An Analytical Study of the Last Clause of Section 59 in the Light of Section 88 of the Negotiable Instruments Law

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INTRODUCTION

A. *History and Preliminary Considerations.*

ACT No. 2031 of the Philippine Legislature, entitled "The Negotiable Instruments Law", is patterned after the draft of a bill codifying the law of negotiable instruments, prepared under the auspices of the National Conference of State Boards of Commissioners for Promoting Uniformity of Legislation in the United States and approved by the Conference of 1896 for submission to the Legislatures of the various States. This draft in turn is modelled upon the English Bills of Exchange Act of 1882 and is in substance a codification of the principles of the Common Law governing negotiable instruments. (Campbell vs. Fourth National Bank, 137 Ky. 555; 126 S. W. 114). It was adopted in the Philippines on February 3, 1911, upon the recommendation of the Code Committee.

The adoption in recent years of the Negotiable Instruments Law by so many of the States has been in response to the general desire for uniformity in respect to commercial papers.

One of the main purpose of the Commissioners in codifying the law on negotiable instruments was to settle the conflicts and remove ambiguities existing in this particular branch of the law merchant and the common law. In spite of their efforts, however, they have not entirely succeeded in settling all the discrepancies. Immediately after the completion and promulgation of the Uniform Negotiable Instruments Law, criticisms and attacks were made at the codification from respectable authorities. The most outspoken of these critics was Professor James Barr Ames, Dean of the Harvard Law School. In his "Comments and Criticisms Upon the Negotiable Instruments", published in volume 14 Harvard Law Review 241, he said: "The friends of codification who chance to read the following pages may become convinced that there are serious defects of commission and omission in the new Code". A critical inspection discloses that the law is very far from being a scientific analysis of the subject. (R.C.L. p. 855.)

STATEMENT OF THE PROBLEM

The subject of this thesis is one of the ambiguities of the Negotiable Instruments Law. Section 59 of the said law provides:

"Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. BUT THE LAST MENTIONED RULE DOES NOT APPLY IN FAVOR OF

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A PARTY WHO BECAME BOUND ON THE INSTRUMENT PRIOR TO THE ACQUISITION OF SUCH DEFECTIVE TITLE."

What does the last sentence mean? What is its scope? Is it merely a rule of procedure or is it a rule of substantive law? Does it conflict with section 88 of the same law which provides:

"Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective"?

All these questions will be dealt with at length as the discussion of the problem progresses. In order to arrive at an intelligible conclusion, it is necessary to inquire into the history of the last sentence of section 59 and to know the precise meaning and scope of both sections 59 and 88. To this end, American and English cases and authorities as well as the pertinent sections of the Negotiable Instruments Law will be referred to.

SECTION 59—EXPLAINED AND ANALYZED

A. *Terms Defined*

1 What is Implicit in the Phrase "Holder in Due Course".

a. *Definition*

A holder in due course is a holder who has taken the instrument under the following conditions:

(a) That it is complete and regular upon its face;

(b) That he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact;

(c) That he took it in good faith and for value;

(d) 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. (Section 52 N. I. L.)

The words holder and purchaser assume the existence of a negotiable instrument which may be purchased and owned or held by a holder. No one can be holder of a negotiable instrument which has never had a legal existence of a negotiable instrument. (The Law of Commercial Paper—William U. Moore, p. 119).

A holder to be holder in due course must have acquired the instrument in good faith and without notice of the defenses which the maker or acceptor has against the payee. A holder is one in good faith and without notice when as a matter of fact he acted in actual good faith and without actual knowledge. (The Law of Commercial Paper—William U. Moore, pp. 115-116).

b. *Rights of holders in due course.*

In general, a holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument. (Section 51 N. I. L.) In view of the provision of section 51 of the Negotiable Instruments Law, notwithstanding the provision of the Code of Civil Procedure requiring an action to be brought in the name of the real party in interest, an indorsee for collection may sue in his own name. (Craig v. Palo Alto Stock Farm, 16 Idaho 701).

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 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. (Section 57 N. I. L.) Accordingly it becomes the recognized rule at an early time

that a due course holder of a bill or note may recover thereon, notwithstanding the existence of facts which would impeach its validity between antecedent parties. The authorities in support of this rule are innumerable. (First National Bank of Montgomery v. Slaughter, 98 Ala. 602.) So great is the protection which the law extends to the innocent holder of such paper that there are said to be but few cases in which any defense will be held available as against him in favor of the antecedent parties. (Tevis v. Young, 1 Metc. [Ky.] 197.) Real defenses, however, are good as against holders in due course. 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. (Section 58 N.I.L.)

2. *What is Meant by Defective Title.*

According to section 55 of the Negotiable Instruments Law, the title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under circumstances as amount to a fraud.

Defects and infirmities as used in this connection mean such defect as make the title voidable. What is really meant by infirmities and defects in title are equities and personal defenses; the act is not clear in this regard. (Commercial Law—Principles and Cases, Charles N. Hulvey, pp. 203-204.)

3. *Negotiation Defined.*

An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by the delivery of the instrument; if payable to order, it is negotiated by the indorsement of the holder completed by delivery. (Section 30 N.I.L.)

B. *Analysis of the First Sentence of Section Fifty-nine*

1. *Rule in the Law Merchant.*

By the rule of the law merchant, which has been incorporated in the Negotiable Instruments Law, every holder of an instrument is deemed to be *prima facie* to be a holder in due course. (Parsons v. Utica Cement Co., 82 Conn. 333.) In other words, the mere possession of a negotiable instrument by the indorsee, or by the transferee, where no indorsement is necessary, imports *prima facie* that he is the lawful owner and that he acquired it before maturity, *bona fide*, for value in the usual course of business, and without notice of any circumstance impeaching its validity. (Wyman v. Colorado National Bank, 5 Col. 30.) This presumption continues until overcome by sufficient proof. By presenting the paper the plaintiff makes a *prima facie* case, that is, a case sufficient to justify a verdict of finding for him if the defendant does not rebut it. (Atlas Bank v. Doyle, 9 R. I. 76.)

While the production of a negotiable instrument properly indorsed, is *prima facie* evidence of the holder's right to recover against the maker, yet, according to the then prevailing view the maker may compel the holder to support his *prima facie* case with further evidence, by showing a defense that would have been available against the payee. (Vosburg v.

Diefendorf, 119 N.Y. 357.) The reason for this distinction, as generally given, is that the presumption exists that a fraudulent payee would be likely to shield himself by placing the instrument in the hands of another person to sue upon it. (McNight v. Parsons, 136 Ia. 390.)

2. *Statutory Rule.*

The first sentence of section 59 is: Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. This provision is similar to section 30, subdivision (2) of the English Bills of Exchange Act of 1882 which provides:

> Every holder of a bill is prima facie deemed to be holder in due course, but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation is affected with fraud, duress, or force and fear, or illegality, the burden is shifted, unless and until the holder proves that subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.

As will be noticed, the phraseology of the first sentence of section 59 is a modification of that of the Bills of Exchange Act so as to better harmonize with the language of section 55 of the Negoable Instruments Law which is the same as section 29, subdivision (2) of the English Law. The language of the Bills of Exchange Act is "subsequent to the alleged fraud or illegality". But this is not quite correct; for the holder may be a holder in due course though the fraud or illegality was in the transfer to him provided he does not have notice of the defect in the transfer. (Beutel on Negotiable Paper — Commissioners' Note, p. 27.) According to section 59 once the plaintiff has established that he is a holder of the instrument sued upon, he is not obliged to go further and prove that he is a holder in due course, for that is presumed, unless the defendant shows that the title of any person who negotiated the instrument was defective, when the plaintiff must then prove that he or some previous transferee obtained the paper under circumstances specified in section 52. (Moon v. Simpson, 170 N.C. 335; 87 S. E. 118). After proof that it was once in the hands of a fraudulent holder, it may justly be presumed to continue in the hands of a holder of that character until the contrary be proved. (Parsons v. Utica Cement Mfg. Co., 82 Conn. 333.)

C. *Meaning and Scope of the Last Sentence of Section 59*

1. *Preliminary Considerations.*

The last sentence of section 59 provides:

> But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

This last sentence has no equivalent in the Bills of Exchange Act. As to its scope, it was held in Hilman v. Cornett, 137 Va. 200; 119 S.E. 74, that said sentence has no application to an action by the indorsee against the maker where the genuineness of the payee's indorsement is in issue. It was held that it related only to paper which was in a state of negotiability when transferred, not applying when the indorsement was forged. Only defects that make the title voidable but not void, as enumerated in section 55, are contemplated by section 59. A

cursory reference to subsection (2) of section 30 of the Bills of Exchange Act of 1882 will show that section 59 was not intended to include defects that render the instrument void. This interpretation is further supported by the ruling laid down in the case of Bowles v. Oakman, 246 Mich. 674, which held that in an action by the holder of stolen or lost instrument, the maker may defend on the ground that the plaintiff is not the owner of the instrument, does not have legal title to it, for the reason that the maker has the right to insist that he pay his obligation only once, and hence to the true owner.

The Commissioners who drafted the Uniform Negotiable Instruments Law added the last sentence as "it is necessary to qualify the previous general statement". According to them, under the last sentence, if A issues his note to B, and C gets possession of it and fraudulently negotiates it to D, the fraud of C in no wise affects A, and it is no defense to him when sued on the instrument by D. (Uniform Statutes Affecting Negotiable Paper—Beutel, p. 28.) Aside from this meager explanation the Commissioners did not give any other reason for the inclusion of the last sentence. As a result more doubts and ambiguities have been added specially when the provision in question is read in the light of section 88, *supra*. As will be indicated later the courts are not unanimous in the construction of this last sentence. Some entirely ignore it. Commentators make conjectures on mere possibilities. A brief review of the status of the law on the question before the adoption of the last sentence will prove enlightening

2. *Rule in Law Merchant.*

At common law there was a conflict of authorities as to whether a party liable on a negotiable instrument may set up personal defenses or equities of third persons. Suppose A made a note to B. C fraudulently secured the indorsement of the note to him by B. C in collusion with D transferred the note to the latter. It is clear that D is not a holder in due course. His title is defective according to section 55 of the Negotiable Instruments Law. May A, in a suit on the note by D set up as a defense the fraud of C to B? In Stewart v. Bibb County Banking and Trust Co., 58 South 273, the majority of the court held that in an action on a note it was a good plea that it was transferred by the payee to the plaintiff as collateral to a usurious debt and that before this suit was begun the defendant paid the note to the payee without knowing that it was transferred. Chief Justice Dowdell dissented and made the following remarks: "Under this state of facts we are unable to see how the fact of usury in the debt of the payee for which the note was sued was given as collateral security could be of any avail to the maker of the note." In Connecticut it was also held that where the plaintiff acquired the instrument from a prior holder, who obtained it fraudulently and without consideration from the rightful owner, the burden of proof was on the plaintiff to prove that he was a holder in due course although the defendant, the maker, had no defense of its own to the instrument. (Parson v. Utica Cement Co., 80 Conn. 58; 66 Atl. 1024.) These and other cases clearly give A in the hypothetical case a defense by setting up the fraud of C on B.

In Prouty v. Roberts, 6 Cush. (Mass.) 19, the court laid down a ruling contrary to that of the above cases. In that case the note was obtained from the payee thru fraud and false representation, of which the plaintiff had knowledge. In an action against the maker, the defendant offered to show that the note was obtained from the payee by fraud and that the plaintiff had notice. The evidence was excluded as constituting no defense. The plaintiff proved legal title to the note and the facts proposed to be proved by the defendant could afford him no ground of defense. It was no fraud upon the defendant; he was called upon to pay only what he had undertaken to pay, and payment to the plaintiff would be a good discharge. (Knights v. Putnam, 3 Peck. 184.) In a case in Michigan it was also held that in an action by the owner of a note against the maker, the defense that the indorsee who negotiated the note had been guilty of fraud upon the payee or equitable owners was not available and judgment should be for the plaintiff. (Bowles v. Oakman, 246 Mich. 674.) It is said in the text of Jayce on Defenses to Commercial Paper, 2d. Ed. sec. 247: "And it is no defense to an action on a note by an indorsee against the maker, that the payee was induced fraudulently to transfer the note to the plaintiff." In Robinson Reduction Co. v. Johnson, 10 Col. App. 135, the defendant undertook to inquire into the consideration of the assignment to the plaintiff and the court refused to admit the evidence. And in Kinney v. Kruse, 28 Wis. 183, A who held possession of a note for the payee, fraudulently transferred it. This was held to be no defense in a suit by the holder against the maker and not to change the burden of proof so as to require the plaintiff to show that he was a *bona fide* holder for value. The fraud in putting the note in circulation which will operate as a defense or change the burden of proof, must be a fraud against the defendant. The Supreme Court of Connecticut, while holding that this case is opposed to the strong current of authority, cited no case except Fulton Bank v. Phoenix Bank, 1 Hall (Superior Court of New York) 562, which case in turn cited no authority upon the point except an earlier case of Talman v. Gibson in the same volume, page 308. In this case no cases were cited on the point except Solomons v. Bank of England, 13 East 135, and Rees v. Marquis, 2 Campbell 274. The truth is that the question involved in these cases is rather one of substantive law than of the burden of proof, that is, whether a defendant who has no defense of his own, can set up collateral equities existing in favor of other persons. It is submitted by the great weight of authorities, he cannot do so. As can be seen from the cases, the reason is that one who acquires a negotiable instrument under circumstances that make his title defective under section 55, has a legal title enforceable at law. The defect only renders his title voidable at the option of the aggrieved party. Otherwise, his title is valid and good against anybody. (Caldwell v. Lawrence, 84 Ill. 161.)

3. *Rule as Codified*

The last sentence of section 59, *supra*, is said to codify the ruling in Kinney v. Kruse, *supra*, and thus settle the conflict of authority in this question. (Hilman v. Cornett, 137 Va. 200.) Thus in

Farmer's State Bank of Dickenson v. Koffer, 232 N. W. 307, decided by the Supreme Court of North Dakota in 1930, where similar set of facts were presented, the Court said:

"The last sentence of section 59 was apparently intended to codify the rule of Kinney v. Kruse to the extent at least of continuing the burden of proof on the defendant in such a case as the one at bar. Unless the last sentence is so interpreted, it is difficult if not impossible to give it any reasonable meaning. We conclude then that section 59 considered as a whole does not have the effect of shifting to the plaintiff the burden of proving that he is the holder in due course of the note on which he sues merely by showing on the part of the defendant that the title to the instrument was defective as against some intermediate indorsee."

It is interesting to note that the court uses the word "apparently". Obviously, the court is not very sure about the real meaning of the last sentence of section 59.

In spite of the alleged codification of the rule, there are still conflicts and doubts. In Parsons v. Utica Cement Co. 80 Conn. 58; 66 Atl. 1024, the court appears to have overlooked the last sentence of section 59. After the second trial of the same case, 82 Conn. 333, the court discovered that the instrument had been made and delivered prior to the taking effect of the Negotiable Instrument Law and deciding the case according to the pre-existing law, the court declined to follow Kinney v. Kruse, saying that it was opposed to the strong current of authority.

The foremost question that comes up is whether the last sentence of section 59 is a rule of substantive law or procedure. Brannan in his Commentaries on the Negotiable Instruments Law, page 42, is of the opinion that it is merely procedural. He says:

"Section 59, it is submitted, does not present a satisfactory way of dealing with the question (referring to the substantive rule regarding defenses). The first sentence of the section requires that when it is shown that the title of any person who negotiated the instrument was defective, the burden is on the holder to show that he or some person under whom he claims, acquired the title as a holder in due course which included, under sections 52 to 54, the requirement, that at the time it was negotiated to him he had no knowledge of any infirmity in the instrument or defect in the title of the person negotiating it. From this the inference seems necessary that, if he had notice, even of an equity in favor of a former holder, he could not recover against any party to the instrument—a result, it is submitted, contrary to the authorities. In order to prevent this result the last clause of section 59 was inserted, but it is insufficient for the purpose since it implies that if the defendant successfully sustains the burden of showing that the plaintiff is not a holder in due course, the action must fail, whether the equity against his ownership is in favor of the defendant or a third person. The question is one of substantive law and not merely of rules of evidence and it is to be regretted that a section regulating the burden of proof should be so drawn as to involve this question in uncertainty.—Consequently the last sentence of section 59 probably applies to the burden of proof of defense of fraud, etc., in a Prouty v. Roberts situation in jurisdictions where that case is not followed and the fraud on the payee can be set up at law. On the other hand, in jurisdictions where Prouty v. Roberts was followed at common law, the defense could not be set up so that no question of the burden of proof arose. In such jurisdictions, this substantive rule as to defenses can hardly be altered by the last sentence of section 59, which relates merely to a procedural matter. In short, this sentence leaves the problem of Prouty v. Roberts just as it was at common law, and is only useful in states which reject the authority of that decision."

The case of Voss v. Chamberlain, 139 Iowa 569, seems to regard the last clause of section 59 as procedural in character. It was held there, after citing section 59, that where one G., having the custody of a note indorsed by the defendants, the payee, wrongful-

ly pledged them to the plaintiff by way of substitution for other collateral held by the plaintiff as security for antecedent indebtedness of G., the defendants could not overcome the presumption that the plaintiff became the holder of the notes in due course without notice by showing that the title of G. was defective; and to defeat the title of the plaintiff, the defendants had the burden of proving for want of good faith on the part of the plaintiff in accepting the notes. From this case, it may be deduced that the defendants can set up the defense of fraud only they have the burden of proof. If they succeed in proving the defense the action fails.

From the literal interpretation of section 59 the opinion of Professor Brannan and the ruling in Voss v. Chamberlain *supra*, are logical conclusions. However, in the light of the law merchant, the majority of the cases on the question, the Commissioners' Note, *supra*, and the other sections of the Negotiable Instruments Law as discussed above, the most plausible interpretation of the last clause of section 59 is that it is a rule of substantive law. It is well settled that it is no defense to an action by the transferee of a negotiable instrument against the maker that the payee was induced by fraud to transfer the note to the plaintiff. The maker of a promissory note cannot in an action brought against him by the indorsee or transferee thereof, litigate questions that can properly arise only between the holder and his immediate indorser. (Gamel v. Hynds, 34 Okl. 388; 125 Pac. Rep. 1115; Caldwell v. Lawrence, 84 Ill. 161; Robinson Reduction Co. v. Johnson, 10 Colo. App. 135.) It is clear from these authorities that the last sense of section 59 embodies a rule of substantive law. In short, the rule may be stated thus: A party who became liable on a negotiable instrument before the defect arose, may not set up as defense such defect in the title in an action by the holder irrespective of whether such holder is one in due course or not.

SECTION 88 ANALYZED

A. *Payment in Due Course.*

Having discussed the last sentence of section 59, we are now ready to inquire into its relation with section 88. To do this it becomes necessary to analyze section 88 first.

Section 88 provides:

> "Payment is made in due course when it is made at or after maturity of the instrument to the holder thereof in good faith and without notice that his title is defective."

This section requires that the person paying should do so in good faith and without notice that the title of the holder is defective. The question as to what constitutes a defective title has been discussed already. The maker of a note who pays without notice and in good faith to a fraudulent holder does so in due course. (Alexander v. Rollins, 14 No. App. 109; Loomis v. Downs, 26 Ill. App. 257.)

1. *Effect of Payment in Due Course.*

When an instrument is paid in due course it is discharged, and the contract of the parties thereto is *ipso facto* extinguished. (Comnstock v. Buckley, 141 Wis. 228; First Nat. Bank of Nashville v. McClung, 7 Lea. (Tenn.) 492.) The rule as to the payment and discharge of negotiable instruments is that the payment of the bill or

notes must be made to the rightful holder or his authorized agent. Payment in due course is valid as against other parties. (University Bank v. Tucker, 101 Ga. 104.)

Payment with knowledge that the holder has no right to receive payment is voluntary and does not discharge the note. So payment by the maker to an unknown holder or stranger who has no right to collect it, either as an agent in fact, or as a *bona fide* owner in the face of a special indorsement, for collection to a bank or other person, is made at the risk of the payer, as the possession with such indorsement is notice that none but the special indorsee or his agent is authorized either to present the note or receive the money. (Barnett v. Ringgold, 80 Ky. 289.)

EFFECT OF THE LAST SENTENCE OF SECTION 59 ON SECTION 88

A. *As a Rule of Substantive Law.*

To recapitulate, the last sentence of section 59 has two possible meanings: Either as a rule of substantive law or procedure. The writer has shown why he believes it embodies a rule of substantive law. Considered as such, the last sentence of section 59 has this effect:

If A makes a note to B and C fraudulently induces B to indorse the note to him, and then C later indorses it to D, with whom he is in collusion, A when sued by D cannot set up as defense the fraud of C even if asked by B not to pay D. Yet under section 88, if A pays D, since the former knows that the latter's title is defective, he does so at his peril. His payment is not in due course hence he is liable to a suit by B. In Drinkall v. Movius State Bank, 88 N.W. 724, the defendant issued a cashier's certificate to D who gambled and lost to one M. D indorsed to M the cashier's certificate in payment of the gambling debt. D notified the defendant before payment not to pay M on account of the defect in M's title. M presented the cashier's certificate and was paid by the defendant. It was held that M's title was defective under section 55 of the Negotiable Instruments Law. Payment to the indorsee after D notified the defendant did not constitute a defense against an action by the payee D. The defendants were held liable to pay D.

Norton in his Handbook of the Law of Bills and Notes, p. 397, made the following comments:

> "The wording of some sections of the Negotiable Instruments Law suggest the view taken in Drinkall v. Movius State Bank, *supra*, and also the view taken in Parsons v. Utica Cement Co. 82 Conn. 333, that where the transferee, obtains the instrument by fraud from the payee, this is a defense in an action by such transferee against the maker and therefore that the payment by the maker to such transferee with knowledge of such fraud is not a defense in an action by the payee."

He went on to cite sections 88, 55, 51, and 119 of the Negotiable Instruments Law. It is obvious that Mr. Norton has entirely overlooked the last sentence of section 59. It is hard to accept his theory taking into consideration section 59 and the majority of the cases.

One who holds the full legal title to a promissory note by assignment may maintain an action thereon against the maker, notwithstanding he has no beneficial interest in the proceeds. Even tho he may be under obligation to account to some third person for the entire proceeds, it is often said that in such an action the defendant cannot challenge the plaintiff's rights to maintain it. (Green v. McAuley, 70 Kansas 601.) In

no way is it a matter of the slightest concern of the debtor what arrangement between the plaintiff and the original creditor occasioned the transfer. This being true, it would be a sacrifice of substance to form to permit the defendant to defeat the action by showing a failure of consideration for the transfer, or that the plaintiff was bound to account to his assignor for a part or all of the proceeds. And even under statutes requiring actions to be brought in the name of the real party in interest, it had been held that the nominal holder of a negotiable instrument may maintain a suit thereon. (Manley v. Park, 68 Kansas 400.)

In the face of all these considerations, it is inescapable to conclude that the last sentence of section 59 modifies section 88 to the extent of the former's scope.

B. *As a Rule of Procedure.*

Viewed as a rule of procedure, the last sentence of section 59 may be harmonized with section 88. As indicated, A in the hypothetical case, *supra*, would be able to set up the defense of fraud only that he has the burden of proof. If A succeeds in proving that D knew that C acquired the instrument by fraud from B, D's action fails, and A would not be compelled to pay one whose title he knows is defective. Both sections can stand together and be given full effect without exposing any of the parties liable to any risk of being compelled to pay again or be sued for damages.

It would seem that since by interpreting the last sentence of section 59 as merely procedural it does not conflict with section 88, it should logically be given such interpretation. It is true that one fundamental rule of statutory construction is that a statute should be given such a construction as would give effect to all its parts; but this is merely an aid to construction and cannot prevail over the intention of the legislature. As seen in the previous discussion, the Commissioners intended to give the last sentence the effect of a substantive rule. This intention was also manifested in the judicial decisions immediately after the adoption of the Negotiable Instruments Law. Of course there are some conflicting authorities; but as the Kansas court very ably put it: "The application by the courts of legal principles to particular facts has not reached scientific exactness and never will. It is hardly to be expected, therefore, that the courts of the different states which have adopted the act will always agree in the construction and application of its provisions. Actual uniformity in the law of negotiable instruments will remain a dream more or less iridescent; substantial uniformity is all that can be hoped for." (Holliday State Bank v. Hoffman, 85 Kansas 71.)

Is the Person Primarily Liable Discharged Upon Payment Under Section 59?

This is the most important and practical question that arises in this thesis. The inclusion of the last sentence of section 59 created a very precarious situation for the person primarily liable on the instrument. To go back to the hypothetical case: A made a note to B. C fraudulently secured the indorsement of the note to him by B. C in collusion with D transferred the note to the latter. D sues A. B tells A not to pay D because of the latter's knowledge of the fraud. A pays D anyway. Is A's liability on the instrument discharged by such payment to

D? As we have already seen the authorities in the common law and even after the passage of the Negotiable Instruments Law are conflicting. It will be noticed that in jurisdictions where A is given the right to set up the defense of the fraud of C, his payment with knowledge of the defect to the holder will not discharge him. On the other hand, in jurisdictions where A is not allowed to set up the said defense, his payment to D will, under the same circumstances, constitute a discharge.

It is easy to see that if the last sentence of section 59 and section 88 were given full effect, the maker, drawer, or any party similarly liable as the former two, will be in constant danger of being forced to pay twice or being sued for damages. With the last sentence of section 59 considered as a rule of substantive law, it is doubtless in direct contravention with section 88. As to which should prevail it is hard to say. However, in the light of the previous discussion and the spirit that pervades the entire Negotiable Instruments Law, viz., to aid commerce, the writer reiterates his belief that the last sentence of section 59 should take precedence. As was already stated, the mere fact that a person acquires the negotiable instrument under circumstances that render his title defective under section 55, does not necessarily mean that he gets a void title. His title is voidable to do so, it remains valid and enforceable at law. The assignor or indorser of negotiable instruments must guard his own interest, where he has been induced to assign or indorse by fraud; and the maker cannot defend or set up matters of defense which only exist between the indorser and the indorsee. (Camel v. Hynds, 34 Okl. 388, 125 Pac. Rep. 1115.) If the defendant owed the debt, payment to the assignee would discharge it, and it is immaterial what as between the assignor and the assignee, the consideration, or whether there was any. (Robinson Reduction v. Johnson, 10 Colo. App. 135.) A judgment in the action would be conclusive. It makes no difference to the defendant who may have the equitable title to the instrument as he has no defence on the merits. (Bowles v. Oakman, 246 Mich. 674.)

On the strength of these authorities it is logical to conclude that A's payment to D would constitute a discharge of the former's liability on the instrument.

REMEDY AND CONCLUSION

Since the last sentence of section 59, as a substantive rule, is manifestly in conflict with section 88, it becomes imperative that the defendant be given some legal subterfuge. As it is, he is proverbially between the devil and the deep blue sea. Professor Brannan suggests a remedy:

> "The proper remedy for the defendant in such case is either to file a bill of interpleader bringing in the third party, who claims in equity, or where the procedure in the jurisdiction permits it, to make such third person a party to the action at law. If notice has been given by the defrauded owner of an instrument not to pay, the court of law may well permit the rights of such defrauded persons to be set up by the defendant by analogy to cases of bailments. A bailee is ordinarily estopped to dispute the title of his bailor and to set up the right of a third person, but where a person, claiming to be the owner of the property serves notice on the bailee, he may defend an action by the bailor, it being held that in such cases the defendant may set up the jus tertii in answer to the action. 'The bailee can set up the title of another only if he defends upon the right and title and by the authority of that person.' (Biddle v. Bond, 6 B & S 225.)"

It is interesting to note that in the American Law Institutes' restatement of the law of contracts, interpleader lies wherein an assignment is voidable. If an assignment is voidable the obligor may interplead the assignee and the person having the power of avoidance. If the latter elects to exercise his power the obligor is under no duty to the assignee. (Sec. 169.)

An examination of similar provisions in the Warehouse Receipts Act may give further aid.

"Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section, and though he delivered the goods as authorized by said subdivisions he shall be so liable, if prior to such delivery he had either:

(a) Been requested, by or on behalf of the person lawfully entiled to a right of property or possession in the goods, not to make such delivery, or

(b) Had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods." (Sec. 10.)

"If more than one person claims the title or possession of the goods, the warehouseman may, either as a defense to an action brought against him for non-delivery of the goods or as an original suit, whichever is appropriate, require all claimants to interplead." (Sec. 17.)

"If some one other than the depositor or person claiming under him has a claim to the title or possession of the goods, and the warehouseman has information of such claim, the warehouseman shall be excused from liability for refusing to deliver the goods, either to the depositor or person claiming under him or to the adverse claimant, until the warehouseman has had a reasonable time to ascertain the validity of the adverse claims or to bring legal proceedings to compel all claimants to interplead." (Sec. 18.)

"Except as provided in the two preceding sections and in sections 9 and 36, no right or title of a third person shall be a defense to an action brought by the depositor or person claiming under him against the warehouseman for failure to deliver the goods according to the terms of the receipt." (Sec. 19.)

As can be seen from the above provisions, interpleading is a form of defense. The Warehouse Receipts Act expressly provides for interpleading as a defense; whereas the Negotiable Instruments Law is silent on the point. It would appear that to allow the defendant in a suit on a negotiable instrument to set up a suit of interpleader as a defense would be to go around the provision of the last sentence of section 59, and render it meaningless and without effect. Besides, interpleading is inherently dilatory and contrary to the very aims and purposes of the Negotiable Instruments Law. If this were allowed, the currency of negotiable instruments would be greatly hampered and negotiable instruments would flow less freely in the business world. For it would be possible for evil minded persons, liable on the instrument, to bide their time and cause unnecessary delay in the settlement of their obligations by instituting suits of interpleader.

It is worthy of note that in Parsons v. Utica Cement Mfg. Co. 82 Conn. 333, decided in 1909, the court made this remark: "The legislative justification of the last sentence of section 59 would be that it tends to force the maker to interplead the third person or to take equivalent steps under the practice acts, rather than to defend the action, to which the third person is not a party."

To avoid all doubts, however, if interpleading should be accepted as a remedy, section 59 of the Negotiable Instruments Law should be amended with a saving clause after the last sentence expressly granting the "party who became bound on the instrument

prior to the acquisition of such defective title" the right to interplead the third person having the equitable interest on the instrument.

Another remedy, which the writer believes is more in keeping with the spirit of the Negotiable Instruments Law is to amend section 88 expressly subjecting it to the last sentence of section 59; that is, it should not apply to cases covered by the last sentence of section 59. By adopting this remedy a conflict between the two sections is eliminated without hampering the negotiability of negotiable instruments.

In proposing these remedies the writer does not in any manner intend them to be exclusive. So far no case squarely on the point has been brought before the Supreme Court of the Philippines. Our courts, in their infinite wisdom, may give their own version and it goes without saying that their decision would be in the last analysis that which will prevail.

The Negotiable Instruments Law is not a law created and conceived by man at one sitting. It is the product of customs and usages that have had their beginnings in the 12th or 13th century in Europe. Like any other law it should be modified and adapted to the changing times in order to be of practical use to man. Speed is the by-word in this day and age. It is particularly true in commerce. The principal purpose of the Negotiable Instruments Law is to give the holder as good a title and as complete a right to the instrument as is consistent with a fair administration of the law. If negotiable instruments are to continue to be an aid to commerce, they should be given more currency and the Negotiable Instruments Law be construed in such a manner as would encourage their more frequent use in the business world. In short, the Negotiable Instruments Law should be interpreted so as to make negotiable instruments more "negotiable."