]Professor Greeley appears to think that the answer to the question as to whether the defendant took the instrument as a holder in due course should settle his merit or demerit in the action by the drawee to recover back. 20 ILL. L. REV. 160.