



NORTH CAROLINA LAW REVIEW

Volume 32 | Number 4

Article 11

6-1-1954

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Recommended Citation

Donald R. Erb, *Negotiable Instruments -- Defenses of Lack and Failure of Consideration as Affected by Seal*, 32 N.C. L. REV. 556 (1954).
Available at: <http://scholarship.law.unc.edu/nclr/vol32/iss4/11>

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the ordinance construed excepted drug stores for the sale of "drugs, medicines, mineral waters, soft drinks, cigars and tobacco only," but the ordinance in the principal case excepted drug stores furnishing enumerated items, not *expressly* limiting them to sales of such items *only*. Whether a drug store could sell staple groceries on Sunday under the ordinance the court does not decide, and it is open to question whether the court would hold an ordinance discriminatory under such circumstances.

Ordinances such as the one considered in the *Towery* case seem to place more significance upon the name of the business than upon what business it in fact does. Where an ordinance excepts drug stores from its operation, for instance, should a store still be considered a drug store although its primary business consists of the sale of articles other than drugs and medicines? It has been stated that at the present time "a 'drug store' could mean anything from a place where 'drugs alone are sold to one where anything from an aspirin tablet to an automobile could be purchased."²² It is submitted that the better Sunday closing ordinance is one with a general closing provision and which does not except particular kinds of businesses from its operation, but rather excepts only enumerated articles or items which can be sold on Sunday.²³

CALVIN C. WALLACE

Negotiable Instruments—Defenses of Lack and Failure of Consideration as Affected by Seal

In an action on promissory notes under seal, it was held that if the defendant could show a total failure of consideration, this would be a good defense, since the presumption of consideration arising from the seal is rebuttable.¹

The origin of the seal is traceable to times when few people could write, and accordingly identified themselves by the use of a distinctive

²² See *Henderson v. Antonacci*, 62 So. 2d 5, 10 (Fla. 1952) (concurring opinion).

²³ Statutes with this type of classification have generally been upheld. *State v. Justus*, 91 Minn. 447, 98 N. W. 325 (1904); *State v. Diamond*, 56 N. D. 854, 219 N. W. 831 (1928); *People v. Zimmerman*, 48 Misc. Rep. 203, 95 N. Y. Supp. 136 (Sup. Ct. 1904).

Under such a statute, it has been said that where tobacco and candy are excepted from its operation, a large department store could open for the sale of those items, although there is doubt whether it would be economically feasible for them to do so. *State v. Grabinski*, 33 Wash. 2d 603, 206 P. 2d 1022 (1949).

Such an ordinance has been held arbitrary in permitting the sale of a can of beer on Sunday, while prohibiting the sale of a can of orange juice or coffee. *Gronlund v. Salt Lake City*, 113 Utah 284, 194 P. 2d 464 (1948).

¹ *Mills v. Bonin*, 239 N. C. 498 (1954). The distinction between *want* and *failure* of consideration should be noted. "Want of consideration embraces transactions or instances where none was intended to pass, while failure of consideration implies that a valuable consideration, moving from obligee to obligor, was contemplated." *In re Killeen's Estate*, 310 Pa. 182, 187, 165 Atl. 34, 35 (1932).

personal seal. This use of the seal as a means of identification antedated the contract theory of consideration, and when that doctrine arose, the exception of sealed instruments from its application became a part of the substantive law.²

A clear statement of this exception was made in *Walker v. Walker*,³ where in an action on a sealed promissory note, the court stated that it is "not aware of any rule of law by which a consideration is inferred from the fact of the execution of a sealed instrument. No consideration is necessary in order to give validity to a deed."⁴ The presence or absence of consideration apparently could not be inquired into, as none was necessary;⁵ therefore, lack of consideration would be no defense to an action on the note.

In several decisions subsequent to the *Walker* case the North Carolina court states that "a note under seal imports a consideration," which might mean that the seal only creates a rebuttable presumption, so that lack of consideration, once proved, would be a defense to an action on a sealed note.⁶ Regardless of what language it may use, however, the court has uniformly reached the result that lack of consideration is no defense to liability on a note under seal. It would seem that this result is against the weight of authority, which recognizes that the Uniform Negotiable Instruments Law makes lack of consideration a defense against anyone not a holder in due course in these cases.⁷ North Caro-

² BLACKSTONE, COMMENTARIES 493 (Gavit ed. 1892); HOLMES, THE COMMON LAW 273 (1881).

³ 35 N. C. 335 (1852).

⁴ *Id.* at 336.

⁵ *Ducker v. Whitson*, 112 N. C. 44, 16 S. E. 854 (1893) (notes were intended as a gift).

⁶ *Angier v. Howard*, 94 N. C. 27, 29 (1886). Similar language is used in *Cowen v. Williams*, 197 N. C. 432, 149 S. E. 396 (1929); *Moose v. Crowell*, 147 N. C. 551, 61 S. E. 524 (1908); *Ducker v. Whitson*, 112 N. C. 44, 16 S. E. 854 (1893). In *Webster v. Bailey*, 118 N. C. 193, 194, 24 S. E. 9, 10 (1896), the court states that "the law conclusively presumes that it was made upon good and sufficient consideration." *Burriss v. Starr*, 165 N. C. 657, 81 S. E. 929 (1914), quotes the accurate language of *Walker v. Walker*, 35 N. C. 335 (1852), and *Harrell v. Watson*, 63 N. C. 454 (1869), uses language similar to that in the *Walker* case. See 1 CORBIN, CONTRACTS § 252 (1950).

⁷ *St. Paul's Episcopal Church v. Fields*, 81 Conn. 870, 72 Atl. 145 (1909); *Italo-Petroleum Corp. of America v. Hannigan*, 1 Ter. 500, 14 A. 2d 401 (Del. 1940); *Citizens' Bank of Blakely v. Hall*, 179 Ga. 662, 177 S. E. 496 (1934); *Citizens' Nat. Bank v. Custis*, 153 Md. 235, 138 Atl. 261 (1927) (all decided under the NIL). *Contra*: *Shinn et al. v. Stemler*, 150 Pa. Super. 350, 45 A. 2d 242 (1946) (want of consideration is no defense, although failure of consideration is; case decided in absence of NIL).

Lack of consideration would appear to be a valid defense, however, if the action is brought in equity. The court in *Woodall v. Prevatt*, 45 N. C. 199, 201 (1853), said that "while in law a seal imports a valuable consideration which is conclusive, in equity a seal only raises a presumption of a valuable consideration which may be rebutted." See *Thomason v. Bescher*, 176 N. C. 622, 97 S. E. 654 (1918). And Dean Roscoe Pound has written, "although courts of equity are accustomed to say they will not aid a volunteer, and will not give specific performance of a contract under seal where there is no common law consideration, they enforce options under seal." Pound, *Consideration in Equity*, 13 ILL. L. REV. 667, 676 (1918).

lina cases fail to refer to the NIL in this situation and apparently treats those cases decided before its enactment in 1899 no differently from those decided afterward.⁸

The principal case concerns failure of consideration, and apparently the rule relied upon was first announced in *Farrington v. McNeill*.⁹ Without discussion or citation of authority, the court in that case simply concluded its opinion by stating that "it is true, the note in this case is under seal, which purports a consideration, but such presumption is rebuttable as between the parties thereto."¹⁰ Where the *Farrington* case has been cited by our court for this rule, it has always been in a case treated as one involving a failure of consideration, and not lack of consideration; but the statement of the rule is not so limited on its face.¹¹ Yet it is doubtful whether the rule could have any reasonable application except to a lack of consideration, for since the use of a seal "imports" a consideration at the inception of the agreement, it could hardly have any bearing on the issue of whether consideration actually bargained for

⁸ The basis for the rule in other jurisdictions is NIL § 6(4), which provides that "the validity and negotiable character of an instrument are not affected by the fact that . . . [it] bears a seal." N. C. GEN. STAT. § 25-12 (1953). This, the courts say, makes the sealed note a negotiable instrument within the NIL, and therefore subject to NIL § 24, which provides that "every negotiable instrument is deemed prima facie to have been issued for a valuable consideration," N. C. GEN. STAT. § 25-29 (1953), and also to NIL § 28, which provides that "absence or failure of consideration is a matter of defense as against any person not a holder in due course." N. C. GEN. STAT. § 25-33 (1953). See *Citizens' Nat. Bank v. Custis*, 153 Md. 235, 239, 138 Atl. 261, 263 (1927), where it is stated that the instrument is negotiable paper under the uniform act, and "by statutory conversion loses its position and quality as a specialty to the extent of both its negotiable characteristics and of its validity or legal sufficiency as a negotiable instrument."

North Carolina has always declared that a sealed note could be negotiated, *Marsh v. Brooks*, 33 N. C. 409 (1850), and therefore would seemingly need not employ N. C. GEN. STAT. § 25-12 (1953) to declare that a sealed note is negotiable; while in many other jurisdictions, before the NIL, a sealed note was a specialty (called a 'bill single'), which was non-negotiable. *Ex parte First Nat. Bank of Ozark*, 212 Ala. 274, 102 So. 371 (1924); *Brown v. Jordahl*, 32 Minn. 135, 19 N. W. 650 (1884); *McLaughlin v. Braddy*, 63 S. C. 433, 41 S. E. 523 (1901).

In *Perry v. First Citizens National Bank & Trust Co.*, 226 N. C. 667, 40 S. E. 2d 116 (1946), the court cited N. C. GEN. STAT. § 25-33 (1953) in support of its holding that a failure of consideration is a valid defense to a note under seal. The same result apparently could be reached in cases involving a lack of consideration.

⁹ 174 N. C. 420, 93 S. E. 957 (1917).

¹⁰ *Id.* at 422, 93 S. E. at 958. Compare this with the language quoted earlier from *Walker v. Walker*, 35 N. C. 335 (1852), where the court said consideration was not necessary to a sealed instrument.

¹¹ *Patterson v. Fuller*, 203 N. C. 788, 167 S. E. 74 (1932). An ideal situation was presented here for the exact definition of our status regarding lack or failure of consideration as a defense, as the defendant attempted to construe *Burris v. Starr*, 165 N. C. 651, 81 S. E. 929 (1914), a case involving a lack of consideration, so as to include a failure of consideration. The court left the situation still in doubt. *Royster v. Hancock*, 235 N. C. 110, 69 S. E. 2d 29 (1951); *Perry v. First Citizens National Bank & Trust Co.*, 226 N. C. 667, 40 S. E. 2d 116 (1946); *Lentz v. Johnson & Sons, Inc.*, 207 N. C. 614, 178 S. E. 226 (1934).

has subsequently failed.¹² However this may be, the rule that failure of consideration is a defense to an action on a sealed promissory note is in accord with the weight of authority.¹³

Although in the *Farrington* case it was expressly stated that a failure of consideration was involved, in many cases the court does not state clearly whether the problem in the particular case involves a lack or a failure of consideration; and in no case is there any discussion of the distinction between the two. Since lack of consideration is no defense, while failure of consideration may be shown in an action on a sealed note in this jurisdiction, it is felt that an express statement as to which is being dealt with is needed in each instance. Especially in *Lentz v. Johnson & Sons, Inc.*,¹⁴ is it questionable whether the court recognized the difference between a lack and a failure of consideration. There the plaintiff held notes made by the defendant's brother, and at the plaintiff's request, so as to make the situation appear better to the bank examiners, the defendant signed his name to the notes. It would seem that the parties never intended any consideration to be present, and therefore a lack of consideration would be involved, but the court nevertheless applied its rule as to failure of consideration without any discussion as to which was present.

Although most of the other jurisdictions deal with sealed promissory notes under the provisions of the NIL, and consequently treat them separately from general contracts under seal,¹⁵ there seems to be no distinction made between the treatment of notes under seal and contracts under seal in this jurisdiction.¹⁶ And just as in the case of a note

¹² Williston, speaking of contracts under seal, points out that a sharp distinction must be made between a lack and a failure of consideration since a failure of consideration is a defense to an action on the contract. 1 WILLISTON, CONTRACTS § 109 (Rev. ed., 1936). It seems this would be equally true of a note under seal.

¹³ *Citizens' Bank of Blakely v. Hall*, 179 Ga. 662, 177 S. E. 496 (1934); *Citizens' Nat. Bank v. Custis*, 153 Md. 235, 138 Atl. 261 (1927) (both decided under the NIL). *Shinn et al. v. Stemler*, 150 Pa. Super. 350, 45 A. 2d 242 (1946) (decided in absence of NIL). Although several North Carolina cases involving a failure of consideration cite N. C. GEN. STAT. § 25-33 (1953), see note 8, *supra*, apparently little reliance is placed thereon.

¹⁴ 207 N. C. 614, 178 S. E. 226 (1934).

¹⁵ *Ex parte First Nat. Bank of Ozark*, 212 Ala. 274, 102 So. 371 (1924). The court there points out that a sealed note at one time was a specialty, and even when a state statute provided that the consideration of a sealed instrument could be attacked, it had no application to sealed notes. It was not until the NIL was enacted that a sealed note was relieved of the effect of its seal. But see BLACKSTONE, COMMENTARIES 493 (Gavit ed. 1892), where it is stated that a note "is little more than an ordinary contract" between the original parties.

¹⁶ Apparently notes under seal and contracts under seal are treated interchangeably. In *Coleman v. Whisnant*, 226 N. C. 258, 37 S. E. 2d 693 (1946), the action was on a contract under seal, and to support its decision that consideration was not necessary, the court relied upon *Harrell v. Watson*, 63 N. C. 454 (1869), which involved a bond (a note under seal), and the *Harrell* case was in turn aided in its determination by the fact that a *deed* needs no consideration. *Thomason v. Bescher*, 176 N. C. 622, 97 S. E. 654 (1918), dealt with an option, but quoted from the *Harrell* case.

under seal, it appears that lack of consideration is not available as a defense to a contract under seal.¹⁷ This also remains the view, as regards contracts, in those jurisdictions which have not yet changed by statute the effect of the seal.¹⁸

Apparently North Carolina has no cases involving a failure of consideration in the case of a general contract under seal, although the same criticism made previously with respect to sealed notes is valid here also—namely, that the court does not indicate that it is aware of the distinction between a lack and a failure of consideration in these cases involving sealed instruments. In two cases¹⁹ there were recitals of mutual promises in the contracts involved, which it seems would involve a failure of consideration. Nevertheless, the court apparently considered only the issue of lack of consideration, as it was stated that under “the common law, which still obtains in this jurisdiction, instruments under seal are generally held to be good as against a plea by one of the parties of *no* consideration, because the seal imports consideration or renders it unnecessary.”²⁰ As regards other jurisdictions in the matter of failure of consideration of a contract, Professor Williston, writing on sealed instruments, states that “at the present time there is no doubt that failure of consideration would everywhere be held a defense.”²¹

In view of the desirability of having a rule that is as definite in statement and as simple of application as a rule can be, perhaps by applying our statutes on negotiable instruments to notes under seal we could at least enjoy the convenience of having only one rule to apply, whether a lack *or* a failure of consideration was involved.²² We could thereby do away as well with the burden of having first to decide whether the case concerns a lack or a failure of consideration. And as for general contracts under seal, perhaps it would not be unwise to join the majority of states which have already enacted legislation abolishing the distinction between sealed and unsealed instruments.²³

DONALD R. ERB

¹⁷ *Crotts v. Thomas*, 226 N. C. 385, 38 S. E. 2d 158 (1946); *Samonds v. Cloninger*, 189 N. C. 610, 127 S. E. 706 (1925); *Thomason v. Bescher*, 176 N. C. 622, 97 S. E. 654 (1918).

¹⁸ *Wagner v. McClay*, 306 Ill. App. 560, 138 N. E. 164 (1923); *Zirk v. Nohr*, 127 N. J. Law 217, 21 A. 2d 766 (1941); *Poelcher v. Poelcher*, 366 Pa. 3, 76 A. 2d 222 (1950); *Bandy v. Bandy*, 187 S. C. 410, 197 S. E. 396 (1938). See RESTATEMENT, CONTRACTS § 110 (1932); 1 WILLISTON, CONTRACTS § 217 (Rev. ed. 1936).

¹⁹ *Coleman v. Whisnant*, 226 N. C. 258, 37 S. E. 2d 693 (1946); *Basketeria Stores, Inc. v. Public Indemnity Company*, 204 N. C. 537, 168 S. E. 822 (1933).

²⁰ *Coleman v. Whisnant*, 226 N. C. 258, 260, 37 S. E. 2d 693, 694 (1946).

²¹ 1 WILLISTON, CONTRACTS § 109 (Rev. ed. 1936). But see *Harvey v. Ryan*, 59 W. Va. 134, 53 S. E. 7 (1906), pointing out that failure of consideration is no defense at common law, but is made so today by statute. *Contra*: *Goodwin v. Cabot Amusement Co.*, 129 Me. 36, 149 Atl. 574 (1930), where it is said the defense of failure of consideration is no more potent than that of want of consideration.

²² See statutes and cases cited note 8 *supra*.

²³ 1 WILLISTON, CONTRACTS § 218 (Rev. ed. 1936).