SECURITY TRANSACTIONS

By GERALD L. KOCK*

On the assumption that *security transactions* is more than a catch-all label for events that have no essential similarity, it is possible to say things about *security* transactions generally even when the rules discussed were enunciated specially in terms of a particular kind of transaction. This year there have been several instances in which cases involving either real or personal property turned on propositions that are valid without regard to the kind of property involved.

First there is the question of labels. We hear of mortgages, deeds to secure debt, security deeds, bills of sale to secure debt, conditional-sale contracts, and chattel mortgages. There may be even more labels in use, but among those on this list there are only three kinds of transactions. The conditional-sale contract, a contract retaining title until future payment of the price, is in some states in common use to finance the distribution of low cost housing;[1] it is more commonly used to finance consumer purchases of chattels.[2] A mortgage is a lien.[3] It is created by agreement in any form sufficient to demonstrate an intention to create a lien upon property.[4] It is a real property mortgage or a chattel mortgage depending upon whether the collateral in which the security interest attaches is real or personal property.[5]

Security deed is no more than a nickname for a deed to secure debt. A deed to secure debt effects a transfer of the legal title to the collateral,[6] but because it is a transfer solely for the purpose of security, it does not affect most of the transferor's rights of ownership unless he defaults in his performance of the obligations that are secured by the conveyance.

This very useful instrument has been the source of confusion. Being, in essence, a highly sophisticated reconstruction of the seventeenth century conveyance upon a condition subsequent, it is not particularly mysterious, but its very antiquity has been a puzzlement at times. The deed to secure debt looks like what most common-law jurisdictions call a mortgage. In Georgia it is not a mortgage, as that term is used in the Code,[7] but it may be fore-

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1. See, for example, Chambless v. Cain, 109 Ga. App. 163, 135 S.E.2d 463 (1964).
2. See GA. CODE ANN. §§67-1401 (1957 Rev.), 109A-9-102 (2) (1962).
3. GA. CODE §67-101 (1933).
4. GA. CODE ANN. §67-102 (1957 Rev.).
5. The rights of a chattel mortgagee differ from those of a real property mortgagee because of the terms of the Uniform Commercial Code—Secured Transactions (GA. CODE ANN. §§109A-9-101 to -507 (1962).
6. GA. CODE ANN. §67-1301 (1957 Rev.).
7. *Ibid.*

closed in equity, because it is an equitable mortgage.[8] The courts have applied to it Code sections that refer only to mortgages.[9] And, people at large, when they mean to say security agreement, use the terms mortgage and security deed indiscriminately.

Since the normal terms of the two kinds of contract are quite different, the enforcement procedures and other rights and obligations of the parties are different. As a result, there are many situations in which it would be of great importance exactly which of the two it was that the parties had in mind. On the other hand, in ordinary conversation, both terms are used to mean *some sort of security,* the kind not being considered of particular importance. Even in legal transactions both terms are sometimes used in this general sense, as was recently recognized by the Court of Appeals.[10] The use of both "mortgage" and "security deed" to refer to the same security interest was raised as an ambiguity that would render a contract to procure a purchaser of certain real estate vague and, thus, legally unenforceable The court ruled that it could take judicial notice of the ambiguity of common usage and held that the inaccurate usage did not render the agreement too vague for enforcement.

Unless usage or dealings between the parties could be used to clarify their use of the words, a different result would very likely obtain in the case of an agreement to create a security interest, for example, but in the case before the court, where the sole significance of the words was to describe an existing arrangement, the court's solution is, clearly, the common-sense one.

Another point in which security agreements are similar has arisen in both real and personal property cases recently. The function of security is to back-stop another obligation. The agreement not infrequently contains provisions about preservation and insurance against loss to the collateral or even restricting its use, but the heart of the arrangement is the provision of an alternate performance of the obligation due the secured party in the event of its default. As a result, the security provided is available only in the event of default on the underlying obligation.[11] Because the security and the underlying obligation are commonly evidenced by different instruments, it is possible that their terms not jibe exactly. It is the acceleration clause that has raised this problem most accutely. If the security is in exactly the same terms as the note representing the underlying debt, the debt and

8. Under GA. CODE ANN. §67-601 (1957 Rev.). Merchants Bank v. Beard, 162 Ga. 446, 134 S.E.2d 107 (1926). Also see the discussion by Justice Lumpkin in Pusser v. Thompson, 132 Ga. 280, 64 S.E. 75 (1909).
9. GA. CODE ANN. §67-104 (1957 Rev.); Hutchinson v. King, 192 Ga. 402, 15 S.E.2d 523 (1941).
10. Cole v. Cates, 110 Ga. App. 820, 140 S.E.2d 36 (1964).
11. In Purser v. Charles S. Martin Distrib. Co., 110 Ga. App. 768, 140 S.E.2d 75 (1964), the petition in a trover action was held to be subject to general demurrer because it failed to allege default.

the security mature at the same time, whether accelerated under a proper clause or not. Partial enforcement of the security causes problems, but that is another matter. Should the note not contain an acceleration clause, the security may be enforced only to the extent of the actual default, even if the security instrument contains an acceleration clause.[12] This is so because of the distinction between the debt secured and the security provided for its enforcement. On the other hand, should the security instrument contain no acceleration clause when the note does, the security is enforceable for the full amount after the balance has been accelerated under the note and default has been had. This different result comes because the security is enforceable on default of obligations under the note, any default, however large, and to its full extent.[13]

The importance of this is clear. It is only after a default on the underlying obligation that a sale may properly be had under the terms of a power of sale contained in a security deed. A case included in last year's survey held that a premature publication of intent to exercise such a power of sale constitutes tortious conduct for which the debtor may recover damages.[14]

The same rule applies to chattel security. The right to possession that is necessary to support the customary trover action accrues only on default.[15] Lacking the right of possession, an action in trover must fail.

With this brief mention of more general matters, we can turn to the particular kinds of transactions.

I. Security Interests in Personal Property.

A. Motor Vehicle Certificates of Title.

Motor vehicles are goods.[16] Rules for the sale and purchase of them and security transactions involving them are, therefore, contained within the Commercial Code. They are goods, moreover, the peculiar mobility of which has caused much difficulty in legal attempts to prevent frauds and other deceits. These difficulties have led to considerable inconveniences in the application of the usual rules of law governing personal property, which inconveniences have, in many states, resulted in enactment of certificate of title acts.

Though they differ in many respects from each other, all of these statutes

12. An exception has eaten away almost the entire impact of this rule. If the two instruments were executed at the same time, they will be read as one contract so that, as between the parties, the acceleration clause in the deed would be fully effective. Watson v. Planters & Citizens Bank, 110 Ga. App. 725, 140 S.E.2d 30 (1964).
13. Ward v. Watkins, 219 Ga. 629, 135 S.E.2d 421 (1964), *overruling* Verner v. McLarty, 213 Ga. 472, 99 S.E.2d 890 (1957).
14. Sale City Peanut & Milling Co. v. Planters & Citizens Bank, 107 Ga. App. 463, 130 S.E.2d 518 (1963).
15. *Supra* n. 11; Ga. Code Ann. §109A-9-503 (1962).
16. Ga. Code Ann. §§109A-2-105 (1), 109A-7-102 (1) (f), 109A-9-105 (1) (f) (1962).

have basically the same purpose. That purpose is simply to create a public record of ownership and other claims that is as mobile as the property itself, thus ending the dependance upon the courthouse records generally thought sufficient for property generally.[17] This is an important development, but if that were clearly what the statutes did, all that would be required would be familiarity with the procedure for using this new recording device. But, people can, and frequently do, deal in personal property without paying any heed to the public records. To ensure the effectiveness of the new laws, most legislatures felt a need to prevent such heedlessness. The impact on our law of the various devices adopted to accomplish this end will not be known for some time.

The question is of the legal nature of the certificate. As indicated above it can be looked upon as a public record, like the books and files in the office of the clerk of the superior court. The language of the statute makes it clear that more than that was intended. The law provides that except as between the parties, a transfer of a motor vehicle by an owner that does not involve a car dealer "is not effective until the provisions of [the act] . . . have been complied with and no purchaser or transferee shall acquire any right, title, or interest in and to a vehicle purchased by him unless and until he shall obtain from the transferor the certificate of title thereto, duly transferred in accordance with the provisions of this section."[18]

This sounds very much like the familiar cases of documents of title to goods in the hands of a bailee, *i.e.* warehouse receipts and bills of lading. There is even reference to negotiability as an attribute of certificates of title.[19] Law and commerce have long been familiar with the situation of documents that so far represent goods that, once the document comes into existence, rights in the goods are subject to rights in the document; ownership of the document is ownership of the goods. This is more than can be said of certificates of title, because the statute clearly recognizes possible rights in the goods. It is specifically provided that in spite of the existence of an outstanding certificate the vehicle is subject to levy, but the certificate is not.[20] This is directly contrary to the rule requiring that a negotiable document of title be taken out of circulation before an effective levy can be had.[21]

We have then the problem of determining the fit of the certificate of title act with other statutory provisions designed to protect persons who deal with goods without conducting a title search. There are two specific rules of

17. So, it has been held that actual knowledge is effective notice even in the absence of a certificate notation. Franklin Finance Co. v. Strother Ford, Inc., 110 Ga. App. 365, 138 S.E.2d 679 (1964).
18. GA. CODE ANN. §68-415a (d) (Supp. 1963).
19. See GA. CODE ANN. §68-412a (a) (Supp. 1963).
20. GA. CODE ANN. §68-411a (d) (Supp. 1963).
21. *Cf.* GA. CODE ANN. §109A-7-602 (1962).

this sort in the Commercial Code, both of which can be discussed in terms of recent cases.

It is provided by the Commercial Code that one who acquires goods in a transaction of purchase may, though he has a defective or voidable title, convey good title to a good faith purchaser.[22] In a recent case[23] the owner of a car arranged a deal by which he would trade his Ford for another car. He handed over his car together with the certificate of title and took the other car, apparently to try it out, while its prior owner freed it of a prior security interest. The new possessor of the Ford took the endorsed certificate of title to his bank and arranged for a security interest in the Ford. The exchange deal broke down and the Ford owner wanted his car back free of the bank's claim. The court held that, having surrendered the Ford and the certificate of title that represented its ownership to another, he was bound to recognize the rights of a good faith purchaser who had relied on the representation of title. In arriving at its decision the court relied on the bad-check cases to which special reference is made in the Commercial Code,[24] and it is not entirely clear whether the court had in mind a rule that there was apparent authority that amounted to power to convey[25] or the rule that a person with voidable title may convey good title to a good faith purchaser. If the latter rule is applied we are left with the question whether it is essential that the certificate be delivered along with the goods. Under the Code alone, delivery of the goods in a transaction of purchase would be the only requirement. Given the certificate of title act, one might reasonably expect that both would have to be delivered before this rule would be operative to affect the rights of the parties.[26]

Another important rule designed to protect persons dealing with chattels is the one that provides that "any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster."[27] This is the situation in which a car is left with a dealer for any purpose whatever and is then sold by him to a third party buyer in the ordinary course of business. Though the certificate of title act's provision states that a transferee cannot acquire any rights in a vehicle unless he obtains transfer of the certificate, it does not apply to transfers by a dealer.[28] One could quite reasonably expect that no one would be permitted the status of a buyer in ordinary course unless the dealer is in possession of a proper certificate that can be used to effectuate the transfer.[29]

22. GA. CODE ANN. §109A-2-403 (1) (1962), second and third sentences.
23. Wreyford v. Peoples Loan & Fin. Corp., 111 Ga. App. 221, 141 S.E.2d 216 (1965).
24. GA. CODE ANN. §109A-2-403 (1) (b) (1962).
25. GA. CODE ANN. §109A-2-403 (1) (1962), first sentence.
26. See GA. CODE ANN. §68-415a (d) (Supp. 1963).
27. GA. CODE ANN. §109A-2-403 (2) (1962).
28. GA. CODE ANN. §68-415a (d) (Supp. 1963).
29. See GA. CODE ANN. §68-416a (Supp. 1963).

If the dealer is in possession of a certificate but not of the vehicle the essential element of the Commercial Code's "entrusting" rule is missing,[30] and in the absence of a rule that possession of a certificate of title is alone sufficient apparent authority to sell, a buyer would not be protected. Of course, if both the vehicle and an endorsed certificate of title are entrusted to a merchant who deals in motor vehicles, the requirements of both statutes are met.

Security interests in motor vehicles are exempted from the filing requirements of the Commercial Code,[31] but they are otherwise within the Code's rules for security interests in personal property within the state.[32] In spite of this, the certificate of title act contains a separate statement of some rules and in two instances contains a different rule.

Both the certificate of title act and the Commercial Code provide that if the parties to a security agreement understand that a vehicle outside the state will be brought to Georgia after the interest attaches, Georgia law will be the measure of the validity of the interest, if the collateral is in fact brought into the state within thirty days after the interests attaches. In all other cases, the validity of a security interest is determined by the law of the state in which the goods were at the time the interest attached.[33] In either case, if the security interest was perfected in the other state before the property was brought to Georgia, it remains perfected in Georgia for six months after the first Georgia certificate of title is issued. This continued perfection will lapse at the end of the six-month period unless it is perfected under the Georgia certificate of title law, but it may be re-perfected at any time thereafter by compliance with the certificate of title act.[34] A security interest in a vehicle that is perfected under a certificate of title law requiring notation on the certificate must be perfected under that law and remains perfected in Georgia.[35]

There is an important difference in the priority of mechanics' liens under the two statutes. Under the Commercial Code, a security interest has priority over all liens described in section 67-1701, with exceptions that are not relevant here.[36] The certificate of title act provides for a special lien for the benefit of mechanics that has priority over all security interests and liens of which the mechanic had no actual or constructive notice *when the work was done or the material furnished.*[37]

30. See GA. CODE ANN. §109A-2-403 (3) (1962).
31. GA. CODE ANN. §§109A-9-302 (3) (b), (4) (1962).
32. GA. CODE ANN. §109A-9-102 (1) (1962).
33. GA. CODE ANN. §§68-421a (d) (1) (Supp. 1963), 109A-9-103 (3) (1962).
34. GA. CODE ANN. §§68-421a (d) (2) (B) (Supp. 1963), 109A-9-103 (3) (1962). The Commercial Code rule provides for only four months' extended perfection.
35. GA. CODE ANN. §§68-421a (d) (2) (A) (Supp. 1963), 109A-9-103 (4) (1962).
36. GA. CODE ANN. §109A-9-310 (1962).
37. GA. CODE ANN. §68-423a (Supp. 1963).

There has been one substantial change in the policy of the statute since it was adopted. As originally enacted, it provided for a certificate of title that would be in the possession of the owner of the vehicle. The certificate served the purposes of a record of all interests in the vehicle, showing his ownership, and containing on it notations of outstanding security interests and liens. In order to insure its accuracy, whenever a certificate was issued or amended it was to be transmitted by the Commissioner to the beneficial owner down through the chain of security-interest holders in order of priority, if there were any such claimants.

In 1964 this policy of the statute was changed.[38] Under an amendment of that year, the statute was changed so that the secured party having priority on the certificate would retain possession of this certificate of title and the owner of the vehicle would receive a so-called "non-negotiable" copy of it.[39] In 1965, provisions were added to smooth out the procedure for getting subsequent interests noted on the certificate since it is no longer in the debtor's possession.[40]

Under the present arrangements, when a certificate is issued or endorsed to show a security interest or lien, it and a copy are sent by the Commissioner to the first named secured party as before.[41] Within five days after receipt of the certificate by the lien or security interest holder, he must mail the "non-negotiable" copy to the owner and notify any other lien or security interest holders that he has received the certificate and inform them of its contents.[42] When his interest is satisfied, he must deliver the certificate to the next lien holder or secured party or, if there are no other claimants, to the owner within ten days.[43]

Should it be desired to add a notation of another security interest to the certificate, the owner must execute an appropriate application and notice of the new security interest. The new secured party then forwards those documents, together with the required fee, to the secured party who has possesion of the certificate. That holder must then forward the certificate and the other documents to the Commissioner so that a proper notation may be made on the certificate. This must be done within ten days, but if it is not, the subordinate claimant may apply directly to the Commissioner for assistance. If the Commissioner cannot pry the certificate loose, he may cancel the outstanding certificate and issue a duplicate, which shall then be handed over to the uncooperative first lien holder or secured party.[44]

Of course, none of these changes affects the rules that a dealer need not

38. GA. LAWS, 1964 pp. 436, 438, *amending* Section 12 of the Certificate of Title Act.
39. GA. CODE ANN. §68-412a (a) (Supp. 1963).
40. GA. LAWS, 1965, pp. 304, 306, *amending* Section 12 of the Certificate of Title Act.
41. GA. CODE ANN. §68-412a (a) (Supp. 1963).
42. GA. CODE ANN. §68-412a (b) (Supp. 1963).
43. GA. CODE ANN. §68-412a (c) (Supp. 1963).
44. GA. CODE ANN. §68-412a (d) (Supp. 1963).

have a title for vehicles held for sale registered in his own name,[45] that a dealer's inventory of vehicles is exempt from the requirements of the title act,[46] and that a buyer in the ordinary course of business takes free of security interests created by the dealer.[47]

B. OTHER CHATTEL TRANSACTIONS.

The legislature acted during its last session to facilitate a significant group of transactions. Under the new statute,[48] any married or emancipated child having reached his eighteenth birthday may validly execute conditional-sale contracts for the purchase of any personal property.

It would seem from the reports that there has been an upsurge of accord and satisfaction cases. These need attention, and it would be well also to examine the Commercial Code rule that bears some marks of similarity to the traditional contract rule.

Under the Commercial Code, if there has been a default by the debtor, the secured party may take possession of the collateral.[49] Once he has it in his possession, the secured party may sell it and apply the proceeds of the sale to the debt,[50] or he may retain the property in satisfaction of the obligation.[51] If he chooses to retain the property, he must give notice to that effect to all known interested parties. If any interested person objects to the disposition of the matter, the secured party must dispose of the property within thirty days or be subject to the Code's penalty rules.[52] This remedy operates very much like an accord and satisfaction, but it is a mandatory term imposed on security agreements by statute.[53]

An accord and satisfaction on the other hand is a separate contract, the result of which is to substitute the performance called for by another contract. The case that most readily comes to mind is that of a compromise, but it is not necessary that there be a disputed claim to be compromised, so long as consideration can be found to support the obligation to accept a different performance by the other party than he was required to accept by the original contract. Ordinarily, of course, payment of part of a debt will not satisfy the debt. A security case, however, has another element that can be seen as meeting the requirement.

45. GA. CODE ANN. §68-416a (a) (Supp. 1963).
46. GA. CODE ANN. §68-404a (2) (Supp. 1963).
47. GA. CODE ANN. §68-405a (Supp. 1963).
48. GA. LAWS, 1965, p. 234, adding for chattels a somewhat more limited rule than that existing for real estate. See GA. LAWS, 1964, p. 213.
49. GA. CODE ANN. §109A-9-503 (1962).
50. GA. CODE ANN. §§109A-9-504 (1), (2) (1962).
51. GA. CODE ANN. §109A-9-505 (1962) subject to limitations spelled out in sub-section (1).
52. GA. CODE ANN. §109A-9-507 (1) (1962).
53. GA. CODE ANN. §109A-9-501 (3) (1962).

For example, in *Gibson v. Filter Queen Co.*,[54] the debtor surrendered the collateral to the assignee of the security interest. Since the secured party is not entitled to the collateral in the absence of a default by the debtor, its surrender to him is a sufficient consideration to support the release of the debtor from his obligation to pay the balance still owing. The security agreement (contract) has been discharged. In pleading such a discharge, it is important to remember that it is the contract that must be pleaded. Merely alleging that the debtor "returned said property to plaintiff and he accepted same" is not sufficient. Though in such cases the secured party's assent must be inferred from his action in retaining the collateral, facts sufficient to put him on notice of the terms of the agreement must be alleged.[55]

Though accord and satisfaction is possible in these cases even after the Commercial Code, the other route to discharge, rescission, appears to be replaced by a statutory remedy. The rescission cases arise after default. What happens is that a conditional seller repossesses the goods and then fails to dispose of them for the debtor's account.[56] Under the pre-code cases, this failure of the seller to resell within a reasonable time would result in a rescission of the original contract for sale, and the debtor's obligation to pay the price would, therefore, disappear. Under the Commercial Code, a secured party who fails to sell when he must, may be ordered to do so by a court of proper jurisdiction and is liable to the debtor for any loss caused by his failure to comply with the statute. If the collateral is consumer goods, the damages recoverable are fixed by the Code at the full amount of the time-price differential plus ten per cent of the cash price.[57]

There were several priorities and enforcement problems during this survey period. *Holmes v. Western Auto Supply Co.*[58] involved conflicting claims to a fund held by a bank for distribution. The claimants were Western Auto, for balances due on purchases of inventory for a store, the holder of a promissory note and bill of sale to secure debt covering the goods in the store, and a judgment lien creditor. The holder of the bill of sale was bound by an agreement to his transferor subordinating the note and bill of sale. The judgment lien was in favor of the holder of the subordinated note and security agreement. The normal order of priority would have been: security agreement, judgment lien, creditor.[59] The subordination agreement between the debtor and the payee of the note was for the benefit of the creditor, so the lien of the bill of sale could not be asserted against him.[60] However, that agreement would not affect the priority of the judgment over the creditor's

54. 109 Ga. App. 650, 136 S.E.2d 922 (1964).
55. Smith v. Cauley, 111 Ga. App. 62, 140 S.E.2d 527 (1965).
56. See Anderson v. Cheely, 109 Ga. App. 681, 137 S.E.2d 383 (1964).
57. GA. CODE ANN. §109A-9-507 (1) (1962).
58. 220 Ga. 528, 140 S.E.2d 204 (1965).
59. GA. CODE ANN. §§109A-9-310, 109A-9-201, 109A-9-301 (1) (1962).
60. See GA. CODE ANN. §109A-9-316 (1962).

claim, unless it were shown that it was a judgment rendered on the subordinated security. Since that was not shown, the creditor's claim was subject to that of the judgment creditor, the fact that he was also the owner of the subordinated security notwithstanding.

Mack Trucks, Inc. v. Ryder Truck Rental, Inc.[61] involved a conflict between an out-of-state conditional-sale contract and a local attaching lien creditor. The validity of the conditional-sale contract would be governed by the law of Maryland, where the goods were when it was executed. That would not alone control its effect in Georgia. Here unless it were filed within two months,[62] it would be effective against all persons except good faith purchasers. Since the attachment creditor was not a purchaser, the conditional seller prevailed. This result is changed by the Commercial Code. Under the Code, the out of state security interest, though valid, would become unperfected if no filing was made within four months,[63] and since it was unperfected, an attaching creditor without knowledge of it would gain priority.[64]

Taylor v. Wilson[65] illustrates the use of a breach of warranty claim as a defense to a security contract. The action was to foreclose a conditional sale contract on tobacco curing machines. The defense was that the machines were worthless, so that the seller would not be entitled to the price. It was shown that, though there was a breach of warranty, the cost of repairing them was very small The court held, therefore, that the defendant's recovery in recoupment was not warranted. Under the Commercial Code the result would be roughly the same. The rights and obligations of the parties to the conditional-sale contract would be governed by sales law, whether there was security for the price or not.[66] The buyer might raise his breach of warranty claim in the action for the price, whether secured or not, and the measure of damages would be the difference between the value of the goods as delivered and the value they would have had if there had not been a breach of warranty, plus appropriate incidental and consequential damages.[67] This measure of recovery would probably lead to a result more favorable to the defendant except for a further point raised in the case. The court held that where a seller cures a breach by repairing or replacing defective parts, placing it in good working condition, the buyer has no claim for damages.

61. 110 Ga. App. 68, 137 S.E.2d 718 (1964).
62. The time period has been changed under the Certificate of Title Act and the Uniform Commercial Code. See *supra* n. 34.
63. GA. CODE ANN. §109A-9-103 (3) (1962).
64. GA.. CODE ANN. §109A-9-301 (1) (1962). And see the court's footnotes.
65. 109 Ga. App. 658, 137 S.E.2d 353 (1964).
66. *Cf.* GA. CODE ANN. §109A-9-206 (2) (1962).
67. GA. CODE ANN. §109A-2-714 (1962).

On the facts of the case this result too would be supported by the Code,[68] though the Code does not apply such a general rule to sales cases.[69]

II. SURETYSHIP AND GUARANTY.

It ought by now to be clear that the distinction between contracts of suretyship and those of guaranty is not going to be found in magic words or short "test" phrases, no matter how cleverly contrived.[70] The express terms of the contract will govern, as far as they go, and in most cases that is as far as one has to go to solve the problem at hand. By express terms of the contract, it is not the use of words incorporating legal conclusions that is meant; it is the allocation of rights and burdens that is significant. Calling a contract "guaranty" is only occasionally a legally useful thing to do. *Fagelson v. Pfister Aluminum Corp.*[71] is an example. The consideration supporting the agreement was an extension of credit to General Seat and Back Manufacturing Corporation, not a consideration flowing to the defendants.[72] The defendants did not undertake to ensure that the bills would be paid by General or themselves.[73] They "personally and unconditionally, jointly and severally, [promised] that we will pay for all goods that have been or may be sold to General. . . . " The court noted that they had also authorized extension and renewals and had waived presentment, protest and notice. These things, however, are ambiguous, being not uncommon in any case of accessory liability.[74]

Since this was a contract of suretyship, the statute of limitations would run from the time of the maturity of the obligation that it secured, not from the time the agreement was concluded.

In *Cullens v. Sterling Discount Corp.*,[75] the question was raised whether changing the ownership of a business would increase the guarantor's risk, thus, releasing him. In that case, what had been a sole ownership had been converted into a partnership by the addition of the prior owner's wife as a partner. The court did not have to reach the partnership question, since the guarantor had undertaken an individual obligation of the owner,[76] not a partnership, and an addition of the partnership as an obligor would decrease rather than increase his risk.

68. See GA. CODE ANN. §§109A-2-208, 109A-2-209 (1962).
69. See GA. CODE ANN. §109A-2-607 (2) (1962).
70. A collection of past efforts has been gathered in a casenote at 1 GA. S. B. J. 522, 523, 524 (1965).
71. 109 Ga. App. 663, 137 S.E.2d 313 (1964).
72. A mark of suretyship. See GA. CODE ANN. §103-101 (1955 Rev.)
73. A common form of guaranty.
74. See, *e.g.*, GA. CODE ANN. §§109A-3-511 (2) (a), (b) (1962).
75. 110 Ga. App. 372, 138 S.E.2d 623 (1964).
76. Signed "individually and d/b/a Old South Motor Company," the name of the subsequent partnership.

It was also held that once a proper notice was given under GA. CODE ANN. section 20-506 (1965 Rev.), so that the principal debtor was obligated to pay attorney's fees, those fees became part of the obligation for which the guarantor was liable under his agreement.

Woods v. C.I.T. Credit Corp.[77] appears to have involved the same sort of agreement. In that case, however, the court discussed it as a guaranty contract and, in spite of GA. CODE ANN. section 103-101 (1955 Rev.), held that a grant of credit to the principal debtor was sufficient consideration to support the guarantor's obligation.[78] The court also pointed out that cases involving contracts under which the principal debtor must first be pursued are not authority for a demurrer to a complaint brought on an agreement waiving such actions and which demurrer did not allege a prior action against the principal.

The legal infirmity of married women's contracts was again in issue this year. The often repeated statement that, where a wife signs a note as an apparent principal, the burden is on her to prove that she signed as surety only and that the payee contracted with her as surety, would seem not to be a judicial amendment of GA. CODE section 53-503 (1933), but meaning only that in cases like *Dye v. Richards,*[79] the lady had not proved the facts of suretyship. In a recent case,[80] the proof that the payee had dealt with the defendant as a surety is noteworthy. Noting that the note sued upon was secured by a security deed and that the security deed referred to the recorded deed to the grantor, the court ruled that the payee was bound to know that the property was owned by the husband alone, though the note and security deed were signed by both husband and wife as makers and grantors. Since the loan was for improvements on the property of the husband, for which the wife had not contracted, she was merely surety for his debt and not liable.[81]

If the payee had been plaintiff in the action, the result would not be troublesome, since we can construe the two instruments executed in a single transaction together and hold the payee to notice of anything he could have discovered from pursuing information found on the face of these instruments. But, the plaintiff here was a transferee of the payee, and in the absence of any indication why the transferee could not enforce the note as a holder in due course, the impact of the case on negotiable instruments must be considered. If the transferee gave value and took the paper in good faith and without notice that it was overdue,[82] there are two possibilities.

77. 110 Ga. App. 394, 138 S.E.2d 593 (1964).
78. This, of course, is the normal basis for the liability of a surety or indorser. See Franklin v. Sea Island Bank, 111 Ga. App. 182, 141 S.E.2d 121 (1965).
79. 210 Ga. 601, 81 S.E.2d 820 (1954).
80. Atlas Subsidiaries, Inc. v. Davis, 110 Ga. App. 765, 140 S.E.2d 62 (1964).
81. GA. CODE ANN. §53-503 (1961 Rev.).
82. GA. CODE ANN. §109A-3-302(1) (1962).

Either the defense is one that is good even against holders in due course or the transferee was bound by notice of the defense for the same reasons the payee was.

The defenses that are good against a holder in due course are not many and they are limited to those that, like fraud, vitiate the party's obligation, making it a nullity.[83] Since the suretyship defense is that of a voidable, not void, obligation, not good even against the payee unless he took the note with notice of the woman's status, the defense is not one that is available against a holder in due course.

A holder who is on notice of a defense cannot become a holder in due course.[84] If the kind of knowledge that is said by the court to bind the payee is sufficient also to put a transferee on notice of defenses, notes secured by security deeds are placed in a considerably different position than other negotiable paper. The normal rule is that one has notice of a defense only if he has actual knowledge of it or has had it come to his attention or has had notice of it actually received by him, or if from all the facts and circumstances he has reason to know it exists,[85] but filing or recording of documents does not give notice.[86]

III. Security Interests in Real Property.

A group of mechanic's lien cases can be dealt with first. In *Clause (Clouse) v. Roswell Bank*,[87] it was alleged that the bank held security title and that the plaintiff had constructed buildings on the land. The bank had made payments to the plaintiff after its agent had inspected and approved the materials and labor in the buildings. When the construction deal broke down, the cost of some of the tile work had not been paid for. After the landowner and the bank both refused to pay, the contractor sued the bank. The case is specially interesting because it was an attempt by a contractor to recover directly from the construction lender, relying on the construction loan agreement between the grantor and the grantee in the loan deed. The maneuver did not work The court found it to be clear that the borrower was an independent contractor, not an agent of the bank, and that his agreements with the plaintiff would not bind the bank in the absence of a much more substantial showing than the bank's actions in policing its loan disbursements.

Taken as an attempt to enforce a mechanic's lien, the petition was no better, since it did not contain allegations that the lien was recorded within three months of completion of the work or that there was a valid judgment

83. Ga. Code Ann. §§109A-3-305 (2), 109A-3-304 (1) (b) (1962).
84. Ga. Code Ann. §109A-3-(1) (c) (1962).
85. Ga. Code Ann. §§109A-1-201 (25), (26) (1962).
86. Ga. Code Ann. §109A-3-304 (5) (1962).
87. 109 Ga. App. 647, 137 S.E.2d 86 (1964).

against the contractor for the price of the material and labor and that the action was filed within twelve months of the time the claim became due.[88]

Horne-Wilson, Inc. v. Smith[89] was an action by the supplier to a subcontractor of materials for a motel constructed on the defendant's land. The plaintiff showed that the subcontractor to whom it furnished the materials had become a bankrupt,[90] that the claim had been filed within three months after the material was furnished, that the action was commenced within twelve months after the claim became due, that the price had not been paid, and that the material had been furnished in compliance with its contract with the subcontractor. The defendant contended that the materialman could not recover because there were no signed receipts for the materials and the contractor had made a sworn statement that the materialman had been paid.

Reversing a judgment on the jury's verdict for the defendant, the court held that, in the absence of evidence to the contrary, the invoice evidencing that the materials had been shipped to the subcontractor for use in the motel construction gave rise to a presumption that they were received and used. Also, the fact that the defendant might have produced a sworn statement of the contractor that the materials had been paid for was no defense. In order to establish the defense of payment, the statement must in fact be produced.

The defense of payment was also in issue in *Solomon v. Robert Spector Lumber Co.*[91] In that case the affidavit that was produced specified that $6,250 had been used to pay for labor and materials but did not state what had been done with the rest of the contract price that had been paid him. It also indicated that a number of bills had not been paid. Also in deposition testimony, the contractor stated that out of $32,050 paid him, $6,420.62 was not used for labor and materials. The court held that the defense was not shown, no matter which set of figures was used, because it appeared that the amount of plaintiff's claim was less than the portion of the contract payments not used for labor and materials. This would be so even though there might be unpaid claims outstanding that would in the aggregate exceed that sum.[92]

Several cases involving deeds to secure debt were among the cases of interest during the survey year. *Woods v. State*[93] raised an interesting question of the status of the attorney's fees provision in a secured note. The question

88. GA. CODE ANN. §67-2002 (1957 Rev.).
89. 109 Ga. App. 676, 137 S.E.2d 356 (1964).
90. If the subcontractor has been adjudicated a bankrupt, there is no need to obtain judgment against him. GA. CODE ANN. §67-2002(3) (1957 Rev.).
91. 109 Ga. App. 801, 137 S.E.2d 473 (1964).
92. The total of the liens may not exceed the total of the contract price of the improvements. GA. CODE ANN. §67-2001(2) (1957 Rev.).
93. 109 Ga. App. 225, 136 S.E.2d 18 (1964).

came up in an insolvency proceeding. The insolvent had acquired the land at issue subject to a security deed. The land had been sold by the receiver and the grantee challenged the receiver's determination that, though she was entitled to full payment of principle and interest, no payment would be allowed on the claim for 15% attorney's fees. The court held that, once the requirements of GA. CODE ANN. section 20-506 (1965 Rev.) had been met, the maker of the note would be liable for the attorney's fees and that since the note was secured, the debt to be paid from the land in the hands of a transferee who took the land subject to the security deed would include the addtional 15%. The court noted that allowance of attorney's fees on a note signed by the insolvent might be unlawful as a preference,[94] but that there could be no improper preference of a claim here, since the secured party was only demanding a right to which the land was subject when it became one of the insolvent's assets. The transferee had no greater equity than his transferor, and the latter was subject to the attorney's fees obligation.

Gooden v. Greater New York Sav. Bank[95] was an action to recover property that had been sold under a power of sale. The grantor in the security deed based his claim on tender of the amounts due, but the allegations of tender did not give the times of the alleged tenders and refusals, and they were held insufficient in not making it possible to determine whether proper tenders were made.

Smith v. Oliver[96] was a tender case also, but the question was of tender by a bidder at a sale under power contained in a security deed. The plaintiff alleged that he had made the high bid and that the executor conducting the sale had recognized that fact and "did announce that the said property had been sold to . . . [plaintiff] and, that . . . [plaintiff] did advise the said . . . [executor] to prepare the deed and that he would pay the amount of his bid upon execution of a deed." The executor, however, had sold the land to another. It was also alleged as to tender that later in the day of the sale the plaintiff had asked the executor to prepare the deed and that "he had money and did tender money in payment of said deed."

Holding the petition demurrable the court pointed out that an offer to pay on delivery of a properly executed deed is not an unconditional tender, that informing the person conducting the sale that he had money and tendering money in payment is not an allegation of a valid tender, and that an alleged tender of money in no definite amount is not a tender of the amount of the bid. Allegation of "tender" or "unconditional tender" is only a legal conclusion anyway, and the court stated the requirement as allegation of facts sufficient to amount to a legal tender.

94. GA. CODE ANN. §28-405 (1952 Rev.).
95. 220 Ga. 515, 140 S.E.2d 199 (1965).
96. 219 Ga. 720, 135 S.E.2d 862 (1964).

There were several cases of special enforcement problems, probably the most important of which was *Modern Home Constr. Co. v. Burke.*[97] Alleging fraud in the transaction out of which the security deed had arisen, the grantor filed an equitable petition seeking an injunction against the exercise of the power of sale in the deed and asking damages and that the deed be cancelled. Relying on the 1962 amendment[98] to GA. CODE section 3-302 that purported to give foreclosures and sales under powers the status of pending litigation, the plaintiff filed his suit in the county in which the sale was being undertaken as he would have filed a petition for an injunction to restrain normal litigation. Since the constitutional rule is that equity cases shall be tried in the county where the defendant resides, the jurisdiction of the court in which the suit was filed depended upon there being pending litigation in that county. In 1962 the legislature provided that there was pending litigation in such cases; the Supreme Court had earlier said that there was not. Pointing out the now familiar maxim that "legislation is within the province of the legislature; construction of statutes is the province of the courts," the high court declared the 1962 act to be an unconstitutional encroachment upon the judicial power.[99]

In *Todd v. Conner,*[100] the court held that equity might properly entertain the entire controversy where the grantee of a security deed brought an action on a secured note in the county where the maker resided, but in the county where the land was located a cancellation of the security deed was recorded, and where the maker claimed that the debt was paid and the grantee claimed that the cancellation of the security deed was forged. Since only the equity court had jurisdiction over the original grantor and grantee, the grantor's warrantors, and the subsequent purchaser of the land, the declaratory judgment action was held properly not abated.

In *Hearn v. Maddox,*[101] a taxpayer challenged the legality of a contract and demanded cancellation of the security deed by which Putnam County had acquired land for improvements. The court ruled that the person who conveyed the land to the county and took the deed to secure debt was an indispensable party to such an action. And it was held[102] that a petition to cancel a security deed is an equitable matter that must be brought in the county where the defendant resides, not in the county where the land lies.

97. 219 Ga. 710, 135 S.E.2d 383 (1964).
98. GA. LAWS, 1962, p. 659.
99. The court passed over the defendant's argument that since the plaintiff had asked for affirmative relief he had not brought himself within the rule of GA. CODE §3-202 even as amended. The same result would very likely have been possible without reaching the constitutional issue.
100. 220 Ga. 173, 137 S.E.2d 614 (1964).
101. 219 Ga. 637, 135 S.E.2d 416 (1964).
102. In Bordin v. I.B.C. Corp., 220 Ga. 688, 141 S.E.2d 449 (1965).