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## **Risk of Loss Due to Forgery of Drawer's Signature on a Bill of Exchange or Check-The Operation of the Doctrine of Price v. Neal in Pennsylvania**

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situations in which it is permitted, it seems safe to say that they are essentially the same as those stated in the *Sorrells* case. True, the *Wasson* case apparently injects a corrupt private motive on the part of the entrapper as an additional requisite, but this was completely ignored in the references to entrapment in the cases which followed it.

Oftentimes when a case involves the defense of entrapment, the parallel question is raised as to the status of the entrappers, the contention being made that when they instigate the act or aid in its commission, they are equally guilty with the defendant.<sup>18</sup> The Pennsylvania doctrine on this point seems to be unequivocal. In the leading case of *Campbell v. Comm.*<sup>19</sup> it is stated as follows: " \* \* \* \* if he intended and continued in that intention from the time he came into the coal regions as a detective, to ferret out and make known the crimes and secret frauds of such others, in order to effect their arrest and punishment, then he is not to be regarded as an accessory before the fact." This case has been cited and followed in *Comm. v. Wasson*, *Comm. v. Earl*,<sup>20</sup> *Comm. v. Smith*,<sup>21</sup> and *Comm. v. Hollister*.<sup>22</sup>

W. H. Wood.

#### RISK OF LOSS DUE TO FORGERY OF DRAWER'S SIGNATURE ON A BILL OF EXCHANGE OR CHECK—THE OPERATION OF THE DOCTRINE OF PRICE v. NEAL IN PENNSYLVANIA

In 1762 Lord Mansfield, in the famous case of *Price v. Neal*,<sup>1</sup> decided that the drawee of a bill of exchange is bound to know the drawer's signature, and if the drawee pays a bill on which the drawer's signature is forged, he cannot recover back from a holder the amount paid. This doctrine constitutes a well recognized exception to the rule that money paid under mistake of fact can be recovered. The case leading to the adoption of this rule in America was the Pennsylvania case of *Levy v. The Bank*.<sup>2</sup> In the many states in this country in which the question arose prior to the adoption of the Uniform Negotiable Instruments Law, the rule of *Price v. Neal* was adopted.<sup>3</sup>

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<sup>18</sup>It has been suggested that entrapment by public officers should be a punishable offense on their part. 29 H. L. Rev. 100.

<sup>19</sup>84 Pa. 187.

<sup>20</sup>91 Pa. Super. Ct. 447.

<sup>21</sup>89 Pa. Super. Ct. 190.

<sup>22</sup>157 Pa. 13.

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<sup>1</sup>3 Burr. 1354, 97 Eng. Repr. 871; 1 W. Bl. 390, 96 Eng. Repr. 221.

<sup>2</sup>1 Binn. (Pa.) 37 (1802).

<sup>3</sup>Cases collected in 3 R. C. L. 615; 7 C. J. 688; 12 A. L. R. 1089, 71 A. L. R. 337; Bran-  
nan's Negotiable Instruments Law (5th), 615; Morse on Banks and Banking, Sec. 463 et seq.,  
Woodward on Quasi-Contracts, Sec. 80.

With but two or three possible exceptions the rule has been held to have been codified by Section 62 of the N. I. L.<sup>4</sup> The rule seems to be founded on sound public and commercial policy.<sup>5</sup> In fact, it has been stated:<sup>6</sup>

"This rule is absolutely necessary to the circulation of drafts and checks, and is based on the presumed negligence of the drawee in failing to meet its obligation to know the signature of its correspondent. Conditions would be intolerable if the retiring of commercial paper through its payment by the drawee did not close the transaction, but it was possible at an indefinite time in the future to reopen the matter and recover the money if the paper proved to have been forged. *No one would dare handle it, and it would pass out of use regardless of its convenience or necessity as a part of the life of business.*"

Pennsylvania, however, by the Act of April 15, 1849, P. L. 424, Section 10,<sup>7</sup> has expressly abrogated the doctrine of *Price v. Neal*, allowing the drawee to recover back money paid upon bills or checks bearing forged drawer's signatures. This Act has been held to have been neither expressly nor impliedly repealed by the N. I. L.<sup>8</sup>

It is evident that this rule has not driven bills and checks from use in this Commonwealth, and it cannot be seen that their use is seriously impeded. If the two apparently contrary rules equally take care of the requirements of business, there must be something about their operation which tends to make them less contrary than their words indicate.

Other jurisdictions start with the rule that they will place the risk of loss

<sup>4</sup>Brannan's Negotiable Instruments Law (5th), comment under Sec. 62. Section 62 (Act of 1901, P. L. 194, Sec. 62) states: "The acceptor by accepting the instrument . . . admits.—(1) The existence of the drawer, the genuineness of his signature . . ."

<sup>5</sup>Ames, "The Doctrine of *Price v. Neal*", 4 Harv. L. R. 297; F. C. Woodward, "Risk of Forgery or Alteration of Negotiable Instruments", 24 Col. L. R. 469, 470 (1924); Ralph W. Aigler, "The Doctrine of *Price v. Neal*", 24 Mich. L. R. 809, 819 (1926), wherein is collected statements by various courts as to the desirability of such a rule.

<sup>6</sup>Editorial comment in 12 A. L. R. 1089, 1091.

<sup>7</sup>"Whenever any value or amount shall be received as a consideration in the sale, assignment, transfer, or negotiation, or in payment of any bill of exchange, draft, check, order, promissory note, or other instrument negotiable within this Commonwealth by the holder thereof, from the indorsee or indorsees, or payer or payers of the same and the signature or signatures of the person or persons, represented to be parties thereto, whether as drawer, acceptor or indorser, shall have been forged thereon, and such value or amount by reason thereof erroneously given or paid, such indorsee or indorsees, as well as such payer or payers respectively, shall be legally entitled to recover back from the person or persons previously holding or negotiating the same, the value or amount so as aforesaid given, or paid by such indorsee or indorsees, or payer or payers respectively, to such person or persons, together with lawful interest thereon from the time that demand shall have been made for repayment of the same."

<sup>8</sup>Colonial Trust Co. v. National Bank of Western Penna., 50 Pa. Super. Ct. 510 (1912), Union National Bank v. Franklin National Bank, 249 Pa. 375 (1915). These decisions have been criticized as being fatal to uniformity, 30 Yale L. J. 296 (1921).

on the drawee because he is presumed to know the drawer's signature.<sup>9</sup> This is merely another way of saying that there is a presumption of negligence on the part of a drawee who fails to recognize the drawer's signature. When negligence can be found there is no necessity for resorting to this presumption. Thus if the holder is negligent, the drawee will be allowed to recover.<sup>10</sup> What conduct will constitute negligence on the part of the holder need not be discussed here further than to note that the care necessary to fulfill the holder's duty will vary with the holder's relation to the paper; i. e., the one who cashes a check is under a duty to use greater care than one through whose hands a check passes in the process of collection.<sup>11</sup> Going one step further, even though the holder has been negligent, the drawee will be barred from recovery if he has been actually negligent.<sup>12</sup>

Thus the rule in other jurisdictions may be stated: if both parties are negligent, or neither party is negligent, the drawee cannot recover; while if the holder alone is negligent, the drawee can recover.

In this Commonwealth, by virtue of the Act of 1849, the risk is placed on the holder to start with. It was stated in an early and leading case, however,<sup>13</sup>

"The mere fact of payment is no longer, eo instanti, and of itself a bar to the recovery of the money, but the principles of the commercial law are still applicable, and there is still the same necessity as before for care, diligence and proper notice under the settled rules of negotiable paper . . . the drawee is still presumed to know the drawer's signature . . . though the first slip is no longer conclusive against him."

This case has been consistently followed, and a drawee can be estopped from exercising his right to recover by negligence in failing to exercise due diligence in discovering the forgery and promptly notifying the person to whom the check was paid,<sup>14</sup> or by paying a series of such checks, and thus leading the holder to believe that the signature has been recognized as genuine.<sup>15</sup> The Pennsylvania courts have held the drawee banks to a very strict duty in this regard. The rule virtually is that payment, examination

<sup>9</sup>Supra note 3.

<sup>10</sup>12 A. L. R. 1087, 1097 (Supplemented by 71 A. L. R. 337, 339); *Brannan's Negotiable Instruments Law* (5th), "Equitable Exceptions to the rule in *Price v. Neal*", at p. 702-705; *Woodward*, supra n. 5, at page 473; *Aigler*, supra n. 5, at page 820.

<sup>11</sup>12 A. L. R. 1089, 1099, supplemented in 71 A. L. R. 337, 339.

<sup>12</sup>12 A. L. R. 1089, 1106, supplemented in 71 A. L. R. 337, 340.

<sup>13</sup>*Iron City National Bank v. Fort Pitt National Bank*, 159 Pa. 46, 50, 52 (1893).

<sup>14</sup>*Union National Bank v. Franklin National Bank*, 249 Pa. 375 (1915); *United States National Bank v. Union National Bank*, 268 Pa. 147 (1920); *Union National Bank v. Farmer's and Mechanic's National Bank*, 271 Pa. 107 (1921), and *Market St. Title and Trust Company v. Cheltenham Ave. Trust Co.*, 296 Pa. 230 (1929).

<sup>15</sup>*Union National Bank v. Farmer's and Mechanic's National Bank*, 271 Pa. 107 (1921).

and dismissal from further consideration without discovering the forgery amounts to lack of due diligence and bars the drawee's right to recover.<sup>16</sup> What might be the rule where both parties are negligent cannot be stated since the point seems never to have been raised.

Comparing the Pennsylvania and foreign rules the conclusion seems inevitable that in the vast majority of cases the same result would be reached in a given state of facts. Where we would allow a drawee to recover under the Act of 1849, other states might allow a recovery under an "equitable exception"; and where in Pennsylvania the drawee would be "estopped" (and this estoppel is very easy to acquire) other states would deny recovery under Section 62 of the N. I. L., which codifies *Price v. Neal*. In all jurisdictions the courts are merely trying to temper harsh cases, where one of two innocent parties must suffer from the wrong of a third party. It is only in the very narrow line of cases, in which all things may be equal, that the courts, following different policies, will differ in result. These exact situations will occur so infrequently, that neither rule can be said to hinder the free use of credit instruments. Either rule would seem to suffice its purpose of furnishing a ready guide as to where the loss will fall in the comparatively infinitesimal number of instances where such instruments are found in circulation.

J. Boyd Landis.

### MISJOINDER OF TORT FEASORS

Having ascertained that a cause of action based on tort has accrued, the plaintiff's next consideration is whom to make parties defendant.

Under the common law of Pennsylvania if the tort is one that is deemed joint, the plaintiff may in one action, at his election, sue all the wrongdoers,<sup>1</sup> sue any number of them, or sue each one separately.<sup>2</sup> Where the tort is separate and distinct, the wrongdoers had to be sued separately.<sup>3</sup>

Accordingly, where the plaintiff contemplated suit against two or more tortfeasors jointly, he had to be sure that the facts showed a joint tort. If it later appeared that there in fact was no joint liability, plaintiff was confronted with a nonsuit or a verdict against him,<sup>4</sup> unless he amended his pleadings at the trial by striking out the defendant who was not a joint tortfeasor upon request properly made to the court. If the amendment were allowed, the

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<sup>16</sup>See all cases cited supra note 14.

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<sup>1</sup>*Klauder v. McGrath*, 35 Pa. 128 (1860).

<sup>2</sup>*Rowland v. Phila.*, 202 Pa. 50 (1902); *Gates v. P. R. R.*, 150 Pa. 50 (1892).

<sup>3</sup>*Dutton v. Lansdowne Borough*, 198 Pa. 563 (1901); *Wiest v. Traction Co.*, 200 Pa. 148 (1901).

<sup>4</sup>*Leidig v. Bucher*, 74 Pa. 67 (1873); *Polis v. Heinzmann*, 276 Pa. 315 (1923).