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# Clarifynig The Amending Process

Noel T. Dowling

# CLARIFYING THE AMENDING PROCESS

NOEL T. DOWLING*

In a decision[1] accompanied by a series of opinions last Term, the Supreme Court put a new complexion on the legal features of the process of amending the Constitution. Hitherto the question whether an amendment had been properly and seasonably adopted was, by assumption if not by actual decision, cognizable in and determinable by the Court, though the principles governing the determination were by no means clear or settled. Today the question is one for Congress. It has ceased to be justiciable. It has become political.

This bit of transmutation was not accomplished with the greatest of ease. Two cases were argued together[2] in October, 1938, but, while other cases submitted then and thereafter were readily disposed of in the normal period of six weeks to two months, nothing was heard of these. At that time the Court had only eight members, no successor to Mr. Justice Cardozo having been appointed, and it was believed that they were equally divided on the question of jurisdiction. After the appointment of Mr. Frankfurter it was expected that the cases would be set down for re-argument, but the retirement of Mr. Justice Brandeis again reduced the Court to eight. Finally, on April 17, the day on which Mr. Justice Douglas took his seat to make a full bench of nine, the re-argument was begun. Seven weeks later, June 5, the decision came down. Four opinions were delivered, the prevailing one by Mr. Chief Justice Hughes (joined by Justices Stone and Reed), a concurring one by Mr. Justice Black (joined by Justices Roberts, Frankfurter and Douglas), a separate one by Mr. Justice Frankfurter (joined by Justices Roberts, Black and Douglas), and a dissenting one by Mr. Justice Butler (joined by Mr. Justice McReynolds).

The case which called forth this bevy of opinions presented a single issue, namely, whether or not the ratification of the Child Labor Amendment by Kansas was valid. In the period which had elapsed since the submission of the amendment in 1924 the State had first (1925) rejected the proposal and thereafter (1937) accepted it. A suit was begun to test the legality of such action and two separate questions were developed in the litigation; first, was a State bound by its first vote, so that

*Nash Professor of Law, Columbia University Law School.

[1]Coleman v. Miller, 307 U. S. 433, 59 S. Ct. 972 (1939).

[2]Chandler v. Wise, 307 U. S. 474, 59 S. Ct. 992 (1939), was the other, but as will appear later, it was dismissed without consideration of the merits.

after having voted No it could not vote Yes, and, second, was the proposed amendment "dead" by reason of the passage of so many years since its submission, notwithstanding the absence of any time limit in the proposing resolution. The highest court of Kansas had answered both questions in the negative, and sustained the ratification.[3] This judgment was affirmed by the Supreme Court of the United States.[4]

On the first question, the effect of the previous rejection of the amendment, the Court deemed the matter settled by "historic precedent." This precedent was created by the action of Congress and the Secretary of State in proclaiming the ratification of the Fourteenth Amendment. The legislatures of some of the States, including North Carolina and South Carolina, had first rejected and then ratified the Amendment, while in at least two other States, Ohio and New Jersey, the legislatures first ratified and then passed resolutions withdrawing their consent. Congress, informed of these facts by a report from the Secretary of State, adopted a Concurrent Resolution which declared the Fourteenth Amendment to be a part of the Constitution, all four of the above named States being included in the list of those which had ratified. Thereupon the Secretary of State issued his proclamation which also included those States.

Thus, as the Court points out, the "political departments of the Government" had dealt not only with the first question here involved but also with the related one whether prior ratification could be revoked, and had determined that both previous rejection and attempted withdrawal "were ineffectual in the presence of an actual ratification."[5]

Declaring that this decision by the political departments as to the validity of the Fourteenth Amendment "has been accepted," the Court added:

> "We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the

[3]In the Chandler case similar questions were involved concerning ratification by Kentucky. The Court of Appeals of that State answered both questions in the affirmative, and overturned the ratification.

[4]Thus the judgments in both cases were left standing, that of Kansas (for ratification) because the Supreme Court thought it was right, and that of Kentucky (against ratification) because the Court, there being no justiciable question, could not say whether it was right or wrong.

[5]The Court noted that there were "special circumstances" because of the action of Congress in relation to the governments of the rejecting States but said that these circumstances "were not recited in proclaiming ratification."

exercise of its control over the promulgation of the adoption of the amendment."

The Court then stated the "precise question" in the case to be "whether, when the legislature of the State, as we have found, has actually ratified the proposed amendment, the Court should restrain the State officers from certifying the ratification to the Secretary of State, because of an earlier rejection, and thus prevent the question from coming before the political departments"; and answered it: "We find no basis in either Constitution or statute for such judicial action."

The second question, as to whether the proposal by Congress had lost its vitality through lapse of time, was found by the Court to be "more serious" than the first. *Dillon v. Gloss*[6] brought on the difficulty. In that case, as the Court now re-affirms, it was held that Congress in proposing an amendment may fix a reasonable time for ratification.[7] But much more was said in the opinion. Thus it was suggested that amendments would not remain open to ratification for all time, that ratification must be sufficiently contemporaneous in the required number of States to reflect the will of the people in all sections at relatively the same period, and that ratification must be within some reasonable time after the proposal.

These considerations, and others not necessary to be recited here, were "cogent reasons," said the Court, for sustaining the power of Congress to fix a reasonable time, but they must not be taken as indicating that, when Congress does not exercise that power, the Court should take upon itself the responsibility of deciding what constitutes a reasonable time. No such question was presented in *Dillon v. Gloss* and the Court did not consider itself foreclosed from examining the matter on the merits.

The question of a reasonable time, said the Court, would involve an appraisal of "a great variety of relevant conditions, political, social, and economic," which are appropriate for the consideration of the political departments of Government. Indeed the Chief Justice suggests that these conditions "can hardly be said to be within the appropriate range of evidence receivable in a court of justice" and as to them "it would be an extravagant extension of judicial authority to assert judicial notice"

[6]256 U. S. 368, 41 S. Ct. 510 (1921).

[7]Actually, as Professor Freund pointed out at the time, Legislative Problems and Solutions (1921) 7 A. B. A. J. 656, that was not the holding. The seven year limit in that case had been inserted by Congress in the text of the amendment itself (it was the Eighteenth); it was not a part of the proposing Resolution. Mr. Chief Justice Hughes calls attention to the fact that no limitation of time in respect of the Child Labor Amendment appears "either in the proposed amendment or in the resolution of submission."

as the basis of deciding the controversy. The questions they involve are "essentially political and not justiciable."

> "Our decision that the Congress has the power under Article V to fix a reasonable limit of time for ratification in proposing an amendment proceeds upon the assumption that the question, what is a reasonable time, lies within the congressional province. If it be deemed that such a question is an open one when the limit has not been fixed in advance, we think that it should also be regarded as an open one for the consideration of the Congress when, in the presence of certified ratifications by three-fourths of the States, the time arrives for the promulgation of the adoption of the amendment. The decision by the Congress, in its control of the action of the Secretary of State, of the question whether the amendment had been adopted within a reasonable time would not be subject to review by the courts."

On both points, then, the Chief Justice concluded that the determining power rested in Congress rather than in the courts. But either he was not categorical enough or else he said too much to satisfy Mr. Justice Black and the three associates who joined with him. In their view control of the amending process has been given by the Constitution "exclusively and completely" to Congress. They considered the process as "political" in its entirety, from the submission of an amendment to its adoption, and they denied that it is "subject to judicial guidance, control or interference at any point." Consequently they looked on any judicial expression which amounted to "more than mere acknowledgment of exclusive Congressional power" as a "mere admonition to the Congress in the nature of an advisory opinion, given wholly without constitutional authority."

The bare fact that the Court discussed the matter at all, as against dismissing the cause forthwith and completely as a political question, evidently gave them some concern. In fact they insisted that the Court "treats the amending process of the Constitution in some respects as subject to judicial construction." They wanted an express disapproval of the "conclusion arrived at in *Dillon v. Gloss* that the Constitution impliedly requires that a properly submitted amendment must die unless ratified within a 'reasonable time'," together with a disapproval of the Court's "prior assumption of power to make such a pronouncement."

In the separate opinion by Mr. Justice Frankfurter the position was taken that the parties had "no standing in this Court" and that the cause should be dismissed.

Mr. Justice Butler, dissenting, stood squarely on the conclusion which he quoted from *Dillon v. Gloss,* namely, that "the fair inference

or implication from Article V is that ratification must be within some reasonable time after the proposal." In his judgment, upon the reasoning of the opinion in that case, "more than a reasonable time had elapsed." Also, declaring that the non-justiciable character of the question had not been raised or argued at the bar, he urged that no decision should be rendered on the point that the Court lacks power to determine what is a reasonable time for ratification.

In the companion case of *Chandler v. Wise,* already referred to, which brought up on certiorari similar questions concerning the validity of Kentucky's ratification and which had held the ratification invalid, the writ was dismissed on the ground that after the Governor "had forwarded the certification of the ratification of the amendment to the Secretary of State of the United States there was no longer a controversy susceptible of judicial determination." Mr. Justice Black and Mr. Justice Douglas, concurring, referred to the opinion by the former in the Kansas case and added: "We do not believe that state or federal courts have any jurisdiction to interfere with the amending process."[8] Mr. Justice McReynolds and Mr. Justice Butler thought that the Kentucky judgment should be affirmed on the authority of *Dillon v. Gloss.*

The result of it all seems to be: first, that the Court considers the law already settled by "historic precedent" to the effect that a state can change its vote from No to Yes (the same precedent refused a change from Yes to No), and, second, that the Court will have nothing to do with determining what is a reasonable time for ratification.

The first of these results itself involves something akin to a decision on the merits. That is to say, when the Court declared that the historic precedent of the Fourteenth Amendment "has been accepted" it was in that very declaration making a pronouncement on the law. And it will be recalled that the Court retained jurisdiction of the Kansas case and affirmed the judgment, "but upon," as it added, "the grounds stated in this opinion."

Whether the Child Labor Amendment is now to be listed among the quick or the dead, we do not know.[9] That puzzle still survives notwithstanding the elaborate discussion of the general problem in the present case. But the opinions do point the way for those who would

[8]It will be noticed that while Mr. Justice Roberts and Mr. Justice Frankfurter concurred in Mr. Justice Black's opinion in the Kansas case concerning the political character of the question they did not join in the present declaration of no jurisdiction.

[9]Four other amendments have been proposed, two in 1789, one in 1810, and one in 1861, and are "outstanding" in the sense that they have not been ratified.

like to know what rules shall govern the game of amending the Constitution. The rules must be made by Congress, unless peradventure Congress, eschewing rules, prefers to leave all questions open for decision if and whenever they may arise in connection with the ratification of any given amendment. But surely the law on such a basic matter as amending the Constitution ought to be known in advance; and the judicial branch has here passed full responsibility over to the legislative.

Congress has done singularly little on the subject. Today the total statutory content consists of one provision to the effect that it is the duty of the Secretary of State to proclaim the adoption of an amendment whenever he has received official notice that the requisite number of States have ratified it.[10] Even that provision was not thought heretofore to have any striking legal significance, for the Secretary's proclamation was treated, not as necessary to ratification, but as a means of giving publicity to a result already accomplished. *Dillon v. Gloss* was decided on the theory that ratification is complete as soon as the last State required to make up the three-fourths has accepted the amendment; furthermore, the Court will take judicial notice of such state action.[11] The episode of December, 1933, may be recalled when, with ratification of the Twenty-first Amendment already completed in 35 States, the thirty-sixth staged a performance not far from theatrical in putting an end to prohibition.

But perhaps that feature of *Dillon v. Gloss* must also be taken with reservation in the light of the new views of the Court. And one wonders whether the same must be said of *Hawke v. Smith*,[12] *National Prohibition Cases*,[13] and *United States v. Sprague*,[14] where the Court dealt

[10]The text of the provision is as follows: "Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States." 5 U. S. C. 160, from an Act of April 20, 1818.

[11]Thus, with regard to the Eighteenth Amendment whose effective date was involved in the case, the Court said: "Its ratification, of which we take judicial notice, was consummated January 16, 1919. That the Secretary of State did not proclaim its ratification until January 29, 1919, is not material, for the date of its consummation, and not that on which it is proclaimed, controls." (256 U. S. at 376.) To the same effect, United States v. Chambers, 291 U. S. 217, 222 (1934), concerning the effective date of the Twenty-first as repealing the Eighteenth.

[12]253 U. S. 221, 40 S. Ct. 495 (1920).

[13]253 U. S. 350, 40 S. Ct. 486 (1920).

[14]258 U. S. 130, 42 S. Ct. 217 (1922).

with the validity of the Eighteenth Amendment; and of *Leser v. Garnett*,[15] involving the validity of the Nineteenth. In all these cases the Court passed on questions of procedure or substance, though it must be said that they were decided in the absence of any explicit congressional legislation on the points involved.[16]

The way is open, and the responsibility clear, for clarifying the amending process by a comprehensive statute. Could Congress, notwithstanding the historic precedent, now prescribe that a State's first vote on a proposed amendment shall be final, whether No or Yes,

[15]282 U. S. 716, 51 S. Ct. 220 (1930).

[16]These cases covered features of the Eighteenth Amendment other than the time factor discussed in Dillon v. Gloss. Thus in Hawke v. Smith it was held that when Congress submits an amendment for ratification by legislatures a State has no authority to require the submission of ratification to a referendum under the State Constitution; consequently, as sought in the case, an injunction should issue against the spending of public money for that purpose. Here the Court passed on the meaning of the term "Legislatures" in Article V. In the National Prohibition Cases, which comprised seven suits each seeking an injunction against the execution of the National Prohibition Act to enforce the Eighteenth Amendment, the Court, in the face of elaborate argument to the contrary, concluded, *inter alia*, that the substance of the Amendment "is within the power to amend reserved by Article V" and that the "Amendment, by lawful proposal and ratification, has become a part of the Constitution." United States v. Sprague was an appeal by the Government from an order of the federal court in New Jersey quashing an indictment for violation of the National Prohibition Act. That court, entertaining the view that the convention method was requisite for such an amendment, held that the amendment (ratified by legislatures) had not been validly adopted. In reversing this judgment the Supreme Court, reiterating what was said in the National Prohibition Cases, declared that it rests solely in the discretion of Congress to make the choice of method of ratification. In Leser v. Garnett the Supreme Court affirmed the judgment of a Maryland court dismissing a petition to require election officers to strike the names of specified women voters from the registration list. The contention was made that the extension of suffrage to women was so great an addition to the electorate that, absent the State's consent (Maryland had refused to ratify), it would destroy the State's autonomy as a political body, and hence did not lie within the amending power. Other contentions were that limitations either in state constitutions or in legislative procedure had not been complied with and that noncompliance made the ratifications ineffective. All these contentions were considered and rejected.

Prior to these cases, Professor Orfield writes, the only instance in which the Supreme Court had passed on the validity of an amendment was Hollingsworth v. Virginia, 3 Dall. 378 (1798), concerning the Eleventh. Even there, however, he says, the question had to do with the procedure by which the Amendment was adopted, not with its content; and no point was made or discussed that the question was a political one. In a later case, Luther v. Borden, 7 How. 1 (1849), Professor Orfield adds, the Court declared in dictum that it was political. As far as state courts are concerned he finds that the decisions have been "virtually unanimous to the effect that the question is judicial." He concludes that "it is not peculiar" that the Supreme Court "when it came to passing on the Eighteenth and Nineteenth Amendments was prepared to view the issue as judicial." The Federal Amending Power: Genesis and Justiciability (1930) 14 Minn. L. Rev. 369, 374, 379.

thus preventing a shift in either direction? Presumably such action lies within the competency of Congress under the view expressed by the Chief Justice that the "question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question." Certainly full Congressional freedom would be acceptable to Mr. Justice Black. Doubless Congress could authorize the Secretary of State to make the determination, on grounds fixed by the statute, whether an amendment has been adopted or rejected, and to proclaim the result. That would give potency and dignity to the Secretary's proclamation. And much can be said for making proclamations operate on a two-way street: *ratification* when three-fourths of the States signify their acceptance; *rejection* when more than one-fourth signify the contrary.

Congress might strike out on other lines for the purpose of making the adoption or rejection of amendments depend upon a nation-wide and substantially direct vote of the people. Thus, it might declare a national policy that all amendments hereafter proposed shall be submitted for ratification or rejection by state conventions instead of legislatures, and provide that delegates to such conventions be chosen at elections, general or special, held throughout the country on a given date; that the election of delegates be accompanied by a state-wide referendum on the adoption of the amendment, the result thereof to bind the delegates; and that the conventions assemble and vote within a specified time after the election.

To a considerable extent that method was tried and found satisfactory in the ratification of the Twenty-first Amendment, the only amendment so far ratified by conventions.[17] There, however, the individual States, not Congress, enacted legislation embodying one or more of the above noted provisions concerning the election of delegates and the procedure of the conventions. The question whether Congress had power to legislate along those lines was debated in the House when the resolution submitting the amendment was under consideration, and the House was divided in opinion.[18]

Large questions of power and policy are involved in any assertion

[17]See A New Experiment in Ratification (1933) 19 A. B. A. J. 383.

[18]Such legislation has been urged by publicists from time to time, and at least one Bill has been introduced in Congress to that end. The Bill was introduced by Mr. Wadsworth of New York in the 74th Congress. H. R. 2900, and again in the 75th Congress, H. R. 299. Remarks of Mr. Wadsworth on the subject of the Bill will be found in 79 Cong. Rec. 1264-68, January 30, 1935, and 81 Cong. Rec. 1873-1876, March 4, 1937.

of congressional authority touching elections in the States. Manifestly it is a matter of great delicacy in federal relationships. But within the limited area of the election of convention delegates the question of power, whatever may be said for or against the propriety of its exercise, wears a different aspect since the Child Labor Amendment decision was rendered.[19]

Even if Congress should resolve the issues of power and policy favorably and enact a law calling for the convention method and making general provision for the conventions, the legislative program would still be incomplete. Further legislation would be necessary in the States themselves, complementary to the Congressional, to provide the local machinery for the election of the delegates and to set it in motion upon the submission of an amendment.

Legislation of that character in the States is needed whether Congress passes such a law as the above or not. It is needed, that is, if the States are to be equipped to proceed without delay in the event that Congress should submit an amendment and, as it did in the case of the Twenty-first, specify merely that it be ratified by conventions instead of by legislatures. Up to that time no laws had been passed under which such a constitutional convention could be assembled. And if it had not been for the efforts of individuals and private organizations it is likely that the formulation of the necessary statutes would have been considerably retarded. Even so, only sixteen States made their statutes general in character, that is, designed to become operative whenever Congress submits an amendment for ratification by conventions. The remainder shaped their laws solely with regard to the proposed Twenty-first Amendment; and those laws, their function in the ratification of that Amendment having been performed, are dead letters now. They of course furnish guides for legislative action if further proposals should be submitted, but the point is that new state legislation would be necessary. At the present time not more than one-third of the States are ready to proceed by the convention method for the consideration of proposed amendments.

[19]A surprisingly sympathetic attitude towards national power was taken by the States when they enacted statutes to provide for conventions to deal with repeal of prohibition. About half of those statutes contained a provision to the effect that if Congress should prescribe the manner in which the conventions shall be constituted and should not make an exception of States which had enacted their own plans, then the state statute "shall be ineffective" and state officers shall be authorized and directed to act in obedience to the federal statute "as if acting under a statute of this State." See the article cited in footnote 17.

# EQUITABLE EXCEPTIONS TO PRICE v. NEAL:

## *The Virginia Solution in a Case of Double Forgery*

CHARLES R. MCDOWELL

The case of *Central National Bank of Richmond v. First and Merchants National Bank of Richmond*[1] presents such an unusual factual situation as to be unique.[2] Certain fraudulent parties, desiring to get possession of money standing to the credit of one Justin Moore in the Central Bank, forge Moore's name as drawer of a check on the original depository bank (Central Bank) and deposit it in the second bank (Merchants Bank) to the credit of the same man, Moore. They then forge checks on Moore's account in the Merchants Bank in order to withdraw the funds for their own use. It is not at all unusual for a forger to put money fraudulently withdrawn from the first bank into a second bank and allow it to remain there for a short time before withdrawing it from the second bank. The device is apparently thought to lull the first bank into security, the theory being that the original bank will be less suspicious of a transaction which simply transfers funds to another solvent bank than it is of a transaction involving direct payment of cash. In the ordinary case, however, the money fraudulently checked out of the first bank is placed to the forger's own credit in the second bank and later withdrawn from the second bank by checks drawn in his own name. In the ordinary case of this type, therefore, the first check is a forged check but the second is not. While strange factual situations are likely to arouse a certain amount of human interest among members of the legal profession, such cases are not always important as far as the legal problems are concerned. The unusual device employed by this forger, however, has obliged the Court of Appeals of Virginia to review the whole problem of *Price v. Neal*[3] and to take a position as to the true meaning of Section 62[4] of the Negotiable Instruments Law.

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[1] 171 Va. 289, 198 S. E. 883 (1938).

[2] The opinion states that exhaustive briefs by able counsel fail to disclose a case closely in point.

[3] 3 Burr. 1354, 97 Eng. Rep. 871 (1762).

[4] Va. Code Ann. (Michie, 1936) § 5624: "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, and 2. The existence of the payee and his then capacity to indorse."

The problem is: Since Section 62 of the N. I. L. is simply a direct copy of Section 54 of the English Bills of Exchange Act, which in turn is a legislative declaration of *Price v. Neal,* and since the English Courts had declined to recognize certain equitable exceptions to the *Price v. Neal* doctrine which had grown up in the various jurisdictions in the United States, did the passage of Section 62 of the N. I. L. constitute a statutory abolition of the equitable exceptions to the *Price v. Neal* doctrine?[5] The significant point in the case, therefore, is that Virginia has added itself to that list of jurisdictions which take the view that the passage of Section 62 of the N. I. L. has not abolished the so-called equitable exceptions to the *Price v. Neal* doctrine.[6]

So far as necessary to the main point involved, the facts may be given as follows: A fraudulent party, who called himself Clancy, learned that one Justin Moore had a substantial checking account with the Central Bank. He forged Moore's name as drawer of a check for $8500 on the Central Bank and deposited it in the Merchants Bank to the credit of Moore. Previous to the time of this transaction, Moore already had a substantial checking account with the Merchants Bank.[7] Central Bank paid the full amount of the original check through the clearing house to Merchants Bank. Clancy later withdrew $8149, or all except $351 of the $8500, from the Merchants Bank by checks to which Moore's name was forged. Moore discovered the forgery of the $8500 check and demanded that the Central Bank recredit his account for that amount. Central did recredit Moore's account[8] and demanded of Merchants that they return the $8500. Merchants refused and Central brought suit against Merchants for money had and received under mistake. Merchants' main defense is that under the rule of *Price v. Neal* and Section 62 of the N. I. L., Central is not entitled to recover because of its legal responsibility for recognizing its own depositor's signature. The case was tried under a stipulation that neither party was guilty of any factual negligence, the forgeries in both instances being clever forgeries upon Moore's own blank checks stolen from Moore's office. The trial court gave judgment for the plaintiff bank for so much of the $8500 as

[5]See full discussion by Crawford D. Henning, The Uniform Negotiable Instruments Law (1911) 59 U. of Pa. L. Rev. 471, 497.

[6]For recent cases see Brannon, Negotiable Instruments Law (6th ed., Beutel, 1938). For earlier cases see Note (1907) 10 L. R. A. (N. S.) 49.

[7]Except for this fact it might be argued that the method employed in withdrawing the money from the second bank did not constitute a forgery.

[8]At the time Central recredited the account, Central took an assignment of Moore's claim against the defendant. A considerable portion of the opinion relates to the assignment but is unnecessary to the point herein discussed.

had not been checked out of the Merchants Bank, or $351. The Court of Appeals reversed the trial court and gave the plaintiff Central Bank judgment for the full amount of the original check, or $8500.

In his opinion, Justice Spratley takes the following position: Where the original bank pays to the second bank money on checks drawn on the first bank to which the drawer's name has been forged, and the second bank has paid out all of the money on authentic checks, the so-called rule of *Price v. Neal* or the rule of Section 62 of the N. I. L. prevents the original bank from recovering; but where the money paid by the original bank is still in the second bank, the original bank may recover. Next, since the $8149 paid out by Merchants were mispayments on forged orders, the court must treat the case as if the $8500 was in fact still in the Merchants Bank. Ergo, the court says that the plaintiff Central Bank can recover the full amount of $8500.

The opinion, upon analysis, is syllogistic. It amounts to this: If the money is still in the second bank, the original bank may recover it. The $8500 is in legal effect still in the second bank, the second bank having paid out its own money on forged orders. Therefore, the first bank can recover.

A generation of lawyers taught to look at a syllogism out of the corners of their eyes may react to the opinion with suspicion. They may ask themselves: Was the money still in the Merchants Bank; had not Clancy taken most of it and spent it? Was not the whole case decided when the meaning was put into the minor premise? Was the court justified in treating the case as if the money were still in the Merchants Bank when it was irrecoverably gone?

It is believed that the decision would have been more palatable if the court had simply said that Virginia is hereby deciding, as a matter of policy, to take its position among those states which hold that the established American equitable exceptions to the *Price v. Neal* doctrine have not been abolished by Section 62[9] of the N. I. L.; that before the N. I. L. there was respectable authority to the effect that a negligent defendant was ineligible to invoke *Price v. Neal* as a defense in a suit for money had and received under mistake of fact,[10] and that the legal

[9]Va. Code Ann. (Michie, 1936) § 5624.

[10]In the opinion in American Surety Co. of N. Y. v. Industrial Savings Bank, 242 Mich. 581, 219 N. W. 689 (1928) the following cases are cited as applying to so-called equitable exceptions: Canadian Bank of Commerce v. Bingham, 30 Wash. 484, 71 Pac. 43 (1902), 60 L. R. A. 955 (1903); Gloucester Bank v. Salem Bank, 17 Mass. 33 (1820); American Express Co. v. State National Bank, 27 Okla. 824, 113 Pac. 711, 33 L. R. A. (N. S.) 188 (1911); Woods v. Colony Bank, 114 Ga. 683, 40 S. E. 720, 56

negligence of the Merchants Bank in allowing the money to be withdrawn on forged orders prevented it from invoking the rule of Section 62 as a defense to this suit for money had and received under mistake.

Section 62 is a rather vague section of the N. I. L. So far as the problem of this case is concerned, Section 62 simply says that an acceptor by accepting "admits" the genuineness of the drawer's signature. Since payment of a check is held to have the same effect as a certification for future payment,[11] our problem is: Since Central Bank "admitted" to Merchants Bank that the signature to the original $8500 check was the authentic check of Justin Moore, what was the legal effect of such "admission"? Did Central by admitting the signature make such an irrevocable guaranty of the authenticity of Moore's signature that Central would be absolutely barred from bringing the matter up, regardless of the negligence of the Merchants Bank; or, on the other hand, did Central simply make a representation implied-in-law or a holding out implied-in-law which would be the basis of an equitable estoppel in the event that Merchants was injured by reasonably and non-negligently relying upon such representation? If Central's admission means nothing more than a legal representation, then it may be reasonably contended that Merchants did not reasonably and non-negligently rely upon such holding out, because it was itself guilty of legal negligence in allowing the money to be checked out on forged signatures of the drawer.

In *Louisa National Bank v. Kentucky National Bank*,[12] decided by the Kentucky Court of Appeals in 1931, where the drawee (Catletts-

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L. R. A. 929 (1902); Continental National Bank v. Metropolitan National Bank, 107 Ill. App. 455; Bank of Williamson v. McDowell County Bank, 66 W. Va. 545, 66 S. E. 761 (1909), 36 L. R. A. (N. S.) 605 (1912).

[11]In First National Bank of Portland v. U. S. National Bank of Portland, 100 Ore. 264, 197 Pac. 547, 552, 14 A. L. R. 479, 488 (1921) the following words appear: "It will be observed that in § 7854, Or. L., [Sec. 62 N. I. L.] the word 'accepting' and not the word 'paying' is employed in the statute; and yet in all the states where the question has been presented, except the state of Pennsylvania, where a different course of legislation has produced a different result, and except in South Dakota . . ., the courts have ruled that Section 62 is merely a legislative affirmation of the rule announced in Price v. Neal, and that this section includes the payment as well as the acceptance of a negotiable instrument on the theory that the section was intended as a legislative adoption of the entire doctrine of Price v. Neal." Also see case in Brannon, Negotiable Instruments Law (6th ed., Beutel, 1938) 761.

[12]239 Ky. 302, 39 S. W. (2d) 497 (1931).

It is noteworthy that the courts in cases like the Louisa Bank case require a higher standard for eligibility to plead Price v. Neal as a defense than is required of a purchaser to qualify as a holder in due course. The purchaser of bearer paper may qualify as an h.d.c. without having the transferor identified. Goodman v. Simonds,

burg Bank) had paid a check to the Louisa Bank under a forged drawer signature, and the Catlettsburg Bank sued for money had and received under mistake, the court allowed a recovery because the defendant Louisia Bank had negligently cashed the check without having the fraudulent transferor identified. The Kentucky court said:

> "Some . . . [courts] hold that the provisions of the Negotiable Instruments Law adopt the rule in Price v. Neal, free from the exceptions which the courts have grafted onto it. . . . Others hold that the Uniform Negotiable Instruments Law is merely a legislative affirmation of the rule of Price v. Neal with the equitable exception. . . . The exception is not expressly included. . . . Nor is it abrogated."[13]

It will be noticed that while the Kentucky court used the terminology of equitable exception, the result is the same as if the Kentucky court had talked the language of estoppel. The drawee-payor bank would have recovered if the Kentucky court had simply said that Section 62 provided that the drawee's paying a check constitutes an implied-in-law representation that the signature was genuine and that the defendant's negligence prevented it from establishing reasonable reliance. The only real difference between the Kentucky case and the principal case is that in the Kentucky case factual negligence on the part of the defendant bank was found in its cashing the check without identifying the fraudulent transferor, whereas, in the principal case, the court found legal negligence in the defendant's allowing the money to be withdrawn on forged signatures.

Several different theories concerning the reason for the original rule of *Price v. Neal* are discussed and analyzed by Mr. Woodward in his textbook on the law of quasi-contract.[14] Among them appears the so-called "Change of Position Theory" which is in effect the same as the estoppel theory. Mr. Woodward rejects this theory in favor of the view that the reason for the rule lies in a general rule of policy—a broad policy of promoting security by regarding payment as final and irrevocable so far as possible. But whatever may have been the original reason for the rule, an examination of the cases in Beutel's recent re-

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20 How. 343, 15 L. ed. 934 (U. S. 1857). The apparent inconsistency is perhaps explained by the fact that the law of negotiable instruments is seeking to promote free transfer as far as possible, whereas the law of quasi-contracts is based upon broad equitable doctrines. While the problem of the Louisa Bank case involves an N. I. L. section it is ambiguous and is interpreted in the light of quasi-contract law.

[13]Louisa Nat. Bank v. Kentucky Nat. Bank, 239 Ky. 302, 39 S. W. (2d) 497, 500-501 (1931).

[14]Woodward, The Law of Quasi-Contracts (1931) §§ 81-88 inclusive.

vision of Brannon on *Negotiable Instruments* indicates that there is a definite tendency for the courts to hedge about the doctrine with equitable limitations[15] and to arrive at the same result as if they actually said: "Payment by the drawee bank amounts to a representation implied-in-law to the effect that the drawer's signature is genuine, which, if reasonably and non-negligently relied upon by the bank receiving payment, may estop the plaintiff bank to show that the money was paid under mistake to the extent of the reasonable reliance, but not in case of negligent reliance, nor beyond the extent of detriment actually suffered."

That there is a trend toward reliance as a necessary element of the defendant's right to invoke *Price v. Neal* or Section 62 as a defense to a suit for money had and received, is indicated by the following cases. In *American Surety Company of New York v. Industrial Savings Bank,*[16] where the collecting bank had been paid by the drawee bank on a drawer's forged signature and had given the fraudulent party credit which had not been drawn out, the defendant collecting bank was held ineligible to invoke Section 62 as a defense. There was no reliance upon the representation. Again, in *First State Bank & Trust Company v. First National Bank of Canton,*[17] the court protected the collecting bank to the extent of its reliance before notice. The Illinois court permitted a recovery for so much of the money as had not been withdrawn, and no more.

It is well to remember that these cases are to be decided under the broad equitable principles of quasi-contract law so far as they are not clearly modified by the statutory enactment found in Section 62 of the N. I. L., the general rule of quasi-contracts being that money paid under a mistake of fact may be recovered by the payor from the recipient. It is well to remember also that the so-called rule of *Price v. Neal* is not really an affirmative rule but a statutory exception to the general rule. Therefore, to say that there are exceptions to the rule of *Price v. Neal* amounts to saying that there are exceptions to the exception. By creating exceptions to the exception, we bring ourselves by circuitous and

[15]See Brannon, Negotiable Instruments Law (6th ed., Beutel, 1938) 769 for collection of cases decided under N. I. L. Mr. Beutel says: "Only two cases, however, have been found, namely, National Bank of Commerce v. Mechanics American Nat. Bank, 87 Neb. 841, 128 N. W. 552, and State Bank v. Cumberland Savings, etc., Co., 168 N. C. 605, 85 S. E. 5, L. R. A. 1915D, 1138, not citing the N. I. L. which seem to hold that the drawee can not recover, even though the holder was negligent."

[16]242 Mich. 581, 219 N. W. 689 (1928).

[17]314 Ill. 269, 145 N. E. 382 (1924).

awkward thinking back into the original affirmative rule. It would seem simpler to think of *Price v. Neal* as merely a statutory exception to the broad rule that money paid under mistake may be recovered and to regard the so-called equitable exceptions to the so-called *Price v. Neal* doctrine as mere qualifications of the statutory exception. The question then becomes understandable and free from confusion. Shall we say that the statutory exception to the general rule found in Section 62 is limited to cases in which the defendant collecting bank has reasonably and non-negligently relied upon the implied-in-law representation found in Section 62; or, should the exception be broadened to amount to an absolute guaranty of the drawer's signature irrespective of freedom from negligence or reliance? Virginia in deciding the *Central Bank* case has limited the *Price v. Neal* exception to cases which show a meritoriousness on the part of the receiving bank justifying what amounts to an estoppel. Thus far, the writer approves the case. Whether the court has made a proper application of the rule is more questionable. The present writer leaves the case with the feeling that a man on a log would have thought that the Merchants Bank never would have been subjected to any responsibility for determining the authenticity of Moore's signature if Central had not gotten them mixed up with the "crooks." If that is a straddle, the only answer is that a system of law which never divides losses between equally innocent parties is likely in such a case to make straddlers or "rationalizers" of us all.

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