SECURITY TRANSACTIONS

By ED S. SELL, JR.*

The article which follows canvasses court decisions and legislation relating to security transactions both as to real property and as to personal property.

A survey by definition does not contemplate a study in depth. It is, therefore, not within the scope of this article to develop the full import of all that is here noted and not every case is mentioned. In the case of secured transactions relating to personal property, however, the writer suggests that the reported cases during the period of time covered by this survey are of more than passing interest. The cases decided during the first part of the period arose prior to the effective date of the UNIFORM COMMERCIAL CODE,[1] and pre-code concepts were utilized in the decision-making process. However, during the latter part of the period under review, cases were considered on appeal to which the UNIFORM COMMERCIAL CODE was applicable.[2] As to secured transactions involving personal property, therefore, the period under review saw the beginning of the transition from pre-code law to UNIFORM COMMERCIAL CODE concepts and as will more fully be hereafter shown, preliminary evidence makes it appear that the transition will not be smooth.

This article will consider legislation, security transactions involving real estate, guaranty and suretyship, and security transactions in personal property. This follows in general the prior development of the same subject matter.[3]

LEGISLATION

Legislation during the survey period includes one act relating to personal property and three relating to real property. The Motor Vehicle Sales Finance Act[4] reflects the apprehension of the General Assembly of Georgia about finance charges in the sale of motor vehicles. The Act requires that a retail installment contract for the sale of a motor vehicle be signed by the buyer and seller and give notice of its terms in a clear and understandable manner. Section 7 of the Act[5] in effect amends the UNIFORM COMMERCIAL CODE[6] by requiring, as a condition precedent to a deficiency judg-

*Member of the firm of Sell & Comer, Macon, Georgia. A.B., University of Georgia, 1937; LL.B., University of Georgia, 1939. Member of the Georgia Bar and the American Bar Association.

1. This was Jan. 1, 1964. GA. CODE ANN. §109A-10-101 (1962 Rev.).
2. All of them by the Court of Appeals of Georgia.
3. See Kock, *Security Transactions,* 18 MERCER L. REV. 198 (1966).
4. Ga. Laws, 1967, p. 674.
5. Ga. Laws, 1967, p. 682.
6. GA. CODE ANN. §109A-9-501 *et seq.* (1962 Rev.).

ment, ten days notice to the debtor of his rights of redemption and a demand for a public sale.

The Act regulating charges on "secondary security deeds"[7] and previously noted by the MERCER LAW REVIEW[8] was amended in 1967. Since the statute concerns itself with rates of charge rather than the essence of the security transaction itself, the amendment is noted in passing. Of more immediate concern in the real property field is a 1967 Act relating to the exercise of powers of sale in deeds to secure debt and like instruments.[9] The existing law[10] was amended so as to provide that a power of sale contained in a deed to secure debt might be exercised by a transferee of the deed whether or not the transfer specifically included an assignment of the power. A companion law[11] enacted a new code section and makes it possible to transfer the indebtedness and the property described in a deed to secure debt without specific mention that the property or the debt are being transferred.[12] These Acts seem designed to modify the previous statutory and bench law[13] relating to the strict construction of powers and to avoid the effect of earlier decisions requiring an express transfer of the security and the powers to enable the assignee to exercise the power of sale.[14]

Legislative changes made during the period under review, therefore, are not of great importance in the security transaction field, but would appear to be salutary in their operation and effect.

SECURITY TRANSACTIONS INVOLVING REAL ESTATE

Ten court decisions on various facets of security transactions (including liens) are noted. In the area of liens the importance of good bookkeeping by the materialman was made apparent. In *Atlanta Lighting Fixture, Inc. v. Peachtree-Sheridan Corp.*,[15] the supplier was held to have waived his right to a lien where he furnished materials to a contractor for the improvement of various properties owned by different persons but kept only one ledger sheet for the contractor rather than separate accounts for the property owners, and at the same time failed to ascertain from the contractor, when payments were made, to what job the money was to be applied. The same result was reached for the same reasons in *Artistic Ornamental Iron Co. v. Long*.[16]

Goodman v. Nadler[17] decided, apparently as a matter of first impression

7. Ga. Laws, 1966, p. 574.
8. Kock, *supra* note 3.
9. Ga. Laws, 1967, p. 735.
10. GA. CODE ANN. §37-607 (1962 Rev.).
11. Ga. Laws, 1967, p. 737.
12. The new CODE section will be numbered §67-1305.1.
13. *Cf.* GA. CODE ANN. §37-607 (1962 Rev.), Doyle v. Moultrie Banking Co., 163 Ga. 140, 135 S.E. 401 (1926).
14. See, for example, McCook v. Kennedy, 146 Ga. 93, 90 S.E. 713 (1916).
15. 113 Ga. App. 313, 147 S.E.2d 847 (1966).
16. 113 Ga. App. 464, 148 S.E.2d 478 (1966).
17. 113 Ga. App. 493, 148 S.E.2d 480 (1966).

in Georgia, whether or not the provisions of Georgia law relating to deficiency judgments after foreclosure of security deeds by the exercise of power of sale[18] would be applicable to a suit against a Georgia resident with respect to property in Florida after a foreclosure in that jurisdiction which had a different rule. Concluding that, although the mortgage was signed in Georgia by Georgia residents, since the contract was to be performed in Florida where the land lay, a suit for deficiency judgment under the Florida statute was permissible even though Georgia law did not permit the same result. The court found no violation of Georgia public policy.

Finch v. McAloney[19] gives consolation where the transferee of a security deed inadvertently cancels it when the parties intended it to be retransferred to the original grantee. A suit to cancel the satisfaction of record was successful although there is an intimation that the result would be different in a case where the original debtor relied on the cancellation to his detriment.

The Georgia Court of Appeals in *Peters v. Thompson*[20] gave a strict construction to the lien foreclosure process. The statute[21] provides in part that if a suit to foreclose a lien is successful, "the verdict shall set it forth, and the judgment and execution be awarded accordingly."[22] In the *Peters* case, a default judgment was rendered by the court in a lien foreclosure case. The judgment was held to be fatally defective because there was no jury verdict to support it. Granting the established principle that lien laws are to be strictly construed,[23] the case as reported scarcely reflects harmful error to the appellant.[24]

Typical of what appears to be a growing line of cases is *Bieter v. Decatur Federal Sav. & Loan Ass'n.*[25] This case holds that where a borrower has reasonable grounds to assume that a lender has placed credit life insurance in force or has renewed an expired policy (by continuing to collect the premiums as a part of the monthly payment), the lender will be liable for its negligent failure to fulfill the reasonable expectations of the borrower, and for failure to procure or maintain insurance in force.

In *Shelnutt v. Bank of Hancock County*[26] the invocation of a "dragnet" clause had rather curious results. A debtor gave two deeds to secure debt to a bank, conveying different tracts of land, and securing two debts. Each of the deeds to secure debt contained an open-end clause. After the death of the debtor, the bank foreclosed one of the deeds to secure debt, receiving

18. GA. CODE ANN. §37-608 (1962 Rev.).
19. 222 Ga. 174, 149 S.E.2d 100 (1966).
20. 114 Ga. App. 228, 150 S.E.2d 482 (1966).
21. GA. CODE ANN. §67-2301 (1957 Rev.).
22. *Cf.* Fowler v. Roxboro Homes, Inc., 98 Ga. App. 829, 107 S.E.2d 285 (1959).
23. Query: If a verdict is required, what quantum of evidence must support it?
24. 222 Ga. 516, 150 S.E.2d 687 (1966).
25. 223 Ga. 74, 153 S.E.2d 442 (1967).
26. 222 Ga. 849, 152 S.E.2d 836 (1967).

at the sale more than twice as much as the balance due it on both notes. The bank was foreclosing the second security deed. The action in the *Shelnutt* case was to enjoin the foreclosure of the second security deed upon the ground that the bank had been paid, the suit being brought by the debtor's widow to whom the property described in the second security deed had been set aside as a year's support. It appears from the brief statement of fact in the report that the widow did not claim any interest in the lands described in the security deed previously foreclosed. Her suit to enjoin the bank from proceeding with the second foreclosure was dismissed for failure to make parties of the heirs or devisees of the debtor, who were interested in the title to the land described in the first security deed. The curious aspects of the case, however, are why it was that a creditor whose debt had been fully satisfied was permitted to foreclose on additional security at all, and what was its purpose in so doing. If the case eventuated as the record might indicate, the widow would be deprived of her year's support, the creditor would be permitted to continue to foreclose after its indebtedness had been fully paid and it would wind up with a substantial addition to an existing surplus of funds, and some concern as to the disbursement of the money.

The importance of listening to announcements by the seller at a foreclosure sale is emphasized by the case of *Peacock v. Boyd.*[27] The auctioneer at the foreclosure sale in the *Peacock* case announced that only the interest of the grantor in the security deed was being sold and that there were outstanding liens against the property superior to the security deed. The highest bidder coupled his tender of the bid price with the condition that he be given a fee simple title, but he was required to take the property in accordance with the announcement of the auctioneer.

The rights of bona fide purchasers or lienors vis-a-vis the rights of a prior lienor whose security deed was allegedly satisfied of record through fraud were the subject matter of *Murray v. Johnson.*[28] The facts of this case are too complicated to describe here, but the end result was that a bona fide purchaser (or one claiming under him though the latter had notice) was protected. The case seems sound and reassuring.

One last case relating to real estate should be noted for the record. The statement of facts in *Citizens Bank of Hapeville v. Sterling*[29] is not susceptible of easy comprehension and the opinion which cites no authorities for its position is brief. While a correct result was undoubtedly obtained, the case should prove no considerable burden to the publishers of *Shepard's Citations* in the future.

27. 222 Ga. 788, 152 S.E.2d 739 (1966).
28. 115 Ga. App. 103, 153 S.E.2d 733 (1967).
29. See GA. CODE ANN. §53-503 (1961 Rev.).

GUARANTY AND SURETYSHIP

One of the troublesome areas of Georgia law is when a married woman is or is not liable on contracts which may be construed to be a contract of suretyship or a sale of her separate estate made to a creditor of her husband in extinguishment of his debts.[30] Cases decided during the period under review do not appear to have gone very far in resolving the problems. Some cases, however, are of interest. *Rankin v. Smith*[31] sustained a married woman's contract of indemnity under the terms of which she became liable for the debts of a corporation in which she was a stockholder. The court did not determine by what name the contract in question would be known.

National Acceptance Co. v. Fulton Nat'l Bank of Atlanta[32] was another case involving a contract whereby a married woman became obligated for a corporate obligation. It was undisputed in the trial court that the married woman received nothing of value as a consideration, but the court held the contract to be binding because it was not exclusively one of suretyship. The opinion by Justice Hall made a good start on eliminating the confusion in this area but the case was reversed on certiorari *sub nom. Wolkin v. Nat'l Acceptance Co.*[33] In the view of the Supreme Court, the absence of an independent consideration running to the married woman was fatal, and it may perhaps be hereafter assumed that in the absence of independent and identifiable consideration paid to the married woman, it will be difficult if not impossible to establish that the contract is one of guaranty which is permitted under the law.

One case somewhat off the beaten path is that of *Domestic Loans of Washington, Inc. v. Wilder,*[34] in which it was held that a married woman who received title to real estate from her husband subject to judgment liens already in existence could thereafter execute a valid deed to secure debt on the property for the purpose of discharging the prior liens. The result seems quite proper as against the contention that the conveyance was in extinguishment of her husband's debt.

SECURED TRANSACTIONS INVOLVING PERSONAL PROPERTY— UNIFORM COMMERCIAL CODE NOT INVOLVED

As indicated above, the cases decided during the earlier part of the survey period involving secured transactions with respect to personalty did not concern themselves with the UNIFORM COMMERCIAL CODE. Four cases in which the Code was either not involved or was immaterial are noted. One of them, *American Security Inv. Co. v. Poppell,*[35] highlights the desirabil-

30. 113 Ga. App. 204, 147 S.E.2d 649 (1966).
31. 113 Ga. App. 517, 148 S.E.2d 907 (1966).
32. 222 Ga. 487, 150 S.E.2d 831 (1966).
33. 113 Ga. App. 803, 149 S.E.2d 717 (1966).
34. 114 Ga. App. 268, 150 S.E.2d 697 (1966).
35. 113 Ga. App. 225, 147 S.E.2d 807 (1966).

ity of being prompt for sheriff's sales. Where the attorney for the plaintiff in the foreclosure of a bill of sale to secure debt did not arrive at the place of sale until noon, the creditor could not complain that the property had been sold at 10:00 o'clock where the record did not disclose that the attorney had had a clear understanding with the Sheriff upon which he relied to the plaintiff's detriment that the sale would not be held at 10:00 o'clock promptly.

In *Chastain v. Consol. Credit Corp.*[36] the previously decided principle that the holder of a bill of sale to secure debt may maintain a trover action against the debtor notwithstanding the latter's discharge in bankruptcy was reaffirmed. While the transaction here involved was pre-code, presumably the same result would obtain under the UNIFORM COMMERCIAL CODE.[37]

The operation of dragnet or open-end clauses in bills of sale to secure debt was involved in *Cantwell v. Fulton Nat'l Bank of Atlanta.*[38] In that case, it was held that where the creditor was the holder of two bills of sale to secure debt on two separate automobiles, each of the bills of sale being given not only to secure the specific indebtedness with respect to the automobile described but also any other indebtedness between the parties, the holder of the bills of sale to secure debt could foreclose the first instrument (the debt specifically incurred in connection with which had been fully paid) in order to realize on the security therein described because of default in the payment of the indebtedness represented by the later instrument. It appears that the automobile involved in the subsequent transaction had already been repossessed prior to the instant foreclosure. Since the effective date of the UNIFORM COMMERCIAL CODE, other factors may enter into the disposition of similar cases.[39]

Finally, there is the case of *Sun Ins. Office, Ltd. v. First Nat'l Bank & Trust Co.*[40] There, a non-recording (or non-filing) insurance policy excluded losses from loans made to a dealer as to the property held for resale. An automobile on which the creditor had made a loan to a dealer was in fact held for resale although the lender thought that the automobile was being held by the dealer for his personal use. The lender was unable to recover under the insurance policy because the actual facts of the situation controlled rather than the lender's understanding of it. The policy in this respect was held to be unambiguous.

SECURED TRANSACTIONS AND PERSONALTY—UNIFORM COMMERCIAL CODE APPLICABLE

Four cases involving secured transactions under the Uniform Commercial Code are noted as illustrative of the judicial developments in this area.

36. See GA. CODE ANN. §109A-9-503 (1962 Rev.).
37. 113 Ga. App. 358, 148 S.E.2d 95 (1966).
38. See GA. CODE ANN. §109A-9-505 (1962 Rev.).
39. 113 Ga. App. 782, 149 S.E.2d 753 (1966).
40. 114 Ga. App. 268, 151 S.E.2d 530 (1966).

It is unfortunate that circumstances do not permit a detailed examination and analysis of these cases and the writer commends the decisions to an energetic law review writer for a more profound treatment. While it does not appear unequivocally that the results in any of the cases were contrary to the philosophy of the UNIFORM COMMERCIAL CODE, the opinions do reflect a need to understand and adhere to code language for purposes of clarity. For example, in *Guardian Discount v. Settles,*[41] the court concluded that the filing provisions of Article 9 of the UNIFORM COMMERCIAL CODE,[42] apply to the perfection of security interests created by dealers or manufacturers, but that security interests created by others must be perfected under the Motor Vehicle Title Certificate Act.[43] This result seems to be correct, but it would have served a better purpose for future reference had the language of the decision been couched in the Code terms of inventory financing as opposed to consumer goods or equipment financing.[44] There are various rules in the UNIFORM COMMERCIAL CODE other than those relating to filing which vary according to the type of collateral.[45] The distinction which the Court in fact made in the *Settles* case without expressly so stating, was between inventory and other types of financing. It would have been better if this had been made clear.

Martin Distrib. Co. v. First State Bank of Blakely,[46] concerns itself with transactions entered into before the effective date of the UNIFORM COMMERCIAL CODE and enforced thereafter. The court held, it would seem correctly, that a properly recorded bill of sale to secure debt on inventory, executed and recorded prior to the effective date of the UNIFORM COMMERCIAL CODE was sufficient to continue to preserve the security interest in inventory acquired by the debtor after the effective date of the Code. The bill of sale to secure debt contained the usual pre-code provision that it conveyed inventory changing in specifics. The holder of the bill of sale was held to have priority over holders of security interests in the same collateral acquired after the effective date of the Code.[47] The case is clear warning to those intending to finance upon the security of inventory that they must check the record of pre-code bills of sale to secure debt, especially if the new inventory financing does not involve a purchase money security interest.[48]

In *Peoples, Inc. v. Devane,*[49] it was held that, as between the holder of a security agreement on a 1951 truck as to which a Form T-3 had been

41. GA. CODE ANN. §109A-9-302 (1962 Rev.).
42. GA. CODE ANN. §68-401a (1957 Rev.).
43. See GA. CODE ANN. §109A-9-109 (1962 Rev.).
44. See for example, GA. CODE ANN. §§109A-9-207, 312 (1962 Rev.).
45. 144 Ga. App. 693, 152 S.E.2d 599 (1966).
46. See GA. CODE ANN. §109A-10-101 (1962 Rev.).
47. The court indicates that the later creditors did not hold security agreements for purchase money of inventory.
48. 144 Ga. App. 597, 152 S.E.2d 649 (1967).
49. *Cf.* Staley v. Phelan Fin. Corp., 116 Ga. App. 1, 156 S.E.2d 201 (1967).

filed and a mechanic who had possession of the vehicle under a claim of lien, the mechanic had the prior claim. The case turns on the proposition that there was no evidence that the Form T-3 used by the creditor was that prescribed by the Revenue Commissioner, and the court would not take judicial notice (in these particular circumstances) of the rules and regulations of the Commissioner.[50] Thus, there was no evidence before the court that the security interest was perfected. The court based its ruling, in part, on the Motor Vehicle Certificate of Title Act[51] but made no reference to corresponding provisions of the UNIFORM COMMERCIAL CODE which, under the facts set out, presumably would have authorized the same result.[52]

Finally, *Dunford v. Columbus Auto Auction, Inc.*,[53] involved a contest between a lender under a floor plan arrangement and a purchaser from the debtor-dealer in the ordinary course of business. The lender failed to file a financing statement. The plaintiff was held to be a bona fide purchaser for value without notice of the lender's interest. It would seem that under the UNIFORM COMMERCIAL CODE, knowledge on the part of a purchaser from a dealer in the ordinary course of business as to the existence of security interest created by the dealer is immaterial and that the purchaser would take free and clear of a security interest in such case even though he knows of its existence. It would have been well for the court to indicate this by way of instruction.

CONCLUSION

During the survey period the most interesting developments relate to the treatment by the courts of the UNIFORM COMMERCIAL CODE. In some instances, relevant provisions of the new Code were not discussed or applied, although it is doubtful that any different results would have been reached had they been applied. The failure, however, to apply and discuss the provisions of the UNIFORM COMMERCIAL CODE indicates that both the bench and bar are relatively unfamiliar therewith. Both should take care to insure that future decisions are soundly based if the business community is to derive the greatest possible benefit from the adoption of the Code.

50. GA. CODE ANN. §68-423a (1957 Rev.).
51. See GA. CODE ANN. §109A-9-301 (1962 Rev.).
52. 114 Ga. App. 407, 151 S.E.2d 464 (1966).
53. See GA. CODE ANN. §109A-9-307 (1962 Rev.).