SECURITY TRANSACTIONS

By PIERRE R. LOISEAUX*

During the survey period the Georgia courts once again were presented with many problems involving the creation, relations of the parties, and enforcement rights in secured transactions. The legislature made some changes during the period and these are noted in the first section of this article. The court decisions are divided into persons, real property, and personal property as security. The year did not produce any startling changes or departures from established precedent, but there were a number of somewhat unique and interesting problems created by changing fact problems.

LEGISLATION

The first act of 1956 affecting the area of security was Georgia Laws 1956, p. 185. This act amended Georgia Code sections 67-2001 and 67-2002 to include in this chapter on Mechanics' and Materialmen's Liens a lien for registered land surveyors and registered professional engineers. In addition to adding the necessary words in these two sections the legislature added a clause to subsection 2 of 67-2001 to make the lien of architects, surveyors and engineers under this section only effective as to third persons from the date of filing. The other modification is a provision that whenever a surveyor or engineer under this chapter is a member of a partnership or the agent of a corporation, and the contract is made on behalf of such organization, then the partnership or corporation shall be entitled to the privileges and benefits of these sections. The terms professional engineer and land surveyor are taken from the provisions of title 84 chapter 2 which provide for registration under a state board for these persons. The amendments are prospective only; section four of the 1956 act provides that application shall be to services performed after the date of the approval of the act (Feb. 23, 1956).

A second 1956 act also dealt with Mechanics' and Materialmen's Liens. Georgia Code section 67-1701 was amended to include in paragraph number eight subcontractors, materialmen furnishing material to subcontractors, and laborers furnishing labor to subcontractors.

*Visiting Associate Professor of Law, University of Texas, on leave from Lamar School of Law, Emory University; LL.B. 1950, Boston University; LL.M., 1951, New York University.

A further sentence was then added to the same paragraph specifying that "subcontractor" as used in this section shall not be limited to those contractors having privity with the prime contractor. The same act, Georgia Laws 1956 p. 562 made further amendments to Georgia Code sections 67-2001 and 67-2002 to include in these paragraphs subcontractors, and materialmen and laborers furnishing labor or materials thereto. This act also added a fourth paragraph to 67-2002 providing that subcontractors, or the materialmen or laborers included by this amendment may proceed without the necessity of making the prime contractor a party, but saving the prime or other intermediate contractor's right to intervene and resist the claim.

The second act creates a problem which was clearly unintentional, but nevertheless extant. When the latter act was passed the usual form was used, that is, it was stated that sections 67-2001 and 67-2002 shall henceforth read as follows, and the new section was set forth. The difficulty is that in so doing the legislature not only ignored the earlier 1956 act amending the same section, but apparently the draftsman used a copy of the annotated code without its supplement so that the last act to be passed also leaves out the 1953 act[1] which had included architects in the section. Probably the codifiers and the courts will merely overlook this difficulty. Mention is made only to illustrate the pressing need in Georgia for a permanent legislative revision commission. Here the oversight was obvious; in another instance it might require extensive litigation to clarify such an ambiguity.

Another 1956 act, Georgia Laws 1956 p. 338, although perhaps not properly under this topic needs brief mention. This act authorizes the use of guaranteed arrest bond certificates of automobile clubs and associations in all courts of this state. There are several qualifications: the maximum amount is $200, the certificate must be in a form prescribed by the insurance commissioner, the certificates must be backed by a company qualified to transact such business in the state, and the certificates cannot be used for the offences of driving under the influence of intoxicating liquors or drugs, or for any felony.

Persons as Security

Once again the Georgia Court of Appeals had opportunity to spin the suretyship-guaranty wheel.[2] The trial judge had thought the ball rested upon suretyship, but when Judge Carlisle peered into the slowly revolving disk he saw the ball resting on guaranty. The occasion for

1. Ga. Laws 1953 p. 582, Ga. Code Ann. § 67-2001, 67-2002 (Supp. 1955).
2. Bradley v. Swift & Company, 93 Ga. App. 842, 93 S.E.2d 364 (1956).

this arose when one Bradley signed the back of an agency contract under a printed paragraph labeled "Guaranty." This undertaking by defendant Bradley contained among other clauses the following: " . . . hereby guarantee the full, *prompt* and complete *performance* by said WHM . . . promise and guarantee the *unconditional payment at maturity* of all accounts receivable, acceptances, notes, and other obligations of every nature and kind arising out of or in connection with the said contract .... It is understood that this is a continuing, *absolute and unconditional* guaranty, *co-extensive with said contract* between said principal and said agent . . ." (emphasis added). About a year and a half after the plaintiff company accepted this contract the agent named therein was adjudged a bankrupt. At the time of the bankruptcy adjudication the agent in the contract owed the plaintiff principal approximately fourteen hundred dollars. At the time of the suit against Bradley it did not appear that the agent had been discharged in the bankruptcy proceeding. At the trial defendant Bradley admitted the account but alleged release for a number of reasons. The trial judge directed a verdict for the plaintiff and the defendant assigns numerous errors in the appeal. In his opinion for the court of appeals Judge Carlisle first states Georgia Code section 20-701, that the construction of a contract is a question of law for the court, and then proceeds to discuss the difference between contracts of suretyship and guaranty. The discussion is largely in terms of results; however, we are told the surety says, "If your debtor will not pay I will pay" and the guarantor says, "proceed first against the principal, and if he should not be able to pay, then you may proceed against me." Viewing this test and the language quoted from the contract in this case it might appear that this case was one of suretyship, but the opinion says, "Properly construed in the light of the foregoing authorities, the contract under which the plaintiff seeks to hold the defendant liable for the unpaid balance on the account between the plaintiff and Moreland, is one of guaranty." Apparently because the agent and the defendant had signed this contract at different times, although the contract did not become effective as to either one of them until it was accepted by the plaintiff company, and because the defendant's contract recited a consideration of $1.00 and other valuable consideration, and the terms of the two contracts were not identical, this is guaranty. After classifying the contract at hand as above, the court then disposed of other assignments of error relating to fraud and the effect of bankruptcy on such a contract. The court then concluded that because this was a contract of guaranty and there was no evidence of a discharge of the agent in bankruptcy nor any evidence of insol-

vency there was not sufficent evidence to authorize a verdict for the plaintiff. In deciding this case the court relied heavily upon the opinion in the case of *Manry v. Waxelbaum*[3] which appears to be very similar. That case relies heavily upon out-of-state authorities; however, many other state courts have distinguished between guarantors and guarantors of collection, whereas in Georgia we put all "guarantees" into the latter class.

In *Copeland v. Beville*[4] the court disposed of a problem involving the distinction between contracts of suretyship and contracts of indemnity. It is well settled that contracts of indemnity are not considered contracts to answer for the debt of another, whereas contracts of suretyship are by definition obligations to answer for another's debt. In this case plaintiff had signed a bond in dispossessory proceedings for a corporation at the request of the defendant, an officer of the corporation. Plaintiff alleges that he knew of the poor financial condition of the corporation and that in order to induce the signing, the defendant had orally promised the plaintiff that he would personally guarantee that the plaintiff would not lose anything by the signing, which defendant said was a mere formality. Subsequently plaintiff was compelled to pay the bond because the corporation was insolvent. Defendant denied the oral agreement and alleged the plantiff signed to protect property of his own located on the premises. The jury found for the plaintiff. On appeal the court found that the trial judge had properly charged on the theory of indemnity rather than guaranty. The appelate court relies on C.J.S. for a definition of "indemnity" and finds that the mere allegation that the word guaranty was used makes no difference.

The case of *Ferguson v. Atlanta Newspapers*[5] appeared again this year in the court of appeals. Last year[6] the court had sent the case back because the trial judge had found the contract at hand to be one of suretyship and the appellate court found it, as a matter of law, to be a contract of guaranty. On the second trial the plaintiff did not show a judgment against the principal debtor with execution unsatisfied, but instead put the principal debtor on the stand. The debtor admitted the account and testified that he had not had sufficient property at any time since incurring the liability to pay off the debt. The court in reviewing the case states that, nothing more appearing, the principal's insolvency is thus established and the plaintiff was entitled

3. 108 Ga. 14, 33 S.E. 701 (1899).
4. 93 Ga. App. 442, 92 S.E.2d 54 (1956).
5. 93 Ga. App. 622, 92 S.E.2d 321 (1956).
6. See, 7 MERCER L. REV. 152 (1955) for comment on previous appeal.

to recover against the guarantor without showing a prior judgment against the principal. There was no showing of an acceptance of the offer of guarantee or notification of acceptance to the guarantor; however, as in the usual continuing guaranty, the court finds that where the extension of credit is contemplated such extension of credit constitutes acceptance, and it is only necessary for the creditor to show this in order to make his prima facie case. Where, as in this case, there is no contradicting evidence of the debtor's insolvency, it is well to modify the usual rule requiring a prior judgment. Once the decision that the contract is guaranty is made the result follows, but one wonders if, when the arrangement was made, the creditor anticipated the necessity of suing the principal or showing his insolvency before the creditor could realize upon the contract.

In *White v Pratt*[7] a wife mortgaged an automobile and gave a security deed on real estate to defendant. It was admitted that the property concerned was a part of the wife's separate estate; however, in the wife's petition for cancellation it was alleged that part of the consideration given by the creditor was the extinguishment of a debt of her husband and therefore under Georgia Code section 53-503 the contract was void. It appeared in evidence that the debt of the husband which had been extinguished was $49 out of a total consideration of roughly $5,400. The trial judge directed a judgment for the defendant apparently subtracting the amount of the husband's debt from the amount secured by the property. On appeal the court reversed the decision after finding that the security contract in question was not severable and therefore if any part of the contract was void by statute the whole contract fails. The court states that if the contract were severable it would be possible to allow the creditor to recover the part not falling within the statutory prohibition on his cross bill. The case is clearly proper on the basis of an entire non-severable contract. The only disturbing part is that less than ten per cent of the total consideration destroys the entire contract, and in light of our contemporary social views of married women's rights, could the court have mitigated this harsh result by an application of the rule of *de minimis lex?*

Real Property as Security

There were about half a dozen cases in the survey period relating to real property which deserves discussion. The first group are those relating to the enforcement of rights created by the security instrument

7. 211 Ga. 891, 89 S.E.2d 502 (1955).

relating to real property. In *Harpe v. Stone*[8] the debtor brought an equitable petition to set aside a sale under power of sale contained in his security deed alleging that he was tendering and willing to pay into court such amounts as the court might designate as actually due. This was held not to state any cause for relief. The supreme court stated the well established rules that in order to seek equitable relief petitioner must do equity, and that where the amount due on a debt is in dispute petitioner must at least tender the amount that is admittedly due, even if the creditor is demanding more than that amount. Because of the petitioner's failure to make the necessary tender the court does not have to decide whether or not the purchasers under the deeds in question were to be classified as mortgagees in possession so as to become liable to account for rents and profits under Georgia Code section 67-115.

Another case regarding confirmation of a sale of property under a power of sale raised an interesting problem because the present equitable owner of the real estate had filed a petition under chapter twelve of the bankruptcy act seeking an arrangement.[9] The court of appeals finds that under the provisions of the federal act [10] the filing of the petition in bankruptcy acts as a stay of any action to enforce a lien upon the property of the debtor and that this provision would include title to secure debt. However, the court properly found that this stay would only apply to a petition properly filed. Here the petition as filed was imperfect and incomplete and the debtor did not ask leave to amend within ten days to perfect his petition which could have been allowed by the federal district court for the eastern district of Arkansas. In fact, at the time of the hearing in this case, more than two months had passed since the filing of the bankruptcy petition and no further action had been taken therein. Also it would be possible for the announcement of the bankruptcy proceedings at the time of the sale under the power to chill the bidding so as to render the sale invalid, but defendant in this proceeding makes no allegation to that effect. Further, the court points out that even if the petition had been full and complete it would not operate as a stay of this proceeding except after notice and upon hearing, neither of which are here alleged. Thus the court affirmed the confirmation of the sale by the trial judge.

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8. 212 Ga. 341, 92 S.E.2d 522 (1956).

9. Tingle v. Atlanta Federal Savings & Loan Assn., 93 Ga. App. 393, 91 S.E.2d 804 (1956).

10. 52 STAT. 918 (1938), 11 U.S.C. § 828 (1952).

In *Maguire v. Ivey*[11] a debtor was asking cancellation of a deed made pursuant to the exercise of a power of sale in a security deed. The debtor alleged that there was a mutual departure from the terms of the contract and that therefore it was necessary for the creditor to give notice of intention to rely upon the exact terms of the contract before he could abrogate the departure as a new contract. The alleged agreement was to suspend payment for a period because the creditor was to be away on business, and petitioner-debtor complains that after the creditor returned from his sojourn he refused to accept the tendered check bringing the account up to date. The supreme court stated that the trial court should not have overruled the defendant creditor's general demurrer because the alleged agreement did not come within the terms of Georgia Code section 20-116 which provides for notice after departure only when there is payment and receipt of money under the terms of such departure. This alleged agreement suspended payment for the period in question. Also the alleged agreement was not a novation because there was no valid consideration for the substituted contract.

The case of *Bowman v. Poole*[12] involved the rights of a junior encumbrancer against the senior encumbrance. The holder of the first security deed advertised the property for sale on a certain day; thereafter, but before the sale the holder of the junior security deed tendered to the defendant holder of the senior security, the full amount then due and demanded a transfer and assignment. Defendant refused the tender and subsequently sold the property to himself at the sale which was held as advertised. Plaintiff, holder of the junior security deed, asked that the deed made by the senior security holder to himself be cancelled and that plaintiff be given reasonable attorney's fees because defendant had acted in bad faith in refusing the tender of the amount due on the obligation. The court found that the tender was proper and therefore the purported exercise of the power of sale was void. The junior security holder always has the right to protect himself by paying off the senior lien or encumbrance and taking a transfer to himself of the senior's rights. If a proper tender is made and not accepted the lien is discharged. Also the court said that under Georgia Code section 20-1404 the jury could allow attorney's fees where the defendant acted in bad faith and that such allowance did not constitute punitive or vindictive damages. The court therefore concluded that the petition did state a cause of action against the holder of the

11. 212 Ga. 151, 91 S.E.2d 35 (1956).
12. 212 Ga. 261, 91 S.E.2d 770 (1956).

senior security and the trial court erred in dismissing it after general demurrer.

Can an heir get specific performance of an alleged contract whereby the other heirs, all of full legal capacity, agreed orally to release a security deed held by the intestate from the complaining heir? Where the consideration for the promise to release was the payment of all debts and funeral expenses of the intestate, and administration had not been granted on the estate, and petitioner alleged that he fully performed, and all the heirs signed an order for a release except the defendant, the Georgia Supreme Court held that it was an error to sustain a general demurrer to a petition setting out substantially these facts.[13] The court states in its opinion that family settlement contracts are greatly favored by the courts because they save expense, time and feuding. Also this agreement, though oral, may be enforced because there is an allegation of full performance on one side. Refusal to enforce this contract to answer for the debt of another would allow the defendant to defraud the plaintiff within Georgia Code section 20-402 (2) if the court did not act. Also the contract to release relates to real property and not to personal property and thus the contract may be enforced by specific performance.

The last case pertaining to real property involved an attempt by a wife to cancel a deed of sale executed pursuant to a power of sale on the basis that it was a fraudulent attempt to defeat her alimony claim. The wife's claim failed because the court found that the defendant purchaser was a bona fide purchaser for value without notice of any defect in the vendor's title.[14] Plaintiff wife had tried to charge the purchaser with notice under the doctrine that notice to an attorney is notice to the client. The court recognized the rule, but stated that this notice only becomes effective in relation to the subject matter of the attorney's employment, and the wife failed to allege that there was any attorney-client relationship in this case in regard to the property transaction attacked. In this case the wife had known that the property was to be sold to satisfy the alleged fraudulent notes, and knowing this she remained silent until after the sale was made. Under these circumstances where the property has been regularly sold under a power of sale to an innocent purchaser for value the purchaser will be protected in his title, thus the trial court had properly sustained a general demurrer to the complaint.

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13. Wilson v. Whitmire, 212 Ga. 287, 92 S.E.2d 20 (1956).
14. Mathis v. Blanks, 212 Ga. 226, 91 S.E.2d 509 (1956).

PERSONAL PROPERTY AS SECURITY

This section might well be subtitled automobile law for once again this year about two-thirds of the cases involved divided property interests in automobiles.

In last year's survey *Home Finance Company v. United Motor Sales*[15] was noted as holding that when an out-of-state conditional sale contract is properly recorded within the six-month period allowed by Georgia Code section 67-108 it takes precedence over a bona fide purchase within the six-month period before recording. The same case appeared on appeal again this year, this time on the basis that because the conditional sale contract was not properly attested it was not entitled to record and therefore the record amounted to nothing. The court states that in order for an out-of-state contract to be recorded in this state it must comply with Georgia recording requirements. In this state an unattested conditional sales contract is good between the parties but invalid as to third parties. The court therefore concludes that here the judgment dismissing the levy was proper as the recording without attestation amounted to nothing. Judge Felton specially concurred on the basis that although there is authority otherwise he thought that an out-of-state mortgage should be entitled to foreclosure within the six-month period without recording because the foreclosure is just as good notice as recording and in any event the document could be cured within the six-month period so as to entitle it to record. It would appear that Judge Felton's reasoning is sound and that a distinction should not be made between instruments validly recorded in the foreign jurisdiction and those not so recorded, especially in the six-month period. However, the supreme court apparently drew such a distinction in *Smith Motor Car Co. v. Universal Credit Co.*[16]

One Newkirk purchased a car from Universal Motors under a conditional sales contract. The contract was immediately assigned to Universal C.I.T. Credit Corp. Newkirk made three or four payments and then defaulted, whereupon the Credit Corp. repossessed the automobile and resold it. The Credit Corp. now brings action against Newkirk to recover a deficiency. Defendant answers admitting the contract but denying the assignment to plaintiff. Defendant alleged by way of cross-action that there is a working agreement between plaintiff and the seller of the car whereby interest and charges are labelled "time balance" and the plaintiff would pay the seller a bonus or "kick-

15. 19. Ga. App. 679, 86 S.E.2d 659 (1955); note, 7 MERCER L. REV. at 169 (1955).
16. 176 Ga. 565, 168 S.E. 18 (1933).

back" out of illegal interest charged. The trial court sustained demurrers to the answer and cross-action and the defendant appealed. The court of appeals speaking through Judge Nichols distinguishes the case of *Jackson v. Commercial Credit Corp.*[17] because in that case the court found a loan from the finance company to the purchaser at a usurious rate, whereas here there were no facts to establish such a direct transaction between the purchaser and the finance company. Also, as pointed out in the *Jackson* case, it is permissible for a seller to charge one price for cash and another for a credit sale. Therefore the defendant did not establish a plea for usury that would withstand a demurrer. Another point which was again mentioned is that repossession of property sold under a conditional sale is not itself rescission of the contract, and in the *Newkirk* case the contract made it clear that repossession was not to be a rescission. However, the court reversed the case because defendant had denied that the car had been repossessed and disposed of under the terms of the contract, and in this situation the defendant has made an issue which requires the plaintiff to prove the status of the account between the parties.[18]

The court of appeals was faced with a somewhat unique problem in *General Finance & Thrift Corp. v. Bank of Wrightsville.*[19] The Bank of Wrightsville purchased a conditional sale contract from a finance company, which company had taken the contract from the automobile dealer. About a year after the date of the conditional sale contract the bank made a loan to the purchaser of the automobile and took as security therefor a bill of sale to secure debt on the same automobile. Both the conditional sale and the bill of sale were recorded but when the bank foreclosed the bill of sale the plaintiff General Finance & Thrift Corp. sued out a money rule. It appeared that plaintiff also held a bill of sale to secure debt and that although the plaintiff's bill of sale was of later date than the bank's bill of sale, the plaintiff's bill of sale had been recorded first. Thereupon the bank introduced evidence of its prior conditional sale contract. Apparently the trial court decided in favor of the bank. Judge Quillian speaking for the full court stated that on the trial of a money rule an unforeclosed mortgage cannot claim money which is in court for distribution even though it may have a higher priority than the other contesting liens. Here there were two recorded and foreclosed liens and as between these two liens it was proper to show by extrinsic evidence which was superior. However, the holder of one of these perfected

17. 90 Ga. App. 352, 83 S.E.2d 76 (1954); note, 7 MERCER L. REV. at 171 (1955).
18. Newkirk v. Universal C.I.T. Credit Corp., 93 Ga. App 1, 90 S.E.2d 618 (1955)
19. 92 Ga. App. 808, 90 S.E.2d 93 (1955).

liens cannot bring in evidence to show that in fact he has another lien that is superior to either of the contesting liens, but which was not foreclosed. The judge reasons that if the holder of the original title retention contract still held it, he could not intervene in this money rule and therefore the bank cannot do so as they could not have obtained better rights than their transferor by virtue of the assignment. Further, this situation was held analagous to the case of a creditor with two securities for the same debt where it is held that if he elects to proceed upon one of them he waives the other. The court then found the plaintiff finance company's lien to be prior because of the earlier recording and reversed the judgment of the lower court. Judge Felton dissented on the ground that Georgia Code section 24-211 provides for application of equitable principles in the distribution of money in the hands of the court. In this case, where the bank brought the money into court, they should be subrogated to the rights of the oldest lien or title. To allow the bank to show this older title requires no more extraneous evidence than to allow the finance company to show the date of the recording. In discussing the waiver which the bank was held to have made Judge Quillian relied heavily upon an Iowa case[20] where it was held that the plaintiff, holder of a judgment and a chattel mortgage, had made an election. The facts set out in the report of the *General Finance & Thrift* case do not make it entirely clear, but it seems that the Bank of Wrightsville actually had two liens for two separate debts.

Tifton Production Credit Association v. Burkhalter Chevrolet Company[21] involved an allegation of estoppel against the plaintiff Credit Company in its action of trover for an automobile. Defendant alleged that it had purchased the car only after an oral release of the bill of sale to secure debt by plaintiff's president and general manager. Despite the prohibition of such a release in plaintiff's by-laws defendant alleged that this had been done over a considerable period of time to the knowledge of the directors and without their objection. The court of appeals found that under the circumstances it cannot be said as a matter of law that a verdict was demanded for the plaintiff.

In an action for a deficiency judgment on notes secured by a bill of sale the defendant alleged a rescission of the contract for fraud[22]. As to the issue of rescission the court held that when the defendant testified that after discovering the fraud he had made a payment under the contract the trial court did not err in directing a verdict for the

20. Mutual Surety Co. of Iowa v. Bailey, 231 Ia. 1236, 3 N.W.2d 627 (1942).
21. 92 Ga. App. 571, 89 S.E.2d 210 (1955).
22. Clifton v. Dunn, 92 Ga. App. 520, 88 S.E.2d 710 (1955).

plaintiff. Where a person with knowledge of fraud makes a payment on the contract thereafter he has waived his right to rescind for fraud and affirmed the contract.

The case of *Stanton v. Hargett*[23] involved an interesting situation. The debtor had two stores. Hargett loaned money and took a bill of sale to secure debt upon the stock of goods at store number one which bill of sale was to attach to all replacements and additions to said stock. Stanton also took a bill of sale to secure debt from the debtor upon the stock of merchandise in store number two. Hargett's bill of sale was made about six months before Stanton's. Thereafter the debtor moved the stock of goods from store number one to store number two and combined the stock so that it was impossible to tell what property was covered by which bill of sale. Both parties foreclosed their bills of sale and Hargett brought a money rule against the sheriff after sale of the property alleging the facts substantially as set out above. Stanton filed his claim and asked that the judge rule that all the property was covered by his bill of sale and also that Hargett should have proceeded under Georgia Code section 67-805 instead of Georgia Code section 67-118. The judge overruled these motions and Stanton excepted. Judge Felton speaking for the court first found that moving of the goods from one store to another would not constitute a sale at retail so as to release the goods from Hargett's prior lien. It has been held that Georgia Code section 67-118 applies only where both liens are on the same property; however, in this case the bills of sale, although originally given on separate property, were to be treated as on the same property because of the legal confusion that had occurred when the stocks were intermingled. It was for the trial court, using equitable principles, to distribute the fund and it was not improper to overrule the motions to dismiss the money rule. There are no Georgia cases involving the distribution between two innocent parties when the goods have been mixed by a third party.

This year the court had the opportunity to distinguish between adequacy of description in a chattel security which would create a valid lien between the parties, and the certainty necessary to constitute notice to third parties. The case, *Goforth v. Scoggins*,[24] involved a trover action to recover an automobile. Plaintiffs set forth the material allegations including the motor number of the automobile in question. The instrument was filed as an out-of-state mortgage. Defendants answered denying the allegations and stating further that they were

23. 93 Ga. App. 508, 92 S.E.2d 328 (1956).
24. 92 Ga. App. 648, 89 S.E.2d 569 (1955).

not in possession of an automobile having the motor number found in the security contract. The trial court entered a judgment for the defendants and plaintiff appealed. The appellate court found that the car sought by plaintiffs was the same car that was held by the defendants. The court then states that between parties parol evidence is admissible to identify the property, but as to third parties, the instrument cannot constitute notice if extrinsic evidence is necessary to identify the property. The court says the motor number of an automobile is probably the most important element in its description. Therefore as the defendants were bona fide purchasers the recording did not amount to notice and the judgment was affirmed.

The court of appeals decided two cases involving priorities between security interests in personal property. No attempt at a general discussion of priorities will be made, last year in the survey article on this topic the general questions were discussed and the cases added this year are in accord with principles followed in recent years by our courts.[25] The first case, *Parham v. Heath*,[26] involved a contest between a judgment lien, a conditional sale, and a bill of sale to secure debt. The court held that the unrecorded bill of sale took priority over the unrecorded conditional sale and a junior judgment upon which execution had been issued. In an appeal from the first trial in this litigation the court had held that the junior judgment creditor was entitled to priority over the unrecorded conditional sale contract,[27] but in the second trial a valid bill of sale to secure debt was found to be outstanding prior to the rendition of the judgment, and because such bill of sale divests the judgment debtor of all title to the property there was nothing to which the execution under the judgment could attach even though the bill of sale was not recorded. To make this result the court again distinguishes between legal and contract liens as established in *Donovan v. Simmons*[28] and the code construction which necessitates a distinction between conditional sales and bills of sale as set out first in *Evans Motors of Georgia*.[29]

The second priorities case, *Fourth National Bank of Columbus v. Howell*,[30] involved three bills of sale all executed on the same day by the same debtor upon the same property. These bills of sale were recorded at different times. The court relied upon *Wadley Lumber Co.*

25. See, 7 MERCER L. REV. at 164 (1955).
26. 92 Ga. App. 645, 89 S.E.2d 528 (1955).
27. Parham v. Heath, 90 Ga. App 26, 81 S.E.2d 848 (1954).
28. 96 Ga. 340, 22 S.E. 966 (1895).
29. Evans Motors of Georgia v. Hearn, 53 Ga. App. 703. 186 S.E. 751 (1936).
30. 92 Ga. App. 868, 90 S.E.2d 78 (1955).

v. Lott[31] wherein the supreme court had stated that as between deeds taken from the same grantor without notice, the priority would date from the time of filing for record. The court of appeals found that the same principle applied to bills of sale and thus the holder of the first bill of sale to be recorded prevailed. Another point raised was whether the vice-president of the bank who owned no stock in the bank was qualified to attest the bank's bill of sale as a notary. The court, after discussing and distinguishing a number of earlier cases, decided that the vice-president who did not own any stock in the corporation was competent to attest as a notary.

Trusco Finance Company v. Kniphfer[32] involved an important jurisdictional point. The debtor in this case attempted to enjoin the exercise of a power of sale under a title retention contract in a county other than that of the defendant's residence. Petitioner's theory was that Georgia Code section 3-202 providing an exception to the requirement of filing suit in the county of defendant's residence where an attempt is made to enjoin "pending proceedings," applied to this case. The court in a brief headnote opinion stated that it had held consistently that the exercise of a power of sale was not included within the term "pending proceedings" as used in the code section, and therefore the plea to the jurisdiction should have been sustained.

Two cases on court bonds and the liability of sureties thereon are included by way of conclusion. The first, *McClung v. McClung*,[33] presented the question whether sureties upon a bond given to guarantee compliance with an order for alimony could be held in a summary proceeding or whether an independent suit was required. The court held that this was an eventual condemnation bond and that the sureties were subject to summary proceedings. The court points out that this liability is a continuing one and that to require an independent suit against the sureties would make the enforcement extremely expensive. Judge Townsend dissented primarily upon the basis of Georgia Code section 103-103 which provides that the sureties' contract will not be extended by implication or interpretation, and that the bond in suit could not be a condemnation bond except by strained interpretation. Therefore he states that the court below should have sustained the demurrers and required the petitioner to sue the sureties in an independent suit.

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31. 130 Ga. 135, 60 S.E. 836, (1908).
32. 211 Ga. 859, 89 S.E.2d 488 (1955).
33. 93 Ga. App. 274, 91 S.E.2d 377 (1956).

Flegal v. Loveless,[34] questioned the liability of sureties on a replevy bond. The defendant who had executed the replevy bond moved to dismiss the attachment because there was no allegation which would entitle the plaintiff to an attachment under the laws of Georgia. The trial court overruled the motion and allowed the plaintiff to correct the jurisdictional defects by amendment. The rulings were unexcepted to. The court of appeals held that the sureties were bound by the judgment of the court overruling the motion to dismiss. Further, the bond which the sureties had executed recited that the property levied on was the property of the defendant, and under these circumstances the sureties are estopped to deny a valid levy.

34. 93 Ga. App. 41, 90 S.E.2d 606 (1955).