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# LEGAL ASPECTS OF POSTAL MONEY ORDERS

John D. O'Malley†

*The postal money order, sales of which in recent years have averaged 243 million annually, looms as an unwelcome, nonnegotiable fellow traveler of checks and other negotiable instruments moving through banking channels. The author reviews the cases involving the distribution of losses, most of which the Government eschews, that arise from fraudulently issued, stolen, or raised money orders. He concludes that postal money orders should be subject to commercial law since there is no longer any reasonable legal basis for treating their issuance as a protected sovereign function.*

For more than a century,<sup>1</sup> the Post Office Department has issued postal money orders for the purpose of providing a "cheap, immediate and safe agency for the transfer through the mails of small sums of money."<sup>2</sup> The continuing popularity of the system<sup>3</sup> is evident from the fact that in 1965 more than 4½ billion dollars were transferred by postal money orders.<sup>4</sup> In view of the significant number of money orders in use today,<sup>5</sup> it is surprising that the legal and banking communities have given only scant consideration to the legal nature of the instrument itself and to a determination of who will bear the loss resulting from fraudulent issue, forgery, or alteration.<sup>6</sup> While a new encounter with a potential loss from a bad money order can be expected to invite out of the dusty book shelves all of the decisions treating loss distribution,<sup>7</sup> a look at the existing

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<sup>1</sup> The postal money order system was established by Act of Congress, May 17, 1864. 13 Stat. 76. It went into operation on November 1, 1864. Post. Gen. Ann. Rep. 241 n.14 (1965).

<sup>2</sup> Post. Gen. Ann. Rep. 24 (1864).

<sup>3</sup> The use of postal money orders is, of course, dwarfed by the tremendous volume of checks. It is estimated that in 1962, 14.5 billion checks, with a dollar value of 4.7 trillion, were drawn on banks in the United States. H.R. Rep. No. 1147, 88th Cong., 2d Sess. 11 (1964). In the same year, 251,842,000 postal money orders, with a value of \$4.8 billion, were issued. Post. Gen. Ann. Rep. 198, 241 (1965).

<sup>4</sup> Id. at 241.

<sup>5</sup> The dollar amount of money orders issued has expanded from \$1,360,122 in 1865 to \$4,821,033,136 in 1965. Peak volume was reached in 1953 when \$6,644,675,226 worth of money orders were sold. Post. Gen. Ann. Rep. 241 (1965).

<sup>6</sup> The few cases in this area are considered infra. One explanation for the relative scarcity of reported decisions is that postal money orders are issued in amounts not to exceed \$100 and it is not economically feasible to bring, or defend, an action for such small amounts. When, however, a large number of money orders are handled by one person or organization, the deterrent no longer exists. Of the cases discussed in this article, only five reveal the number and value of money orders involved. The number varies from 12 to 699 with loss ranging from \$1,200 to about \$63,000.

<sup>7</sup> Legal research is usually prompted by a form-letter demand for reimbursement from the Post Office Department. A typical letter is as follows:

Gentlemen:

Enclosed is a photostat of money order, serial number listed below, stolen in blank in the burglary of a post office. As the result of the cashing of this stolen form through your bank, the Government has suffered a financial loss and it is necessary to make demand on you for the amount, \$100.00. Please forward your remittance by means of

state of the law will produce a somewhat confusing, if not alarming, picture.

The statutes establishing the postal money order system were patterned, with some modification,<sup>8</sup> after those adopted in 1848 in England.<sup>9</sup> The actual form in which postal money orders are written has changed several times since their inception, except that all forms have included the name of the purchaser and the amount payable.<sup>10</sup> The earliest forms were drawn by the postmaster at the place of purchase on the post office closest to the place where the purchaser (remitter) intended to send the money order. The payee was not named in the money order itself,<sup>11</sup> but his name was contained in the application form forwarded to the drawee post office.<sup>12</sup> It was contemplated that the application form would arrive at the drawee post office before the holder requested payment, as this was the only method of determining who was entitled to receive the money.<sup>13</sup> In later forms the payee was named, as were the drawer and drawee post offices. The form in use today contains the stamped name of the issuing post office, the issuer's initials, and the name of the payee; but the drawee is omitted. Presumably, the unnamed drawee is now the Post Office Department instead of any local post office.

#### NEGOTIABILITY OF POSTAL MONEY ORDERS

A review of the meager authority on postal money orders will produce but one definite conclusion—a negative one. A postal money order is not a negotiable instrument.<sup>14</sup> The obligations undertaken by the Govern-

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check payable to the Disbursing Officer, Post Office Department, in the enclosed envelope which requires no postage. Enclose a copy of this letter so that the remittance can be identified. The photostat may be retained by you.

The burglary of the post office and the cashing of this stolen form are being investigated by the Postal Inspection Service.

Sincerely yours,  
(signed)  
Director

Communication to a Lincoln, Nebraska bank from the Director, Money Order Division, Post Office Department, dated August 5, 1965, on file in the Loyola Law Library. See also note 71 *infra*.

<sup>8</sup> See note 21 *infra*.

<sup>9</sup> Post Office Act, 1848, 11 & 12 Vict. c. 88. A General Post Office was established in England in 1660, 12 Car. II c. 35, and the issuance of postal money orders was authorized in 1840. 3 & 4 Vict. c. 96, § 38.

<sup>10</sup> The maximum amount for which the first postal money orders could be issued was \$30. Today, it is \$100. 39 U.S.C. § 5102(b) (1964).

<sup>11</sup> That form was discontinued in 1894. Ch. 21, § 9, 28 Stat. 33.

<sup>12</sup> 14 Ops. Att'y Gen. 119, 121 (1872).

<sup>13</sup> Rogers, *The Postal Power of Congress* 31 (1916).

<sup>14</sup> *Bolognesi v. United States*, 189 Fed. 335 (2d Cir.), cert. denied, 223 U.S. 726 (1911); *Jaselli v. Riggs Nat'l Bank*, 36 App. D.C. 159 (D.C. Cir. 1911); *United States v. Stockgrowers' Nat'l Bank*, 30 Fed. 912 (C.C.D. Colo. 1887); *United States v. Arnhold & S. Bleichroeder, Inc.*, 96 F. Supp. 240 (S.D.N.Y. 1951); *United States v. Northwestern Nat'l Bank & Trust Co.*, 35 F. Supp. 484 (D. Minn. 1940); *Lewin v. United States*, 170 F. Supp. 646 (Ct. Cl. 1959).

ment in the issuance of postal money orders and their negotiability are severely restricted by statute.<sup>15</sup> In commenting upon the absence of freedom of circulation and of an unconditional promise to pay, the court in *Bolognesi v. United States*<sup>16</sup> pointed out that: (1) The cashing of a money order cannot, under ordinary circumstances, be made in advance of the receipt of the corresponding advice. (2) More than one indorsement of a money order invalidates it. (3) After an order has once been paid by whomsoever presented, the Department will not be further liable. (4) Payment of orders will be withheld under a variety of circumstances.<sup>17</sup> And Judge Brewer of the Circuit Court for Colorado, later Associate Justice of the Supreme Court of the United States, stated in *United States v. Stockgrowers' Nat'l Bank*<sup>18</sup> that:

It is undoubtedly true, as settled by the case of *Cooke v. U.S.*, 91 U.S. 389, that when the government descends from its position as sovereign and deals in negotiable paper, it subjects itself to the ordinary rules controlling negotiable paper the same as any individual. But these post-office orders are not negotiable paper; they are orders drawn by one postmaster upon another, payable to a particular person not named in the order itself, unknown save as to the particular parties to the transaction—the two postmasters and the party who obtains them—so that the protection which the rules applicable to negotiable paper would lay around many transactions do not avail the defendant in this case.<sup>19</sup>

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<sup>15</sup> The relevant provisions of 39 U.S.C. (1964) are:

§ 5101: To promote public convenience, and insure greater security in remitting funds through the mail, the Postmaster General may maintain a money order system.

§ 5102(b): The Postmaster General may not permit a money order to be issued under this chapter for more than \$100.

§ 5103(a): The Postmaster General shall provide for the payment of money orders to the payee, indorsee, or remitter at offices at which money orders are issued.

(b): When a money order has been lost the Postmaster General, upon evidence satisfactory to him, may pay the face value thereof or issue a duplicate money order, without charge, to the person he determines is entitled thereto.

(c): The records of the Department shall serve as the basis for adjudicating claims for the payment of money orders.

(d): The Postmaster General may not pay a money order after twenty years from the last day of the month of original issue. Claims for unpaid money orders are forever barred unless received by the Department within that period.

§ 5104: The payee of a money order, by his written indorsement thereon, may direct it to be paid to any other person who shall be entitled to payment upon furnishing such proof as the Postmaster General requires that the indorsement is genuine, and that he is the person named therein. More than one indorsement renders an order invalid. The holder of such an order, if otherwise entitled thereto, may obtain payment under such application and proof of the genuineness of the indorsements as the Postmaster General requires.

§ 2408: The Postmaster General shall request the Attorney General to bring a suit to recover with interest any payment made from moneys of, or credit granted by, the Department or postal saving system as a result of (1) mistake; (2) fraudulent representations; (3) collusion; or (4) misconduct of an officer or employee of the Department.

<sup>16</sup> 189 Fed. 335 (2d Cir.), cert. denied, 223 U.S. 726 (1911).

<sup>17</sup> Id. at 337, referring to Postal Laws and Regulations §§ 1002, 1007, 1009.

<sup>18</sup> 30 Fed. 912 (C.C.D. Colo. 1887).

<sup>19</sup> Id. at 914.

However, the unity of opinion concerning the nonnegotiable character of a postal money order<sup>20</sup> has not produced results exhibiting perfect logical consistency. For example, although he will not permit the purchaser of a postal money order to stop payment<sup>21</sup> without surrendering

<sup>20</sup> It has also been held in England that postal money orders are not negotiable instruments. *Fine Art Soc'y, Ltd. v. Union Bank*, 17 Q.B.D. 705 (1886). The bank in that case was held to have wrongfully converted the proceeds of postal orders payable to the plaintiff but credited to the personal account of the plaintiff's embezzling employee. Although the decision has been criticized, Pagent, *The Law of Banking* 144-145 (4th ed. 1930), because the court failed to give effect to provisions of the Post Office Act, see note 67 *infra*, which provides that no banker collecting a postal order shall be liable to anyone but the principal for having received payment, the decision appears correct since the bank acted for the wrong principal.

<sup>21</sup> In reply to an inquiry from Postmaster General J. A. Creswell concerning the right of a remitter to stop payment of a postal money order without surrendering it, Attorney General George H. Williams, in 14 Ops. Att'y Gen. 119, 121-22 (1872), wrote:

These provisions, it will be seen, make the money-order, to a certain extent, a negotiable instrument; enable the indorsee, seemingly without the permission of the remitter, to obtain a new order from the Postmaster-General; authorize the Postmaster-General to issue a duplicate in case the money-order has been lost, upon application of the remitter *or payee*; and expressly provide that the postmaster issuing the order shall repay the amount of it upon the application of the remitter *and the return of the order*. Extensive powers are confided by the statute to the Postmaster-General in respect to the form of the order; and the form authorized by him, while omitting the name of the payee, does state the amount for which the order is given.

Although the money and the fee are paid by the remitter of the order, and the contract of the Government is in the first place with him, yet, upon full consideration, I am of opinion that the statute did not intend that the remitter should be able to revoke the order, or to demand back his money against the objection of the payee. He cannot obtain repayment of the money deposited unless he produces the order. The order may be indorsed once, and the indorsee may secure a new order by application to the Postmaster-General. It would seem, therefore, to be the intention of Congress to give these orders in many respects the character of ordinary negotiable instruments, in order that full credit may be given to them, and, consequently, that their use be greatly extended. It was the intention of Congress, as shown by the statute, that the payee or holder of the order shall be able to obtain the money notwithstanding the objection of the remitter, and although the latter may desire to recall it. But if there is any doubt in regard to this, so far as our statutes themselves are concerned, I think that there is another circumstance which renders this view of the question decisive. The money-order system was established in the English post-office department more than thirty years ago, and is principally regulated there now by the statute of 11 and 12 Victoria, chap. 88, passed in 1848, and contained in the 88th volume of the English Statutes at Large, 562, and the systems in the two countries are so similar as to make it very apparent that the English statutes and regulations were considered in draughting the laws establishing our own system. By the English statute above cited, section 111, it is enacted "That it shall be lawful for the postmaster-general at any time hereafter to repay or refund the amount of any money-orders, either heretofore granted or issued to the person or persons to whom the same have been or shall or may be so granted or issued, . . . *whether such money-orders shall remain or be in the possession of such person or persons or not.*"

Under this statute, as you inform me, it has been decided in England by the solicitor of the post-office (and very properly decided) that the remitter can forbid the payment of the order against the protest of his payee; but the omission to insert any similar provision in our own statute, and the insertion of one expressly limiting the power of repayment to cases where the remitter produces the order, seems to me to show conclusively that it was the intention of Congress not to adopt this provision of the English statute, but to increase the credit attaching to the orders by rendering them irrevocable when delivered by the remitter to the payee.

I am of the opinion, therefore, in the cases you mention, that the payee of the money-order is entitled to the money upon demand, and upon complying with the statutes and regulations of the Post-Office Department, notwithstanding the protest of the remitter, and that the remitter of the money-order cannot forbid the payment of it by any notice to the office at which it is made payable before it has been paid.

the item,<sup>22</sup> the Postmaster General can, on his own initiative, stop payment of money orders in the possession of parties who are, in his judgment, conducting a lottery through the mails.<sup>23</sup>

The reverse side of the money order form in current use contains a statement giving notice to the payee and his indorsee that only one indorsement is authorized by law.<sup>24</sup> However, the statute does permit payment to be made to the holder of a money order containing more than one indorsement if the holder can establish the validity of his title.<sup>25</sup> In *Lewin v. United States*,<sup>26</sup> the plaintiff held ninety-five money orders, with a value of \$8,344, which he had purchased as second indorsee while residing in the Philippine Islands. Since all the money orders bore a second indorsement, the Postmaster General refused to make payment unless the holder produced evidence of the validity of the indorsements and of his ownership. Lewin was unable to locate or even identify any of the payees or remitters named in the money orders, and the Court of Claims, in upholding the position of the Postmaster General, stated:

The instruments involved in this case are not "negotiable instruments" and are not therefore governed by the laws applicable to commercial paper. They are specialties called "money orders" and are governed by the postal laws. In order for the plaintiff to receive payment he must comply with the procedure required by those laws. In order to obtain payment on these money orders he must "make proof of the genuineness of the indorsements as the Postmaster General may require." The mere fact that the plaintiff is a holder for value is not sufficient. The issue is whether the plaintiff has complied with the statutory requirements. We hold that he has not met these requirements and that in refusing payment, the Postmaster General acted neither arbitrarily nor capriciously.<sup>27</sup>

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<sup>22</sup> There is no intention to imply that payment of a postal money order could be stopped by the remitter if it were a negotiable instrument. A money order, as a purchased draft drawn by the Government on itself, is analogous to a purchased cashier's check or bank money order payable to someone other than the purchaser. Payment of a cashier's check or bank money order cannot be stopped by the one who procures its issuance. *Walker v. Sellers*, 201 Ala. 189, 77 So. 715 (1918); *Drinkall v. Movius State Bank*, 11 N.D. 10, 15, 88 N.W. 724, 726 (1901) (dictum); *Cross v. Exchange Bank Co.*, 110 Ohio App. 219, 220, 168 N.E.2d 910, 912 (1958); *Scott v. Seaboard Securities Co.*, 143 Wash. 514, 517, 255 Pac. 660, 661 (1927). However, if the contention that a postal money order is not subject to the law merchant is correct, the rationale behind the refusal to permit payment to be stopped would, to a large extent, be inapplicable.

<sup>23</sup> *Enterprise Sav. Ass'n v. Zumstein*, 67 Fed. 1000 (6th Cir. 1895).

<sup>24</sup> See 39 U.S.C. § 5104, quoted at note 15 supra. The statement on the money order recites:

PAYEE MUST ENDORSE BELOW ON LINE MARKED "PAYEE". OWNERSHIP OF THIS ORDER MAY BE TRANSFERRED TO ANOTHER PERSON OR FIRM IF THE PAYEE WILL WRITE THE NAME OF SUCH PERSON OR FIRM ON THE LINE MARKED "PAY TO" BEFORE WRITING HIS OWN NAME ON THE SECOND LINE. MORE THAN ONE ENDORSEMENT IS PROHIBITED BY LAW. BANK STAMPS ARE NOT REGARDED AS ENDORSEMENTS.

Another statement on the reverse side informs all holders that the money order becomes invalid after twenty years and thereafter no claim for payment will be considered. See 39 U.S.C. § 5103(d), quoted at note 15 supra.

<sup>25</sup> See 39 U.S.C. § 5104, quoted at note 15 supra.

<sup>26</sup> 170 F. Supp. 646 (Ct. Cl. 1959).

<sup>27</sup> *Id.* at 648.

The *Lewin* case is considered here merely to illustrate the application of one of the statutory provisions regulating postal money orders<sup>28</sup> and to demonstrate one of the effects of the nonnegotiable nature of such orders. However, it would seem that for the Government to require the stated proof of ownership in the complete absence of any evidence of the holder's bad faith or an adverse claim (such as a request by the purchaser, payee, or first indorsee for replacement of a lost or forged money order) is clearly unreasonable in light of current commercial practices in comparable situations. Rather than completely denying payment in such cases,<sup>29</sup> the Postmaster General could honor the holder's claim upon the submission of an affidavit of title and a corporate surety's bond indemnifying the Government and any other party for any loss which might be sustained as a result of an improper payment. If that procedure were followed, there would be no undue burden of proof placed upon good faith purchasers of money orders containing more than one indorsement, and the parties involved would be afforded sufficient protection from loss.<sup>30</sup>

#### FRAUDULENTLY ISSUED MONEY ORDERS

Probably the most troublesome cases concerning postal money orders are those involving postal employees who issue money orders to innocent persons as part of an embezzlement scheme. Indeed, the first case to consider loss distribution in matters of bad postal money orders involved such a situation. In *United States v. Stockgrowers' Nat'l Bank*,<sup>31</sup> the postmaster at Lewiston, Idaho, issued money orders drawn on the post office at Pueblo, Colorado, without making payment for them. He then sent the orders to the defendant bank with directions to deposit the proceeds to the account of one J. G. Wilson, a fictitious name assumed by the postmaster. Shortly after the bank had received payment from the post office in Pueblo, the postmaster withdrew most of the proceeds.

In refusing to accede to the Government's demand for repayment, the bank grounded its defense on two well-established principles, namely, that (1) a principal is bound by an agent's wrongful acts committed within the scope of the agent's apparent authority, and (2) a final

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<sup>28</sup> See 39 U.S.C. § 5104, quoted at note 15 supra.

<sup>29</sup> The court pointed out that Lewin had several years before the period of limitations would expire in which to establish his right to the money orders. *Lewin v. United States*, supra note 26, at 648. In view of the fact that he could not accomplish this during the six years prior to the court's decision, however, it is questionable whether another fourteen years would be of any help.

<sup>30</sup> If a postal money order were a negotiable instrument, the holder would be deemed *prima facie* a holder in due course and would not have to prove the genuineness of indorsements unless the question were properly put in issue. See Britton, Bills and Notes 249 (2d ed. 1961).

<sup>31</sup> 30 Fed. 912 (C.C.D. Colo. 1887).

payment is irrevocable. The court rejected the first contention, stating that as a general principle of agency it does not apply to the Government, and that as a principle of the law merchant it does not apply to postal money orders, since they are not negotiable instruments.<sup>32</sup> The court dismissed any consideration of the harshness of its position with the comment that the "general weal of the public requires that the individual and not the government should bear the burden of the conduct of the government's agent."<sup>33</sup> However, as its basis for holding the bank liable, the court considered that payment of the money orders by the post office at Pueblo was only provisional, since a final determination of the validity of the money orders and their issuance rested with the Post Office Department in Washington.<sup>34</sup> The conclusion does not seem supportable, however, in view of the fact that the money orders were actually drawn on the post office at Pueblo, instead of the Post Office Department, and that the former office had authority to pay them.<sup>35</sup> But the more unusual aspect of the decision is that by holding final payment not to have taken place, the court gave tacit approval to the bank's contention that the concept of finality of payment, as established by the law merchant,<sup>36</sup> is applicable to postal money orders. Conceivably, then, if payment had been held to be final, the Government would not have been able to shift its loss to the collecting bank.<sup>37</sup>

The possibility of an early application of the law merchant to postal money orders was effectively precluded, however, by the next case to treat fraudulently issued money orders, *Bolognesi v. United States*.<sup>38</sup> In that case, one Marone, who was a banker as well as the clerk in charge of a postal substation, issued to the appellants as payees 128 money orders with a total value of \$12,800. These money orders, which had been given in payment of sums due the appellants for foreign currency surrendered to Marone, as banker, for conversion into United States currency, were presented to and paid by the Brooklyn Post Office. In ruling for the Government, whose case was presented by the then assistant United States

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<sup>32</sup> See quotation in text accompanying note 19 supra.

<sup>33</sup> *United States v. Stockgrowers' Nat'l Bank*, supra note 31, at 914.

<sup>34</sup> To buttress its position, the court relied on *Cooke v. United States*, 91 U.S. 389 (1875), which allowed recovery of money paid on forged treasury notes by a sub-treasurer in New York City, since the Act authorizing issuance of the notes specifically provided that payment was to be made by the Treasury Department itself. However, in the case of postal money orders, the statute does not provide for payment other than at post offices. See 39 U.S.C. § 5103(a), quoted at note 15 supra.

<sup>35</sup> The current form of money order does not name a drawee. In practice, it is payable at any post office or Federal Reserve Bank.

<sup>36</sup> See note 58 infra.

<sup>37</sup> If this conclusion is correct, the court would be in the contradictory position of applying the law merchant to payment but not to the liability of a principal for the acts of an agent.

<sup>38</sup> 189 F. 335 (2d Cir.), cert. denied, 223 U.S. 726 (1911).

Attorney Felix Frankfurter, and in refusing to apply the rules of the law merchant by which the principal would be bound by the agent's actions in issuing commercial paper, the court stated:

In the establishment and operation of the money order system the government exercises a governmental power for the public benefit. It serves the public by furnishing a safe and cheap method for transmitting small sums of money. It carries on the system not for gain, but to supply a public need. It does not engage in business, but stands in its position of sovereignty. Consequently the principles which govern commercial transactions between individuals have little application in this case. . . .

It follows as a corollary to the conclusion that the government in issuing money orders exercises a governmental function and does not engage in a commercial transaction that money orders are not negotiable instruments subject to the defenses permitted by the law merchant to bona fide holders for value. They stand in marked contrast to notes or similar obligations which the government might issue to obtain money for its own use and upon which it might incur all the responsibilities of a private person.<sup>39</sup>

It is not easy to assess the correctness of the legal judgments in the *Stockgrowers'* and *Bolognesi* cases, especially in view of the harsh consequences visited upon innocent parties in the wake of some imponderables of public policy. Standing together, the cases provide formidable authority for the proposition that in the issuance of postal money orders the Government acts in its sovereign capacity, and the principles of the law merchant, whether concerned with the apparent authority of an agent or finality of payment, are not applicable. A subsequent discussion will consider the validity of this proposition in view of current practices.<sup>40</sup>

Another issue in cases involving postal money orders fraudulently issued by postal agents is whether the negligence of the Government in failing to discover the wrongdoing will operate as a bar to recovery. The issue was not raised in the cases already considered, except inferentially in *United States v. Bolognesi*.<sup>41</sup> In offering a defense of good faith,<sup>42</sup> *Bolognesi* alleged that the Post Office Department, through an inspector, had conducted an investigation of Marone's business dealings, including the issuance of a large number of money orders to *Bolognesi*, and had assured the latter that the transactions were in every respect right and proper. He also alleged that some time after the investigation he asked a postal auditor if Marone's practice in issuing money orders in payment of his own banking obligations was permissible, and he received a reply that there was no reason why Marone could not do it. Although the court, in

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<sup>39</sup> *Id.* at 336-37.

<sup>40</sup> See text accompanying notes 74-89 *infra*.

<sup>41</sup> The *Bolognesi* case is reported three times: twice on rulings on demurrer, *United States v. Bolognesi*, 164 Fed. 159 (C.C.S.D.N.Y. 1908), and 169 Fed. 1013 (C.C.S.D.N.Y. 1909); and finally on writ of error, *Bolognesi v. United States*, 189 Fed. 335 (2d Cir.), cert. denied, 223 U.S. 726 (1911).

<sup>42</sup> *United States v. Bolognesi*, 169 Fed. 1013, 1014 (C.C.S.D.N.Y. 1909).

sustaining the demurrer, ruled that such evidence of good faith would present no defense to the Government's action, there is no indication that it was asserted that the same evidence would demonstrate negligence on the part of the Government.

The issue of negligence was properly raised in *United States v. Citizens & Southern Nat'l Bank*,<sup>43</sup> which involved a suit by the Government to recover about \$13,000 paid on 130 postal money orders issued for insufficient consideration by a post office clerk. The misappropriations took place over a period of eight months during which the money orders were sent to the defendant bank, to which they were made payable, for deposit to the clerk's account. On the application forms retained at the issuing post office, the clerk showed various parties as the purchasers and indicated that the orders were for sums ranging from one to six dollars, with an aggregate principal amount of only \$281.38. Not only did numerous other discrepancies and circumstances exist which should have alerted the postmaster to the defalcations,<sup>44</sup> but after the fraud was discovered a delayed notice was given to the bank. In a trial without jury, the court concluded that the Government was guilty "of such flagrant and continuing negligence"<sup>45</sup> in the supervision of its employee and in the discovery and giving notice of the fraud as to constitute a bar to recovery. It was without any apparent twinge of remorse that the court distinguished prior cases<sup>46</sup> and blandly ignored those which hold that the Government is not chargeable with the knowledge or negligence of its employees in the performance of governmental functions,<sup>47</sup> even in cases involving negotiable instruments.<sup>48</sup>

In departing from the traditional view of governmental immunity, the

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<sup>43</sup> 144 F. Supp. 601 (S.D. Ga. 1956).

<sup>44</sup> See note 51 infra.

<sup>45</sup> *United States v. Citizens & Southern Nat'l Bank*, 144 F. Supp. 601, 606 (S.D. Ga. 1956).

<sup>46</sup> *Ibid.* The Bolognesi and Stockgrowers' Bank cases, and *United States v. Northwestern Nat'l Bank & Trust Co.*, 35 F. Supp. 484 (D. Minn. 1940), were distinguished on two grounds: (1) absence of evidence of gross negligence on the part of the Government, and (2) failure to raise the issue that any defense which could be urged against a private party may be offered against the Government when it is plaintiff.

<sup>47</sup> *National Metropolitan Bank v. United States*, 323 U.S. 454 (1945) (Government allowed to recover on checks paid over forged indorsements despite fact that fraud by government clerk covered more than two years during which he obtained 144 checks payable to various Marine Corps officers by submitting spurious pay and travel vouchers); *Washington Loan & Trust Co. v. United States*, 134 F.2d 59 (D.C. Cir. 1943) (Government's negligence in failing to supervise and keep proper records not a bar to recovery on checks paid with forged indorsements even though employee padded payroll with names of employees of imaginary C.C.C. camp and thereby obtained 1,072 checks over a four-year period); *United States v. National Bank of Commerce*, 205 Fed. 433 (9th Cir. 1913), judgment aff'd on new opinion, 224 Fed. 679 (9th Cir. 1915), cert. denied, 241 U.S. 658 (1916) (Government employee's knowledge that checks were payable to fictitious payees not imputed to Government). See Note, "Forged Government Checks: Misallocation of Loss by the Federal Common Law," 66 Yale L.J. 1107 (1957).

<sup>48</sup> See generally Wachtell, "Sovereign Immunity and Its Application to Commercial Paper," 6 Brooklyn L. Rev. 1 (1936).

court fastened its decision to those cases which have enunciated the principle that any defense which can be asserted against an ordinary party can be urged against the Government as plaintiff,<sup>49</sup> since pleading a defense, such as negligence, is not the same as seeking to recover damages from the Government in a suit based upon the negligence of its employees. In adopting this view, the court reasoned that:

If the plaintiff were allowed to recover, it would mean that a party whose agents and employees were negligent could recover from a defendant who was not even charged with fault. It is perfectly clear that if the plaintiff were an ordinary citizen, the plaintiff could not recover. Likewise the sovereign as plaintiff should not recover in this case. This is not a case of the sovereign being harassed by an action being brought by one of its subjects, but is a case of the sovereign coming into Court and asking for justice.<sup>50</sup>

While *United States v. Citizens & Southern Nat'l Bank* is susceptible to attack from the standpoint of precedent, the result is so clearly demanded by the facts that it is doubtful that many legal voices of dissent will be heard to challenge the decision. However, since the court cut such a wide swath in enumerating the acts which collectively, rather than individually, constituted sufficient negligence to preclude recovery,<sup>51</sup> there will be difficulty in applying the decision to cases with similar fact situations.

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<sup>49</sup> *United States v. Citizens & Southern Nat'l Bank*, supra note 45, at 605-06. The court cited *United States v. Norwegian Barque Thekla*, 266 U.S. 328 (1924); *Jones v. Watts*, 142 F.2d 575 (5th Cir. 1944); *United States v. Kiriaze*, 172 F.2d 1000 (5th Cir. 1949); *United States v. Moscow Seed Co.*, 14 F. Supp. 135 (D. Idaho 1936); *Howard v. Cook*, 59 Idaho 391, 83 P.2d 208 (1938). For a detailed discussion on the suability of the United States, see generally "Development in the Law—Remedies Against the United States and Its Officials," 70 Harv. L. Rev. 827 (1957).

<sup>50</sup> *United States v. Citizens & Southern Nat'l Bank*, supra note 45, at 605. To support its conclusion, the court quoted the statement of Mr. Justice Holmes in *United States v. Norwegian Barque Thekla*, supra note 49, at 339-40:

When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it.

*United States v. Citizens & Southern Nat'l Bank*, supra at 606.

<sup>51</sup> *Id.* at 605. The court stated:

I find the plaintiff's employees and agents were negligent in the following particulars:

(a) The Postmaster at Jesup trusted Martin and failed to make even a cursory examination of the money order accounts, although post office regulations require that a Postmaster closely supervise the money order business.

(b) The discrepancy between the stubs as filled out and as cut was noticeable to casual inspection and not only should have been caught by Miss Murphy, the money order clerk, but also by the Postmaster and Inspector Crawford when the latter made a check of the Jesup, Georgia, post office, including the money order account, about September 24, 1950.

(c) The Postmaster at Jesup failed to exercise adequate supervision over Martin whom he permitted to write money orders without increasing his bond over the pre-existing \$1,000 bond and whom he permitted to handle money orders when no one else was present without carefully checking him.

(d) The Postmaster at Jesup was negligent in failing to check the money order account when he should have been suspicious of Martin whom he had known for years

## STOLEN BLANK MONEY ORDERS

As could be expected, the theft of blank money orders from post offices, and their subsequent completion and transfer to innocent parties, is not an unusual occurrence.<sup>52</sup> Such a series of events was involved in *United States v. Northwestern Nat'l Bank & Trust Co.*<sup>53</sup> In that case, the post office at Mississippi City, Mississippi was burglarized and the thief stole both blank money orders and the rubber stamps used to validate them. Twelve of the money orders were completed in usual form by the thief for \$100 each, drawn on the post office at Minneapolis, Minnesota, payable to a fictitious payee. Though the defendant bank cashed the money orders, it did so only after one of its clerks telephoned a branch post office and received assurance from an unidentified postal clerk that the described money orders were genuine. The postal clerk had overlooked the fact that they were listed as stolen in a postal bulletin on file at the branch. When the bank presented the money orders to the main Minneapolis post office for payment, the postal employees again failed to detect them as stolen, and they were therefore honored. Despite the genuine but unauthorized form of execution and the failure of the postal employees to identify the money orders as stolen, judgment was rendered for the Government.

In holding the bank liable for the Government's loss, the district court based its decision upon the equitable right to recover money paid through mistake of fact<sup>54</sup> rather than on the statutory grounds relied upon in the

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as a boy with very limited means and who, in a short period of time after he started handling money orders, appeared in new clothes, acquired an interest in a restaurant in Jesup and bought three or four new automobiles, including an Oldsmobile 98.

(e) It caused defendant, through its delay of 19 months in properly notifying defendant from the date when the first money order was fraudulently issued payable to defendant and through a delay of 7 months from the date when plaintiff itself discovered the fraud, to lose the value of all moneys standing to the credit of Martin in his checking account with defendant, and to lose the value of his equity in the other assets he had, including a home, a car, plus his interest in the restaurant. The plaintiff was again negligent in its agents and employees permitting these particular money orders to be cashed at the post office in Savannah, Georgia, when the same were presented for payment.

<sup>52</sup> During fiscal year 1965, there were 1,551 burglaries of post offices. Of the blank money orders stolen, the total number of which is not reported, those with a potential value of \$2,391,900 were recovered before they could be cashed. Post. Gen. Ann. Rep. 146, 140 (1965). See note 7 supra.

<sup>53</sup> 35 F. Supp. 484 (D. Minn. 1940). See note 73 infra.

<sup>54</sup> In summarizing the doctrine, the court stated:

Equity recognizes the right to recover money paid through mistake, and the negligence of the payor does not affect the right of such recovery. In other words, if a benefit is bestowed through mistake, no matter how careless or inexcusable the act of the bestower may have been, the recipient of the benefit in equity must make restoration, the theory being that restitution results in no loss to the recipient. He merely received something for nothing.

*United States v. Northwestern Nat'l Bank & Trust Co.*, 35 F. Supp. 484, 486 (D. Minn. 1940).

*Stockgrowers'* and *Bolognesi* cases.<sup>55</sup> Although the court recognized that by holding the bank responsible in such a case it might "impair the mobility of these instruments in business transactions,"<sup>56</sup> since banks could not rely upon the "integrity of money orders, although accepted and cashed by the Government,"<sup>57</sup> it nevertheless rejected the bank's argument that the concept of finality of payment, as embodied in the law merchant and developed through the various ramifications of the doctrine of *Price v. Neal*,<sup>58</sup> was applicable also to postal money orders.<sup>59</sup> The

<sup>55</sup> See 39 U.S.C. § 2408, quoted at note 15 supra. While the similar, predecessor statute was relied upon as a basis for recovery in the prior cases, in *Bolognesi* the court stated that it was not negating the possibility that in the absence of the statute the Government might recover in a common-law action of *indebitatus assumpsit*. *Bolognesi v. United States*, 189 Fed. 335, 338 n.3 (1911).

Despite the language used, the statute does not confer upon the Government an absolute right of recovery. It states merely the *basis for a claim*, not from whom and under what circumstances there is a *basis for recovery*. But to argue further the meaning of the statute or attempt to ascertain its dominant thrust would provide nothing more than another example of legal minds paddling about in a sea of semantics, unable to keep an eye fixed on the raft of central issues.

<sup>56</sup> *United States v. Northwestern Nat'l Bank & Trust Co.*, supra note 54, at 490.

<sup>57</sup> *Ibid.*

<sup>58</sup> 3 Burr. 1354, 97 Eng. Rep. 871 (K.B. 1762).

The legal obligation to repay money received through mistake of fact is abandoned in cases where the drawee honors by payment or acceptance a draft bearing a forgery of the drawer's signature. The existence of the exception is usually attributed to the celebrated decision of Lord Mansfield in *Price v. Neal*, although the origin of the rule of law merchant is traced to *Jenys v. Fowler*, 2 Strange 946, 93 Eng. Rep. 959 (K.B. 1715). The *Jenys* case, which the plaintiff's attorney in *Price v. Neal* attempted to argue away, involved the enforcement of payment of an accepted bill of exchange containing a forgery of the drawer's signature; *Price v. Neal* involved an unsuccessful attempt to recover payments made on two forged bills of exchange, one of which had been accepted prior to payment.

The doctrine of *Price v. Neal*, that payment by a drawee (or drawer) or a forged instrument is final in favor of a good faith purchaser, has been followed with remarkable consistency not only in this country but also in England and Scotland and reflects, as well, the law in continental Europe. Ames, "The Doctrine of *Price v. Neal*," 4 Harv. L. Rev. 297, 298 (1891). The earliest decisions in the United States following the doctrine appear to be *United States Bank v. Bank of Georgia*, 23 U.S. (10 Wheat.) 333 (1825); *Gloucester Bank v. Salem Bank*, 17 Mass. 32 (1820); *Levy v. Bank of United States*, 1 Binn. 27 (Pa. 1802).

Lord Mansfield's reported opinion in *Price v. Neal* contains so many conflicting rationales, as if he were casting about for pegs stout enough to support his decision, that it has provided material for as many theories as there are commentators to offer them. In general, the various theories searching for an explanation of the doctrine can be reduced essentially to the propositions that a drawee cannot recover payment made on a check or other instrument bearing a forged signature because of (1) his negligence in failing to detect the forgery, (2) estoppel to deny what he has admitted by paying the item, that is, the drawer's signature, which he is conclusively presumed to know, (3) the public policy in favor of finality in commercial transactions, and (4) the lack of a superior equity. While the theory that public policy favors finality in commercial transactions is generally accepted today, *Dedham Nat'l Bank v. Everett Nat'l Bank*, 177 Mass. 392, 59 N.E. 62 (1901), there is absolutely no express support for the theory in *Price v. Neal*. The words frequently seized upon to support it, though, are those of the reporter at 3 Burr. 1356, 97 Eng. Rep. 872: "Lord Mansfield stopt him from going on; saying that this was one of those cases that could never be made plainer by argument." But these remarks prefaced those about the equitable nature of the remedy sought and they have no independent significance. When *Price v. Neal* is read in total, there can be little doubt that what Lord Mansfield relied upon in refusing to permit the drawee to recover his mistaken payment was his lack of a superior equity to that of the recipient of the money. As the foremost advocate of that theory, Professor Ames stated:

The true principle, it is submitted, upon which cases like *Price v. Neal* are to be supported, is that far-reaching principle of natural justice, that as between two persons

court concluded that "the equitable doctrine of permitting a recovery where there has been an unjust enrichment . . . should have greater weight . . . than the doctrine enunciated in *Price v. Neal*."<sup>60</sup>

### DOCTRINE OF MISTAKE

The court in the *Northwestern Nat'l Bank* case not only devoted as little time to considering the commercial aspects of postal money orders as Alexander gave to the Gordian Knot, but it also incorrectly applied the doctrine of mistake. Although the equitable rule that a mistaken payment can be recovered, even though negligence surrounds the mistake,<sup>61</sup> is not

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having equal equities, one of whom must suffer, the legal title shall prevail. The holder of the bill of exchange paid away his money when he bought it; the drawee parted with his money when he took up the bill. Each paid in the belief that the bill was genuine. In point of natural justice they are equally meritorious. But the holder has the legal title to the money. A court of equity (and the action of assumpsit for money had and received is, in substance, a bill in equity) cannot properly interfere to compel the holder to surrender his legal advantage.

Ames, *supra* at 299.

The doctrine of *Price v. Neal* has been incorporated into the Uniform Commercial Code by providing, in Section 3-418, 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." The doctrine has not, in general, been extended to payment or acceptance of an instrument containing a forged indorsement or an alteration, except where drawer and drawee of an altered instrument are the same person. U.C.C. § 3-417.

In the decisional development under common law and the Uniform Negotiable Instruments Law, the drawee has been held entitled to recover its payment of a forged draft when the party who received payment did not give value for the instrument, e.g., *First State Bank & Trust Co. v. First Nat'l Bank*, 314 Ill. 269, 145 N.E. 382 (1924), or knew of the forgery at the time of the transaction, e.g., *Great American Ins. Co. v. Holiday Motors*, 264 N.C. 444, 142 S.E.2d 13 (1965), or should have known of the forgery. E.g., *Mechanics Nat'l Bank v. Worcester County Trust Co.*, 341 Mass. 465, 170 N.E.2d 476 (1960). In such cases, it is clear that the party who receives payment is not a holder in due course. But even though the recipient may qualify as a holder in due course, many courts have danced their way around *Price v. Neal* by maintaining that the recipient not only must be in good faith but also must be free from negligence in order to prevent recovery by the drawee. E.g., *First Nat'l Bank v. United States Nat'l Bank*, 100 Ore. 264, 197 Pac. 547 (1921). Although the freedom-from-negligence concept mustered substantial support from text writers, Brannan, *Negotiable Instruments Law* § 62, at 915 (7th ed. Beutel 1948), as well as the courts, the draftsmen of the Uniform Commercial Code rejected the view except where the negligence is of such a degree as to constitute bad faith. U.C.C. § 3-418, comment 4. Thus, under the Code, the question would appear to be one of good faith or bad faith, as the terms are used in determining status as a holder in due course, measured, however, at the time the instrument is presented for acceptance or payment and not at the time it is acquired. U.C.C. § 3-417, comment 4.

<sup>59</sup> The court argued that inasmuch as the consensus of opinion now is that the only satisfactory explanation for the doctrine of *Price v. Neal* is one of public policy in promoting the use of negotiable instruments by making the time of payment the time of final and conclusive settlement, there is no reason why that policy should override the policy evident in the immunities associated with the performance of governmental functions. The court stated:

If, therefore, we accept the view that the doctrine of *Price v. Neal* is primarily one of public policy and in furtherance of the mobility of negotiable instruments in the field of the law merchant, no cogent reason is suggested why it should be extended to instruments issued by the Government in connection with the performance of a public duty.

*United States v. Northwestern Nat'l Bank & Trust Co.*, *supra* note 54, at 489.

<sup>60</sup> *Id.* at 490.

<sup>61</sup> See Woodward, *Quasi Contracts* § 3 (1913). Woodward states:

No matter how close at hand the means of knowledge may be, no matter how stupid or careless the failure to ascertain the truth may be, if one confers a benefit under

open to serious question, it is not absolute. The rule is inapplicable in any situation where an obvious injustice would be effected. Ordinarily restitution results in no loss to the recipient of a payment made through mistake, because the party was entitled to nothing in the first place. But where the recipient has changed his position in reliance upon the payor's mistake, justice does not dictate that the benefit be returned, since it would result in a loss to the recipient.<sup>62</sup> In the case at hand,<sup>63</sup> it is true that in point of time the bank cashed the money orders before it received payment from the post office and there was, therefore, no change in position in reliance upon the payment itself. But the cashing was in reliance upon an assurance from a postal clerk that the money orders were valid.<sup>64</sup> Thus, there was a change in position based upon the Government's mistake in characterizing the instruments as genuine, and the existing equities would not require a return of the money received by the bank. Although restitution is an equitable device used to achieve justice, somewhere along an intangible line the concrete case becomes an abstraction and an absolute or rigid rule emerges from what originally was a malleable rule of equity. However, rules of equity were never intended to develop myopic limitations simply because of age. The change in position which will terminate the right to recover a mistaken payment does not necessarily have to follow payment; in a proper case, it could precede it.

#### BANKS AS AGENTS FOR COLLECTION

The position occupied by a bank in the handling of postal money orders normally is that of an agent acting for a principal, rather than that of a purchaser of the instrument, and this appears to be the case whether the postal order is deposited by a customer for credit to his account or is cashed over the counter.<sup>65</sup> A bank could, however, be the

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an honest mistake, *i.e.* in unconscious ignorance of the truth, the retention of the benefit is ordinarily inequitable. By the weight of authority restitution may be enforced. *Id.* § 15, at 16.

<sup>62</sup> *Id.* § 25.

<sup>63</sup> Of the reported cases concerning postal money orders, only *United States v. Northwestern Nat'l Bank & Trust Co.*, 35 F. Supp. 484 (D. Minn. 1940), evoked any comment. In support of the decision, see *Notes*, 25 Minn. L. Rev. 516 (1941), 14 So. Cal. L. Rev. 471 (1941). *Contra*, *Notes*, 9 Duke B. Ass'n J. 137 (1941), 40 Mich. L. Rev. 108 (1941).

<sup>64</sup> See text accompanying note 53 *supra*.

<sup>65</sup> The liability of banks in handling postal money orders may, of course, take many more directions than are considered in this paper. The case of *Jaselli v. Riggs Nat'l Bank*, 36 App. D.C. 159 (D.C. Cir. 1911), will serve to illustrate the point. In that case, the bank was sued by a depositor for slander of credit in dishonoring checks for which *Jaselli* maintained he had sufficient funds on deposit. The insufficiency of funds was brought about by a repayment to the Government and a debit to the account of the sum of four postal money orders (deposited and the proceeds collected from the post office about eighteen months before) after the bank was notified about forged indorsements by a postal inspector, an affidavit of forgery presented, and the orders returned through clearings. The bank had failed after two attempts to notify its depositor of the claim before dishonoring the checks. The court held that whether forgery had taken place was a question

purchaser or true owner of the instrument when, for example, it is taken in payment of a loan or for services or goods. In the application of principles of agency, once an agent has performed his obligation in good faith, he is not liable to the third party with whom he deals on behalf of a principal.<sup>66</sup> Thus, if a bank, as agent, receives a payment by mistake and in good faith pays the money to its principal or customer, the bank incurs no liability to the third party.<sup>67</sup> This point was ably developed, by way of dictum, by Judge Brewer in the *Stockgrowers' Nat'l Bank* case,<sup>68</sup> but for seventy-five years it did not receive the attention it deserved. Then it was resurrected in a case involving raised money orders.

### RAISED MONEY ORDERS

In *United States v. Cambridge Trust Co.*,<sup>69</sup> the latest reported case to treat postal money orders, one Ralph Porter paid for various electrical supplies and appliances purchased from the E.M.F. Electric Supply Company with postal money orders which he had raised approximately ninety dollars each.<sup>70</sup> The money orders, payable to himself, were specially indorsed to the Supply Company which, in turn, restrictively indorsed 699 of them for deposit to its account at the Cambridge Trust Company. The face amount of each order was paid by the Federal Reserve Bank of Boston. When the Cambridge Trust Company received notice from the Government that the orders were raised,<sup>71</sup> the bank had already paid the

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of fact as was due diligence in giving notice. If, of course, due diligence could be shown, the bank would not be liable for slander, but it is apparent that a bank cannot simply debit a customer's account because of the Government's claim without laying itself open to suit by its customer.

<sup>66</sup> Restatement (Second), Agency § 339 (1958); Restatement, Restitution § 24 (1937).

<sup>67</sup> The same result, at least with respect to domestic postal orders, is achieved by the statute in England. Post Office Act, 1908, 8 Edw. 7, c. 48, § 25 provides:

Any banker . . . who, in collecting in that capacity for any principal, shall have received payment . . . of any postal order, or of any document purporting to be a postal order, shall not incur liability to anyone except that principal by reason of having received the payment or allowance, or having held or presented the order or document for payment; but this section shall not relieve any principal for whom any such order or document has been so held or presented of any liability . . . .

<sup>68</sup> *United States v. Stockgrowers' Nat'l Bank*, 30 Fed. 912, 914 (C.C.D. Colo. 1887). The agency concept was rejected by the court in that case only because the bank, as far as the Government knew, acted as principal in obtaining payment of the money orders. It will be recalled that the money order form then in use did not contain the payee's name; it was in the application form forwarded to the drawee post office. However, since in the overwhelming majority of transactions a bank acts only as agent, there seems no reason why a presumption of agency could not be created.

<sup>69</sup> 300 F.2d 76 (1st Cir. 1962).

<sup>70</sup> Porter purchased \$1.00 money orders in large blocks and spoiled 200 before learning how to alter them successfully using sulfuric acid neutralized by hypochloride to remove the dollar limitation and dry pastel pigment to restore the color. Between October 1956 and January 1958, he raised 1,062 money orders, which were collected by four banks, including the Cambridge Trust Company. Although he was arrested and indicted in 1958, the Government did not see fit to bring Porter to trial until three years later when he was arrested for passing a fresh batch of about 100 altered money orders. During April, 1961, Porter pleaded guilty to altering 1,087 money orders and received a four-year sentence.

<sup>71</sup> First notice to the Cambridge Trust Company was contained in the following letter,

entire proceeds to the Supply Company. In affirming the district court's entry of summary judgment against the Government, the court of appeals relied solely upon the application of rules of agency.<sup>72</sup> In summarizing the court's views, Judge Woodbury stated:

In this situation there is no need to consider whether postal money orders are to be treated as negotiable instruments or nonnegotiable instruments when in fact being negotiable but once, they fit precisely into neither category. The Bank is entitled to the benefit of the old and well-established principle, applicable alike in cases involving negotiable instruments and in those which do not, that a known agent who receives money paid to him by mistake is protected from liability if innocently and in good faith he has paid the money over to his principal before receipt of notice of the payor's mistake.<sup>73</sup>

### POSTAL MONEY ORDERS AND THE LAW MERCHANT

The more recent cases involving postal money orders<sup>74</sup> have been decided correctly but upon issues which have permitted the courts to skirt conveniently around the deeper issue, that is, whether the sale of postal money orders today is a commercial transaction subject to the rules

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copy on file in the Loyola Law Library, from the Post Office Department, Office of Inspector, dated January 14, 1958:

Gentlemen:

Enclosed are photostats of three postal money orders issued at the Cambridge A Branch of the Boston Post Office which were altered by Ralph W. Porter who is being prosecuted for this offense. The money orders are described below:

<i>NUMBER OF MONEY ORDER</i>	<i>DATE OF ISSUE</i>	<i>ISSUED FOR</i>	<i>RAISED TO</i>	<i>LOSS TO THE GOVERNMENT</i>
1-22,912,674	10-16-56	\$1.00	\$97.00	\$ 96.00
1-22,912,675	10-16-56	1.00	97.00	96.00
1-22,911,690	10-8-56	1.00	91.00	90.00
Total Government Loss				\$282.00

These three money orders were deposited in your bank by the E.M.F. Electric Supply Company, and your bank guaranteed prior endorsements.

It will be appreciated if you will forward to me a check for \$282.00, payable to the Post Office Department, so that this Government loss may be adjusted.

You may use for the purpose the enclosed official envelope which requires no postage.

Sincerely yours,  
(signed)  
Postal Inspector

<sup>72</sup> In considering the matter of the disclosure of the agency relationship, and in meeting the Government's contention that the Stockgrowers' Bank case (see note 68 supra) was determinative of the question, the court reasoned that since postal money orders can, according to law, be transferred only once (by the payee, Porter, to E.M.F. Electric Supply Co.) the Government knew that it was making payment not to the owner but to the owner's agent for collection. *United States v. Cambridge Trust Co.*, 300 F.2d 76, 78 (1st Cir. 1962).

<sup>73</sup> *Ibid.* Applying agency principles relied upon in the Cambridge Trust case, banks have been relieved from liability in cases involving stolen blank money orders. See *United States v. Bank of Hollywood*, Civil No. 65-324, S.D. Fla., Aug. 27, 1965; *United States v. Wilton Manors Nat'l Bank*, Civil No. 65-497, S.D. Fla., Sept. 30, 1965.

<sup>74</sup> *United States v. Cambridge Trust Co.*, supra note 72; *United States v. Citizens & Southern Nat'l Bank*, 144 F. Supp. 601 (S.D. Ga. 1956); *United States v. Arnhold & S. Bleichroeder, Inc.*, 96 F. Supp. 240 (S.D.N.Y. 1951).

of the law merchant<sup>75</sup>—especially finality of payment—or whether it is still a function of sovereignty. But the right question will eventually have to be raised, and the issue joined where it ought to be, namely, whether or not the public policy evident in the earlier cases<sup>76</sup> makes sense today. However much validity there once may have been to the contention that the Government is exercising a sovereign function in selling money orders, that contention is now open to serious doubt. If the sale of postal money orders is in direct competition with those sold by private enterprise, or if the Government has for its own benefit injected them into the normal stream of commerce, then it would seem only logical to conclude that their issuance is no more an action of sovereign capacity than is the issuance of checks, bonds, or notes.<sup>77</sup>

When the postal money order system was inaugurated in 1864,<sup>78</sup> it may have been a unique service to provide those persons who did not have checking accounts with a substitute for money. Since that time, however, most banks and several nonbanking establishments have also entered the money order market, and the service has come to assume all the aspects of a commercial venture. A representative comparison of the fees charged for money orders will reveal that the Government charges not only as much as its competitors, but usually more.

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<sup>75</sup> There are only a few indications that the direction of the cases is toward subjecting money orders to the law merchant. In a conflict of laws problem, the commercial law of a foreign country was, in effect, held applicable to postal money orders.

*United States v. Arnhold & S. Bleichroeder, Inc.*, supra note 74, involved suit to recover payment made on 42 money orders which contained forgeries of the payees' indorsements. The money orders had been lost by or stolen from members of the armed forces overseas and they were cashed by a Swiss bank. The defendant had acted as the Swiss bank's agent for collection. In granting a motion for letters rogatory, the court held that a defense that under Swiss law good title passes to a good faith purchaser, for substantial value in the ordinary course of business, of instruments with forged indorsements was not so insufficient as a matter of law as to cause the court to strike the defense on its own initiative. If it is the nature of a money order itself, as determined by the statutes under which it is issued, that precludes a money order from being subject to domestic commercial law, there is no compelling reason why a court should have to apply foreign commercial law.

For a review of foreign commercial law relating to negotiable instruments, see Murray, "Forged Bills of Exchange and Checks: A Comparison of the Anglo-American, European and Latin American Law," 82 *Banking L.J.* (pts. 1-2) 565, 659 (1965).

<sup>76</sup> *United States v. Stockgrowers' Nat'l Bank*, 30 Fed. 912 (C.C.D. Colo. 1887); *Bolognesi v. United States*, 189 Fed. 335 (2d Cir.), cert. denied, 223 U.S. 726 (1911); *United States v. Northwestern Nat'l Bank & Trust Co.*, 35 F. Supp. 484 (D. Minn. 1940).

<sup>77</sup> It has long been held that in the issuance of checks and similar instruments, the Government subjects itself to the ordinary rules regarding commercial paper. E.g., *Cooke v. United States*, 91 U.S. 389 (1875); *United States v. Chase Nat'l Bank*, 252 U.S. 485 (1920); *United States v. National Exchange Bank*, 270 U.S. 527 (1926). But in determining what constitutes a forged indorsement, the fictitious payee rule has not been adopted in federal common law on the ground that a defaulting employee's knowledge is not imputed to the Government. *United States v. National Bank of Commerce*, 205 Fed. 433 (9th Cir. 1913), judgment aff'd on new opinion, 224 F. 679 (9th Cir. 1915), cert. denied, 241 U.S. 658 (1916).

<sup>78</sup> See note 1 supra.

*Amount of Fees Charged*

Amount of Money Order	U.S. Postal Money Order <sup>79</sup>	American Express Money Order <sup>80</sup>	Bank Money Order <sup>81</sup>	Bank Money Order <sup>82</sup>
\$ 0.01 to \$10	\$0.25	\$0.20-.30	\$0.15	\$0.10
\$10.01 to \$50	.35	.35	.15	.10
\$50.01 to \$100	.45	.45	.15	.10

Thus, it is no longer true that the postal money order system is carried on "not for gain, but to supply a public need."<sup>83</sup> It is in direct competition with bank money orders, private money orders, and numerous "purchased check" devices such as cashier's checks, registered checks, and travelers checks, all of which are subject to the laws governing commercial transactions.

Even though at one time all postal money orders were payable only at post office branches, they have long been collected through banking channels, as is evident from the cases already considered. And to promote such a collection procedure, which obviously inures solely to the benefit of the Government, bank stamps are not treated as indorsements.<sup>84</sup> But not only has the Government encouraged the introduction of postal money orders into the private commercial world, it has practically insured it since 1951 by providing during that year that Federal Reserve Banks may pay money orders.<sup>85</sup> The result of that provision is that now very few money orders are cashed by post offices. During the five-year period from 1961 through 1965, the average annual sales of postal money orders amounted to 243,533,600 with a value of \$4,771,907,270.<sup>86</sup> During the same period, an average of 241,607,800, or 99% of the money orders issued with a value of \$4,671,212,000, or 97.9%, were handled not by post offices but by commercial banks and were paid by Federal Reserve Banks.<sup>87</sup> Thus, substantially all postal money orders have been deliberately injected into the usual stream of commerce by the Government for its own benefit, and it is clearly untenable, if not an atomic attack upon common sense, to deny the relevance to postal money orders of the

<sup>79</sup> Rates effective March 26, 1966. Post. Bull. No. 20519 (1966).

<sup>80</sup> The actual rates in effect on September 1, 1966 were: \$0.01 to \$5 — \$0.20; \$5 to \$9.99 — \$0.30; \$10 to \$49.99 — \$0.35; \$50 to \$100 — \$0.40.

<sup>81</sup> LaSalle Nat'l Bank, Chicago. Rate in effect on September 1, 1966 was \$0.15 per money order up to \$250.

<sup>82</sup> Harris Trust & Savings Bank, Chicago. Rate in effect on September 1, 1966 was \$0.10 per money order up to \$499.99.

<sup>83</sup> *Bolognesi v. United States*, 189 Fed. 335, 336 (2d Cir.), cert. denied, 223 U.S. 726 (1911). See quotation in text accompanying note 39 supra.

<sup>84</sup> See note 24 supra.

<sup>85</sup> Post. Gen. Ann. Rep. 11-12 (1951). As fiscal agents of the United States, Federal Reserve Banks on July 1, 1951 began processing punch card postal money orders. During the last six months of 1951, they handled 175 million money orders. Fed. Res. Bank Ann. Rep. 46 (1951).

<sup>86</sup> Computed from figures contained in Table 801, Post. Gen. Ann. Rep. 241 (1965).

<sup>87</sup> Computed from figures contained in Table 10, Fed. Res. Bank Ann. Rep. 268 (1965).

commercial law which governs the rights of all other parties dealing with negotiable and nonnegotiable paper.<sup>88</sup>

To hold that postal money orders are subject to commercial law may, like all categorizations, have the attraction of simplicity, but it is not without the usual complications. In cases involving fraudulently issued money orders, the Government could not refuse payment or shift its loss to others, since the acts of its authorized but defaulting agent would be imputed to it. But where a forged indorsement is involved, any payment could be recovered, and a bank or other collecting agent would not be relieved of liability. Of greater importance in terms of loss frequency, however, would be the consequences of final payment of a counterfeit, stolen and completed, or altered money order. In such cases, the Government could not recover from a good faith holder for value or from one who had in good faith changed his position in reliance upon payment. But when would final payment take place? If, by agreement, the Federal Reserve Banks have the right to make a payment which is not conditional, then when a cash payment is made or a provisional credit becomes irreversible, payment would be final. On the other hand, if actual payment can be made only by the Post Office Department in Washington, through the Audit Division to which all money orders are now sent, then its cash payment, final settlement, or retention of a money order beyond a reasonable period of time without notice of dishonor would constitute final payment.<sup>89</sup>

#### CONCLUSION

In the early cases involving the fraudulent issuance of postal money orders and the theft of blank ones, the courts, in relieving the Government of any loss, made a drastic and intellectually unwarranted leap from a perfectly proper legal concern for the public policy interest in governmental functions to a blatant disregard for justice and reason. If the courts in the future decide that legal improvement is to be obtained only through the loyal preservation of the past, then to maintain the direction of the older cases they will have to hammer out new theories. Clearly the old ones no longer have any persuasive force. Since postal money orders are sold in direct competition with private enterprise and are

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<sup>88</sup> Although a postal money order is not a negotiable instrument, it has none of the aspects of a simple contract and must be treated as a mercantile specialty. The law merchant is applicable to such nonnegotiable instruments. *United States v. Bank of New York*, 219 Fed. 648, 653 (2d Cir. 1914) (dictum); Norton, *Bills and Notes* 8-14 (4th ed. 1914). See generally Aigler, "Recognition of New Types of Negotiable Instruments," 24 *Colum. L. Rev.* 563 (1924); Goodrich, "Nonnegotiable Bills and Notes," 5 *Iowa L. Bull.* 65 (1920).

<sup>89</sup> The recitation in this paragraph is intended merely to generalize about probable loss distribution. Any definitive examination is beyond the scope of this article.

injected into the normal stream of commerce, their sale cannot be treated as a function of government, but rather must be viewed as a commercial transaction at the same level as the Government's issuance of checks, bonds, or notes. They are, therefore, subject to the law merchant as expressed in the federal common law or the Uniform Commercial Code.<sup>90</sup> Such a conclusion should not provide any anxious moments for those sensitive spirits among us who are in perpetual agony about the rising costs of government. Any additional losses to the Government should be used as a factor in determining the fees charged for money orders (although high enough now to produce a substantial profit in any efficient organization),<sup>91</sup> thereby achieving a relatively wide distribution of loss by spreading it thinly among all postal order purchasers.

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<sup>90</sup> Although the Uniform Commercial Code does not apply to instruments subject to federal common law, there are indications that its provisions will be applied to the extent possible on the theory that the Code is the best expression of the current commercial law. See *United States v. Wegematic Corp.*, 360 F.2d 674 (2d Cir. 1966); *Padbloc Co. v. United States*, 161 Ct. Cl. 369 (1963); *Reeves Soundcraft Corp.*, CCH 1964 Bd. Contract. App. ¶ 4317.

<sup>91</sup> In fiscal year 1965, the fees paid for postal money orders amounted to \$56,748,000. *Post. Gen. Ann. Rep.* 198 (1965).