# BILLS AND NOTES

*By* C. EDWIN ROZIER*

This survey issue finds very few outstanding cases in the field of bills and notes which would startle the average practicing lawyer. Most of the cases are in line with those in the past since the adoption of the Negotiable Instrument Law in our state. As a result of this, these few words will be directed at cases which only remind us of a few pitfalls. Many of the cases were decided mainly on procedural law and this field I leave to one better informed than myself.

The cases of the *First Federal Savings and Loan Association in Atlanta v. Norwood Realty Company, Inc.*[1] and *H. G. Walton v. Herbert Johnson*[2] once again point out that if any attorney desires to collect attorney fees provided in a note, he must comply with the statute strictly. The former case, which was a rather involved case relating to usury, holds that if a debtor pays his obligation in full within ten days from the date he received notice of attorney fees, the debtor is not liable for attorney fees. In the latter case, the court held the burden was on the plaintiff to show that valid notice had been given to the defendant that attorney fees would be claimed as required by code section 20-506, as amended. The notice given in this case was one of intention to file suit for collection of said note including ten per cent attorney fees provided therein, and the court set out that the requirement of such notice that the debtor have ten days notice to pay the obligation without attorney fees had not been complied with.

Appellate procedure was involved in the case of *S. A. Still, Sr. v. Citizens and Southern National Bank.*[3] This was a suit on a note in which judgment was entered against both defendants as joint makers of the note and only one defendant brought error. The court of appeals held that as a procedural matter, a codefendant, not named in the bill of exceptions, had a right of contribution against the remaining defendant and was therefore an indispensable party to the bill of exceptions. The court restated the settled rule that interested parties in sustaining the judgment of the court or who would be affected by judgment of reversal, were indispensable parties and must be made parties to the bill of exceptions.

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1. 212 Ga. 524, 93 S.E.2d 763 (1956).
2. 213 Ga. 108, 97 S.E.2d 310 (1957).
3. 95 Ga. App. 710, 98 S.E.2d 578 (1957).

The rights of a transferee were expounded in the case of *Sarah L. Robbins et al. v. Welfare Finance Corporation.*[4] In this case, the plaintiff was a transferee of a promissory note secured by a bill of sale to secure debt to certain personal property. The right of the transferee to bring suit was questioned and the opinion of the court pointed out that where the holder of the instrument payable to his order transfers it for value without indorsement, the transfer vests in the transferree such title as the transferor had in the instrument and the transferee acquired, in addition the right to have the endorsement of the transferor. Such a transfer without indorsement, vests in the transferee legal title, and althought not effective to render the transferee as a holder in due course, did permit the transferee to bring suit in his own name. There was a question as to whether the transfer conveyed to the transferee the benefit of the security securing the notes and in this regard, code section 14-802 providing, "Transfer of notes secured by a mortgage otherwise conveys to the transferee the benefit of the security," was authority to the decision that the security went with the transfer of the note?

Several cases dealt with defenses to suits on notes. In *C. W. Childs v. J. D. Mason,*[5] the maker of notes was sued by the payee, and the defendant filed his answer setting up an absolute failure of consideration. The defense was based on a separate and distinct oral agreement entered into between the parties at the time of the execution of the notes. The defendant's plea of failure of consideration was rather novel in that the basis was that the consideration was the payment of a series of notes by a third party. In other words, no money was to pass until this third party paid the several notes. The defendant claims that as this third party paid none of the notes that there was no consideration at any time for the notes between he and the plaintiff and therefore no consideration. This is based on an oral agreement between the parties that they would not consider the transaction complete until this third party had paid the several notes. The court following settled law held that the plea of failure of consideration was based on an oral statement and was an attempt to vary an unconditional promise to pay by oral agreement and to add a condition to the note not contained therein and that it was clear that oral agreements may never vary unconditional promises to pay. Along the line of oral agreements, the case of *Thomas Fulmer v. M. E. Barber*[6] was an action on a check which had been given by the defen-

4. 95 Ga. App. 90, 96 S.E.2d 892 (1957).
5. Ga. App. 662, 98 S.E.2d 379 (1957).
6. 95 Ga. App. 576, 98 S.E.2d 164 (1957).

dant to the plaintiff for payment of the plaintiff's one-half interest in a partnership between the parties. An oral agreement was made between the parties to the effect that the check was given and not to be presented to the bank until the books of the partnership were audited. The court of appeals set out the law of conditional delivery of instruments and cited code section 14-416 as authority that between immediate parties and as regard to any remote party other than a holder in due course, the delivery, in order to be effective, must be either by or under the authority of the party making, drawing, excepting, or indorsing, as the case may be; and in such case a delivery may be shown to have been conditional, and for a special purpose only, and not for the purpose of transfering the property in the instrument. A contemporaneous oral agreement is admissible between parties not holders in due course to show that the instrument was not to take effect until some condition was performed. *Tom Chandler v. Southern Union Conference of Seventh Day Adventist*[7] followed a long line of previous appellate decisions in holding insufficient a plea of payment which failed to allege the amount paid, and how, when and to whom paid. In the same case the court pointed out that a plea of failure of consideration must be set out fully and that the defense of fraud must be specially pleaded and mere loose general allegations of fraud are insufficient to state a defense to an action on a note. The plea of failure of consideration and a plea of fraud in the procurement was set out in the case of *Standard Dry Wall Company, Inc. et al v. Georgia Railroad Bank and Trust Company.*[8] The court made slight notice of the attempt to set up fraud in the procurement as a defense as it was insufficient for failure to allege specific facts supporting the conclusion of fraud; and held the pleas of failure of consideration as insufficient for failure to allege that a third maker of a note who was not involved in this suit, had not received the proceeds nor had they alleged that they had made demand or received the proceeds of the note. The court's opinion was as follows: "a contract may be supported by adequate consideration as against the promisor under it who never receives any part of consideration. This is Horn Book Law—the most elementary."

The case of *Anna Lou Jones et al. v. H. B. Darling, Jr. et al.*[9] was one in which there was an action on a note by the trustee of beneficiaries of payee (deceased). This case, while not new law, brings on a strange situation in which the note made by the defendant to the

7. 95 Ga. App. 776, 98 S.E.2d 653 (1957).
8. 94 Ga. App. 357, 94 S.E.2d 511 (1956).
9. 94 Ga. App. 641, 95 S.E.2d 709 (1956).

deceased payee provided as follows: "in case of her death . . . the note becomes cancelled and the obligations of the maker ceases." The payee of the note died before maturity date. The court pointed out that this provision was not ambiguous and that the note could be enforced by the payee at any time after its maturity, if the payee was still in life. The court decided that the contract was not a negotiable instrument because it did not contain an unconditional promise to pay as provided in code section 14-201. The court's reasoning in stating that this was a note and a covenant not to sue amounting to a lease which was executed temporaneous and that the note itself was unconditional but that the release joined with it made it conditional is not clear. The effect of the note was to release the maker of the indebtedness so far as the payee's estate was concerned. Judge Felton's dissenting opinion should be noted in this case.

Five decisions dealt with miscellaneous questions involving payment, indorsers, the right to fill in blanks and the right of an indorser. *Piedmont Engineering and Construction Corporation v. Hanna Paint Company, Inc.*[10] involves the theory of law regarding appropriation of payments. The plaintiff furnished materials to the defendant and his sub-contractor. The defendant issued a check payable jointly to the plaintiff and the sub-contractor; and the plaintiff elected to apply the check to money owed by the sub-contractor to the plaintiff, leaving the account against the defendant still outstanding. There is evidence that there was no instruction as to where or to whom the payment should be made. The court, relying on code section 20-1006, decided that in the absence of instructions otherwise, the plaintiff had the right to apply the check toward money owed to the sub-contractor or to his account and having applied it to the sub-contractor's account, the account against the defendant was still outstanding. This decision is a warning to debtors who have several accounts with a single creditor. In the absence of instructions otherwise such a creditor has the right to apply the payment toward any of the accounts. In *Homer Mitchell v. T. O. Asbury*,[11] an employee accepted a check with a notation, "In full settlement of account", and took the check to the bank on which it was drawn and had it certified. Under the law of accord and satisfaction, the court held that acceptance of such a check with the understanding that it was in satisfaction of his claim, was an accord and satisfaction of the demands. The certification of the check by the bank released all parties from liability except the bank and the payee, and amounted to an acceptance

10. 95 Ga. App. 605, 98 S.E.2d 137 (1957).
11. 94 Ga. App. 465, 95 S.E.2d 341 (1956).

by the bank for payment. An action by the payee against the maker of a note which the maker had signed in blank was presented in the case of *W. D. Ferguson v. R. L. Straton.*[12] Code section 14-214 states the right of a person in possession of an instrument signed in blank to fill in these blanks, the blanks were filled in accordance with the authority given by the maker and therefore the court granted non-suit for the maker. *H. O. Jordan v. Curtis Daniels*[13] is a case in which the defendant alleged that he was an indorser on a note and was discharged by reason of failure of the payee to give him notice of non-payment of the notes. Code section 38-509 provides that as between parties one signing a promissory note apparently as a joint principal may in an action on the note by the payee plead and prove that he signed the note in the capacity of accommodation indorser for benefit of the principal maker and that the plaintiff took the note with knowledge of such facts. This rule of law allowed the defendant to show that he was an indorser and the court further pointed out that an accommodation indorser, was discharged by failure of the holder of the note to give notice of non-payment of the instrument by the maker where there was no waiver of notice provided in the note. In answer to the defendant's allegation that he was a surety for the maker, the court recited from our N.I.L. and pointed out that an express agreement was necessary to render one a surety. There being an absence of such an agreement, the defendant could not be classified as a surety. The presumption that an individual is an indorser when he places his signature upon an instrument other than as a maker, drawer, or acceptor as provided in code section 14-604, 605 is set out in the case of *H. E. Glassner v. Decatur Lumber and Supply Company.*[14] The defendant alleged that he was the guarantor and not an indorser and therefore could not be sued in the same action as the maker, but his answer did not allege any facts showing it to have been the intention of the parties that the individual defendant indorsed the note as a guarantor. Code Section 103-205 which is to be considered in connection with the code Title 14 is also brought to play in this case. This section provides that any surety, guarantor, or indorser, at any time after debt on which he is liable becomes due, may give notice in writing to creditor to proceed to collect debt from principal, and, if creditor refuses or fails to commence action within three months after such notice, indorser, guarantor or surety giving notice shall be discharged. The court pointed out this being statutory must be

12. 94 Ga. App. 463, 95 S.E.2d 337 (1956).
13. 94 Ga. App. 456, 95 S.E.2d 28 (1956).
14. 95 Ga. App. 665, 99 S.E.2d 330 (1957).

strictly complied with by the one giving notice and if the principal in the notes resides outside the state, this section is not applicable. The court went further and said any notice sent under this section was not sufficient not only because the principal resided outside the state, but also because the notice should state the county in which the maker resides and the notice in this case failed to do so.