SECURITY TRANSACTIONS

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In the realm of legal science, it is frequently noted that certainty is essential in commercial transactions and that the giving of security is only possible when predictability has been reduced to mathematical formulae.[1] An extension of credit, regardless of the time element, involves a sufficient number of economic indeterminates without embracing the risk of collectibility by adding legal guesswork as to outcome. The need for certainty is reflected in the trend toward uniform Acts and close professional supervision in the drafting and execution of security instruments. Evidence of achievement may be found in the dearth of litigation involving such issues[2] and by the fact that procedures which reach the assets of the debtor or property pledged as security are administrative rather than judicial. In this connection it may be observed that during the survey period, a segment of time that occurs in the midst of tremendous commercial expansion, only twenty cases appeared in the appellate courts in which issues appropriate to the topic were disposed of.

SURETYSHIP

Certainty, of course, is a two-way street. Not only must the law and its application be definite but society must act accordingly. If the latter persists in acting otherwise, then the former must change. In *Dunn v. Robinson*[3] legal certainty was achieved, but the fact that the issue presented is a hardy perennial in litigation, such certainty does not accord with societal needs and demands. The petitioner sought to have a deed declared invalid on the ground that it was given as security for a debt of her husband and covered a tract of land which was a part of her separate estate. The court found little difficulty in agreeing with petitioner and in doing so it repeated several excerpts from previous cases and made a general reference to Code section 53-503. This section, which contains the sole remaining disability of coverture, provides that a wife "may not bind her separate estate by any contract of suretyship" nor "by any assumption of the debts of her husband" and that "any sale of her separate estate, made to a creditor of her husband in extinguishment of his debts, shall be absolutely void." Obviously, however, the transaction in the present case is not a "contract of suretyship," nor is it "an assumption of the husband's debts" nor is it a "sale of the wife's separate estate in extinguishment of a husband's debts." Moreover, it is not an instance in which the wife's property is made liable for the husband's debts within the limitations con-

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1. HANNA, CASES ON SECURITY 1 (1932); see generally BRANNAN, NEGOTIABLE INSTRUMENT LAW 1-109 (7th ed. Beutel, 1948); BRITTON, BILLS AND NOTES 19 (1943).
2. See Spark, *Security Transactions*, 2 MERCER L. REV. 208 (1950).
3. 208 Ga. 476, 67 S.E.2d 565 (1951).

tained in the Georgia Constitution.[4] Actually, what the courts have done is to endow the Code section with an "ever brooding spirit" which has the effect of reducing to invalidity any security which a creditor obtains when trafficking with husband and wife. Hence the certainty contained in application of the rule is in the judicial gloss which surrounds the Code section. To illustrate, not infrequently invalidity in the wife's participation is found by merely referring to the law of the state without specification.[5] The fact that it is spirit rather than text which controls may be found in the observation that these "restrictions [are] designed to protect the wife against the kicks and kisses of her husband, her conjugal leanings, the importunities of her husband's creditors, and the pliant nature of feminine character."[6]

Only rarely has the light of the spirit dimmed sufficiently to cast doubt on certainty. On at least one occasion it was held that the wife was liable on contracts of guaranty even though she could not be held as a surety.[7] But the other view has also been followed.[8] At times, when the arrangements make it appear that the debt is actually that of the wife, escape has been more difficult even though the court has shown a willingness to denominate such efforts as colorable.[9] In fact the spirit becomes defunct only where innocent third parties are concerned.[10]

It would seem that both the Code section and the spirit should be eliminated. The notion that a wife needs particular protection is compatible with earlier times, and is bolstered today only by outmoded Victorian attitudes. If she is competent to deal with both her husband and the world at large in regard to everything else, there is no reason why she should not be permitted to participate generally in security transactions.

In the second case in the field of suretyship both the result reached and the techniques and methods of the decision seem slightly awry, and in view of the fact that the case is one of first impression, the ideal of legal certainty in a local sense is not involved. In *Bank of Georgia v. Card*[11] the payee of a note sought to recover the balance due thereon from an accommodation endorser whose anomalous position permits him to be referred to as a surety. It was contended by the surety that a payment obtained by foreclosing a bill of sale executed by the maker as security for the same debt should be applied to the note and not to other claims. In deciding adversely to the surety, the court began its opinion by stringing

4. GA. CONST. Art. IV, § 5, ¶ 1. GA. CODE § 2-2801 (1948 Rev.).
5. Thompson v. Wilkinson, 9 Ga. App. 367, 71 S.E. 678 (1911).
6. Farmers and Traders Bank v. Eubanks, 2 Ga. App. 839, 59 S.E. 193 (1907).
7. Wilson Bros. v. Heard, 46 Ga. App. 497, 167 S.E. 913 (1933).
8. See n.5 *supra*.
9. Jackson v. Reeves, 156 Ga. 802, 120 S.E. 541 (1923).
10. Howard v. Simpkins, 70 Ga. 322 (1883). To these exceptions should be added the situation where a loan is made directly to the wife and the fund thus secured is used to pay an obligation of the husband. In such cases the wife is liable even though the lender had knowledge of the purposes of the loan, Third National Bank of Columbus v. Poe, 5 Ga. App. 113, 62 S.E. 826 (1908), but otherwise if the lender is the husband's creditor. Ginsberg v. Peoples Bank of Savannah, 145 Ga. 815, 89 S.E. 1086 (1916). When innocent third persons are protected, the expression "absolutely void" in the Code section becomes somewhat meaningless.
11. 84 Ga. App. 142, 65 S.E.2d 841 (1951).

together a series of excerpts from previous decisions none of which seem relevant.[12] Such excerpts explore the meaning of Code section 20-1006 which controls the right to direct the application of payment as between debtor and creditor, and provides that if neither acts, then the right belongs to the court. But this section is not applicable to involuntary payments, and in the present case the payment was obtained by a foreclosure proceeding.[13] Apparently, when Code section 20-1006 does not control, then application will be made by the court in accordance with "reason and equity."[14] Incidentally, this is the same standard which guides the court in regard to voluntary payments when neither the debtor nor creditor makes a designation.[15]

Rarely, however, will reason and equity aid the surety. When the payment is voluntary, the presence of a surety does not require that an undesignated payment be applied to the claim on which the surety is liable.[16] Only when there is some *special* equity will the court interfere with the creditor's selection. This occurs, for example, when the payment arises from the project to which the surety is attached or the particular fund which represents the payment as furnished by the surety. In such instances, the preferable view requires that the creditor have knowledge of the facts which create the equity at the time application is made.[17] When security has been given in addition to the surety, then funds which are obtained by resort to the security must be credited to the surety's undertaking.[18] The equitable right of subrogation should be sufficient to bring about such a result. In the present case, the court recognized that generally a surety would be protected by payments which arose from resort to the security, but concluded otherwise on the basis of certain stipulations which appeared in the note and the bill of sale. The note contained the following provision:

> A loan is granted to the holder hereof, as security for the payment of this note and/or any other liability of any maker to the holder, whether due or not due, or whether now existing or hereafter contracted . . . on all . . . property of any maker and of which the holder has possession, custody or control, or may hereafter come into possession, custody or control . . . but the failure to apply any part or all of the same to this or any other indebtedness shall not affect the liability of any party thereto.

This provision, however, does not apply to the property covered by the bill of sale. The purpose of a bill of sale is to transfer legal title to the creditor as security, and to permit the debtor to keep possession, custody, and control. In other words, the property has never been in the possession,

12. Bufford v. Wilkerson, Bolton and Company, 7 Ga. App. 443, 67 S.E. 114 (1910); voluntary payment; Horne v. Planters' Bank of Georgia, 32 Ga. 1 (1861); voluntary payment; the fourth excerpt not identified; Baumgartner v. McKinnon, 10 Ga. App. 219, 73 S.E. 519 (1912); voluntary payment, security not involved.
13. Kyle v. Chattahoochee National Bank, 96 Ga. 693, 24 S.E. 149 (1895).
14. Citizens & Southern Bank v. Armstrong, 22 Ga. App. 138, 95 S.E. 729 (1918).
15. " . . . the law will direct the application in such manner as is reasonable and equitable. . . . " GA. CODE § 20-1006 (1933).
16. Baumgartner v. McKinnon, 10 Ga. App. 219, 73 S.E. 519 (1912); Horne v. Planters' Bank, 32 Ga. 1 (1861).
17. For an excellent discussion, see ARANT, SURETYSHIP 344-354 (1931).
18. Montgomery v. Martin, 94 Ga. 219, 21 S.E. 513 (1894); Barrett v. Bass, 105 Ga. 421, 31 S.E. 435 (1898); Taylor v. Scott, 62 Ga. 39 (1878).

custody, or control of the creditor. When foreclosure is begun, the property is impounded by the court which by judicial sale, transfers it to a purchaser. The sum of money raised by the sale is not property belonging to the debtor. Hence the concluding phrase of the provision dealing with application of payments has no bearing at all.[19]

The bill of sale which secured the note provided as follows:

> This instrument shall be construed to be a bill of sale passing title to secure debt evidenced by a note signed by the party of the first part, payable to the order of the Bank of Georgia . . . and also to secure any and all renewals and extensions hereof, together with all such other sums as are now or do become hereafter owing by the party of the first part to the said bank, whether owned directly or indirectly, or whether conditionally or unconditionally.

The effect of this stipulation is to make the property covered by the bill of sale a security for the several debts which the creditor might hold. This does not eliminate the interest of the surety in the security. The surety's interest is merely reduced in size. However, when this occurs the general view, which is in accord with the present case, permits the creditor to make an application to the disadvantage of the surety. The other view, which seems preferable, permits the surety to obtain a proportional payment on the debt for which he is liable.[20] In view of the fact that the provision in question does not eliminate the surety but merely pledges the security for all debts and the further fact that the guide in making application is "reason and equity," then the surety in the present case should have been given a proportional credit. In this connection it should be noted that the surety's rights are subject to the agreement between the principal debtor and the creditor in reference to the security. Ultimately then, from the viewpoint of the creditor, the problem is merely one of draftsmanship. Explicit provisions in security instruments would not only tend toward the goal of certainty, but would eliminate the risk of obtaining, in the future, the sort of "liberal interpretation" that was made in the present case.

Real Property as Security

History indicates that from the time tribal organizations began living in fixed settlements, land has been a form of security. Its permanence and stability of value have given it added attractiveness. Today, after years of drafting expertise and a great bulk of litigation, most of the problems in mortgages and deeds to secure debt are merely routine. One of the peripheral areas is the question of determining priorities. In *King v. Dalton*[21] the court sought to determine whether one who had paid a funeral bill or the holder of a purchase money mortgage should come first. The case arose on a petition by one administrator as to how to dispose of funds of the estate. The fund in question had been obtained by a sale of the land which was subject to a purchase money mortgage. Two claims were filed; one by a son of the decedent who had paid the funeral bill, and one by the holder of the mortgage. The fund was sufficient to pay

19. Unless, of course, the word "control" means something else.
20. See Notes, 21 A.L.R. 704 (1921), 49 A.L.R. 956 (1927), 60 A.L.R. 206 (1929).
21. 85 Ga. App. 641, 69 S.E.2d 907 (1952).

either but not both. The holder of the purchase money mortgage contended that his claim was first by virtue of Code section 113-1010 which provides that the widow and children shall not be entitled to a year's support in such land until the purchase money is fully paid, and in view of the fact that a widow's right to a year's support precedes funeral bills,[22] ergo, the lien of the purchase money mortgage is prior. In other words, where a series running from one to ten is arranged in accordance with priority, and then an addition is made which is declared to be prior to the first, it logically follows that such addition is prior to those which are inferior to the first. However, the court decided in favor of the son and in doing so limited the application of Code section 113-1010 only to contests between the lien of a purchase money mortgage and the right to a year's support. The reason for this, according to the court, was that the Code section was not intended to change the general law in regard to the payment of the debts of a deceased person, and further, the section should be "strictly construed" because it affected property rights. Such a solution is easy so long as the contest does not involve the first in the series. Suppose, for example, that an administrator is in possession of a fund which has been raised by a sale of land which is subject to a purchase money mortgage. Three claims are filed against the fund: one by the widow for a year's support, one by the holder of the mortgage, and one by the person to whom the funeral bill is owed. The court may not award the fund to the widow because the mortgage is prior, and it may not award the fund to holder of the mortgage because the funeral bill is prior, and it may not award the fund to pay the funeral bill because the year's support is prior.

There is also a provision in the Code that gives priority to the holder of a purchase money mortgage on personalty,[23] and a similar construction of this section has been made.[24] However, this section, which was adopted thirteen years after the one dealing with realty, contains a proviso to the effect that the mortgage must expressly state that it is given as security for the purchase price.[25] If such a proviso is deemed essential, then it should appear in both sections. Actually, both sections indicate that purchase money mortgages should be placed in the same position as a deed to secure debt. Such deeds do not have to participate in the struggle to obtain priority in the assets of a decedent's estate.[26]

Another area in which litigation is frequent deals with the effect of "dragnet" provisions, which in recent years have appeared in various

22. GA. CODE § 113-1508 (1933).
23. GA. CODE § 113-1011 (1933).
24. Warfield & Robinson v. Young, 20 Ga. App. 328, 93 S.E. 28 (1917).
25. The ruling of the court in the present case may be attributable to some "inarticulate premise." The instrument in question was a second mortgage and did not contain an express provision that it was given to secure the purchase price. However, the court could not borrow the proviso in section 113-1011 and make it a part of section 113-1010 because it was talking in terms of "strict construction."
26. Burckhalter v. Planters Bank, 100 Ga. 428, 28 S.E. 236 (1897); Georgia National Bank of Albany v. Reese, 156 Ga. 652, 119 S.E. 610 (1923).

types of security instruments. In *Bank of LaFayette v. Giles*[27] husband and wife signed a promissory note payable to defendant bank for a loan, and at the same time both executed a deed to secure debt as a security. The land covered by the deed was owned solely by the wife. Upon the bank's refusal to renew, the wife offered to pay the principal and interest if the deed was cancelled. This the bank refused to do on the ground that a provision contained in the deed made it a security for indebtedness evidenced by two notes which had been signed by the husband and a third person, and which were held by the bank. The deed provided that it was executed to secure a specified debt "or any other present or future indebtedness or liability of *first parties* to second party." In deciding for the wife, the court construed the expression "first parties" as referring to husband and wife and that a note signed by the husband and a third person was not an indebtedness of such "first parties." For this exceedingly technical interpretation, the court depended primarily on the recent case of *Americus Finance Co. v. Wilson*.[28] In this case three individuals executed a security deed in which they were referred to as "party of the first part," and as "grantor." The deed contained a provision that "it shall operate as security for any and all other indebtedness which the grantor may now or hereafter owe. . . . " In excluding from the security a debt evidenced by a note signed by only one of the individuals, the court construed the word "grantor" to mean only the three who had executed the deed.

In these cases the result is controlled by words which appear in instruments by accident rather than intent, and their use is caused by the fact that forms are printed in advance. It seems strange that important litigation should depend on whether a singular is changed to a plural when a previously prepared form is executed. Actually, however, though the decisions travel the narrow path of technicalities, they represent an instance of policy making that is both wholesome and desirable. The "dragnet" provisions in security instruments enclose the unsuspecting debtor in the folds of indebtedness which he did not contemplate. When such instruments have this effect, it becomes a matter of policy to control and limit the "encircling tentacles."[29]

Similar to the effect of the dragnet clause, the position of the creditor is frequently strengthened by provisions that include the value and use of the property pledged, and at times, by covering something that would not normally be found in the type of instrument in question. For example, it has been said that the modern deed to secure debt may include everything from the baby to the kitchen sink. Be that as it may, when security instruments are given in reference to property that is under lease, it is not unusual to find therein a provision covering the rents and profits. In *Padgett v. Butler*[30] the validity of a provision in a security deed which

27. 208 Ga. 674, 69 S.E.2d 78 (1952). It is unfortunate that the dissenting views of Chief Justice Duckworth and Justice Wyatt were not stated at length.
28. 189 Ga. 635, 7 S.E.2d 259 (1940).
29. Note, 13 GA. B. J. 471 (1951).
30. 84 Ga. App. 297, 66 S.E.2d 194 (1951).

assigned the rent as further security was presented in a unique way. Petitioner, the grantee, alleged that the rent had been assigned in case of default in payment, that default had occurred, that the grantor died, and that thereafter, for a period of fourteen months, the defendant, surviving wife of the grantor, had collected the rent.

At common law, rent already due was treated as a chose in action, but rent not yet due was an incorporeal hereditament and could be transferred only by grant.[31] This view, however, has yielded to judicial improvisation, and today rent not yet due is transferable by any method competent to transfer a chose in action.[32] Assuming the validity of the assignment, the act of the wife in collecting the rent seems to be that of an intermeddler, and as between herself and the assignee, the latter has the preferable claim.[33] This was the view followed in the present case, though little is added by the observation of the court that the wife's position was inferior due to constructive notice. Surely the position of the wife would not be improved if the instrument had not been recorded. Moreover, notice should be confined to the sort of document authorized to be recorded. Finally, it should be noted that provisions pledging the rents and profits raise a delicate problem of policy. In an act sponsored by the National Conference of Commissioners on Uniform State Laws, section 2 provides that even though a mortgage contains a pledge of the rents and profits, the right thereto does not arise until after foreclosure and the expiration of the period of redemption.[34]

Strange as it may seem, there is a tendency on the part of grantees in security deeds and those to whom the rights of such grantees have passed, to delay for an extensive period before seeking relief. Such passage of time between the pledge and the petition, with its customary deaths and transfers, may not only result in unexpected hardship, but clutters the record with issues that are both complex and difficult. To meet the situation, the General Assembly in 1941 adopted an Act which has the effect of revesting title in the grantor if action has not been instituted within twenty years after maturity or the final payment.[35] So far the validity and effect of the Act have not been passed on, and in two recent cases the court successfully dodged the issue. In *McKenny v. Woodbury Banking Company*[36] the plaintiff sued to recover the balance due on a note, alleging that a deed to secure debt had been given as security. He asked that the judgment be declared a special lien on the land covered by the deed. After a maze of amendments, demurrers, motions and exceptions, the trial court directed a verdict for the plaintiff for the balance due, and in doing so it gave the defendant credit for all payments which he claimed had been made. How-

31. 1 TIFFANY, LANDLORD AND TENANT § 180c (1912).
32. Strickland v. Thornton and Nasworthy, 2 Ga. App. 377, 58 S.E. 540 (1907); Autrey v. Autrey, 94 Ga. 579, 20 S.E. 431 (1894).
33. As personalty, title to rent and the right to collect it is vested in the administrator. Apparently the wife could be classed as an executor *de son tort* or as such subject to extraordinary liability.
34. See Note, 91 A.L.R. 1218 (1934).
35. GA. CODE ANN. § 67-1308 (Supp. 1951).
36. 208 Ga. 616, 68 S.E.2d 571 (1952).

ever, the judgment rendered by the trial court failed to state that it was a lien on the land. The effect of this failure, as the appellate court pointed out, was to eliminate any question as to the application of the Act of 1941 and that there could be no further valid contention by the plaintiff that the deed was a lien on the land. In *Thomas v. Stedham*[37] the court again obviated the necessity of applying the Act of 1941 by ruling that the plaintiffs did not base their claim on a reversion after twenty years, but on other grounds. Such other grounds are elaborate. The deed in question was executed in 1910. Thereafter the grantor went through bankruptcy, and the debt was duly listed and discharged. The trustee in bankruptcy quitclaimed the property to "the estate of the grantee" who was now dead. Other transfers were made by the heirs of the grantee. Eventually, the grantor died, and the plaintiffs are his heirs who have remained in possession. The purpose of the action was to cancel the security deed, the trustee's deed, and the transfers by the heirs of the grantee on the ground that such instruments were a cloud on plaintiff's title which had accrued by prescription. In deciding for the defendants, the court pointed out that the possession of the grantor could not be adverse to the grantee and hence the plaintiff's title was not sufficient to support the action. Thus went two recent opportunities to apply the Act of 1941, and any hope for a definite analysis and construction of the Act must be relegated to the future.

Personal Property as Security

A majority of the cases during the survey period were concerned with personal property as security and in most instances the words "motor vehicle" might be substituted for personal property. Also, the issues presented are usually those which arise between competing claimants who are holders of security instruments and the possible rights of the debtor-pledgor are not involved. At times, the picture is expanded by a claim based on ownership which is deemed superior to any lien or title evidenced by a security instrument. In *Smith v. Norman Motors Co.*[38] the latter situation was presented. In an action of trover, defendant admitted having possession of the motor vehicle, but contended that title to the vehicle was vested in himself rather than the plaintiff. The evidence showed that plaintiff sold the car to defendant's transferor and received a check for the purchase price. The bill of sale contained the following notation: " . . . title to pass on cars paid by check only when check has cleared." Immediately thereafter the purchaser transferred the car to the defendant. When the check was returned unpaid for "insufficient funds," the plaintiff demanded the car from defendant and when he refused to return it, the action of trover was instituted. While this action was pending, defendant's transferor made a substantial payment on the check which was accepted. In reversing the lower court and giving judgment for the defendant, the court ruled that the acceptance of the payment changed the original rela-

37. 208 Ga. 603, 68 S.E.2d 560 (1952).
38. 84 Ga. App. 186, 65 S.E.2d 699 (1951).

tionship to a sale on credit which vested title in defendant's transferor.

In a cash sale, where the buyer gives in payment a worthless check, it is generally held that the condition of payment has not occurred and no title passes to the buyer and even innocent purchasers from the buyer would not be protected. Criticism of this view is based on the fact that the fraud perpetrated by the worthless check creates merely a rescindable transaction, and such relief could not be obtained against an innocent purchaser.[39] On the other hand, when the intent of the seller to retain title until the check clears is clearly expressed, such intent prevails and neither the buyer nor the innocent purchaser would obtain title.[40] However, the condition of payment in cash may be waived, and the acceptance of part payment changes the relationship to debtor-creditor. Of course the debtor has title and could scarcely be classed as a converter, and in the present case the title of the debtor is now vested in the defendant. The harshness of this rule from the standpoint of the seller is rather obvious: having attempted to protect his bargain by retaining title, and having parted with possession of property in exchange for a worthless check, upon being offered a payment on account he is required to refuse it if he wishes to preserve his claim against the property.

The position of one who claimed as owner was again involved in *Hertz Driv-Ur-Self Stations v. Arnold*.[41] In this case the plaintiff made a loan and received as security a bill of sale to certain laundry trucks which was duly recorded. The financial condition of the borrower deteriorated and the plaintiff wrote a letter to the borrower urging that the trucks be sold to Hertz and that the proceeds of the sale be used to settle various claims against the trucks, including plaintiff's. It was suggested that the borrower could continue to use the trucks by leasing them from Hertz after the sale. The plaintiff also noted that he was sending a copy of the letter to his lawyer. Thereafter, plaintiff executed a power of attorney which authorized his lawyer to release the liens of the bill of sale upon payment of the debt. There was evidence to the effect that the borrower requested plaintiff's attorney to release the lien for less than full payment, but this was refused. The sale was made and the borrower failed to pay plaintiff, and in a proceeding to foreclose the bill of sale, the Hertz Company interposed a claim based on full ownership. It was admitted that Hertz in buying the trucks did not rely on any letter or statement made by the plaintiff and that no search of the records was made. In reversing the trial court and deciding for Hertz, it was held that the exercise of the authority to sell by the borrower transferred the trucks free of the plaintiff's lien.

In order to reach this result it was necessary for the court to decide that the evidence in reference to authority to sell was conditional, *i.e.*,

39. 3 WILLISTON, CONTRACTS § 132 (Rev. ed. 1936), citing Chafin v. Cox, 39 Ga. App. 301, 147 S.E. 154 (1929).
40. Collins, *Title to Goods paid for with Worthless Check*, 15 So. CALIF. L. REV. 340 (1941). The effect of the Uniform Sales Act on payment by worthless check is discussed.
41. 85 Ga. App. 175, 68 S.E.2d 182 (1951).

upon payment of the debt, or whether it authorized a sale regardless, and plaintiff would look to the proceeds for reimbursement.[42] In evaluating the plaintiff's testimony, the court referred to it as vague, self-contradictory or equivocal, and with this as a basis, construed it in favor of the purchaser. The basic inconsistency appeared in a contract between the letter written to the borrower, and the power of attorney given to the lawyer. In this connection, it should be noted that the borrower and the holder of the bill of sale were brothers, and the letter was merely brotherly advice, informally prepared, in which a brother-creditor was attempting to solve the financial difficulties of a brother-debtor. When the "chips were down" and it appeared that the borrower would act on the advice, the intent of the creditor was expressed in the power of attorney given to the lawyer. The only reasonable effect of the evidence is that the authority to sell was conditional.

A difficult problem in handling security instruments is to determine whether the property pledged is sufficiently designated so as to create a lien between the immediate parties and when recorded, would be sufficient notice to third persons.[43] In *Morris and Eckels Co. v. Fulton National Bank*,[44] in a proceeding for equitable foreclosure of a chattel mortgage, it was held that the description of the property was inadequate in order to give notice to third persons and that parol evidence was not admissible to identify the property. The opinion is unsatisfactory because it fails to particularize the insufficiencies in the description.

As between the immediate parties, parol evidence is admissible to identify the property subject to the lien. Where third parties are involved, the words used must "point out and specify" in order that the record will be notice.[45] The trouble with this rule is that words are not sufficient to point out and specify. Even "hay in a rick, a new born calf or the old grey mare" defy description. When a stock of merchandise or house furniture or manufacturing devices are involved, the task is impossible.[46] Hence the preferable rule is that if the language in the instrument is such that third persons, by making a few inquiries, can identify the property, then the record acts as notice.[47] In view of the fact that the property in the present case represented machinery and supplies in the fur trade and that the parties concerned were experienced in such business, the preferable rule should have been applied.

Another phase of this case should be mentioned. In addition to notice from the record, plaintiff alleged that defendant had actual notice, in that he knew or ought to have known of the existence of plaintiff's paper. In accordance with general custom, the court considered such alternative pleading defective.[48] On the other hand, it appeared that the debtor had

42. The varying views are discussed in note, 14 GA. B. J. 472 (1952).
43. GA. CODE § 67-102 (1933).
44. 208 Ga. 222, 65 S.E.2d 815 (1951).
45. 1 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES § 53 (6th ed. 1933).
46. GA. CODE ANN. § 67-102 (Supp. 1951).
47. See n.45 *supra*.
48. DAVIS AND SHULMAN, GEORGIA PRACTICE AND PROCEDURE § 74 (1948).

given a number of security instruments and his financial condition was well known to the trade. This is sufficient to infer actual notice, yet plaintiff, for lack of specific information that is not obtainable, must plead as he did. Definitely, this seems to be the sort of case that should be disposed of only on the merits.

Not the least of the problems involved in security transactions is to determine the nature of the instrument which is in litigation. In *Gordon v. Commercial Auto Loan Corp.*[49] in which a struggle for position occurred between a judgment creditor and the holder of an alleged purchase money mortgage, the question was raised as to whether the particular instrument could be classed as a mortgage. The instrument contained 3,000 words and recited that it was given for the purchase of a four percent certificate of indebtedness. None of the provisions purported to create a mortgage. At the trial, parol evidence was introduced without objection to the effect that the paper was given to secure the purchase price of an automobile. The court considered such evidence controlling, and, as the mortgage had been given prior in point of time to the judgment, the lien of the mortgage had priority.

Generally, evidence which is not admissible due to some exclusionary rule, if admitted without objection, becomes a part of the record. The parol evidence rule, however, is not a part of the law of evidence, but belongs rather to substance. A failure to always recognize this fact has resulted in contradiction and confusion in the cases. In Georgia, there appears to be two distinct lines of decisions: one adhering to the view adopted in the present case, and the other to the effect that such evidence may not be considered.[50] Such a situation completely destroys any possibility of certainty.

The remaining cases dealing with personal property as security may be disposed of by summary comment. In *Adel Banking Co. v. Parish*[51] it was decided that the assignee of a bill of sale given as security stood in the shoes of his assignor and that the lien was superior to the claim of a junior lienor. The junior lienor attempted to gain priority on the contention that payment by the assignee created merely a right to subrogation.

In *Denny v. C. L. Fain Co.*[52] a money-rule proceeding was brought against a marshal to obtain the distribution of a fund which arose upon the sale of the debtor's property. The claims of various judgment creditors as well as a foreclosure proceeding brought by the holder of a bill of sale were joined and consolidated. At the trial, the holder of the bill of sale introduced no evidence, and the fund was awarded to the judgment creditors. The appellate court affirmed the award, but a vigorous dissenting opinion pointed to the fact that a requirement of evidence in such a proceeding was purely formal.

49. 85 Ga. App. 808, 70 S.E.2d 406 (1952).
50. The two lines of opposing decisions are discussed in the majority and dissenting opinions in the present case.
51. 84 Ga. App. 329, 66 S.E.2d 150 (1951).
52. 84 Ga. App. 477, 66 S.E.2d 260 (1951).

In *Southern Discount Co. v. Elliott*[53] the owner of an automobile left it with a used car dealer for the purpose of sale. A sale was made and the dealer received a sum of money and another used car as the purchase price. The owner agreed to the transaction and then left the trade-in with the dealer. The purchaser gave a bill of sale on such vehicle to the dealer. Subsequently, the dealer obtained a loan and executed a bill of sale as security. In a contest between the owner and the holder of the bill of sale, it was held that the possession of the vehicle by the agent plus documents of title were sufficient to protect the third person.

In *Chapman v. Commercial National Bank*[54] it was decided that the power of sale in a security instrument could be exercised without waiting for twelve months upon the death of the debtor.

In *Posey v. Frost Motor Co.*,[55] an action of trover, the instrument establishing plaintiff's title contained an endorsement to a third person. According to the court, this was not sufficient to show lack of title on the part of the plaintiff, and the conclusion was supported by reference to analogous views in decisions dealing with negotiable instruments.

Surety Bonds

In *Hurt and Quinn, Inc. v. St. Malyon*,[56] the only case decided during the survey period dealing with surety bonds, the opinion is important because of the appearance of the same instrument in previous litigation. An employer bonded the conduct of an employee in the sum of $10,000 with National Surety Company, and the additional sum of $40,000 was furnished by Lloyds on the same terms and provisions. When a shortage occurred, the employer brought an action against National Surety Company, and the court held that the allegations showed only an indebtedness on the part of the employee and failed to show a loss within the terms of the bond.[57] In the present case, the same instrument is involved, but there are slight variations in the pleading. Emphasis was put on the fact that the funds belonging to the employer were paid to an *agent* and were thereafter *diverted*. This was deemed sufficient to withstand a general demurrer, *viz.*, the duty of an agent is fiduciary and different from that of a debtor and the word "divert" possesses implications of moral turpitude. A dissenting opinion could find no difference in the allegations in the two cases, and urged the court to overrule the first opinion if the finding in the second case was to the contrary.

Warehouse Receipts Act

In *Graham v. Frazier*[58] the rights of a transferee of warehouse receipts were recognized and it was decided that such transferee could maintain

53. 86 Ga. App. 50, 70 S.E.2d 605 (1952).
54. 86 Ga. App. 178, 71 S.E.2d 109 (1952).
55. 84 Ga. App. 30, 65 S.E.2d 427 (1951).
56. 85 Ga. App. 164, 68 S.E.2d 213 (1951).
57. 81 Ga. App. 683, 59 S.E.2d 722 (1950).
58. 84 Ga. App. 458, 66 S.E.2d 77 (1951).

trover. This was the second appearance[59] of the case, and the two opinions show a proper application of the Uniform Warehouse Receipts Act that was adopted in Georgia in 1938.[60] Essentially, the opinion demonstrated the difference between negotiable and non-negotiable receipts and indicates that formal requirements are unimportant. It was also decided that a pledge of such receipts vested title to the property in the pledgee, and that a transfer of the receipts by the pledgee would vest title in the transferee.

LIENS

In *Athens Lumber Company v. Burton*[61] the question was raised as to the time of filing in order to obtain a lien pursuant to Code section 67-2001. The owner employed a contractor to repair and improve a house and to install a pump. Payment was made to the contractor without obtaining the customary affidavit. The claimant furnished the materials and has not been paid. Sometime after completing the house but before the pump was installed the contractor died. The claim of lien was filed more than three months after finishing the house but within such time from the date of the contractor's death. The court held that completion of the contract did not occur until the contractor's death and hence the filing was proper. The clarity of the opinion is dimmed by an effort to properly arrange contradictory standards of interpretation which are deemed to be applicable to lien statutes.

In *King v. Rutledge*[62] the plaintiff attempted to establish a lien by several methods. In the petition it was alleged that plaintiff had furnished building material to a contractor who was defendant's agent, that such agent had pledged the credit of defendant, that plaintiff should have a judgment for the account due and that such judgment should be a lien on the described property. The second method consisted of allegations to the effect that plaintiff had filed a lien on property owned by the defendant and which he had been informed was where the materials would be used, that actually such materials were used on other property and the time for amending his lien had expired. The court ruled that both methods were subject to general demurrer. The first method was defective because, after all, contractors are never agents but are always independent contractors, and moreover, when foreclosing a materialman's lien, the claimant may never have a general judgment for the value of the materials furnished. It is possible, of course, for a building contractor to be an agent and there is nothing in the first method to indicate that it is an effort to foreclose a materialman's lien. In fact the tenor of the entire proceeding is to obtain relief because such a lien was not perfected. As to the second method the court decided that plaintiff had been negligent in not discovering that the lien had been filed against the wrong property, hence equity would not assist in giving relief. The court indicated however that if bad faith or fraud were present, relief would have been granted. Of course when the

59. 82 Ga. App. 185, 60 S.E.2d 833 (1950).
60. GA. CODE ANN. § 111-404 (Supp. 1951).
61. 84 Ga. App. 249, 66 S.E.2d 124 (1951).
62. 208 Ga. 172, 65 S.E.2d 801 (1951).

moving party fails to show vigilance it is within the discretion of the court to deny equitable relief. In view of the fact that it was alleged that the erroneous filing was due to misinformation furnished the plaintiff, and that the time in which to correct the error was indeed short, the conscience of the chancellor ought to suffer a few minor qualms.

CONCLUSION

As a result of the survey, there seems to be little to recommend. Needed, possibly, is a softening of the harshness of the deed to secure debt. Such instruments should be treated not as a transfer but merely as creating a lien for security. Needed also is a modern recordation statute for titles to motor vehicles. And some day in the future, when the new Code is prepared, sections dealing with security should be consolidated, overhauled and revised. And, as for the ideal of certainty, it was lost in a fog of many topics and many contradictory views. Surely the observation that the "law must be stable but it cannot stand still" includes the authoritative materials which are applicable to security transactions.