SECURITY TRANSACTIONS

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PERSONAL PROPERTY AS SECURITY

Since there is no motor vehicle title registration law in Georgia, cases concerning the title to motor vehicles continue to be governed by the law applicable to personal property in general. Most of the statute law relating to personal property as security was enacted years before the automobile came into the the mass use which we know today. Clearly these laws were not designed to cope with personal property of such a transitory nature as the automobile. The lawyer dealing with a real estate title can generally be sure that all the records relating to the property will be recorded in the county where the land lies. However, the automobile is in one place today and perhaps two hundred or two thousand miles away a few days later, often leaving in its wake a chain of title which is extremely difficult to follow. The "automobile cases" decided during the survey period are examples of this growing problem.

In *Nalley Chevrolet v. California Bank*,[1] the Court of Appeals was presented with a novel question of constructive notice. A California corporation had sold an automobile on a conditional bill of sale on June 28, 1957, in California. One of the purchasers who executed the conditional bill of sale was a resident of Fulton County, Georgia. However, no witnesses to his signature appeared on the instrument. The purchaser who resided in Georgia returned to Georgia with the automobile and on September 20, 1957, traded it to Nalley Chevrolet. On this latter date, the conditional bill of sale executed in California had not been recorded in Georgia and could not have been because it did not bear the required notary public witness. Nalley Chevrolet then sold the automobile to another concern. On December 26, 1957, the Georgia resident who was one of the purchasers in California re-executed the instrument in Fulton County, Georgia and after his signature appeared the following: "Witness—M. D. Roseberry. Sworn to and subscribed before me this 26th day of Dec., 1957. John H. Howard, Notary Public, Fulton County, Ga." and attested by notary seal. The re-executed instrument was filed for record in Fulton County on December 27, 1957. Still later on October 4, 1958, Nalley Chevrolet pur-

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1. 100 Ga. App. 197, 110 S.E.2d 32 (1959), noted in student section, *infra*.

chased the automobile *a second time* from one Craven. California Bank, as transferee of the California corporation which had originally sold the car, commenced a foreclosure proceeding in the Civil Court of Fulton County and Nalley Chevrolet filed its claim to the automobile. Judgment in the trial court was for the plaintiff and Nalley appealed. The Court of Appeals affirmed, holding that the original conditional bill of sale could not be recorded because of the lack of the required witnesses, but when it was re-executed in Georgia before a notary public it became entitled to record. Since it was recorded before Nalley Chevrolet purchased the car *the second time,* Nalley had constructive notice of the instrument. Therefore California Bank's title was superior to that of Nalley. The court also held that the form of attestation used by the notary public when the instrument was re-executed in Georgia was sufficient to entitle it to record even though it did not recite that delivery of the instrument was made. It was further held that the instrument, when re-executed by only one of the two original purchasers, was entitled to record as the contract of the party who re-executed it.

In the case of *Peoples Loan & Finance Corporation of Rome v. McBurnette*,[2] it was alleged: 1) that the plaintiff had loaned a sum of money to one Harwell, taking as security a bill of sale to secure debt on a 1957 Mercury automobile, which sale was duly recorded; 2) that the defendant, Minish, obtained possession of the automobile from Harwell in payment of a gambling debt owed by Harwell to Minish; 3) that, later, Minish sold the automobile to the defendant, McBurnette; 4) that McBurnette had possession of the automobile and was holding it under a claim of title and refused to deliver it to plaintiff; 5) and that, by reason of these facts, Minish obtained no title to the automobile as against the plaintiff, and the defendant, McBurnette, also is without any title thereto. The bill of sale to secure debt executed by Harwell to plaintiff contained a provision reciting that the maker was a dealer in automobiles and would be permitted to sell the automobile, but the proceeds of any sale would immediately become impressed with the trust for the use and benefit of the plaintiff. McBurnette filed a general demurrer to the petition which was sustained. The case went before the Court of Appeals on exceptions to that ruling. The Court of Appeals affirmed, holding that the above mentioned provision in the instant bill of sale took this case out of the general rule and permitted the purchaser to take title free and clear of the lien of the security instrument. Several cases were cited

2. 100 Ga. App. 4, 110 S.E.2d 32 (1960).

which so held. The court then held, relying on GA. CODE §96-207 which provides that,

> where an owner has given to another such evidence of the right of selling his goods as, according to the custom of trade or the common understanding of the world, usually accompanies the authority of disposal, or has given the external indicia of the right of disposing of his property, a sale to an innocent purchaser divests the true owner's title.

Since the petition showed that McBurnette had purchased the automobile from Minish without notice that Harwell, the automobile dealer, had not sold the automobile to Minish in the regular course of business, McBurnette was in the same position as though he had actually purchased it in like manner direct from Harwell.

The case of *Church v. Trailermobile, Inc.*,[3] involved a suit by Trailermobile, Inc. against one Church to recover the balance due on a conditional sale contract given for the purchase price of a trailer. The petition alleged: 1) that the defendant failed to pay the purchase price when due; 2) that the plaintiff repossessed the trailer under the terms of the contract and sold it for $3800.00; 3) that there was a balance due plaintiff of $1,339.44. The defendant alleged in his answer that the plaintiff had acquired possession of the trailer for the purpose of repairing it. Therefore, as plaintiff did not restore the possession to defendant before the sale, the repossession was illegal and the sale was a conversion. As a result, plaintiff was indebted to the defendant in the sum of $363.38, the defendant having allowed the sum of $1,424.00 as a reasonable rental value of the trailer for the time he used it. The trial court directed a verdict for plaintiff, from which defendant appealed. The decision was reversed by the Court of Appeals. This court held that since the plaintiff had obtained possession of the trailer only for the purpose of making repairs, it was the duty of the plaintiff to restore possession of the trailer to the defendant-vendee before it could legally take possession from the vendee for the purpose of sale under the power contained in the sale contract. The failure to do so and the subsequent sale of the trailer was a conversion of the trailer by the vendor.

A question which apparently never had been presented to the appellate courts before was decided in the case of *City Wholesale Company v. Harper*[4]. The facts stipulated in the case show that the owner of certain personal property executed a bill of sale to secure debt covering the property to one Dorsey on March 12, 1951. This instru-

3. 99 Ga. App. 750, 109 S.E.2d 636 (1959).
4. 100 Ga. App. 151, 110 S.E.2d 561 (1959).

ment was recorded March 12, 1951. On January 28, 1958, the same grantor executed a second bill of sale to secure debt covering the same property to City Wholesale Company. The question presented to the court was whether the older security deed had priority over the younger. It was contended that the instrument dated January 28, 1958, had precedence over the one executed March 12, 1951, because the owner of the older security instrument had not filed an affidavit to renew its record within seven (7) years from the date of the filing as provided in Ga. Laws 1937, p. 760. The Court of Appeals held that the sole effect of the recordation of a bill of sale to secure debt is to afford to the junior grantee constructive notice at the *time* such junior grantee takes or contemplates the taking of a conveyance from the common grantor. Once such notice has been afforded by the proper record of a bill of sale to secure debt, the respective priorities of the junior and senior instruments are fixed forever. Since the security deed executed January 28, 1958, was executed within seven (7) years from the date on which the senior security deed was recorded, the junior grantee had constructive notice of the senior instrument and no subsequent failure on the part of the owner of the senior instrument to file an affidavit could affect the priority between the parties.

In the case of *Turner v. Kay Jewelry Company*,[5] it was held that a seller, who has reserved title to personalty, may bring suit to collect the purchase price without abandoning the security since there is nothing inconsistent in attempting to collect the purchase price and at the same time retaining title as security for unpaid balance of the purchase price. The opinion points out that a seller of personalty who has reserved title may, after obtaining judgment against the buyer for the price and collecting a portion of the same, nevertheless, without cancelling the judgment or paying or tendering back what has been received, maintain an action of trover against the buyer for the purpose of collecting the balance of the purchase money.

In *Dr. Pepper Finance Corporation v. Cooper*,[6] the Supreme Court held that where a conditional sale contract contained a stipulation that the seller made no warranty of the property and that the purchaser agreed to look solely to the manufacturer's guarantee, the purchaser was precluded from asserting in response to an action by the seller for a deficiency judgment on such contract, the defense of failure of consideration. The court also held that the defense of fraud interposed by the purchaser was not sustained by the evidence because there

5. 101 Ga. App. 173, 112 S.E.2d 783 (1960).
6. 215 Ga. 598, 112 S.E.2d 585 (1960).

was no showing that the purchaser relied upon the representations made to him by the seller or that he was deceived in any way.

In the case of *Continental National Bank v. Short*,[7] the Court of Appeals pointed out that where a security instrument on personal property purchased outside the state and afterwards brought into the limits of the state is foreclosed within six months after the property was brought into the state, the foreclosure is valid as against a bona fide purchaser of the property without notice of the mortgage, although it is not recorded. The commencement of the foreclosure proceedings within the six months period is itself sufficient notice.

An interesting question of pleading and practice arose in the case of *General Gas Corporation v. Robinson*.[8] In that case the plaintiff foreclosed its conditional sale contract covering a certain home freezer. Execution issued and levy was made on the property of the defendant in *fi. fa.* The defendant filed an affidavit of illegality alleging that the conditional sale contract was never signed nor executed by him. The court held that this constituted a proper plea of *non est factum* and placed the burden on the plaintiff to prove the execution of the contract which was sought to be foreclosed. Since the plaintiff offered no evidence concerning the execution of the contract, the trial court did not err in dismissing the levy and overruling the plaintiff's motion to strike the affidavit of illegality for the defendant's failure to offer any evidence thereunder.

Real Property as Security

Probably the most far reaching decision during the survey period was that of the Supreme Court in *Todd v. Morgan*.[9] In that case, the plaintiff filed an action to recover land and to have declared void a sheriff's deed to the property. The petitioner alleged that she was the holder of a deed to secure debt executed by one of the defendants in 1932 conveying the property in suit to secure a specified indebtedness "or any other present or future indebtedness or liability" between the grantor and grantee; that an additional indebtedness was made in 1942 for $2,500.00 for which the grantor in the security deed (one of the defendants) executed a note; and that subsequent to the signing of the security deed, an execution was issued against the grantor-defendant and the property in suit was levied upon and sold by the sheriff to the other defendant. It was further alleged that the defendant-holder of the sheriff's deed claimed that the absolute title con-

7. 101 Ga. App. 304, 113 S.E.2d 491 (1960).
8. 101 Ga. App. 192, 112 S.E.2d 774 (1960).
9. 215 Ga. 220, 109 S.E.2d 803 (1959).

veyed in the deed to secure debt had reverted to the grantor under GA. CODE ANN. §67-1308.[10] Plaintiff by amendment, attacked the constitutionality of this code section. The defendant contended that since the plaintiff's petition showed on its face that the debt secured by the security deed had matured more than twenty (20) years before the filing of the petition, title had reverted to the grantor in the security deed.[11] The court held that GA. CODE ANN. §67-1308, "as applied to the deed to secure debt in this case, which was executed prior to the passage and effective date of the act, is unconstitutioual." The court goes on to point out that the Georgia and United States Constitutions prohibit the state from passing any retroactive law or any law impairing the obligations of a contract. The court found that, at least as applied to the facts in this particular case, the statute in question violated these requirements of the two constitutions. The exact wording used by the court in its opinion has been quoted above to show the relatively narrow state of facts upon which the ruling of the court was based. It seems fairly evident from the opinion that the court ruled only that the statute is unconstitutional as applied to the particular facts in the case. *Royal Cigar Co. v. Huiet*[12] would seem to indicate that the statute is now completely void.

In the case of *Norwood Realty Company v. First Federal Savings and Loan Association of Atlanta,*[13] the respondent had sold certain real property under the power of sale contained in a security deed. The respondent then filed suit in DeKalb Superior Court for a judicial confirmation of the sale. The trial court confirmed the sale and the Supreme Court affirmed. The facts of the case show that after the execution of the security deed the grantor in the security deed had obtained several quit claim deeds from the grantee in order that the grantor might sell certain lots free and clear of the security deed. The advertisement under the power of sale contained a description of the property as originally conveyed in the security deed and then expressly excepted from the description the lots previously released to the grantor by quit claim deed. The Supreme Court held that the advertisement was sufficient.

In the case of *Dozier v. Mangham,*[14] the plaintiffs brought suit to enjoin the sale of certain real property under a power of sale contained in a security deed executed by the plaintiffs to the defendant. A tem-

10. For a full understanding of the facts it is necessary to refer to the first appearance of the case before the Supreme Court. Morgan v. Todd, 214 Ga. 497, 196 S.E.2d 37 (1958).
11. Ga. Laws 1941, pp. 487, 488; Ga. Laws 1953, pp. 313-315.
12. 195 Ga. 852, 25 S.E.2d 810 (1943).
13. 99 Ga. App. 692, 109 S.E.2d 844 (1959).
14. 215 Ga. 720, 113 S.E.2d 123 (1960).

porary restraining order was issued by the trial court. At the hearing on the interlocutory injunction, the restraining order was dissolved and a further restraining order denied. An appeal was taken from this judgment to the Supreme Court. The opinion of the Supreme Court points out that there was a direct conflict in the evidence as between the plaintiffs' and the defendant's contentions. Under such circumstances, the court pointed out, it has long been the law of Georgia that the discretion of the trial court in granting or refusing a further restraining order will not be disturbed.

In the case of *Manget Foundation, Inc. v. White,*[15] the defendant had purchased certain real property and the warranty deed to the defendant recited the following:

> The consideration of this deed is the assumption by the grantee herein of the unpaid principal balance of $6,948.96 due on loan No. 57687 and secured by loan deed from the grantor herein to Standard Federal Savings & Loan Association of Atlanta; and the assumption of the unpaid principal balance and interest due on the debt secured by second loan deed from the grantor herein to Manget Foundation, Inc.

The facts show that the defendant accepted the warranty deed and entered into possession but failed to pay anything on either of the two loans. Standard Federal foreclosed and sold the property. The plaintiff, the grantee in the second security deed, then brought an action against the defendant for the sum of $4,640.00 plus interest. The defendant pleaded the statute of frauds, contending that he had not signed any agreement, obligation or assumption to pay the second loan. The trial court sustained the plea. On appeal the Court of Appeals reversed, holding that where a warranty deed recites that the grantee agrees to pay another's debt as a part of the consideration, the statute of frauds is satisfied if the grantee accepts the warranty deed and enters into possession of the land. The court then held that the words "the assumption by the grantee herein of the principal balance" contained in the warranty deed may be read "the agreement by the grantee herein to pay the principal balance."

In *Bell v. Allied Finance Company,*[16] the Supreme Court held that the grantor in a security deed retains the right of redemption by payment of the debt and consequently an equitable estate in the land which may be subjected to the payment of debts. When a judgment based on the homestead waiver note is rendered at any time prior to

15. 101 Ga. App. 239, 113 S.E.2d 235 (1960).
16. 215 Ga. 631, 112 S.E.2d 609 (1960).

an adjudication in bankruptcy, the lien of such judgment attaches to the homestead exemption and the bankruptcy proceedings do not divest or affect the lien of such judgment. It was further held that ordinarily the holder of a junior judgment against the grantor in a security deed cannot enforce his lien against the interest of the grantor in the land conveyed without first paying in full the secured debt. However, under the unique facts alleged the plaintiff had no adequate remedy at law and was entitled to equitable relief, including the appointment of a receiver, to enable him to enforce its lien.

In the case of *Williamson v. Floyd County Wildlife Association, Inc.*,[17] plaintiff brought an action in ejectment against the defendant. The defendant filed an equitable plea alleging that the absolute deed upon which the plaintiff relied for title, was in fact a deed to secure debt which had not matured and under which grantees had the right to enter and cut timber to pay off indebtedness. The Supreme Court held that the question of whether the defendant thought he was signing a mortgage and deed to secure debt with right to cut timber to pay off indebtedness, and whether the debt was due and did not mature for twenty years, were questions for the jury and that the court erred in directing a verdict. The Supreme Court citing a number of Georgia cases pointed out that under GA. CODE ANN. §85-408 the possession of the land is notice of whatever right or title the occupant may have, and a deed absolute in form may be shown by parole evidence to have been made to secure debt where the maker remains in possession of the land. In such a situation, the occupant may assert his equity against the grantee and a bona fide purchaser of the land from the grantee who has no actual notice of the occupant's equity and who makes no inquiry of the occupant.

17. 215 Ga. 789, 113 S.E.2d 626 (1960).