

1960

The Moffat County State Bank v. R. J. Pinder : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

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THE MOFFAT COUNTY STATE
BANK, a Colorado corporation,

Plaintiff and Respondent,

—vs.—

R. J. PINDER,

Defendant and Appellant.

Utah Supreme Court, Utah

Case No.

9166

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS	3
ARGUMENT	3
POINT I. THE LAW OF THE STATE OF COLORADO MUST BE APPLIED IN DE- TERMINING THE LEGAL STATUS OF PLAINTIFF	3
POINT II. PLAINTIFF IS A HOLDER IN DUE COURSE AND, THEREFORE, FAILURE OF CONSIDERATION IS NOT A DEFENSE TO THE ACTION	13
(A) UNDER THE LAW OF UTAH	13
(B) UNDER THE LAW OF COLORADO	14
POINT III. PROTEST OF THE CHECK WAS NOT REQUIRED, AND THEREFORE THE DEFENDANT DRAWER IS NOT DIS- CHARGED	20
POINT IV. INTEREST SHOULD BE COM- PUTED FROM THE DATE OF DISHONOR.....	24
CONCLUSION	25

AUTHORITIES CITED

CASES

Bromfield v. Cochran, et al, 283 Pac. 45, 86 Colo. 486.....	14-18
Cox, et al v. Metropolitan State Bank, Inc. et al, 336 P2d 742 (1959)	18
Pintel v. K.N.H. Mohamed & Bros., et al, 107 Cal App 2d 328, 237 P2d 315 (1951)	11
United States v. Guaranty Trust Co., 293 U.S. 340, 79 L. ed 415, 55 S. Ct 221, 95 ALR 651	11
United States v. Lemons, (DC Mo) 67 F. Supp 985 (1946).....	11
Western Creamery Co. v. Malia, et al, 89 Utah 422, 57 P(2d) 743	13

STATUTES AND RULES

	Page
Colorado Revised Statutes, 1953, 73-1-2	24
Negotiable Instruments Law :	
§§57, 59	14
§114	22
§152	21, 22
§159	22
Utah Code Annotated, 1953 :	
15-1-1	24
44-1-116	22
44-2-27	21, 22
44-2-34	22
Utah Rules of Civil Procedure, Rule 7(b)(1)	5

TEXTS

95 ALR :	
Page 658	8
Page 667	6
ALR 2d Supplement Service, 1960 Issue	20
59 ALR 2d 1173	19
11 American Jurisprudence, Conflict of Laws :	
§144	7
§§148, 150, 151	6, 9
§149	21
12 American Jurisprudence, Contracts §428	19
Britton on Bills and Notes (1943 Ed) :	
§221	22
§225	5, 21
Goodrich on Conflict of Laws (3d Ed) 498	12
19 LRA(NS) 665	8
61 LRA 193, 212	8, 9
Restatement of Conflict of Laws, §§336, 349	6, 12

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BRIEF OF RESPONDENT

STATEMENT OF FACTS

Throughout this brief, R indicates pages of the record. Some italicized emphasis has been added throughout by respondent.

Respondent agrees with the major portion of the statement of the facts as set forth in appellant's brief. However, respondent controverts appellant's statement made at page 10 of his brief, that the check in question was executed and delivered in Utah. (See also pages 18 and 21 of appellant's brief.) This statement is not true. the check was executed and delivered in Colorado (R. 15 and Supplemental Record).

Respondent also feels that the circumstances surrounding appellant's stop-payment order should be made clear. Appellant appears to take the position that such order did not become effective until after the check was dishonored and returned to respondent. See page 19 of appellant's brief.

The facts are that on October 17, 1956, the check passed through the Clearing House and the Federal Reserve Bank of San Francisco at Salt Lake City, in transit to the drawee bank at Midvale (R. 8). On October 20th, the check was processed by an officer of the drawee bank, who, knowing of the appellant's stop-payment order, designated it to be returned marked "refer to maker," because payment had been stopped (R. 6, 8). Said bank would have paid the check on that day if payment had not been stopped (R. 6).

As a conflict of laws matter probably must first be resolved in deciding this case, respondent will discuss appellant's Point II before discussing his Point I.

STATEMENT OF POINTS

POINT I

THE LAW OF THE STATE OF COLORADO MUST BE APPLIED IN DETERMINING THE LEGAL STATUS OF PLAINTIFF.

POINT II

PLAINTIFF IS A HOLDER IN DUE COURSE AND, THEREFORE, FAILURE OF CONSIDERATION IS NOT A DEFENSE TO THE ACTION.

(A) UNDER THE LAW OF UTAH.

(B) UNDER THE LAW OF COLORADO.

POINT III.

PROTEST OF THE CHECK WAS NOT REQUIRED, AND THEREFORE THE DEFENDANT DRAWER IS NOT DISCHARGED.

POINT IV.

INTEREST SHOULD BE COMPUTED FROM THE DATE OF DISHONOR.

ARGUMENT

POINT I

THE LAW OF THE STATE OF COLORADO MUST BE APPLIED IN DETERMINING THE LEGAL STATUS OF PLAINTIFF.

The entire argument of appellant in support of his Point II is founded upon a false premise, to-wit, that the instant check was drawn in Utah. It was not drawn in

Utah, but was executed and delivered in the State of Colorado (R. 15 and Supplemental Record).

It is interesting to note that appellant, at page 20 of his brief, seeks to place respondent on the horns of a dilemma by assuming that respondent desires to take inconsistent positions in regard to this matter of fact. Respondent has never contended that this check was an inland bill, but has at all times agreed with appellant's statement to the lower court that it is a foreign bill. Rather, it is appellant, not respondent, who is in serious difficulty by attempting to disregard the facts as he, himself, stated them to be. He now seeks to deny one of the two grounds expressly stated by him as a basis for his motion for summary judgment—seeks to deny it, that is, until he arrives at his Point III, where it does not seem like such a bad idea after all.

Let's have the record speak for itself, so that we may set the fact at rest and proceed to discuss resultant legal conclusions. Appellant's motion for summary judgment of dismissal (R. 15) reads:

“COMES NOW the defendant, R. J. Pinder, and moves the Court for its Judgment of no cause of action and as grounds for said Motion shows the Court as follows:

“1. That the instrument sued upon is a negotiable instrument *which was executed and delivered in the State of Wyoming* and that the plaintiff has not protested the instrument as is required on a *foreign* bill of exchange.

“2. [That plaintiff is not a holder in due course.]

“ . . . ”

At the hearing of the respective motions for summary judgment, appellant's counsel stated to the court that by mistake the words “State of Wyoming” appear in paragraph 1 of his motion instead of “State of Colorado,” and that he intended it to read “State of Colorado.” Details in connection with this are set forth in the Statement of Proceedings, which was duly settled and approved by the lower court (Supplemental Record).

A statement of the grounds for a motion is not mere surplusage but is required by URCP Rule 7(b)(1). When the statement of the factual grounds for appellant's motion was acquiesced in by respondent, which it then was and at all times has been, it became an admission of a fact material to a decision in the cause. But now appellant, for the first time, attempts to completely reverse his position. He now says that the check was executed and delivered in Utah, and is an inland bill. In his motion for summary judgment, appellant acknowledged the check to be a “foreign bill of exchange” and grounded his motion upon that fact (R. 15).

The check is foreign in fact (executed and delivered outside Utah) although it appears on its face to be an inland bill (purports to be both drawn and payable in Utah). See Britton on Bills and Notes (1943) §225.

There is a difference in the conflicts rule concerning liability of a maker of a promissory note or an acceptor

of a bill of exchange (who are primarily liable) from the rule concerning liability of an indorser or a drawer of a bill of exchange (who are secondarily liable). Only the second situation is present in the instant case.

There is also a different rule applicable to (a) matters concerning the nature and effect of a mercantile instrument than to (b) matters concerning the indorsement and transfer thereof. Compare Restatement of Conflict of Laws §336 with §349, and compare 11 Am. Jur., Conflict of Laws §§ 150, 151 with §148. Matters in group (a) are not now being challenged before this court; matters in group (b) are.

Four possible conflicts rules may be considered in determining the status of a holder of a bill of exchange as against the drawer, i.e., the law of one of four different places could conceivably apply:

- (1) Where drawn.
- (2) Where transferred to the holder.
- (3) Where payable.
- (4) Where sued upon.

As might be imagined, the authorities are not entirely in agreement as to which jurisdiction should control. Nevertheless, (4), the forum, has been almost universally rejected. 95 ALR 667.

As to (3), the place payable, liability of the drawer of a bill (a secondary party) has generally been held not to be governed by the law of the place where it is to be paid. 11 Am. Jur. 446, Conflict of Laws §151. It should

be observed at this point that nearly every case cited in appellant's brief, for the proposition that the place where payable governs, is a case involving either the maker of a promissory note or the acceptor of a bill of exchange, both of whom are primarily liable. A careful reading of appellant's other authorities will show either that they relate to parties primarily liable or that they declare the place where a bill was drawn to govern.

This leaves the question whether the controlling law, as between the holder of a bill and the drawer, should be that of (1) the place where the bill was drawn, or (2) the place where it was transferred to the holder. The authorities differ here. It is generally held that the place where drawn controls, but there is highly respected authority, most of it recent, that the place of transfer governs in determining the status of the holder as against the drawer. We shall present some group (1) authorities first.

At 11 Am. Jur. 437, Conflict of Laws §144, it is stated:

“ . . . The question as to what law governs any particular relation of contract under negotiable paper is best determined, as a general rule, by first inquiring whether the liability is a primary or a secondary one—that is, whether the person is absolutely required to pay the bill or note according to its terms, or whether he is only secondarily or conditionally liable. The law of the place where the note or bill is payable ordinarily governs in matters incident to the primary obligation, such as the manner or mode of making presentment and the details connected therewith, whereas

where the liability is conditional and dependent upon the necessity for presentment or demand and protest, these must be made in accordance with the law of the place where the contract of the drawer or indorser is made."

An annotation at 95 ALR 658, published in 1935, discusses "Conflict of laws as regards title to commercial paper and right of holder to enforce it as against the drawer or primary obligor." The annotation is appended to *United States v. Guaranty Trust Co.*, discussed below as an authority for group (2), place of transfer. It is the latest annotation in ALR or ALR 2d on this subject. The note supplements prior ones in 19 LRA (NS) 665 and 61 LRA 193, which express the view that the place where the bill was drawn controls. At 19 LRA (NS) 665, 672 it is stated:

"Liability of and defenses available to drawer or indorser.

"The later cases recognize and apply the general principle stated and formulated at page 212 of the earlier note [61 LRA 193], to the effect that the contract of the drawer or indorser (the secondary obligors) is not only a separate contract which has a situs of its own independent of that of the maker or acceptor (the primary obligor) but also that his obligation is to pay, in the event of the default of the primary obligor, *not at the place of payment expressly or impliedly named in the bill or note, but at the place where in a legal sense, his contract was made.*

At 61 LRA 193, 212 the annotator states:

"[Discussion of argument, sometimes made, that law of place of payment should govern.] But

it is held by the great weight of authority not only that the contract of the drawer and indorser is a separate and independent contract, but also that such contract is to pay, in the event of the default of the primary obligor, not at the place of payment expressly or impliedly in the bill or note, but at the place where, in a legal sense, the contract of the drawer or indorser was made."

More recent authority supports group (2), that the place of transfer to the holder controls. At 11 Am. Jur. 441, Conflict of Laws §148, it is stated:

"Law Governing Indorsements and Transfers; Rights of Holders — The transfer of a negotiable instrument is a new and independent contract. According to the general rule, this transfer is governed by the law of the place where it is made. . . . The English decisions leave the general question of what law governs the transfer of commercial paper in a somewhat unsettled state. The recent tendency, however, in cases where the instruments are transferred by indorsement, is to hold that the validity of the transfer must be governed by the law of the country in which the transfer takes place.

"This same rule applies where the transfer is by indorsement; that is, it is governed by the law of the place where the indorsement is made, and not by the law of the place where the bill or note is payable or where suit thereon is brought or the law of the place of residence of the indorser.
. . .

"The title of a holder of a negotiable instrument which depends upon a transfer by indorsement or otherwise is likewise governed by the law of the place where the indorsement or transfer is made.

“The question also arises as to the law governing the title and the right to recover of an indorsee under a foreign indorsement of a bill or note, as against the maker, the drawer, or the acceptor. In this respect, a distinction has been drawn in England between what are designated as ‘inland bills’ (negotiable paper made and to be paid in the same country) and ‘foreign bills’ (negotiable paper made in one country and to be paid or accepted in another). In the case of inland bills, the view is taken that the validity of the indorsement and its sufficiency to convey title to the holder so that he may recover against the primary obligor or the drawer are to be determined not by the law of the place where the indorsement is made, if it is made at a place other than that where the instrument was executed or is to be paid, but by the law governing the primary obligor’s or drawer’s contract. On the other hand, in the case of foreign bills—bills drawn in one country upon a drawee in another—the opposite view is taken, to the effect that the law of the place of indorsement governs the title of the indorsee and his right to recover from the primary obligor or the drawer.

. . .

“[Footnote 9:] Annotation: 95 ALR 662, 663. The distinction pointed out between an inland bill and a foreign bill seems to proceed upon sound legal principles. The drawer or acceptor of an inland bill contemplates the negotiation of the bill only in the country of its origination, and therefore, even if, contrary to such contemplation, the bill is indorsed in a foreign country, he undertakes to pay to the holder only in the event his title is good according to the law of the country where his (drawer’s or acceptor’s) liability originated, irrespective of what may be the status of the title under the law of the country where the indorse-

ment is made. Not so with the drawer or acceptor of a foreign bill. He contemplates that the bill will be negotiated in foreign countries and his undertaking may, in this view, be said to be to pay to anyone who acquires a good title, wherever the bill is negotiated, irrespective of what the status of the title might be under a like indorsement if made in the country where his (the drawer's or acceptor's) liability originates. Annotation: 95 A.L.R. 665."

In 1934 the Supreme Court of the United States ruled upon the question in *United States v. Guaranty Trust Co.*, 293 U.S. 340, 79 L. Ed. 415, 55 S. Ct. 221, 95 ALR 651. In this case a check was drawn and delivered in the District of Columbia upon a bank in the District of Columbia. It was subsequently indorsed and transferred to defendant in Yugoslavia. The Supreme Court held that the law of the country to which a check payable to one there resident was mailed by the drawer governs the determination of the question whether good title thereto can be acquired by a transferee in due course where its purported indorsement by the payee was there forged. If the holder's title is good there, it is good elsewhere, even in a country where it would not have been good if the forging had there taken place.

The rule of this case, that the law of the place of indorsement governs, has been followed in *United States v. Lemons*, (DC Mo) 67 F. Supp 985 (1946), and in *Pintel v. K.N.H. Mohamed & Bros., et al.*, 107 Cal. App. 2d 328, 237 P2d 315 (1951).

The Restatement of Conflict of Laws makes no distinction between inland and foreign bills, or between primary and secondary liability, but refers to the law of the place of transfer to determine whether or not a holder takes good title:

“§349. TRANSFER OF NEGOTIABLE INSTRUMENT.

“The validity and effect of a transfer of a negotiable instrument are determined by the law of the place where the instrument is at the time of its transfer.

“Comment:

“ . . .

“e. While any defense which grows out of the original making or discounting of a negotiable instrument is governed by the law of the place of contracting, a defense which grows out of the circumstances of the transfer is determined by the law of the place of transfer.

“Illustration:

“1. A negotiable bill of exchange, drawn in State X, is delivered over to a bona fide holder with a forged indorsement in State Y. By the law of X, a forged indorsement does not transfer the instrument; by the law of Y a bona fide holder gets title. The holder takes a good title to the bill.”

Goodrich on Conflict of Laws (Third Edition) supports this view, at page 498:

“That the law of the place of transfer governs is supported by authority, though there has been surprisingly little litigation of the question.”

Where the place the bill was drawn and the place of transfer is the same, the question as to which of the

two controls need not be decided, of course. Under the facts in the instant case, as respondent feels them clearly to be established, the check was both drawn by appellant and subsequently transferred to respondent in Colorado.

By the consensus of nearly all opinion dealing with the conflict of laws rule applicable to the right of a holder of a bill of exchange to enforce it against the drawer, the place where it was drawn or the place where it was transferred to the holder controls. The place of transfer is preferred by most recent authorities. But either doctrine invokes the law of Colorado in this case.

POINT II

PLAINTIFF IS A HOLDER IN DUE COURSE AND, THEREFORE, FAILURE OF CONSIDERATION IS NOT A DEFENSE TO THE ACTION.

(A) UNDER THE LAW OF UTAH.

Appellant relies upon the decision in *Western Creamery Co. v. Malia, et al.*, 89 Utah 422, 57 P (2d) 743. For the reasons stated above, it is respectfully submitted that the law of Utah is not determinative of respondent's status as against appellant. But even if it were, we feel that the Western Creamery case is not in point under our factual situation for the reason that there the depositor did not draw against the check nor receive any payment thereon. In other words, there the bank of deposit did not give any value for it.

(B) UNDER THE LAW OF COLORADO.

No discussion is necessary of the established rule that a holder in due course holds the instrument free from the defense of failure of consideration that may be available to prior parties among themselves. NIL 57. And every holder is deemed prima facie to be a holder in due course. NIL §59.

Is respondent a holder in due course under Colorado law?

In Colorado, a bank becomes the owner of a check deposited with it when it extends credit to the depositor and permits the depositor to withdraw against such credit, although the deposit agreement provides that the bank is merely an agent for collection. The Colorado case, *Bromfield v. Cochran et al.*, 283 Pac. 45, 86 Colo. 486, is controlling in the situation now before this court, and it is felt appropriate to quote from this decision at length here:

“ . . .

“*Moore, J. George A. Stahl*, as receiver of the Broadway National Bank, brought suit in the county court of the city and county of Denver against Cochran & Cochran, co-partners, the Rockwell Investment Company, and the Parker Realty Company, corporations, to recover \$652.41. The complaint charged that the Rockwell Investment Company and the Parker Realty Company, for a valuable consideration, made, executed and delivered a certain check drawn on the International Trust Company, dated December 16, 1925, and payable to Horace B. Cochran and James M. Cochran in the sum of \$1,497.30; that

said check was indorsed unconditionally by the payees, and thereafter deposited in their account at the Broadway National Bank, payees using a deposit slip which contained the following provisions: 'All checks, drafts and other items drawn on or payable at other banks are offered for deposit to, and received by, this bank as a *forwarding agency * * ** and will be credited *provisionally subject to final cash payment, the bank reserving the right to decline payment of checks drawn against such credits,*' that said amount was credited to the account of defendants Cochran & Cochran, who thereupon were permitted to draw and drew against said check, *sums aggregating* \$652.41, and that the bank became thereby the owner thereof. *Thereafter payment upon said check was stopped,* and this suit was instituted to recover the amount thus paid out, \$652.41, together with interest at 8 per cent, from December 16, 1925. Cochran & Cochran failed to appear, and judgment was entered against them in the county court.

"The defendants the Rockwell Investment Company and the Parker Realty Company answered, admitting the execution and delivery of said check, and that payment thereof had been stopped because of alleged fraud perpetrated by the payees upon the makers. By stipulation, the allegations contained in the complaint and answer, for the purposes of the trial, were admitted as if proven. The county court thereupon entered judgment for the defendant, from which plaintiff appealed to the district court. Upon a trial there, under a similar stipulation, judgment was again rendered in favor of the defendants, which the plaintiff now seeks to review, contending that the court erred in failing to render judgment for the plaintiff.

“From the foregoing, it is apparent that the sole question for determination of this court is: *Was the Broadway Bank the owner of said check or merely an agent of the depositors for collection? If title to the check passed to the bank, it should recover, otherwise not.*

“[1, 2] We have held that, where a check is drawn on one bank and unconditionally deposited in another, the latter becomes merely an agent of the depositor, and title does not pass to said bank; and further that, under such circumstances, *if the bank of deposit extends credit and permits the depositor to withdraw the amount of the check, the bank becomes the owner thereof.* See *Union Bank v. Motor Company*, 70 Colo. 132, 197 P. 753; *Manatee Bank v. Fruit Company*, 70 Colo. 342, 201 P. 560; *First National Bank v. Fleming State Bank*, 74 Colo. 309, 221 P. 891 and *Scully v. Denver National Bank*, 76 Colo. 227, 230 P. 610.

“*Defendant corporations contend* that the provisions contained in the deposit slip aforesaid are controlling, and that thereby the bank became merely an agent of the depositor, and that the subsequent extension of credit to the depositor and withdrawal of funds did not change the contract of deposit so as to then pass title to the bank. In support thereof, the Fleming case, *supra*, is cited. We are of the opinion that this case is not decisive of defendants’ claims . . .”

“ . . .

“‘In this state the general custom and understanding is that, when a customer deposits in his bank checks drawn on another bank, they are received for collection, and are charged to the customer’s account if dishonored. Some banks, by way of precaution, print upon their deposit slips notice to this effect. The banks generally,

in the absence of special notice, regard such transactions as deposits for collection, and, even when credited to a checking account, the right recognized by the law merchant to charge back to the account a dishonored check is exercised. *Town of Manitou v. First Nat. Bank of Colorado Springs*, 37 Colo. 344, 356, 86 P. 75.'

"[3] Applying these principles to the instant case, we must necessarily hold that *the intention of the parties is controlling*: that, *pursuant to the provisions of the deposit slip, plaintiff bank, at the time of deposit, was merely an agent to collect; that, when it credited the amount of said check to the payees' account, and thereupon paid to them \$652.41 on account thereof, it thereby elected not to exercise the right to decline payment thereof as provided by the terms of said deposit slip; and that the payment so made and the receipt thereof by the depositor evidenced an intention of the parties that a sale of said check be consummated, and the bank thereby became the owner of said check.*

"Our conclusions herein are fortified by all of the Colorado cases hereinabove set forth. Defendant authorized the circulation of their negotiable instrument in the commercial world, and thereby represented that it was their valid and binding obligation to pay the amount thereof to any innocent party who held the same for value and without notice of any claimed infirmity. It would be unjust and inequitable under all the circumstances in this case to hold that the plaintiff bank, an entirely innocent party, should suffer a loss of \$652.41. Certainly, in all fairness, as between plaintiff bank and the defendants, the loss should fall upon the defendants which cause it to exist.

“The judgment of the lower court is therefore reversed, with directions to enter judgment for the plaintiff in the sum of \$652.41, together with interest thereon at the rate of 8 per cent per annum from December 16, 1925, to date.

“Reversed.”

Argument was made by appellant in the court below that the recent Colorado case, *Cox, et al vs. Metropolitan State Bank, Inc. et al*, 336 P2d 742 (1959) overruled *Bromfield vs. Cochran*. This is clearly not so, for the following reasons.

In the *Cox* case four of the five judges of the court each wrote a separate opinion. There were two specially concurring opinions, and two of the judges dissented. The case was decided by two of the five on a theory of law entirely different from that expressed in *Bromfield vs. Cochran*, i.e., that under the facts of the *Cox* case the check deposited was the subject of a trust, and that the depositor had no beneficial interest in it. These two judges did not mention the *Bromfield* case in any way. Further, the specially concurring opinion of Justice Frantz, relied on by appellant below, quotes from and cites the *Bromfield* case without any expression of disapproval.

Justice Frantz' specially concurring opinion is not the opinion of the court. Actually, it only concurs in the result, on a *different* theory. The dissenting opinion of Justice Hall, in which Chief Justice Knauss joined without reservation, is certainly entitled to as much weight. At page 758, Justice Hall says:

“I find not one word in this specially concurring opinion that sanctions one word of the majority opinion, and in my humble opinion it might with equal if not greater propriety be labelled ‘dissenting’ instead of ‘concurring.’”

Appellant also argues that there is no evidence of an intention concurred in by both Arnn (the payee-depositor) and the respondent bank to change respondent's status from agent-to-collect to owner. There is such evidence. See Stipulation paragraphs 5 and 6 (R. 8). If anyone knew that the consideration for the check had failed, Arnn knew it. He was the promissor. He must have known that as a consequence it was likely not to be paid. Nevertheless, he sought respondent's payment of checks, totaling more than \$2,000, drawn by him subsequently against the same account — checks which he must have known would seriously overdraw the account if the Pinder check was not paid. And respondent, in good faith, did pay those checks when they were presented. Contracts may be changed by the parties to them by implication as well as by express agreement. See 12 Am Jur 1006, §428.

This subject is discussed thoroughly in a recent annotation in 59 ALR 2d 1173, entitled “Crediting proceeds of negotiable paper to depositor's account, as constituting bank a holder in due course.” The annotator concludes, at page 1187, that:

“The general rules that a bank is a holder in due course when the proceeds of the deposited item have been withdrawn from the account or otherwise applied have been followed by most of the courts considering the question, notwith-

standing the fact that the instrument may have been received by the bank for collection, or the proceeds credited provisionally to the account of the depositor. [Citing 17 jurisdictions, including Colorado's *Bromfield vs. Cochran*, in support.]”

Attention is particularly called to the following sections of this annotation

“§5. Proceeds partially withdrawn.

“§6. Receipt for collection, or conditionally; indorsement for deposit only.

“§7. What amounts to withdrawal or credit, generally; computation.”

It is significant that the ALR 2d Supplement Service, 1960 Issue, does not cite *Cox vs. Metropolitan State Bank* in any way in connection with this annotation.

Whichever rule might be deemed to best meet the needs of the business and financial community, it is respectfully suggested that the Court's function in our case is not to determine this. Rather, in this conflict of laws situation, this court will determine what the law of Colorado is — not what, perhaps, it should be.

Bromfield vs. Cochran is definite and certain in its holding that under circumstances present in our case a bank is a holder in due course.

POINT III.

PROTEST OF THE CHECK WAS NOT REQUIRED, AND THEREFORE THE DEFENDANT DRAWER IS NOT DISCHARGED.

Appellant contends that failure of respondent to protest the check discharged appellant.

The general conflicts rule governing the necessity of protest as a condition of holding the drawer of a bill is determined by the law of the place where the bill was drawn. 11 Am Jur 443, Conflict of Laws §149. But since there is no showing that the law requiring or dispensing with protest is any different in Colorado than in Utah, Colorado law may be deemed to be the same as Utah's in this connection. In fact, appellant has relied upon the Utah statute in his Point III.

Appellant intimates that respondent cannot decide whether to treat the check as inland or foreign. This is not true. Respondent has not been, and will not be, evasive about this. It is in accord with the proposition that this check is a foreign bill, executed and delivered outside of Utah (R. 15 and Statement of Proceedings). It believes this to be the fact. Respondent acknowledges that it did not protest the instrument and that *if*, under the facts disclosed by the record, protest was required, respondent cannot prevail.

It is true that foreign bills of exchange must ordinarily be protested. UCA, 1953, 44-2-27 (NIL §152). Was the check in question a foreign bill appearing on its face to be such?

It is foreign in fact (it was executed and delivered in Colorado) but it appears on its face to be an inland bill (purports to be both drawn and payable in Utah). See Britton on Bills and Notes (1943) §225.

UCA, 1953, 44-2-27 (NIL §152) states:

“ . . . Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.”

There is another reason why appellant's contention that this check was required to be protested is insupportable. UCA, 1953, 44-2-34 (NIL §159) provides:

*“When protest dispensed with—*Protest is dispensed with by any circumstances which would dispense with notice of dishonor. . . .”

UCA, 1953, 44-1-116 (NIL §114) provides:

“When notice need not be given to drawer — Notice of dishonor is not required to be given to the drawer in any of the following cases:

“(5) Where the drawer has countermanded payment.”

See Stipulation paragraph 7 (R. 8).

Britton on Bills and Notes (1943) §221, states the reason for the foregoing rules as follows, at page 928:

“Notice of dishonor to the drawer is not required where, in the language of Section 114(5), he ‘has countermanded payment,’ for the reason that the drawer’s own act causes the dishonor of the instrument. A drawer of a check who stops payment thereon is therefore not entitled to notice of dishonor, nor is he entitled to presentment of such check, for it is held, under Section 79 that the stop order makes the situation one where the drawer ‘has no right to expect or require that the drawee or acceptor will pay the instrument.’ ”

Appellant contends, at page 19 of his brief, that a duty to protest existed, notwithstanding the foregoing, because respondent did not know of the stop-payment order until later. Appellant entirely overlooks a basic reason for the rules dispensing with notice of dishonor and protest, i.e., to inform the drawer that his secondary liability has ripened, so that he may promptly take appropriate action. The purpose for the rule, requiring protest, is for the holder to do something that is usually useful to the drawer — not to require the holder to do a useless, meaningless act.

The check was marked “refer to maker” but was returned unpaid *because payment had been stopped*. Stipulation paragraph 7 (R. 8) states:

“... defendant notified the Midvale Branch of the Sandy City Bank to refuse payment and said Bank for *such* reason did refuse payment *when* the check was *presented*.”

Exhibit A annexed to Defendant’s Demand for Admission (R. 6) reads:

“... This check was subsequently processed by an officer of the Bank, who, *knowing* of the Stop-Payment Order, designated the check to be returned marked ‘Refer to Maker.’

“...
“I further certify that *on October 20, 1956, if payment had not been stopped on the check described, this bank would have paid that check, even though it would have resulted in an overdraft of \$531.54.*”

Accordingly, it is evident that protest of this check was not required and that appellant is not discharged from liability for it.

POINT IV.

INTEREST SHOULD BE COMPUTED FROM THE DATE OF DISHONOR.

Interest owing to respondent, upon non-payment of the check, should be computed from the date of dishonor at the rate of six per cent per annum, irrespective of whether the law of Utah or the law of Colorado is deemed to apply for such purpose. The governing principles and the rate of interest are the same in both jurisdictions. UCA, 1953, 15-1-1. Colorado Revised Statutes, 1953, 73-1-2. The Colorado section declares:

"Creditors allowed six per cent — Creditors shall be allowed to receive interest, when there is no agreement as to the rate thereof, at the rate of six per cent per annum, for all moneys after they become due, on any bill, bond, promissory note or other instrument of writing, . . . [balance of section not material]."

In *Bromfield vs. Cochran*, interest was computed from the date of the check. In our case it should be computed at least from the date of dishonor, October 20, 1956.

CONCLUSION

The facts as stated in the record on appeal, including the supplemental record, are controlling, of course. No one seriously pretends that the law of the State of Wyoming is in any way involved.

The law of Colorado is applicable under recognized conflict of laws rules, because the check was drawn there and it was transferred to respondent there. The place of transfer is preferred by most recent authorities in determining the status of a holder as against the drawer. But either doctrine invokes the law of Colorado in this case.

Under the rule declared in *Bromfield vs. Cochran*, plaintiff is a holder in due course and, therefore, failure of consideration is not a defense.

Bromfield vs. Cochran declares the law of Colorado at the present time. Further, it follows the general rule that a bank becomes the owner of a check deposited with it when it extends credit to the depositor and permits the depositor to withdraw against such credit, notwithstanding the deposit agreement provides that the bank is merely an agent for collection.

Protest is dispensed with by any circumstances which dispense with notice of dishonor. Notice of dishonor is not required to be given to the drawer where the drawer has countermanded payment. Appellant stopped payment of the instant check.

Interest should be computed from the date of dishonor under the circumstances present in this case. The applicable rate of interest is six per cent per annum.

Accordingly, respondent respectfully submits that the lower court's judgment awarding respondents \$2,216.03 principal should be affirmed, and interest at the rate of six per cent per annum from October 20, 1956, to date should be awarded in addition thereto.

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Received two copies of the foregoing Brief of Respondent this day of March, 1960.

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