The Defenses of Want and Failure of Consideration in Negotiable Instruments

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fall within the scope of the meaning of the word "supplies" as it is used in the Fictitious Payee Act. Thus, under the Fictitious Payee Act the agent's intent and knowledge is pertinent in determining whether the fictitious payee doctrine is applicable in the situation where the agent does nothing more than to induce the preparation and signing of the instrument.

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The Defenses of Want and Failure of Consideration in Negotiable Instruments

The defense of want asserts that no consideration ever existed for the negotiable instrument. There

44. Citizens Loan & Security Co. v. Trust Co. of Georgia, 79 Ga. App. 184, 53 S.E.2d 179 (1949); 3 VAND. L. REV. 109; Hillman v. Kropp Forge Co., 340 Ill. App. 806, 92 N.E.2d 537 (1950); Prugh, Combest and Land, Inc. v. Limwood State Bank, 241 S.W.2d 83 (Mo. App. 1951), 3 HASTINGS L.J. 58 (1951); Southall v. Columbia Nat. Bank, 244 S.W.2d 577 (Mo. App. 1951); Swift and Co. v. Bankers Trust Co., 280 N.Y. 135, 19 N.E.2d 992 (1939). In the Hillman case the court said that "the name was supplied by Lane, an employee within the meaning of the amendment, since he was an integral part of the required procedure established by defendant, which ultimately led to the issuance of the checks in question. The fact that his duties did not call upon him to prepare, execute or issue the checks in question would not take it out of the amendment." Id. at 612, 92 N.E.2d at 539.

45. For a discussion of this problem, see Boardman, Proper Construction of the so-called "Bankers' Amendment" and its Significance Respecting Forgery Claims Under Bankers' Blanket Bonds, 1950 INS. COUNSEL J. 166. It is interesting to note that the last clause of Missouri's NIL § 9(3) reads: "or was known to his employee or other agent who supplies or causes to be inserted the name of such payee." (Emphasis added.) Mo. REV. STAT. ANN. § 401.009 (1952).

1. This Comment does not include actions instituted by a maker to cancel a note on the ground of want or failure of consideration. As regards such suits, however, see Fisher v. Rice Growers' Bank, 122 Ark. 600, 184 S.W. 36 (1916).

2. "Want," "lack," and "absence" of consideration are synonymous terms. The term "absence" is used in § 28 of the Uniform Negotiable Instruments Law (hereafter referred to as the NIL). LA. R.S. 7:28 (1950). The Uniform Commercial Code in § 3-408 uses the term "want." In court opinions the terms most commonly used are "want" and "lack."

3. Under the NIL, "consideration" is defined in § 25 in terms of "value." This section provides: "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time." LA. R.S. 7:25 (1950). See also Uniform Commercial Code § 3-408.

In Robinson Lumber Co. v. Tracka & Boudreau, 134 So. 430, 431 (La. App. 1931), it was said: "A valuable consideration may, in general terms, be said to consist either in some right, interest, profit, or benefit accruing to the party who makes the contract, or some forbearance, detriment, loss, responsibility or act, or labor or service on the other side; and if either of these exist, it will furnish a sufficient valuable consideration to sustain the making or indorsing of a promissory note in favor of the payee or other holder." Citing Benner v. Van Norden, 27 La. Ann. 473 (1875).

4. First State Bank v. Radke, 51 N.D. 246, 199 N.W. 930 (1924). See also Killeen's Estate, 310 Pa. 182, 165 Atl. 34 (1932). It is to be noted that there
would be a want of consideration, for example, when a note is issued as a gift, or when the instrument is signed for the purpose of accommodating another. The defense of failure of consideration, on the other hand, admits that there was consideration for the instrument in its inception, but alleges that the consideration has wholly or partially ceased to exist. Thus, if a note is given for the purchase price of equipment, a failure of consideration occurs when the equipment subsequently proves unsatisfactory. Although some decisions loosely refer to “want” and “failure” of consideration as if they were synonymous, in some jurisdictions the distinction between the two terms produces procedural and substantive differences between these defenses.

**Availability of Want or Failure of Consideration as a Defense**

Want and failure of consideration are not defenses against a holder in due course. Under Section 28 of the Uniform Negotiable Instruments Law (NIL), the general rule is stated may be a “partial want” of consideration for a negotiable instrument. Thus in Sharp v. Sharp, 4 Ohio App. 418 (1915), a note was made for $2,000.00, which represented a $250.00 debt the maker owed the payee, and $1,750.00 as a simple gift to the payee. The court sustained the defense of a partial want of consideration urged as to the $1,750.00 gift. Want or failure of consideration is to be distinguished from the separate defense of “illegality of consideration,” which latter defense is not within the scope of this Comment. On illegality of consideration, see Maison Blanche Co. v. Putfark, 119 So. 289 (La. App. 1928).

7. For a thorough treatment of what constitutes a failure of consideration, see Note, 25 COLUM. L. REV. 83 (1925).
that want\textsuperscript{18} or failure of consideration is a matter of defense as against any person not a holder in due course.\textsuperscript{14} In this section, partial want\textsuperscript{15} and partial failure of consideration, whether or not the failure is an ascertained and liquidated amount, are made defense pro tanto.\textsuperscript{16} When Section 28 is read in conjunction with other provisions of the act,\textsuperscript{17} exceptions and qualifications are made to the availability of these defenses as against a holder for value of accommodation paper, and as against a payee or endorsee of a bill of exchange.\textsuperscript{18}

It is well settled, however, that as between maker and payee,\textsuperscript{19} drawer and drawee,\textsuperscript{20} and endorser and endorsee,\textsuperscript{21} (total or

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\item[13.] Though the NIL uses the term "absence," for the sake of uniformity the term "want" is used in this Comment. See note 2 supra.
\item[14.] This rule is in effect also stated in NIL § 58. Under the Uniform Commercial Code § 3-306, entitled "Rights of one not a holder in due course" it is provided: "Unless he has the rights of a holder in due course any person takes the instrument subject to: . . . (c) the defenses of want or failure of consideration." This language substantially tracks NIL § 28. The language used in NIL § 28 as to an "ascertained or liquidated amount, or otherwise," is omitted from the Uniform Commercial Code since the draftsmen believed it to be superfluous. See ALI, UNIFORM COMMERCIAL CODE, OFFICIAL DRAFT, TEXT AND COMMENTS EDITION 340 (1952).
\item[15.] Partial want of consideration is a defense to a suit on a negotiable instrument although the word "partial" is not expressly stated in the text of § 28. The express mention of "partial" failure of consideration in § 28 was intended to end the conflicting decisions on the right to interpose it as a defense, whether the amount was liquidated or not, but it was not intended to alter the common law as to want of consideration. The right at common law to defend on partial want of consideration was well recognized. Sharp v. Sharp, 4 Ohio App. 418 (1915).
\item[16.] Thus there is a total of four defenses, i.e., want and failure of consideration, and partial want and partial failure of consideration. For brevity, these four defenses will be referred to collectively hereafter as "the defenses of want or failure of consideration."
\item[17.] See NIL §§ 6, 24, 29, 61, 62.
\item[18.] The Orleans Court of Appeal apparently considered that there is a further exception to § 29 when the consideration for the note is a contractual undertaking of the payee. In the case of Boelte v. West, 185 So. 471 (La. App. 1939), defendant executed a note as consideration for an undertaking by a private educational institution to furnish him instruction by correspondence. In a suit to enforce payment of this note the court held that the defenses of failure or non-tender of performance of the contract to furnish instruction could not be set up even though the holder was a party to the contract from which the note arose. For adverse criticism of this case see Note, 2 LOUISIANA LAW REVIEW 189 (1939).
\item[20.] National Park Bank v. Saitta, 127 App. Div. 624, 111 N.Y. Supp. 927 (1st Dept. 1908). If the drawee accepts the bill for the accommodation of the drawer, want of consideration is a defense. See note 25 infra.
\item[21.] Kugman v. Donnell, 271 S.W. 535 (Mo. App. 1925) (want); Dittmar v. Frye, 200 Wash. 451, 98 P.2d 709 (1939) (want); State Bank v. Morrison, 85 Wash. 182, 147 Pac. 875 (1915) (want). If the endorser signs the note for the
want and failure of consideration are defenses to a suit on a negotiable instrument. It is also clear that the maker of a non-accommodation note may urge these defenses against a holder not in due course. Regardless of the capacity in which the litigants are parties to the instrument, as between an accommodation party and the accommodated party, want of consideration is a defense.

Availability of the Defenses as Against a Holder for Value of Accommodation Paper

Section 29 of the NIL provides that an accommodation party "is liable on the instrument to a holder for value notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party." This section eliminates the defenses of want of consideration when the holder for accommodation of the endorsee, want of consideration is a defense. See note 25 infra.

22. See note 16 supra.


24. NIL § 29 defines an accommodation party as "one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person." LA. R.S. 7:29 (1950). One who is paid a fee for endorsing a note is an accommodation party. Carr v. Wainwright, 43 F.2d 507 (3d Cir. 1930). See Note, 9 Texas L. Rev. 601 (1931).

A person may become an "accommodation party" even though he is indebted to the party whom he is attempting to accommodate, so long as the former signs the instrument with the understanding that it is for accommodation, and this intention is expressed to the party sought to be accommodated. Cox v. Heagy, 194 S.W. 480 (Mo. App. 1916).

It does not affect the rights of the parties, or prevent the paper from becoming accommodation paper that the accommodation party has taken security for the loan, or for the credit. Green v. McCord, 204 Ala. 356, 85 So. 750 (1920); Brown v. Volz, 90 Cal. App. 2d 793, 204 P.2d 110 (1949); Iglehart v. Todd, 203 Ind. 427, 173 N.E. 655 (1931); Warner v. Fallon Coal Mines Co., 246 Mich. 493, 224 N.W. 601 (1929).

25. Caskey v. Crawford, 134 So. 711 (La. App. 1931); Gillihan v. Assel, 186 S.D. 772 (Mo. App. 1945); Robinson v. Linn, 155 Ore. 591, 65 P.2d 669 (1937). See cases cited 5 Uniform Laws Annotated, Part I, § 29, p. 428, n. 81 (1943) (endorser signing for accommodation of payee); Green v. McCord, 204 Ala. 356, 85 So. 750 (1920) (accommodation drawer); First National Bank v. Reed, 198 Cal. 252, 244 Pac. 368 (1926) (maker signing for accommodation of payee); Gibbs v. The Lido of Worcester, 332 Mass. 426, 125 N.E.2d 406 (1954) (accommodation maker); Federal Chemical Co. v. Hitt, 155 S.W.2d 890 (Mo. App. 1941). This result is codified under the Uniform Commercial Code § 3-415(5): "An accommodation party is not liable to the party accommodated, and if he pays the instrument [he] has a right of recourse on the instrument against such party."


27. Since by the nature of accommodation paper the accommodation party receives no consideration for his signature, there could be no total or partial failure
value takes the instrument before maturity. When the holder for value takes the instrument after maturity, however, the authorities are in conflict as to whether Section 29 should be applied.

One line of authority, headed by the case of Marling v. Jones, applies Section 29 and permits the holder for value to recover on the theory that the only effect of maturity is to give constructive notice of defenses, which notice would be immaterial since under the terms of Section 29 even actual knowledge of the accommodation does not affect the holder's right to recover.

of consideration. Hence, the defense in such cases would always be one of want of consideration.

"Holder for value" in this instance is used to mean a holder with knowledge that the defendant is an accommodation party.


Under § 3-415(2) of the Uniform Commercial Code, clearer language is used: "When the instrument has been taken for value before it is due the accommodation party is liable in the capacity in which he has signed even though the taker knows of the accommodation."

For a collection of cases, see Annot., 48 A.L.R. 1280 (1927). This question has been treated in various periodicals: Notes, 24 Colun. L. Rev. 791 (1925); 28 Ill. L. Rev. 702 (1934); 38 Mich. L. Rev. 238 (1939), 13 Texas L. Rev. 501 (1940). See also Brannan, Negotiable Instruments Law 568, § 29 (Beutel's 7th ed. 1948). It is to be noted that if the instrument is transferred after maturity contrary to an express agreement between the parties, the maker could avail himself of the defenses of breach of faith under NIL § 58, and breach of conditional delivery under NIL § 16. But see Wilhoit v. Seavall, 121 Kan. 239, 246 Pac. 1013 (1926), where the transferee after maturity of accommodation paper in breach of an express agreement against such transfer was said to take the note "subject to the equities between the parties." This could include the defense of want of consideration. See textual discussion on page 472 infra.

Uniform Commercial Code § 3-415(2), quoted in the preceding footnote, is evidently drafted to deny recovery where the instrument is negotiated after maturity, regardless of what the accommodation party may have intended. However, this section merely states an affirmative that "where the instrument has been taken for value before it is due" the accommodation party is liable. Hence, it might still be argued that if in fact the accommodation party had no objections to after-maturity transfer he would be liable. The wording of UCC § 3-415(2) would seem inappropriate to cover the situation in which a demand note is signed for accommodation.

138 Wis. 82, 119 N.W. 931 (1909).

32. Charbonnet v. Reliance Finance Corp., 143 So. 104 (La. App. 1932); Mersick v. Alderman, 77 Conn. 634, 60 Atl. 109 (1905); Tabor State Bank v. Rollins, 54 S.D. 521, 223 N.W. 726 (1929). The same result is reached in Illinois by means of the following addition to § 29: "and in case a transfer after maturity was intended by the accommodating party notwithstanding such holder acquired title after maturity." See D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp., 117 F.2d 491 (Mo. Cir. 1941), affirmed 315 U.S. 447 (1941), rehearing denied, 315 U.S. 830 (1941).
Further support for this position arises from the legislative history of Section 29. Since the wording of Section 29 is substantially similar to that of Section 28 of the English Bills of Exchange Act, it has been contended that it was the intention of the draftsmen of the NIL to adopt the English rule permitting recovery. Under this reasoning Section 29 is considered as being independent of other provisions of the NIL, with the result that the holders of accommodation paper are accorded rights which are denied the holders of all other classes of negotiable instruments. Louisiana appears to be in accord with this position.

The majority view, headed by the case of *Rylee v. Wilkinson*, is that when a holder for value with knowledge of the accommodation signature takes the instrument after maturity Section 29 has no application, and the holder is thus subject to the defense of want of consideration. Under this view, accommodation paper is not accorded preeminence over other classes of negotiable instruments, and Section 29 is placed in harmony with Section 28 which provides that want of consideration is a defense as against any person not a holder in due course, and

33. The Bills of Exchange Act was enacted by Parliament in 1882. Section 28 of this act reads: "(1) An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. (2) An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not."

36. Charbonnet v. Reliance Finance Corp., 143 So. 104 (La. App. 1932). Prior to the adoption of the NIL in Louisiana in 1904, Louisiana courts uniformly held that the holder for value after maturity of an accommodation note took the instrument subject to the defense of want of consideration. Carrol v. Peters, 1 McGloin 88 (La. 1880); Stetson v. Stackhouse, 18 La. 119 (1841); Whitwell, Bond & Co. v. Crehore, 8 La. 540 (1835). In Carrol v. Peters, supra, the court recited the conflicting authorities on the issue in a well-considered opinion. In the *Charbonnet* decision, however, the opinion merely cites § 29 and makes no reference to the overwhelming authority to the contrary in other states.
37. 154 Miss. 663, 99 So. 901 (1921).
with Section 58 which declares that a negotiable instrument in the hands of a holder not in due course is subject to the same defenses as if the instrument were non-negotiable. This position appears to be supported by the better reasoning.\(^{39}\)

It has been held that Section 29 has no application, and that the defense of want of consideration is available as against a holder for value with knowledge of the accommodation character of the instrument, unless such holder not only took the instrument before maturity, but is otherwise qualified as a holder in due course.\(^{40}\) Under this view the defense of want of consideration is available if the holder for value took the accommodation instrument with notice that the instrument is tainted with fraud or other defect.\(^{41}\) Making the defense of want of consideration available under such circumstances does not appreciably enhance defendant's position since a valid defense is made out when plaintiff's knowledge of the fraud or other defect is established.\(^{42}\)

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39. Concerning this problem one writer has advocated the view that the real defense is not lack of consideration, but rather whether there has been a conditional delivery of the instrument. See Note, 24 COLUM. L. REV. 791 (1924). (For instances when there is an express agreement not to transfer the instrument after maturity, see note 30 supra.) Under this view it is presumed that when one signs as an accommodation party the fair implication is that he intends to lend his credit only until the maturity of the paper. Transfer after maturity, therefore, under NIL § 16 would be a violation of the accommodation party's conditional delivery of the paper which may be asserted as a defense against the holder not in due course. Professor Steffen criticizes this view as not covering the frequent case where the accommodation party was actually indifferent as to whether negotiation was before or after maturity. STEFFEN, CASES ON COMMERCIAL AND INVESTMENT PAPER 887 (2d ed. 1954). Such was the case in Mersick v. Alderman, 77 Conn. 634, 60 Atl. 109 (1905). In this case the court followed the minority view and held the defense of want of consideration not available against the transferee for value after maturity.

40. National City Bank v. Parr, 205 Ind. 108, 185 N.E. 904 (1933). In this regard see also Wilhoit v. Seavall, 121 Kan. 239, 246 Pac. 1013 (1926), wherein the accommodation paper was transferred after maturity in violation of an express agreement. See note 30 supra. The court held for defendant on the ground that the purchaser after maturity took the note "subject to the equities between the parties."

Massachusetts has adopted this view by amending § 29, substituting the words "holder in due course" in lieu of the words "holder for value."


42. This view is criticized in Note, 28 ILL. L. REV. 702 (1934), the writer pointing out that this view would work an injustice, for example, in cases where the accommodation paper was incomplete on its face and authority was given to the holder to complete the instrument. Under such circumstances, the fact that the instrument was incomplete on its face would disqualify the holder of due course status, and would permit the accommodation party to urge the defense of want of consideration against him even though the note was completed in accordance with the agreement.
Availability of the Defenses as Against a Payee or Endorsee of a Bill of Exchange

Before acceptance or dishonor, the drawer of a bill is secondarily liable on the instrument. If the drawee refuses to accept the bill, or otherwise dishonors the instrument, however, the drawer becomes liable to the holder of the instrument. Under such circumstances, Sections 28 and 58 of the NIL permit the drawer to assert the defenses of want and failure of consideration as against the payee, and as against an endorsee of the bill who is not a holder in due course. If the drawee accepts the bill, however, under Section 62 he promises that he will pay the instrument according to the tenor of his acceptance. Under this provision, the drawee's promise to pay is independent of any consideration which he may have received for his acceptance from the drawer. In a suit on an accepted bill, therefore, want or failure of consideration as between the drawer and drawee is not a defense as against the payee, or a holder for value. However, the drawee may avail himself of these defenses if he accepts the instrument on the express condition that the consideration between him and the drawer does not fail.

Authority exists for the proposition that where a want or failure of consideration occurs between the drawer and drawee, even though the acceptance is unconditional, the defenses of want or failure of consideration are available to the drawee as against a holder or payee who gave no consideration for his title

43. NIL § 61; LA. R.S. 7:81 (1950).
44. Ibid.
45. LA. R.S. 7:28, 7:58 (1950); Krumbhaar v. Ludeling, 3 Mart. (O.S.) 640 (La. 1815) (pre-NIL in Louisiana).
46. LA. R.S. 7:62 (1950): “The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance.”
47. Deen v. De Soto National Bank, 97 Fla. 862, 122 So. 105 (1929). See also cases in note 49 infra.
48. It is immaterial when the acceptance is made. Whether a payee or endorsee acquires the instrument before or after acceptance does not affect his right to recovery. National Park Bank v. Salitta, 127 App. Div. 624, 111 N.Y. Supp. 927 (1st Dept. 1903).
to the instrument, or whose title is based on a consideration which has failed. This position is probably based on the theory that it would be inequitable to allow a plaintiff who gave nothing for his title to enforce the instrument against the drawee who accepted the instrument on the faith that the drawer would provide the agreed consideration. If the drawee accepted the instrument for the accommodation of the drawer, it is clear that under Section 29 the drawee may set up the defense of want of consideration as against a party not a holder for value.

The Presumption of Consideration in Negotiable Instruments

In a suit on a negotiable instrument, the plaintiff is not required to allege that the paper was issued for consideration. When the plaintiff introduces the note as evidence, and the defendant admits the execution of the instrument, there arises a presumption that the instrument was issued for a valuable consideration. This presumption stems from Section 24 of the NIL, which provides that “every negotiable instrument is

52. NIL § 29; LA. R.S. 7:29 (1950): “An accommodation party is one who has signed the instrument as . . . . acceptor . . . . , without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.”
53. Sapp v. Lifrand, 44 Ariz. 321, 36 P.2d 794 (1934); Pettay v. Cavin, 59 Ohio App. 531, 18 N.E.2d 996 (1936). In his petition, the plaintiff would, however, recite the contents of the note, and allege that the defendant signed the instrument. See LA. CODE OF PRACTICE arts. 324-326 (1870).
54. Bevis v. Alexander, 88 So.2d 398 (La. App. 1956); Iaccuzzo v. Fabregas, 12 So.2d 16 (La. App. 1943); Iaccuzzo v. Cole, 135 So. 750 (La. App. 1931); Huntington v. Shute, 180 Mass. 371, 62 N.E. 380 (1902). Under Louisiana's practice, if the plaintiff alleges in his petition that the defendant signed the instrument, the defendant is bound to acknowledge expressly or deny his signature in his answer. LA. CODE OF PRACTICE art. 324 (1870); LA. CIVIL CODE art. 2244 (1870). If the defendant denies the signature, then the plaintiff must prove that it is authentic. LA. CODE OF PRACTICE art. 325 (1870). Article 326 then provides that after the defendant has denied that the signature is his, if the plaintiff proves the genuineness of the signature, the defendant is barred from every other defense, and judgment will be given against defendant without further proceedings. Under this procedure, the genuineness of defendant's signature will usually be admitted before the case comes to trial.
55. LA. R.S. 7:24 (1950). Under the Uniform Commercial Code, value is divorced from consideration in UCC § 3-303. Under the UCC consideration is important only on the question of whether the obligation of a party can be enforced against him. See ALI, UNIFORM COMMERCIAL CODE, OFFICIAL DRAFT, TEXT AND COMMENTS EDITION 329 (1952). NIL § 24 is generally replaced by UCC § 3-307 relating to the burden of establishing signatures and defenses, which provides in part: “(1) Unless specifically denied in the pleadings, each signature on an instrument is admitted . . . . (2) When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense.” Thus under the provisions of this section, in the absence of a defense, any holder is entitled to recover and there is no occasion to resort
deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon [is deemed prima facie] to have become a party thereto for value.\(^5\)

This statutory presumption of consideration is a rebuttable presumption of fact extending to any fact which, under the circumstances of the parties, might reasonably supply a consideration.\(^6\)

The presence of the words “value received” on the face of the instrument,\(^7\) or the fact that the instrument is under seal,\(^8\) does not affect this presumption. The suit having proceeded thus far, the plaintiff is said to have established a prima facie case for recovery on the instrument.\(^9\)


58. The presence of the words “value received” on the face of the instrument of itself is a prima facie acknowledgment or admission by the makers that a sufficient consideration was received. Hance Hardware Co. v. Howard, 1 Terry 209, 8 A.2d 30 (Del. 1939); Tremont Trust Co. v. Brand, 244 Mass. 421, 138 N.E. 564 (1923); In re Dashnau’s Estate, 194 Misc. 156, 88 N.Y.S.2d 13 (Sur. Ct. 1948); Blanshan v. Russell, 32 App. Div. 103, 52 N.Y. Supp. 963 (3d Dept. 1898). See other cases cited in 5 UNIFORM LAWS ANNOTATED, Part I, § 24, p. 274, n. 41 (1943). The practical effect of the inclusion of these words on the face of the instrument is to effect an “additional presumption" that the note was issued for a valuable consideration. Both the statutory presumption and the “additional presumption” are rebuttable presumptions, and thus any evidence sufficient to overcome the statutory presumption will likewise overcome the “additional presumption” arising from the inclusion of the words “value received” on the face of the instrument. The omission of the words “value received” does not impair an instrument or weaken the statutory presumption that it was given for value. Roux v. Morey, 128 Me. 428, 148 Atl. 406 (1930); McLeod v. Hunter, 29 Misc. 558, 61 N.Y. Supp. 73 (Sup. Ct. 1899).

59. Under NIL § 6(4) it is provided that: “The validity and negotiable character of an instrument are not affected by the fact that . . . [it] bears a seal." LA. R.S. 7:6(4) (1950). Under this section the states which have considered the question have held that the seal simply creates a second rebuttable presumption of consideration and does not affect the availability of want of consideration as a defense. As in the case where “value received” is placed on the face of the instrument, any evidence sufficient to overcome the statutory presumption will likewise overcome this additional presumption arising from the seal. Peay v. General Securities Corp., 205 Ga. 82, 63 S.E.2d 149 (1951); Trustees of Jesse Parker Williams Hospital v. Nibet, 189 Ga. 807, 7 S.E.2d 737 (1940); Citizens National Bank v. Custis, 153 Md. 255, 138 Atl. 261 (1927); Mills v. Bonin, 239 N.C. 498, 80 S.E.2d 365 (1954).

Under § 3-113 of the Uniform Commercial Code it is provided that “an instrument otherwise negotiable is within this article even though it is under a seal.” This is a restatement of the rule obtaining under the NIL.

Though the authorities are in conflict on the point, some courts hold that, if the plaintiff is not content to rest on this presumption of consideration, but instead introduces evidence toward establishing a consideration, he thereby waives his right to rely on the presumption and can avail himself only of the evidence which he has adduced.61

Pleadings, and Proof Required to Establish the Defenses

The NIL does not prescribe rules of procedure under which the defenses of want and failure of consideration are to be established. The procedure required to establish these defenses varies among the jurisdictions.

Pleadings. In Louisiana the defense sought to be established should be specially pleaded.62 One Louisiana court, however, considered a defense of failure of consideration, although it was not clearly pleaded in the answer, when the allegations made in the answer suggested that failure of consideration was the ground on which defendant resisted plaintiff’s demand.63 Although the plea of “want or failure” of consideration appears to be acceptable to the courts,64 care should be taken to insure that the defense is properly named.65 Under a plea of want of consideration, defendant need not allege the circumstances under which the instrument is given.66 When a failure of consideration is pleaded, however, defendant must allege the time, place, and circumstances of such failure.67 Under the proper plead-

Collateral Liquidation v. Manning, 287 Mich. 568, 283 N.W. 691 (1939); In re Wood’s Estate, 229 Mich. 635, 1 N.W.2d 19 (1941).


65. Apparently the defendant need plead either “want” or “failure” of consideration, and need not specify whether it is “total” or “partial.”


ings, if the plaintiff is subject to the defense of want or failure of consideration, parol evidence is admissible to establish the defense.68

Burden of proof. Prior to the adoption of the NIL, many jurisdictions considered the defenses of want and failure of consideration as being so dissimilar in nature that the burden of proving want of consideration and that of proving failure of consideration were placed on different parties.69 Under the NIL, however, it is generally held that inasmuch as Section 28 treats “failure” and “want” of consideration in the same clause, and makes both matters of defense, it was the intention of the framers to abolish the distinctions regarding the burden of proof, and to place both defenses on the same plane.70

The various jurisdictions are not in accord on the question of whether plaintiff or defendant bears the ultimate burden of proving by a preponderance of the evidence his position on the issue of the presence of consideration. This burden is sometimes called the “burden of persuasion.”71 The overwhelming weight of authority places the burden of persuasion on defendant to establish his defense of want or failure of consideration.72

68. Goldsmith v. Parsons, 182 La. 122, 161 So. 175 (1935); Balknap Hardware & Mfg. Co. v. Hearn, 179 La. 908, 155 So. 396 (1934); Robichaux v. Block, 144 La. 859, 81 So. 371 (1919). Parol evidence is admissible to show whether a party signed for accommodation and to show who was accommodated thereby. Palmer v. Oscar Dowling Food Products, 174 La. 923, 142 So. 127 (1932); Davenport & Harris Undertaking Co. v. Roberson, 219 Ala. 206, 121 So. 793 (1929); Jeffrey v. Jeffrey, 157 Miss. 187, 127 So. 296 (1930); Haddock Blanchard & Co. v. Haddock, 192 N.Y. 499, 85 N.E. 682 (1908).

69. Many courts placed the burden of proving the issue by a preponderance of the evidence on plaintiff when want of consideration was pleaded, and on defendant when the defense was failure of consideration. For example, see the following Massachusetts cases: Jennison v. Stafford, 1 Cush 168, 48 Am. Dec. 594 (1848) (failure); Delano v. Bartlett, 6 Cush 364 (1850) (want). For a collection of cases, see Annot., 35 A.L.R. 1370, 1376, 1395 (1925).


72. Due to the dual sense in which “burden of proof” is used, it is often difficult to determine when the court is speaking of the “burden of persuasion,” or the “duty of producing evidence.” See note 82 infra. The following cases placed the burden of persuasion on defendant: Porter v. Porter, 224 Ala. 182, 12 So.2d 186 (1943); Lackey v. Thomas, 26 Ala. App. 65, 153 So. 287 (1933), reversed on other grounds, 228 Ala. 106, 163 So. 289 (1934) (failure); Chernov v. Sandell, 68 Ariz. 327, 206 P.2d 348 (1949) (want and failure) (semble);
This view is based on the premise that under NIL Section 28, want and failure of consideration are intended to be affirmative defenses which must be pleaded and proved by the defendant. This appears to be a sound position. In these jurisdictions where


Effect of action being brought by endorsee not a holder in due course. In all states except Florida, the allocation of the burden of persuasion appears generally to be unaffected by the fact that the action is brought by an endorsee. See White v. Camp, 1 Fla. 109 (1846).

73. See note 70 supra. It was pointed out in First State Bank v. Radke, 51 N.D. 199, 199 N.W. 930 (1924) that Sections 24 and 28 contain no provision similar to that found in Section 59, which puts the burden upon the payee or holder in cases where evidence introduced tends to show a want or failure of consideration. It was the court’s position that the omission of this express provision was not accidental, but was the deliberate intent of the framers of the NIL to cast upon the maker the duty of proving by a preponderance of the evidence the defenses of want and failure of consideration.
the burden of persuasion is placed on defendant, if the defense urged is want of consideration, defendant must prove the absence of all elements which in the contemplation of law could constitute a sufficient consideration.\(^7\) Consideration may exist in many forms, and proof of the absence of one kind of consideration does not necessarily disprove the presence of another kind. When the defense urged is failure of consideration, however, defendant need prove only the identity and subsequent failure of the consideration intended to support the instrument.\(^7\)

A minority view in effect takes the position that the NIL does not regulate the procedural matter of allocating the burden of proving want or failure of consideration, with the result that in these jurisdictions the burden of persuasion is placed according to precedent, or by the effect of special statutes.\(^7\) Louisiana is a member of this minority position, and places the burden


\(^7\) Florida: Burden of persuasion in defense of failure of consideration is on plaintiff under a Florida statute. Towles v. Azar, 112 Fla. 405, 150 So. 734 (1933). But if an endorsee is suing on the note, the burden rests on defendant. See note \(^7\) supra. No Florida cases were found concerning the defense of want of consideration. \textit{Iowa}: In defense of want of consideration, plaintiff bears burden of persuasion. \textit{In re} Custer's Estate, 229 Iowa 1061, 295 N.W. 848 (1941).

\(^7\) But, when failure of consideration is pleaded, it appears that the defendant bears the burden of persuasion. First Presbyterian Church of Mt. Vernon v. Dennis, 173 Iowa 1932, 161 N.W. 183 (1917) (\textit{semblie}. \textit{Louisiana}: As will more fully appear below, when either of these defenses are pleaded Louisiana places the burden of persuasion on plaintiff to prove the existence of consideration. See notes \(^7\) and \(^7\) infra. \textit{North Carolina}: Plaintiff bears the burden of persuasion when the defense is want of consideration. Stein v. Levins, 205 N.C. 302, 171 S.E. 96 (1933). No cases were found involving failure of consideration. \textit{Ohio}: Plaintiff bears burden of persuasion under a Florida statute. Towles v. Azar, 112 Fla. 405, 150 So. 734 (1933). But if an endorsee is suing on the note, the burden rests on defendant. See note \(^7\) supra. No Florida cases were found concerning the defense of want of consideration. \textit{Iowa}: In defense of want of consideration, plaintiff bears burden of persuasion. \textit{In re} Kennedy's Estate, 82 Ohio App. 359, 80 N.E.2d 810 (1948). But when the defense is failure of consideration, the defendant bears the burden of proof. Bear v. Bear, 29 Ohio App. 272, 162 N.E. 711 (1928). \textit{But see} Note, 18 U. CIN. L. REV. 219 (1949), to the effect that in light of \textit{Darby} v. Chambers, 70 Ohio App. 287, 46 N.E.2d 302 (1942) (decided prior to \textit{In re Kennedy's Estate}) Ohio may have no compelling authority as concerns the burden of persuasion in the defense of want of consideration. \textit{New York}: In defense of want of consideration, plaintiff bears burden of persuasion. Bay Parkway National Bank v. Shalom, 146 Misc. 431, 261 N.Y. Supp. 347 (Spec. term 1932). But defendant bears burden of persuasion when the defense is failure of consideration. Bentley, Settle Co. v. Brinkman, 42 N.Y.S.2d 194 (Sup. Ct. 1948). \textit{Rhode Island}: Plaintiff bears the burden of persuasion when defense is want of consideration. Notarianni v. Di Muccio, 58 R.I. 504, 193 Atl. 617 (1937). Burden of persuasion rests on defendant when failure of consideration is pleaded. Sixth St. Realty Co. v. Horowitz, 50 R.I. 446, 148 Atl. 597 (1930). No cases specifically covering the burden of persuasion were found for South Carolina, New Mexico, Utah, West Virginia, and Wyoming.
of persuasion on plaintiff in both the defenses of want77 and failure78 of consideration.79

It appears that the allocation of the burden of persuasion is unaffected by the fact that the instrument recites on its face that it was given "for value received,"80 It is unsettled whether the allocation of the burden of persuasion is affected if plaintiff unnecessarily alleges a consideration.81

Although the procedure to establish the defenses of want and failure of consideration is complex in jurisdictions in which suits on negotiable instruments are tried before a jury,82 in


79. Although many Louisiana opinions on the subject are not sufficiently descriptive of the case to determine whether the court is speaking of the burden of persuasion or the duty to overcome the statutory presumption of consideration, it would appear that on several occasions the courts have placed the burden of persuasion on the defendant. See Gaddis v. Brown, 1 So.2d 845 (La. App. 1941) (want); Gillon v. Miller, 130 So. 672 (La. App. 1930) (failure); Maison Blanche Co. v. Putfark, 119 So. 289 (La. App. 1928) (failure). In Daniel v. Hernandez, 173 So. 482, 484 (La. App. 1937), the court held "a plea of want or failure of consideration in an action on a promissory note, is one of confession and avoidance and . . . the burden of proof is upon the maker of the note." The defense of failure of consideration was characterized in Reconstruction Finance Corp. v. Hutchinson, 1 So.2d 423, 425 (La. App. 1941) as being "an affirmative and special defense [and being so] the burden of proof rested on the defendant to support it." Despite these cases it is well settled in Louisiana today that the burden rests on plaintiff.

80. All cases found which expressly considered the effect of the words "value received" held that these words had no effect on the burden of persuasion. See Best v. Rocky Mt. National Bank, 37 Colo. 149, 85 Pac. 1124 (1906); Huntington v. Shute, 106 Mass. 371, 62 N.E. 380 (1902); In re Wood's Estate, 299 Mich. 635, 1 N.W.2d 19 (1941); Chapman v. First National Bank, 275 S.W. 498 (Tex. Civ. App. 1924).


82. This complexity arises from the interdependent procedural rules regarding submission of a case to the jury, the awarding of a non-suit, and the direction of verdicts, which accompany trial by jury. In addition to this, there is confusion existing as to the respective responsibilities of plaintiff and defendant in establishing a defense of want or failure of consideration. This confusion has resulted from the indiscriminate use of the term "burden of proof" by many courts to connote two different legal concepts of evidence— the concept of the "duty of producing evidence," and that of "the burden of persuasion." The duty of producing evidence means the procedural duty of adducing evidence sufficient to take the case to the jury. The burden of persuasion means the ultimate burden of convincing the jury by a preponderance of the evidence. The loci of these two burdens were expressed
Louisiana, where juries are rarely used in such cases, the procedure is relatively simple. The burden of persuasion, which Louisiana places on the plaintiff, never shifts, but remains on plaintiff throughout the trial. As previously indicated, when plaintiff has availed himself of the statutory presumption of consideration under Section 24, a prima facie case for recovery on the instrument is established. If defendant fails to introduce evidence of the alleged want or failure of consideration, or if

in Downs v. Horton, 287 Mo. 414, 432, 230 S.W. 103, 109 (1921) as follows: "The burden of proof, in the sense of the duty of producing evidence . . . passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of the evidence . . . never shifts during the course of the trial." See also In re Kennedy's Estate, 82 Ohio App. 359, 80 N.E.2d 810 (1948). As the defendant is the proponent of the defense of want or failure of consideration he first bears the "burden of producing evidence." When the defendant has offered evidence sufficient for the court to submit the case to the jury over a motion by the plaintiff for a directed verdict, the defendant is said to have made a prima facie defense. Evidence sufficient to take the case to the jury is that evidence from which reasonable men could conclude that the claims of a party are true—at this stage of the trial, that the defendant's claim of a want or failure of consideration is true. To avoid a directed verdict under these circumstances, plaintiff would have to offset the defendant's prima facie defense by adducing evidence from which reasonable men could conclude that a valid consideration exists for the instrument. In this situation it is sometimes said that the "burden of producing evidence" shifted to the plaintiff. If the plaintiff fails to meet this burden, then the defendant is entitled to a directed verdict maintaining his defense. If on the other hand, the plaintiff meets the burden of producing evidence, and reasonable men could conclude (but would not be compelled to conclude) that consideration exists for the instrument, then there is an issue of fact for submission to the jury under an appropriate instruction as to which party bears the "burden of persuasion." See, generally, McCormick, The Law of Evidence §§ 306, 307 (1955); 9 Wigmore, Evidence §§ 2485, 2487 (3d ed. 1940).

83. In Louisiana, under Article 494 of the Louisiana Code of Practice of 1870, jury trials are permitted in suits on negotiable instruments where the defendant makes an oath that there was a want or failure of consideration for the instrument. As a practical matter, since the appellate courts of Louisiana may review findings of fact as well as findings of law, suits on negotiable instruments are almost never tried by a jury. Relatively speaking, therefore, the burden of proof in Louisiana is simple as compared to the burden in states where trial is customarily by jury.

84. It is generally accepted that the "burden of persuasion" does not shift. Clapper v. Lakin, 348 Mo. 710, 123 S.W.2d 27 (1938); Downs v. Horton, 287 Mo. 414, 230 S.W. 103 (1921); Fitzsimons v. Frey, 153 Neb. 124, 43 N.W.2d 531 (1950); In re Atkinson's Will, 225 N.C. 526, 35 S.E.2d 638 (1945). The writers are in general agreement: McCormick, The Law of Evidence § 307 (1954); McKelvey, The Law of Evidence § 47 (1944); 9 Wigmore, Evidence § 2489 (3d ed. 1940).

85. There is some academic disagreement on the question of whether the burden of persuasion is allocated from the inception of the suit, or whether it does not come into play until the end of the proofs. Wigmore and McKelvey take the former position. 9 Wigmore, Evidence § 2489 (3d ed. 1940); McKelvey, The Law of Evidence § 47 (1944). This would seem to be the better position. McCormick, however, contends that the burden of persuasion does not come into play until the end of the proofs, until the judge charges the jury, or in a judge-tried case, until he finds himself in doubt on the facts. McCormick, The Law of Evidence § 307 (1954).

86. Jackson v. Kelly, 179 La. 757, 155 So. 15 (1934); Maison Blanche Co. v.
the evidence which he adduces is insufficient to overcome plaintiff's statutory presumption, defendant's plea of want or failure of consideration will be rejected, and judgment will be given for plaintiff. Under these circumstances plaintiff's statutory presumption of consideration has sufficient probative value to meet the burden of persuasion and entitle plaintiff to a judgment. In order to overcome plaintiff's presumption of consideration, defendant must do more than merely deny the existence of consideration; he must introduce evidence, the minimum effect of which is to "cast doubt or suspicion on the reality of a consideration." This rule is not affected by the fact that under the circumstances any evidence which could show a want or failure of consideration is peculiarly within the knowledge of plaintiff. If defendant successfully overcomes plaintiff's presumption of consideration, the presumption and its artificial probative value are destroyed, and plaintiff is un-


Note signed after execution and delivery by additional maker or by endorsee. In order to rebut the statutory presumption of consideration for the signature of an additional maker or endorsee who signed the instrument after its execution and delivery, evidence must be presented which negates any promise by maker to payee at or before delivery of the instrument that the instrument would be signed by such additional maker or by such endorsee. Dittmar v. Frye, 200 Wash. 451, 93 P.2d 709 (1939). See Annot., 124 A.L.R. 717 (1940).
91. The weight of authority is that once a presumption of fact has been overcome, the presumption ceases to exist and has no evidentiary value. This position was taken in Nicholson v. Neary, 77 Wash. 294, 137 Pac. 492 (1914) in a case involving the presumption of consideration for a negotiable instrument. Contra, Bevis v. Alexander, 88 So. 2d 1956 (La. App. 1956) dictum. This case appears to be out of line with the accepted view. For a collection of cases see 95 A.L.R. 878 (1935). 9 Wigmore, EVIDENCE § 2491 (3d ed. 1940). Wigmore states that the falsity that a presumption which has been overcome does have evidentiary value arose through "attempting to follow the ancient Continental phraseology, which grew up under the quantitative system of evidence fixing artificial rules for the judge's measure of proof." Id. at 291. That a presumption which has been overcome has no evidentiary value is also the position of the ALI, Model Code or Evidence,
aided in his task of meeting the burden of persuasion which has rested upon him throughout the trial. To recover on the instrument, plaintiff must now introduce evidence of sufficient probative value to prove by a preponderance of the evidence that the instrument is supported by a valid consideration.

Proof of Defense of Want or Failure of Consideration as Placing Burden on Holder Under Section 59 to Prove Himself Entitled to Rights of Holder in Due Course

Under Section 59 of the NIL "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." (Emphasis added.) Section 55 sets forth the circumstances which constitute a defective title "within the meaning of this act." Want or failure of consideration, however, is not such a circumstance. Accordingly, a majority of the courts which have considered the question hold that proof by the maker of a want or failure of consideration does not operate to place the burden on the holder to prove that he or some person under

Rule 704(2) (1942), and the National Conference of Commissioners on Uniform State Laws, Uniform Rules of Evidence, Rule 14 (1953).

Some Louisiana cases indicate that when defendant overcomes the statutory presumption of consideration, "the burden of proof" then "shifts" to the plaintiff to prove consideration by a preponderance of the evidence. Bernard Bros. v. Dugas, 220 La. 181, 85 So.2d 257 (1958); Bank of Coushatta v. Debose, 10 So.2d 386 (La. App. 1942); Columbia Restaurant v. Sadnovick, 157 So. 280 (La. App. 1934); McKnight v. Cornet, 143 So. 726 (La. App. 1932). It is submitted that this is not an accurate description of the procedure under which plaintiff must prove the existence of a consideration for the instrument. As previously noted, the burden of proof in the sense of "the burden of persuasion" does not shift. See note 84 supra. It is probable that the Louisiana courts have confused the "burden of persuasion" with the plaintiff's "duty of producing evidence" when defendant has overcome the presumption of consideration. See note 82 supra.

According to the weight of authority "burden" as used in NIL § 59 means the burden of persuasion, i.e., proof by a preponderance of the evidence. See Annot., 152 A.L.R. 1331 (1944). See also Brannan, Negotiable Instruments Law 876 (Beutel's 7th ed. 1948); Comment, 80 U. Pa. L. Rev. 717 (1932).

LA. R.S. 7:59 (1950). This section continues: "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." For the law under the Uniform Commercial Code on this point, see note 98 infra.

whom he claims acquired the title as the holder in due course.97 Under this view, defendant bears the burden of proving that plaintiff is not entitled to the rights of a holder in due course. Until this is proved, it would appear that defendant cannot introduce evidence to prove a defense of want or failure of consideration.

A few courts, however, hold that proof of want or failure of consideration by the defendant will bring Section 59 into operation and require the plaintiff to bear the burden of proving that he is entitled to the rights of a holder in due course.98 Louisiana adheres to this view.99 While this view is clearly contrary to the provisions of the act, it is likely that courts adhering to this position are guided by the belief that a party who claims the special rights of a holder in due course should be required to prove his bona fide character when the obligor on the instrument proves circumstances concerning the instrument of which the holder need only have knowledge in order to be disqualified as a holder in due course. While this policy has its merits, it must be recognized as judicial legislation.


99. Credit Industrial Co. v. Jewell, 58 So. 2d 239 (La. App. 1952); Commercial Credit Corp. v. Setliff, 44 So.2d 167, 170 (La. App. 1950): "The burden is upon the holder . . . not only to show that he took the instrument in good faith for value, but also to go further and prove want of consideration on his part of the infirmity."

This is the view adopted by the Uniform Commercial Code. Under UCC § 3-307(3) proof of the defense of want or failure of consideration would operate to place the burden on the plaintiff to prove he is entitled to the rights of a holder in due course. This article provides: "After evidence of a defense has been introduced a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims was in all respects a holder in due course."

Conduct of Defendant Which Precludes Him from Asserting the Defenses

Though a defendant may be in all other respects entitled to urge the defenses of want or failure of consideration in a suit on a negotiable instrument, nevertheless certain conduct on his part will preclude him from asserting these defenses. This result may arise from public policy, or from the theories of estoppel, or waiver.

When a dispute arises over the amount owed on an open account, if the debtor executes a note for the full amount claimed by the creditor, the debtor thereby waives the defense of want of consideration to a suit brought on the instrument. Similarly, when the consideration for a note has failed or is lacking, and the maker admits his signature to a proposed purchaser of the instrument without disclosing the vice in the consideration or represents to the proposed purchaser that the instrument is valid, the maker will be estopped from asserting the defenses when the party purchases the note and later brings an action on the instrument.

One who enables bank officials to deceive bank examiners by signing a note for the accommodation of the bank, or who signs a note under an agreement that it shall not be enforced, cannot thereafter defend an action on the instrument on the ground of want of consideration. While most courts base

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100. Arkansas Fuel Co. v. Underwood, 193 S.W.2d 276 (Tex. Civ. App. 1946). The court drew an analogy to waiver of the defenses on a note when a renewal note is given. See page 486 infra.


103. In Officer v. Owens, 252 Fed. 337 (2d Cir. 1918), on a separate cause of action the maker had previously obtained judgment for damages against plaintiff, which damages were in part based on notes which plaintiff held. Held, in suit by plaintiff on the notes, maker estopped to assert defense of want of consideration.


106. It appears that this rule holds true even though the defendant was "very ignorant and ill informed of the character of the transaction." See Rinaldi v. Young, 67 App. D.C. 305, 92 F.2d 229 (1937). For a good discussion of the effect of defendant's knowledge of the nature of the transaction, see D'oench, Duhme & Co. v. Federal Deposit Insurance Corp., 117 F.2d 491 (Mo. Cir. 1941), aff'd, 315 U.S. 447 (1941), rehearing denied, 315 U.S. 830 (1941).
their decisions in these cases on the theory of estoppel, a few courts more realistically declare that they rest their decisions on public policy.\textsuperscript{107} Some courts, however, hold that even though the banking examiners are deceived, the defense of want of consideration is available to defendant if the bank remains solvent.\textsuperscript{108}

It has also been held that if a maker has knowledge of facts constituting a defense on his note, but nevertheless secures an extension of the maturity date, he thereby ratifies the instrument and waives his right to assert the defenses.\textsuperscript{109} 

**Renewal note.** It is well settled that if a maker has no actual or imputed knowledge of a want or failure of consideration for his note, the fact that he gives a renewal note in lieu of paying the original instrument does not preclude him from asserting the defense of want or failure of consideration in an action on the renewal instrument.\textsuperscript{110} Many jurisdictions hold, however, that where there is a failure of consideration on a note, the fact that the maker knows of this defect, but nevertheless gives the payee a renewal note, operates to waive\textsuperscript{111} the defense of failure of consideration on the renewal instrument.\textsuperscript{112} It appears that this rule applies not only when the original instrument remains in the hands of the payee, but also when the original note is

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\item \textsuperscript{107} Wood v. Wilhoit, 291 Ky. 175, 164 S.W.2d 478 (1942) (public policy); Mt. Vernon Trust Co. v. Oakwood Gardens, 254 App. Div. 686, 3 N.Y.S.2d 532 (2d Dept. 1938) (estoppel).
\item \textsuperscript{108} Whitesboro National Bank v. Wells, 143 Tex. 232, 184 S.W.2d 276 (1944); White v. Waddell, 42 Wyo. 274, 262 P. 1091 (1930).
\item \textsuperscript{110} Stewart v. Simon, 111 Ark. 358, 163 S.W. 1135 (1914); William Barco & Son v. Forbes, 194 N.C. 204, 139 S.E. 227 (1927). For a collection of cases, see Annot., 72 A.L.R. 600 (1931). This holding is implicit in all recent cases on the subject.
\item \textsuperscript{111} The majority of cases involving renewal notes wherein the maker is precluded from bringing a defense are based on the theory of waiver. Some decisions, however, utilize the theory of estoppel.
\end{itemize}
transferred to a holder not in due course,\textsuperscript{113} and the maker executes a renewal note in which such holder is named payee.\textsuperscript{114} It appears to be unsettled whether the rule that a defense will be waived if the maker knows of the vice when he executes a renewal note applies to the defense of want of consideration.\textsuperscript{115} Cases which have specifically considered the question hold that the maker need not have actual knowledge of the vice in the original instrument when he executes the renewal note, but that it is sufficient to constitute a waiver of the defense if the maker had knowledge of facts sufficient to put him on inquiry, or if by the exercise of ordinary diligence he could have discovered the facts constituting such defense.\textsuperscript{116}

But even though a maker has knowledge of a want or failure of consideration in his note, he will not be deemed to waive his defense if he executes a renewal note to an endorsee of the original instrument on the faith of the latter's false representation that he is a holder in due course.\textsuperscript{117} By the same token, it appears that a maker with knowledge of a want or failure of con-

\textsuperscript{113} A holder in due course who acquires knowledge of a defense the maker would have thereon against the payee does not lose his bona fide character if he later accepts a renewal of the instrument. Molsons Bank v. Berman, 224 Mich. 606, 195 N.W. 75 (1923). See Annot., 35 A.L.R. 1294 (1925).

One not a holder in due course of an original note may not acquire that character simply because he takes the renewal note before it was overdue, for good faith and value, and without any knowledge of infirmity. W. R. Grace & Co. v. Strickland, 188 N.C. 360, 124 S.E. 856 (1924). See Annot., 35 A.L.R. 1300 (1926).

\textsuperscript{114} Moore v. Wade, 174 Ark. 984, 186 S.W. 828 (1916); Farmers' and Merchants' Savings Bank v. Jones, 196 Iowa 1071, 196 N.W. 57 (1923). In First National Bank v. Brown, 134 Tex. 38, 131 S.W.2d 958 (1939), the renewal note was issued to a holder for value of accommodation paper, and the accommodation maker urged that the renewal permitted him to urge the defense of want of consideration even in the face of § 29. \textit{Held}, as the holder for value took the note in the first instance with the right to enforce the same, such holder did not lose this right by taking a renewal.


\textsuperscript{117} Moore v. Wade, 174 Ark. 984, 186 S.W. 828 (1916).
sideration in his note who, for reasons of his own, wishes to execute a renewal note without waiving his defenses, may protect against such waiver by executing a renewal instrument on the condition that he reserves the right to assert any defenses against an action on the renewal note which he might have had on the original instrument.118

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118. Weiser National Bank v. Peters, 174 Ark. 984, 298 S.W. 878 (1927) (accommodation note renewed under strict understanding that accommodation party would not be held liable on the renewal instrument). See also Rice v. Osborne, 306 Ky. 591, 208 S.W.2d 747 (1948).