The Doctrine of *Price v. Neal* in English and American Forgery Law: A Comparative Analysis

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I. INTRODUCTION

For the last several centuries, a paper-based payment system has been at the center of American, English, and transatlantic commercial activities. Despite the increasing use of electronic fund transfer (EFT) systems in commercial transactions, paper-based payment systems continue to dominate commercial activities.[1] The legal doctrines governing the paper-based systems, primarily the common law of negotiable instruments ("bills and notes" in English usage), have their roots in fourteenth century English law[2] and were first codified in the late nineteenth century in both England[3] and the United States.[4] For the last

1. The early development of EFT was accompanied by widespread predictions that it would rapidly displace checks as the primary method of payment. *See, e.g.*, Dale L. Reistad, *The Coming Cashless Society*, 10 BUS. HORIZONS 23 (1967). By the late 1970s, however, these predictions proved to be premature. A notable lack of consumer demand, most likely the result of uncertainty over legal rights and duties under EFT systems greatly hampered the expected growth of EFT. *See* Elizabeth C. Hirschman, *Consumer Payment Systems: The Relationship of Attribute Structure to Preference and Usage*, 55 J. BUS. L. 531 (1982). There has been a considerable increase in the number of EFT, although much of this growth is attributable to use of EFT by large business organizations and governments. In the early 1980s, it was estimated that in the private sector, fund transfer by EFT accounted for only 1%-2% of check volume, *see Business Bulletin: Uncle Sam, not the private sector, does better at eliminating checks*, WALL ST. J., Mar. 1, 1984, at A1, and that nationwide, 95% of employees were paid by check. *See Business Bulletin: Electronic Deposits replace payroll checks for many workers*, WALL ST. J., Jan. 20, 1983, at A1. A report by Arthur D. Little, Inc., *Issues and Needs in the Nation's Payment Systems* (1982), found that in 1980, EFT numbered 56 million while 34 *billion* transactions were conducted by check, and 1.3 *billion* transactions were conducted by bank credit cards. *See also* Steven B. Dow, *Damages under the Federal Electronic Transfer Act: A Proposed Construction of Sections 910 and 915*, 23 AM. BUS. L.J. 1 (1985). In the official comments to the 1990 revision of the Uniform Commercial Code [hereinafter R.U.C.C.], *see infra* § 4-101, the drafters state that, in 1990, the "annual volume was estimated by the American Bankers Association to be about 50 billion checks." U.C.C. § 4-101. Data from 1995 show that there has been a significant increase in the use of EFT by all sectors of the economy, but paper-based payments remain a significant portion of fund transfers. *See* COMMITTEE ON PAYMENT AND SETTLEMENT OF THE CENTRAL BANKS OF THE GROUP OF TEN COUNTRIES, BANK FOR INTERNATIONAL SETTLEMENTS, STATISTICS ON THE PAYMENT SYSTEMS IN THE GROUP TEN COUNTRIES 110 (1996). With respect to dollar amounts, EFT has surpassed all other payment systems, including checks, credit cards, and debit cards, but this is largely due to the heavy use of EFT by large banks, governments, and large corporations. *See id.* With respect to the number of transactions using various payment methods, the estimated 63-65 *billion* check transactions each year exceeds the number of transactions using all other systems combined by a factor of approximately four. Check transactions constitute approximately 77% of all transactions (1995 data). *See id.*; *see also* Telephone Interview with Jack Walton, Manager of the Check Section, Division of Reserve Bank Operations and Payment Systems, Board of Governors of the Federal Reserve Board, Washington, D.C. (Mar. 17, 1997).

2. *See* J. MILNES HOLDEN, THE HISTORY OF NEGOTIABLE INSTRUMENTS IN ENGLISH LAW 21-29 (1955).

3. *See* Bills of Exchange Act of 1882, 45-46 Vict. ch. 61, 5 HALSBURY'S STATUTES OF ENGLAND AND WALES 342 (4th ed. 1993 reissue).

4. The first project of the National Conference of Commissioners on Uniform State Laws (N.C.C.U.S.L.) was the Uniform Negotiable Instruments Law (N.I.L.). It was promulgated in 1896, eventually to be adopted by all states. *See generally* NEGOTIABLE INSTRUMENTS LAW, 3A U.L.A. 479 (1981); *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 403-11,

half century, the American doctrine has been embodied in the original version of Article 3 (and to some extent, Article 4) of the Uniform Commercial Code (U.C.C.).[5] The continuing national importance of this doctrine is underscored, in part, by the efforts of the National Conference of Commissioners on Uniform State Laws (N.C.C.U.S.L.) in its recently completed major revision of Articles 3 and 4, which is currently nearing the end of the state-by-state adoption process.[6]

674-75 (2d ed. 1985); John M. McCabe, *Foreword, Symposium: Revised U.C.C. Articles 3 & 4 and New Article 4A*, 42 ALA. L. REV. 367 (1991); Fred H. Miller, *The Benefits of New UCC Articles 3 and 4*, 24 UCC L.J. 99, 99-100 (1991); Steve H. Nickles, *Problems of Sources of Law Relationships Under the Uniform Commercial Code—Part II: The English Approach and a Solution to the Methodological Problem*, 31 ARK. L. REV. 171, 218 n.311 (1977) [hereinafter *Nickles II*]; Edward Rubin, *Efficiency, Equity and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551, 553 (1991) [hereinafter Rubin, *Efficiency and Equity*]; Edward L. Rubin, *Uniformity, Regulation, and Federalization of State Law: Some Lessons from the Payment System*, 49 OHIO ST. L.J. 1251, 1253, 1261 (1989) [hereinafter Rubin, *Federalization*]; U.C.C. Prefatory Note i (1990); DOUGLAS J. WHALEY, PROBLEMS AND MATERIALS ON NEGOTIABLE INSTRUMENTS 3 (1981); John L. Gedid, *U.C.C. Methodology: Taking a Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 345, n.22 (1988).

The N.I.L. "was closely modeled on the British Bills of Exchange Act of 1882. . . ." Robert L. Jordan & William D. Warren, *Introduction, Symposium: Revised U.C.C. Articles 3 & 4 and New Article 4A*, 42 ALA. L. REV. 373, 385 (1991); *see also* Rubin, *Efficiency and Equity*, *supra* at 553; Rubin, *Federalization*, *supra* at 1253 (suggesting the N.I.L. was "inspired by" the Bills of Exchange Act).

5. *See* U.C.C. arts. 3-4 (1990). Articles 3 and 4 of the Code govern negotiable instruments, check collections, some bank-customer relations, and certain other banking practices. For a table listing states that have adopted the U.C.C. and state codifications, see UNIF. COMMERCIAL CODE art. 3, 2 U.L.A. 1-2 (1991). The original U.C.C. was drafted by the National Conference of Commissioners on Uniform State Laws (N.C.C.U.S.L.) in conjunction with the American Law Institute beginning in the mid-1940s. For background on the U.C.C. drafting process, see generally Fred H. Miller, *U.C.C. Articles 3, 4 and 4A: A Study in Process and Scope*, 42 ALA. L. REV. 405, 406 (1991) [hereinafter Miller, *Process and Scope*]; *see* Rubin, *Efficiency and Equity*, *supra* note 4, at 552-56. For a discussion on the scope of the recent revisions to the original U.C.C. and the extent to which these change it, see, for example, Miller, *Process and Scope*, *supra* at 416-24; *see also infra* note 6.

Article 3 has been described as "a restatement of the N.I.L.," Jordan & Warren, *supra* note 4, at 385, and "simply the preservation of the NIL," Rubin, *Efficiency & Equity*, *supra* note 4, at 554. The drafters of the revised U.C.C. state that the N.I.L. was "reorganized and modernized" by the Code. *See* U.C.C. Prefatory Note 2 (1990). Assessments of the Code are varied. John M. McCabe, Legal Council to the N.C.C.U.S.L., describes the U.C.C. as a "watershed event. For here is the monumental distillation of the common law, modified for sound economic reasons, into statute. It was unprecedented, and is extraordinarily successful. It should be regarded as a triumph of democratic processes. . . ." McCabe, *supra* note 4, at 369. Writing shortly after Article 4 was promulgated, Frederick Beutel described the article as "a deliberate sell-out of the American Law Institute and the Commission of Uniform Laws to the bank lobby. . . ." Frederick K. Beutel, *The Proposed Uniform [?] Commercial Code Should Not Be Adopted*, 61 YALE L.J. 334, 362-63 (1952). Professor Rubin suggests that the drafting process of the original Code was "dominated by banking interests." Rubin, *Efficiency and Equity*, *supra* note 4, at 592. Rubin further claimed that the Code versions "perpetuate the one-sided, pro-bank perspective." *Id.*

6. The Code revisions, which began in 1985 and were completed in 1990, attempt to clarify the effect of final payment on the payor bank's restitutionary rights, which make the revisions very relevant for this Article, as well as to accommodate the development of modern

Arguably the most important and problematic area within the entire field of negotiable instruments law is the law relating to forgery, especially the allocation of losses that result from forgery.[7] Within paper-

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electronic check processing methods. *See* Robert G. Ballen et al., *Commercial Paper, Bank Deposits and Collections, and Other Payment Systems*, 45 BUS. LAW. 2341, 2355-57 (1990). *See generally* Robert G. Ballen et al., *Commercial Paper, Bank Deposits and Collections, and Other Payment Systems*, 44 BUS. LAW. 1515 (1989); Thomas C. Baxter, Jr. et al., *Revised Articles 3 and 4 of the UCC: Will New York Say Nix?*, 114 BANKING L.J. 219 (1997); John J.A. Burke, *Loss Allocation Rules of the Check Payment System With Respect to Wrongful Honor; Alterations; Lost, Stolen, or Destroyed Checks; and Forged Accounts: An Explanation of the Present and Revised UCC Articles 3 and 4*, 26 UCC L.J. 41 (1993) [hereinafter *Burke II*]; John J.A. Burke, *Loss Allocation Rules of the Check Payment System With Respect to Forged Drawer Signatures and Forged Indorsements: An Explanation of the Present and Revised UCC Articles 3 and 4*, 25 UCC L.J. 319 (1993) [hereinafter *Burke I*]; Nan S. Ellis & Steven B. Dow, *Banks and Their Customers under the Revisions to Uniform Commercial Code Articles 3 and 4: Allocation of Losses Resulting From Forged Drawers' Signatures*, 25 LOYOLA L.A. L. REV. 57 (1991) [hereinafter Ellis & Dow, *Banks and Their Customers*]; Donald W. Garland, *A New Law of Deposits and Collections: Revised Article 4 of the UCC*, 110 BANKING L.J. 51 (1993); Gila E. Gellman, *Bank Liability and Defenses in Forged Check Cases*, 112 BANKING L.J. 157 (1995); Miller, *Process and Scope*, *supra* note 5, at 409-16; Miller, *supra* note 4; Fred H. Miller & William B. Davenport, *Introduction to the Special Issue on the Uniform Commercial Code*, 45 BUS. LAW. 1389 (1990); Robert D. Mulford, *New Federal Reserve Actions Modifying the UCC: Intraday Posting, Same-Day Settlement, and MICR Encoding Warranties*, 26 UCC L.J. 99 (1993); Patricia B. Fry, *Dedication to Fairfax Leary, Jr.*, 42 ALA. L. REV. 351 (1991). The revised version of Articles 3 and 4 has supplanted the original version in nearly every jurisdiction, but for purposes of this Article the revised version will be referred to as the R.U.C.C. and the original version will be referred to as the U.C.C. For additional commentary on an earlier draft of the R.U.C.C., see Steven B. Dow & Nan S. Ellis, *The Payor Bank's Right to Recover Mistaken Payments: Survival of Common Law Restitution Under Proposed Revisions to Uniform Commercial Code Articles 3 and 4*, 65 IND. L.J. 779 (1990) [hereinafter Dow & Ellis, *Survival of Common Law Restitution*].

As of the date of this publication, the jurisdictions that have adopted the U.C.C. revisions are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. For a table of current state adoptions of Revised Article 3, see U.C.C. art. 3, 2 U.L.A. 1 (1991). For a table of current state adoptions of Article 4, see U.C.C. art. 4, 2B U.L.A. 1 (1991). A bill to adopt the revisions was introduced in the Massachusetts legislature in 1997. *See* Publication of the N.C.C.U.S.L., *A Few Facts About Revised Article 3 of the UCC*, Feb. 1, 1997. It is worth noting that the New York Law Revision Commission has concerns over the revisions and, as a result, New York has not adopted them. *See generally* Baxter et al., *supra*.

7. *See* Neil O. Littlefield, *Articles 3, 4 and 4A*, 49 BUS. LAW. 1937 (1994) ("[L]oss allocation problems . . . still dominate the Articles 3 and 4 litigation."); Miller, *supra* note 4, at 108 ("Perhaps no area under present Article 3 produces as much litigation as that involving the allocation of loss for forgery and alteration."); Gellman, *supra* note 6, at 159 ("Whether economic times are good or bad, fraud and forgery never seem to go away."); Donald J. Rapson, *Loss Allocation in Forgery and Fraud Cases: Significant Changes Under Revised Articles 3 and 4*, 42 ALA. L. REV. 435 (1991) [hereinafter Rapson, *Loss Allocation*]. Mr. Rapson argues that conflicting principles and policies as well as "deficiencies or gaps" in Code Articles 3 and 4 have resulted in "extensive litigation." *See* Rapson, *Loss Allocation*, *supra*, at 436. Later in the article

based payment systems, the orders and promises to pay on which these systems are based are all authenticated by signatures, making forgery central to the operation of these systems. Forgery continues to account for significant losses for banks, their customers, and the economy as a whole. Two decades ago, losses from forged checks[8] alone were estimated at between $60 million and $1 billion annually. These losses are higher today, despite the growing importance of EFT. A 1995 survey by the Federal Reserve Board estimated that banking industry losses from check fraud, which includes forgeries, were between $475 million and $875 million each year. Annual losses to the entire national economy were estimated to be between $10 billion and $60 billion.[9] Despite the

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Rapson states that this litigation "has resulted in ever-increasing uncertainty and confusion as to the resolution of these issues rather than increased clarity and predictability." *Id.* at 448. Professor Edward Rubin states that "[f]raud and forgery probably raise the most complex problems and certainly have provoked the most complex statutory response [in the R.U.C.C.]." Edward L. Rubin, *Policies and Issues in the Proposed Revision of Articles 3 and 4 of the UCC*, 43 BUS. LAW. 621, 646 (1988) [hereinafter Rubin, *Policies and Issues*]. In one article on fraud, of which forgery is a part, the authors report that "[f]raud happens." Marion W. Benfield, Jr. & Peter A. Alces, *Bank Liability for Fiduciary Fraud*, 42 ALA. L. REV. 475, 476 (1991).

Professors White and Summers caution that the material on fraud and forgery and its relationship with negligence has been described by a student as one "for adults only." *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 548 (4th ed. 1995). They add that it is "abstract, difficult and interrelated" and suggest that "the student and the neophyte lawyer will have to proceed slowly and back-track frequently." *Id.* With respect to the entire body of Articles 3 and 4, one author suggested that "[a] first reading . . . whether of the former version or the revisions, can leave the nonspecialist feeling that the subject is beyond comprehension." Gail K. Hillebrand, *Revised Articles 3 and 4 of the Uniform Commercial Code: A Consumer Perspective*, 42 ALA. L. REV. 679, 684 (1991).

8. In this context, "forged checks" are checks upon which there is a forged drawer's signature or forged indorsement. Typically, this term refers only to a check with a forged drawer's signature. *See* Steven B. Dow & Nan S. Ellis, *The Proposed Uniform New Payments Code: Allocation of Losses Resulting from Forged Drawers' Signatures*, 22 HARV. J. LEGIS. 399, 400 (1985) [hereinafter Dow & Ellis, *Proposed New Payments Code*]. For an explanation of these terms, see *infra* note 13-21 and accompanying text.

9. *See generally* Board of Governors of the Federal Reserve System, *Report to the Congress on Funds Availability Schedules and Check Fraud at Depositary Institutions* 5-7 (1996); Telephone Interview with Jack Walton of the Federal Reserve Board, Washington, D.C. (Mar 17, 1997).

A recent article by Professor Ronald Mann argued that due to technical changes in payment and credit systems the concept of negotiability and its supporting doctrinal structure are largely irrelevant. *See generally* Ronald J. Mann, *Searching for Negotiability in Payment and Credit Systems*, 44 U.C.L.A. L. REV. 951 (1997). Mann suggests that new technology and practices have developed that dispense with negotiable documents and to some extent dispense with paper documents entirely. *See id.* Mann further believes that at some point these developments will result in the total abolition of paper documents and their authorizing signatures. *See id.* This may all be true, but for purposes of this present study, it must be pointed out that according to Professor Mann, negotiability remains quite relevant in checking systems. *See id.* Given the continued dominance of checks in the national payment system, negotiability and related doctrines will continue to be relevant for some time. *See generally supra* note 1. Second, and more important, the central issue discussed in this Article will not be resolved by the advent of nonsignatory payment devices or even by the advent of nondocument digital systems. This is

significance of this problem, many of the legal doctrines governing forgery loss allocation remain quite problematic, even after nearly three centuries of development.[10]

From the standpoint of comparative law, forgery presents an interesting problem because English and American forgery law have developed along very different lines, especially during the second half of the nineteenth century. This development is all the more puzzling when we consider the common origins of the doctrine, the great similarities in related substantive law, and the very similar economic and legal systems of these two countries.[11]

In view of both the comparative and the economic importance of forgery, it is surprising that there has never been any comprehensive analysis of the comparative development of Anglo-American forgery law.[12] The purpose of this Article is to fill part of this gap in the negotiable instruments and comparative law literature by presenting (1) an overview and analysis of the development of both the English and American doctrine; (2) an overview and analysis of the divergence of

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because the key function signatures perform in a paper-based system, namely authentication by the party ordering the payment, must necessarily be fulfilled in a nonsignatory system by some other device, such as a digital signature. There is no doubt that such devices are currently, or soon will be, subject to fraudulent use by wrongdoers. Under these new systems, both those currently in use or being developed, as well as those beyond our present imaginations, bankers will undoubtedly continue to make unauthorized payments out of their customers accounts with new "techno-forgers" absconding with the funds. In such cases, the issue is precisely the same as it was in the seventeenth century: which innocent party must bear the resulting loss? A good example of this process can be seen with the modern advent of MICR encoding, which was developed to enable high-speed, automated check processing. As soon as MICR encoding came into being, the problem of MICR fraud followed shortly thereafter.

10. There are two basic types of forgeries: forged drawer's signatures and forged indorsements. *See* John D. Colombo, Note, *Commercial Paper and Forgery: Broader Liability for Banks?*, 1980 U. ILL. L. REV. 813, 820. As will be discussed in this Article, loss allocation resulting from forged indorsements is fairly well-settled, while loss allocation resulting from forged drawer's signatures remains problematic, even though some of the issues were clarified in the R.U.C.C. An item with *both* a forged drawer's signature and a forged indorsement, referred to as a "double forgery," is treated by the courts as a forged drawer's signature for purposes of loss allocation. *See, e.g.*, Perini Corp. v. First Nat'l Bank, 553 F.2d 398 (5th Cir. 1977), usually considered to be the leading case. *See also* Rapson, *Loss Allocation*, *supra* note 7, at 468-73. For an overview of forgery loss allocation, see, for example, Dow & Ellis, *Proposed New Payments Code*, *supra* note 8.

11. The divergence of English and American forgery doctrine was first discussed in a recent article published in the United Kingdom. *See* Steven B. Dow, *Restitution of Payments on Cheques with Forged Drawers' Signatures: Loss Allocation Under English Law*, 4 RESTITUTION L. REV. 27 (1996) [hereinafter Dow, Restitution on Payments].

12. In every American study of forgery law, the early English doctrine serves as the background for the American doctrine that followed from it. None of these studies looks at the development of the English doctrine that took place after the American doctrine was established. *See, e.g.*, Thomas L. Cooper, Note, *The Doctrine of* Price v. Neal *Under Articles Three and Four of the Uniform Commercial Code*, 23 U. PITT. L. REV. 198 (1961).

English law from American law that took place during the nineteenth and early twentieth centuries; (3) a consideration of some doctrinal explanations for this significant divergence; (4) a comparative analysis of the current law on the subject; and (5) some suggestions on the direction of the doctrine's future development and of future research in this area.

II. OVERVIEW OF THE PROBLEM

The basic problem of forgery loss allocation first begins when a check,[13] or another item bearing a forgery,[14] is presented[15] to a bank either directly[16] or through the check collection system.[17] If the bank fails to

13. The R.U.C.C. defines a check ("cheque" in English usage) as "a draft . . . payable on demand and drawn on a bank or (ii) a cashier's check or teller's check." U.C.C. § 3-104(f) (1990). The U.C.C. defined a check as "a draft drawn on a bank and payable on demand." U.C.C. § 3-104(2)(b) (1987). "Like all drafts, it is a written order (direction) by a drawer (customer) to the drawee (payor bank) to pay a sum of money to a third party (payee) or other person as instructed by the payee." *Id.* § 3-104(i)(b)-(d); *see* Dow & Ellis, *Proposed New Payments Code*, *supra* note 8, at 402 n.12. "Generally, the *drawer* is the person who (or whose agent) signs a cheque or draft ordering the drawee to pay. The *drawee* is the bank or other entity to whom the order in the cheque or draft is addressed. The *payee* is the person to whom the drawer ordered the drawee to pay. The bank *accepts* an item by signing and returning it to the presenting party. A drawee that has accepted a cheque or draft becomes an *acceptor*." Dow, *Restitution on Payments*, *supra* note 11, at 28 n.1. For a discussion of these concepts, see generally ROBERT BRAUCHER & ROBERT A. REIGERT, INTRODUCTION TO COMMERCIAL TRANSACTIONS 63-64 (1977); WHALEY, *supra* note 4. For a brief overview of the acceptance and payment process, see Dow & Ellis, *Proposed New Payments Code*, *supra* note 8, at 402-05. For a thorough treatment of this topic under American law, see generally Fairfax Leary, Jr., *Check Handling Under Article Four of the Uniform Commercial Code*, 49 MARQ. L. REV. 331 (1965); Walter D. Malcolm, *How Bank Collection Works—Article 4 of the Uniform Commercial Code*, 11 HOW. L.J. 71 (1965); Colombo, *supra* note 10. For an overview of this process under English law, see, for example, FRANK R. RYDER & ANTONIO BUENO, BYLES ON BILLS OF EXCHANGE (26th ed. 1988) [hereinafter BYLES 1988]; A.G. GUEST, CHALMERS AND GUEST ON BILLS OF EXCHANGE, CHEQUES AND PROMISSORY NOTES (14th ed. 1991)] [hereinafter CHALMERS & GUEST 1991].

14. A "forgery falls into the general classification of unauthorized signatures, including those made without actual, implied, or apparent authority." Dow & Ellis, *Proposed New Payments Code*, *supra* note 8, at 405; *see* U.C.C. § 1-201(43) (1990). This section expressly includes forgery under the definition of "unauthorized signature." U.C.C. § 3-504(1) (1987).

15. "Presentment" is a demand for payment made upon the drawee bank. *See* R.U.C.C. § 3-501; U.C.C. § 3-504(1).

16. This direct presentment is commonly referred to as a presentment "across the counter."

17. The payee will either initiate the check collection process personally or transfer the check to another person who will initiate the collection process. Collection begins when the payee or this other person deposits the item for the first time in a depositary bank. *See* U.C.C. § 4-105(2) (1990); U.C.C. § 4-105(a) (1987). The collection process is one of transferring the item from the depositary bank to the payor bank. *See* U.C.C. § 4-105(3) (1990); U.C.C. § 4-105(b) (1987). The depositary bank may send the item to the payor bank directly or more typically, through one or more intermediary banks. *See* U.C.C. § 4-105(4) (1990); U.C.C. § 4-105(c) (1987). *See generally supra* note 13.

detect the forgery,[18] it will most likely either mistakenly accept the item[19] or pay[20] the amount of the item to the presenting party. In both cases, it will charge (debit) its customer's account for the amount of the item.

When the bank learns of the forgery, it will typically have to credit its customer's account and will then find itself in one of two positions with respect to the presenting party.[21] The bank will have paid money for the item, or it will still have the money, but will also be obligated to pay it

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18. In deciding whether to pay the item, the payor bank may check the validity of its customer's (the drawer's) signature, determine whether the item bears all necessary indorsements, and whether the customer's account has sufficient funds to pay the item. *See* Dow & Ellis, *Proposed New Payments Code*, *supra* note 8, at 404. On whether and to what extent the payor bank actually does these things, see Mann, *supra* note 9, at 985-98.

The statement in the text rests on the assumption that the customer's account has sufficient funds since the bank may refuse to pay a check drawn on insufficient funds without liability. *See* U.C.C. § 4-402(a) (1990); U.C.C. §§ 4-104(1)(i), 4-402 (1987). *See* Dow & Ellis, *Proposed New Payments Code*, *supra* note 8, at 404.

19. By accepting the item, the payor undertakes an obligation to pay the item in the future. *See* U.C.C. §§ 3-410(1), 3-413(1) (1987); U.C.C. §§ 3-409(a), 3-413(a) (1990).

20. Under the U.C.C., the payor bank can "pay" an item in several ways. For present purposes the most important are: (1) the payor pays the item in cash, which means that it disburses cash to the presenting party and (2) it fails to return the item within the time permitted. *See* U.C.C. §§ 4-213(1)(a), 4-301(1), 4-302, 4-103(1), 4-104(1)(h) (1987). (The R.U.C.C. scheme employs similar rules.) In a case where the payor has intentionally or inadvertently failed to make a timely return of the item, the U.C.C. provides that the payor is "accountable" for the amount of the item. *See* U.C.C. § 4-302 (1987). This was uniformly interpreted by the courts to mean "liable" for the item. *See, e.g.*, Houston Contracting Co. v. Chase Manhattan Bank, 539 F. Supp. 247 (S.D.N.Y. 1982). *See generally* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 809 n.122; *see also* Dow & Ellis, *Proposed New Payments Code*, *supra* note 8, at 408 n.49, 418 n.109.

21. When the bank learns of the forgery it typically is required to credit its customer's account on demand because, absent customer negligence or other valid defense, the bank is permitted to charge a customer's account only when an item is properly payable, a check with a forgery was not properly payable. *See* Dow & Ellis, *Proposed New Payments Code*, *supra* note 8, at 409. "As a result, a bank is deemed to have paid such items out of its own funds." Dow, *Restitution on Payments*, *supra* note 11, at 28 n.2. In order to avoid bearing the loss itself, the bank must shift it onto other banks or individuals. *See generally* Dow & Ellis, *Proposed New Payments Code*, *supra* note 8, at 409-10; Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 783; Ellis & Dow, *Banks and Their Customers*, *supra* note 6, at 59-66. Under the U.C.C., the customer's negligence did not provide the bank with a defense *if the bank was also negligent*. *See* U.C.C. § 4-406(3) (1987); Ellis & Dow, *Banks and Their Customers*, *supra* note 6, at 63; Dow & Ellis, *Proposed New Payments Code*, *supra* note 8, at 410. The approach under English law is essentially the same with respect to the properly payable concept. *See generally* CHALMERS & GUEST 1991, *supra* note 13, at 178, 187; 3(1) LORD HAILSHAM OF ST. MARYLEBONE, HALSBURY'S LAWS OF ENGLAND para. 182 (4th ed. reissue 1989); MAURICE MEGRAH AND F.R. RYDER, PAGET'S LAW OF BANKING 255, 262 (9th ed. 1982) [hereinafter PAGET'S 1982]; Dow, *Restitution on Payments*, *supra* note 11, at 28 n.2.

The R.U.C.C. has shifted to a comparative negligence scheme under which the customer and bank proportionately share the loss when both are negligent. *See* Ellis & Dow, *Banks and Their Customers*, *supra* note 6, at 66-74; *see also infra* notes 217-18. For an alternative approach, see Ellis & Dow, *Banks and Their Customers*, *supra* note 6, at 75-79. It remains to be seen the extent to which litigation will no longer be cost effective for the customer, even the nonnegligent customer.

to the presenting party (or another holder of the item in a case where the item was accepted).[22] One fundamental doctrinal issue examined in this Article is whether, under the first situation, the bank can successfully recover the money it mistakenly paid out for the item from the individual to whom it was paid. "At common law, mistaken payments sometimes could be recovered through an action for money had and received, a form of *indebitatus assumpsit*."[23] The problem here was whether money mistakenly paid by the bank on an item bearing its customer's forged drawer's signature or other forgery could be recovered through this type of action. The other fundamental doctrinal issue examined here is whether, under the second situation, the bank can avoid having to pay the amount of the item to the holder.[24] At common law, a holder of an instrument enforced the acceptance obligation through an assumpsit action.[25] The problem in such a case was whether the forgery provided the bank a defense in this action.

III. COMMON LAW ORIGINS OF THE PROBLEM

A. Recovery of Mistaken Payments

In the second half of the seventeenth century,[26] courts began to allow an assumpsit action[27] "to be brought by a plaintiff seeking to recover

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22. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 783.

23. Dow, *Restitution on Payments*, *supra* note 11, at 28. This action currently falls under the general heading of restitution in both English and American law. *See id.* For a discussion of restitution and the development of the action for money had and received, see *infra* notes 25-38 and accompanying text.

24. This term is used throughout this Article in its non-technical sense because forgeries may preclude anyone from qualifying as a (technical) holder of an item. *See* CHALMERS & GUEST (1991), *supra* note 13, at 184; Douglas J. Whaley, *Forged Indorsements and the UCC's "Holder,"* 6 IND. L. REV. 45 (1972).

25. *See, e.g.*, Cooper v. Meyer, 109 Eng. Rep. 525 (K.B. 1830); Sanderson v. Collman, 134 Eng. Rep. 86 (P.C. 1842). In English law, the acceptor's liability currently is embodied in section 54(1) of the Bills of Exchange Act. *See* Bills of Exchange Act of 1882, 45-46 Vict. ch. 61, § 54(1); 5 LORD HAILSHAM OF ST. MARYLEBONE, HALSBURY'S STATUTES OF ENGLAND AND WALES 367 (4th ed. 1993 reissue). In American law, the acceptor's liability is embodied in the U.C.C. *See* U.C.C. § 3-413(i) (1987); U.C.C. § 3-413 (1990).

26. For background on the law of mistake and the development of the action for money had and received, see J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 409-26 (3d ed. 1990); J. BEATSON, THE USE AND ABUSE OF UNJUST ENRICHMENT: ESSAYS ON THE LAW OF RESTITUTION ch. 6 (1991); PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION (1985); ESSAYS ON THE LAW OF RESTITUTION (Andrew Burrows ed., 1991); LORD GOFF OF CHIEVELEY & GARETH JONES, THE LAW OF RESTITUTION (Gareth Jones ed., 4th ed. 1993) [hereinafter GOFF & JONES]; A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 489-96, 504-05 (1987); *see also* JOHN P. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS 10-16 (1951); DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 232-36 (1973); 8 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 88-98 (1925); WILLIAM A. KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS 14, 23 (1893); F.W. MAITLAND, EQUITY AND THE FORMS OF ACTION AT COMMON LAW 53-57 (A.H. Chaytor & W.J. Whittaker eds.,

money from a person to whom it had been mistakenly paid."[28] Although there was no actual undertaking (or promise) by the recipient to repay the money, courts began to find such a promise *implied in law* in a case of a mistaken payment. Inasmuch as the source of the obligation to repay the money was this promise and not the express or implied assent of the obligor, the obligation to repay was considered quasi-contractual rather than contractual.[29] The use of assumpsit under these circumstances eventually developed into an action for *money had and received*.[30] Under this action, the plaintiff could obtain restitution of money paid to the defendant by mistake.[31]

The action for money had and received began as an action at law[32] and remains so today;[33] however, in the mid-eighteenth century Lord

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1968); 1 JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 74 (1992); 1 GEORGE E. PALMER, THE LAW OF RESTITUTION 6-9 (1978); MARK HAPGOOD, PAGET'S LAW OF BANKING 402-23 (10th ed. 1989) [hereinafter PAGET'S 1989]; THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 637-46, 396-411 (5th ed. 1956); FREDERIC C. WOODWARD, THE LAW OF QUASI CONTRACTS 2-4 (1913); J.B. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1 (1888) [hereinafter Ames, *Assumpsit*]; Arthur L. Corbin, *Quasi-Contractual Obligations*, 21 YALE L.J. 533 (1912); William A. Keener, *Recovery of Money Paid under Mistake of Fact*, 1 HARV. L. REV. 211 (1887) [hereinafter Keener, *Recovery*]; Harold Luntz, *The Bank's Right To Recover On Cheques Paid by Mistake*, 6 MELB. U. L. REV. 308 (1968); Nicholas J. McBride & Paul McGrath, *The Nature of Restitution*, 15 OXFORD J. LEGAL. STUD. 33 (1995). On seventeenth century developments, see BAKER, *supra*, at 416-20; SIMPSON, *supra* at 495; OLDHAM, *supra* at 217-21. Corbin traces a similar rule to ancient Roman law. Corbin, *supra* at 533; *see also* WOODWARD, *supra* at 3 n.5; *but cf.* DAWSON, *supra* at 12-14.

27. Beginning in the early sixteenth century, assumpsit, which is the Latin word for undertaking, developed into an action to enforce bargained-for promises. *See* MAITLAND, *supra* note 26, at 56. It was first limited to express promises, but by the early seventeenth century, assumpsit would lie in the case of a promise implied (in fact) from the conduct of the parties. *See* DOBBS, *supra* note 26, at 234; 1 PALMER, *supra* note 26, at 7; PLUCKNETT, *supra* note 26, at 645-48; WOODWARD, *supra* note 26, at 3. *See generally* Ames, *Assumpsit*, *supra* note 26.

28. Dow, *Restitution on Payments*, *supra* note 11, at 24; DOBBS, *supra* note 26, at 235; HOLDSWORTH, *supra* note 26, at 94; 1 PALMER, *supra* note 26, at 7. One of the earliest English cases finding a promise or obligation to repay implied in law in this situation is *Bonnel v. Foulke* [or *Fowke*], 82 Eng. Rep. 1224 (K.B. 1657). *See* Ames, *Assumpsit*, *supra* note 26, at 66.

29. *See* DOBBS, *supra* note 26, at 235; HOLDSWORTH, *supra* note 26, at 96-97; 1 PALMER, *supra* note 26, at 7; WOODWARD, *supra* note 26, at 4; *see also* KEENER, *supra* note 26, at 14, 23; Ames, *Assumpsit*, *supra* note 26, at 63-9; Corbin, *supra* note 26, at 543-44. Quasi-contractual obligations exist in situations other than the mistaken payment of money. *See* KEENER, *supra* note 26, at 16-23; *see also* Ames, *Assumpsit*, *supra* note 26, at 64.

30. This was one of the so-called "common counts" or sub-categories of general assumpsit. *See* DOBBS, *supra* note 26, at 236; 1 PALMER, *supra* note 26, at 7; 2 GEORGE PALMER, THE LAW OF RESTITUTION 500 (1978).

31. *See* DOBBS, *supra* note 26, at 236. Under this action, the plaintiff could obtain restitution from the defendant of money that belonged in good conscience to the plaintiff, such as money paid to the defendant by mistake, or under fraud or duress. *See id*. *See also generally* Corbin, *supra* note 26, at 543-44; PALMER, *supra* note 30, at 500.

32. *See* DOBBS, *supra* note 26, at 229, 239; 2 PALMER, *supra* note 29, at 498-99; WOODWARD, *supra* note 26, at 5, 8; Keener, *Recovery*, *supra* note 26, at 212 (in some cases bills in equity have been maintained). The action originated in the courts of law, not equity, and the

Mansfield attempted to place the action on an equitable foundation.[34] In the leading case of *Moses v. MacFerlan*,[35] decided in 1760, Lord Mansfield stated that this action, "founded in equity," could be brought to enforce obligations to refund money that arose "from the ties of natural justice."[36] This equitable foundation was later repudiated by English judges and played only a limited role in its English development until it was revived by the House of Lords in 1943.[37] The American

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quasi-contractual obligation to repay the money is enforced by legal, not equitable, remedies. *See* Keener, *supra* note 26, at 212. Note also that in a case of mistaken payments, the measure of recovery is not based on loss or damage suffered by the plaintiff, but on the benefit received by the defendant. *See* WOODWARD, *supra* note 26, at 5. The general availability of a jury trial in an action for money had and received further supports the idea that the action is a legal one. *See* PALMER, *supra* note 30, at 500 n.27.

33. *See, e.g.*, Citizens & Southern Nat'l Bank v. Youngblood, 219 S.E.2d 172, 173 (Ga. 1975); Picotte v. Mills, 200 Mo. App. 127, 131 (1918); Federal Ins. Co. v. Groveland State Bank, 333 N.E.2d 334, 336 (N.Y. 1975); Rohrville Farmers Union Elev. v. Frison, 42 N.W.2d 354, 356 (N.D. 1950); Texas Bank & Trust Co. v. Custom Leasing, Inc., 498 S.W. 243, 250 (Tex. App. 1973). *But see* Chase Manhattan Bank v. Burden, 489 A.2d 494, 497 (D.C. Cir. 1985). *See also* 1 PALMER, *supra* note 26, at 9; 2 PALMER, *supra* note 30, at 500; George P. Costigan, Jr., *Change of Position as a Defense in Quasi-Contracts—The Relation of Implied Warranty and Agency to Quasi-Contracts*, 20 HARV. L. REV. 205, 205 (1907).

34. *See* Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd., 1 App. Cas. 32, 62-64 (1943) (Lord Wright); BAKER, *supra* note 26, at 424; GOFF & JONES, *supra* note 26, at 8-9, 13-15; C.H.S. FIFOOT, LORD MANSFIELD 141-57 (1936); OLDHAM, *supra* note 26, at 220-21.

35. 97 Eng. Rep. 676 (K.B. 1760).

36. *Id.* at 678, 681. Professor Palmer states that this was perhaps the first attempt in English common law to state a theory of quasi-contract for mistaken payments. *See* GEORGE PALMER, THE LAW OF RESTITUTION 291 (1978); 1 PALMER, *supra* note 26, at 7-8; 2 PALMER, *supra* note 30, at 501. Professor W. Friedmann describes this case as the most important example in English law of the "open invocation" of natural law. *See* W. FRIEDMANN, LEGAL THEORY 135 (5th ed. 1967). For a discussion of this case, see also DAWSON, *supra* note 26, at 11-16; HOLDSWORTH, *supra* note 26, at 97; WOODWARD, *supra* note 26, at 2, 8; James B. Ames, *The Doctrine of Price v. Neal*, 4 HARV. L. REV. 297, 299-300 (1891) [hereinafter Ames, *Price v. Neal*]; *see also* Henry Cohen, *Change of Position in Quasi-Contracts*, 45 HARV. L. REV. 1333, 1334-36 (1932).

37. Following Lord Mansfield's death, the doctrine of unjust enrichment was widely repudiated in England, largely as a result of the influence of legal positivism. On the rejection of the equitable nature of the action, see BAKER, *supra* note 25, at 425; DAWSON, *supra* note 26, at 15-21; FIFOOT, *supra* note 34, at 245-249; FRIEDMANN, *supra* note 36, at 135; HOLDSWORTH, *supra* note 26, at 30-31; OLDHAM, *supra* note 26, at 245-49; Cohen, *supra* note 36, at 1335-36. Even though the equitable basis of the action was rejected, the action continued to develop as a contract doctrine after Lord Mansfield's tenure. *See* BAKER, *supra* note 26, at 425; FIFOOT, *supra* note 34, at 245-249; GOFF & JONES, *supra* note 26, at 5-12. An action for money had and received continues to be the basis for recovering mistaken payments. *See, e.g.*, GOFF & JONES, *supra* note 26, at 3-5; Luntz, *supra* note 26, at 310.

On the revival in England of the equitable nature of the action, see *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, 1 App. Cas. 32, 62-64 (1943) (Lord Wright); BAKER, *supra* note 26, at 524-25; GOFF & JONES, *supra* note 26, at 9-16; *see also* David Securities Pty. Ltd. v. Commonwealth Bank of Australia, 66 A.L.J.R. 768, 782-84 (Austl. 1992) (Brennan, J.); Lipkin Gorman v. Karpnale Ltd., 4 All E.R. 512, 532 (H.L. 1992) (Lord Goff); Jack Beatson, *Restitution of Taxes, Levies and Other Imposts: Defining the Extent of the* Woolwich *Principle*, 109 L.Q. REV. 401, 402 (1993); Brice Dickson, *Unjust Enrichment Claims: A Comparative*

development, however, was quite different. For American judges, the equitable nature of the action was paramount from its initial adoption in this country to the present day,[38] typically under the rubric of *unjust enrichment*.[39] The significance of these different developments will be considered in Part VIII.[40]

This Article explores from a comparative perspective a bank's use of restitution to recover money mistakenly paid on a check or other item on which its customer's signature has been forged.[41] This type of case calls for another doctrine, also articulated by Lord Mansfield. It was set out in 1762 in the leading case of *Price v. Neal* (or *Neale*).[42] This doctrine conflicted with the basic purpose of restitution by imposing limitations on

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Overview, 54 CAMBRIDGE L.J. 100, 105 (1995); Ewan McKendrick, *Restitution, Misdirected Funds and Change of Position*, 55 MOD. L. REV. 377, 377-78 (1992). For a discussion of the significance of the revival of unjust enrichment under English restitution law, see *infra* notes 313-314, 318-321 and accompanying text.

38. Professor Palmer states that "[f]rom the beginnings of our law, American judges have recognized that quasi-contract rests upon fundamental conceptions of equity and justice." PALMER, *supra* note 30, at 501. As a result of the rejection of the doctrine of unjust enrichment, its development as a basis for restitution was principally by American, not English, courts. *See* PALMER, *supra* note 26, at 1-6; 2 PALMER, *supra* note 30, at 500-01; DAWSON, *supra* note 26, at 21-26; *see also* Bryan v. Citizens Nat'l Bank, 628 S.W.2d 761, 763 (Tex. 1982). With respect to the American development of this concept, see *infra* note 320 and accompanying text.

39. *See, e.g.*, Morgan Guar. Trust Co. v. American Sav. & Loan Ass'n, 804 F.2d 1487, 1492-94 (1986), *cert. denied*, 107 S. Ct. 3214 (1987); Northern Trust Co. v. Chase Manhattan Bank, 582 F. Supp. 1380, 1384 (1984), *aff'd*, 748 F.2d 803 (2d Cir. 1984); South Shore Nat'l Bank v. Donner, 249 A.2d 25, 31 (N.J. Super. 1969); Federal Ins. Co. v. Groveland State Bank, 333 N.E.2d 334, 336 (N.J. 1975) (action is "founded upon equitable principles aimed at achieving justice"); Bryan v. Citizens Nat'l Bank, 628 S.W.2d 761, 763 (Tex. 1982); Texas Bank & Trust Co. v. Custom Leasing, Inc., 498 S.W.2d 243, 250 (Tex. App. 1973) (action is "controlled by principles of equity"); Bank of Williamson v. McDowell County Bank, 66 S.E. 761, 770 (W. Va. 1909) (concurring opinion). For a case in which the court refused to weigh equitable considerations in a quasi-contract action to recover a mistaken payment, see *Consumers Power Co. v. County of Muskegon*, 78 N.W.2d 223 (Mich. 1956), *overruled by* Spoon-Shacket Co. v. Oakland County, 97 N.W.2d 25 (Mich. 1959). *See also* RESTATEMENT OF RESTITUTION § 1 (1937) ("A person who has been unjustly enriched at the expense of another is required to make restitution."); DAWSON, *supra* note 26, at 21-26; 1 PALMER, *supra* note 26, at 1-8; 2 PALMER, *supra* note 30, at 500-01; Cohen, *supra* note 36, at 1336; Costigan, *supra* note 33, at 205. The concept of unjust enrichment is central to all restitutionary awards, not just in the case of mistaken payments. *See* DOBBS, *supra* note 26, at 227-29; 2 PALMER, *supra* note 30, at 501; Ames, *Assumpsit*, *supra* note 26, at 66.

40. *See* Dow & Ellis, *Survival at Common Law Restitution*, *supra* note 6, at 784. See the discussion on unjust enrichment in *infra* notes 290-314, 317-320 and accompanying text.

41. It appears that by the early eighteenth century English courts were allowing restitution of funds mistakenly paid on negotiable instruments. *See* Charles E. Corker, *Risk of Loss from Forged Indorsements: A California Problem*, 4 STAN. L. REV. 24, 34 (1951); Keener, *supra* note 26; John D. O'Malley, *Common Check Frauds and the Uniform Commercial Code*, 23 RUTGERS L. REV. 189, 201 (1969); Colombo, *supra* note 10, at 820 n.50; Sally S. Harwood, Note, *Commercial Transactions—Commercial Paper—Allocation of Liability for Checks Bearing Unauthorized Indorsements and Unauthorized Drawer's Signatures*, 24 WAYNE L. REV. 1077, 1086 (1978); Breese, *supra* note 12, at 199.

42. 97 Eng. Rep. 871 (K.B. 1762).

the bank's action for money had and received in cases of forged drawer's signatures. In doing so, it greatly unsettled the law governing the allocation of losses resulting from mistaken payments in this type of case. More importantly, it is on this doctrine that English and American forgery law diverged, beginning in the middle of the nineteenth century.

B. The Decision in Price v. Neal

The doctrine of *Price v. Neal*[43] originated in the earlier eighteenth century case of *Jenys v. Fawler*.[44] The issue in the *Jenys* case was whether a bank that had mistakenly accepted an item on which the drawer's signature was forged was nevertheless liable to the holder on its acceptance.[45] In refusing to admit evidence the acceptor offered to prove that the drawer's signature was forged, the court relied on a commercial policy rationale, specifically the "danger to negotiable notes" if acceptors were permitted to use the forgery of a drawer's signature to avoid liability on their acceptance.[46] Although the court did not elaborate on this point, it presumably meant that if potential purchasers of accepted bills of exchange were concerned about the validity of the drawer's signature, the transferability of negotiable instruments and their function as a payment mechanism would be impaired.

This concern with commercial policy was noticeably missing in the leading case of *Price v. Neal*. This case involved two bills of exchange drawn on the plaintiff. The plaintiff paid the first one, and then later accepted and paid the second bill. When it was discovered that the drawer's signature on both bills had been forged, the plaintiff attempted to recover both payments from the defendant in an action for money had and received.[47] Lord Mansfield framed the issue, as he had done in *Moses v. MacFerlan*, in terms of the equitable nature of the action for money had

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43. 93 Eng. Rep. 959 (K.B. 1733); *see* Breese, *supra* note 12, at 200; *see also* Gloucester Bank v. Salem Bank, 17 Mass. 32, 43 (1820); Neal v. Coburn, 42 A.2d 348, 350 (Me. 1898); Bernheimer v. Marshall & Co., 2 Minn. 61, 64 (1858); National Park Bank v. Ninth Nat'l Bank, 46 N.Y. 77, 80 (1871).

44. The material in this Article on the *Price v. Neal* decision and its subsequent development in English law is a summary of an earlier study published in 1996. *See* Dow, *Restitution on Payments*, *supra* note 11. Readers desiring a more detailed account of these developments should refer to that earlier work.

45. *See id.*

46. A precursor of this doctrine can be found in the earlier case of *Wilkinson v. Lutwidge*, 93 Eng. Rep. 758 (K.B. 1725). Here, the court found that the acceptance was a "sufficient acknowledgement on the part of the acceptor" of the validity of the drawer's signature. Evidence of forgery was nevertheless admitted in this case because the acknowledgement was not considered to be conclusive. *See id*.

47. The defendant had obtained both bills for fair value, in good faith, and without notice or knowledge of the forgeries. *See Price v. Neal*, 97 Eng. Rep. at 871.

and received, inquiring as to whether it was "against conscience" for the defendant to retain the payments.[48] He denied recovery of both payments, concluding that under the circumstances of the case, it was not "against conscience" for the defendant to retain the money.[49]

It has been argued that *Price* was an aberration of the mistaken payments law that had developed up to that point;[50] however, the better view is to see the *Price* decision as totally consistent with that law. Lord Mansfield's opinion makes it clear that he framed the issue in terms of the conscience and equity he established in *Moses*. His consideration of delay, estoppel, reliance, negligence, and so forth were all in the context of determining whether allowing the defendant to keep the mistakenly paid funds would be unjust.[51]

Despite Lord Mansfield's obvious concern with conscience and equity, some ambiguities in the decision have resulted in considerable disagreements over its justification.[52] These disagreements began not long after Lord Mansfield left the bench in 1788.[53] "Over the last century alone commentators have proposed and debated as many as ten different and sometimes conflicting justifications for the rule in the case, most of which find some measure of support in the language of Lord Mansfield's opinion."[54] The uncertainties over the justification were probably

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48. *See id.*

49. *See id*. The plaintiff in *Price*, apparently anticipating a commercial policy argument like Lord Raymond's in the *Jenys* case, argued that a decision in his favor would not undermine the transferability of negotiable instruments because, at least with respect to the unaccepted bill, the defendant relied on the credit of the indorsers when he paid for it. *See id.*

50. *See infra* notes 82-83 and accompanying text; *see also* KEENER, *supra* note 26, at 154 n.1; Elmer W. Beasley, *Liability of Drawee Bank where a Check or Bill Has Been Materially Altered Before Payment, Acceptance or Certification—Inability of Drawee to Recover Payment From Holder Under Section 62 of the Negotiable Instruments Law*, 10 TENN. L. REV. 87 (1931).

51. *See* Dow, *Restitution on Payments*, *supra* note 11, at 30-31. Moreover, it is worth noting that his subsequent decisions show that Lord Mansfield continued to expand the action for money had and received under the same principles of conscience and equity until he left on the bench. *See, e.g.*, Sadler v. Evans, 98 Eng. Rep. 34 (K.B. 1766); Jestons v. Brooke, 98 Eng. Rep. 1365 (K.B. 1778); Longchamp v. Kenny, 99 Eng. Rep. 91 (K.B. 1779).

52. Perhaps the most accurate way to characterize this is that the uncertainties were over *why* it was not unconscientious for the defendant to retain the money under the circumstances.

53. *See, e.g.*, Smith v. Mercer, 128 Eng. Rep. 961 (P.C. 1815) (Chambre, J, dissenting).

54. *See id.* The following overview of the various justifications for the decision emphasizes American case law and commentary. For a discussion of English case law, see *infra* notes 65-85, 227-328 and accompanying text. First, a number of commentators and courts argue that with respect to a forged drawer's signature, the drawee is in the *best position* to detect the forgery and therefore should bear the risk of a mistaken payment. Inasmuch as the drawee is not in a better position to detect a forged indorsement, the drawee does not bear that risk. It should be noted that in *Price v. Neal*, Lord Mansfield had not referred to any party as being in the best position or being the best judge of the forgery, but he had suggested that the plaintiff had a duty ("it was incumbent upon the plaintiff") to verify the signatures, both his own and that of the drawer. It is reasonable to assume that Lord Mansfield imposed this duty on the plaintiff *because* the plaintiff was in the best position to detect the forgeries. *See* KEENER, *supra* note 26, at 155;

WOODWARD, *supra* note 26, at 137, 139; William D. Kloss, Jr., Note, *Mistaken Payment and Restitutionary Principles Under the Uniform Commercial Code:* Morgan Guar. Trust Co. v. American Sav. and Loan Ass'n , 804 F.2d 1487 (9th Cir. 1986), 56 U. CIN. L. REV. 1075, 1090 n.143 (1988); Note, *Holder in Due Course; Case Analyzed*, 36 HARV. L. REV. 858, 859 n.8, 860 (1923) (secondary rationale) [hereinafter Note, *Holder*]. Professors White and Summers see this rationale as not "consistent with the rules for forged indorsements." WHITE & SUMMERS, *supra* note 7, at 614. For examples of this rationale being used by courts, see, for example, *Fireman's Fund Ins. Co. v. Security Pac. Nat'l Bank*, 85 Cal. App. 3d 797, 149 Cal. Rptr. 883, 899-900 (1978); Bank of Glen Burnie v. Loyola Fed. Sav. Bank, 648 A.2d 453, 455 (Md. 1994) (traditional justification); Mid-Continent Nat'l Bank v. Bank of Independence, 523 S.W.2d 569, 575 (Mo. Ct. App. 1975); Bank of Williamson v. McDowell County Bank, 66 S.E. 761, 762 (W. Va. 1909). *See also* Morgan Guar. Trust Co. v. American Sav. & Loan Ass'n, 804 F.2d 1487, 1495 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 3214 (1987) (discussing New York law) (drawee has "means to compare" signatures). This rationale has been described as one of the most common. *See* E. Allen Farnsworth, *Insurance Against Check Forgery*, 60 COLUM. L. REV. 284, 302 n.85 (1960). *See also* Harwood, *supra* note 41, at 1090 (rationale criticized as "archaic"); Robert D. Cootner & Edward L. Rubin, *A Theory of Loss Allocation for Consumer Payments*, 66 TEX. L. REV. 63, 105-06 (1987); Rapson, *Loss Allocation*, *supra* note 7, at 435, 439 (suggesting that finality of payment is the rationale for *Price*, but that the "guiding principle and rationale" for Code Article 3 and 4 loss allocation rules is to impose the loss on the party in the best position to avoid or prevent it, and this is sometimes "said to be" the rationale for *Price*. He acknowledges that these two conflict.); *see also* Perini Corp. v. First Nat'l Bank, 553 F.2d 398, 405 (5th Cir. 1977) (within the context of a double forgery court discusses best position justification for *Price*). In the comments to R.U.C.C. the drafters suggest indirectly that the rationale for *Price* is the best position argument. They suggest that loss from forged drawer's signatures is not imposed on the depositary bank because "it has no way of detecting the forgery because the drawer is not that bank's customer." U.C.C. § 3-404 cmt. 3 (1990).

"Second, the recipient's *change of position* in reliance on the mistaken payment precludes recovery of the payment by the drawee under this well established defense to a restitutionary action." Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 789 n.45. A leading English case focusing on this rationale is *Cocks v. Masterman*, 109 Eng. Rep. 335, 338 (K.B. 1829). *See also* Smith v. Mercer, 128 Eng. Rep. 961, 965-66 (P.C. 1815) (Gibbs, C.J.) (delay in discovering the forgery resulted in the defendants' loss of rights against prior parties). For American cases where this rationale is relied on, in part, see *Commercial & Farmers Nat'l Bank v. First Nat'l Bank*, 30 Md. 11, 19 (1869); Merchants Nat'l Bank v. National Bank, 139 Mass. 513 (1885) (without a change of position on the part of the recipient, the drawee can recover a mistakenly paid insufficient funds item). *See also* Ralph W. Aigler, *The Doctrine of Price v. Neal*, 24 MICH. L. REV. 809, 813 (1926) (discussing Cocks v. Masterman); Beasley, *supra* note 50, at 89; Note, *Holder*, *supra*, at 859 n.8, 860. *But see* Ames, *Price v. Neal*, *supra* note 36, at 298-99; WOODWARD, *supra* note 26, at 137. The change of position is typically identified as the impairment of or loss of recourse against prior indorsers resulting from the drawee's delay in notifying the presenting party of the forgery. *See, e.g.*, Note, *Holder*, *supra*, at 859 n.8. Some commentators argue that this rationale is persuasive only when there *were* prior indorsers against whom recourse was impaired. *See* WOODWARD, *supra* note 26, at 135-36. Others argue that a loss of recourse can be presumed to result from the drawee's delay. *See* Ellis & Morton v. Ohio Life Ins. & Trust Co., 4 Ohio St. 628, 660 (1855); Note, *Holder*, *supra*, at 860. For a criticism of this approach, see, for example, *Neal v. Coburn*, 42 A. 348, 351 (Me. 1898).

"Third, the rule is commonly supported by a *policy of finality*. Promoting certainty in commercial transactions requires an end to the process of check collections at some point." Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 789 n.45. *See also* 1 PALMER, *supra* note 26, at 291 ("perhaps the most important" among several factors); WOODWARD, *supra* note 26, at 136, 137; Aigler, *supra*, at 811, 815, 819 (at least implicit in Lord Mansfield's opinion and expressed in later cases); Farnsworth, *supra*, at 302 n.85; O'Malley, *supra* note 40, at 202-03, 227-28 ("no expressed support for this theory" in opinion, but by consensus is the "only

satisfactory explanation"); Rapson, *Loss Allocation*, *supra* note 7, at 435 n.2, 439 (refers to finality as a "less fictional" justification than the "best position"); Frederic C. Woodward, *The Risk of Forgery or Alteration of Negotiable Instruments*, 24 COLUM. L. REV. 469, 470 (1924); Kloss, *supra*, at 1090, 1090 n.145 ("strongest purpose"); Harwood, *supra* note 41, at 1090, 1099 ("most viable rationale"); Note, *Effect of Bank's Credit to Payee of Check in Misreliance Upon State of Drawer's Account*, 21 COLUM. L. REV. 805, 807 (1921) [hereinafter *Effects*]. Professors White and Summers see this rationale as "not consistent with the rules for forged indorsements." WHITE & SUMMERS, *supra* note 7, at 614. For examples of this rationale being used by courts, see, for example, *Morgan Guar. Trust Co. v. American Sav. & Loan Ass'n*, 804 F.2d 1487 (9th Cir. 1986) (discussing New York law), *cert. denied*, 107 S. Ct. 3214 (1987); Fireman's Fund Ins. Co. v. Security Pac. Nat'l Bank, 149 Cal. Rptr. 883, 904 (1978) ("drafters recognize as the only valid basis for the rule. . . ."); Bank of Glen Burnie v. Loyola Fed. Sav. Bank, 648 A.2d 453, 455, 458 (Md. 1994) (modern justification); Germania Bank v. Boutell, 62 N.W. 327, 328, 329 (Minn. 1895). Related rationales are those of *maintaining confidence in commercial paper* in order to promote its transfer. *See, e.g.*, Germania Bank v. Boutell, 62 N.W. 327, 329 (Minn. 1895); Bank of Williamson v. McDowell County Bank, 66 S.E. 761, 762, 764 (W. Va. 1909); WOODWARD, *supra* note 26, at 137; Note, *Allocation of Losses From Check Forgeries under the Law of Negotiable Instruments and the Uniform Commercial Code*, 62 YALE L.J. 417, 420 n.17 (1953) (citing WOODWARD, *supra* note 26, §§ 80-87) [hereinafter Note, *Losses and Commercial Convenience*]. *Id.* (citing Dedham Nat'l Bank v. Everett Nat'l Bank, 59 N.E. 62 (Mass. 1901) (Holmes, J.).

"Fourth, some authorities cite the drawee's *negligence* in paying a check as a rationale for the rule." O'Malley, *supra* note 41, at 202-03; *see also* Note, *Losses*, *supra*, at 420 n.17, 441 n.107 (original justification for rule, but unrealistic under modern banking practices). For examples of courts using negligence as a basis for the rule, see *Citizens' Bank v. J. Blach & Sons, Inc.*, 153 So. 404, 406 (Ala. 1934); Woods v. Colony Bank, 40 S.E. 720, 722 (Ga. 1902). *See also* American Hominy Co. v. Millikin Nat'l Bank, 273 F. 550, 558 (S.D. Ill. 1920). *But see* Germania Bank v. Boutell, 62 N.W. 327, 328 (Minn. 1895); WOODWARD, *supra* note 26, at 129-32, 137 (not satisfactory explanation of rule); KEENER, *supra* note 26, at 155; Ames, *Price v. Neal*, *supra* note 36, at 298-300 ("not true principle"); *Burke I*, *supra* note 6, at 352 (Lord Mansfield's decision was "[w]ithout regard to negligence"). "Related to the negligence rationale is the idea that the rule encourages banks to be cautious in examining signatures." Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 789. Farnsworth, *supra*, at 302; Colombo, *supra* note 10, at 825; *see also* Cootner & Rubin, *supra*, at 105.

"Fifth, some commentators, notably Ames, argue that the rule is based on the principle that between two persons having equal equities, the one with legal title should prevail." Dow & Ellis, Survival of Common Law Restitution, *supra* note 6, at 789 n.45; Ames, *Price v. Neal*, *supra* note 36, at 299-301; Beasley, *supra* note 50, at 90; O'Malley, *supra* note 41, at 202-03, 203 n.85; Note, *Losses*, *supra*, at 420 n.17. For examples of courts using this rationale, see *Gloucester Bank v. Salem Bank*, 17 Mass. 32, 41 (1820); First Nat'l Bank v. United States Nat'l Bank, 197 P. 547, 551 (Or. 1921). *Contra* KEENER, *supra* note 26, at 155-58 (in a typical case, the equities are not equal); WOODWARD, *supra* note 26, at 132-37; Note, *Relation of* Price v. Neal *to the Doctrine of Purchase for Value Without Notice*, 26 HARV. L. REV. 634 (1913) [hereinafter *Relation*]; Note, *Defense of Change of Position in Cases of Payment under Mistake on a Negotiable Instrument*, 42 HARV. L. REV. 411, 414 (1929) [hereinafter *Defense of Change of Position*]. *See also* Mid-Continent Nat'l Bank v. Bank of Independence, 523 S.W.2d 569 (Mo. Ct. App. 1975).

Sixth, some commentators and courts suggest that the rule is justified on the basis that the drawee is "*bound to know the drawer's signature and is estopped from denying its validity once the item is paid or accepted*." Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 789 n.45; KEENER, *supra* note 26, at 155; WOODWARD, *supra* note 26, at 129 (strongly suggested by Lord Mansfield's opinion; "favorite explanation"); Beasley, *supra* note 50, at 89; *Burke I*, *supra* note 6, at 351-53 ("A bank is presumed to know the signature of the customer"); Lawrence, *Misconceptions About Article 3 of the Uniform Commercial Code: A Suggested Methodology and Proposed Revisions*, 62 N.C. L. REV. 115, 132 (1983) ("assumes the risk of

inevitable. After setting out an array of factors that made it just for the defendant to retain the funds, Lord Mansfield gave no indication as to which of these several factors were most significant and whether all of them were necessary to justify the result. On a theoretical level, this ambiguity over the decision's justification was problematic.[55] By failing

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payment over the forged signature of the drawer"); O'Malley, *supra* note 41, at 202-03; Note, *Losses*, *supra*, at 420 n.17. For examples of this rationale being used by courts, see *Morgan Guar. Trust*, 804 F.2d at 1495 (Payor bank is "responsible for knowing the authentic signatures of its customers and having the means to compare them with the signatures on the instrument."); Deposit Bank v. Fayette Nat'l Bank, 13 S.W. 339, 339 (Ky. 1890); Bank of Glen Burnie v. Loyola Fed. Sav. Bank, 648 A.2d 453, 455 (Md. 1994) ("expected to know" part of traditional justification); Commercial & Farmers Nat'l Bank v. First Nat'l Bank, 30 Md. 11, 19 (1869); Mechanics Nat'l Bank v. Worcester County Trust Co., 170 N.E.2d 476, 480 (Mass. 1960) ("It is presumed that the bank knows the signature of its own customers and therefore is not entitled to the benefit of the rule."); First Nat'l Bank v. First Nat'l Bank, 151 Mass. 280, 283 (1890); American Sur. Co. v. Industrial Sav. Bank, 242 Mich. 581, 583-4 (1928) ("[T]he duty of the drawee . . . to know the [signature of the drawer]."); Levy v. Bank of the United States, 1 Binn. 27, 30 (Pa. 1802); Bank of St. Albans v. Farmers & Mechanics Bank, 10 Vt. 141, 145 (1838). *But see* National Bank v. First Nat'l Bank, 125 S.W. 513, 515 (Mo. App. 1910) ("too narrow a basis"); WOODWARD, *supra* note 26, at 137 (does not satisfactorily account for the rule); Aigler, *supra*, at 809, 813; Ames, *Price v. Neal*, *supra* note 36, at 298-99.

"Seventh, one commentator argued that the refusal in *Price v. Neal* to allow recovery resulted from a simple application of the law of mistake in that, under the facts, it was not against good conscience for the defendant to retain the money." Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 790 n.45; *see also* Aigler, *supra*, at 810-11; *see also* Bernheimer v. Marshall & Co., 2 Minn. 61, 67 (1858).

"Eighth, Wigmore suggested that the refusal to refund the money in this type of case is based on the idea that there was *no mistake* with respect to the drawee's duty to the holder." Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 790 n.45; *see also* Wigmore, *A Summary of Quasi-Contract*, 25 AM. L. REV. 695, 706 (1891). This rationale was most prevalent in insufficient fund cases. *See, e.g.*, Boylston Nat'l Bank v. Richardson, 101 Mass. 287, 291 (1869). *But see* WOODWARD, *supra* note 26, at 136-37 (1913) (not a satisfactory theory).

"Ninth, Keener argued that the denial of recovery ought to be based on the idea that the defendant received money from the plaintiff in *extinguishment of a right* he surrendered for the money and should not be required to return the money." Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 790 n.45; *see also* KEENER, *supra* note 26, at 157.

"Tenth, Professor Farnsworth argues that the rule is justified on a more efficient distribution of losses by placing the loss on the party able to spread the loss through insurance, although he acknowledges that this idea was not part of Lord Mansfield's opinion." Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 790 n.45; *see also* Farnsworth, *supra*, at 303; Colombo, *supra* note 10, at 826.

Professor Edward Rubin offers what might be an eleventh justification for the doctrine when he suggests that "it is the simplest rule from an operational perspective." Rubin, *Policies and Issues*, *supra* note 7, at 647.

Courts typically cite more than one of these rationales. *See, e.g.*, Commercial & Farmers Nat'l Bank v. First Nat'l Bank, 30 Md. 11 (1869). Professors White and Summers find that "none of the justifications is entirely satisfactory." WHITE & SUMMERS, *supra* note 7, at 614-15. They do, however, support the doctrine as it applies to payment of insufficient fund checks. *See id*. at 615. Several of these justifications will be discussed in the course of this Article.

55. Professor Fredrick Schauer makes it clear that justifications guide the application and modification of rules over time and changing circumstances, especially in a legal system, such as a common law system, where rules are typically not set out in canonical form. *See* FREDRICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-

to make clear the justification of the decision and, at the same time, suggesting an array of potentially conflicting possibilities, Lord Mansfield invited confusion and conflict over the doctrine.[56]

This is precisely what happened in the application and development of the *Price* doctrine over the next two centuries. As the next several sections of this Article will illustrate, without guidance from the *Price* opinion on whether all of the factors set out were necessary to reach the result, judges typically focused on a single one of these as a justification for the decision.[57] Similarly, without guidance "on which factors, if any, deserved more weight, different judges focused on different factors. When, in later cases, not all of these factors were present, the application of the doctrine became problematic."[58] This was especially evident in the English development.[59]

When English judges repudiated Lord Mansfield's views on the equitable nature of the action for money had and received,[60] they removed the primary justification for the *Price* doctrine and left later judges to focus on one or more of the various factors set out in the opinion, but without the cohesiveness that the underlying concepts of conscience and equity brought to the doctrine.

Finally, Lord Mansfield's apparent lack of concern over the commercial policy relating to the transferability of negotiable instruments was also significant. Nonetheless, he must have been aware of this policy. It was the rationale for the decision in *Jenys v. Fawler*,[61] was raised by the plaintiff in *Price*, was central to the leading role Lord Mansfield played "in the articulation and synthesis of English negotiable instruments law during the eighteenth century, especially doctrines relating to the transferability of such instruments,"[62] and continued to play

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MAKING IN LAW AND IN LIFE 26, 178, ch. 8 (1991); *see also* A.W.B. SIMPSON, LEGAL THEORY AND LEGAL HISTORY 370 (1987). On occasion, the justification itself serves as the rule. The absence of a justification may disrupt the entire decision-making process. *See generally* SCHAUER, *supra* ch. 1-5, 8-9.

56. The confusion over the decision's rationale may result, in part, from errors in reporting Lord Mansfield's remarks from the bench. The court in *Ellis & Morton v. Ohio Life Ins. & Trust Co.*, 4 Ohio St. 628 (1855), suggested that the opinion "is not very clearly reported. . .," and then declined to advance its own views on the rationale for the holding. *Id*. at 654.

57. According to Professor Palmer, "[s]ome of the disagreement stems from the common error of assuming that the decision rested on a single overriding policy, whereas in fact it probably was a response to several factors." 1 PALMER, *supra* note 36, at 291.

58. Dow, *Restitution on Payments*, *supra* note 11, at 32.

59. *See infra* notes 65-85, 227-328 and accompanying text.

60. *See supra* note 37 and accompanying text.

61. *See supra* notes 44-45 and accompanying text.

62. Dow, *Restitution on Payments*, *supra* note 11, at 31. Lord Mansfield's influence extended well into commercial law generally. *See* 1 WILLIAM HOLDSWORTH, A HISTORY OF

an important role in English negotiable instrument cases decided by other judges.[63] It is likely that the commercial policy implications did not significantly influence Lord Mansfield's decision,[64] but his failure to express this potentially important commercial policy justification subsequently had the effect of undermining some of the support that the *Price* doctrine otherwise would have had. The next several sections of this Article will illustrate how all of these circumstances played a role in undermining the doctrine in English law over the century and a half following the *Price* decision and brought about the divergence between English and American forgery law.

IV. DEVELOPMENT OF THE *PRICE* DOCTRINE IN ENGLISH LAW THROUGH *COCKS V. MASTERMAN* (1829)

Beginning in the early nineteenth century, there were several important developments in the *Price* doctrine in English law. First, it has already been indicated that shortly after Lord Mansfield left the bench, English judges rejected his view on the equitable nature of the action for money had and received.[65] Instead, these judges came to see recovering mistaken payments in terms of both consideration and warranty. "[B]y the early nineteenth century, some judges began to refer to a 'general' rule of recovering mistaken payments" resting on this basis.[66] "[T]ransferring or presenting an instrument bearing a forgery (or material alteration) constituted a failure of consideration or breach of warranty, [which] entitled the plaintiff to recover the payment."[67] For some judges, this

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ENGLISH LAW 572 (1925). James Holden suggests that while Lord Mansfield was influential, he clearly was not the "founder" of commercial law. *See* HOLDEN, *supra* note 2, at 112-22. *See generally* OLDHAM, *supra* note 26; FIFOOT, *supra* note 34.

63. *See* Dow, *Restitution on Payments*, *supra* note 11, at 31 n.24. The commercial policy justification would become very significant in the *Price* doctrine's subsequent development in English law. *See, e.g.*, London & River Plate Bank v. The Bank of Liverpool, 1 Q.B. 7 (1896). It developed as one of the leading justifications for the doctrine in American law. *See* Dow, *Restitution on Payments*, *supra* note 11, at 32 n.27; *supra* note 51; *infra* note 101, 182-184 and accompanying text. The drafters of the original U.C.C. cited commercial policy "as *the* rationale for the rule." *See* Dow, *Restitution on Payments*, *supra* note 11, at 32 n.27; *see* U.C.C. § 3-418 (official comment).

64. *See* Dow, *Restitution on Payments*, *supra* note 11, at 31; *see* OLDHAM, *supra* note 26, at 596-609.

65. This development was not limited to the use of the action in the context of negotiable instruments. It took place across the entire area of restitution law. *See supra* note 37 and accompanying text.

66. Dow, *Restitution on Payments*, *supra* note 11, at 33; *see, e.g.*, Smith v. Mercer, 128 Eng. Rep. 961 (C.P. 1815); Wilkinson v. Johnson, 107 Eng. Rep. 792 (K.B. 1824).

67. Dow, *Restitution on Payments*, *supra* note 11, at 33; Jones v. Ryde, 128 Eng. Rep. 779 (C.P. 1814).

approach was supported by a commercial policy argument similar to that found in *Jenys v. Fawler*[68] and other eighteenth century cases.[69]

During this period, the *Price* doctrine became "firmly established as an exception to the general rule" regarding recovery of mistaken payments, although acceptance was not unanimous.[70] The doctrine was expanded slightly to prohibit recovery of a payment on a forged acceptance.[71] The courts, however, consistently refused to extend the doctrine to allow recovery "in cases involving material alterations[72] or forged indorsements."[73]

During this period, the courts routinely "isolated a single factor from the *Price* opinion as *the* justification for that decision. . . ."[74] They then "used it as the basis for the decision in the subsequent case" while, at the same time, ignoring or rejecting the other factors Lord Mansfield articulated in *Price*.[75] Courts also began introducing presumptions into the *Price* doctrine during this period. Judges began to presume the plaintiff's negligence as well as the resulting loss to the defendant.[76]

Cocks v. Masterman,[77] decided in 1829, is often viewed "as the leading case with respect to mistaken payments of forged bills."[78] In

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68. *See* Jones v. Ryde, 128 Eng. Rep. 779, 782 (C.P. 1814) (Chambre, J.) ("[I]f the defendant's doctrine could prevail, it would very materially impair the credit of these instruments.").

69. *See, e.g.*, Fenn v. Harrison, 100 Eng. Rep. 842 (K.B. 1790).

70. *See* Dow, *Restitution on Payments*, *supra* note 11, at 33; Smith v. Mercer, 128 Eng. Rep. 961, 963-65 (C.P. 1815) (Chambre, J. dissenting).

71. *See id*. "In both *Price* and *Smith* the banker plaintiffs were unable to recover a payment (or avoid an acceptance) mistakenly made over the forgery of their customer's signature." Dow, *Restitution on Payments*, *supra* note 11, at 33 n.38. In *Price*, the customer's signature was forged as drawer, and in *Smith*, it was forged as drawee.

72. *See* Dow, *Restitution on Payments*, *supra* note 11, at 33; Jones v. Ryde, 128 Eng. Rep. 779 (C.P. 1814).

73. *Id.* at 34; Robinson v. Yarrow, 129 Eng. Rep. 183 (C.P. 1817).

74. Dow, *Restitution on Payments*, *supra* note 11, at 33-34.

75. *See* Dow, *Restitution on Payments*, *supra* note 11, at 33. On page 33, it is erroneously stated that no recovery was allowed in *Jones v. Ryde*, 128 Eng. Rep. 779 (C.P. 1814). Recovery was allowed. *See Jones*, 128 Eng. Rep. 779.

76. *See* Dow, *Restitution on Payments*, *supra* note 11, at 34.

77. *See* Cocks v. Masterman, 109 Eng. Rep. 335 (K.B. 1829). Here, the plaintiffs were bankers who mistakenly paid a bill on which the acceptance of their customer had been forged, a situation quite similar to that in *Smith v. Mercer*. *See id.* After discovering the forgery, they sought to recover the payment through an action for money had and received. *See id.* Both counsel made a change of position argument on behalf of their respective clients. *See id.* On behalf of the defendants, Pollock argued that a change of position should be presumed to have occurred during the one-day period between the payment and the discovery of the forgery. *See id*. at 337. Plaintiff's counsel argued against the use of any presumption by claiming that there was no actual loss during this period. *See* Dow, *Restitution on Payments*, *supra* note 11, at 34 n.51.

denying recovery of the mistaken payment of a bill on which the acceptance of the plaintiff's customer had been forged, the court took a new approach. It framed the issue not as a matter of a banker's duty with respect to its customer's acceptance, but from the standpoint of the presenter's right to know whether a bill will be paid or dishonored on the day on which it is due.[79] This right was justified in relation to the "presenter's right of recourse against prior parties on their signatures."[80] To preserve this recourse the presenter "has a right to know on the day of presentment whether the drawer's signature or drawee's acceptance is valid."[81] More importantly, in this case the court presumed that the presenter's position had changed during this period. Needless to say, in some cases this presumption would result in restitution being denied even when the banker's failure to detect the forgery before paying and its delay in notifying the presenter of the forgery did not actually prejudice the presenter's recourse.

The substantial measure of certainty for the parties provided by the presumed change of position approach was considerably diminished in this same decision when the court raised the issue of negligence and conditioned the banker's liability on its being free of negligence. It suggested that a banker is liable for any failure to notify the presenting party of a forgery, on the day of payment, only if the banker were negligent.[82] This raised potentially difficult questions with respect to what constitutes negligence in this context, and contributed to undermining the doctrine in the second half of the nineteenth century.

Thus, it is clear that the *Price* doctrine was well-established by 1829, even though it had not been expanded much beyond its original facts. Under the doctrine, payments could not be recovered or acceptances be avoided by drawees in cases of forged drawer's signatures or forged acceptances, or "by the drawee's bankers in cases of forged

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78. Dow, *Restitution on Payments*, *supra* note 11, at 34; *see, e.g.*, Barclays Bank Ltd. v. W.J. Simms, 3 All E.R. 522 (Q.B. 1979) (Goff J.); JOHN R. PAGET, THE LAW OF BANKING 158, 169 (1904) [hereinafter PAGET 1904].

79. Justice Bayley said that the judges "are all of the opinion that the holder of a bill is entitled to know, on the day when it becomes due, whether it is an honoured or dishonoured bill, and that, if he receive [sic] the money and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back." *Cocks*, 109 Eng. Rep. at 338. The presenter's right also can be expressed as the banker's duty.

80. Dow, *Restitution on Payments*, *supra* note 11, at 35. This recourse is based on the contract or warranty created by indorsing an instrument.

81. *Id.*; *see Cocks*, 109 Eng. Rep. at 338.

82. *See id.*

acceptances."[83] During the same period, English courts refused to extend the doctrine to forged indorsements[84] and material alterations.[85]

The clarity of the rule at this point was in sharp contrast with the confusion over its justification. The courts failed to reconcile the versions of rationales suggested in Lord Mansfield's *Price* opinion and failed to settle on any primary rationale for the doctrine. Instead, judges developed a broad array of rationales and shifted from one to another, often asserting more than one, all in an effort to justify a result that most judges apparently supported.[86] These differing and potentially conflicting rationales created uncertainties over the doctrine's scope and were an important contributing factor in the process of undermining the doctrine.[87] Before this development is examined it will be helpful to first consider the doctrine's development in American courts during the nineteenth century.

V. DEVELOPMENT OF THE DOCTRINE IN AMERICAN LAW THROUGH THE UNIFORM COMMERCIAL CODE

A. American Development in the Nineteenth Century

Despite some uncertainties over the *Price* doctrine in English law, particularly with respect to its underlying rationale, the basic doctrine was adopted fairly quickly and, for the most part, enthusiastically by the courts in all but a few jurisdictions in the United States during the nineteenth century.[88] In one of the early leading cases involving the doctrine, the

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83. *See id.*

84. *See* Robinson v. Yarrow, 128 Eng. Rep. 183 (C.P. 1817).

85. *See* Dow, *Restitution on Payments*, *supra* note 11, at 35; *see* Jones v. Ride, 128 Eng. Rep. 779 (C.P. 1814). In a later case, *Chambers v. Miller*, 143 Eng. Rep. 50 (C.P. 1862), the court extended the *Price* doctrine to payments made on a bill of exchange drawn on insufficient funds.

86. Dow, *Restitution on Payments*, *supra* note 11, at 35.

87. This process got underway not long after the decision in *Cocks v. Masterman* in 1829.

88. *See* Bank of the United States v. Bank of Georgia, 23 U.S. (10 Wheat.) 333, 348-52 (1825); American Hominy Co. v. Millikin Nat'l Bank, 273 F. 550, 554 (S.D. Ill. 1920); Louisa Nat'l Bank v. Kentucky Nat'l Bank, 39 S.W.2d 497, 499 (Ky. 1931); Commercial & Farmers Nat'l Bank v. First Nat'l Bank, 30 Md. 11, 19 (1869) ("authority of the case...has been uniformly and abundantly sustained"); Gloucester Bank v. Salem Bank, 17 Mass. 32, 43 (1820); Neal v. Coburn, 42 A. 348, 350-51 (Me. 1898); American Surety Co. v. Industrial Sav. Bank, 290 N.W. 689, 690 (Mich. 1928) ("The great majority of American courts have in the final analysis followed the doctrine of *Price v. Neal*. . . ."); Germania Bank v. Boutell, 62 N.W. 327, 328 (Minn. 1895) ("This general doctrine is recognized as the law by the courts of every state in the Union except Pennsylvania. . . ."); National Park Bank v. Ninth Nat'l Bank, 46 N.Y. 77, 81 (1871); First Nat'l Bank v. United States Nat'l Bank, 197 P. 547, 551 (Or. 1921); Bank of Williamson v. McDowell County Bank, 66 S.E. 761, 764 (W. Va. 1909) (court acknowledges criticism, but follows the rule it describes as "indispensable").

For commentary on this adoption process, see PALMER, *supra* note 36, at 292; WOODWARD, *supra* note 26, at 127, 139; Aigler, *supra* note 54, at 816; Ames, *Price v. Neal*, *supra* note 36, at 297-98, 297 n.2; Beasley, *supra* note 50, at 88 ("rule well settled"); Farnsworth, *supra* note 54, at 302 ("universal favor"); Stephen I. Langmaid, *Quasi-Contract—Change of Position by Receipt of*

United States Supreme Court said, "[t]he case of *Neal v. Price* has never since been departed from; and . . . it has had the uniform support of the Court, and has been deemed a satisfactory authority."[89] The few courts eventually rejecting the doctrine did so with surprisingly vehement criticism.[90] At the same time, however, the courts that expressly rejected the doctrine nevertheless adhered to its substance. For these courts, the recipient's good faith, nonnegligent change of position in reliance on the mistaken payment precluded recovery by the drawee under traditional restitution law.[91]

This pervasive willingness of American courts to adopt the basic *Price* doctrine must be viewed in light of the restrictions they placed on its application. A careful look at the American cases shows that "[p]rotection from the drawee's restitutionary action was generally available only to holders who paid value for the draft and were in good faith at the time payment was received."[92] "In addition, protection was

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Money in Satisfaction of a Preexisting Debt, 21 CAL. L. REV. 311, 346 (1933); O'Malley, *supra* note 41, at 202 ("instantaneous and apparently permanent success"); Roy L. Steinheimer, *Impact of the Commercial Code on Liability of Parties to Negotiable Instruments in Michigan*, 53 MICH. L. REV. 171, 209-10 (1954); Note, *Losses*, *supra* note 54, at 420 n.17; Note, *Relation*, *supra* note 54, at 634 (firmly established).

A number of American courts expressly recognized that the doctrine became well established in England. *See, e.g.*, Bank of the United States v. Bank of Georgia, 23 U.S. (10 Wheat.) 333, 348-52 (1825); American Hominy Co. v. Millikin Nat'l Bank, 273 F. 550, 554 (S.D. Ill. 1920); Gloucester Bank v. Salem Bank, 17 Mass. 32, 43 (1820); First Nat'l Bank v. United States Nat'l Bank, 197 P. 547, 550 (Or. 1921).

89. Bank of the United States v. Bank of Georgia, 23 U.S. (10 Wheat.) 333, 349-50 (1825).

90. *See, e.g.*, First Nat'l Bank v. Bank of Wyndmere, 108 N.W. 546, 546 (N.D. 1906) (characterizing the doctrine as "unsound"); American Exp. Co. v. State Nat'l Bank, 113 P. 711, 712 (Okla. 1911) (doctrine is "unsound and illogical"). The most poetic of this criticism was offered by the Texas Court of Civil Appeals in a 1912 case: "The magic name of Mansfield has not been sufficient to render perpetual the heresy taught by him. . . ." First Nat'l Bank v. Farmers & Merchants State Bank, 146 S.W. 1034, 1035-6 (Tex. Civ. App. 1912). From the perspective of 1997, at least, the court plainly was wrong. The doctrine clearly has survived intact in American law. *See infra* notes 92-226 and accompanying text.

91. *See* First Nat'l Bank v. Bank of Wyndmere, 108 N.W. 546, 549 (N.D. 1906); American Exp. Co. v. State Nat'l Bank, 113 P. 711, 712 (Okla. 1911). The limits on recovery of the mistakenly paid funds in states that nominally rejected the *Price* doctrine could be interpreted instead as constituting acceptance of the doctrine with change of position and reliance restrictions. These restrictions had their counterpart in some English cases. The most complete rejection of the *Price* doctrine occurred in Pennsylvania, which enacted a statute in 1849 abolishing it, the only state to do so. *See* PA. STAT. 426 § 10 (Purdon 1853); Union Nat'l Bank v. Franklin Nat'l Bank, 94 A. 1085 (Pa. 1915).

92. Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 791 n.49; *see* First Nat'l Bank v. United States Nat'l Bank, 197 P. 547, 551 (Or. 1921); *see also* Harwood, *supra* note 41, at 1086; Note, *Losses*, *supra* note 54, at 420 n.17. Professor O'Malley saw a further restriction in cases where the presenter learns of forgery *after* acquiring holder in due course status (that is, after obtaining the instrument for value, in good faith, and without notice)

denied to holders who were negligent in originally obtaining the instrument or the payment."[93] In most cases where the holder's negligence permitted the drawee to recover the mistaken payment, the negligence was found in the presenter's failure to obtain proper identification from the transferor before taking a check.[94] The bank's negligence in paying the forged item might excuse the recipient's negligence,[95] but otherwise it generally was not relevant unless it prejudiced the recipient.[96]

Reflecting upon the restrictions courts were imposing on the *Price* doctrine during the late nineteenth century, an American judge remarked that "[t]he trend of modern authorities is to impose upon it some limitations and modifications."[97] It is clear, however, that these restrictions were no different from what we have already observed in the early nineteenth century English cases.[98] Moreover, it is not at all certain that these even can be considered "limitations and modifications" of the original doctrine because support for each of these can be found in Lord Mansfield's opinion in *Price*.[99]

There also was a parallel development between English and American courts with respect to the types of mistakenly paid items to which the rule applied. As we saw with the English courts, American

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but before payment. *See* O'Malley, *supra* note 41, at 206 n.98. He suggested that in such a case the drawee bank could recover the mistaken payment because its equity is superior. *See id.*

93. Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 791 n.50; *see, e.g.*, State Bank v. First Nat'l Bank, 127 N.W. 244 (Neb. 1910) (same); First Nat'l Bank v. United States Nat'l Bank, 197 P. 547, 551 (Or. 1921). For later twentieth-century cases on this issue, see, for example, *Payroll Check Cashing v. New Palestine Bank*, 401 N.E.2d 752, 755 (Ind. Ct. App. 1980); First Nat'l City Bank v. Altman, 3 U.C.C. Rep. Serv. 815, 816-17 (N.Y. Sup. Ct. 1966) (*Price v. Neal* rule may not apply in a case where purchaser was negligent in obtaining the instrument). *See also* Ames, *Price v. Neal*, *supra* note 54, at 300; Woodward, *supra* note 54, at 473; Colombo, *supra* note 10, at 824; Harwood, *supra* note 41, at 1086; Note, *Losses*, *supra* note 54, at 425-26, 426 n.45.

94. *See, e.g.*, First Nat'l Bank v. United States Nat'l Bank, 197 P. 547, 551-52 (Or. 1921); People's Bank v. Franklin Bank, 12 S.W. 716, 717 (Tenn. 1889). *But see* Bank of St. Albans v. Farmers & Mechanics Bank, 10 Vt. 141, 147-48 (failure to obtain proper identification did not preclude protection under rule); O'Malley, *supra* note 41, at 205 n.93.

95. *See, e.g.*, Woods v. Colony Bank, 40 S.E. 720, 722 (Ga. 1902); Bank of Williamson v. McDowell County Bank, 66 S.E. 761, 764 (W. Va. 1909). *But see* People's Bank v. Franklin Bank, 12 S.W. 716, 717 (Tenn. 1889). *See also* Note, *Losses*, *supra* note 54, at 426, 450 n.158.

96. *See, e.g.*, First Nat'l Bank v. First Nat'l Bank, 24 N.E. 44, 45 (Mass. 1890); National Loan & Exch. Bank v. Lachovitz, 128 S.E. 10 (S.C. 1925); Note, *Effect*, *supra* note 54, at 805. For a discussion of the negligence rule and its rationale, see *Bank of Williamson v. McDowell County Bank*, 66 S.E. 761, 763-64 (W. Va. 1909).

97. Germania Bank v. Boutell, 62 N.W. 327, 329 (Minn. 1895).

98. This is particularly true with respect to negligence. Lord Mansfield specified it as a factor in his *Price* decision. It was the primary focus in *Smith v. Mercer*, 128 Eng. Rep. 961 (C.P. 1815). *See supra* notes 62, 70-71 and accompanying text. It was again brought up in *Cocks v. Masterman*, 109 Eng. Rep. 335 (K.B. 1829). *See supra* notes 77-81 and accompanying text.

99. *See supra* notes 45-64 and accompanying text.

courts were reluctant to expand the rule beyond the facts of the *Price* case. The only significant expansion of the basic doctrine was to the mistaken payment of insufficient funds[100] and no-account checks,[101] in which case payment was final and could not be recovered by the bank so long as the holder was in good faith, not negligent, and had taken the item for value.[102] In other types of mistaken payment cases, such as payment of an item with a forged indorsement or material alteration, American courts, like their English counterparts, refused to follow *Price*.[103] In such

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100. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 791 n.51; *see, e.g.*, Liberty Trust Co. v. Haggerty, 113 A. 596, 597 (N.J. Ch. 1921). For later twentieth century cases on this issue, see, for example, *Central Bank & Trust Co. v. General Fin. Corp.*, 297 F.2d 126 (5th Cir. 1961); Kirby v. First & Merchants Nat'l Bank, 168 S.E.2d 273, 276 (Va. 1969). *See also* Colombo, *supra* note 10.

For later twentieth century cases discussing the rationale for extending the rule to insufficient fund checks, see, for example, *Morgan Guar. Trust Co. v. American Sav. & Loan Ass'n*, 804 F.2d 1487, 1495 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 3214 (1987) (discussing New York law); Central Trust Bank & Trust Co. v. General Fin. Corp., 297 F.2d 126, 130 (5th Cir. 1961). *See also* PALMER, *supra* note 36, at 300-01, 300 n.44; RESTATEMENT, *supra* note 39, § 33; Note, *Defense of Change of Position*, *supra* note 54, at 411 n.3 (transaction is closed, mistake is not mutual). For additional cases holding that the rule did not apply to insufficient funds cases, see PALMER, *supra* note 36, at 301 n.44.

There are, of course, other rationales for specific exceptions to the *Price* doctrine. With respect to insufficient funds as well as stop payment order cases, Professor Palmer argues that the denial of restitution may rest on different grounds than exist in the *Price v. Neal* situation. With a stop payment order and insufficient funds, the drawee has paid the holder in discharge of a claim against the drawer. Where the claim is valid and the holder is acting in good faith, there is no unjust enrichment, even though the item was mistakenly paid. This idea has no application in forged drawers' signature or material alteration situations because the holder has no valid claim against the drawer. When restitution is denied, it must be for another reason. *See* 1 PALMER, *supra* note 36, at 302.

With respect to recovering mistaken payments over a stop payment order, there is some authority for the idea that the mistaken payment cannot be recovered because the mistake is not mutual. Note, *Defense of Change of Position*, *supra* note 54, at 411-12. *See also* PALMER, *supra* note 36, at 301 n.46. There is also some authority that the mistaken payment of a post dated check could not be recovered because the mistake was not mutual. Note, *Defense of Change of Position*, *supra* note 54, at 411-12.

101. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 792 n.52.

102. *See id.*; Note, *Effect*, *supra* note 54, at 807 (In most of the cases where a recovery has not been allowed, the defendant has been a purchaser for value) (without purchaser for value or change of position restitution of the NSF payment was generally allowed.). *But see* O'Malley, *supra* note 41, at 193 n.30 (stating that payment of insufficient funds and no account items are final in favor of good faith holder, but not specifying payment of value).

With respect to the extension of the doctrine, see also *Neal v. Coburn*, 42 A. 348, 350 (Me. 1898).

On the application of the rule to both payment and acceptance, see also *Kansas Bankers Surety Co. v. Ford County State Bank*, 338 P.2d 309, 313 (Kan. 1959); Bank of St. Albans v. Farmers & Mechanics Bank, 10 Vt. 141, 145 (1838). Professor Palmer writes that under the rule both payment and acceptance become final. *See* 1 PALMER, *supra* note 36, at 292.

103. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 793 n.54. With respect to forged indorsements, see also Harwood, *supra* note 41, at 1080 n.16; Breese, *supra* note 12, at 199, 203; Note, *Losses*, *supra* note 54, at 421-22; Colombo, *supra* note 10, at

cases, restitution could be obtained through an action for money had and received.[104]

It should be added that the relationship between these forged indorsement and material alteration cases and the *Price* doctrine is somewhat unclear. In such cases, traditional defenses such as change of position sometimes were available to preclude recovery.[105] Consequently, courts are consistent with the *Price* doctrine if they accept the view that the recipient's change of position in reliance on the mistaken payment[106] and allow recovery of the mistaken payment in forged indorsement and material alteration cases when there is a change of position.[107]

1. Rationale for the Doctrine

We also see an interesting parallel development between English and American courts with respect to the rationale underlying the *Price* doctrine. The overwhelming support for the basic doctrine in American law was accompanied by a general failure to firmly settle on a satisfactory

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821. The same rule applied in cases of a forged indorsement on a note. *See* PALMER, *supra* note 36, at 285.

Ames argued that recovery in cases of material alteration should be denied for the same reason as in cases of forged drawers signatures, but he acknowledged that many cases held to the contrary. *See* Ames, *Price v. Neal*, *supra* note 36, at 306; *see also* Beasley, *supra* note 50; Woodward, *supra* note 26, at 474-75; Breese, *supra* note 12, at 199, 203; Note, *Losses*, *supra* note 54, at 424 n.32 (courts split with respect to recovery in material alteration cases).

104. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 793 n.55; Harwood, *supra* note 41, at 1080 n.16; Breese, *supra* note 12, at 199, 203; Note, *Losses*, *supra* note 54, at 422 n.21; *see also* North Carolina Nat'l Bank v. Hammond, 260 S.E.2d 617, 621-22 (N.C. 1979) (regarding recovery with respect to forged indorsements).

Ames argued that with respect to recovery in forged indorsement cases, the presenter is not a holder, but a converter and therefore a constructive trustee for the true owner. *See* Ames, *Price v. Neal*, *supra* note 36, at 307. For a discussion of other alternative theories of recovery, see *infra* notes 102-111 and accompanying text.

105. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 793 n.55. For a discussion of the change of position defense, see *infra* notes 229-236 and accompanying text.

106. There is significant support for this proposition in some nineteenth century English cases, *see, e.g.*, Cocks v. Masterman, 109 Eng. Rep. 335, 338 (K.B. 1829); Smith v. Mercer, 128 Eng. Rep. 961, 965-66 (C.P. 1815), as well as some American cases. *See, e.g.*, Commercial & Farmers Nat'l Bank v. First Nat'l Bank, 30 Md. 11, 19 (1869); Merchants Nat'l Bank v. National Bank, 139 Mass. 513, 518-20 (1885); Ellis & Morton v. Ohio Life Ins. & Trust Co., 4 Ohio St. 628, 660 (1855). *See generally supra* notes 54, 74-75, 229-236.

107. Under other rationales, recovery in these cases also would be entirely inconsistent with the doctrine. The change of position concept, both as a basis for the *Price* doctrine and a defense in other restitutionary actions involving mistaken payments, turns out to be a key factor in explaining the divergence between English and American law that took place during the late nineteenth and early twentieth centuries. The English courts' rejection of the change of position defense in nearly every type of restitution case, *see infra* notes 229-236 and accompanying text, and the American courts' adherence to it, proves to be significant. *See supra* notes 54, 84, and accompanying text. On the recognition of a general change of position defense in English restitution law see *infra* notes 289-313 and accompanying text.

justification for it. American courts followed the English courts in looking at "a broad array of rationales and shifting from one to another, often asserting more than one," to justify a result that nearly all American judges supported.[108] At the same time, it would be reasonable to say that this process was not as pronounced in American courts as in the English courts. The effect this failure had on the subsequent development of the doctrine will be considered in subsequent sections of this Article.

2. Alternative Theories of Recovery

There is another important development in American law that parallels English law to some extent. It is clear that by the last two decades of the nineteenth century, a great majority of authority supported the basic *Price* doctrine and simultaneously allowed restitution in cases of forged indorsements, material alterations, and other types of mistaken payments that did not fall within the *Price* rule.[109] At the same time, however, we see the development of alternative theories of recovery in mistaken payment cases by some American courts.

The most significant of these was a *warranty of good title* implied from the act of presenting an item for payment (or acceptance).[110] Presenting an item bearing a forged indorsement breached the warranty, obligating the presenter to refund the payment.[111] Inasmuch as good title to the item was not affected by the presence of a forged drawer's signature, the distinction between the various types of forgeries that existed under implied warranty principles was maintained under the implied warranty theory.[112] This warranty was sometimes viewed as a *warranty of genuineness* with respect to signatures, and, for a majority of courts taking this approach, this warranty did not encompass the drawer's signature,[113] thereby maintaining the distinction between types of

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108. *See* Dow, *Restitution on Payments*, *supra* note 11, at 35. For an overview of the various justifications offered by American courts for the doctrine, see *supra* note 54.

109. *See supra* notes 95-97 and accompanying text.

110. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at n.56; *see, e.g.*, Security Sav. Bank v. First Nat'l Bank, 106 F.2d 542, 544 (6th Cir. 1939). For a late twentieth century case dealing with this issue, *see North Carolina Nat'l Bank v. Hammond*, 260 S.E.2d 617 (1979). *See also* WHITE & SUMMERS, *supra* note 7, at 563; Note, *Losses*, *supra* note 54, at 422 n.21; Harwood, *supra* note 40, at 1080, 1080 n.17.

111. *See* 1 PALMER, *supra* note 35, at 283; O'Malley, *supra* note 41, at 228 n.238.

112. *See, e.g.*, Dow & Ellis, *Survival of Common Law Restitution supra* note 6, at 793. For late twentieth century cases on this point, see also *Bagby v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 491 F.2d 192, 199 (8th Cir. 1974); Sun N' Sand v. United Cal. Bank, 582 P.2d 920, 929-32 (Cal. 1978); Payroll Check Cashing v. New Palestine Bank, 401 N.E.2d 752, 754-56 (Ind. Ct. App. 1980); Aetna Life & Casualty Co. v. Hampton State Bank, 497 S.W.2d 80, 84 (Tex. Civ. App. 1973). *See also* Note, *Losses*, *supra* note 54, at 456 n.195.

113. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 793 n.58; *see, e.g.*, First Nat'l Bank v. United States Nat'l Bank, 197 P. 547, 555-6 (Or. 1921). *But see, e.g.*,

forgeries.[114] This warranty approach has been heavily criticized by commentators over the last hundred years as an illegitimate extension of the implied warranty of good title in the *transfer* of an instrument to the *presentment* of the instrument.[115] It nevertheless persisted as a minority view in mistaken payment cases,[116] sometimes, as the sole basis of recovery,[117] and sometimes in conjunction with restitutionary principles.[118]

Williamsburgh Trust Co. v. Tum Suden, 105 N.Y.S. 335, 335-36 (1907) (holding that holder's indorsement warranted genuineness of drawer's signature, an "exception" to *Price v. Neal*).

114. It is worth noting at this point that under this warranty approach the change of position defense would not be available. *See* Note, *Losses*, *supra* note 54; Note, *Defense of Change of Position*, *supra* note 54, at 412; *see also infra* notes 144-45, 164-65 and accompanying text. The impact of this on the *Price* doctrine is problematic. On the one hand, to the extent that *Price* rested on a change of position rationale, this would tend to undermine it. But this effect would be more than offset by the fact that these warranties were carefully fashioned in conjunction with the *Price* doctrine in that no warranty was made with respect to the drawer's signature. The presenter of an item did not warrant the genuineness of that signature and, therefore, would not be obligated to return the money in a warranty action, a result entirely consistent with the *Price* doctrine. Inasmuch as the presenter was free of warranty liability under this approach, the absence of the change of position defense was not a disadvantage.

115. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 794 n.59; Breese, *supra* note 12, at 205-07; Note, *Defense of Change of Position*, *supra* note 54, at 412-13, 412 n.11.

116. *See* WHITE & SUMMERS, *supra* note 4, at 597-98; O'Malley, *supra* note 41, at 228-29; Harwood, *supra* note 41, at 1080; Breese, *supra* note 12, at 203-07.

117. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 794 n.61.

118. *See* First Nat'l Bank v. First Nat'l Bank, 24 N.E. 44, 45 (Mass. 1890). There was a parallel development in mistake cases involving materially altered items. While the large majority of courts followed quasi-contract principles in allowing recovery, *see supra* notes 96-97 and accompanying text, a few courts allowed recovery under a warranty of genuineness implied in the presentment. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 794 n63; *see supra* notes 108-109 and accompanying text.

Another alternative basis of recovering mistaken payments that developed in the nineteenth century was the bankers' practice of requiring banks that forwarded or presented items for collection to guarantee the genuineness of prior indorsements by affixing "Prior Endorsements Guaranteed," "P.E.G.," or similar language to an item. For background on the guarantee, see generally First Nat'l Bank v. First Nat'l Bank, 50 N.E. 723, 724 (Ohio 1898); Farnsworth, *supra* note 54, at 304; Rogers, *supra* note 97, at 957 n.84; Cecile L. Piltz, Comment, *Bills & Notes—Interpretation of "All Prior Endorsements Guaranteed"*, 11 N.C.L. REV. 318 (1933) [hereinafter Comment, *Interpretation*]. This practice is still in effect. *See, e.g.*, United Carolina Bank v. First Union Bank, 426 S.E.2d 462, 465 (N.C. App. 1993). It was initiated and developed by bankers and was the result of the widespread use of the change of position defense in check collection cases. *See* PALMER, *supra* note 36, at 520; Rogers, *supra* note 97, at 957 n.84; Comment, *Interpretation*, *supra*. During the nineteenth century, many courts began to hold that a collecting bank that was acting merely as an agent for collection of an item and whose agency status was disclosed was not obligated to refund the mistaken payment if it had passed the money on to its customer (principal) before being notified of the mistake. Requiring the collecting banks to guarantee indorsements allowed the drawee to recover payments made over a forged indorsement in an action for breach of the guarantee, thereby avoiding any change of position defense. *See* PALMER, *supra* note 36, at 283 n.13, 520; Corker, *supra* note 41, at 34. This would allow recovery from the immediate holder as well as from remote collecting banks. *See id*. at 34. In a few cases, courts construed the guarantee to encompass the genuineness of the body of the

Unlike English law, in which the warranty or failure of consideration theories developed into a majority approach, these various alternative theories remained a minority view in nineteenth century American law. Moreover, it is important to reiterate that under each of these alternative theories the distinction between forged drawer's signatures on the one hand and forged indorsements and material alternations on the other was maintained. As a result, the application of these theories in various types of forgeries and alterations was entirely consistent with the *Price v. Neal* result, if not the underlying theory.

B. Recovery of Mistaken Payments under the Uniform Negotiable Instruments Law

The N.I.L.[119] gave no explicit recognition to the *Price v. Neal* rule.[120] Given the near universal adoption of the rule at common law in both England and the United States and the commentary it generated, this silence is surprising. The most likely explanation for this is that nearly the entire text of the N.I.L. is taken paragraph by paragraph from the English Bills of Exchange Act of 1882,[121] which also gave no explicit recognition to *Price*.[122] In spite of, or perhaps because of, the statutory silence, the courts, in an overwhelming majority of states, found that the *Price* rule was incorporated in the N.I.L. For most courts this was through section 62,[123] which was copied almost word for word from Section 54 of the English Act.[124] Section 62 provided:

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instrument and thereby allowed recovery of a payment for an item that was materially altered. *See, e.g.*, National Park Bank v. Eldred Bank, 97 N.Y. Sup. Ct. (90 Hun.) 285 (1895). However, these cases were a small minority. *But see* Farnsworth, *supra* note 54, at 309-10 (P.E.G. did not cover altered items.) The guarantee of prior indorsements did not serve as the basis for recovery of payments over a forged drawer's signature because that signature is not an indorsement. *See, e.g.*, Interstate Trust Co. v. United States Nat'l Bank, 185 P. 260 (Colo. 1919). For a discussion on the English development of the change of position defense, see *infra* notes 229-236, 275, 291-313 and accompanying text.

119. For background on the N.I.L., see *supra* note 4; Steve H. Nickles, *Problems of Sources of Law Relationships under the Uniform Commercial Code—Part I: The Methodology Problem and the Civil Law Approach*, 31 ARK. L. REV. 1, 12 (1977) [hereinafter *Nickles I*].

120. *See* O'Malley, *supra* note 41, at 204 n.88; Breese, *supra* note 12, at 207.

121. *See supra* note 4.

122. For a discussion of the extent to which the English Act embodied *Price*, see *infra* notes 241-251, 259-264 and accompanying text.

123. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 795 n.66; Kansas Bankers Surety Co. v. Ford County State Bank, 338 P.2d 309, 317 (Kan. 1959); Title Guarantee & Trust Co. v. Haven, 111 N.Y.S. 305, 307 (1908); Commerce-Guardian Bank v. Toledo Trust Co., 21 N.E.2d 173, 177-78 (Ohio App. 1938); *see also* Woodward, *supra* note 26, at 476 (possible exception of loss allocation regarding altered items); Breese, *supra* note 12, at 207; Note, *Losses*, *supra* note 54, at 420 n.17; Note, *Defense of Change of Position*, *supra* note 54, at 411.

124. *See infra* notes 242-43 and accompanying text.

> The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits:
> (1) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; . . . .[125]

The admission under this section of the genuineness of the drawer's signature had the effect of precluding the recovery of the payment, thereby preserving the *Price* rule.[126] By limiting the admission to the genuineness of the drawer's signature, the distinction under the *Price* doctrine between forged drawer's signatures on the one hand and forged indorsements and material alterations on the other was maintained.[127]

Notice, however, that the language of the section limits the admission to cases when the item was accepted.[128] The nineteenth-century American common law doctrine entailed no such limitation.[129] Nearly all courts adhered to this broader approach and simply extended the acceptance concept under the statute to encompass payment, which also precluded such recovery.[130] The few courts that were unwilling to take this step were not motivated by any dissatisfaction with the *Price* doctrine or its underlying rationale. Instead, they were unwilling to interpret the concept of acceptance to include the very distinct concept of payment. They simply read the doctrine into the N.I.L. through section 196,[131] as a supplementary common law principle, and applied it to both payment and acceptance cases.[132]

This is not to suggest, however, that no doctrinal disputes lingered among American courts. One dispute was over whether a negligent

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125. Negotiable Instruments Law § 62 (1920).

126. Normally, in an action to recover a payment, the basis of the recovery is the mistaken nature of the payment. The mistake could be, for example, as to the genuineness of a signature on the item. *See supra* notes 13-40 and accompanying text. When, under section 62, the drawee admits that the signature of the drawer is genuine, there obviously could be no mistake with respect to its genuineness.

127. Recovery of mistaken payments on materially altered items became more problematic under the N.I.L. *See infra* notes 135-137, 141 and accompanying text.

128. *See* PALMER, *supra* note 36, at 292; Palmer, *supra* note 117, at 295 n.147. The English statutory counterpart has the identical limitation. *See infra* note 243 and accompanying text.

129. Limiting recovery of mistaken payments to cases of forged acceptances has no basis in the *Price* decision itself, because it involved the mistaken payment of *both* an unaccepted draft and an accepted draft. *See supra* notes 43-44 *infra* notes 237-40 and accompanying text.

130. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 795 n.68; *see, e.g.*, National Bank v. First Nat'l Bank, 125 S.W. 513, 516 (Mo. App. 1910); First Nat'l Bank v. United States Nat'l Bank, 197 P. 547, 552 (Or. 1921).

131. *See id.* at n.69. A similar provision is found in section 97 of the English Bill of Exchange Act of 1882. *See Nickles II*, *supra* note 4, at 196-97.

132. *See, e.g.*, Louisa Nat'l Bank v. Kentucky Nat'l Bank, 39 S.W.2d 497, 499-500 (Ky. 1931); South Boston Trust Co. v. Levin, 143 N.E. 816, 817 (Mass. 1924). *See also* Aigler, *supra* note 54, at 818; Palmer, *supra* note 117, at 295 n.147; Breese, *supra* note 12, at 207; Note, *Losses*, *supra* note 54, at 420.

recipient was entitled to protection. A substantial majority of courts retained the common law view that the recipient's negligence will preclude protection under the *Price* rule.[133]

The most problematic aspect of the doctrine was the growing differences among the American courts over the underlying theory of recovering the mistaken payment. With respect to recovery of payments over forged indorsements and material alterations under the N.I.L., an overwhelming majority of courts continued to adhere to restitutionary principles. Under this approach, a mistaken payment would be recovered unless the recipient changed his position in reliance on the payment or asserted some other affirmative defense.[134] At the same time, however, the erosion of this approach, which had begun earlier in the century with the development of various warranties, accelerated under the N.I.L. The primary reason for this was that the warranty of genuineness and good title, which had developed at common law as a *transfer* warranty, was expressly codified in the N.I.L. in sections 65 and 66.[135] Under the terms of the statutes, these warranties were made only in the transfer and negotiation process, and most courts adhered to this limitation.[136]

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133. *See, e.g.*, Cairo Banking Co. v. West, 2 S.E.2d 91, 94-98 (Ga. 1939) (negligent holder not entitled to protection under the rule); Louisa Nat'l Bank v. Kentucky Nat'l Bank, 39 S.W.2d 497, 500-01 (Ky. 1931); Commerce-Guardian Bank v. Toledo Trust Co., 21 N.E.2d 173, 175-77 (Ohio App. 1938) (negligence of recipient will preclude protection under the rule, but no negligence found under facts of case at bar); First Nat'l Bank v. United States Nat'l Bank, 197 P. 541, 551, 553 (Or. 1921) (suggesting that the few cases extending protection to a negligent holder are "out of harmony with practically all else that has been written on the subject," but court finds no negligence under the facts of the case at bar). *See also* Steinheimer, *supra* note 88, at 207.

Another doctrinal dispute was over whether protection under the doctrine was limited to cases where the recipient was an holder in due course. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 795 n.70; Banca Commerciale Italiana Trust Co. v. Clarkson, 8 N.E.2d 281, 282 (N.Y. 1937) (holding that protection of rule not available to recipient whose agent obtained payment while suspecting a forgery). *See also* Steinheimer, *supra* note 88, at 207; O'Malley, *supra* note 41, at 204-05.

134. *See, e.g.*, First Nat'l Bank v. United States Nat'l Bank, 197 P. 547, 556 (Or. 1921); PALMER, *supra* note 36, 283; Note, *Losses*, *supra* note 54, at 422 n.21, 424, 424 n.32, nn.32, 35.

135. N.I.L. §§ 65, 66 (1920). These sections provided in part:

> Section 65. Every person negotiating an instrument by delivery or by a qualified indorsement warrants: (1) That the instrument is genuine and in all respects is what it purports to be; (2) That he has a good title to it.
>
> ....
>
> Section 66. Every indorser who indorses without qualification warrants to all subsequent holders in due course:
>
> (1) The matters and things mentioned in subdivision one, two, and three of the next preceding section; . . . .

Id.; *see* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 796 n.73.

136. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 796 n.74; South Boston Trust Co. v. Levin, 143 N.E. 816, 817 (Mass. 1924); First Nat'l Bank v. United States Nat'l Bank, 197 P. 547, 555 (Or. 1921). *See also* Palmer, *supra* note 36, at 297 n.157; Comment, *Interpretation*, *supra* note 118, at 319.

However, during this period, a growing minority of courts extended this warranty to the *presentment* process.[137] As previously discussed, there was a similar development prior to the N.I.L.[138] Extending the N.I.L. statutory warranties was heavily criticized on the grounds that a presentment is not a negotiation, and a signature by the presenter is not an endorsement.[139] Some courts, unwilling to extend the statutory warranty in this way, nevertheless continued to find a common law warranty *implied* in that process as they had done prior to the N.I.L.[140] Thus, under either an implied warranty theory, the extension of the statutory warranty, or restitution, the drawee of an item of forged indorsement could recover the payment from the recipient.

With respect to payments made on altered items, most courts allowed recovery[141] under restitutionary principles.[142] Some courts, however, took an approach similar to that in forged indorsement cases and allowed the recovery of payments on altered items under warranty, either implied or statutory.[143]

C. Summary of Pre-Code American Development

It is evident from the foregoing that the basic *Price v. Neal* doctrine was firmly established in American law, both common law and the N.I.L., prior to the Uniform Commercial Code. In cases of a forged drawer's signature, finality of payment was nearly universal. At the same time, it is

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137. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 26, at 796 n.75; Note, *Losses*, *supra* note 54, at 422 n.21; Note, *Defense of Change of Position*, *supra* note 54, at 412-13, 412 n.11.

138. *See supra* notes 102-111 and accompanying text.

139. *See, e.g.*, Note, *Losses*, *supra* note 54, at 422 n.21; Note, *Defense of Change of Position*, *supra* note 54, at 412-13. The consequences of adopting a warranty theory of recovery under the N.I.L. were like those under the common law. Most notably, the change of position defense, an important defense to a quasi-contract action, was no longer available. *See* Note, *Defense of Change of Position*, *supra* note 54, at 412. *See also infra* notes 164-65, *supra* notes 102-111 and accompanying text.

140. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 796 n.77. According to Beutel, the *Price v. Neal* rule was preserved in the N.I.L. under section 23. *See* Frederick K. Beutel, *Comparison of the Proposed Code, Article 3, and the Negotiable Instrument Law*, 30 NEB. L. REV. 531, 554 (1951).

141. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 797 n.78; *see, e.g.*, Central Nat'l Bank v. F.W. Droston Jewelry Co., 220 S.W. 511, 514 (Mo. Ct. App. 1920); McClendon v. Bank of Advance, 174 S.W. 203, 205 (Mo. Ct. App. 1915). *See also* O'Malley, *supra* note 41, at 261; Note, *Losses*, *supra* note 54, at 424, 424 n.32, 424 n.35, 459 n.213.

142. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 797 n.79; *see, e.g.*, Central Nat'l Bank v. F.W. Drosten Jewelry Co., 220 S.W. 511, 514 (Mo. Ct. App. 1920); National Reserve Bank v. Corn Exch. Bank, 157 N.Y.S. 316 (N.Y. App. Div. 1916). *See also* O'Malley, *supra* note 41, at 261.

143. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 797 n.80.

clear that the availability of its protection was restricted.[144] The rule's application was extended only to insufficient funds and no-account items.[145] On the other hand, recovery of the payment of an item with a forged indorsement was widely available;[146] recovery in a case of material alteration occurred to a somewhat lesser degree.[147] During this period, the dominant theory of recovery (or its denial) was restitution,[148] but the alternative theories, particularly the common law implied warranty theory, survived under the N.I.L.[149]

Although restitution and the various warranties were alternative theories of recovering mistaken payments, their application was entirely consistent with the *Price v. Neal* result; however, as they continued to develop, the similarities between them became more and more superficial. While they both called for the same *general* treatment of the different types of mistaken payments, they gradually became distinct theories of recovery as the change of position and other defenses of an equitable nature were discarded under the warranty theory.[150] The distinction between restitution and warranty will become more apparent under the Uniform Commercial Code.[151] The next section of this Article will examine the extent to which the Code embodied the *Price* doctrine.

VI. THE *PRICE* DOCTRINE UNDER THE UNIFORM COMMERCIAL CODE

A. The Price *Doctrine under the Original Code*

The basic *Price* doctrine clearly was embodied in the original U.C.C. statutory framework.[152] However, the way in which this was accomplished was complicated by the drafters adopting both warranty *and* restitution as means of recovering mistaken payments. Although

144. *See supra* notes 95-97, 121, 127 and accompanying text.

145. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 797 n.81. With regard to pre-N.I.L. development see *supra* notes 93 and accompanying text.

146. *See supra* notes 121, 128-134 and accompanying text.

147. *See supra* notes 135-137 and accompanying text.

148. *See supra* notes 128-134, 136 and accompanying text. *See also* Rogers, *supra* note 97, at 956, 956 n.84.

149. *See supra* notes 102-111, 128-37 and accompanying text.

150. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 798 nn.82-83.

151. *See id.*; *see also* Note, *Defense of Change of Position*, *supra* note 54, at 412. For a discussion of the distinction between restitution and warranty as bases of recovery under the Code, see *infra* notes 150-80 and accompanying text.

152. An analysis of the survival of any common law doctrine under the Code must address the different theories of *displacement* under section 1-103. *See* U.C.C. §§ 1-103 (1987). Under the majority view, the Code displaces the common law doctrine. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 798-800. The analysis in the present Article follows the majority view.

neither Article 3 nor Article 4 of the Code expressly adopted or codified restitution, it is clear that the drafters intended to retain it in some form, at least under some circumstances.[153] Most courts found a restitutionary action available as a supplementary common law principle under section 1-103, limited by various Code sections,[154] while a small minority held that such an action was created by section 3-418 and limited by that same section.[155] At the same time, however, the U.C.C. manifested a significant doctrinal shift with respect to recovering mistaken payments. The drafters took the warranty theory of recovery, which was the minority view in pre-Code law, and *expressly* adopted it in section 3-417[156] and 4-207,[157] as the *primary* basis for recovery.[158] This warranty scheme went beyond its scope under the N.I.L. by establishing not only a transfer warranty, as under the N.I.L., but a presentment warranty as well.[159] The substantive complexity of the warranties and the drafters' attempt to combine both transfer and presentment warranties in a single code section resulted in what Professors White and Summers have described as a "mess."[160]

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153. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 801 n.98, 802 n.99.

154. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 800-23, 806 n.113; *Burke I*, *supra* note 6, at 352; U.C.C. § 3-418, cmt. 1 (1990) (discusses U.C.C. version of § 3-418); *see also supra* notes 154-162 and accompanying text.

155. *See, e.g.*, Blake v. Woodford Bank & Trust, 555 S.W.2d 589, 601-02 (Ky. Ct. App. 1977); Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 806 n.114.

156. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 800 n.91; U.C.C. § 3-417.

157. *See* U.C.C. § 4-207; Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 800 n.92.

158. For an overview of the substance of the presentment warranties under sections 3-417 and 4-207, see Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 800 n.93.

The presentment warranty is breached primarily in cases of forged indorsements and material alterations. *See, e.g.*, Dominion Bank v. Household Bank, F.S.B., 827 F. Supp. 463, 466 (S.D. Ohio 1993) (holding that presentment warranty of good title "is breached when the check contains a forged signature"); Bank of Glen Burnie v. Loyola Feb. Sav. Bank, 648 A.2d 453, 458 (Md. 1994) (holding that warranty of good title is a warranty that no one has a better title); United Carolina Bank v. First Union Nat'l Bank, 426 S.E.2d 462, 465 (N.C. App. 1993) (holding that under warranty of good title presenting party warrants that the item contains neither forged indorsements nor missing indorsements); Fairfax Bank & Trust Co. v. Crestar Bank, 442 S.E.2d 651, 654 (Va. 1994) (holding that warranty of good title warrants that indorsements appear to be genuine and that no one has better title). *See also* Burke II, *supra* note 6, at 60 (Under the UCC, the "general loss allocation scheme for altered checks follows the scheme to distribute losses on checks bearing forged indorsements."); Rapson, *Loss Allocation supra* note 7, at 441 (suggesting that warranty liability in cases of forged indorsements rests on the idea that collecting banks are in the "best position" to detect such forgeries); *see also* cases cited in Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 800 n.93.

159. *See supra* notes 131-33 and accompanying text. The adoption of a warranty theory under the Code has been criticized. *See, e.g.*, Rogers, *supra* note 97, at 956 n.84, 957; Breese, *supra* note 12, at 212.

160. *See* WHITE & SUMMERS, *supra* note 7, at 563.

Within this dual system of recovering mistaken payments (both restitution and warranty), it is quite clear that the basic features of the *Price* doctrine were preserved. This was accomplished in the following way. The *Price* doctrine is a finality rule, making some types of payments final and, thus, nonrecoverable. In the U.C.C., this doctrine was reflected in the language of section 3-418 which provided, in part, that "payment or acceptance of any instrument is final in favor of a holder in due course, or a person who has in good faith changed his position in reliance on the payment."[161] This "payment . . . is final . . ." language was interpreted as cutting off the restitutionary rights, *from whatever source*, of a bank or person who mistakenly paid an item.[162] Under pre-Code law, protection under the *Price* doctrine was limited to cases where the recipient was acting in good faith and had either paid value for the item or changed his position in reliance on the payment.[163] These restrictions were incorporated into the text of section 3-418.[164]

The other two significant restrictions on the *Price* doctrine, found in forged indorsement and material alteration cases, were preserved in the U.C.C. warranty provisions,[165] which were expressly incorporated into section 3-418 as an *exception* to the finality rule.[166] The presentment warranty provisions were carefully drawn in such a way that the types of mistaken payments that would trigger a breach of warranty and allow recovery of the mistaken payment, were basically the same as under common law restitution.[167] Of equal importance was the fact that the exceptions to warranty recovery were parallel to common law restitution, especially as they related to presenting an item with a forged drawer's signature.[168] In this way, the basic *Price* doctrine, which was an

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161. U.C.C. § 3-418 (1990).

162. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 803 n.101, 802-07; *Burke I*, *supra* note 6, at 352.

163. *See supra* note 95 and accompanying text; Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 803.

164. *See* U.C.C. § 3-418 (1990). Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 803 nn.102-103. With respect to good faith and payment of value under the holder in due course concept and the change of position defense, see also *Bank of Glen Burnie*, 648 A.2d at 459 n.7 (regarding a double forgery case); *see, e.g.*, WHITE & SUMMERS, *supra* note 7, at 611-14; Colombo, *supra* note 10, at 826-28.

165. *See supra* note 54.

166. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 800-01, 804; *Bank of Glen Burnie*, 648 A.2d at 455 (discussing presentment warranty in cases of forged indorsements); *United Carolina Bank v. First Union Nat'l Bank*, 426 S.E.2d 462, 466 (N.C. App. 1993).

167. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 800-01, 804; *see supra* notes 95-97, 102 and accompanying text.

168. There was no warranty of genuineness with respect to the drawer's signature, and the warranty of good title was not breached by presenting an item with a forged drawer's signature

exception to recovering mistaken payments under a common law restitutionary action, was preserved as an exception to the Code's warranty provisions. There is abundant, unambiguous evidence that this overall result was specifically intended by the Code's drafters.[169] Moreover, both courts and commentators found that section 3-418, in conjunction with the relevant warranty provisions, embodied the basic doctrine.[170]

The unmistakable presence of the basic *Price* doctrine in the U.C.C. warranty sections and section 3-418 must be considered in light of three important changes in the doctrine. The first relates to the effect of the recipient's negligence. Under pre-Code law, the protection of the *Price* doctrine was not available to a negligent defendant. Negligence was most often found in the defendant's failure to obtain reasonable identification from the person from whom they received the instrument.[171] This was changed under the Code to preclude protection only if the defendant's negligence amounted to a lack of good faith.[172]

Second, the shift to warranty as the primary basis of recovering mistaken payments greatly streamlined the process in those cases where the warranty action was available, particularly for forged indorsement and material alteration cases. Under the warranty provisions, the holder in due course and change of position defenses, two important defenses that were generally available in restitution cases under pre-Code law[173] were abolished. Freed from these defenses, a bank or other party that had mistakenly paid an item with a forged indorsement and material alteration, had essentially an absolute right in a warranty action to recover the payment, even where the defendant was a holder in due course or had relied in good faith on the mistaken payment.[174]

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unless the presenter knows of the forgery. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 801 nn.15-96; Rapson, *Loss Allocation*, *supra* note 7, at 439.

For a discussion on recovering payments in cases of insufficient fund items, see Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 804.

169. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 801, 804.

170. *See id.* at 801 n.97, 804; *Bank of Glen Burnie*, 648 A.2d at 455, 458; WHITE & SUMMERS, *supra* note 7, at 563; Ellis & Dow, *Banks and Their Customers*, *supra* note 6, at 64 n.38 (overview of the relationship among various Code sections that reflect the *Price* doctrine); Rubin, *Efficiency and Equity*, *supra* note 4, at 567 n.60; Rubin, *Policies and Issues*, *supra* note 7, at 646-47.

171. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 803 n.104; *Bank of Glen Burnie*, 648 A.2d at 458 n.5. *See also Burke I*, *supra* note 6, at 351; Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 803.

172. *See supra* note 171.

173. *See supra* notes 128-45 and accompanying text.

174. Perhaps as important, under warranty the plaintiff did not have to show that it would be unjust for the defendant to keep the payment, thereby avoiding a whole array of potentially difficult issues. *See supra* notes 25-38 and accompanying text.

By contrast, recovering the mistaken payment on other types of items, especially insufficient fund items, was much more problematic. Typically, no presentment warranty is breached in such cases,[175] making the plaintiff's sole remedy a restitutionary action.[176] The relative success of the action depended partly on whether it would have succeeded at common law[177] and partly on the means through which the item was paid.[178] If the item was paid in cash, then common law restitution, as modified by section 3-418, would determine whether that payment could be recovered. At the same time, however, the U.C.C. provided for other noncash methods of payment, and these would bring in the third important change in the *Price* doctrine, the "accountability" concept.[179] For instance, the Code provided that an item was paid when, following presentment, the payor bank failed within specified time limits[180] to return

175. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 805 n.111; *see, e.g.*, Lowe's of Sanford, Inc. v. Mid-South Bank & Trust co., 260 S.E.2d 801 (N.C. 1979). With respect to closed account items, see O'Malley, *supra* note 41, at 193 n.30. These types of cases are the most common check funds. Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 805 n.111.

176. The basis of the action would be common law brought into the Code through section 1-103 and subject to the holder in due course and change of position defenses under section 3-418 or, according to an alternative interpretation, a restitutionary-type of action *created* by section 3-418 and subject to the same defenses. *See supra* notes 147-157 and accompanying text. *See also* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 806-07.

177. In the absence of a warranty action, common law restitution would govern such cases. In most states restitution was not available to recover funds mistakenly paid on insufficient fund items. *See supra* note 93 and accompanying text. For an example of a court's reliance on common law restitution under state law, see *National Sav. & Trust Co. v. Park Corp.*, 772 F.2d 1303 (6th Cir. 1983), *cert. denied*, 466 U.S. 939 (1984).

178. For a discussion of the various ways an item can be paid (technically referred to as "final payment"), see WHITE & SUMMERS, *supra* note 7, at § 17-4; Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 8, at 808-10; Dow & Ellis, *Proposed Uniform New Payments Code*, *supra* note 10, at 402-05, 407-08; Ellis & Dow, *Banks and Their Customers*, *supra* note 6, at 59 n.15. For a discussion of the legal consequences of final payment, see, for example, WHITE & SUMMERS, *supra* note 7, §§ 17-2, 17-3.

179. Article 4 governs items once they enter the check collection process. *See* U.C.C. § 4-102 (1989); *see also* Miller, *Process and Scope*, *supra* note 5, at 423-24. Most checks are collected through this process rather than presented "over the counter" by the payee, making Article 4 particularly relevant on the issues discussed in this article. What follows is a brief discussion of the various methods of payment and the related rules under Article 4 of the Code. For a more complete discussion, see, for example, sources cited in *supra* note 169. There are additional federal regulations that apply to items in the check collection system, especially those collected through the Federal Reserve System. *See generally* WHITE & SUMMERS, *supra* note 7, at 613, § 17-5 (discussion of Regulation J and Regulation CC); Jordan & Warren, *supra* note 4, at 399-402; Miller, *Process and Scope*, *supra* note 5, at 424; Mulford, *supra* note 6. Inasmuch as these federal regulations do not have an impact on the issues raised in this Article, they are not discussed.

180. For a discussion of relevant time limits, see WHITE & SUMMERS, *supra* note 7, at 625-31, 634-35, 642-45.

the item[181] and to revoke any provisional credits it may have given.[182] Under both sections 4-213 and 4-302, this failure would make the bank "accountable" for the item.[183] This term, which was not defined in the Code, was widely interpreted by the courts as meaning "liable,"[184] and the major questions, ones that were never satisfactorily resolved in cases not covered by the warranty provisions,[185] concerned the relationship between this concept, common law restitution, and the limits on common law restitution found in section 3-418 but not found in Article 4. Stated in their most basic form, the questions were (1) whether, once the check had entered the check collection system the Article 4 accountability provisions might operate to cut off all of the bank's restitutionary rights, even in cases where there was no holder in due course or good faith change of position, or (2) whether the holder in due course and change of position limitations on restitution, found in section 3-418, would be read into Article 4 and cut off the bank's restitutionary rights *only* when the

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181. For a discussion of the mechanics of returning an item, see WHITE & SUMMERS, *supra* note 7, at 631-34, 635-41.

182. This failure is sometimes referred to as "undue retention" or "delayed return." For a discussion of the undue retention doctrine from an historical perspective, see *Blake*, 555 S.W.2d at 589. *See generally* Garland, *supra* note 6, at 59-60; Lawrence J. Ball, Note, *Retention of a Check: Payor Bank's Liability Under Section 4-302*, 10 B.C. INDUS. & COM. L. REV. 116 (1968). The time limit was the "midnight deadline," which was defined as "midnight on its (a bank's) next banking day following the banking day on which it receives the relevant item." U.C.C. § 4-104(a)(10) (1989). The time limits under section 4-302 may be extended under the operation of section 4-108, but that excuse section has been construed very narrowly. *See, e.g.*, First Nat'l Bank in Harvey v. Colonial Bank, 831 F. Supp. 637, 639 (N.D. Ill. 1993); Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 815 n.148.

183. *See* U.C.C. §§ 4-213, 4-302 (1987). The accountability provision would only come into play with noncash methods of final payment. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 808-09, 814.

184. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 808-09 n.122; Los Angeles Nat'l Bank v. Bank of Canton, 280 Cal. Rptr. 811, 836-38 (Cal. Ct. App. 1991).

The courts are split on the measure of damages for failure to return the item by the statutory deadline. For example, in the 1991 case of *Los Angeles Nat'l Bank*, *supra*, the court held that the accountability provisions of U.C.C. § 4-302 imposed a strict liability on the payor bank for failing to return NSF items by the statutory deadline without proof that such failure caused any actual loss to the collecting bank. The court did not take into account whether that bank relied on the failure or was negligent in paying out cash to its customer for the items. The court offered the rationales of efficiency and certainty for its holding. On the other hand, in *First Nat'l Bank in Harvey v. Colonial Bank*, 831 F. Supp. 637, 640-41 (N.D. Ill. 1993) (discussing Illinois's amended version of § 1-103 which adds "unjust enrichment" as a supplemental common law provision), the court found that liability under § 4-302 should reflect whether the collecting bank's customer withdrew some or all of the funds or repaid funds withdrawn to the collecting bank after the forgery was discovered.

185. In other words, the problem was in forged drawer's signature cases and insufficient fund cases because in such cases there is no breach of the presentment warranty. A detailed examination of this problem is presented in Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 808-23. What follows in the text is a brief summary of the central question.

recipient was a holder in due course or had changed position in reliance on the mistaken payment. Under either interpretation, the *Price* doctrine clearly survived, but under the second interpretation it survived in essentially its pre-Code form. Under the first interpretation, where all restitutionary rights are cut off whether or not the recipient is a holder in due course or has changed position in reliance on the payment, the Code significantly expanded the doctrine, at least with respect to cases of forged drawer's signatures.[186]

There was no way to answer this question in a manner that satisfactorily reconciled all the relevant Articles 3 and 4 provisions along with the prevailing judicial interpretations.[187] When faced with a mistaken payment case involving a forged drawer's signature, most courts simply ignored the conflict between the Code sections and applied the limitations on restitution found in section 3-418 even where the check had entered the check collection system.[188] This would result in allowing restitution where there was neither a holder in due course nor good faith reliance. Those few courts that did recognize the conflict were split as to its resolution; some read the section 3-418 limitations into Article 4 cases while others refused to do so.[189] Thus, for substantial majority of courts, the *Price* doctrine was preserved under Article 4 in essentially its pre-Code form.

From this overview of the *Price* doctrine under the U.C.C., it is clear that despite some conflicting judicial interpretations and the shift to warranty as the primary basis for recovering mistaken payments, the doctrine survived with relatively few substantive changes from its common law form. At the same time, it is important to view this

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186. Recovering mistakenly paid insufficient fund items was even more problematic than forged drawer's signature cases, because there was some variation over whether at common law mistaken payments on insufficient fund items could be recovered. *See supra* notes 93, 168 and accompanying text; *see also* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 822.

187. This was the conclusion reached in Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 821-22. For additional discussion of this problem, see Rubin, *Policies and Issues*, *supra* note 7, at 647-48.

188. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 822 n.170. Initially Professors White and Summers took the position that the accountability language in Article 4 cut off the payor's restitutionary rights, but with the two most recent editions of their treatise they have reversed their position. *See* WHITE & SUMMERS, *supra* note 4, at 616-17. *See also Burke I*, *supra* note 6, at 353. For commentary, see also, e.g., Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 822; Dow & Ellis, *Proposed New Payments Code*, *supra* note 10, at 422-23.

189. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 822 n.171. *Compare Demos*, 151 N.J. Super at 489, 376 A.2d at 1352 *with Ashford Bank*, 544 F. Supp. at 26.

widespread support[190] for the doctrine in light of the fact that courts and commentators continued to disagree over the underlying rationale.[191] To be sure, some justifications such as "commercial finality" came to be more widely accepted than others,[192] but they never settled on a single rationale for the doctrine.[193]

These sorts of conflicting interpretations and other doctrinal problems, along with problems resulting from the rapid development in the latter half of this century of alternative payment systems and new banking practices, especially automated check processing,[194] prompted efforts to revise Articles 3 and 4. The two revision projects will be considered briefly in the next section.

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190. The doctrine was not without its critics. *See* Rubin, *Policies and Issues*, *supra* note 7, at 647 n.82; *see also* WHITE & SUMMERS, *supra* note 4, at 614-15.

191. For a detailed discussion of the various justifications for the doctrine, see *supra* note 50. Professors White and Summers find that none of the traditional justifications is "entirely satisfactory." *See* WHITE & SUMMERS, *supra* note 4, at 614. They also "see no adequate rationale to explain the difference between the liability of the drawee bank on checks bearing forged indorsements and its liability on those bearing forged drawer's signatures." *Id*. at 615. They do, however, support the doctrine as it applies to payment of insufficient fund checks. *See id*.

192. *See id.* One member of the R.U.C.C. Drafting Committee begins an article by stating that the "guiding principle and rationale" for all Article 3 and 4 loss allocation rules was " that loss should be imposed upon the party best able or in the best position to avoid the loss." Rapson, *Loss Allocation*, *supra* note 7, at 435. *See* Rubin, *Efficiency and Equity*, *supra* note 4, at 566. Rapson then goes on to state that this principle conflicts with other policies in the Code such as "finality of payment," for which he cites *Price* as authority. *See id*. at 441. In the same article, he also states that "the underlying rationale of this [*Price*] rule is said to be that . . . [the payor] is in the best position to know its customer's signature, although the 'less fictional rationalization' is that the policy of finality of payment should be served." *Id*. at 439 (citing U.C.C. § 3-418 comment 1). Later in the article he concludes that there are "substantial doubts as to whether there really is a common theme or consistent application of principles in the loss allocation rules of former Articles 3 and 4," and that it is sometimes very difficult to determine which party is in the best position to avoid the loss. *See id*. at 448-49.

193. For a recent case discussing various justifications for the doctrine, see *Bank of Glen Burnie*, 648 A.2d at 455, 458.

194. The number of checks processed annually increased from 6.7 billion in 1950, the year when Article 4 was drafted, to 50 billion in 1990, largely as the result of automation. *See* U.C.C. § 4-101, cmts. 1, 3 (1987). The increases have continued since 1990. *See supra* note 1. The Code was completed shortly before the development of high-speed, automated check processing. *See* Jordan & Warren, *supra* note 4, at 392-98. An "important goal" of the current Article 4 revision is to make its provisions more compatible with these systems. *See id.*; U.C.C. § 4-101, cmt. 1 (1990); U.C.C. Prefatory Note, 2 U.L.A. 7-8 (1990). *See also* Garland, *supra* note 6, at 51-52; Ellis & Dow, *Banks and Their Customers*, *supra* note 6, at 67, 71; Miller, *Process and Scope*, *supra* note 5, at 409-10; Miller, *supra* note 4, at 102-04; Rapson, *Loss Allocation*, *supra* note 7, at 449 (The author implies that the problems under the Code were primarily the result of doctrinal ambiguities and conflicting policies.).

Professor Edward Rubin faults the drafters for over-emphasizing problems caused by automated check processing at the expense of giving adequate attention to other issues, especially those dealing with consumer protection. *See* Rubin, *Efficiency, Equity*, *supra* note 4. He argues that this led to the failure to deal with the problem of information asymmetry and rules that might be necessary to remedy it. *See id*. at 562-63. A similar view is expressed in Hillebrand, *supra* note 7, at 700-03.

B. The Price *Doctrine under the Uniform New Payments Code*

In the early 1980s, a subcommittee of the Permanent Editorial Board of the Uniform Commercial Code began work on a Uniform New Payments Code (N.P.C.) designed to substantially supplant Articles 3 and 4.[195] The N.P.C. was designed "to create a legal framework that would govern all types of funds transfers except cash . . . payments," and sought "to have the same legal consequences attach to similar kinds of funds transfers, regardless of the method of transfer."[196] Among the important substantive changes incorporated in the N.P.C. were provisions that would abolish the *Price* doctrine.[197] The N.P.C. drafters, who were quite critical of the doctrine, stated that it was their intention to bring about this result.[198] Criticism of this and other N.P.C. proposals eventually led to the project's abandonment.[199]

In light of the hostility towards the *Price* doctrine that was expressed in the N.P.C. project, it might have been expected that the *Price* doctrine would be vulnerable in subsequent revision projects undertaken by the Permanent Editorial Board and its subcommittees. This turned out not to be the case. Soon after the N.P.C. project was abandoned, the N.C.C.U.S.L. embarked on another revision project. This revision was completed in 1990 and is currently in the final stages of the state adoption process.[200] The next section will examine briefly the extent to which the *Price* doctrine survived this most recent revision.

C. The Price *Doctrine under the Revised Code*

The failure of the N.P.C. did not diminish the Commissioners' desire to revise Articles 3 and 4, but the experience convinced them that in order

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195. For a discussion of the N.P.C. project see, for example, Roland E. Brandel & Anne Geary, *Electronic Fund Transfers and the New Payments Code*, 37 BUS. LAW. 1065 (1982); Dow & Ellis, *Proposed New Payments Code*, *supra* note 10, at 399-401; Fred H. Miller, *A Report on the New Payments Code*, 39 BUS. LAW. 1215 (1984); Miller, *supra* note 4, at 102; Miller, *supra* note 5, at 407-09; Rubin, *Efficiency and Equity*, *supra* note 4, at 557-58; Luc Thevenoz, *Error and Fraud in Wholesale Funds Transfers: U.C.C. Article 4A and the UNCRITICAL Harmonization Process*, 42 ALA. L. REV. 881, 887-88 (1991).

196. *See* Dow & Ellis, *Proposed New Payments Code*, *supra* note 10, at 400-01.

197. *See generally* Dow & Ellis, *Proposed New Payments Code*, *supra* note 10, at 424-33.

198. *See* N.P.C. § 204, cmt. 2; Dow & Ellis, *Proposed New Payments Code*, *supra* note 8, at 425.

199. *See* Miller, *Process and Scope*, *supra* note 5, at 409; Rapson, *Loss Allocation*, *supra* note 7, at 445 n.39; Ellis & Dow, *Banks and Their Customers*, *supra* note 6, at 71 n.77. Rubin attributes the NPC's demise to intense criticism by both banking interests and organized consumers. *See* Rubin, *Efficiency and Equity*, *supra* note 4, at 557-58.

200. *See supra* note 6 and accompanying text.

to be successful, subsequent projects must be more modest.[201] As a result, the Revised Uniform Commercial Code, adopted in 1990, (hereinafter R.U.C.C.)[202] substantially adheres to the structure and substance of the Code in most respects.[203]

From a formal standpoint, while there are relatively minor changes in the sections that constitute the *Price* doctrine, its substance overall remains intact. Section 3-418 is carried forward in the R.U.C.C. as one of the key sections; however, instead of relying on common law restitution as the source of the recovery right, which was the prevailing view under the Code,[204] R.U.C.C. section 3-418(a) *specifies* the right of recovery in cases of forged drawer's signatures and payment over a stopped payment order.[205] For other types of mistaken payments, such as the payment of insufficient fund items, subsection (b) follows the Code in relying on common law restitution to determine the right of recovery.[206] The

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201. *See* Miller, *Process and Scope*, *supra* note 5, at 409-16; Rubin, *Efficiency and Equity*, *supra* note 4, at 558.

202. *See supra* note 6.

203. *See* WHITE & SUMMERS, *supra* note 4, at 548 (The authors find that there are "no major substantive changes in the basic liabilities" with respect to forged instruments.); Jordan & Warren, *supra* note 4, at 386 (R.U.C.C. is "not a radical departure from the previous law. The basic doctrines of negotiable instruments law embodied in former Article 3 are carried forward in revised Article 3. Moreover, the organization of the new statute generally follows that of the old statute."); *see also* Jordan & Warren, *supra* note 4, at 390; Miller, *Process and Scope*, *supra* note 5, at 411-12.

204. *See supra* notes 146-62 and accompanying text; *see also* Jordan & Warren, *supra* note 4, at 390; U.C.C. § 3-418, cmt. 1 (1990).

205. U.C.C. § 3-418(a), cmt. 1 (1990); *see* WHITE & SUMMERS, *supra* note 4, at 617; Miller, *supra* note 4, at 111 n.57; *Burke I*, *supra* note 6, at 353. The precise nature of the recovery right in subsection (a) is not entirely clear. The critical question is whether the recovery right in subsection (a) *displaces* common law restitution or *codifies* common law restitution, as subsection (b) appears to do. Specifying in the statute a right to recover the mistaken payment avoids the uncertainty and diversity of common law restitutionary doctrine, but in comment 1 the drafters state that R.U.C.C. § 3-418 "specifically states the right to restitution in subsections (a) and (b)." Using the specific term "restitution" rather than the more general term "recovery" in the comment suggests that both subsections embody common law restitution. On the other hand, the language of subsection (a) is different from that of subsection (b). Under subsection (a) the drawee "may recover" certain mistaken payments; under subsection (b) other types of mistaken payments "may be recovered *to the extent* permitted by the law governing mistake and restitution." [emphasis added]. On balance, the most likely intent of the drafters is that subsection (a) creates a new statutory right, limited only by subsection (c) and other R.U.C.C. provisions, while subsection (b) incorporates common law restitution. For a more detailed discussion of similar language in an earlier tentative R.U.C.C. draft, see Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 828-33.

206. *See* U.C.C. § 3-418(b), cmt. 3 (1990); WHITE & SUMMERS, *supra* note 4, at 617; Miller, *supra* note 4, at 111 n.57. The language of subsection (b) does not refer to *common law* restitution, but the "law governing mistake and restitution" could be nothing other than the common law. Moreover, in comment 3 to the section, the drafters state that subsection (b) "directs courts to deal with those cases under the law governing mistake and restitution." The law referred to here could be nothing other than common law restitution. "It is, therefore, fairly clear that the subsection *states* the right of restitution but does not change the nature of that right

R.U.C.C. follows the Code further by stating that both types of recovery rights (the statutory right under subsection (a) and common law restitution under subsection (b)) are expressly limited by subsection (c), which provides that mistaken payments cannot be recovered from one who obtained the item in good faith and for value[207] or from one who changed his or her position in good faith reliance on the mistaken payment.[208] The R.U.C.C. also provides that the payor's recovery rights are not affected by any negligence on its part.[209] For those types of mistaken payment cases that are covered by the warranty provisions, such as forged indorsements and material alterations, the section 3-418 provisions do not control.[210] Instead, the recovery would be under the warranty provisions, which are not limited by section 3-418(c) or any substantive defenses under common law restitution.

The U.C.C. warranty provisions were also an important part of the *Price* doctrine. Under the R.U.C.C., presentment warranty and transfer warranty provisions are set out in separate sections (§ 3-416[211] and § 3-417[212]) in order to simplify them,[213] but the substance of these warranties

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form the common law. In this way subsection (b) expressly incorporates common law restitution," subject to the limits set forth in subsection (c). *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 830 (discussing similar language in an earlier tentative R.U.C.C. draft). The result of this is that the outcome of cases arising under this section will vary to some extent depending on which state law is applied. *See* WHITE & SUMMERS, *supra* note 4, at 617. The majority rule at common law was that mistaken payments of insufficient fund items could not be recovered. *See supra* note 93 and accompanying text. Moreover, it should be added that the payor's recovery rights might be quite problematic in that a defendant in a *common law* restitution action can raise a whole array of arguments to show why it would not be unjust for him or her to keep the money. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 786, 831.

207. This language is a minor departure from the U.C.C., which used the "holder in due course" terminology. The effect should be that a party who paid value for the item in good faith but does not qualify technically as a holder may nevertheless be protected. *See* WHITE & SUMMERS, *supra* note 4, at 617-18; Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 829-33 (discussing earlier draft).

208. *See* U.C.C. § 3-418(a) and (b), cmt. 1 (1990); WHITE & SUMMERS, *supra* note 4, at 617; *Burke I*, *supra* note 6, at 354; Miller, *supra* note 4, at 111.

209. *See* U.C.C. § 3-418(a), cmt. 1 (1990); Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 829-33 (discussing earlier draft); *Burke I*, *supra* note 6, at 354. Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 832 (discussing earlier draft). This issue was not addressed by the U.C.C. or its comments. Presumably, there was no need to do so because under the leading English case of *Kelly v. Solari*, negligence did not provide a basis for denying recovery of a mistaken payment. *See infra* notes 223-225 and accompanying text.

210. *See* U.C.C. § 3-418(c) (1990).

211. *Id.* § 3-416.

212. *Id.* § 3-417.

213. *See* WHITE & SUMMERS, *supra* note 4, at 563-64; Jordan & Warren, *supra* note 4, at 389-90; Miller, *supra* note 4, at 106; Rubin, *Efficiency and Equity*, *supra* note 4, at 567 (The R.U.C.C. sections replace Code section 3-417 with "mercifully clearer language . . .").

remains the same as under the Code.[214] As in the U.C.C., the R.U.C.C. transfer warranties guarantee that all signatures are genuine; such warranties, however, do not run to the drawee.[215] At the same time, the R.U.C.C. presentment warranties, which do run to the drawee, do not guarantee the genuineness of the drawer's signature, only that the presenter (and prior parties) have no knowledge of a forged drawer's signature.[216] The R.U.C.C. presentment warranties follow the U.C.C. in allowing the drawee to recover mistaken payments of items with forged indorsements[217] and material alterations.[218]

The R.U.C.C. drafters clarified the relationship between the recovery rights under section 3-418 and the Article 4 provisions. Under the R.U.C.C., the method of payment, including payment through undue retention of an item,[219] does not affect the recovery rights under section 3-418 or the warranty provisions.[220] Thus, the R.U.C.C. follows the majority view under the Code which holds that the accountability provisions of Article 4 do not cut off a payor's restitutionary rights even for checks that have entered the check collection system.[221]

The only formal deviation is with respect to double forgeries (items with both a forged drawer's signature and a forged indorsement). Under the U.C.C., double forgeries were treated as forged drawer's signature cases and governed by the *Price* rule.[222] Under the R.U.C.C., loss in this

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214. The only change relating to the *Price* doctrine worth mentioning is the one in § 3-417 which specifies that negligence on the part of the payor or drawee bank is not a defense to a warranty claim. U.C.C. § 3-417(b) (1990); *see also* Jordan & Warren, *supra* note 4, at 389.

215. *See* U.C.C. § 3-416(a)(2) (1990); WHITE & SUMMERS, *supra* note 4, at 563; *Burke I*, *supra* note 6, at 354-55.

216. *See* U.C.C. § 3-417(a)(3) (1990); WHITE & SUMMERS, *supra* note 4, at 552, 563-64, 616; *Burke I*, *supra* note 6, at 355.

217. *See* U.C.C. § 3-417(a)(1) (1990). Under the U.C.C., the indorsement guarantee was accomplished through a warranty of good title, which encompassed a guarantee of those indorsements necessary to have good title. Under the R.U.C.C. the same guarantee is accomplished by having the presenting party and all prior parties warrant that they are entitled to "enforce the draft or authorized to obtain payment . . . on behalf of a person entitled to enforce the draft." *Id*. In order to be entitled to enforce the draft, all of the necessary indorsements must be genuine. *See* WHITE & SUMMERS, *supra* note 4, at 564; *Burke I*, *supra* note 6, at 363.

218. *See* U.C.C. § 3-417(a)(2) (1990); *Burke II*, *supra* note 6, at 63 ("revisions basically conform to present law. . .").

219. The R.U.C.C. follows the Code by providing that the payor is liable for retaining an item beyond the specified time limits without returning it. *See* U.C.C. §§ 4-215, 4-302 (1990); WHITE & SUMMERS, *supra* note 4, at 615, 621-22; Garland, *supra* note 6, at 59-60.

220. *See* U.C.C. § 3-418, cmts. 2 & 4, 4-301 cmt. 7 (1990); WHITE & SUMMERS, *supra* note 4, at 614, 616; *Burke I*, *supra* note 6, at 353.

221. *See supra* notes 170-80 and accompanying text. The accountability language has been deleted from the Article 4 sections, but the nature of the payor's liability remains the same. *See* WHITE & SUMMERS, *supra* note 4, at 614, 616.

222. *See* Perini Corp. v. First Nat'l Bank, 553 F.2d 398 (5th Cir. 1977); WHITE & SUMMERS, *supra* note 4, at 564-65; Rapson, *Loss Allocation*, *supra* note 7, at 468-73.

type of case is allocated under a comparative negligence scheme. As a result, the loss is shared between the payor bank and the depositary bank, and is based upon the extent to which each contributed to the loss.[223] The drafters' justification is that the rationale for the *Price* doctrine, suggested to be the best position argument, does not apply in double forgery cases because in such cases the depositary bank may be in a better position to detect and prevent the fraud.[224] From this overview of the relevant R.U.C.C. provisions, it is clear that from a formal standpoint, the *Price* doctrine safely survived the revision of the U.C.C. with few substantive changes.[225] It is also clear that the drafters intended this result.[226]

Looking over two centuries of American law we can see a remarkable continuity with respect to the *Price* doctrine. Since its original adoption by American courts in the early nineteenth century, the doctrine survived a century or so of common law development in a diverse and expanding federal system, three codifications over the last century, remarkable advances in technology that surrounds the transactions governed by the doctrine, and profound quantitative and qualitative changes in the institutions and institutional practices in which these transactions take place. The development of the *Price* doctrine in England since the mid-nineteenth century is consequently puzzling because, while the doctrine was becoming more deeply ingrained in

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223. *See* U.C.C. §§ 3-404(d), 3-405(b) (1990). This change goes along with the more general shift in the R.U.C.C. to a comparative negligence system. *See generally* Rapson, *Loss Allocation*, *supra* note 7, at 469-73.

224. *See* U.C.C. § 3-404, cmt. 3 (1990); WHITE & SUMMERS, *supra* note 4, at 564-65, 584-85. Of course, the customer must bear some or all of this loss if it was negligent. *See* Rapson, *Loss Allocation*, *supra* note 7, at 469-73.

225. *See* WHITE & SUMMERS, *supra* note 4, at 614; *Burke I*, *supra* note 6, at 353; Rapson, *Loss Allocation*, *supra* note 7, at 469 n.156 (suggesting that in cases of forged drawer's signatures that are not double forgeries "[n]othing in the revision suggests that the *Price v. Neal* doctrine has been modified in that circumstance."); Rubin, *Efficiency and Equity*, *supra* note 4, at 566 (stating that the "venerable rule of *Price v. Neal* . . . is preserved in sections 3-416, 3-418, and 3-419. . . ."). *See also* Rubin, *Policies and Issues*, *supra* note 7, at 647-49 (discussing an earlier tentative R.U.C.C. draft). Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 831-33.

Although the *Price* doctrine clearly remains intact from a formal standpoint, the R.U.C.C. contains some important provisions that may have a significant but indirect impact on the *Price* doctrine. *See infra* notes 326-335 and accompanying text.

226. *See* Jordan & Warren, *supra* note 4, at 395-96 ("At a very early stage in the project the Drafting committee decided to retain the principle of *Price v. Neal* and the decision was reaffirmed throughout the project."). *Id*. at 396. "The doctrine that prevents a drawee bank from recovering payment with respect to a forged check if the payment was made to a person who took the check for value and in good faith is incorporated into Section 3-418 and Sections 3-417(a)(3) and 4-208(a)(3)." U.C.C. § 3-404, cmt. 3 (1990) (referring to a forged drawer's signature case); *see also* Jordan & Warren, *supra* note 4, at 390 ("[R.U.C.C.] Section 3-418 retains the rule of *Price v. Neal* . . . ."); U.C.C. § 3-418, cmt. 1 (1990) ("Subsections (a) and (c) are consistent with former Section 3-418 and the rule of Price v. Neal.").

American commercial law, it was being undermined by English courts. This process continued to the point at which, by early in this century, there was is very little left of it in English law. This development will be considered in the next section.

VII. ENGLISH DEVELOPMENT OF THE *PRICE* DOCTRINE FROM *COCKS V. MASTERMAN* (1829) TO THE PRESENT

A. Development from Cocks v. Masterman *through the Turn of the Century*

Cocks v. Masterman,[227] decided in 1829, emerged as the leading case on the question of recovering mistakenly paid bills with forged drawer's signatures, and remained so throughout the remainder of the nineteenth century. The holder's right to know, on the day of presentment, whether the bill would be honored became a "general rule" that provided substantial certainty for both courts and the business community.[228] During this period, English courts expanded the doctrine slightly to prohibit recovery of mistaken payments on insufficient fund items,[229] but generally allowed recovery in forged indorsement cases.[230]

While the *Price* doctrine was becoming a general rule during the nineteenth century, another important development got underway.

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227. 109 Eng. Rep. 335 (K.B. 1829). For a discussion of the *Cocks* decision, see *supra* note 72-76 and accompanying text; *see also* Dow, *Restitution on Payments*, *supra* note 11, at 34-36.

228. *See, e.g.*, Mather v. Lord Maidstone, 139 Eng. Rep. 1374 (C.P. 1856). As late as 1895 one can find great enthusiasm expressed for the doctrine in a decision that significantly expanded it. *See also* London & River Plate Bank v. Bank of Liverpool, 1 Q.B. 7, 11 (1896) (rule described as "indispensable" for the conduct of business). During the second half of the nineteenth century, the leading treatises on bills of exchange gave the case and its focus on the holder's right "a fairly prominent place in their discussions on recovering mistaken payments of forged bills." *See* Dow, *Restitution on Payments*, *supra* note 11, at 36 (citing JOHN B. BYLES, A TREATISE OF THE LAW OF BILLS OF EXCHANGE, PROMISSORY NOTES, BANK-NOTES, BANKERS' CASH-NOTES, AND CHECKS 252 (5th ed. 1847) [hereinafter BYLES 1847]; JOHN B. BYLES, A TREATISE OF THE LAW OF BILLS OF EXCHANGE, PROMISSORY NOTES, BANK-NOTES, AND CHECKS 492-93 (5th Am. ed. 1867) [hereinafter BYLES 1867]; JOHN B. BYLES, A TREATISE OF THE LAW OF BILLS OF EXCHANGE, PROMISSORY NOTES, BANK-NOTES, AND CHECKS (8th Am. ed. 1891) [hereinafter BYLES 1891]; JOSEPH CHITTY & JOHN W. HULME, A PRACTICAL TREATISE ON BILLS OF EXCHANGE, CHECKS ON BANKERS, PROMISSORY NOTES, BANKERS' CASH-NOTES AND BANK NOTES 426 (11th Am. ed. 1849) [hereinafter CHITTY 1849]; JOSEPH CHITTY & JOHN W. HULME, A PRACTICAL TREATISE ON BILLS OF EXCHANGE, CHECKS ON BANKERS, PROMISSORY NOTES, BANKERS' CASH-NOTES AND BANK NOTES 481 (12th Am. ed. 1854)) [hereinafter CHITTY 1854].

229. *See* Chambers v. Miller, 143 Eng. Rep. 50 (C.P. 1862); Pollard v. Bank of England, 6 L.R. 623 (Q.B. 1871).

230. *See, e.g.*, Beeman v. Duck, 152 Eng. Rep. 796 (Ex. Ch. 1843). *See also* Ryan v. Bank of Montreal, 12 O.R. 39 (1886). *Cf.* London & River Plate Bank v. Bank of Liverpool, 1 Q.B. 7 (1896) (relying on an estoppel rationale, the court refused to allow recovery of payment on an item with forged indorsement).

Beginning in about 1840, in a series of cases, many of which did not involve forged drawer's signatures,[231] English judges undermined many of the various justifications supporting the doctrine, which eventually had the effect of significantly undermining the doctrine itself. This process, which continued throughout the first three decades of the present century, can be illustrated by examining a few of the doctrine's justifications. Starting with Lord Mansfield's opinion in *Price*, negligence was commonly seen as an important justification for the doctrine.[232] In the leading case of *Kelly v. Solari*,[233] decided in 1841, the court held that negligence on the part of the party making the mistaken payment should not preclude its recovery, even when that party had forgotten facts which would show that the payment was improper.[234] While this development certainly did not overturn the *Price* doctrine, it partially undermined it to the extent that it rested on negligence.

Another justification for the *Price* doctrine was an estoppel argument in the sense that payment or acceptance of an item constituted a representation that a signature, whether one's own or that of a customer in the capacity of drawer or drawee, was valid, sometimes with a suggestion that the payment or acceptance was negligent.[235] In the last quarter of the nineteenth century, courts began to narrow this justification by holding in a variety of contexts "that negligence provided an estoppel *only* when the negligence arose out of some duty the negligent party owed specifically to the person asserting the estoppel or to the general public."[236] In later cases, courts found that any bank mistakenly paying or accepting "an item on which its customer's signature was forged owed no duty to the party who obtained payment or acceptance" and, therefore, was not estopped from denying the validity of the signature; to the extent that the *Price* rule

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231. Some of these cases did not even involve bills of exchange. *See infra* notes 317-319 and accompanying text.

232. Lord Mansfield's opinion in *Price* referred to negligence. *See Price*, 97 Eng. Rep. at 872.

233. 152 Eng. Rep. 24 (Ex. 1841).

234. *See id*. at 26. Within the context of forged drawer's signatures, this latter point is especially significant. The drawee maintains signature cards for its customers against which it can verify the signature on items before payment. Under *Kelly*, those signature cards are a means to acquire knowledge (of the forgery) but are not equivalent to actual knowledge of the forgery prior to payment.

235. *See, e.g.*, Mather v. Lord Maidstone, 139 Eng. Rep. 1374 (C.P. 1856); Phillips v. im Thurn, 1 L.R.-C.P. 463 (1866). Dow, *Restitution on Payments*, *supra* note 11, at 38.

236. *See, e.g.*, Arnold v. Cheque Bank, 1 C.P. 578 (1876); Patent Safety Gun Cotton Co. v. Wilson, 49 L.J.R. 713 (C.A. C.P.D. 1880); Lewis Sanitary Steam Laundry Co. Ltd. v. Barclay & Co. Ltd., 95 L.T.R. 444 (K.B. 1906).

rested on an estoppel argument, this development substantially undermined it.[237]

Another important rationale for the *Price* rule was the change of position that a party might undergo in reliance of the mistaken payment or acceptance.[238] This would occur, for example, where the presenting party waited until the drawee paid the item before spending the money or handing over goods or funds to his transferor, or where the drawee's delay in discovering the forgery resulted in the presenting party's loss of claims against indorsers and other parties on the indorsement. It has already been indicated that in *Cocks v. Masterman*, the court presumed that such a delay impaired these claims.[239] This presumption generally remained in effect until the turn of the century.[240] During this same period, however, three developments undermined the change of position rationale for the *Price* rule.[241]

First, some judges simply were unwilling to presume a change of position in bills of exchange cases.[242] Second, it was held that the defendant's change of position did not preclude recovery of a mistaken payment unless "the plaintiff was at fault based on some breach of duty arising out of a mutual relationship between the parties."[243] Limiting the change of position defense in this way did not undermine the *Price* doctrine immediately because at this point in time, most courts were willing to see a duty arising out of the relationship between the drawee (or drawee's banker) and the presenting party. However, this view would change within the first few decades of the twentieth century.[244]

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237. *See* Dow, *Restitution on Payments*, *supra* note 11, at 42; *see, e.g.*, Imperial Bank v. Abeysinghe, 29 N.L.R. 257 (Cellon 1927).

238. Prior to the recent House of Lords decision in *Lipkin Gorman v. Karpnale Ltd.*, 2 App. Cas. 548 (1991), English courts had not recognized change of position as a general defense in restitution cases, but it was recognized as a defense in bills of exchange cases since the late eighteenth century.

239. *See supra* notes 72-76 and accompanying text.

240. In one case, it provided a basis to expand the *Price* rule to forged indorsements. *See* London & River Plate Bank v. Bank of Liverpool, 1 Q.B. 7 (1896).

241. These very likely contributed to its rejection by the Privy Council in *Imperial Bank v. Bank of Hamilton*, 1 App. Cas. 49, 56 (P.C. 1903).

242. *See, e.g.*, Ryan v. Bank of Montreal, 12 O.R. 39 (1887) (finding no actual loss of rights for the defendant against parties on the bill resulting from the drawee's delay in discovering the forgery).

243. Dow, *Restitution on Payments*, *supra* note 11, at 39 (citing Durrant v. Ecclesiastical Commissioners for England and Wales, 6 Q.B.D. 234 (1880)). *Durrant* involved an action to recover money the plaintiff mistakenly paid to the church as a tithe on land he did not possess. *See id.* The court found that as a result of the delay in discovering the mistake, the church had changed its position by losing its statutory remedy against the actual possessors of the land, but the absence of a mutual relationship between the church and the plaintiff meant that the payment could be recovered. *See id*. at 236.

244. *See supra* notes 277 and accompanying text.

The third development relating to the change of position concept involved cases in which parties receiving mistaken payments turned the funds (or other things of value) over to other parties believing that the first payments were proper. This has particular importance for bills of exchange cases in which a merchant delays turning goods over to a customer until after the customer's check has been paid by the drawee, or in which a collecting bank allows its customer to withdraw funds credited for a deposited item only after the drawee has paid the item. Turning the funds or goods over was considered to constitute a change of position in reliance of the first payment thereby precluding recovery of the funds. In the second half of the nineteenth century, courts began to limit this use of the change of position defense to cases in which the party who received the payment and, in turn, paid over these funds to another party in reliance on the initial payment, did so as an *agent*.[245] This development did not preclude the change of position defense in a case where a bank was acting as an agent for its customer by presenting an item for payment and turning the funds over to its customer upon receipt of the payment from the drawee; however, this development did significantly limit the defense in cases where the parties were dealing with each other in an arm's length transaction, such as a merchant turning over goods to a customer after receiving from the drawee payment for the customer's check. These developments in the change of position defense, taken together, did not abolish the defense, but they created the potential for significantly limiting it in a number of cases involving the *Price* doctrine.

Another nineteenth century development, eventually having a significant impact on the *Price* doctrine, is the distinction that arose between mistaken acceptance cases and mistaken payment cases.[246] There is no indication in the *Price* doctrine's early development that the courts saw any significance in this distinction with respect to forged drawer's signatures. Indeed, the *Price* case itself involved both an accepted item and a paid item, and Lord Mansfield's opinion gave no

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245. By 1913, the change of position defense was *limited* to agents. *See* Baylis v. Bishop of London, 1 L.R.-Ch. 127 (Ch. App. 1913). For commentary on this defense and its development, see BIRKS, *supra* note 26, at 412-14; GOFF & JONES, *supra* note 26, at 125, 739-40, 750-55; PAGET'S 1989, *supra* note 26, at 415-17 (traces the rule back to 1777); Luntz, *supra* note 26, at 322. Professor Luntz suggested that the defense in English law seemed to have been almost exclusively confined to agents, but he acknowledged it was somewhat more extensive in forged drawer's signature cases. *See id*. at 322-23.

246. The concepts of acceptance and payment were well established in eighteenth century negotiable instruments law. *See supra* notes 60-80, 123 and accompanying text; Dow, *Restitution on Payments*, *supra* note 11, at 37-38, 40. Although an accepted item is eventually paid, it differs from an item that is merely paid in that it bears the drawee's signature (the acceptance), which constitutes that party's contractual undertaking to pay the item. The statement in the text refers to the significance of the acceptance/payment distinction with respect to loss allocation.

indication that he saw any significance in this distinction with respect to loss allocation. During the nineteenth century, especially the latter half, the *Price* doctrine seems to have become much more firmly established in mistaken acceptance cases than in mistaken payment cases. Courts developed a seemingly "absolute rule that accepting an item precluded the acceptor from disputing . . . the genuineness of the drawer's signature. . . ."[247] Surprisingly, middle to late nineteenth century treatise writers apparently did not recognize any significance in the acceptance/payment distinction with respect to forgery loss allocation.[248] The distinction between acceptance and payment relating to forgery loss allocation would become much more significant in the early twentieth century *Price* doctrine cases.[249]

Given the foregoing, it is somewhat surprising to find that when the common law of bills of exchange was codified in The Bills of Exchange Act of 1882,[250] the distinction between mistaken acceptance and mistaken payment was included in the section that incorporated the *Price* doctrine.[251] Section 54 provided, in part, that "[t]he acceptor of a bill, by

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247. Dow, *Restitution on Payments*, *supra* note 11, at 37 n.69.

248. A review of various editions of the leading treatises during this period fails to uncover any explicit statements on its significance. *See* Dow, *Restitution on Payments*, *supra* note 11, at 37 n.71. These treatises express the *Price* doctrine in a fairly absolute fashion. *See, e.g.*, BYLES 1847, *supra* note 228, at 146; JOHN B. BYLES, A TREATISE OF THE LAW OF BILLS OF EXCHANGE, PROMISSORY NOTES, BANK-NOTES, BANKERS CASH-NOTES AND CHECKS 265 (4th Am. ed. 1856) [hereinafter BYLES 1856]; BYLES 1867, *supra* note 219, at 325; BYLES 1891, *supra* note 219, at 318; M.D. CHALMERS, A DIGEST OF THE LAW OF BILLS OF EXCHANGE, PROMISSORY NOTES AND CHECKS 210-11 (Am. ed. 1881) [hereinafter CHALMERS 1881]; M.D. CHALMERS, A DIGEST OF THE LAW OF BILLS OF EXCHANGE, PROMISSORY NOTES, CHEQUES, AND NEGOTIABLE SECURITIES 183-85 (5th ed. 1896) [hereinafter CHALMERS 1896]; CHITTY 1854, *supra* note 219, at 298, 346. Elsewhere the treatises discuss the doctrine as entailing a more limited right to retain mistaken payments, but some of these discussions appear to cover both acceptance and payment cases. *See id.* at 37 n.72.

> As a result, one finds the doctrine expressed in both an absolute and a limited fashion in acceptance cases, making the significance of the . . . distinction unclear. Moreover, as late as 1896, in the fifth edition of Chalmers' treatise on bills of exchange, payment was distinguished from acceptance, but according to the treatise's illustrations Chalmers saw no significance in this distinction with respect to recovering mistakenly paid bills.

Id. at 37 (citing CHALMERS 1896, *supra*, at 206-08.

In illustrations 2 and 3 on p. 207 and illustration 6 on p. 208, the drawee cannot recover the money from the holders regardless of whether the bills were accepted and then paid or simply paid. *See id*.

249. *See, e.g.*, Bank of Montreal v. The King, 38 S.C.R. 258 (Can. 1907); Dow, *Restitution on Payments*, *supra* note 11, at 45-46.

250. Bills of Exchange Act of 1882, 45 & 46 Vict. ch. 61, § 54, *reprinted in* 5 HALSBURY'S STATUTES OF ENGLAND AND WALES 334 (4th ed. 1989 reissue).

251. The 1882 Act was drafted by Chalmers, based on his *Digest of the Law of Bills of Exchange* (1878), and was the first successful effort to codify English common law. BAKER,

accepting it - (2) Is precluded from denying to a holder in due course: (a) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill."[252]

Finally, the "sham" doctrine,[253] which emerged early in the century, eventually narrowed the *Price* rule in a significant way. Under this doctrine, a valid drawer's signature is an essential requirement of a valid bill of exchange.[254] Courts held that the absence of a valid drawer's signature precluded both contractual liability on an instrument under the bills of exchange law[255] and liability under criminal forgery law.[256] Such an instrument was sometimes referred to as a "mere sham" or a "nullity."[257] The rationale for this doctrine—that items without valid drawer's signatures were not properly bills of exchange—is not discussed in any of the nineteenth century judicial opinions or treatises.[258] Nevertheless, it was eventually codified in the Bills of Exchange Act of 1882 as sections 3[259] and 24.[260]

Of course, the key issue with respect to the *Price* rule was the consequence of the sham doctrine for recovery of mistakenly paid bills and other aspects of forgery loss allocation. With respect to this issue, the nineteenth century sources are silent. The cases in which the sham doctrine was articulated had nothing to do with forgery loss allocation and

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supra note 25, at 251. The Act makes a distinction that was absent in Chalmers' treatise, written about the same time the Act was being drafted. *See* CHALMERS 1881, *supra* note 239.

252. Bills of Exchange Act of 1882, *supra* note 250.

253. This doctrine was first discussed in Dow, *Restitution on Payments*, *supra* note 11, at 40-43, 51-57.

254. *See* 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON BILLS OF EXCHANGE, PROMISSORY NOTES, AND BANKER'S CHECKS 9 (1834) [hereinafter CHITTY 1834]; JOSEPH CHITTY, A PRACTICAL TREATISE ON BILLS OF EXCHANGE, CHECKS ON BANKERS, PROMISSORY NOTES, BANKERS' CASH NOTES AND BANK NOTES 89-90 (6th Am. ed. 1826) [hereinafter CHITTY 1826]; Dow, *Restitution on Payments*, *supra* note 11, at 41.

255. *See, e.g.*, M'Call v. Taylor, 34 L.J.R.N.S. 365 (C.P. 1865). *See also* Stoessiger v. South Eastern Ry. Co., 118 Eng. Rep. 1248 (Q.B. 1854); Ex parte Hayward, in re Hayward, 6 L.R. ch. 546 (Ch. App. 1871).

256. *See, e.g.*, Queen v. Harper, 7 Q.B.D. 78 (Crim. App. 1881); Queen v. Mopsey, 32 J.P. 631 (1868).

257. *See, e.g.*, Bank of England v. Vagliano Bros., 1 App. Cas. 107 (1891).

258. In the nineteenth century editions of his treatise on bills of exchange, Byles consistently reiterates the sham doctrine but fails to discuss its rationale. *See* Dow, *Restitution on Payments*, *supra* note 11, at 41 n.103. *See, e.g.*, BYLES 1891, *supra* note 219, at 486; BYLES 1867, *supra* note 219, at 484; BYLES 1856, *supra* note 248, at 396; BYLES 1847, *supra* note 228, at 245-46. We find it reaffirmed in the 1896 edition of Chalmers' treatise (also without discussion of its rationale), which was published after the passage of the Bills of Exchange Act. *See* CHALMERS 1896, *supra* note 239, at 9, 71.

259. Under section 3, an instrument must inter alia be "signed by the person giving it" in order to be a valid bill of exchange. *See* Bills of Exchange Act § 3; 4 HALSBURY'S LAWS OF ENGLAND paras. 306, 326 (Lord Hailsham of St. Marylebone ed., 1973).

260. *Id*. § 24; 4 HALSBURY'S LAWS OF ENGLAND para. 326 (Lord Hailsham of St. Marylebone ed., 1973).

the opinions in these cases do not speak to this issue.[261] The sham doctrine had no apparent impact in the principal nineteenth century cases dealing with recovery of mistaken payments on bills of exchange. There is no indication in the provisions of the Bills of Exchange Act that the sham doctrine was relevant to forged drawer's signature loss allocation.[262]

"It was not until the turn of the century editions of Paget's treatise on banking law[263] that one [found] a clear expression of the sham doctrine and its impact on loss allocation."[264] For Paget, the sham doctrine was based on the "exigencies of negotiability." Although he did not elaborate on these exigencies, his discussion shows he was primarily concerned with promoting bills of exchange as payment and credit devices. This required that courts enforce the holder's right to know, on the day of payment, whether the bill was genuine by precluding recovery of mistaken payments when necessary. With respect to the consequences for loss allocation, he argued that because the leading cases on mistakenly paid bills of exchange are "founded mainly on the exigencies of negotiability . . . [their] effect must be *limited to* negotiable instruments."[265] These exigencies did not call for treating a sham item in the same way as a negotiable instrument. In fact, he argued that doing so would be "contrary to reason and public policy . . . ."[266] He also argued that under these same exigencies, "a sham item may by addition of a genuine signature [e.g., a valid indorsement or acceptance] become a negotiable instrument." Under this view, the addition of a genuine signature "brought the exigencies into play and called for the application of the doctrines relating to negotiability."[267] Paget's basic idea, which was more fully articulated and applied in early twentieth century cases, was that *Price v. Neal* and the other cases that addressed the problem of allocating losses resulting from forged drawer's signatures, should not govern cases involving items with a forged drawer's signature unless a valid signature, such as an acceptance or indorsement, was added.

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261. *See supra* notes 246-247; Queen v. Butterwick, 174 Eng. Rep. 260 (Ex. 1839); South Wales & Cannock Chase Coal Co. Ltd. v. Underwood & Son, 15 T.L.R. 157 (Q.B. 1899).

262. The 1896 edition of Chalmers' treatise does not show the sham doctrine having any impact on forgery loss allocation. "The treatise's illustrations show the *Price* line of cases governing cases involving" sham items. *See* Dow, *Restitution on Payments*, *supra* note 11, at 42 (citing CHALMERS 1896, *supra* note 239, at 9, 207 (illustration 2)).

263. PAGET 1904, *supra* note 73; JOHN R. PAGET, THE LAW OF BANKING (2d ed. 1908) [hereinafter PAGET 1908].

264. Dow, *Restitution on Payments*, *supra* note 11, at 42. It was also alluded to in dicta in a few late nineteenth and early twentieth century cases. *See* Bank of England v. Vagliano Bros., 1 App. Cas. 107 (1891); Bank of Montreal v. The King, 38 S.C.R. 258 (Can. 1907).

265. PAGET 1908, *supra* note 254, at 219 (emphasis added).

266. PAGET 1908, *supra* note 254, at 220.

267. PAGET 1904, *supra* note 73, at 164.

The consequences of this idea for twentieth century loss allocation will be considered more fully in the next section. The more immediate question is the impact of the sham doctrine on nineteenth century loss allocation and, in particular, the Bills of Exchange Act. Given that the relevance of the sham doctrine on loss allocation was not discussed in any authoritative source until Paget's treatise in 1904 and that Paget cited only late nineteenth and early twentieth century cases, it is reasonable "to conclude that the sham doctrine, although it emerged earlier in the nineteenth century, was not seen as having any significant impact . . . until the turn of the century."[268]

Assessing the impact of the sham doctrine on the Bills of Exchange Act is more problematic. It has already been suggested that under sections 3 and 24[269] of the Act, an instrument without a valid drawer's signature was not classified as negotiable, but this does not address the problem of allocating losses resulting from such instruments. The only provision relevant to that problem is section 54,[270] quoted above, which provided that in cases of acceptance the acceptor was estopped from denying the validity of the drawer's signature. One possible explanation for why this provision did not extend to payment cases was the influence of the sham doctrine. An unaccepted instrument with a forged drawer's signature would be classified as a sham, assuming it was not endorsed, while an instrument with a forged drawer's signature that *was* accepted (i.e., with a valid drawee's signature) was not a sham. Chalmers, the Act's drafter, may have believed that the *Price* doctrine, expressed in section 54 as an estoppel, should apply only to non-sham items and conveyed that idea by limiting the estoppel to cases where an item was accepted. Perhaps the cumulative effect of the emerging sham doctrine along with the more overt nineteenth century developments undermining the *Price* doctrine's rationale provides a better explanation for why the doctrine was codified in mistaken acceptance cases, but not in mistaken payment cases. These developments may have significantly undermined the doctrine within the mistaken payment context to the point that perhaps Chalmers saw it as too unsettled to warrant codification.

While this explanation is plausible, it is not the most likely in light of all the nineteenth century developments. The idea of limiting the *Price* doctrine to non-sham items does not appear in any nineteenth century case or treatise.[271] On the contrary, Chalmers' treatise, written about the same time as he drafted the Bills of Exchange Act, sets forth an expansive

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268. *See* Dow, *Restitution on Payments*, *supra* note 11, at 42.
269. *See supra* notes 249-251 and accompanying text.
270. *See supra* note 243 and accompanying text.
271. *See supra* notes 252-258 and accompanying text.

version of the *Price* doctrine. It gives no indication that he saw the acceptance/payment distinction as having any significance, or the sham doctrine as having any impact on the *Price* doctrine and forgery loss allocation.[272] There is no articulation of the doctrine in any source until Paget's treatise appeared just after the turn of the century. All of the authority Paget cites in support of his view on the doctrine's impact on forgery loss allocation was from the late nineteenth and early twentieth centuries.[273] This leaves the question of why the Act limited the *Price* doctrine to acceptance cases unanswered, and without additional evidence on the drafter's thinking it will remain so.[274]

B. Development from the Turn of the Century to the Present

During the first three decades of this century there was a continuation and acceleration of the undermining process that had begun in the middle of the preceding century. Each rationale or justification that was restricted in the nineteenth century was further restricted or rejected outright during this period, while some new restrictions were added.[275] In the first key decision in this century, *Imperial Bank v. Bank of Hamilton*,[276] the Privy Council held that money paid under a mistake of fact could be recovered even though the person who made the payment had the means of discovering the mistake but failed to do so.[277] The importance of this holding with respect to forged drawer's signature cases should be obvious. A drawee who mistakenly pays an item on which its customer's signature is forged invariably will have that customer's signature on file. This signature "constitutes the 'means of ascertaining' its validity, but the decision in *Imperial Bank*, suggested that the failure to avail oneself of these means cannot be the basis of placing the loss on the drawee. . . ."[278] This decision also imposed a reliance requirement on the

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272. *See supra* note 239.

273. *See supra* notes 254-259.

274. *See generally* Bank of Montreal v. The King, 38 S.C.R. 258 (Can. 1907).

275. Not all cases fit this pattern. In *Bank of Montreal v. The King*, 38 S.C.R. 258 (Can. 1907), the Supreme Court of Canada reaffirmed *Price*. The court was unanimous in finding that, under either section 54 or the general law of mistake, the drawee could not recover funds mistakenly paid on items with forged drawer's signatures. Even though the court voiced strong support for *Price*, this case is clearly at odds with the direction in which the English courts have been going throughout this century. For a detailed discussion, see Dow, *Restitution on Payments*, *supra* note 11, at 45-46.

276. 1 App. Cas. 49. (P.C. 1903).

277. *See id.* at 56. In this holding, the Privy Council followed *Kelly v. Solari*. *See supra* notes 224-25 and accompanying text. The *Imperial Bank* case involved the mistaken payment of an altered item. The bank had in its possession records showing that the amount of the item had been altered, but it failed to use these records in verifying the amount before it paid the item.

278. Dow, *Restitution on Payments*, *supra* note 11, at 44.

negligence rationale, such that, even if the drawee were found to be negligent, this would not preclude recovery of the payment unless the defendant relied on that payment by, for instance, waiting for the item to be paid before allowing its customer to withdraw the funds.[279] Finally, this decision also rejected any presumed change of position.[280]

By 1927, the impact of the sham doctrine on loss allocation was clearly discernable. In a decision by the Supreme Court of Ceylon in *Imperial Bank v. Abeysinghe*,[281] a case involving the mistaken payment of a sham item with a forged drawer's signature, the court found that *Price* and the line of cases following it governed only negotiable instruments (i.e. non-sham items) and, therefore, did not provide authority for the defendant to retain the payment.[282]

The *Abeysinghe* decision has further significance for the *Price* doctrine because, even though the court decided the case under the general law of mistake rather than the *Price* line of cases, the court used that line of cases as an analogy. Using this analogy, the court rejected every justification the defendant offered in support of retaining the payment and allowed the drawee to recover.[283] It found that the drawee bank was not "bound to know its customer's signature,"[284] that by paying the item the bank makes no representation of genuineness with respect to the drawer's signature,[285] that the change of position defense is only available in an agent context,[286] that the bank's mistaken payment was not the "proximate cause" of the defendant's paying the funds over to his

279. Under the facts of the case the defendant had allowed its customer to withdraw funds *before* the item was paid and, therefore, did not rely on the mistaken payment. *See id*. at 56.

280. The Privy Council found that the drawee's delay in discovering and giving notice of the fraud did not result in any actual prejudice to or loss of rights by the defendant because there were no parties entitled to notice. *See id.* at 57-58.

281. 29 N.L.R. 257 (Ceylon 1927). This decision by the Supreme Court of Ceylon was completely ignored by English courts and commentators for several decades until Justice Kerr adopted its holding and reasoning in *National Westminster Bank Ltd. v. Barclays Bank International Ltd.*, 3 All E.R. 834 (Q.B. 1974). Justice Kerr viewed the *Abeysinghe* case as highly significant with regard to loss allocation. *See generally id.*

282. In distinguishing the *Price* line of cases from the sham item in the *Abeysinghe* case, Chief Justice Fisher stated that there was "no authority" for the defendants' arguments, but there is some question over whether this view was based on the sham status of the item in the case or some distinguishing feature of the facts in *Price* and following cases that was absent in *Abeysinghe*. *Id*. at 260-63. For a detailed discussion, see Dow, *Restitution on Payments*, *supra* note 11, at 46-49.

283. *See Imperial Bank*, 29 N.L.R. at 260-64, 266-68.

284. *Id.* at 260.

285. *See id.* at 261.

286. *See id*. at 262. Inasmuch as the defendant and the person to whom he paid the money were not in an agency relationship, the defense did not apply. *See id.*

transferor,[287] and, finally, that there was no relationship between the drawee and the defendant that might be the basis of a duty on which to base the change of position defense.[288]

Although the *Abeysinghe* decision significantly undermined the array of *Price* rationales, its impact on the rule itself was problematic. Inasmuch as the case involved a sham item, the *Price* line of cases had no direct application. It was, instead, used as an analogy. From this perspective, the decision undermined the *Price* line of cases *as an analogy*, but theoretically left that line of cases intact as direct authority. The major problem with this view is that there is little real "difference between the rationale of *Price* as an analogy and the rationale of *Price* as precedent. Undermining one . . . [as the court] did in *Abeysinghe*, cannot help but undermine the other."[289]

This same approach was followed by the court in the leading case of *National Westminster Bank v. Barclay's Bank*, decided in 1974.[290] This case provides the most elaborate consideration by an English court of the sham doctrine and its implications for forgery loss allocation. Looking at this decision and the recent commentary, it becomes apparent that "[i]n its most basic form, the doctrine holds that items containing forged drawer's signatures without the addition of any genuine indorsement or acceptance are not negotiable instruments at all."[291] The *Price* line of cases and section 54 of the Bills of Exchange Act govern only negotiable instruments. As a result, sham items are not governed by that line of cases, nor are they governed by section 54 of the Bills of Exchange Act.[292] As a consequence of the sham doctrine, loss allocation resulting from forged drawer's signatures is governed by two bodies of doctrine:

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287. *See id*. at 262-63. This was the view in spite of the admission by Justice Schneider that if the bank had not paid the item in the first place, the defendant would not have paid the transferor. *See id*. at 268.

288. *See id*. at 262-63 (citing Durrant v. Commissioners, 6 Q.B.D. 234 (1880)).

289. Dow, *Restitution on Payments*, *supra* note 11, at 48.

290. 3 All E.R. 834 (Q.B. 1974).

291. National Westminster Bank Ltd. v. Barclays Bank Int'l Ltd., 3 All E.R. 834, 843-44, 847, 850-51 (Q.B. 1974); 3(1) HALSBURY'S LAWS OF ENGLAND para. 181 (4th ed. reissue 1989); PAGET'S 1982, *supra* note 21, at 315; PAGET'S 1989, *supra* note 25, at 412; CHALMERS & GUEST 1991, *supra* note 13, at 25 n.88, 176-77, 455-56, 502. Typically, no authority is cited for this principle, but it is consistently repeated in various sources. For cases from other common law jurisdictions, see, for example, *Koster's Premier Pottery Pty. Ltd. v. Bank of Adelaide*, (1981) 28 S.A. St. R. 355 and *First Sport Ltd. v. Barclays Bank Plc*, 3 All E.R. 789, 797-98 (C.A. 1993) (Kennedy, L.J., dissenting).

292. *See* National Westminster Bank, 3 All E.R. 834, 836, 843, 846-47 (Q.B. 1974); CHALMERS & GUEST 1991, *supra* note 13, at 21-26, 164-79, 496-504; GOFF & JONES, *supra* note 26, at 711; PAGET'S 1989, *supra* note 25, at 412; PAGET'S 1982, *supra* note 21, at 315.

one governing negotiable (non-sham) instruments and the other governing sham items.[293]

With respect to sham items, English law on loss allocation is very uncertain.[294] This is because taking sham items out of the *Price* doctrine and section 54 leaves courts without the guidance that this authority otherwise would have provided in these situations. English courts, therefore, are developing a new line of authority to govern loss allocation resulting from the mistaken payment of sham items. This developing doctrine "is closely tied to the more general law of mistaken payments,"[295] which contributes to its uncertainty.[296]

The direction of this new doctrine is not wholly uncharted because it is clear from the *National Westminster Bank* case that English judges are using the *Price* line of cases and the principles they embody as an analogy in sham cases.[297] Looking at this authority, several features become apparent that together will make recovery of mistakenly paid items unlikely, at least in the near future. First, estoppel will no longer serve as grounds for precluding recovery of a mistaken payment. This is because of the prevailing view that the mistaken "payment alone did not constitute a representation by the bank that its customer's signature was genuine, and that the bank owes no duty to third parties to know its customer's signature."[298] It is also highly unlikely that negligence would provide grounds for estoppel because inasmuch as a bank "owes no duty of care to a payee,"[299] it is difficult to see how drawee negligence might be present in this situation.[300] In addition, the principle that negligence in

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293. This perspective, which was first articulated by Justice Garvin (in dissent) in the *Abeysinghe* case, 29 N.L.R. 257, 268-77 (Ceylon 1927) is clearly set out in *National Westminster Bank*, 3 All E.R. 834 (Q.B. 1974).

294. *See, e.g.*, *National Westminster Bank*, 3 All E.R. at 836, 846-47 (Q.B. 1974).

295. Dow, *Restitution on Payments*, *supra* note 11, at 53.

296. This is because the general law of recovering mistaken payments is itself highly uncertain and undergoing significant changes. *See* Fibrosa Spolka Akeyjna v. Fairbairn Lawson Combe Barbour Ltd., 1 App. Cas. 32 (1943); Barclays Bank Ltd. v. W.J. Simms, 3 All E.R. 522, 527 (Q.B. 1979); Weld Blundell v. Synott, 2 K.B.D. 107, 112 (1940); CHALMERS & GUEST 1991, *supra* note 13, at 496; GOFF & JONES, *supra* note 26, at 12-51; BAKER, *supra* note 25, at 424-25; PAGET'S 1989, *supra* note 25, at 402.

297. *See National Westminster Bank*, 3 All E.R. at 843-44 (Q.B. 1974).

298. *See* Dow, *Restitution on Payments*, *supra* note 11, at 53; *National Westminster Bank*, 3 All E.R. at 840-42, 846-47, 849, 850-52 (Q.B. 1974); Barclays Bank Ltd. v. W.J. Simms, 3 All E.R. 522 (Q.B. 1979); CHALMERS & GUEST 1991, *supra* note 13, at 501; GOFF & JONES, *supra* note 26, at 747-48, 757; PAGET'S 1989, *supra* note 25, at 418-19. *But cf*. BIRKS, *supra* note 25, at 402-06; BEATSON, *supra* note 25, at 170.

299. *National Westminster Bank*, 3 All. E.R. at 841 (Q.B. 1974). *See also* Luntz, *supra* note 25, at 322.

300. On the limits on estoppel to preclude recovering mistaken payments, see generally *Lipkin Gorman v. Karpnale Ltd*., 2 App. Cas. 548, 579 (1991); GOFF & JONES, *supra* note 26, at 141, 746-48; Richard Nolan, *Change of Position*, *in* LAUNDERING AND TRACING, 135-89, 138-88

mistakenly paying an item will not bar its recovery even when the person who made the payment had the means of discovering the mistake but failed to do so was first articulated in *Kelly v. Solari*[301] and reaffirmed sixty years later in *Imperial Bank v. Bank of Hamilton*,[302] continued adherence to this principle makes drawee negligence an even more unlikely basis on which to preclude recovery of mistaken payments.[303]

Second, the change of position rationale may prove to be a much more solid basis for the *Price* doctrine even though currently it has a limited scope. Until 1991, this defense was not recognized as a general defense in restitution cases under English law,[304] but it has been well-established as a defense in an agency context for well over a century,[305] even in cases involving sham items.[306] This has and will continue to favor collecting banks in defending actions to recover mistaken payments, because typically they act as agents for their customers in collecting items and turning over the funds.

> In the final analysis, however, the agent rule does not play a significant role in loss allocation resulting from forged drawer's signatures. It simply shifts the focus of the drawee's recovery efforts to a different defendant, such as the collecting bank's customer. If the change of position defense is to be meaningful it must be available to this customer.[307]

Until recently, however, it is fairly clear that the change of position defense was not available with sham items outside the agent context.[308]

In *Lipkin Gorman v. Karpnale Ltd.*,[309] the House of Lords recognized for the first time in English law a general change of position defense in restitution cases. In doing so, it opened the way through which to expand the defense to sham cases outside the agent context.[310] The

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(Peter Birks ed., 1995). *But cf.* McKendrick, *supra* note 36, at 385 (suggesting "that estoppel will not wither away").

301. 152 Eng. Rep. 24 (Ex. 1841).

302. 1 App. Cas. 49 (P.C. 1902).

303. *See* Barclays Bank Ltd. v. W.J. Simms, 3 All E.R. 522, 528-29 (Q.B. 1979); *see also* Luntz, *supra* note 25, at 321.

304. This was the situation prior to the House of Lords decision in *Lipkin Gorman*, 2 App. Cas. at 548.

305. *See National Westminster Bank*, 3 All E.R. at 853 (Q.B. 1974); GOFF & JONES, *supra* note 26, at 125-26, 750-53.

306. It was reaffirmed in this context by the House of Lords in *Lipkin Gorman*, 2 App. Cas. 548, 579 (1991) (per Lord Goff).

307. Dow, *Restitution on Payments*, *supra* note 11, at 55.

308. *See id.* at 578-79; *Barclays Bank*, 3 All E.R. at 522 (per Goff, J.). It remains to be seen whether these decisions will lead English courts to expand the defense into other contexts.

309. 2 App. Cas. 548 (1991).

310. Lord Goff suggested in *Lipkin Gorman* that the defense "will, no doubt, be found in those cases where the plaintiff is seeking repayment of money paid under a mistake of fact." *See id.* at 580.

decision provides support for (1) rejecting the view that the defense should be limited to cases where there were parties entitled to notice of dishonor;[311] (2) expanding the defense to cases where the defendant's detriment was paying funds over to a transferor in reliance on the bank's mistaken payment[312]; and (3) narrowing or abolishing the limitation that restricts the defense to cases where the plaintiff breached a duty owed to the defendant.[313] At this point, the extent to which these changes will, in fact, come about as the result of the *Lipkin Gorman* decision is uncertain.

Although *Lipkin Gorman* may eventually result in abolishing the distinction between sham and non-sham items, they must, for the present, be treated as distinct categories.[314] With respect to negotiable (i.e. non-sham) instruments, loss allocation in such cases is governed by the *Price* line of cases and section 54 of the Bills of Exchange Act, which should tend to favor the defendant over the bank seeking to recover mistakenly paid funds. Clearly, there are statements in the *National Westminster Bank* decision that support an expansive view of this authority;[315] however, there are also numerous statements in that decision and in the more recent decision of *Barclays Bank Ltd. v. W.J. Simms*[316] that reflect a very narrow view of the *Price* doctrine and its underlying rationale, particularly with respect to the views on estoppel,[317] negligence,[318] and the change of position defense.[319]

Most problematic is the view that the defense is available only when the defendant's detrimental reliance on the bank's payment was

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311. *See, e.g.*, Cocks v. Masterman, 109 Eng. Rep. 335 (K.B. 1829). *See supra* notes 72-76, 266-268 and accompanying text. In *Barclays Bank Ltd.*, Justice Goff suggested that, if "full recognition is accorded to the defense of change of position there will be no further need . . ." for the "stringent" and "technical" rule set forth in *Cocks*. 3 All E.R. at 542. It follows that now that the defense has been given full recognition, the limitation should be rejected. *See* Dow, *Restitution on Payments*, *supra* note 11, at 56-57; Nolan, *supra* note 287, at 144-48, 173.

312. *See Lipkin Gorman*, 2 All E.R. at 517, 519, 533-34 (1991); *see also supra* notes 270-280 and accompanying text; Dow, *Restitution on Payments*, *supra* note 11, at 56-57.

313. *See generally supra* notes 234, 285 and accompanying text (discussing Durrant v. Ecclesiastical Commissioners for England and Wales, 6 Q.B.D. 234 (1880)). In *Lipkin Gorman*, Lord Goff stated that a general change of position as a defense is inconsistent with the rule in the *Durrant* case. 2 App. Cas. 548, 579 (1991).

314. Among all the English commentators, only the authors of Chalmers & Guest 1991, *supra* note 13, question the soundness of the doctrine, and there only by implication. *See id*. at 25-26, 176, 502.

315. *See* 3 All E.R. at 843-44 (Q.B. 1974).

316. 3 All E.R. 522 (Q.B. 1979).

317. *See National Westminster Bank*, 3 All E.R. at 841-42, 846-47, 850-52; *Barclays Bank*, 3 All E.R. at 540-42.

318. *See National Westminster Bank*, 3 All E.R. at 840-41; *Barclays Bank*, 3 All E.R. at 528-29.

319. *See National Westminster Bank*, 3 All E.R. at 842-43, 851-53; *Barclays Bank*, 3 All E.R. at 536-37, 540-43. *See generally* Dow, *Restitution on Payments*, *supra* note 11, at 57-58.

accompanied by the bank's breach of duty to the defendant[320] coupled with the prevailing view that the drawee owed no duty to third parties with respect to a mistaken payment.[321] In addition, in *Barclays Bank v. Simms*[322] the court held that the proper scope of the defense is limited to cases where the defendant has the "need" to give actual notice of dishonor to other parties and fails to give such notice as a result of the delay in receiving notice from the bank of the forgery.[323] In light of this, it is fair to say that, on balance, the view of the *Price* doctrine and its underlying rationale articulated in *National Westminister Bank* and *Barclays Bank* was quite narrow.[324] With respect to non-sham items, nearly all commentators take a generally narrow view of the *Price* doctrine's scope and rationale, a view that is quite similar to that articulated in the *National Westminster Bank* and *Barclays Bank* cases.[325] In light of the foregoing, it seems fair to conclude that at least prior to *Lipkin Gorman* (except for mistaken payment to an agent who turns the funds over to his principal, cases requiring actual notice of dishonor, and acceptance cases under

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320. *See National Westminster Bank*, 3 All E.R. at 851-52 (Q.B. 1975) (citing Durrant v. Ecclesiastical Commissioners, 6 Q.B.D. 234 (1880)).

321. *See id*.; Barclays Bank Ltd., 3 All E.R. at 528-29. *See generally* Dow, *Restitution on Payments*, *supra* note 11, at 58.

322. 3 All E.R. 522 (Q.B. 1979).

323. This restriction was set forth in *Cocks v. Masterman*, 109 Eng. Rep. 335 (K.B. 1829), and modified by *Imperial Bank v. Bank of Hamilton*, 1 App. Cas. 49. (P.C. 1902). *See supra* notes 72-76, 266-270 and accompanying text; *see also* Dow, *Restitution on Payments*, *supra* note 11, at 58.

324. Judge Goff mentioned *Price* and further recognized the limited nature of the change of position defense in this context. *Barclays Bank*, 3 All E.R. at 540-42. The ultimate impact of this view on cases involving non-sham items is somewhat uncertain because in *National Westminster Bank*, the *Price* line of cases was considered only as an analogy in order to discover "the reasoning underlying" it. *See* National Westminster Bank, 3 All E.R. at 843. In a situation where this line of cases *directly* applies (i.e. non-sham cases) this narrow view may prevail. Using the *Price* line of cases as an analogy in developing a new and fairly narrow doctrine for sham cases may invite the use of this same narrow doctrine in developing rules for governing loss allocation in non-sham cases.

325. The conventional view among commentators is that payment does not constitute a representation of genuineness by the drawee, who owes no duty of care to the presenting party. *See* CHALMERS & GUEST 1991, *supra* note 13, at 504; GOFF & JONES, *supra* note 26, at 747-57; PAGET'S 1989, *supra* note 26, at 418-19. This makes estoppel very problematic in this context. The commentators also find that outside of an agent context, the *Imperial Bank* case limits the change of position defense to cases where the actual (rather than presumed) parties entitled to notice of dishonor. *See* BYLES 1988, *supra* note 13, at 147-48; CHALMERS & GUEST 1991, *supra* note 13, at 501-02; GOFF & JONES, *supra* note 26, at 139, 758-59; PAGET'S 1989, *supra* note 26, at 413-15. Under Bills of Exchange Act section 54, recovery of a mistaken payment in acceptance cases protects only holders in due course, which, under English law, excludes the payee. *See* R.E. Jones, Ltd. v. Waring & Gillow, Ltd. 1 App. Cas. 670, 680 (1926); 5 HALSBURY'S STATUTES OF ENGLAND AND WALES 359 n. (4th ed. reissue 1993); CHALMERS & GUEST 1991, *supra* note 13, at 445 n.63. *See* Dow, *Restitution on Payments*, *supra* note 11, at 49-50, 59.

section 54), the *Price* doctrine in non-sham cases was not much broader than in sham cases.

It was already suggested that in the *Lipkin Gorman* decision, the House of Lords opened the way for significantly expanding the change of position defense in cases involving sham items. This may allow for a parallel development in cases involving non-sham items.[326] At this point, however, the degree of change that *Lipkin Gorman* might bring about with respect to the *Price* doctrine is very speculative,[327] and there is reason to be pessimistic. In the most recent edition of the leading treatise on restitution in English law, "which was published nearly two years after *Lipkin Gorman*, and makes a number of express references to that decision, the authors continue to express a fairly narrow, conventional view of the change of position defense."[328]

Finally, the prevailing English views on the importance of restitution and unjust enrichment weigh against expanding the *Price* doctrine. These views demonstrate a lack of understanding and concern over the problems that restitution creates in the payment system by undoing other transactions, sometimes multiple ones, and destroying the reasonable expectations that are created by a bank's payment of a check, even a forged one.[329]

From this overview of the *Price* doctrine's development in modern English law, it should be apparent that while the doctrine has not been overturned, its justifications have been largely undermined and its scope considerably limited so that outside of a few specific situations there is very little left of it in English law. It has already been suggested that during this same period the *Price* doctrine became deeply ingrained in American commercial law. What is especially puzzling is that this development occurred during a period when English and American

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326. *See* Dow, *Restitution on Payments*, *supra* note 11, at 58 n.240.

327. Part of the uncertainty is due to the inherent nature of the "case by case" approach called for by at least two of their Lordships in *Lipkin Gorman*. 2 App. Cas. 548, 558, 580 (1991) (Lord Bridge of Harwich).

328. Dow, *Restitution on Payments*, *supra* note 11, at 57; GOFF & JONES, *supra* note 26, at 739-64; *Cf.* Nolan, *supra* note 286; R.M. Goode, *The Bank's Right to Recover Money Paid on a Stopped Cheque*, 97 L.Q. REV. 254, 260 (1981).

329. The concern with finality and the commercial policies it promotes are currently identified as the "American view" and are given little weight in English law. *See National Westminster Bank*, 3 All E.R. at 844; GOFF & JONES, *supra* note 26, at 757-58; Luntz, *supra* note 26, at 334-35. On the other hand, the importance of finality is given significant weight in Birks, *supra* note 25, at 148, 156, 414-15, and less weight in Nolan, *supra* note 287, at 156. The authors of *The Law of Restitution* apparently believe that avoiding a contract must "overcome the pressures favouring finality," while restitution "does not destroy expectations created by a previous bargain. . . ." GOFF & JONES, *supra* note 26, at 110.

payments law otherwise remained quite similar. The final section of this Article considers some doctrinal solutions to this puzzle.

VIII. SEARCHING FOR A DOCTRINAL SOLUTION

Although some recent comparative research has suggested that there are significant differences between the English and American legal systems,[330] these differences are minimal with respect to payments law. This is especially true for the critical period in the *Price* doctrine's development.[331] The substantial similarity between the Bills of Exchange Act and the N.I.L. underscores the identity of the underlying doctrines. In light of all this, it is fair to conclude that during the nineteenth century, English and American negotiable instruments laws were quite similar and had not developed into two distinct bodies of doctrine. During this same period, however, the loss allocation rules that fall within the *Price* doctrine developed along distinctly different paths. The challenge, then, from a doctrinal perspective is to uncover some feature of negotiable instruments law or of a related doctrinal area that might explain this development. In the remainder of this section the most plausible of these will be considered.

The undermining of the *Price* doctrine in England coincides with the rise of restitution in English law and, in particular, the growing significance of the law governing recovery of mistaken payments. At the time the Bills of Exchange Act became law, a number of the important cases in this area were already decided.[332] In addition, other key English restitution cases were decided early in this century as the undermining

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330. *See* PATRICK ATIYAH & ROBERT SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS (1987); RICHARD A. POSNER, LAW AND LEGAL THEORY IN ENGLAND AND AMERICA (1996).

331. A comparison of the nineteenth century English and American editions of the leading treatises on negotiable instruments reveals a remarkable similarity. In many cases the only difference worth noting is the addition of American citations in the American editions, but the substantive discussion of the doctrine was typically left unchanged. *Compare, e.g.*, BYLES 1847, *supra* note 228, at 146 (discussing what acceptor admits) *with* BYLES 1856, *supra* note 219, at 265. In Story's treatise on bills of exchange, the first published in this country on the subject, one finds heavy reliance on English cases and treatises throughout the text. *See, e.g.*, JOSEPH STORY, COMMENTARIES ON THE LAW OF BILLS OF EXCHANGE, FOREIGN AND INLAND AS ADMINISTERED IN ENGLAND AND AMERICA 121-24, 245-46, 289-292 (4th ed. 1860); JOSEPH STORY, COMMENTARIES ON THE LAW OF BILLS OF EXCHANGE, FOREIGN AND INLAND AS ADMINISTERED IN ENGLAND AND AMERICA 126-28, 247-49, 290, 526-29 (1843). Of course, this phenomenon is not limited to negotiable instruments. The influence of English law on nineteenth century American law generally is noted by Lawrence Friedman. *See* FRIEDMAN, *supra* note 4, at 111-13.

332. According to Robert Goff, an author of the leading English treatise on restitution (GOFF & JONES, *supra* note 26) and currently in the House of Lords, the "most fundamental authorities" on recovering mistaken payments were cases decided between 1841 and 1885. *See Barclays Bank*, 3 All E.R. at 527.

process was being completed.[333] Many of these key cases were non-bill of exchange cases.[334] Although these two developments were clearly underway at the same time, it does not follow that a cause and effect relationship is thereby established. What makes such a relationship unlikely is that in the United States the law of restitution developed well ahead of its English counterpart into a robust doctrine, one consistently based on the concept of unjust enrichment.[335] The *Price* rule has always been compatible with American restitution law. This is not to suggest that the rise of restitution in English law had no impact on the *Price* doctrine in that country. It may have influenced Chalmers in the Bills of Exchange Act to limit the *Price* doctrine to acceptance cases only. But from a comparative perspective, it is highly unlikely that the rise of English restitution law provides a complete explanation for the way in which the *Price* doctrine developed differently in the two countries.

At first glance, the sham doctrine appears to provide a plausible means of explaining the *Price* doctrine's divergent development. Whatever the merits of the sham doctrine,[336] there is no doubt that it played a major role in undermining the *Price* doctrine in England by removing it from the types of cases it was developed to govern. The fact that the sham doctrine has no counterpart in American law makes it a convenient explanation, but this just shifts the inquiry to another level without answering the central question.[337] It does not address the question of why the sham doctrine did not develop in the United States. "[T]he American experience shows that paper-based payment systems can survive, indeed flourish, without . . . this doctrine."[338] Ultimately, the

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333. *See, e.g.*, R.E. Jones Ltd. v. Waring & Gillow Ltd., 1 App. Cas. 670 (1926); Kerrison v. Glyn, Mills, & Co., 105 L.T.R. 721 (H.L. 1911) (appeal taken from Eng. C.A.); Kleinwort, Sons & Co. v. Dunlop Rubber Co., 97 L.T.R. 263 (H.L. 1907).

334. *See, e.g.*, Kelly v. Solari, 152 Eng. Rep. 24 (Ex. 1841). This and many other such cases are discussed in the leading English treatise on restitution. *See* GOFF & JONES, *supra* note 26, at 112, 117, 126-28, 739.

335. *See* GOFF & JONES, *supra* note 26, at 3-16; FRIEDMANN, *supra* note 35, at 132-37; BAKER, *supra* note 25, at 424-26. *See generally* PALMER, *supra* note 26.

336. For an evaluation of the sham doctrine, see Dow, *Restitution on Payments*, *supra* note 11, at 51-52.

337. Under American law, the forgery operates as the signature of the forger. In this way, a forged check is nevertheless a "signed" instrument for purposes of satisfying the requirements of negotiability. *See, e.g.*, Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 800-01; Dow & Ellis, *Proposed Uniform New Payments Code*, *supra* note 10, at 420. *See generally* Whaley, *supra* note 105.

338. Dow, *Restitution on Payments*, *supra* note 11, at 52. It is clear that under American law an item with a forged drawer's signature can nevertheless be treated as a negotiable instrument, and the loss allocation resulting from payment of such an instrument is governed by the same Code provisions that govern negotiable instruments. *See* Dow & Ellis, *Survival of Common Law Restitution*, *supra* note 6, at 800-01; Dow & Ellis, *Proposed Uniform New Payments Code*, *supra* note 10, at 420.

sham doctrine not only fails to provide an explanation for the *Price* doctrine's divergent development, but its own unique development in English law creates another doctrinal puzzle.[339]

Looking away from common law doctrines in order to find a solution in the statutory treatment of the *Price* rule is also unsatisfactory. The relevant provisions of the English and American acts, relating to both the *Price* rule and the sham doctrine, are virtually identical.[340] The very different interpretation given to these provisions by English and American courts simply restates the central question and, at the same time, shows the limited role that legislation played in this entire process.

Finally, the search for a satisfactory solution must consider the *Price* doctrine within the broader context of loss allocation rules. Significant differences or changes in these related rules could have an effect on the impact of the *Price* rule without formally altering the rule itself. Prior to the recent changes under the R.U.C.C., the rules in both English and American law relating to the bank-customer relationship presented significant obstacles to a bank wishing to shift forgery losses onto its customer. Generally, in both systems, an item on which its customer's signature was forged (as drawer) was not "properly payable" and, as a result, it was wrong for the bank to pay such an item out of its customer's account.[341] If a bank mistakenly paid such an item, it was obligated to credit the account, at least in the absence of a defense such as customer negligence.[342] Any attempt by the drawee to shift the loss onto the collecting banks or other presenting parties was typically blocked by the *Price* doctrine to the extent it was intact, making that doctrine significant in both legal systems. The interplay of these doctrines resulted in losses from forged drawer's signatures resting on the drawee so long as the *Price* doctrine was in effect.[343]

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339. The question raised by the sham doctrine is similar to that raised by other developments in English law, such as limiting the change of position defense to agents. These help explain how the *Price* doctrine was undermined, but they raise equally difficult questions with respect to their own origins and development.

340. *Compare* Bills of Exchange Act §§ 3, 24, & 54 *with* N.I.L. § 62 and U.C.C. §§ 3-103(a)(6), 3-104, cmt. 1, 3-401, 3-403 (1990).

341. *See* Dow & Ellis, *Proposed New Payments Code*, *supra* note 10, at 409-10. With respect to American law, commentators and courts construed related Code sections to reach this result. *See* Ellis & Dow, *Banks and Their Customers*, *supra* note 6, at 60-61 nn.18-19. For a discussion of English law on these points see the English sources cited in *supra* note 21. For an overview of the acceptance and payment process under English law, see generally BYLES 1988, *supra* note 13 and CHALMERS & GUEST 1991, *supra* note 13.

342. *See* Dow, *Restitution on Payments*, *supra* note 11, at 409-10; Ellis & Dow, *Banks and Their Customers*, *supra* note 6, at 60-61, nn. 17-20. On the question of how often banks may assert customer negligence as a defense to recrediting an account, see *infra* notes 339-343 and accompanying text.

343. *See supra* notes 81-100, 114-141, 147-181, 195-217 and accompanying text.

From a formal perspective, the R.U.C.C. retains the *Price* doctrine intact;[344] however, it also embodies some important changes that will bring about a substantial shift in forgery loss allocation. These changes are primarily: (1) the significant shift to a comparative negligence scheme,[345] (2) a major change in the definition of ordinary care for banks with respect to processing checks that, in effect, relieves payor banks of any duty to examine items for forgeries before paying them out of their customer's accounts,[346] and (3) changes in the rules that allocate losses

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344. *See supra* notes 192-217 and accompanying text.

345. *See* U.C.C. §§ 3-404(d), 3-405(b), 3-406(b) (1990). *See generally* WHITE & SUMMERS, *supra* note 4, at ch. 16, 567, 603; Baxter et al., *supra* note 6, at 226-31; Garland, *supra* note 6, at 58-59; Jordan & Warren, *supra* note 4, at 388; Miller *supra* note 4, at 109; *Burke I*, *supra* note 6, at 321-24, 344-51 (notes the absence of any empirical data to support the shift from contributory to comparative negligence); Rapson, *Loss Allocation*, *supra* note 7, at 449 n.53; Julianna J. Zekan, *Comparative Negligence under the Code: Protecting Negligent Banks Against Negligent Customers*, 26 U. MICH. J.L. REFORM 125 (1992); *supra* note 214.

This is part of an overall shift to a comparative negligence system under the R.U.C.C. One of the drafters suggests that the revised rules are an improvement in that they allocate loss among various parties involved in check frauds in proportion to their responsibility in failing to prevent the loss, which will provide adequate deterrence with respect to dealing with wrongdoers and an incentive to settle rather than litigate. *See* Rapson, *Loss Allocation*, *supra* note 7, at 473. He also suggests that the guiding principle of loss allocation under the R.U.C.C. is no longer one of putting the loss on the party in the best position to avoid or prevent it. Under the comparative negligence system, loss is apportioned among the parties based only in part on the extent to which they were able to avoid or prevent the loss. *See id.*

Professor Rubin has criticized the move to comparative negligence because it will increase administration costs through increased litigation needed to determine relative degrees of fault. *See* Rubin, *Efficiency and Equity*, *supra* note 4, at 569. *See also* Hillebrand, *Consumer Perspective*, *supra* note 7, at 688-89 (criticizing the move to a comparative negligence scheme as unnecessary to provide adequate incentives for consumers to be careful with their accounts, as wrong in shifting loss away from banks (which are better able to prevent or avoid the loss) and as generating an increase in litigation expenses disadvantaging consumers). *See also* Ellis & Dow, *Banks and Their Customers*, *supra* note 6, at 66-70, 74.

346. *See* U.C.C. § 3-103(a)(7) (1990); *see also* WHITE & SUMMERS, *supra* note 4, at 577; *Burke I*, *supra* note 6, at 342, 342 n.117, 346-51; Ellis & Dow, *Banks and Their Customers*, *supra* note 6, at 66-74; Hillebrand, *Consumer Perspective*, *supra* note 7, at 682, 697-98; Jordan & Warren, *supra* note 4, at 396-98; Littlefield, *supra* note 7, at 1950; Miller, *Process and Scope*, *supra* note 5, at 414-16; Rapson, *Loss Allocation*, *supra* note 7, at 440, 440 n.17; Rubin, *Efficiency and Equity*, *supra* note 4, at 567-69, 651. An attorney with Consumers Union argues that this new provision does not relieve banks in every case of their duty to examine signatures, but only in cases where the customer was negligent. *See* Hillebrand, *Consumer Perspective*, *supra* note 7, at 697-98.

Professors White and Summers suggest that as a result of the new provision, signatures are no longer important with respect to authorizing payment. *See* WHITE & SUMMERS, *supra* note 4, at 575-79, 656, 660. On the extent to which banks visually inspect their customers' items before paying them see *infra* note 338-42. Under the U.C.C., courts were split on whether a bank's failure to inspect items constituted negligence. *See, e.g.*, McDowell v. Dallas Teachers Credit Union, 772 S.W.2d 183, 189 (Tex. Ct. App. 1989); Jordan & Warren, *supra* note 4, at 396; Dow & Ellis, *Banks and Their Customers*, *supra* note 6, at 63-64 n.32, 69 n.63. This issue of banks' negligence was critical because while the customers' negligence relieved the banks from their obligation to credit their customers' account in the event they paid a not properly payable item, the banks' negligence canceled their customers' negligence, requiring the banks' to credit the

resulting from the acts of dishonest employees.[347] These changes all relate to the bank-customer relationship while the *Price* rule's primary focus is the relationship between the drawee bank and presenting parties, including collecting banks. Although a thorough consideration and evaluation of these changes is well beyond the scope of this Article,[348] there is little doubt that, despite claims by those associated with the drafting project that the R.U.C.C. achieved a balance between bank and customer interests,[349] the changes will have the combined effect of shifting more losses from all types of forgeries from the drawee bank to its customer.[350] This will tend to neutralize the impact of the *Price* rule on drawee banks because shifting losses to customers reduces the need to shift such losses onto collecting banks and other presenting parties. This, in turn, reduces the number of instances in which the *Price* rule will have

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account. *See* Dow & Ellis, *Proposed Uniform New Payments Code*, *supra* note 10, at 409-10; Ellis & Dow, *Banks & Their Customers*, *supra* note 6, at 59-63; Rubin, *Policies and Issues*, *supra* note 7, at 646-47.

347. *See* Benfield & Alces, *supra* note 7; Jordan & Warren, *supra* note 4, at 388; *see generally* Rapson, *Loss Allocation*, *supra* note 7.

348. For an analysis and commentary on these changes, see generally the works cited *supra* notes 6-7.

349. *See* Miller, *Process & Scope*, *supra* note 5, at 405-16; Rapson, *Loss Allocation*, *supra* note 7, at 440 n.17 (arguing that relieving the drawee from the duty of examining signatures does not relieve it from its duty to pay only "properly payable" items out of its customer's account, and to credit the account when it fails to comply); *see also* Baxter et al., *supra* note 6, at 226-31; Miller, *Benefits of New UCC Articles 3 and 4*, *supra* note 4.

350. *See* WHITE & SUMMERS, *supra* note 4, at 548, 567, 579, 605-06, 651. Professors White and Summers write that "[i]t would not stretch the truth much to assert that bankers wrote Part 4 of Article 4 for bankers. Protection of payor banks is the dominant theme of Part 4 . . . ."). *See also Burke I*, *supra* note 6, at 319, 346-51; Ellis & Dow, *Banks and Their Customers*, *supra* note 6, at 66-74; Hillebrand, *supra* note 7, at 682, 699; Littlefield, *supra* note 7, at 1950; Rubin, *Efficiency and Equity*, *supra* note 4, at 551-60, 568-69, 576-79, 589, 592.

Professor Rubin of Boalt Hall School of Law has been especially critical of the R.U.C.C. He argues that "banks wanted a broad and overlapping arsenal for shifting liability for check frauds to their customers." Rubin, *Efficiency and Equity*, *supra* note 4, at 568. In his view, the banks obtained exactly what they wanted in the R.U.C.C. In the conclusion of his commentary on the R.U.C.C. he states:

> The revisions of Article 3 and 4 are superbly drafted, and represent high levels of technical achievement. Underneath their polished surface, however, they are deeply flawed. They perpetuate the one-sided, pro-bank perspective of the original, to the exclusion of any cognizable social policy. The revisions fail to achieve a policy of economic efficiency. While they minimize bank costs, they generate excessive social costs by imposing unnecessary losses on consumers and providing too few protections. Moreover, the revisions are inequitable; they fail to consider the consumer's powerless position and give banks too much leeway to be arbitrary, careless, or positively oppressive. This is hardly surprising, since the drafting process of the revisions, like that of the original, was dominated by banking interests.

Id. at 592. This pro-bank bias of the R.U.C.C. is underscored by the admission of one R.U.C.C. drafter that it might be necessary for the states to adopt consumer protection legislation independently from the R.U.C.C. *See* Miller, *Process and Scope*, *supra* note 5, at 412-16; *see also* Hillebrand, *supra* note 7, at 682, 699.

any relevance. In this way, the R.U.C.C. reduces the impact and significance of the rule without formally altering it. From this viewpoint, the difference between English and American law on this matter becomes more formal than real. The important issue shifts from one of trying to understand why the *Price* doctrine developed along divergent paths to one of trying to understand any differences in English and American law with respect to the bank-customer relationship, especially with respect to whether banks can shift forgery losses to their customers (thereby reducing the need to shift them to collecting banks and other presenting parties).

While this perspective is an important one for purposes of understanding current doctrine, it does not help in understanding the doctrine's development because the changes in the R.U.C.C. noted above are much too recent to have had any impact, either directly or indirectly, on the development that was largely completed by 1929. These R.U.C.C. provisions do not codify existing doctrine. Instead, they constitute the few significant changes the R.U.C.C. makes in existing doctrine,[351] or, in some cases, resolve differences among the courts on interpretive questions.[352]

IX. CONCLUSION

From this study of the *Price v. Neal* doctrine and other related doctrines, it becomes apparent that in the final analysis, the search for a doctrinal solution to explain the divergent development of the *Price* doctrine in English and American law is not fruitful. For the most part, the two bodies of negotiable instruments law are quite similar. Any significant differences between English and American law are either too recent to be relevant or merely shift the inquiry to another doctrinal level without providing an answer for the primary question.

The line of inquiry that perhaps has the greatest potential is found beyond doctrine in the *practices* of banks and their customers as they deal with the problem of forgery loss and the economics of litigation. While a bank that pays a forged check or other item that is not properly payable is legally obligated to credit its customer's account,[353] the key question is what banks actually *do* when confronted with a customer's demand to credit an account under these circumstances. One possibility is that banks simply refuse to credit the customer's account, perhaps claiming that the customer was negligent. The economics of litigation, especially those of

351. *See supra* notes 192-217 and accompanying text.
352. *Id.*
353. *See supra* note 327 and accompanying text.

litigating relatively small amounts, would make it extremely unlikely that the customer could afford to enforce his or her rights through litigation. As a result, the customer would bear the resulting forgery loss, making it unnecessary for the bank to attempt to shift the loss to collecting banks or other presenting parties. This has been recognized by a few commentators as something that banks can attempt under the U.C.C. and can continue to do—perhaps more readily—under the R.U.C.C.[354] It is only when the amount of the forgery loss is large enough to make litigation cost-justified that the customer can afford to enforce his or her rights against the bank. Even though such a practice would be at odds with the rules of forgery loss allocation under formal law, it would effectively neutralize the impact of the *Price* doctrine in American law without formally altering it. From a comparative law standpoint, this perspective might provide an explanation for the divergent development of the *Price* doctrine in English and American law. If English banks are less willing than their American counterparts to ignore customer demands to credit an account, the *Price* doctrine would have significantly greater costs for English banks, making it the object of sustained attempts to narrow or overrule it.[355] Despite its great relevance to the problem of forgery loss allocation, there has been very little empirical research on this or related questions.[356] What evidence does exist is largely anecdotal.[357]

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354. *See Burke I*, *supra* note 6, at 350-51; Ellis & Dow, *Banks and Their Customers*, *supra* note 6, at 65-66, 65 n.39; Rubin, *Efficiency and Equity*, *supra* note 4, at 583-84. Professor Rubin argues that under the R.U.C.C., "consumers can virtually never enforce their rights against a bank because it will simply be too expensive to do so." *Id*. at 569. As a result, consumers will almost always bear the loss even if they are not at fault, making the system inefficient. *See id*. at 569-72. Just how readily and how often this might happen is an empirical question.

355. Moreover, the "English rule" with respect to attorney's fees would have an impact on the customer's decision to litigate. *See, e.g.*, HERBERT JACOB ET AL., COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE 55, 136, 146-47 (1996).

356. One of the important related questions on which empirical evidence is lacking is whether banks favor their own customers by crediting an account under circumstances where customer negligence or some other defense removes the bank's legal obligation to do so, and then attempting to pass the loss onto collecting banks or other presenting parties. In other words, could the payor bank waive defenses it might have against its customer, credit the account, and pass the loss onto collecting banks? Does this happen, if at all, only when the customer is a large company with adequate resources to litigate or make a credible threat to move its accounts to another bank? This sort of behavior by the payor would weigh against claims that banks shift forgery losses to their customers. U.C.C. section 4-406(5) required the payor bank to assert any defense it might have against its customer if it wished to proceed against collecting banks on a warranty claim. *See* Ellis & Dow, *Banks and Their Customers*, *supra* note 6, at 64. The U.C.C. was unclear on whether a collecting bank could assert a defense that the drawee failed to raise against its customer. Courts and commentators disagreed on these questions. *See* Rapson, *Loss Allocation*, *supra* note 7, at 442-46, 466-67. A new provision in the R.U.C.C. allows these parties to assert any defense that the drawee could have asserted against its customer. *See* WHITE & SUMMERS, *supra* note 4, at 605-06; *Burke I*, *supra* note 6, at 364; Rapson, *Loss Allocation*, *supra*

Until the necessary empirical research is undertaken, the doctrinal puzzle presented by the development of *Price v. Neal* in English and American law will remain unsolved.

note 7, at 466-67. This suggests by inference that banks sometimes favor their customers in this way.

Another important related question is to what extent banks visually inspect items in order to verify signatures before paying the items. *See, e.g.*, Ellis & Dow, *Banks and Their Customers*, *supra* note 6, at nn. 71-72, 77-79 and accompanying text.

Finally, while there is data on the number of instances of check fraud and the average loss per instance of fraud, *see supra* notes 7-9, there is little data on how many of these instances involve forged drawer's signatures as opposed to, for instance, forged indorsements. *See Burke I*, *supra* note 6, at 323 n.20.

357. It has been suggested that the small number of reported cases in which customers sued banks to credit their account following payment of a properly payable item was evidence of this practice by banks. *See* Ellis & Dow, *Banks and Their Customers*, *supra* note 6, at 65. However, the number of other factors that have an impact on the decision to litigate undermines this claim.