

1968

# Sugarhouse Finance Company v. Zions First National Bank And Walker Bank & Trust : Respondent's Brief

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# In the Supreme Court of the State of Utah

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SUGARHOUSE FINANCE COM-  
PANY, a corporation,

*Plaintiff and Appellant*

vs.

ZIONS FIRST NATIONAL BANK,  
a corporation,

*Defendant and Respondent,*

and

WALKER BANK & TRUST COM-  
PANY, a corporation,

*Defendant.*

Case No.  
11029

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## RESPONDENT'S BRIEF

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Appeal From Judgment For Respondent of the  
Third Judicial District Court in and for Salt Lake County  
Honorable Stewart M. Hanson, Judge

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**FILED**

FEB 26 1968

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Clk. Supreme Court Utah

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WALKER BANK & TRUST COM-  
PANY, a corporation,

*Defendant.*

Case No. .  
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---

## RESPONDENT'S BRIEF

---

### NATURE OF THE CASE

This is the second action brought by appellant against respondent and defendant Walker Bank & Trust Company to recover funds allegedly disbursed on checks drawn on appellant's account with defendant Walker Bank & Trust Company after having been presented to and honored by respondent.

### DISPOSITION IN LOWER COURT

Respondent does not agree with two statements in appellant's brief regarding the disposition of the case

in the lower court. First, the Complaint which is the subject of this appeal, although dated February 6, 1967, was actually filed April 10, 1967, and second, respondent claims the dismissal of the first case was with prejudice. Respondent will, therefore, restate the disposition of the case in the lower court.

Appellant filed a Complaint against respondent and defendant Walker Bank & Trust Company which was dismissed as to respondent. Appellant filed a Petition for Intermediate Appeal from this dismissal which was denied and, thereafter, on April 10, 1967, appellant filed a new Complaint against respondent and defendant Walker Bank & Trust Company. Upon respondent's motion the second Complaint was dismissed as to respondent on August 30, 1967, and it is from this Order of Dismissal of the second Complaint that appellant has appealed.

## RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of the Order of Dismissal entered by the lower court.

## STATEMENT OF FACTS

### FIRST COMPLAINT:

On August 26, 1966, appellant filed a Complaint in the Third Judicial District Court in and for Salt Lake

County, State of Utah, against respondent and defendant Walker Bank Trust Company, Case No. 166815. The allegations of this first Complaint must be analyzed here since they bear on the disposition of the second Complaint.

The first Complaint alleged two causes of action against respondent. Count I of the First Cause of Action in substance alleged that 32 checks, endorsed with signatures other than those of the named payees, were drawn upon appellant's account with defendant Walker Bank & Trust Company and presented to respondent by one Guy E. Davis, or his agent, for deposit. None of the checks were payable to Davis, but they were credited by respondent to an account or accounts belonging to Davis. Based upon these alleged facts, appellant claimed that respondent was negligent in honoring the checks presented to it in (1) failing to compare the endorsements on the checks with the signature card of Davis; (2) failing to require the endorsement of Davis or the person depositing the checks; and (3) failing to recognize a scheme which would have been disclosed by the multiplicity of transactions. As a result of the alleged negligence, appellant claimed that it suffered damage in the amount of \$150,265. (R. 31, 32).

Count II of the First Cause of Action alleged that the endorsements on the checks were forgeries, and that despite the forgeries, respondent honored the checks, in

violation of a duty to appellant to determine the genuineness of the endorsements, and that as a result thereof, appellant was damaged in the amount of \$150,265. (R. 32, 33).

The Second Cause of Action of the first Complaint claimed that in May, 1965, three checks totaling \$47,000 were drawn against appellant's account with defendant Walker Bank & Trust Company signed by Davis and one other employee of appellant, payable in two instances to respondent and in one instance to respondent and a payee known as Treasure Mountain Finance. The Second Cause of Action further alleged that one of the checks was credited by respondent to the account of Treasure Mountain Enterprises, a sole proprietorship of Davis, and that two of the checks were credited by respondent to the account of Treasure Mountain Finance, another sole proprietorship of Davis. Appellant then alleged that respondent was negligent in failing to act in a reasonable and prudent manner consistent with banking standards in the area in transferring funds belonging to appellant to Davis without requiring any demonstration of authority for the transfer and without requiring the endorsement of Davis. (R. 33, 34). The Third Cause of Action was directed only against defendant Walker Bank & Trust Company and is not involved here.

On October 10, 1966, respondent filed a Motion to Dismiss the first Complaint and attached an Affidavit identifying Davis as appellant's manager. Argument was heard



on the Motion to Dismiss, and on January 12, 1967, the Court signed and entered its Order of Dismissal in Civil No. 166815. The Order was prepared with the following language included:

“... plaintiff’s Complaint against defendant Zions First National Bank be, and the same hereby is, dismissed with prejudice on the ground . . .”

Appellant objected to the inclusion of the words “with prejudice,” claiming that the dismissal was without prejudice. The question whether the words “with prejudice” or “without prejudice” should be in the Order was submitted to the Court, and the words “dismissed with prejudice” were crossed out by the Court and only the word “dismissed” inserted. The Order of Dismissal reads:

“... plaintiff’s Complaint against defendant Zions First National Bank be, and the same hereby, is dismissed on the ground . . .” (R. 39).

Appellant filed Petition for Intermediate Appeal from this Order of Dismissal which was denied.

## SECOND COMPLAINT:

On April 10, 1967, appellant filed a new Complaint in the Third Judicial District Court in and for Salt Lake County against respondent and defendant Walker Bank & Trust Company, Case No. 171406. It is this case that

is now before this Court on appeal. Appellant's brief on pages 4, 24 and 25 refers to the new Complaint in Case No. 171406 as an Amended Complaint. This is an incorrect reference. The pleading was not an Amended Complaint, but a new Complaint in a new action. (R. 1-8). The new Complaint also contains three causes of action, the first two directed against respondent. All nine paragraphs in Count I of the First Cause of Action in the first Complaint are repeated verbatim in the corresponding Count of the new Complaint. Exactly the same allegations of fact involving the acceptance by respondent of the 32 checks and their deposit in accounts owned by Davis are made to support a claim of negligence (R. 1, 2), and the new Complaint then adds the following allegations:

“9. That the honoring of said checks with knowledge of the above and foregoing facts amounts to bad faith on the part of the defendant, Zions First National Bank.

“10. That the defendant, Zions First National Bank, paid on such checks with actual knowledge that Guy E. Davis was committing a breach of his fiduciary obligation in making a deposit of such checks.” (R. 2).

Count II of the First Cause of Action of the new Complaint also repeats exactly all six paragraphs of the corresponding Count of the first Complaint alleging in substance that the endorsements on the 32 checks were

forgeries and that respondent breached a duty to determine the genuineness of the endorsements. (R. 2, 3). The new Complaint adds one paragraph to this Count, alleging:

“5. That the failure to perform the duty with knowledge of the facts alleged in Count I of this Complaint amounts to bad faith on the part of the defendant, Zions First National Bank.”

The Second Cause of Action in the new Complaint is identical with the Second Cause of Action in the first Complaint except that five words have been added to paragraph 6. The Second Cause of Action involves three checks in the total amount of \$47,000, one of which was payable to respondent and Treasure Mountain Finance and two of which were payable only to respondent. To the claim of negligence, appellant added “and acted in bad faith.”

On May 4, 1967, respondent filed a Motion to Dismiss the new Complaint in Case No. 171406 and attached to the Motion certified copies of the Complaint in Case No. 166815 and the Order of Dismissal of that Complaint. (R. 12-21). Following argument on this Motion to Dismiss, the Court entered an Order of Dismissal on August 30, 1967, dismissing the Complaint as to respondent in Case No. 171406. (R. 25, 26). The Order was prepared including the words “dismissed with prejudice,” and appellant made no objection to the inclusion of the words

“with prejudice.” This appeal was then taken from the Order of Dismissal in Case No. 171406.

## ARGUMENT

### POINT I

THE DISMISSAL OF APPELLANT'S FIRST COMPLAINT IN CIVIL NO. 166815 BARS APPELLANT FROM MAINTAINING THE INSTANT ACTION SINCE THE CLAIMS OF APPELLANT IN THE INSTANT CASE ARE RES JUDICATA BETWEEN APPELLANT AND RESPONDENT.

The legal effect of the Order of Dismissal of appellant's first Complaint in Case No. 166815 was a judgment on the merits of the Complaint and, therefore, a dismissal with prejudice. The Motion to Dismiss the first Complaint was based on the grounds that it failed to state a claim against respondent upon which relief could be granted and failed to state a claim against respondent upon which relief could be granted by reason of the application of the provisions of Title 22, Chapter 1, U.C.A.(1953). The Motion was made pursuant to Rule 12(b), U.R.C.P., and has attached to it an Affidavit setting forth the fact that Davis was appellant's manager. (R. 37). The attachment of the Affidavit allowed the lower court to treat the Motion under Rule 56, U.R.C.P.

The Motion was granted and the Order of Dismissal prepared with the words “dismissed with prejudice” in-

cluded. Appellant objected to the words "with prejudice," and the lower court struck from the Order "dismissed with prejudice" and inserted only the word "dismissed," refusing to add "without prejudice." Under these circumstances, the Order was that the Complaint was dismissed, with the question whether with or without prejudice resting on the application of the law to a dismissal under Rules (12b) and 56, U.R.C.P.

Rule 41(b), U.R.C.P., with reference to the effect of an involuntary dismissal, in part provides:

"... Unless the court in its order for dismissal otherwise specifies, the dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, or for lack of an indispensable party, operates as an adjudication on the merits."

Counsel for respondent has been unable to find a Utah case on the question of the application of the quoted portion of Rule 41(b), U.R.C.P., to a motion to dismiss a complaint under Rule 12(b), U.R.C.P. However, our Rule 41(b) is similar to Rule 41(b), F.R.C.P., and in the case of *Winegar v. Slim Olsen, Inc.*, 122 Utah 487, 252 P.2d 205, involving a Rule 41(b) question, this Court stated that decisions construing similar Federal Rules of Civil Procedure could be properly examined in cases involving the Utah Rules.

The federal courts on occasion have dealt with the question whether a dismissal under Rule 12(b), F.R.C.P. is a ruling on the merits of a case and, therefore, with prejudice. In *Sardo v. McGrath*, 196 F. 2d. 20, the court recognized that the granting of a motion to dismiss would result in a ruling on the merits. In that case, plaintiff brought suit for declaratory judgment against defendant to determine the validity of an order affirming a deportation order. The district court dismissed the Complaint with prejudice, and in doing so, relied upon certain memoranda of points and authorities outside the pleadings which contained assertions of fact. The Circuit Court reversed the dismissal on the ground that the fact alleged in the memoranda could not be properly considered in ruling on a Motion to Dismiss under Rule 12(b), F.R.C.P. However, on the point in question here, the Court acknowledged that proper dismissals under Rule 12(b), F.R.C.P., were with prejudice. The Court said:

“We conclude that the Order below was not one for summary judgment, but was what the District Court said it was: ‘an order dismissing the Complaint with prejudice.’ Nor can we accept the view that dismissal ‘with prejudice’ lends support to the argument that summary judgment was granted. *‘The Motion to Dismiss for failure to state a claim raises matter in bar and, if sustained without leave to proceed further, results in judgment on the merits.’*” (Emphasis added).

Similar recognition of the effect of a dismissal under 12(b), F.R.C.P., was given in *Mullen v. Fitz Simons &*

*Connell Dredge and Dock Co.*, 172 F. 2d. 601, where the Court of Appeals for the Seventh Circuit in dicta considered the question whether a dismissal pursuant to a motion made under Rule 12(b), F.R.C.P., results in a judgment on the merits. In that case, plaintiffs filed separate actions against defendant for injuries incurred by them while in defendant's employ. The cases involved identical issues and were argued together. The Complaints alleged claims under the Jones Act and in the alternative under common law negligence doctrines in maritime law. Defendant filed motions to dismiss for failure to state claims upon which relief could be granted. The District Court granted the motions and ordered that the suits be dismissed, without prejudice. On appeal, the court noted that the ground for dismissal in each case was failure to state a claim upon which relief could be granted, but that the arguments advanced, to sustain the dismissal, rested, not upon a failure to state a claim upon which relief could be granted, but upon misjoinder of claims, failure to elect between mutually exclusive causes of action, wrong choice of forum and various formal defects. The Circuit Court reversed the dismissals and, with respect to the effect of a dismissal upon motion, said:

"We assume that the foregoing is also a fair statement of the issues presented to the District Court in support of the motions to dismiss the actions. In our opinion, they completely mistake the functions of the motion to dismiss for failure to state a claim. As stated in 2 *Moore's Federal Practice*,

*2d. Ed., par. 1209 at p. 2257, 'The Motion to Dismiss for failure to state a claim raises matter in bar and, if sustained without leave to plead further, results in a judgment on the merits.'*” (Emphasis added).

The function of a motion under Rule 12(b), F.R.C.P. to provide a method for a determination with prejudice of the merits of a Complaint was accepted in *L. B. Wilson, Inc. v. Federal Communications Commission*, 170 F. 2d 793, where the court said:

“A demurrer at the common law (or a motion to dismiss, the substitute in present Federal Court practice for the demurrer) is not a mere procedural nicety. On the contrary it is a precise instrument for final determination on the merits of the justiciability under pertinent rules of law of an asserted cause of action or defense. Sustaining a demurrer puts the part against whose pleading it is directed permanently out of court, unless he is allowed to amend and can amend.”

In 2 Moore's Federal Practice, 2d Ed. par. 12.09, p. 2257, the writer notes that Rule 12(b)(6), F.R.C.P., is properly integrated with Rule 56, F.R.C.P., since motions under both raise only matters on the merits of the case. The granting of an identical motion against the second Complaint was recognized by appellant as being with prejudice.



Since the dismissal on the first Complaint was a final judgment, the matters set forth in the new Complaint are *res judicata* between appellant and respondent. Appellant alleged but one invasion of his rights in both Complaints. The question of appellant's right to recover against respondent for that invasion was litigated in the first lawsuit. In *Knight v. Flat Top Mining Company*, 6 Utah 2d 51, 305 P.2d 503, the court stated that issues concerning which a party or his privy had had an opportunity to litigate in a prior action, could not be reopened in a subsequent suit. The Court said:

"It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form the issue may take in the subsequent action. . . .'

"The Beehive claimants having had an opportunity to defend their title to their claims in that case had they so desired and having failed to do so were precluded from relitigating the same issues in the instant case in so far as the rights of the same parties or their successors in interest are concerned."

One alleged invasion of rights cannot be used by appellant to subject respondent to one suit after another. In

*Williamson v. Columbia Gas & Electric Co.*, 186 F.2d 464, the court dealt with this question and said:

“ . . . The plaintiff having alleged operative facts which state a cause of action because he tells of defendant's misconduct and his own harm has had his day in court. He does not get another day after the first lawsuit is concluded by giving a different reason than he gave in the first for recovery of damages for the same invasion of his rights. The problem of his rights against the defendant based upon the alleged wrongful acts is fully before the court whether all the reasons for recovery were stated to the court or not.”

The generally recognized scope of the doctrine is set forth in 30 *A Am. Jur., Judgments*, Sec. 372, p. 416, where it is stated:

“The phase of the doctrine of res judicata precluding subsequent litigation of the same cause of action is much broader in its application than a determination of the questions involved in the prior action; the conclusiveness of the judgment in such case extends not only to matters actually determined, but also to other matters which could properly have been determined in the prior action.”

The Motion to Dismiss the first Complaint accepted the facts pleaded as true for purposes of the motion and addressed itself to the substantive merits of the claim. The first Complaint was found to be insufficient on its

merits in the lower court, and such dismissal must be with prejudice, and the matter is *res judicata* between the parties. Appellant's remedy for the first dismissal, if a remedy exists, lies in an appeal to this Court from that dismissal and not in the filing of a new lawsuit.

## POINT II

**THE FIRST AND SECOND CAUSES OF ACTION OF APPELLANT'S SECOND COMPLAINT FAIL TO STATE A CLAIM AGAINST RESPONDENT UPON WHICH RELIEF CAN BE GRANTED BY REASON OF TITLE 22, CHAPTER 1, U.C.A. (1953).**

It is conceded by appellant that Davis was its manager and had authority to sign checks for it. (Appellant's Brief pp. 8, 14). The Uniform Fiduciaries Act, Section 22-1-1, U.C.A. (1953), defines the term fiduciary as follows :

“‘Fiduciary’ includes a trustee of any trust, expressed, implied, resulting or constructive, executor, administrator, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors partner, agent, officer of a corporation, public or private, public officer, or any other person acting in a fiduciary capacity for any person, trust or estate.”

As manager of appellant Davis clearly was (1) its agent; (2) an officer of the corporation; and (3) a person acting

in a fiduciary capacity, and the inclusion of Davis in any one of those three categories is sufficient to bring respondent's dealings with Davis within the purview of Title 22, Chapter 1, U.C.A. (1953). In a closely analagous case under the same statute, *Fidelity and Deposit Co. of Md. v. Marion Nat'l. Bank*, 64 N.E. 583, the court held that an employee who was authorized to endorse for deposit or negotiation all negotiable instruments and orders for payment to his employer was a fiduciary within the meaning of this act. The rule of the *Fidelity and Deposit* case encompasses the factual relationship existing between Davis and appellant in the instant case and the same result should be reached.

#### COUNT I OF FIRST CAUSE OF ACTION:

Count I of the First Cause of Action alleges that 32 checks, endorsed with signatures other than those of the named payees, were drawn upon appellant's account with defendant Walker Bank & Trust Company and presented to respondent by Davis or his agent for deposit and credited by respondent to an account or accounts owned by Davis. None of the checks were payable to Davis. Based upon these allegations of fact appellant alleges that respondent was negligent in (1) failing to compare the endorsements on the checks with the signature of Davis; (2) in failing to require the endorsement of the person depositing the check or the person to whom credit was given; and (3) in failing to recognize a scheme which would have been disclosed by the multiplicity of

transactions. Count I then alleges that knowledge of the foregoing facts constitutes bad faith and that respondent had actual knowledge that Davis was committing a breach of his fiduciary obligation.

It is clear that the claim of negligence fails to state a claim against respondent upon which relief can be granted. Section 22-1-9, U.C.A. (1953), as applicable here provides :

“If a fiduciary makes a deposit in a bank to his personal credit . . . of checks drawn by him upon an account in the name of his principal, if he is empowered to draw checks thereon . . . or if he otherwise makes a deposit of funds held by him as fiduciary, the bank receiving such deposit is not bound to inquire whether the fiduciary is committing thereby a breach of his obligation as fiduciary; and the bank is authorized to pay the amount of the deposit or any part thereof upon the personal check of the fiduciary without being liable to the principal, actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making such deposit or drawing such check, or with knowledge of such facts that its action in receiving the deposit or paying the check amounts to bad faith.”

The facts alleged by appellant in Count I as a matter of law fall short of establishing bad faith. Paragraph 9 states :

"9. That the honoring of said checks with knowledge of the above and foregoing facts amounts to bad faith on the part of the defendant, Zions First National Bank."

Section 22-1-1, U.C.A. (1953) defines good faith in the following language :

"A thing is done in 'good faith' when in fact it is done honestly, whether it is done negligently or not."

The courts have looked to this definition of good faith to determine the meaning of the term bad faith in the Uniform Fiduciaries Act. In *Colby v. Riggs National Bank*, 92 F.2d 183, the court said that acts done with knowledge of such facts as amounts to bad faith under the Uniform Fiduciaries Act means acts done dishonestly in view of the definition of good faith in the act. The case of *Davis v. Pennsylvania Co. for Insurances on Lives and Granting Annuities*, 12 A.2d 66, dealt with the meaning of bad faith as used in section 9 of the act, the same section as Section 22-1-9, U.C.A. (1953). The court said that mere failure to make inquiry, even though there are suspicious circumstances, does not constitute bad faith unless the failure is due to a deliberate desire to evade knowledge because of fear that inquiry would disclose a vice or defect in the transaction, and that a thing is done in bad faith, within the meaning of the act, only when it is done dishonestly. Appellant's allegations in Count 1 do not set forth facts that could constitute or support a

claim of dishonesty on the part of respondent, and the acts of respondent of which appellant complains are, as a matter of law, within the protection afforded respondent under Section 22-1-9, U.C.A. (1953).

The allegation in paragraph 10 of Count One that respondent paid on such checks with actual knowledge that Davis was committing a breach of his fiduciary obligation in making a deposit of such checks pleads a conclusion that is not supported by facts alleged in the Count. Appellant has not plead supporting facts of which it claims respondent had knowledge that would constitute or support a claim of actual knowledge of a breach of Davis' fiduciary obligation. Facts necessary to support a claim of actual knowledge must be of a more culpable nature than facts necessary to establish bad faith, and since appellant's allegations in Count I fail to support the claim of bad faith, they cannot substantiate the conclusion of actual knowledge. Since Count I fails to state a claim against respondent upon which relief can be granted because of the application of Section 22-1-9, U.C.A. (1953), the lower court properly granted respondent's Motion to Dismiss as to this Count.

## COUNT II OF FIRST CAUSE OF ACTION:

Count II of the First Cause of Action alleges that the endorsements on the 32 checks in question were unauthorized forgeries, and that respondent honored the

checks despite the forgeries in violation of a duty to determine the genuineness of the endorsements. Appellant then claims that the breach of the duty with knowledge of the facts alleged in Count I constituted bad faith. Dishonesty on the part of respondent is not alleged. Count II also fails to state a claim against respondent upon which relief can be granted because the facts alleged do not support a claim of bad faith which requires that bad faith amount to dishonesty under Section 22-1-9, U.C.A. (1953). *Colby v. Riggs*, supra, *Davis v. Pennsylvania Company Insurances on Lives and Granting Annuities*, supra.

## SECOND CAUSE OF ACTION:

The Second Cause of Action involves three checks allegedly drawn by Davis and another employee of appellant on appellant's account with defendant Walker Bank & Trust Company. Two of the checks were payable only to respondent and one check was payable to respondent and a company known as Treasure Mountain Finance. It is alleged that these checks were deposited with respondent in accounts owned by Davis, and that in transferring funds in the foregoing fashion without requiring any demonstration of authority for the transfer or the endorsement of Davis, respondent was negligent and acted in bad faith.

As previously noted the allegations of negligence fail to state a claim against respondent upon which relief



can be granted. Section 22-1-9, U.C.A. (1953), *supra*. In addition the allegations of the Second Cause of Action do not constitute bad faith in that no facts amounting to dishonesty are alleged. *Colby v. Riggs National Bank*, *supra*; *Davis v. Pennsylvania for Insurances on Lives and Granting Annuities*, *supra*. An allegation that the respondent should have made inquiry from its knowledge of the facts alleged, where a willful and deliberate evasion of knowledge is not alleged, does not constitute bad faith under the statute. *Transport Trucking Company v. First National Bank*, 300 P.2d 476. The Second Cause of Action was properly dismissed on respondent's motion.

### POINT III

RESPONDENT HAD NO DUTY TO APPELLANT TO DETERMINE THE GENUINENESS OF PRIOR ENDORSEMENTS, AND APPELLANT'S CLAIM THAT THE CHECKS WERE FORGERIES DOES NOT STATE A CLAIM AGAINST RESPONDENT UPON WHICH RELIEF CAN BE GRANTED.

Point III of appellant's brief argues at length that the checks involved in the case were forged instruments rather than bearer paper. Count II of the First Cause of Action alleges that the endorsements were forged, and respondent did not dispute this allegation for purposes of its Motion to Dismiss and does not dispute it on this appeal. However, as a matter of law respondent

is not liable to appellant for accepting for deposit forged instruments from appellant's fiduciary in the absense of bad faith or actual knowledge of a breach of the fiduciary obligation. Section 22-1-9, U.C.A. (1953), *supra*, makes no exceptions for forged instruments. It states in substance that if a fiduciary makes a deposit of a check drawn on his principals' account, the bank receiving the check for deposit is not bound to make inquiry and is not liable to the principal in the absence of actual knowledge of the breach or knowledge of facts sufficient to constitute bad faith. This sections fits exactly the facts alleged in the instant case.

Appellant's argument that respondent had a duty to its depositors to determine the genuineness of endorsements is not in point in this case. Appellant was not alleged to be a depositor of respondent; in fact, it is affirmatively alleged that the checks were drawn on appellant's account with defendant Walker Bank & Trust Company. Whatever respondent's duty to its own depositors may be, it had no duty to appellant to determine the genuineness of endorsements when dealing with appellant's fiduciary in view of the provisions of Section 22-1-9, U.C.A. (1953), *supra*. The case cited by appellant *Standard Acc. Ins. Co. v. Pellecia*, 104 A.2d 288, and the argument involving guarantee of prior endorsements are not in point in this case. There is no allegation in Count II of the First Cause of Action, or elsewhere in appellant's Complaint, that respondent guaranteed prior endorsements on the checks in question, and the Com-

plaint does not set forth a cause of action based upon a right of recovery for a guarantee of prior endorsements.

#### POINT IV

THE PROVISIONS OF SECTION 22-1-5, U.C.A. (1953),  
ARE NOT APPLICABLE TO THE INSTANT CASE.

Section 22-1-5, U.C.A. (1953), in substance states, among other things, that, if a check is drawn in favor of a payee who knows that the transaction is for the benefit of the fiduciary the payee is liable to the principal if the fiduciary thereby commits a breach of his obligation. If this section is applied to depository banks, it is clearly inconsistent with and contrary to Section 22-1-9, U.C.A. (1953), *supra*. The entire act, must be read together to determine its intent and application and to resolve apparent inconsistencies. In legislative construction a general provision, such as Section 22-1-5, U.C.A. (1953), should not be held to supercede a specific provision, such as Section 22-1-9, U.C.A. (1953).

A review of these sections, when construed with related sections and in light of the Commissioner's prefatory notes to the Uniform Fiduciaries Act discloses that Sections 22-1-8 and 9, U.C.A. (1953), were intended to govern all depository bank dealings with fiduciaries to the exclusion of Section 22-1-5, U.C.A. (1953). In 9B, *Uniform Laws Annotated*, (1966), page 35, the Commissioner notes:

“Sections 4, 5 and 6 deal with holders of negotiable paper drawn or endorsed by fiduciaries.”

And at page 40, *id*, the note states:

“Sections 7, 8 and 9 deal with depositories of fiduciary funds.”

Section 22-1-9, U.C.A. (1953), makes no exceptions as to who may be payees when it allows banks to accept deposits from a fiduciary without liability to the principal in the absence of bad faith or actual knowledge of the breach of the fiduciary duty. Even more persuasive that Section 22-1-5, U.C.A. (1953) does not apply to a depository bank, however, are the provisions of Sections 22-1-7 and 8, U.C.A. (1953). Section 22-1-7, U.C.A. (1953), deals with deposits to the credit of fiduciaries and states in part:

“. . . If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check.”

Section 22-1-8, U.C.A. (1953), involves deposits by fiduciaries in the name of the principal, and contains exactly the same language as 22-1-7, U.C.A. (1953). If Section 22-1-5, U.C.A. (1953), were applicable to depository banks, then the quoted provisions of Sections 22-1-7 and 8, U.C.A. (1953), would be meaningless and nullities.

It is apparent that the legislature intended a different treatment for depository banks named as payee on checks deposited by fiduciaries from that afforded by Section 22-1-5, U.C.A. (1953), or it would not have enacted the above quoted portions of Sections 22-1-7 and 8, U.C.A. (1953). This is even more clear when it is noted that Sections 22-1-7 and 8, U.C.A. (1953), make no mention of a depository bank's liability to the principal when designated payee on a check unless the check is used in payment of or as security for a personal debt of the fiduciary. No liability is imposed for knowing the transaction to be for the benefit of the fiduciary.

#### POINT V

#### APPELLANT SUFFERED NO LOSS BY REASON OF THE ALLEGED ACTS OF RESPONDENT.

Appellant's Complaint alleges that all of the checks involved in the case were drawn on its account with defendant Walker Bank & Trust Company. Appellant suffered no loss by reason of respondent's conduct, its alleged loss being sustained only by the alleged action of defendant Walker Bank & Trust Company in wrongfully charging the checks to appellant's account. The two causes of action alleged against respondent in the Complaint allege that appellant's loss was a result of respondent's activity, but as a matter of law such allegations fail to state of claim against respondent upon which relief can be granted where the Complaint also alleges

that every check was drawn against its account at another bank.

## CONCLUSION

It is respectfully submitted that the lower court ruled correctly in dismissing appellant's second Complaint in Case No. 171406 for the reasons set forth herein. The Order of Dismissal should be affirmed.

Respectfully submitted,

John F. Piercey

*Attorney for Respondent*