BILLS AND NOTES

By FRANK C. JONES*

The field of Bills and Notes, or Negotiable Instruments, occupied a relatively minor role in the agenda of the Georgia appellate courts during the period chosen for this survey. Of the six cases noted, five are of no lasting interest. The one decision of importance is discussed in detail in the latter part of this paper.

In the case of *Wofford v. Waldrip*[1] the Court of Appeals recited the well-established rule of law that one of two parties signing a promissory note may prove by parol evidence that he signed as surety rather than as a principal.[2] If this suretyship relation were established, it would not, of course, alter the liability to third persons of the principal and surety as co-makers of the notes, but would afford the surety the right to subrogate any claim recovered against him in a subsequent action against his principal.[3]

Two recent cases dealt with Section 14-305 of the Code, which provides that "Absence or failure of consideration is a matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise." In *Moore v. Allen*[4] the evidence was sufficient to establish that there was a total failure of consideration. This constituted a complete defense against the payee in a suit for the balance of a so-called "promissory note."[5] In *Morgan's Inc. v. Mons*[6] the maker also defended on the ground that there was a total failure of consideration. The evidence, however, tended to show only a partial failure and thus would not authorize a verdict for the maker. It was pointed out that where a defendant pleads that a note sued on was without consideration, the burden is on him to sustain this plea "by a preponderance of the evidence," this being so whether the defense be that of a total or partial failure. This and earlier cases clearly illustrate that Georgia sides with the majority of jurisdictions in holding that this burden placed on a defendant means the risk of non-persuasion,[7] and not a mere burden of going forward with the evidence. The defense allowed by Section 14-305 is an affirmative one.

In order for a secondary party to a negotiable instrument to be held

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1. 80 Ga. App. 562, 56 S.E. 2d 816 (1949).
2. GA. CODE ANN. § 103-306 (1946 Rev.).
3. For a good discussion of this, see Hardesty v. Young, 34 F.2d 310 (D. Minn. 1929), and cases therein cited.
4. 80 Ga. App. 784, 57 S.E.2d 511 (1950).
5. In actuality, this "note" was probably only an acknowledgement of indebtedness. As the court pointed out, however, suit would still lie on the contract.
6. 79 Ga. App. 525, 54 S.E.2d 498 (1949).
7. Gallagher v. Kiley, 115 Ga. 420, 41 S.E. 613 (1902); Barfield v. Smith, 45 Ga. App. 624, 166 S.E. 48 (1932).

liable, it is required that the holder present the instrument to the primary party for payment, that the instrument be dishonored, and that notice of such presentment and dishonor be given to each secondary party sought to be held liable.[8] *Lanier v. Waddell*[9] offers an effective illustration of a proper allegation of waiver of these requirements. In that case the payee alleged in his amended petition that the drawer had no money in the bank at the time of execution of the instrument and alleged that it was understood between them that the plaintiff would hold the check until such time as the defendant could pay. A check was used here, so the plaintiff stated, because the parties did not have a note available, this giving further support to the idea that the intention of the parties was that the drawer would be primarily liable on the instrument.[10]

McWilliams v. McWilliams,[11] in actuality, presents no "bills and notes" question, the controversy being over title to land. It does, however, present an interesting situation for application of the rule that "mere lapse of time after a debt becomes due may raise a presumption of payment." A bond for title had been executed in 1910 and, as part consideration, four promissory notes were given, the last of which was due in 1914. It was sought, in an action filed in 1946, to establish the nonpayment of the notes in order to show title in the person executing the bond for title. The evidence was held insufficient, however, to overcome the above-mentioned presumption.

The Court of Appeals' decision in the case of *Barnwell v. Hanson*[12] is one of the most important cases decided in Georgia with respect to the acceleration clause which is often contained in a promissory note, as well as in many other types of security instruments.

Defendant executed a promissory note, dated August 28, 1926, secured by a trust deed to certain realty, to the Hendersonville Real Estate Company, with six per cent interest from date, payable semi-annually, and with the principal becoming due and payable two years after date (*i.e.,* on August 28, 1928). The note provided ". . . that if the undersigned shall fail to pay the interest which may accrue thereon, or any part thereof, promptly as it becomes due . . . *then immediately upon such default in any of these respects, this note shall become instantly due and payable.*" [Italics supplied.] This suit for recovery of the principal amount of the note was filed on August 13, 1948, the plaintiff being a presumed holder in due course from the original payee of the note.

Defendant filed his plea and answer in which he admitted the execution of the note sued on, but denied that he was indebted to the plaintiff because any right of action on said note accrued more than 20 years prior to the commencement of the plaintiff's suit and was, therefore, barred by the statute of limitations on sealed instruments. Defendant alleged, in support of this contention, that he (the maker) had failed to pay the semi-annual interest due on the note on February 28, 1927, and that the

8. GA. CODE §§ 14-701, 14-801, 14-602 (1933).
9. 80 Ga.App. 713, 57 S.E.2d 240 (1950).
10. *See* GA. CODE §§ 14-713 (waiver of presentment), 14-821 (waiver of notice of dishonor) (1933).
11. 206 Ga. 493, 57 S.E.2d 599 (1950).
12. 80 Ga.App. 738, 57 S.E.2d 348 (1950).

right of action had immediately accrued on that date. The evidence confirmed this default, showing that the defendant did not make the payment due February 28, 1927, until September 1, 1927. (There were two other alleged defaults occurring shortly thereafter, and more than 20 years before filing of the suit, and payment was several months late in each case.) A judgment was rendered for the defendant in the trial court.

The immediate question thus presented was whether the default caused the entire debt to immediately mature so that the statute of limitations began running from the date of February 28, 1927. If so, did the subsequent payment to and acceptance by the holder of the past-due installment amount to a waiver of the right of the holder to insist upon the acceleration clause, and thus serve to toll the statute? Plaintiff strongly asserted this and she further relied on the fact that she, being a holder in due course, could not be defeated in her attempt to collect upon this note as she had a right to rely upon the apparent fact that the note would not mature and become payable until two years after its date. She had taken before the maturity fixed on the face of the instrument, for value, and with no notice that default had occurred earlier. Presumably, therefore, she was a holder in due course.

The Court of Appeals affirmed the lower court's holding. The court decided as follows:

(1) The acceleration clause did not render the instrument non-negotiable;[13]

(2) Upon the default in payment of the interest installment due February 28, 1927, the principal of the note became instantly due and payable because of the automatic acceleration clause, and regardless of the wishes of the original holder;

(3) The statute of limitations consequently began to run as of the date of this default;

(4) Subsequent payment by the maker of the installment, and acceptance thereof by the holder, could not amount to a waiver, and could not serve to toll the statute;

(5) Despite the fact that the plaintiff became a holder of the instrument before the maturity date fixed on the note, for value, and without notice of default, she took it, nevertheless, subject to the acceleration provision in the instrument, and by the provision was placed on inquiry to ascertain whether an earlier default had occurred.

There are two broadly different types of acceleration clauses: (a) those exercisable at the option of either the holder or maker, upon default or otherwise; and (b) those which operate automatically upon the happening of any specified act or event. The clause here was clearly within the second group. It has been held in Georgia that where a note contains

13. The question of negotiability was not seriously considered. See Cook v. Parks, 46 Ga. App. 749, 169 S.E.208 (1933), concerning an optional acceleration clause, wherein the court stated: " . . . the better, more reasonable, and more generally accepted rule as to such clauses accelerating the maturity of the instrument appears to be that any additional promise which does not in any wise impair the obligation to pay the certain amount, but merely tends to facilitate rather than impede its collection, does not affect the negotiability of the instrument. . . . "

a clause such as the one in this case, the entire debt becomes due upon default, "automatically and ipso facto, without any option on the part of the creditor to render the entire indebtedness due."[14] Closely accompanying this holding have been those cases concerning waiver of a holder's right. These decisions indicate there is little merit in the contention that subsequent payment to and acceptance by the holder of the defaulted interest payment constitutes a waiver. Where there is an optional acceleration clause, a tender, after the exercises of the option to accelerate maturity of a series of notes, is immaterial as affecting the holder's rights.[15] If there is an automatic acceleration clause then, upon default, the subsequent acceptance of partial payment would likewise not amount to a waiver, the situation being exactly the same as where there is an optional acceleration clause and where the option has been exercised.[16] These cases, however, concerned themselves with the right of the holder to insist upon the benefits of the clause, whereas the present decision allowed the maker also to take full advantage of the clause in that the statute of limitations begins to run for his benefit.

In so deciding, the court relied solely on outside authority.[17] Unquestionably there exists strong support in favor of the holding, various theories being enunciated by other courts. It has been said that the debtor has an equal right to insist upon this provision even though it was inserted for the benefit of the creditor;[18] and that such words should be given effect according to their plain import, and according to the known rules governing the construction of contracts.[19]

On the other hand, there is a strong and respectable group of courts which have refused to take this position. They have relied principally on the idea that any type of acceleration clause, be it optional or automatic, is designed for the sole benefit of the creditor, and that where the creditor has shown no inclination to treat the instrument as matured the statute

14. Tiedeman Mortgage & Finance Co. v. Carlson, 41 Ga. App. 406, 152 S.E. 909 (1930); McRae v. Federal Land Bank of Columbia, 36 Ga. App. 51, 135 S.E. 112 (1926); Guilford v. Green, 33 Ga. App. 1, 125 S.E. 80 (1924). In the *Green* case, there was no accelerating clause in any of the notes; this appeared only in the sales contract, or bond for title. The court said the installment notes and the sales contract, or bond for title, in this case constituted but one contract, thus making the accelerating clause operative upon the notes themselves.

15. Pape v. Woolford Realty Company, 35 Ga. App. 284, 134 S.E. 174. The contrary result is true in the case of an optional acceleration clause, of course, if arrears are paid and accepted prior to the holder's election. McRae v. Federal Land Bank of Columbia, *supra* note 14.

16. McRae v. Federal Land Bank of Columbia, *supra* note 14. It was further stated in that case: "The fact that after the entire indebtedness had been declared due, the holder may have offered to reinstate the contract on certain conditions, which were not complied with, would not operate to change the ruling stated."

17. The Court cited: 34 A.L.R. 901, *et seq.;* 161 A.L.R. 1212, *et seq.;* 34 AM. JURIS. 120, § 151. It is interesting to note that while American Jurisprudence takes this position, it also points out at § 152 that even under an automatic acceleration caluse, while the creditor alone cannot change the effect of the default, the parties may, by mutual agreement, treat the contract as if no default had been made (thus waiving the default).

18. First Nat. Bank v. Peck, 8 Kan. 660 (1871).

19. First Nat. Bank v. Marcher, 179 Misc. 258, 38 N.Y.S. 2d 774 (1942); Perkins v. Swain, 35 Idaho 485, 207 Pac. 585, 34 A.L.R. 894 (1922).

will commence running from the maturity date fixed on the note, and not from the date of default.[20]

Perhaps the chief argument in favor of the latter view—and particularly in favor of its application in the present case—is that of reasonableness. The case of *Hill v. Fryer*[21] represents the only instance in the past where a Georgia appellate court has been faced squarely with this question, and the presence of qualifying words to the automatic acceleration clause permitted a decision in favor of the holder on other grounds. Since the other prior decisions principally dealt with controversies between original parties, and did not involve the plea of the statute of limitations, they were not necessarily binding.

The effect of the decision undoubtedly is to hamper the commercial transfer of instruments containing the automatic provision. A prospective purchaser, because he is "put on inquiry" by the mere presence of such a clause as this, cannot be satisfied to rely on the representations of the seller but must ascertain from the maker whether a prior default, even if it be a delay in payment of only a few hours, has occurred. If so, the right of action on the instrument has already accrued, and this is so regardless of the intentions of the original parties as expressed in their conduct thereafter. It is difficult, if not impossible, for a holder to waive such a default so as to toll the statute. Nothing short of a new promise in writing, signed by the maker and addressed to the holder, will avail to prevent the statute from running.

20. This view is well summed up in Keene Five Cent Sav. Bank v. Reid, 123 Fed. 221 (8th Cir. 1903), *cert. denied* 191 U.S. 567, 24 S.Ct. 841 (1903). See also 54 C.J.S. 90-93, § 150. This work, incidentally, cites the case of Hill v. Fryer, 64 Ga. App. 507, 14 S.E.2d 135 (1941), as supporting the idea that such a provision is for the sole benefit of the creditor. The language of the clause in the *Hill* case was: " . . . [in case of any default in payment] unless excused by the board of directors [of payee] the entire balance of this note shall become immediately due and payable *on demand.*" [Italics supplied.] The court there construed the words "on demand" as necessarily having some meaning—and, if so, they must mean "that the entire indebtedness did not become due by reason of a default in the payment of one installment until demand for payment of the entire indebtedness was made on the maker." Since no such demand had been made, the court concluded that the statute did not begin to run at the date of default. See also BRITTON ON BILLS AND NOTES § 161 (Hornbook Series 1943).

21. 64 Ga. App. 507, 14 S.E.2d 135 (1941).