SECURITY TRANSACTIONS

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I. LEGISLATION

The principal legislative change relating to the law of secured transactions was that governing the contracts of minors. Earlier attempts to facilitate credit transactions of minors[1] who had assumed adult obligations have been discussed in earlier surveys.[2] The effect of the prior legislation was to leave transactions involving personal property on a different footing from that of land transactions.

The new law[3] repealed the earlier statutes on the same subject and changed GA. CODE ANN. section 20-201 (1965 Rev.) and GA. CODE ANN. section 29-106 (1952 Rev.) to provide that contracts, promissory notes, conditional sales contracts and any other consensual transactions,[4] deeds, security deeds, bills of sale, bills of sale to secure debt and any other conveyances of property[5] by a minor 18 years old or older, who is married, shall be effective as though the minor were an adult. The act does not, of course, affect the rule limiting a married woman's capacity to contract.[6]

As of at least peripheral impact on secured transactions also, the legislature adopted an act fixing maximum charges and fees and otherwise regulating second and subsequent security transactions involving property containing four or fewer residential units.[7] It is probably of no particular significance that the regulation of charges refers only to "secondary security deeds other than a first mortgage,"[8] since the statute elsewhere indicates its coverage to include "security deed mortgage, deed of trust, or any other security instrument."[9]

II. RECENT CASES

A. SECURITY INTERESTS IN PERSONAL PROPERTY

With a few exceptions, some of which will be discussed below, a security agreement is effective according to its terms against the world.[10] In order to have any enforceable interest, though, there must be an "agreement"[11] creating or providing for a security interest,[12] signed by the debtor and de-

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1. GA. LAWS, 1961, p. 453; GA. LAWS, 1964, p. 212; GA. LAWS, 1965, p. 234.
2. 13 MERCER L. REV. 188 (1961).
3. GA. LAWS, 1966, p. 291.
4. GA. CODE ANN. §20-201 (1965).
5. GA. CODE ANN. §29-106 (1952).
6. See GA. CODE ANN. §53-503 (1961).
7. GA. LAWS, 1966, p. 574.
8. GA. LAWS, 1966, p. 575.
9. GA. LAWS, 1966, p. 577.
10. GA. CODE ANN. §109A-9-201 (Supp. 1965).
11. GA. CODE ANN. §109A-9-203 (1) (6) (Supp. 1965).
12. GA. CODE ANN. §109A-9-105 (h) (1962).

scribing the collateral.[13] These statutory requirements for the creation of interests give rise to the problem that appears from the holding in *Citizens & Southern Nat'l Bk. v. Capital Const. Co.*[14] that an account debtor could not challenge an assignee's right to sue on an account.

The case involved the assignment of an account against which the plaintiff had advanced funds and which grew out of work done by the assignor under contract with the defendant. The notice filing requirement of the Commercial Code does not apply to such occasional transactions,[15] but the rules governing creation and enforcement of security interests do apply to such assignments whether they are incident to a loan or not.[16]

The only writing that appears to have been available to support the Bank's claim was a letter from the assignor to the account debtor informing it that the account had been assigned to the bank and requesting that payment checks be made out to the assignor and the assignee jointly. This letter bore a notation by the account debtor that it was "accepted." The court accepted this writing as a sufficient security agreement. It would, nevertheless, most certainly be better practice for secured parties to obtain a writing that clearly "creates or provides for a security interest."[17] This practice of substituting the fact of notice for language of agreement will most surely be limited to account situations.

The letter involved here would be a sufficient notice of assignment to prevent the account debtor from satisfying his debt by paying the assignor,[18] but the bank's rights would be subject to any claim or defense that might have arisen under the construction contract.[19] Since the case came up on a dismissal of the petition, the court had no need to reach this point.

Charles S. Martin Distrib. Co. v. Banks[20] involved a trover action brought to recover for goods that had been placed in the defendant's inventory by the plaintiff. It is not clear from the report of the case whether "floor plan", as the term is there used, is a secured transaction, a sale or return, or a consignment type of transaction. The court treats it as one of the latter, but because the two forms of doing business operate in such similar ways that it will be discussed from both points of view.

If this "floor plan" was a sale or return[21] or a consignment transaction,[22] the delivery and acquiescence in retention of possession was an entrusting.[23] Since the goods had been entrusted to a merchant dealing in goods of the kind, he had the power to transfer to a buyer in ordinary course all of the

13. GA. CODE ANN. §109A-9-203 (1) (b) (Supp. 1965).
14. 112 Ga. App. 189, 144 S.E.2d 465 (1965).
15. GA. CODE ANN. §109A-9-302 (1) (e) (Supp. 1965).
16. GA. CODE ANN. §§109A-1-201 (37) (Supp. 1965), 109A-9-102 (1) (b) (1962).
17. GA. CODE ANN. §109A-9-105 (h) (1962).
18. GA. CODE ANN. §109A-9-318 (3) (1962).
19. GA. CODE ANN. §109A-9-318 (1) (a) (1962).
20. 111 Ga. App. 538, 142 S.E.2d 309 (1965).
21. See GA. CODE ANN. §109A-2-326 (1) (b) (1962).
22. See GA. CODE ANN. §109A-2-326 (3) (1962).
23. GA. CODE ANN. §109A-2-403 (3) (1962).

plaintiff's rights in the goods.[24] When the defendant sold the goods, the buyers obtained the plaintiff's title, and without title (or right of possession) an action in trover would not lie.

If the plaintiff's interest were a security title, the result would be the same, but the governing statute would be different. A security title is good against the world,[25] but a buyer in ordinary course would take free of the security interest.[26] Since the plaintiff would then have no interest in the goods, trover would not lie for them, though an interest might continue in the proceeds.[27]

In *Wreyford v. Peoples Loan & Fin. Corp. of Forest Park*,[28] the court had before it an interesting question under the Motor Vehicle Certificate of Title Act.[29] Unfortunately, before reaching the question before them, the court surveyed a lot of case law that has been repudiated by the legislature, and it may have muddied the waters in respect of personal property generally.

The case arose out of one of the most everyday sort of transactions. Wreyford traded in his 1963 Ford on a 1962 Pontiac and paid $200 to boot. At the conclusion of the sale he delivered the certificate of title that was required for the Ford to the buyer. The used car dealer then arranged with the finance company for its security interest in the Pontiac to be released[30] and an interest in the Ford to be substituted for it.

Everything was normal up to that point, but then the officers of the used car company were charged with receiving stolen vehicles. Deeming itself insecure, the finance company commenced foreclosure proceedings against the inventory of used cars. The police discovered that the Pontiac was a stolen vehicle and the police took possession of it. Having lost his new car, Wreyford wanted his Ford back. To that end he filed a claim challenging the finance company's levy. The trial court properly held that the Ford was subject to the levy.

Such a trade-in deal is really just two sales back to back.[31] In case of a breach of warranty of title, as with this Pontiac,[32] the normal remedy is an action for damage to the extent of the value of the car that was bought.[33] In a proper case rescission is possible,[34] but that would not normally be permitted to destroy rights of innocent third parties. When the deal was concluded by delivery of both vehicles and payment of the difference, title to the Ford passed to the used car dealer.[35] When the dealer transferred his

24. GA. CODE ANN. §109A-2-403 (2) (1962).
25. GA. CODE ANN. §109A-9-201 (Supp. 1965).
26. GA. CODE ANN. §109A-9-307 (1) (Supp. 1965).
27. See GA. CODE ANN. §109A-9-306 (1962).
28. 111 Ga. App. 221, 141 S.E.2d 216 (1965).
29. GA. LAWS, 1961, p. 68, as amended, GA. CODE ANN. ch. 68-4A (Supp. 1966).
30. This is only a matter of fair dealing in the financing transaction. The interest had been cut off by the sale. GA. CODE ANN. §§109A-9-307 (1), 68-405a (Supp. 1965).
31. GA. CODE ANN. §109A-2-304 (1) (1962).
32. GA. CODE ANN. §109-A-2-312 (1) (a) (1962).
33. GA. CODE ANN. §109A-2-714 (2) (1962).
34. GA. CODE ANN. §§109A-1-103 (1962 Rev.), 109A-2-721 (1962).
35. GA. CODE ANN. §109A-2-401 (2) (1962).

title by bill of sale to secure debt to the finance company, that title, even if voidable up to that point, became good in the hands of the purchaser.[36]

The Certificate of Title Act does not change sales law, but it does impose additional safeguards. The general rule is that a sale of a vehicle is not effective *except between the parties* until the record title has been placed in the buyer's name.[37] However, in order to facilitate used car transactions, dealers have been exempted from the requirement of transferring title to themselves for the many cars they handle. They are permitted to hold their seller's certificate and transfer that to their buyer.[38] There was some confusion in the evidence of Wreyford's delivery of a properly executed certificate for the dealer, but the court was able to resolve that by reference to the parties' intention to comply with the statute, so that a good security title would be in the finance company.

The law that the court stated but did not use needs some comment. First, there is the important question of a person's power to dispose of goods of which he is not the owner.[39] The cases[40] are generally read to mean that though possession is an indicium of ownership or authority to sell, alone it is not sufficient to justify reliance by a third party so as to cut off the true owner's rights. The rule that in the absence of express agreement title will not pass until the purchase price is paid is no longer good law.[41] The passing of title depends upon the delivery term,[42] and does not depend on the payment term. Also, though payment by check only suspends the obligation,[43] the purchaser can transfer good title even if the check bounces.[44] The seller's remedy is an action for the price, and is not for rescission of the contract.[45] The court, then, is wrong in its conclusion that title to the Ford would not pass to the dealer.

In *Banks v. Employees Loan & Thrift Corp.*,[46] the court laid out as neat a statement as has come down the pike for many a year on the distinction between the two causes of action involved in all secured transactions—one for the debt and one for the security. The lender, seeking judgment for debt, produced a certified copy of a prior mortgage foreclosure proceedings and short order sale proceedings. The trial court refused to admit the defendant's evidence that the debt had been satisfied, and entered summary judgment for the lender. This was error. When the lender seeks a general judgment for

36. GA. CODE ANN. §109A-2-403 (1) (1962).
37. GA. CODE ANN. §68-415a (Supp. 1965).
38. GA. CODE ANN. §68-416a (Supp. 1965). A warranty of title is required also.
39. GA. CODE ANN. §109A-2-403 (1) (1962).
40. Cook Motor Co. v. Richardson, 103 Ga. App. 129, 118 S.E.2d 502 (1961); Gouldman-Tabor Pontiac, Inc. v. Thomas, 96 Ga. App. 279, 99 S.E.2d 711 (1957); Blount v. Bainbridge, 79 Ga. App. 99, 53 S.E.2d 122 (1949); Capital Auto. Co. v. Ward, 54 Ga. App. 873, 189 S.E. 713 (1936).
41. GA. CODE ANN. §109A-2-403 (1) (b), (c) (1962).
42. GA. CODE ANN. §109A-2-401 (2) (1962).
43. GA. CODE ANN. §§109A-2-511 (3) (1962), 109A-3-802 (1) (b) (1962).
44. GA. CODE ANN. §109A-2-403 (1) (b), (c) (1962).
45. GA. CODE ANN. §109A-2-709 (1962).
46. 112 Ga. App. 38, 143 S.E.2d 787 (1965).

the debt the defendant may litigate the question of his liability. Whether or not there was any defense to the foreclosure proceeding the issue is not res judicata.

In *Owen v. Cunningham*,[47] the court straightened out confusion that has grown out of the different functions of execution on a general judgment and on execution in a mortgage foreclosure. The case was a mortgage foreclosure. The defendant filed affidavits of illegality. The affidavits were not traversed by the plaintiff until the trial court ruled that it was too late. Judgment was rendered on the basis of the affidavits of illegality and the question was whether a traverse was required to put the issue. The Court of Appeals held not.

In the case of execution on a general judgment, the issue of liability has been tried. All that remains is the question whether some particular property is available by way of execution to satisfy the judgment debt. An affidavit of illegality raises an original claim that certain property is immune from levy. If the plaintiff in fi. fa. controverts that claim an issue is joined on which a trial can be held.[48]

A foreclosure against personal property works differently. Execution issues before any issue has been considered by the court. The affidavit of illegality is itself in the nature of a responsive pleading, setting out any defense the defendant may have.[49] Once that is done, the issue has been joined and a trial can be had.[50] There is no need for a traverse by the plaintiff in fi. fa.

The Exch. Bank v. Slocumb[51] came up on the question of who had superior title, the mortgagee who had levied on the property in foreclosure proceedings or the purchaser in a prior foreclosure.

In 1958, one Harper, then the owner, conveyed by bill of sale to secure debt to the Coffee County Bank all the machinery and equipment of a laundry and dry cleaning establishment. In 1960, he conveyed certain real estate and the same machinery and equipment to the Exchange Bank by deed to secure debt. In 1961, the two banks and a third party apparently held a joint foreclosure sale at which the claimant, Slocumb, bought the cleaning and laundry business. In order to pay the purchase price, he gave The Exchange Bank a note. He must have defaulted on the note, because the bank undertook to foreclose the Harper security deed again. The court held that the evidence was sufficient to authorize the finding that the claimant had title to the property superior to that of the bank. Under the Commercial Code, which has been enacted since the rights of these parties were created, it is expressly provided that the first foreclosure sale would have discharged all of the security interests in these chattels.[52]

47. 111 Ga. App. 399, 141 S.E.2d 912 (1965).
48. GA. CODE ANN. §39-1006 (1957).
49. GA. CODE ANN. §67-801 (1957).
50. GA. CODE ANN. §67-803 (Supp. 1965).
51. 112 Ga. App. 399, 145 S.E.2d 285 (1965).
52. GA. CODE ANN. §109A-9-504 (4) (1962).

B. GUARANTY AND SURETYSHIP

The most significant case to be handed down during the survey period involved the operation of the Georgia Motor Vehicle Safety Responsibility Law.[53] Under that law, persons involved in accidents resulting in death, bodily injury, or property damage in excess of $100 lose their right to have driver's license and automobile registration unless they file a bond "to satisfy any judgments" and submit proof that they are financially responsible.[54]

Proof of financial responsibility may be made by bond of an authorized surety company, or a bond executed by the person giving proof of responsibility and individual sureties, all of whom must give proof of real property ownership.[55] The statute then goes on to provide that when the individual real estate bond is used to show financial responsibility, the bond, upon proper recording, shall be a lien on the real property of the principal and sureties "in favor of the Governor of Georgia for the use of any holder of a final judgment arising out of the cause of action which necessitated the filing of the bond. . . ."[56]

Conner v. Resolute Ins. Co.[57] involved a bond executed by a corporate surety, naming as obligee the Director of Public Safety, and indicating that it was for the use of "Francis Mullinax and A. J. Mullinax," the condition being that payment be made to those parties of "the amount of any judgment rendered . . . in favor of said Francis Mullinax." The Director apparently accepted the bond as sufficient "to satisfy any judgments for damages or injuries resulting from the accident as may be recovered . . . by or on behalf of any person aggrieved or his legal representative. . . ."[58]

The court held that because the bond was not stated to be for the benefit of the parties who are entitled to a lien in case of a bond with individual sureties, it was not a statutory bond.[59] This being decided, the result was obvious. Since the contract of suretyship is one of strict law,[60] and the condition was that judgment against Francis Mullinax be satisfied, an action on the bond would not lie for a judgment in favor of A. J. Mullinax, Jr.

Sylvania Elec. Prod., Inc. v. Fleming[61] was another case involving a married woman's incapacity to bind her estate for the obligations of her husband.[62] The defendant's husband had purchased goods from the plaintiff for a sole proprietorship operated by him. Thereafter the business was incorporated. Apparently, the husband was in default in paying for the goods, and notes

53. GA. CODE ANN., ch. 92A-6.
54. GA. CODE ANN. §92A-605 (a) (Supp. 1965). Motorists who have adequate insurance or a prior bond are exempt under GA. CODE ANN. 92A-605 (c) (Supp. 1965).
55. GA. CODE ANN. §92A-605 (d) (1) (Supp. 1965).
56. GA. CODE ANN. §92A-605 (d) (4) (Supp. 1965).
57. 112 Ga. App. 883, 146 S.E.2d 791 (1965).
58. GA. CODE ANN. §92A-605 (a) (Supp. 1965).
59. GA. CODE ANN. §92A-605 (d) (4) (1958 Rev.) states that it applies to bonds of individual sureties.
60. GA. CODE ANN. §103-103 (1955).
61. 112 Ga. App. 470, 145 S.E.2d 575 (1965).
62. GA. CODE ANN. §53-503 (1961).

were executed by the corporation and endorsed by the defendant and her husband. They also "guaranteed" payment of the corporation's debts.

The court held that the fact that the defendant owned a five per cent interest in the corporation would not change her position as to the debt incurred by him in the operation of his business.

C. SECURITY INTERESTS IN REAL PROPERTY[63]

Nix v. Cauthen[64] involved a special lien on the proceeds of sale of land rather than a security interest, but the problems involved are so far akin to those involved in security cases that they ought to be discussed here. The plaintiff was the unpaid vendor of certain land and the defendant was the deceased vendee's widow, sued both as executrix and individually. The plaintiff had sold land subject to a mortgage and received some cash and an unsecured note for $13,200 as the remainder of the purchase price. After the vendee's death, the property was set apart to the widow subject to the note as a year's support. She then sold the property subject to the mortgage and deposited $12,000 of the proceeds in savings and loan accounts. The plaintiff's action was for judgment on the note against the executrix, for the amount of the note against the widow individually and for a special lien on the proceeds of sale in the savings and loan deposits. The superior court entered judgment as prayed and granted the special lien.

The court held that, though the general judgments on the note were proper,[65] the special lien and injunction to effectuate it were not. The note involved did not create any lien on land and the vendor's lien that equity imposes for the protection of purchase money has been expressly abolished by the Code of Georgia.[66]

Scott v. Williams[67] was a mechanic's lien case. A materialman who had not been paid by the contractor foreclosed a lien in excess of the amount remaining unpaid on the contract. The court held that in such an event the contractor could not properly have judgment foreclosing a lien for his own benefit.

The owner's land is charged with a lien for the purpose of securing payment of the contract price. As the price falls due it is charged with a lien against the contractor for the benefit of materialmen and laborers.[68] If the contract price falls due in installments during construction the owner has a right to have potential lienors paid at least concurrently with payments made by him.

If the owner pays claims of materialmen and laborers the payments are credited against the amount owing to the prime contractor. If a claim has

63. Also see the discussion of legislation, *supra*.
64. 220 Ga. 850, 142 S.E.2d 230 (1965).
65. The individual judgment against the widow was not discussed because of admissions made at the trial.
66. GA. CODE ANN. §67-1703 (1957).
67. 111 Ga. App. 735, 143 S.E.2d 16 (1965).
68. Following Rowell v. Harris, 121 Ga. 239, 48 S.E. 948 (1904).

been reduced to judgment, but the judgment has not been paid, the fund due the contractor must first be applied to the materialmen's judgment.

A contractor suing to foreclose a lien need not allege that he has paid for all labor and materials, since payment by the owner is a defense to the claim.[69] Since the lien law provides that the aggregate of liens shall not exceed the contract price,[70] a judgment foreclosing a lien is not proper where there is already a similar judgment for an amount in excess of the balance remaining unpaid.

Shine Laundry, Inc. v. Washington Loan & Banking Co.[71] pointed up the specially protected position of the grantor in a security deed who no longer has access to the land for payment of the debt. One who mortgages property is expected, in the last resort, to be able to apply the value of the land for the purpose of paying the debt. If he conveys the land to another subject to the outstanding obligation, he has not received the value represented by the outstanding encumbrance and he is, therefore, still entitled to expect that his purchaser will pay the remaining part of the purchase price to the mortgagee. If the mortgagor has to pay the debt himself, he is entitled to enforce the mortgage owned by the party he has paid for his own benefit; otherwise, he will never be paid his entire purchase price. These common rules and those that follow from them are normally summed up by saying that the land is the primary fund for satisfaction of the debt and the transferor stands in a position like that of a surety.

That was the situation in the *Shine Laundry* case. The laundry company had borrowed $50,000 from the bank and to secure that loan had executed a security deed to two tracts of land, the land on which its business was located and a bill of sale for some chattels. The company then conveyed the two tracts of land to an individual subject to the security deed. Upon the death of the grantee, her executor sold one tract of the land to a different corporation for $53,872. On the same date, the creditor bank executed a quitclaim deed to that tract to the latter corporation,[72] thereby extinguishing its security interest in that tract.

The laundry company had repaid part of the loan from the bank, but it made no further payments after the last conveyance in the series. The bank then brought its action to foreclose the bill of sale on the chattels for the purpose of collecting the balance of the debt.

If the mortgagor had been required to pay the debt, it would have had a right to foreclose the plaintiff's mortgage against all of the property covered by all of the security instruments. The plaintiff deprived it of that right. Such an act, exposing the original debtor to an increased liability, releases it

69. GA. CODE ANN. §67-2002(3) (1957).
70. GA. CODE ANN. §67-2001(2) (1957).
71. 112 Ga. App. 827, 146 S.E.2d 371 (1965). There is no new point in the case, but the application here is interesting.
72. The stated consideration was $5.00.

to the extent of the value of the property. In this case the value of the property was greater than the unpaid balance of the debt.

As the court notes, this result would not necessarily follow if the original debtor had been paid the full value of the property, its own equity *and* the right of redemption from the security deed, but to hold otherwise in this case would be to force the debtor to make a donation of more than $30,000 to the estate of its grantee.

There were several cases involving tender and payment problems. *Carroll v. Robson*[73] was a suit to enjoin dispossessory proceedings and to cancel a foreclosure sale. The plaintiff alleged that the grantee in the security deed had refused to accept several payments and, thereafter, had announced that no further payments would be accepted. Because he had not maintained his tender or deposited the payments into court, the plaintiff was held to be entitled to no relief. Apparently, it is only in sales cases that a repudiation entitles the aggrieved party to suspend his own performance.[74]

In *McEachern v. Coastal Plain Prod. Credit Ass'n*,[75] the plaintiff claimed payment of the debt secured by a security deed on the ground that it had been paid by a subsequent note. He also claimed that both notes were ineffective because he lacked the capacity to contract. It was not shown that the second note, which was clearly void,[76] was accepted in payment of the first note. All that had been alleged in that regard was that "petitioner executed another note to the defendant . . . , a portion of which loan was used to pay the balance then outstanding. . . ." This was held not to be a sufficient allegation of payment under GA. CODE ANN. section 20-1004 (1965 Rev.).[77] The first note is not shown to be void because in the absence of a prior adjudication of incompetence such notes are only voidable upon a showing that the defendant knew the maker was incompetent at the time the note was executed.[78]

Christian v. Carrollton Fed. Savings & Loan Ass'n,[79] was a case arising from the growing use of credit insurance. The widow of the grantor in a security deed sued to enjoin sale of the property and claimed payment as a defense. The basis of the payment claim was that her husband had paid credit insurance premiums to the security deed grantee. The suit seems to have been brought as though it were an action against an insurance company that had wrongfully refused to pay.[80] The petitioner had attached a memorandum from the Association to the petitioner, but the court held that this was insufficient to support a claim against it as an insurer. It does not appear from the report what, if anything, did happen to the proceeds of the

73. 221 Ga. 394, 144 S.E.2d 745 (1965).
74. GA. CODE ANN. §109A-2-610 (1962).
75. 221 Ga. 335, 144 S.E.2d 516 (1965).
76. GA. CODE ANN. §20-206 (1965).
77. See GA. CODE ANN. §109A-3-802 (1962) for current rules.
78. GA. CODE ANN. §20-206 (1965).
79. 221 Ga. 119, 143 S.E.2d 391 (1965).
80. GA. CODE ANN. §56-3309 (1960) would limit insurance to insurance companies.

insurance policy on which the Association had been collecting premiums.

The question in *Security Financial Corp. v. Blackwood*[81] concerned the effect of a notation of payment and satisfaction placed on a security deed and recorded. It seems that the security deed grantor had arranged for sale of part of the land covered by the deed, and in order to facilitate that deal, the lender had executed a satisfaction without noticing that the usual form recites payment of the underlying debt.

On default the grantee sued for the balance of the debt, but in reliance on the statement on the deed the grantor claimed payment.

The court held that words in a release of a security instrument that import payment constitute a receipt. Since receipts are only prima facie evidence of payment, the fact of nonpayment may be shown by parol.[82]

The purchaser of a security deed foreclosure acquires both the legal title and the grantor's equity in the property. If the grantor remains in possession he is a tenant at sufferance and is subject to be summarily dispossessed. A deceased grantor's heirs and devisees are in the same vulnerable position. The only peculiarity in *Lanier v. Dyer*[83] was that the purchaser at the sale and the tenant at sufferance were both heirs of the grantor and would have been tenants in common in the grantor's equity if it had not been foreclosed. The court held that that had no effect on the result.

Several cases during the survey period involved disputes about the operation of the Code section requiring judicial approval of a sale without legal process under a security deed if a deficiency judgment is to be obtained.[84]

When a loan is made on a secured note the creditor has several causes of action.[85] Though he is entitled to only one repayment, he may normally pursue any or all of his rights until he has been repaid. He may obtain a general judgment on the note and levy on any available property of the debtor, or he may pursue the property that has been offered as collateral. If that property is not sufficient to pay the debt, the deficiency may be recovered in an action on the note. Because of the special dangers of lost value to a debtor from forced sales, the legislature has required that the judicial machinery be involved in some way if a judgment for the deficiency is to be obtained. The creditor must either undertake his foreclosure by legal process or obtain a judicial confirmation of the sale.[86] But there is nothing in this requirement that would prevent a secured party from suing on the note before turning to any property of the defendant.[87]

If the secured party does exercise the power of sale contained in a real property security instrument, he must be certain to stay within the terms

81. 111 Ga. App. 850, 143 S.E.2d 515 (1965).
82. GA. CODE ANN. §38-508 (1954).
83. 112 Ga. App. 558, 145 S.E.2d 621 (1965).
84. GA. CODE ANN. §§37-608-11 (1962).
85. See the discussion of the Banks case, *supra*.
86. GA. CODE ANN. §37-608 (1962).
87. Gentry v. Hibbler-Barnes Co., 113 Ga. App. 1, 147 S.E.2d 31 (1966).

of the statute requiring confirmation of sales. Under that statute the land must have been sold for its true market value if the sale is to be confirmed by the court. That was the point that came up in *Hinson v. First Nat'l Bank*.[88] The security deed that had been foreclosed covered a motel, and included land, fixtures and personal property. At the sale the property was offered as a unit, and a bid for the whole of the property was accepted. There was evidence that the market value of the property was less than the amount of the bid, but there was nothing to show at what price the land had been bid or sold.

The court held that, though one seeking confirmation need not allege what the true market value is, there must be evidence to show that the land separately brought its true market value. That being so, a resale should have been ordered under GA. CODE ANN. section 37-610 (1962 Rev.). The defendant also raised two constitutional challenges to the Act of 1935, which the court disposed of by pointing out that, as to one, the provision attached infringed no right of his, and as to the other, he would not benefit should he be successful.

Langley v .Stone[89] also involved an improper sale. In that case the same party was holder of two security deeds on the same property.[90] A sale had been conducted under the first of them, but when application was made for confirmation, the court refused it. The plaintiff then brought an action on the notes secured by the second deed, but the defendant denied the indebtedness and initiated a cross action based on the first sale. Confirmation of the first sale had been denied because the fair market value was found to be $12,000 and the secured party had sold it to himself for $4,000. The $12,000 property was security for debts of $9,800, leaving an equity in the defendant worth $2,200. The loss of this $2,200 was the basis of his cross action.

The court held that failure of a secured party fairly to exercise the power of sale[91] is a breach of duty for which one injured by it may recover and that the fact that the statute prohibits a deficiency judgment[92] where there is such unfair action does not affect that right. The injured party may either rescind the sale and tender the amount owing or affirm the sale and sue for breach of duty to conduct it fairly.

Holcomb v. Garcia[93] was an action by purchasers of land who had given back a note and security deed for the price for cancellation of the deed and the note and for an injunction against foreclosure of the security deed. A defect appeared in the petitioners' title because of a flaw in their grantor's title. The security deed and note were held by the former wife of the petitioners' grantor. It was alleged that she threatened to use the defect in

88. 221 Ga. 408, 144 S.E.2d 765 (1965).
89. 112 Ga. App. 237, 144 S.E.2d 627 (1965).
90. The first was held as assignee and the second was taken as part of the purchase price.
91. GA. CODE ANN. §37-607 (1962).
92. GA. CODE ANN. §37-608 (1962).
93. 221 Ga. 115, 143 S.E.2d 184 (1965).

title to oust the purchasers and generally harrassed them. They stopped paying the installments due on the secured debt.

Noting that a purchaser in possession can not ordinarily obtain relief from payment of the purchase price, the court listed the exceptions as cases of insolvency of the vendor or nonresident vendors with no property in the state. Neither these nor any other appropriate ground for equitable relief was alleged. They were still in possession, but had not made the payments that had come due. The defect involved was of a limited nature,[94] and, in any event, the holder of the security deed was not a warrantor. Whatever defect there might be would not excuse payment of the debt.

In *Shatterly v. Brand-Vaughn Lumber Co.*,[95] the petitioner sought relief from a foreclosure deed. She claimed that the foreclosing savings and loan association failed to perform on a parol undertaking to keep her notified about the loan and treat the notice provision in the deed as waived. She also relied on prior dealings with the same lender.

The court notes that the oral agreement on which the petitioner relied was unenforceable. If it was made prior to or contemporaneous with the deed, the parol evidence rule prevents the proof of it.[96] If it was made subsequent to the making of the deed, it would fail for want of consideration.

There was also a claim that the term of the loan had been extended, but there was no allegation that the payment on which the extension was conditioned had been made.

94. GA. CODE ANN. §20-206 (1965). Incompetence makes the note voidable and not void.
95. 220 Ga. 882, 142 S.E.2d 227 (1965).
96. GA. CODE ANN. §38-501 (1954).