

1960

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

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Irving H. Biele; Attorney for Appellant;

---

## Recommended Citation

Brief of Appellant, *Moffat County State Bank v. Pinder*, No. 9166 (Utah Supreme Court, 1960).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/3542](https://digitalcommons.law.byu.edu/uofu_sc1/3542)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

---

---

# IN THE SUPREME COURT OF THE STATE OF UTAH

---

THE MOFFAT COUNTY STATE  
BANK, a Corporation,  
*Plaintiff and Respondent,*

— vs. —

R. J. PINDER,  
*Defendant and Appellant.*

Case  
No. 9166

---

## BRIEF OF APPELLANT

---

IRVING H. BIELE

*Attorney for Appellant*

## TABLE OF CONTENTS

	Page
STATEMENT OF FACTS.....	1
STATEMENT OF POINTS.....	4
 ARGUMENT	
Point I. The Plaintiff is not a holder in due course and therefore failure of consideration is an absolute defense to the action.....	5
Point II. The Law of the State of Utah must be applied in determining the legal status of the plaintiff.....	9
Point III. The check was not protested as required by Title 44, Chapter 2, Section 27, Utah Code Annotated (1953) and therefore the drawer is discharged.....	18
CONCLUSION .....	20

### Statutes

Section 44-1-53 Utah Code Annotated (1953).....	5
Section 44-1-59 Utah Code Annotated (1953).....	5
Section 44-2-27 Utah Code Annotated (1953).....	18

### Authorities

7 Am. Jur., Banks, paragraph 447, page 318.....	8
7 Am. Jur., Banks, paragraph 449, page 320.....	8
8 Am. Jur., Bills and Notes, paragraph 697, page 383.....	19
11 Am. Jur., Conflict of Laws, paragraph 151, page 832.....	11
11 A. L. R., 1043s, 1046s, 1050s, 1070.....	7, 8, 9
16 A. L. R., 1084.....	8, 9
42 A. L. R., 492, 494, 495, 502.....	7, 8, 9
68 A. L. R., 725, 727, 729, 735.....	7, 8, 9
99 A. L. R., 486, 487, 488, 489.....	8, 9
Buschman, Some Conflict of Laws, Problems Pertaining to Bills and Notes, 8 Ind., L. J. 213, 227 and 228 (1923).....	17
10 C. J. S., Bills and Notes, Sec. 61 (b) page 495.....	11
10 C. J. S., Bills and Notes, Sec. 47 (a) (1) page 486.....	10
7 L. R. A., 852.....	9
Ogden Negotiable Instruments (5th Ed. 1947), Sec. 256, page 482; Sec. 285, pages 484, 485.....	11
Story, Conflict of Laws, Sections 317, 344, 356.....	14
Wharton, Conflict of Laws (3rd Ed. 1905) Sec. 451(c).....	12
Yale Law Journal, Vol. 27, page 804 et seq.....	10

# TABLE OF CONTENTS — (Continued)

Cases	Page
Allen v. Bratton, 47 Miss., 119, page 128 (1872).....	17
Badger Machinery Co. v. United States Bank and Trust Co., 166 Wis. 18, 163 N. W. 188 and 189 (1917).....	13
Bright v. Judson, 47 Barbour's Rep. 29, page 36 (N. Y. 1866)....	15
Broomfield v. Cochran, et al., 283 P. 45.....	9, 21
First Natl. Bank of Chicago v. Dean, 17 N. Y. S., 375, page 378 (NY 1892).....	15
Green v. Kennedy, 6 Mo. App. 577 (Mo. 1879).....	16
Harrison v. Pike Bros., 48 Miss. 46 (1873).....	17
Limerick Natl. Bank v. Howard, 51 Atl. 641, page 643 (N. H. 1901).....	16
Pratt v. Dittmer, 197 P. 365 (Cal. App. 1921).....	16
Tyrell v. Cairo and S. L. R. R. Co. 7 Mo. App. 294 (1879).....	16
United States v. Schaeffer, 33 F. Sup. 547 (D. C. Md. 1940).....	16
Webster v. Howe Machine Co., 54 Conn. 394, 8 Atlantic (1886) page 483 .....	14
Western Creamery Co. v. Malia, 89 Utah 422, 57 P. (2d) 734.....	6, 7
Woodruff v. Hill, 116 Mass. 310, page 311 (1874).....	14

# IN THE SUPREME COURT OF THE STATE OF UTAH

---

THE MOFFAT COUNTY STATE

BANK, a Corporation,

*Plaintiff and Respondent,*

— vs. —

R. J. PINDER,

*Defendant and Appellant.*

Case  
No. 9166

---

## BRIEF OF APPELLANT

---

### STATEMENT OF FACTS

On October 12, 1956, R. J. Pinder issued his check number 442 in the amount of \$2,500.00 payable to Bill Arnn.

On all dates relative to this action Bill Arnn, sometimes known as E. S. Arnn, had an account in The Moffat County State Bank. At the time Bill Arnn opened his account in The Moffat County State Bank he executed a depositor's agreement which contained the following provision:

“Items received for deposit or collection are accepted on the following terms and conditions. This bank acts only as depositor’s collection agent ... items are credited subject to final payment and to receipt of proceeds of final payment in cash ... by this bank at its office ...” (R-10)

On October 15, 1956, at Craig, Colorado, Bill Arnn endorsed the above referred to check for deposit to his checking account and coincidentally therewith executed a deposit agreement which deposit agreement contains the following statement:

“Items received for deposit or collection are accepted on the following terms and conditions. This bank acts only as depositor’s collecting agent and assumes no responsibility beyond its exercise of due care. All items are credited subject to final payment and to receipt of proceeds of final payment in cash or solvent credits by this bank at its own office. This bank may forward items to correspondents and shall not be liable for default or negligence of correspondents selected with due care nor for losses in transit, and each correspondent shall not be liable except for its own negligence. Items and their proceeds may be handled by any Federal Reserve Bank in accordance with applicable Federal Reserve rules and by this bank or any correspondent in accordance with any common bank usage, with any practice or procedure that a Federal Reserve Bank may use or permit another bank to use or with any other lawful means. This bank may charge back at any time any item drawn on this bank which is ascertained to be drawn against insufficient funds or otherwise not good or payable. An item received after this bank’s regular afternoon closing hour shall be deemed received the next business day. (R-9 Lines through 17 and R-11)

The Moffat County State Bank gave Bill Arnn credit in his checking account for the face amount of the check. (R-8)

The check was presented to the drawee Bank (Sandy City Bank), on October 20, 1956, and was dishonored. (R-8)

The Moffat County State Bank received notice of dishonor on October 22, 1956, and cancelled its endorsement on the check on October 24, 1956. (R-8)

The Moffat County State Bank received notice of dishonor on October 22, 1956, and cancelled its endorsement on the check on October 24, 1956. (R-8)

The Moffat County State Bank on and between the date of receipt of deposit and notice of dishonor paid the following checks against the credit resulting from the deposit of the check referred to. (R-10)

Oct. 15	\$217.27 less credit \$27.10.....	\$190.17
Oct. 16	.....	50.00
Oct. 16	.....	50.00
Oct. 16	.....	272.56
Oct. 18	.....	50.00
Oct. 19	.....	200.00
Oct. 19	.....	274.86
Oct. 19	.....	285.14
Oct. 19	.....	376.16
Oct. 20	.....	267.14
Oct. 20	.....	200.00
Total Checks.....		<u>\$2,216.03</u>

The consideration for the check above referred to failed and R. J. Pinder notified Sandy City Bank to refuse payment when the check was presented and said bank did refuse payment. (R-8)

The Moffat County State Bank did not have knowledge of the failure of consideration until such time as it was advised that the check had been dishonored and said bank now holds said check and the same has not been paid. (R-9)

The Moffat County State Bank is incorporated under the laws of the State of Colorado with its principal place of business in Craig, Colorado, and R. J. Pinder is a resident of Salt Lake County, State of Utah. (R-8)

The instrument has not been protested by plaintiff. (R-8, 9, and 15)

(For emphasis, the Appellant has italicized portions of documents and authorities in its brief.)

## STATEMENT OF POINTS

The Court erred in granting the plaintiff's and respondent's motion for summary judgment, in that:

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

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



III. THE CHECK WAS NOT PROTESTED AS REQUIRED BY TITLE 44, CHAPTER 2, SECTION 27, UTAH CODE ANNOTATED (1953) AND THEREFORE THE DRAWER IS DISCHARGED.

## ARGUMENT

### POINT I.

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

If the plaintiff is not a holder in due course then, under the provisions of Utah Code Annotated, Title 44, Chapter 1, Section 59, Utah Code Annotated 1953, the plaintiff is barred from recovery for it is stipulated that the consideration for the instrument failed.

“44-1-59. WHEN SUBJECT TO ORIGINAL DEFENSES. — In the hands of any holder other than a holder in due course a negotiable instrument is subject to the same defenses as if it were non-negotiable . . .”

It is therefore obvious that the plaintiff must establish that he was a holder in due course. A holder in due course is defined by Title 44, Chapter 1, Section 53, Utah Code Annotated 1953, as follows:

“44-1-53. WHAT CONSTITUTES A HOLDER IN DUE COURSE. — A holder in due course is a holder who has taken the instrument under the following conditions:

“(1) That it is complete and regular upon its face.

- “(2) That he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact.
- “(3) That he took it in good faith and for value.
- “(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.”

The critical portions of the above statute are the portions that require the holder to take the instrument “in good faith and for value” by “negotiation.” It is appellant’s contention in this case that the plaintiff was not a holder in due course and not entitled to the privileges and protections thereof because the plaintiff took the instrument as agent of the payee and therefore all defenses available against the principal are also available against the agent.

The relationship between the payee of the check and the plaintiff bank is controlled by written agreements which agreements, as set forth in the Statement of Facts, constitute the bank an agent of the payee for the purpose of collecting the instrument. These agreements are prepared by the Moffat County State Bank and therefore must be construed most strictly against said bank. The wording of the agreements is clear and concise and defines the bank as agent only.

The law of the State of Utah is clearly set forth in the case of *Western Creamery Co. v. Malia et al.*, 89 Utah 422, 57 P. (2d) 734, wherein the Court determined that

the bank would be found by its deposit agreement. The Court's decision in the case of *Western Creamery Co. v. Malia et al.*, supra, stated as follows:

“ \* \* \* . . . When the deposit slip contains a provision to the effect that the bank in which the check is deposited acts merely as the agent for collection, and not as purchaser thereof, such fact is uniformly regarded as very material, if not conclusive, evidence of the intention of the parties as to the passing of title. 11 A.L.R. 1070; 42 A.L.R. 502; 68 A. L. R. 735. In the instant case the check was received by the defendant bank which was authorized to forward it for collection or payment, and to receive payment in a draft drawn by the drawee or other bank, and, except for negligence, the defendant bank was not liable for the dishonor of the draft so received in payment, nor for losses thereon. The foregoing provision clearly indicates that the defendant bank regarded itself, not as the owner of the check, but as the mere agent for the collection of the money notwithstanding plaintiff was given credit therefor. Plaintiff did not draw against the check nor receive any payment thereon. There was no agreement to the effect that plaintiff had any such a right. The mere fact that on one occasion plaintiff did draw against a check deposited to its account at the defendant bank before the check had been collected from the drawee bank does not require a finding that plaintiff on the occasion in question had such a right. The finding of the court below to the effect that the title to the check in question did not pass to the defendant bank when it was there deposited should not be disturbed.”

The doctrine in Utah is in conformity with the general rule of law as applied in the United States and as

set forth in 7 American Jurisprudence — Banks, which states, beginning on page 320:

*“§449. Effect of Giving Credit; Right to Charge Back Dishonored Paper. — . . . That the title remains in the depositor is especially true if the credit is entered upon the agreement that it is subject to payment of the paper and that it may be charged off in case of the dishonor of the paper. (. . . 11 A.L.R. 1050, s. 16 A.L.R. 1084, 42 A.L.R. 495, 68 A.L.R. 729, and 99 A.L.R. 489.) . . . The bank may, as a matter of favor and convenience, permit checks to be drawn against such paper before payment, since the depositor, in the event of nonpayment, is responsible for the sums drawn, not by reason of his indorsement, the paper not having ceased to be his property, but for money paid.”*

In this case the intention of the parties is determined not just by a routine execution of a deposit slip but is actually controlled by the deposit agreement. It is necessary to determine the intention of the parties at the time of the negotiation or transfer of the instrument from the payee to the Moffat County State Bank. This rule is set forth in 7 American Jurisprudence — Banks § 447 as follows:

*“D. Deposits of Commercial Paper; Title Thereto; Right to Charge Back Credit Given*

*“§449. Generally.—*

\* \* \* \*

*“The determination of the question of title to commercial paper transferred to a bank which credits it to the depositor’s account fundamentally involves a question of intention. (. . . 11 A.L.R.*

1043, s. 16 A.L.R. 1084, 42 A.L.R. 492, 68 A.L.R. 725, and 99 A.L.R. 486, 487; . . . ) Where there is direct evidence of such intention, as where the contract expressly provides as to the passing of title, the question is relatively simple. . . . Such intention must, however, be determined as of the date when the deposit is made, and not in the light of subsequent events. (11 A.L.R. 1046, s. 16 A.L.R. 1084, 42 A.L.R. 494, 68 A.L.R. 727, and 99 A.L.R. 488; 7 L.R.A. 852; . . . )”

The intention of the parties at the time of the transfer of the instrument from the payee to his bank must be determined by the written instruments admitted to evidence under stipulation since no contrary evidence of intention has been submitted to the Court.

Under the specific written agreements admitted to evidence in this case and in view of the fact that there is no evidence of any contrary intention, whether oral or written, The Moffat County State Bank's relationship to the payee of the check is conclusively proven to be that of agent and under the prevailing law of the United States and the State of Utah said bank does not qualify as a holder in due course.

## POINT II.

### II. THE LAW OF THE STATE OF UTAH MUST BE APPLIED IN DETERMINING THE LEGAL STATUS OF THE PLAINTIFF.

The plaintiff cites in defense of his position the Colorado case of *Broomfield v. Cochran et al.*, 283 P. 45, but the law of the State of Colorado is not applicable to the

case at hand. In the present case the decisions relative to the determination of this question of conflicts of law have been summarized in 27 Yale Law Journal, Pages 804 through 807 as follows:

“The question of what law defines the defenses available against the good faith holder has most frequently arisen where the defenses have been asserted by the primary parties. . . . The law of the place of endorsement when it differs from that of both the place of execution and payment will not be held applicable. Nor does the law of the place of execution of the instrument govern when the place of execution differs from the place of payment and indorsement. But where it is possible to isolate the place of payment from both the place of execution and indorsement the courts almost uniformly hold the law of the place of payment to govern. . . . The weight of authority seems to apply the same rule (to determine whether a holder is a holder in due course) as in the case of defenses.”

The check was executed, delivered, and made payable in the State of Utah. It was drawn on a Utah bank by a Utah resident and the action has been brought in a Utah Court. The question as to whether the plaintiff is a holder in due course, and entitled to maintain an action against defendant as drawer of the check must be determined by the laws of the State of Utah.

“10 C.J.S. *Bills and Notes* § 47 (a) (1) at page 486. — All matters bearing on the execution, the interpretation, and validity, including the capacity of the parties to contract, are to be determined by the law of the place where the contract is made. (2) All matters connected with the payment, including presentation, notice, demand, pro-

test, and other damages for non-payment, are to be regulated by the law of the place where the instrument is to be paid. All matters respecting the remedy to be pursued, including the bringing of suits, service of process, and admissibility of evidence, depend on the law of the place where the action is brought.”

Under all of these categories, the law of Utah would be applicable. While it is true that the indorsement by Mr. Arnn to the plaintiff bank constituted a separate contract it must be remembered that this is not an action by the receiving bank against the indorser but is one between the indorsee and the drawer, and the liability of the drawer is to be determined by the law of the place where the check is drawn and payable.

“10 C. J. S. *Bills and Notes* § 61(b) at page 495. As the drawer of a bill of exchange does not contract to pay the money in the foreign place on which it is drawn, but only guarantees its acceptance and payment in that place by the drawee, his contract is regarded as made at the place where the bill is drawn, and as to its form and nature and the obligation and effect thereof is governed by the law of that place with regard to the payee and any subsequent holder. This law governs the drawer’s liability to an indorsee, determines his right to set up defenses against the indorsee . . . and determines the measure of his liability for interest and and damages.” To the same effect see 11 American Jurisprudence, *Conflict of Laws* § 151.

“Ogden, *Negotiable Instruments* (5th Ed. 1947) § 256 at page 482 . . . If a negotiable note is made in one state and payable there, and it is afterwards indorsed in another state, and by the

law of the former state, equitable defenses are let in, in favor of the maker, and by the laws of the latter state excluded, the rule governing as to the holder is the law of the place where the note was made. There the maker undertook to pay and the subsequent negotiation did not change his obligation or right. The contract of the drawer of a bill of exchange is governed by the law of the place where the bill is drawn in regard to the rights of the payee and any subsequent holder . . ."

"Ibid § 258 at pages 484 and 485. The liability of the indorser is said to be governed by the law of the place where the indorsement is made. . . . It is the new liability created by the indorsement in favor of the indorsee and subsequent indorsers that causes this law to govern. *This law governs only as to the new liability created between the indorsee or subsequent indorsers and the prior indorsers. The right of the transferee or indorsee against the original parties to the instrument are determined by the law of the place where the contract was made or is to be performed. . . .*"

"Wharton, Conflict of Laws (3rd Ed. 1905) § 45 1(c). While, as shown in a previous section, the indorsement of a note or bill constitutes a separate and distinct contract, which, so far as concerns the liability of the indorser to subsequent parties, is governed by the law of the place of indorsement, it is established, practically without contradiction, that the liability of, and substantive defenses available to, the maker of a note or acceptor of a bill of exchange are, even as against a subsequent indorsee, to be determined by the law that originally governed the contract, and cannot be increased, diminished, or impaired by the subsequent indorsement or transfer. . . ."



In *Badger Machinery Co. v. United States Bank and Trust Co.*, 166 Wisc. 18, 163 N.W. 188 (1917) an action was brought to, *inter alia*, enforce unpaid stock subscriptions and test the validity of outstanding bonds. Under the law of Wisconsin the appellant was not a bona fide holder in due course as the bonds were taken by it as collateral security for a pre-existing debt. It was contended that the trial court erred in excluding proof that under the New Mexico law, where the bonds were transferred to appellant, the appellant was a holder in due course. The Supreme Court in denying this contention stated:

“In the instant case the bonds were Wisconsin contracts payable in Wisconsin; the maker of them . . . is a Wisconsin corporation; and the appellant the United States Bank and Trust Co., is enforcing its claim in a Wisconsin Court. True, the contract between Bridge, who sold the bonds to appellant, and appellant may be considered as made outside of Wisconsin, and if the action here were between appellant and Bridge, a different question would be presented. *The issues involved in the case at bar are between the maker of the paper involved and the appellant who purchased the paper and claims to be a holder for value in due course.*

“*The laws of Wisconsin became a part of the contract of the maker in the instant case and determine whether the holder is a bona fide holder for value in due course or not . . .*

“While there seems to be some conflict in the authorities we are satisfied that the rule laid down for the instant case is supported by the weight of authority.”

In *Woodruff v. Hill*, 116 Mass. 310 at page 311 (1874) the plaintiffs, as indorsees of a promissory note made in Massachusetts by a Massachusetts resident and payable there, brought suit in Massachusetts against the makers. The note was indorsed by the payee to the plaintiffs in New York. The defendants offered to prove that by the law of New York the plaintiffs, upon the evidence, were not bona fide holders for value except as to the amount of the money paid by them to the payees at the time of the indorsement. The Court upheld the exclusion of such proof and stated:

“The note was made in Massachusetts and the contract of the makers with the payees and with any indorsee was to be performed here, and governed by our law. Story Conflict of Laws §§ 317, 344, 356.”

The same result was reached in *Webster v. Howe Machine Co.*, 54 Conn. 394, 8 Atlantic 482 (1886) at page 483 where drafts were drawn in New York by one Stockwell on defendant company in favor of plaintiffs, who were London bankers. The draft was delivered by Stockwell to plaintiffs who indorsed it and sold it for him, and placed the proceeds to his credit in his account with them, as he was then indebted to them for a larger sum. Under the law of New York, one who took a paper upon a pre-existing debt was not a bona fide holder for value. The Connecticut Supreme Court in holding that the law of New York governed stated:

“The defendant had its office and place of business in New York; there the acceptance was made; there the bill was made payable. In an

action at law for an enforcement of a contract, the law of the jurisdiction in which it is made and to be executed determines the extent of the obligation of the contractor, and the character of the defenses which he may interpose for his protection.”

In *Bright v. Judson*, 47 Barbour’s Rep. 29, at page 36 (N. Y. 1866) it was held that a bill of exchange payable in New York, although delivered and accepted in the State of Indiana, was a contract to be performed in New York and was to be governed by the laws of that state as to whether one who received a bill for an antecedent debt is a bona fide holder for value.

“The defendant as acceptor of the draft in suit, was the principal debtor, and although he accepted in the State of Indiana, yet it was a contract to be performed in New York, and is to be governed by the laws of that state.”

In *First Natl. Bank of Chicago v. Dean*, 17 N.Y.S. 375 at page 378 (N. Y. 1892) it was held that the question of whether the plaintiff was holder in due course of negotiable warehouse receipts was to be determined by the law of New York where the contract was made and to be performed and not by the law of Illinois where the notes were indorsed to plaintiffs.

“... It cannot be that if a negotiable obligation, made in this state, is there transferred for a precedent debt, the transferee is not a bona fide holder to shut out equities in favor of the maker; and yet if the obligation is transferred in Illinois, to a resident of that state, our courts must ignore the rule adopted in this state and follow that prevailing in Illinois. . . . *Any such doctrine would be an unjust discrimination in favor of non-residents*

*against residents of our own state, inconsistent with every principle of comity or notion of uniform justice and cannot prevail.*

“As against (indorser), its obligation might, in a proper action, be determined by the laws of Illinois, because its indorsement — which is to an extent an independent contract — was made and delivered there. . . .”

See also *Pratt v. Dittmer*, 197 P. 356 (Cal. App., 1921) held that promissory notes payable in Iowa are to be interpreted under the law of that state as to rights of bona fide holder.

*Green v. Kennedy*, 6 Mo. App. 577 (Mo. 1879) held that the question of a bona fide holder was to be determined under the laws of the state where the note was payable though negotiated in another state. See also *Tyrell v. Cairo and S. L. R. R. Co.*, 7 Mo. App. 294 (1879).

*Limerick Natl. Bank v. Howard*, 51 Atl. 641 at page 643 (N. H. 1901) held that the law of Vermont where the notes were executed and payable governs question as to whether a party is a holder in due course.

“So, if by the law of the place of contract, even although negotiable, equitable defenses are allowed in favor of the baker, any subsequent indorsement will not change his right in regard to the holder. The latter must take it cum onere . . .”

*United States v. Schaeffer*, 33 F. Sup. 547 (D. C. Md. 1940). The question of whether the government was holder in due course of a note was to be determined by the laws of Maryland where the note was executed and where the contract was made and to be performed.

“Allen v. Bratton, 47 Miss. 119 at page 128 (1872). As the notes were executed and to be paid in Tennessee, they are to be governed by the laws of that state, and upon questions connected with commercial paper, it is there well settled that the suspension or satisfaction of a precedent debt is not sufficient consideration to give the assignee or indorsee of a bill or note the position of a bona fide purchaser. . . .” See also Harrison v. Pike Bros., 48 Miss. 46 (1873).

One of the very basic policies of the conflict of laws is to protect the justified expectations of parties by the application of rules which will bring about uniform results whenever and wherever a dispute arises. This can only be accomplished in situations such as the present case by applying the law of the place of payment when the suit is between the alleged holder in due course and the maker of the instrument. See *Buschmann, Some Conflict of Law's Problems Pertaining to Bills and Notes*, 8 Ind. L. J. 213, 227 and 228 (1933).

“ . . . In the interest of uniformity in the application of law, it is desirable, of course, to have the law of the place of payment of the primary party govern. This could be accomplished on the theory that such party expects to be governed, as to defenses and negotiability, by the law of the place of payment, and he is presumed to know what constitutes a holder in due course under that law. . . .”

The validity of this argument can be illustrated by the following hypothetical case:

A writes two checks and delivers them in Utah to B. B indorses and deposits one in C bank in state D. He

indorses and deposits the other in E bank in State F. By the law of State D, the bank has become a holder in due course, by the law of State F it has not. Both banks bring an action in Utah against A.

If the Utah court should apply the rule relied on by the plaintiff, it would be faced with anomalous situation of allowing recovery to Bank C and denying it to Bank E. Yet, both cases arose from the same transaction, and present identical factual situations.

It would appear under the prevailing rules of conflict of law and logic that the laws of the State of Utah must be applied in determining the rights of a holder against the drawer of the instrument when the instrument was prepared, executed and payable in the State of Utah.

### POINT III.

#### III. THE CHECK WAS NOT PROTESTED AS REQUIRED BY TITLE 44, CHAPTER 2, SECTION 27, UTAH CODE ANNOTATED (1953) AND THEREFORE THE DRAWER IS DISCHARGED.

Title 44, Chapter 2, Section 27, Utah Code Annotated (1953), states as follows:

“44-2-27. IN WHAT CASES PROTEST NECESSARY.  
— Where a foreign bill appearing on its face to be such is dishonored by nonacceptance, it must be duly protested for nonacceptance, and where such a bill which has not previously been dishonored by nonacceptance is dishonored by nonpayment, it must be duly protested for nonpayment. If it is not so protested, the drawer and indorsers are dis-

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

The negotiable instrument, a copy of which is admitted to evidence in this case, and the stipulation of facts indicate that the instrument was returned to The Moffat County State Bank with the notation “refer to maker.” The check itself (R-3) contains the notation “not good when presented. Not good now 10/24/56.” It has been stipulated that the plaintiff actually countermanded payment, but this fact was not known to the plaintiff bank and the stop payment was not filed with the drawee bank until after return of the instrument to plaintiff and respondent (R-6) and therefore it was under the duty to protest the instrument.

A formal countermand of the order of payment was not executed until after the check was returned marked “refer to maker.” (R-6)

The law applicable in this case is set forth in 8 American Jurisprudence *Bills and Notes* Paragraph 697 as follows:

“8 Am. Jur. *Bills and Notes*, Par. 697 . . . The Uniform Act provides that where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment as the case may be, but protest is not required except in the case of foreign bills of exchange. The Act further provides that where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill has not previously been dishonored by non-acceptance is dishonored by non-

payment, it must be duly protested for non-payment. If it is not so protested, the drawer and endorsers are discharged . . . it would seem, however, that a check which is not drawn and payable within a State would be regarded as a foreign bill of exchange within the meaning of the Uniform Act and would require protest."

The plaintiff and respondent, The Moffat County State Bank, is in effect placed on the horns of a dilemma for if it contends that the check is an inland bill then no question of conflict of laws arise and the law of the State of Utah would apply and the said bank would not obtain the benefit of being a holder in due course. On the other hand if the plaintiff contends that the instrument is a foreign bill then it has failed to protest the bill as required by the above cited statute and again the drawer of the instrument is discharged. The dilemma is in fact solved for by a proper application of the rules of conflict of law, the laws of the State of Utah must be applied and in all events the drawer of the instrument is discharged.

## CONCLUSION

The plaintiff and respondent must qualify as a holder in due course in order to obtain judgment against the defendant and appellant. Under the law of the State of Utah the plaintiff and respondent has not so qualified. The law of the State of Utah is in accord with the majority view in the United States.

The Moffat County State Bank claims that the law of the State of Colorado applies and relies almost exclu-



sively on the case of *Broomfield v. Cochran, supra*, but such case is not applicable under accepted conflicts of law theories for the instrument in question was drawn and payable in the State of Utah.

The plaintiff and respondent can take little comfort from the Broomfield case since it is distinguished by the introduction into evidence in the case at hand of the depositor's agreement. This agreement was executed by Mr. Arnn at the time of opening the account and accepted by the bank by the acceptance of the account and specifically and formally designated The Moffat County State Bank as agent of the depositor for the purpose of collecting items referred to it. Under the equal dignities rule any change in this agreement would have to be subscribed by the parties and in writing. No evidence, oral or otherwise of a change in the agreement has been adduced.

The intention of the parties at the time the check was delivered by the payee to the receiving bank controls and this intention is set forth in two written instruments. The plaintiff's proper recourse is against the depositor for monies paid.

Since it is apparent that The Moffat County State Bank does not qualify as a holder in due course under the law of the State of Utah or the terms of its written agreements and even if it did qualify it has not protested the instrument as required by law, it is submitted that the defendant and appellant is discharged from obligation on the instrument and the order granting plaintiff's motion

for summary judgment was in error and should be set aside and judgment entered for the defendant "no cause of action."

Respectfully submitted,

IRVING H. BIELE  
*Attorney for Defendant  
and Appellant*

Receipt of copies of the above and foregoing Brief of the Defendant and Appellant acknowledged this ..... day of February, 1960.

---

VICTOR A. SPENCER  
*Attorney for Plaintiff  
and Respondent.*