SECURITY TRANSACTIONS

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The present credit economy on which the economic structure of the country is based lends an increasing importance to the field of security transactions. In view of the enormous amount of credit which must have been present during the period of this survey, the most significant factor from the survey is the number of cases which arose as the result of this credit. They were very few. A review of the cases, however, indicates that this is more significant as an economic factor than a legal factor, and if the time should come when a slip in the economy brings a rash of foreclosures, one tends to wonder if the lender is protected as fully as he might think.

The most practical division of the field of security transactions for the purpose of a survey of the field is persons, real property, and personal property as security. The division is arbitrary, but it will be used for the purposes of this article.

PERSONS AS SECURITY

A contract whereby a person acts as security under Georgia law is either a contract of guaranty or one of suretyship. There is only one case be discussed under this heading, but it provides a good example of why the distinction between guaranty and suretyship is an illusory one.[1]

The case is *Bradley v. Swift & Co.*,[2] and arose from the following facts. On July 1, 1951, Moreland signed a written contract to become agent of Swift & Co. for the sale of its products. On September 6, 1951, Bradley executed a written contract by the terms of which he promised and guaranteed unconditional payment of all "accounts, receivables, notes, and all other obligations of any nature and kind arising out of and in connection with the agreement by Moreland." In 1953, Moreland was adjudged bankrupt. Swift & Co. sued Bradley on his contract, and on trial, the court directed a verdict for Swift & Co.

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1. See Loiseaux, *Security Transactions*, 7 MERCER L. REV. 151 (1951); Green, The Distinction Between Guaranty and Suretyship in Georgia, 9 GA. B.J. 273 (1947). The distinction between surety and guarantor is abolished in the restatement of security. See, RESTATEMENT, SECURITY 82 (1941).
2. 93 Ga. App. 842, 93 S.E.2d 364 (1956).

without determining whether the contract in question was one of guaranty or suretyship. On appeal, the court of appeals concluded that the contract was one of guaranty, and reversed as there had been no proof of the principal's inability to perform. An analysis of the opinion reveals the following conclusions:

(1) A contract of suretyship is a joint obligation of the surety and principal.

(2) A contract of guaranty is a separate undertaking independent of that of the principal.

Given these two principles, the corollaries in the case follow logically. Thus a contract of suretyship is one in which: (a) the surety binds himself to perform if the principal does not; (b) the principal and surety may be sued in the same action, and a judgment returned against both; (c) the surety is usually bound with his principal by the same instrument, executed at the same time, with the same consideration.

A contract of guaranty is one in which: (a) the guarantor contracts not that he will pay, but that the principal is able to pay; (b) the principal must be unable to perform before an action can be maintained against the guarantor; (c) the contract is usually entered into before or after that of the principal; (d) the contract "is often founded on a separate consideration."[3] The court concluded that the contract was one of guaranty, and on the basis of Georgia law, it appears properly so.

The contract reads, in part:

> . . . the undersigned jointly and severally, hereby guarantee the full, prompt and complete performance by said Wm. H. Moreland, (hereafter designated as agent) of all the terms and conditions contained in contract appearing on the reverse side of this sheet. . . .[4]

The significant distinction between a contract of surety and one of guaranty is that in a suit on a contract of guaranty, it must be shown that the principal is *unable to perform.* In the *Bradley* case, even though the principal had been adjudged bankrupt, the Court concluded that the trial court erred in directing a verdict for the plaintiff as:

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3. The statute gives this as the only distinction between the two contracts. See GA. CODE ANN. § 103-101.
4. 93 Ga. App. 842, 93 S.E.2d 364, 368 (1956).

> . . . there was no evidence that the principal had been discharged in the bankruptcy proceeding from liability for the debt here in question, nor was it shown that he was insolvent or would not be made to respond to a judgment in favor of the plaintiff at the time of trial in this case.[5]

Real Property as Security

Precisely what interest does a deed to secure debt convey? The Georgia Code provides that ". . . such conveyance of real or personal property shall pass the title of said property to the grantee until the debt or debts which said conveyance was made to secure shall be fully paid, and shall be held by the courts to be an absolute conveyance," with the right of the grantor to have the property reconveyed to him upon payment of the debt secured.[6]

If this section is to be construed in the light of its language, then a security deed grantor in bankruptcy would have no interest in property so conveyed for a receiver to take. *Erikson v. Hewlett*,[7] by inference, held otherwise. In this case, a temporary receiver was appointed for the properties of the security deed grantor. There were two security deeds outstanding on the property in question, and the holder of the second loan deed sold the property himself after the appointment of a receiver and an oral order from the court enjoining him from selling the property. A nunc pro tunc order was subsequently entered. The seller was held to be in contempt of court.

The amount of the loans outstanding was $17,282.92, and the value of the property was $25,000.00. The court dismissed in summary fashion the contention that the security deed grantor had no interest in the property which the receiver could take, and cited only *Owens v. Keeny*,[8] which held that subsequent security deeds conveyed what interest the grantor had therein. There was no mention of Ga. Code Sec. 67-1301.

Apparently, the defendant did not contend very seriously that the security deed grantor had no interest in the property as his deed was a second deed on the same property. Thus, if the statute in question is to be construed literally, he would have received no interest to sell.

It is probable that no one, except a defendant in an appropriate case, would contend that the security deed conveys out all the grantor's interest in property. And yet, we are still faced with a statute that

5. 93 Ga App. 842, 93 S.E.2d 364, 374 (1956).
6. Ga. Code Ann. § 67-1301. A mortgage is only security for debt and passes no title. Ga. Code Ann. § 67-101.
7. 212 Ga. 423, 93 S.E.2d 563 (1956).
8. 146 Ga. 257, 91 S.E. 65 (1916).

says it does, and apparently no case in which the courts have explained why it does not. In the face of "the contention is without merit" statements, attorneys are left to infer and guess and advise their clients by a sort of divination process.

Logically, of course, the warranty deed to secure debt is precisely what the name implies. Title is conveyed to insure the payment of a debt, and in so far as the grantee is concerned, it does no more. Obviously, the grantor does retain an interest in the property, and he has only to pay the debt in full or make a valid continuing tender of the amount due. In such case, he is entitled to an injunction to prevent the sale of property under power of sale in a loan deed. This is what the court held in *First Federal Savings & Loan Association v. Norwood Realty Co.*[9] Again the proposition was stated in summary fashion, and the opinion was largely concerned with the question of usury.

But before a security deed grantor makes out a case to have a deed under power cancelled, he must pay the debt or make a tender of the amount due. In *Miller v. Levenson,*[10] the petition showed that the secured debt, or at least a part of it, was past due when suit was filed to have the deed cancelled, and there was no allegation that the amount was paid or tendered. Consequently, the petition failed to state a cause of action and the trial judge properly dismissed the case on general demurrer. The court gave no indication of whether relief would have been granted if the proper allegations and proof had been made.

Personal Property as Security

The significance of the recording statutes in the field of security transactions is indicated by the fact that all of the cases concerned with personal property during the survey period turned on the question of the recording of the instrument securing the indebtedness.

When does a recorded bill of sale to secure debt contain a sufficient description? In *Washburn Storage Co. v. Columbia Loan Co.*[11] a loan corporation held a recorded bill of sale to secure debt on household furniture which was subsequently stored by the owner in a warehouse. The warehouseman contended that his storage lien was superior to the loan company's lien for the reason that the chattels involved were not sufficiently described in the bill of sale to secure

9. 212 Ga. 524, 93 S.E.2d 763 (1956).
10. 212 Ga. 496, 93 S.E.2d 753 (1956).
11. 95 Ga. App. 552, 98 S.E.2d 147 (1957).

debt to impart notice to him. He also contended that he was protected by Code section 111-430 (b),[12] as the goods were in possession of the person who gave the bill of sale, with apparent authority to have them stored. As to this latter contention, the court held that Code section 111-430 (b) has no application to goods which are conveyed by their owner under a valid bill of sale to another for the purpose of securing payment of a debt.

The bill of sale recited that it was given to secure payment of a note. The note was unrecorded. There was also an unrecorded bill of sale which purported to be given to secure the note. The recorded bill of sale named the furniture, but merely listed it. The unrecorded bill of sale apparently naming the property recited that the property was in possession of Rev. J. A. Sanders and Laura Sanders, 1514 Simpson Road, N. W., Atlanta, the persons who had stored the furniture.

As to description, the court said that the description must be sufficiently definite to distinguish the property conveyed from other property of a similar nature. And that the recital in a recorded bill of sale that it secures a note of even date, or executed simultaneously with it, is notice of any additional facts which may serve to identify the property conveyed. But the rule did not apply in this case because the note referred to in the recorded bill of sale contained no description of the property conveyed, and it could not be ascertained from the note that it referred to any bill of sale except the one that was recorded. While all of the papers, the note and two bills of sale, were one instrument, the part of the instrument recorded did not identify itself with any other part containing information from which the chattels could be identified.

It is difficult to see why the recorded bill of sale naming particular furniture as having been given to secure a debt by named persons should not be sufficient notice to a warehouseman when those same persons store the named property. Even so, it is difficult to quarrel with the court's conclusion. Conceding that its opinion was highly technical, the answer would seem to be that the recording statutes are technical devices designed to protect lenders in a society where the dollar is an unusually attractive item. When the debt is properly recorded, it serves as constructive notice, regardless of actual notice.

12. GA. CODE ANN. § 111-430 (2) (1955 Supp.) provides that a warehouseman's lien may be enforced against property deposited by the person who is liable to the debtor if the goods had been so entrusted to such person that a pledge of the same by him to one who took goods in good faith for value would have been valid.

In such a case, it is not too much to require the lender recording the instrument to do so with exactitude.

But if the above reasoning is applicable to the *Washburn* case, it is difficult to understand why it is not also applicable to *National Cash Register Co. v. Sikes*,[13] unless the court misunderstood what seemed to be the main question. This case was trover for a cash register, which had been sold to Roth under a title retention contract. Defendant had purchased the cash register at a judicial sale after having a judgment and levy against the property. On the trial of the case, plaintiff sought to introduce the retention title contract signed by "Dixie Service Station by Allen Roth." The trial court excluded this evidence on the grounds that Dixie Service Station was not the name of any person, firm, or corporation, and that the contract had not been registered as required by law, and if recorded, the recording constituted insufficient notice to an innocent purchaser.

The defendant relied on Code section 67-111, which provides that, "A mortgage . . . so defectively recorded as not to give notice to a prudent inquirer, shall not be held notice to subsequent bona fide purchasers or holders of younger liens . . . "

The court held that since the words "Dixie Service Station" do not impart the name of any legal or artificial persons, the obligation was assumed by the person signing the instrument, and said:

> The real complaint of counsel for the defendant, therefore, must be taken to mean, not that the clerk of court in any manner defectively recorded the instrument, but that the records were perhaps not indexed or otherwise set up so that he would thereby locate the record of the transaction under the name of Roth. This, however, does not amount to a defective recording of an otherwise valid instrument so as to allow the same to be excluded from evidence.[14]

The court itself conceded that the undertaking was that of Roth himself, and it seems that the real complaint of counsel for defendant was not that the records were improperly indexed, but that plaintiff had filed for record an instrument under the name of Dixie Service Station, which was the individual undertaking of Roth. This, it appears should constitute defective recording within the meaning of the statute. It seems that the test should be, has the instrument been filed under the name of the individual who is legally liable? And if the recording statute is to serve its purpose, it should be the

13. 94 Ga. App. 391, 94 S.E.2d 782 (1956).
14. 94 Ga. App. 391, 393, 94 S.E.2d 782 (1956).

responsibilty of the person filing the instrument to file it under the proper name.

The holder of a properly recorded bill of sale to secure debt can lose his title to the secured property if he allows the debtor to sell the property in accordance with custom to pay liens held against the property. This was the proposition stated by the court in *Day v. C. O. Smith Guano Co.*,[15] though the court did not cite any substantial authority for the proposition.

The action was in trover against an endorser of a note by the owner of the property. The endorser had insisted that the proceeds from the sale of the property be used to pay off the note, which was secured by an unrecorded bill of sale to secure debt. The owner of the property had wanted to pay off the plaintiff, who held a second bill of sale to secure debt which had been properly recorded. The bill of sale covered a tobacco crop, which was sold at public auction. The question was whether the plaintiff had been divested of title by reason of a custom whereby farmers were permitted to sell their tobacco and then pay off any liens such as the plaintiff held. The defendant contended that there was such a custom. The court said there was no evidence of such custom, but said that if such a custom prevailed, it would have divested plaintiff of the title given to him by the bill of sale.

The proposition stated above appears to be dictum. In any event, the case would not seem to stand for the proposition that as between the two lien holders, the holder of the recorded bill of sale would lose his priority.

Jewelers Investment Co. v. Elliott Addressing Machine Co.,[16] stands for the proposition that a retention title contract creates no lien until it is recorded. Elliott sold to Ross Jewelers an addressograph machine, but failed to record its retention title contract. Before the machine was delivered, Ross Jewelers executed a bill of sale to secure debt to A.V.S., Inc. The bill of sale to secure debt did not refer to the addressograph, but did provide that it was to cover after acquired property, and this bill of sale was recorded. Ross Jewelers defaulted, and A.V.S., Inc. foreclosed and transferred all assets to Jewelers Investment Co. The court said that as Elliott had not recorded the contract, no lien was created, and the institution of a trover suit within the statutory period of thirty days does not dispense with the necessity of recording.

15. 95 Ga. App. 581, 98 S.E.2d 173 (1957).
16. 95 Ga. App. 152, 97 S.E.2d 548 (1957).

Colonial Credit Co. v. Williams[17] was a bail trover suit instituted by the holder of a retention title contract against the buyer after the buyer had defaulted in monthly installment payments. There was no showing that the plaintiff had made a demand for the automobile, and no refusal by defendant to return the automobile. Conversion was not otherwise shown. The court held that a purchaser's default in payment of purchase money alone will not constitute a conversion of the property. The court said that Code section 107-101 which provides that it is not necessary to prove a conversion of the property in an action of trover where the defendant is in possession of the property does not apply where the property has been lawfully acquired. Townsend, J. in a concurring opinion noted that if trover action were maintainable merely because of default in payments, this would deprive defendant of a right to allow the seller to repossess the article before suit in order to avoid a money judgment.

STATUTES

The two statutes enacted during the survey period relative to security transactions were concerned with personal property. The first statute[18] merely amended Code section 67-1403, which provides for the recording of conditional bills of sale, making the lien effective from the date of execution when the instrument is filed for record within thirty days, by repealing all laws and parts of laws in conflict with the statute.

The second statute[19] provides for the creation of factors' liens, and is unusually comprehensive, a fact which may well serve to prevent useless litigation in the future. The following is a brief summary of the statute for the convenience of the reader.

The statute provides for a written agreement between the borrower and the factor which shall constitute a continuing general lien upon the merchandise of the borrower, and upon any accounts receivable or other proceeds resulting from the sale or other disposition of the merchandise, without the merchandise being taken into constructive or actual possession.

The lien shall secure the factor for all loans and advances to or for the account of the borrower, together with interest and other indebtedness of the borrower. Presumably these other indebtednesses are in connection with the subject merchandise, but this point is not clear.

17. 95 Ga. App. 76, 97 S.E.2d 197 (1957).
18. Ga. Laws 1957, p. 86.
19. Ga. Laws 1957, p. 167.

The lien shall be valid from the time of filing the notice, whether the merchandise is in existence, or shall come into existence, or shall be subsequently acquired by the borrower.

The statute also provides detailed instructions for filing notice, which shall be in the county of the residence of the borrower, and if this county differs from the county of the location of the merchandise, then in both counties.

The factors' lien will not be superior to laborers' and mechanic's liens, or to other liens subsequently attaching to the merchandise by reason of work or services rendered thereon.

Where merchandise is sold in the ordinary course of business of the borrower, the lien terminates as to the merchandise, and shall attach to any obligation and to any other proceeds of such sale in the hands of the borrower. Unless otherwise agreed, the delivery of a written statement designating the merchandise to be the subject of the lien shall operate as an assignment of all accounts receivable which will result from the sale or other disposition of the merchandise.

The factors' lien upon accounts receivable shall not be invalidated by reason of the fact that merchandise sold or any part thereof is returned to or recovered by the borrower as his own property, or by reason of the fact that the borrower grants credits, allowances, or adjustments to persons owing on the accounts receivable.

Upon payment of the indebtedness secured, the factor, upon the request of any person interested in the merchandise shall acknowledge satisfaction which can be filed as the original notice of the lien.

The act does not apply to transactions of bailment, pledge, or consignment of merchandise in possession of the factor.