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BILLS AND NOTES—RIGHT OF MAKER OF PROMISSORY NOTE TO SET-OFF IN AN ACTION BY A POST-MATURITY TRANSFEREE—In an action upon a promissory note by a holder who was a transferee after maturity, the maker sought to set-off collateral claims which he held against the holder's transferor.¹ Section 58 of the Negotiable Instruments Law provides: "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."² Another statute³ of the jurisdiction allowed set-off of collateral claims against third persons in actions on negotiable instruments. The lower court refused to allow the set-off. On appeal, *held*, reversed. Section 58 of the Negotiable Instruments Law includes only defenses inherent in the note itself. However, it is not exclusive and does not prevent the pleading of set-off if authorized by other statutes. *Turkenkoph v. Te Beest*, 55 N.M. 279, 232 P. (2d) 684 (1951).

Set-off was unknown to either the common law or the law merchant.⁴ Therefore, in the absence of statute, set-off is not available in an action by a post-maturity transferee.⁵ It seems to be universally agreed that the Negotiable Instruments Law does not affect the question of set-off in an action between the original parties to the note,⁶ but will be applicable in actions between the maker and a subsequent holder.⁷ Of course, under section 57 of the Negotiable Instruments Law,⁸ set-off is not available against a holder in due course. However,

¹ The holder's assignor had also been a transferee after maturity.

² N.M. Stat. Ann. (1941) §53-158.

³ *Id.*, §19-412.

⁴ Principal case at 686.

⁵ BIGELOW, *BILLS, NOTES AND CHECKS*, 3d ed., §551 (1928).

⁶ BRITTON, *BILLS AND NOTES* §153 (1943).

⁷ *Ibid.*

⁸ "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

since the enactment of the Negotiable Instruments Law, there has been a conflict as to whether "defenses" made available in an action by a post-maturity transferee⁹ under section 58 includes only technical defenses inherent in the instrument,¹⁰ or whether it includes both technical defenses and set-offs. The question has seldom been discussed in the decisions.¹¹ The leading case of *Stegal v. Union Bank & Federal Trust Co.*¹² and the principal case are representative of the almost unanimous view¹³ that "defenses" as used in section 58 means only technical defenses inherent in the instrument but that this section does not exclude set-off if it would be otherwise available under other statutes. However, as pointed out in the principal case,¹⁴ there are at least four basic types of set-off statutes,¹⁵ only one of which allows claims against the transferor of the present holder to be used as a set-off in an action upon a negotiable instrument by a post-maturity transferee. Therefore, if the applicable statute is limited to claims against the present holder, or entirely prohibits set-off in actions on negotiable instruments, set-off will not be available even in jurisdictions following the view of the principal case.¹⁶ On the other hand, a few courts have held that section 58 does include set-offs.¹⁷ Thus, if there is no independent set-off statute which is applicable, section 58 may well give new rights to the maker of a negotiable instrument. However, in those instances where it has been held that "defenses" includes set-off and is not limited to technical defenses, it is sometimes found that the set-off statute itself was broad enough to include actions by post-maturity transferees of negotiable instruments even before the question arose under the Negotiable Instruments Law. Thus, in such a jurisdiction, it will most likely make little difference, as to the end result, which view is followed with respect to section 58.¹⁸ However, it is felt that the majority view followed in the principal case is more sound because con-

⁹ This note deals only with the right of set-off in an action by a holder who has taken the instrument after maturity, but who is assumed to meet the requirements of a holder in due course in other respects.

¹⁰ Payment is the most common of such defenses.

¹¹ 95 A.L.R. 607 (1935).

¹² 163 Va. 417, 176 S.E. 438 (1934).

¹³ Note 6 supra.

¹⁴ At 686.

¹⁵ The four general types may be summarized generally as follows: (1) Available only in favor of the defendant against the plaintiff and only when the claim arose out of contract or the transaction set out in the complaint. (2) Available only in favor of the defendant against the plaintiff, but may have arisen out of collateral transactions. (3) Same as (2) and, in addition, claims against the assignor of a chose in action may be used as a set-off against the assignee but negotiable instruments are excluded. (4) Same as (3) and, in addition, includes negotiable instruments except those transferred in good faith for value before maturity.

¹⁶ This was the result in the *Stegal* case, supra note 12.

¹⁷ *Litcher v. North City Trust Co.*, 111 Pa. Super. 1, 169 A. 409 (1933); *Smith v. Fulton*, 51 Ohio App. 12, 199 N.E. 218 (1935).

¹⁸ *Smith v. Fulton*, supra note 17. See note in 2 OHIO STATE L.J. 173 (1936).

sistent with the purpose of the drafters of the Negotiable Instruments Law merely to codify the previously existing law.¹⁹

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¹⁹ "Upon an examination of the statutes of the several states existing at the time the Negotiable Instruments Law was drafted, it will be seen that if section 58 be construed to apply to technical defenses, and to leave negotiable instruments negotiated after maturity subject to set-offs against prior parties or not as the local statutes may provide, the effect would be to leave the law on the subject just where it was under the Law Merchant, as modified by the local statutes of set-off. The purpose of the Negotiable Instruments Law was to codify and make certain and uniform the rules of the Law Merchant, and this meaning accords with that purpose." *Stegal v. Union Bank & Federal Trust Co.*, 163 Va. 417 at 459, 176 S.E. 438 (1934).