COMMERCIAL LAW

By GERALD L. KOCK*

As has been stated here before, the solution of problems that involve the application of the Commercial Code requires a careful characterization of the problem so that the appropriate code sections will be used. The interrelationship between articles nine and two provides a recurring example. Though Ga. Code Ann. §109A-9-201 (Rev. 1973) states that a security agreement is effective according to its terms, most of the provisions of that article relate to the property consequences of the secured transaction. Matters of construction of the agreement, including the use of parol evidence to show modification of the agreement, are left to the general law on such questions. There is one important exception: If the seller's security interest is based upon title retained by him under a conditional sale contract, the seller's remedies with reference to the goods are governed by article nine, not article two,[1] but the contract remains a contract of sale for other purposes. *Giant Peanut & Grain Co. v. Long Manufacturing Co.*[2] is a case in point.

The action was a foreclosure brought under Ga. Code Ann. §67-701 (Rev. 1973) to enforce a security interest provided for in a dealership contract under which Giant was to distribute machinery. In the agreement Long reserved a security interest in its products. The debtor filed an affidavit of illegality in which it alleged a parol agreement for the return of two tractors and some other equipment for credit against amounts owing on the unpaid debt due because of the use of some peanut wagons. This claim would indicate that the dealership contract was actually a consignment transaction, neither a sale nor a secured transaction. The court gives us no such information, probably because the consignor acted like a secured party. If it were a title retention sale, the returned goods would have applied to cancel the debt due to the extent of the returned goods, but it is unlikely that there would be any value to credit to the price of other goods. The court did not characterize the transaction, but it did refer to several code sections that govern sales, without, however, applying the law that governs contract provisions like that claimed by the debtor in this case.

Modification of a contract of sale requires no consideration,[3] so it was unnecessary for the court to hunt around to find consideration. The debtor in this case claimed a parol modification that would permit him to return goods for credit. Any such "or return" provision is so far inconsistent with

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1. The reservation of title "is limited in effect to a reservation of a security interest." GA. CODE ANN. §109A-2-401(1) (Rev. 1973).

2. 129 Ga. App. 685, 201 S.E.2d 26 (1973).

3. GA. CODE ANN. §109A-2-209(1) (Rev. 1973).

a sale that it cannot be proved by parol[4] and must be evidenced by some writing or otherwise pass muster under the Statute of Frauds[5] as a separate contract in order to be enforceable.[6] If title had not been retained by the seller, and if the buyer had rejected the goods or revoked his acceptance, title would have returned to the seller, whether or not the buyer was justified in his action,[7] but none of that has anything to do with this case.

I. SALES

A. *Formation And Formalities*

One of the special Statute of Frauds problems has been discussed above. *Giant Peanut Co. v. Carolina Chemicals Inc.*[8] raised another. In granting summary judgment for the plaintiff, the trial court ruled that the defendant's effort to prove that one of the terms of the contract was that the goods were to be paid for only when sold, and then less a commission, was not permitted by Ga. Code Ann. §109A-2-201(1) (Rev. 1973). That would be true if the term to be proved was within the rule that an "or return" term is a separate contract for the purposes of the Statute of Frauds.[9] The court of appeals did not find it to be an "or return" provision and held that since the plaintiff had admitted the contract, thus making it enforceable,[10] the provisions relied upon by the defendant might be proved, as well as those admitted by the defendant. This is surely a proper result since, even when the statute is satisfied by a writing, the writing need be neither complete nor accurate.[11]

B. *Warranties*

Smith v. Bruce[12] is a good place to begin a discussion of warranties. While the trial court was clearly wrong when it intimated that the Commercial Code affected changes only with reference to the warranty of merchantability, the argument that the change is small was not entirely wrong. We do still seek the covenant of the parties as under former Ga. Code Ann. §96-301 (Rev. 1972), but now the test is the "basis of the bargain." If it is a part of the basis of the bargain, any affirmation of fact or promise relating to the goods,[13] any description of the goods,[14] or any

4. GA. CODE ANN. §109A-2-202 (Rev. 1973).
5. GA. CODE ANN. §109A-2-201 (Rev. 1973).
6. GA. CODE ANN. §109A-2-326(4) (Rev. 1973).
7. GA. CODE ANN. §109A-2-401(4) (Rev. 1973).
8. 129 Ga. App. 718, 200 S.E.2d 918 (1973).
9. GA. CODE ANN. §109A-2-326(4) (Rev. 1973).
10. GA. CODE ANN. §109A-2-201(3)(b) (Rev. 1973).
11. GA. CODE ANN. §109A-2-201(1) (Rev. 1973) (last sentence).
12. 129 Ga. App. 97, 198 S.E.2d 697 (1973).
13. GA. CODE ANN. §109A-2-313(1)(a) (Rev. 1973).
14. GA. CODE ANN. §109A-2-313(1)(b) (Rev. 1973).

sample or model of the goods[15] creates an express warranty. It was error not to charge that "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." But it must be kept in mind that this, as well as the statement that it is not necessary that the seller use formal words such as warrant or guarantee or that there be a specific intention to make a warranty, is intended only as a guideline in the process of determining the basis of the bargain.[16] If an agreement of any significance has been concluded, there must surely have been something at its base other than salesman's puffing. The very agreement means the bargain of the parties was in fact as found in their language or by implication from other circumstances.[17] It was also error not to charge on Ga. Code Ann. §109A-2-316(3)(a) (Rev. 1973) providing for the exclusion of implied warranties by expressions such as "as is." If such language was indeed used, such an expression would operate to exclude the warranty of fitness for the plaintiff's particular purpose unless circumstances indicate otherwise.

These limitations on any disclaimers of liability are very important particularly since, though the Commercial Code does contain some limitations in terms of reasonableness and unconscionability, basically it is a freedom of contract statute. The parties may agree to relieve one or the other party of liability if that is their agreement. A seller may be certain that he has no express warranties by remaining silent;[18] he may avoid implied warranties by an express agreement that there will be none so long as he meets the formal requirements of the statute or the contract, or so long as the conditions are such as to give the buyer notice that there are no warranties, and that he bears the risk.[19] An express provision in the agreement that there are no warranties, express or implied, of merchantability, fitness for a particular purpose or otherwise, unless they appear in writing signed by the seller, is fully effective according to its terms so long as it meets the test of conspicuousness,[20] and will effectively exclude such warranties.[21] There have been a number of cases in which counsel, especially for consumers, have argued that because the seller has been able effectively to eliminate liability for breach of warranties of quality, the contract must be unconscionable.[22] This position is clearly untenable. Although it is not true that a contract term is necessarily conscionable because it is legally permissible, there would be few cases in which a court would have occasion to find as a matter of law that the exclusionary provision was unconsciona-

15. GA. CODE ANN. §109A-2-313(1)(c) (Rev. 1973).
16. GA. CODE ANN. §109A-2-313(2) (Rev. 1973).
17. GA. CODE ANN. §109A-1-201(3) (Rev. 1973).
18. GA. CODE ANN. §109A-2-316(1) (Rev. 1973).
19. GA. CODE ANN. §109A-2-316(3) (Rev. 1973).
20. *See* GA. CODE ANN. §109A-1-201(10) (Rev. 1973).
21. GA. CODE ANN. §109A-2-316(2) (Rev. 1973).
22. *E.g.*, Westinghouse Credit Corp. v. Chapman, 129 Ga. App. 830, 201 S.E.2d 686 (1973).

ble at the time that the agreement was made.[23] This might be the case, for example, where at the time of the contract the seller knew of the particular defect and the buyer was prevented from knowing of it. The fact that the goods later turned out to be defective is not of itself any evidence of unconscionable dealing at the time of contracting.

Evershine Products, Inc. v. Schmitt[24] was a broad ranging attack on products liability in which everything was used except the implied warranty of merchantability. The count based on allegations of express warranty in advertisements to the public, including the plaintiff, that the product could be used safely for household and other cleaning tasks and that it was usable for all household cleaning, was probably the most difficult part of the case to carry. While one normally thinks of express warranty as arising out of contract, rights under the contract existing only for the benefit of direct parties to that contract, it is true that warranties have been recognized for the benefit of a consumer in cases of manufacturers' and producers' express warranties to the ultimate consumer as in the sale of automobiles and household appliances. It was recognized in some states that under the Uniform Sales Act an express warranty might be found under such circumstances, but in most states there are very real questions of privity of contract since the parties have never contracted directly with each other, unless one can find a contract in a mere reliance. The Georgia courts have not shown a willingness to so narrow the privity requirement unless the promise is transmitted directly from the manufacturer or producer to the consumer and unless it is called a warranty. The court of appeals did not pursue its discussion, however, since it found no need to decide whether there was a warranty in view of the fact that none of the claims on the label appear to have been breached, and that the product did appear to work better than any other used by the plaintiff. As far as the count on implied warranty of fitness for a particular purpose is concerned, many of the same considerations are involved. In such a case, we not only have the general assumption that the warranty arises as a term of the contract and protects the parties to the contract, the very statute providing for that warranty term provides that the seller at the time of contracting must have reason to know the particular purpose for which the goods are required and know that the buyer is relying on his skill or judgment to select or furnish suitable goods.[25] The court could find no proof of such an implied warranty.

As has only recently been stated by the court,[26] the origin of warranty was in tort. As the development of informal contracts grew, warranty became accepted as a contract term and that is where we have so often seen

23. GA. CODE ANN. §109A-2-302(1) (Rev. 1973).

24. 130 Ga. App. 34, 202 S.E.2d 228 (1973).

25. GA. CODE ANN. §109A-2-315 (Rev. 1973).

26. This appears to be the thrust of Wood v. Hub Motor Co., 110 Ga. App. 101, 137 S.E. 2d 674 (1964).

it, *e.g.*, former section 96-301, in the law of sales. Given the strict rule of privity, warranty would have to remain under the law of sales because, even from the days when it was a tort, a form of deceit, some promissory language was a part of the action in warranty. The 1957 limitation on the privity requirement was placed by the Code publishers in with other sections on the law of sales,[27] though it would of necessity have been an action in the nature of a tort since it provided liability of manufacturers to ultimate purchases with whom they did not contract. Since it was apparently a part of sales law, it was repealed when sales law was comprehensively revised by the adoption of the Commercial Code. The 1968 efforts by the legislature to limit the effectiveness of the privity rule was inserted as an amendment by the legislature at the end of the section which created the privity problem.[28] As the court notes, that section provides that the manufacturer is liable in tort, irrespective of privity, if injury to person or property is caused because the property when sold was not merchantable and reasonably suited to the use intended. This warranty is, of course, like the warranty of merchantability under Ga. Code Ann. §109A-2-314(2)(c) (Rev. 1973). The modern mix of warranties, both tort and contract, was well stated by an Ohio Court of Appeals in *Lonzrik v. Republic Steel Corp.*[29] as follows:

> There are, therefore, three methods by which one who suffers injury or damage in using a chattel delivered by the manufacturer or the vendor in a defective condition may proceed to seek redress against the manufacturer:
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> 1. Where the ultimate purchaser stands in a contractual relation with the producer or vendor, an action (if justified by the facts) for breach of express or implied warranty may be maintained as provided by the Uniform Commercial Code.
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> 2. By an action charging negligence in producing the chattel as held in *MacPherson, supra*, regardless of privity.
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> 3. By an action seeking to enforce "strict tort liability without privity."
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> . . . The use of the word "warranty" is probably improper; however, the courts, in describing causes of action for strict tort liability in product cases, seem to have continued to use it for want of a better word, not intending it to mean anything more than the manufacturer putting his goods into the stream of commerce, thereby representing that they are of merchantable quality, unless a different intention is clearly expressed.[30]

In *Evershine* the court appears to be willing to construe these counts as tort actions though they were originally alleged in contract, or apparently

27. GA. CODE ANN. §96-307 (Rev. 1972).
28. GA. CODE ANN. §105-106 (Rev. 1968).
29. 1 Ohio App. 2d 374, 205 N.E.2d 92 (1965).
30. *Id.* at ____, 205 N.E.2d at 98-99.

in contract, but it does not pursue the possibility of recovery under this section because the evidence appears to indicate that the injury caused was the proximate result of the plaintiff's failure to follow the instructions of the manufacturer for the use of the goods rather than from the failure of the goods to conform to the quality requirement. The negligence count involves the application of different principles of law, which principles fall within the scope of the survey on torts and will not be repeated here.

C. Sale Or Return, Consignment, And Security Interests

In its ordinary meaning, a consignment is not a sale; it is a bailment for the purpose of sale. The goods remain the property of the entrusting consignor until they are sold to a buyer in ordinary course,[31] and, in the absence of an agreement to the contrary, they remain at his risk.[32] The bailee's duty is to exercise ordinary care.[33] A sale or return is a completed sale[34] and the goods are at the buyer's risk until they are safely returned to the seller,[35] at which time the sales contract is terminated.[36] A consignment in its normal form cannot very well be a secured transaction, but it may be if so intended by the parties.[37] The usual situation in which this occurs is the case in which the bailee-consignee takes goods of the bailor-consignor to secure an obligation owed by him for the purpose of selling them to satisfy the obligation.

Since a consignment is not a sale or return and is seldom a security agreement, the frequent occurrence of these terms in consignment cases indicates a serious misunderstanding of the operation of Ga. Code Ann. §109A-2-326(3) (Rev. 1973) on consignments. That section does not turn a consignment into a sale or return, or require a sale or return in order to operate. What it does do is give the creditors of a consignee in possession of goods the same rights that they would have if the consignee were a buyer under a sale or return contract,[38] unless they are put on notice of the buyer's interest. The surest way for a consignor to give creditors notice of his claim to the goods is to file a public notice in the records that creditors are expected normally to check. An article nine filing is made not because the consignment is a security interest but because that is where creditors are expected to look for claims. That is what is wrong with the decision in

31. *See* GA. CODE ANN. §109A-2-403(2) (Rev. 1973).

32. Knox Jewelry Co., Inc. v. Cincinnati Ins., 130 Ga. App. 519, 203 S.E.2d 739 (1973), was a case of such a contrary agreement. There was no need for the court to find a sale or return or any other kind of sale.

33. GA. CODE ANN. §12-102 (Rev. 1973).

34. *See* GA. CODE ANN. §109A-2-326(1)(b) (Rev. 1973).

35. GA. CODE ANN. §109A-2-327(2)(b) (Rev. 1973).

36. *See* GA. CODE ANN. §109A-2-106(3) (Rev. 1973).

37. *See* GA. CODE ANN. §109A-1-201(37) (Rev. 1973); GA. CODE ANN. §109A-9-102(2) (Rev. 1973).

38. This is a fair use of the word "deemed."

First National Bank & Trust Co. v. Olivetti Corporation of America.[39] The description in the filed statement was certainly adequate,[40] but, in the absence of promissory language, it was not an agreement creating or providing for a security interest.[41] No security interest was needed; it was a statement filed to give notice of consignor's title.[42] From the court's description of the "dealership contract" in *Giant Peanut & Grain Co. v. Long Manufacturing Co.*,[43] one would expect the same thing to be the case, but there the *consignor* initiated foreclosure as for a security interest.

D. Breach, Excuse, And Remedies

Wars and boycotts, and, lately, occasional shortages of petroleum-based products, have given rise to claims of excuse because of commercial impracticability. A seller may assume any burden he agrees to, even that of insurer of the performance owed to the buyer; but, if he does not do so, if the performance of his delivery obligation has been made impracticable by the occurrence of some contingency, the nonoccurrence of which was a basic assumption on which the contract was made, a delay in delivery or failure to deliver is not a breach, if he acts, as specified, to protect his buyers. The same thing is true if the seller acts in good faith compliance with a governmental order or regulation, whether or not that order or regulation ultimately turns out to be invalid. Only good faith in compliance is tested.[44]

Given the occurrence of appropriate contingencies, the seller is excused from performing if it becomes completely impracticable. If however, the effect goes to only a part of his capacity to perform, the seller must allocate his production and deliveries among his customers. He may allocate in any manner that is fair and reasonable, and he may, at his option, include in his allocation regular customers not then under contract, and reserve some deliveries for his own requirements.[45] In order to avail himself of this excusing factor, the seller must give seasonable notice to the buyer of the estimated quota that will be available.[46]

In case of allocation, the buyer has the option to modify the contract by agreeing to take his available quota in substitution for the quantity provided by the agreement.[47] If he fails to do so within thirty days, or some

39. 130 Ga. App. 896, 204 S.E.2d 781 (1974).
40. Under GA. CODE ANN. §109A-9-110 (Rev. 1973).
41. *See* GA. CODE ANN. §109A-9-105(1)(h) (Rev. 1973).
42. Under GA. CODE ANN. §109A-2-326(3)(c) (Rev. 1973).
43. *Supra* note 2.
44. GA. CODE ANN. §109A-2-615(a) (Rev. 1973).
45. GA. CODE ANN. §109A-2-615(b) (Rev. 1973). Mansfield Propane Gas Co., Inc. v. Folger Gas Co., 231 Ga. 868, 204 S.E.2d 625 (1974).
46. GA. CODE ANN. §109A-2-615(c) (Rev. 1973).
47. GA. CODE ANN. §109A-2-616(1)(b) (Rev. 1973).

shorter "reasonable" time, the contract lapses as to any affected deliveries.[48]

A buyer has a legal right to return goods and obtain a refund only if he has properly rejected goods or revoked his acceptance of them, but many merchants have come to allow their customers the privilege to do so. It would seem that third persons have been found to be pretending to be such customers and claiming the privilege of refund. In an effort to limit this practice the General Assembly has acted to make it a misdemeanor to give a false or fictitious name or the name of another person, without permission, for the purpose of obtaining a refund for merchandise or a ticket or other evidence of a service purchased but not yet performed.[49]

Neither rescission nor a claim for rescission is inconsistent with a demand for the normal remedies for breach of a sales contract.[50] The rule that one must either affirm or disavow the contract is itself disavowed in the Commercial Code. This makes the discussion of election of remedies in *City Dodge, Inc. v. Gardner*[51] mostly unnecessary, as is noted in the concurring opinion.

Although the disclaimers that are so commonly used, especially that old friend "as is," seldom leave a used car buyer with a remedy, there is also the problem how to get money out of the dealer, even if there is a right. There may be some help in recent legislation requiring used car dealers either to prove a net worth of at least $30,000 or put up bond in the penal sum of $10,000 for the benefit of purchasers, their vendees or successors in title to pay all loss, damages and expenses that may be sustained by reason of any fraudulent misrepresentation or breach of warranty.[52]

II. Commercial Paper

It seems so often to be forgotten that the law of commercial paper is a law of form and technicality. The search that goes on for unconditional promises ought instead to be a search for complete promises. It is, for example, quite true as states in *Pugh v. First National Bank of Barnesville*[53] that instruments payable on demand include those in which no time for payment is stated.[54] It is also true that an instrument in which the time of payment has been left blank rather than simply left out is unenforceable until it is completed in accordance with authority given.[55]

48. Ga. Code Ann. §109A-2-616(2) (Rev. 1973).
49. Ga. Laws, 1974, p. 490.
50. Ga. Code Ann. §109A-2-721 (Rev. 1973).
51. 130 Ga. App. 502, 203 S.E.2d 729 (1973).
52. Ga. Laws, 1974, p. 1240.
53. 130 Ga. App. 627, 204 S.E.2d 370 (1974).
54. Ga. Code Ann. §109A-3-108 (Rev. 1973).
55. Ga. Code Ann. §109A-3-115(1) (Rev. 1973). *See* ALI Uniform Commercial Code §3-115, comment 2 at 246 (1962 Draft).

Also, with reference to the *Pugh* case, it is true that as between the obligor and the obligee the terms of an instrument may be modified or affected by any other written agreement executed as a part of the same transaction.[56] The court gives us no reason why the effectiveness of the other "written agreement" is optional with the bank.

Though there is no basis for a general objection to the decisions of *Duran v. Judson*,[57] there is one troublesome comment in both opinions. The suggestion that a promissory note is intangible personal property is troublesome. How property can be intangible when it is transferred by physical delivery is hard to see.[58] It is true, of course, that the debt represented by the note is intangible property; it is only the language that is unfortunate.

We continue to have questions about who is the obligee on a note in view of the fact that there is so much careless signing being done. In *Southern Oxygen Supply Co. v. De Golian*[59] the court does not give us the exact facts we need to determine for certain whether Southern Oxygen is the payee, but that would seem to be the case. The court correctly notes that one who has signed either without indicating that he signs in a representative capacity or without naming his principal is personally liable. This is true unless it is otherwise established between the immediate parties to the transaction.[60] It is open to proof.

When officers of a corporation or friends of the maker co-sign or endorse a note for the purpose of lending their credit to another, they are sureties, but the nature of that obligation on commercial paper sometimes causes confusion. In *Brunson v. Bridges*,[61] for example, the action was brought by an indorser against a co-maker, the co-maker claiming to be a co-surety. There is no doubt that it was an accommodation indorsement since the indorsement was executed before the note was signed by the defendant or issued by his co-maker. It certainly could not have been a transfer indorsement since the paper had not been issued. Both of the parties were sureties but such an accommodation party is liable in the capacity in which he has signed, at least as far as the taker of the paper is concerned.[62] Since the indorser has, apparently, had to take up the paper, he will, unless the defendant can show a special agreement between himself and the indorser, be entitled to enforce the paper against a maker as would any other indorser be able to enforce it against a maker. They are not co-sureties. They are successive sureties.

Since surety parties almost never receive consideration for their signing, they very commonly raise as their defense a failure of consideration.

56. GA. CODE ANN. §109A-3-119 (Rev. 1973).
57. 128 Ga. App. 459, 197 S.E.2d 163, *aff'd*, 231 Ga. 206, 200 S.E.2d 872 (1973).
58. GA. CODE ANN. §109A-3-202(1) (Rev. 1973).
59. 230 Ga. 405, 197 S.E.2d 374 (1973).
60. GA. CODE ANN. §109A-3-402(2)(b) (Rev. 1973).
61. 130 Ga. App. 102, 202 S.E.2d 553 (1973).
62. GA. CODE ANN. §109A-3-415(2) (Rev. 1973).

However that is not the real question, through it is true, as stated in *Mercantile National Bank v. Berger*,[63] that the instrument is enforceable unless the defendant establishes his defense.[64] Such a party is liable even if he receives consideration, if the instrument was taken for value before it was due.[65] As the supreme court notes in this same case,[66] the parties have a right to rely upon their suretyship defenses and would have that right even without Ga. Code Ann. §109A-3-119 (Rev. 1973). They have, however, waived away all of their protection. It has lately come to be the practice of lenders to require that those who sign for their protection to surrender, compromise, substitute or exchange the collateral or grant any release, compromise or indulgence without any notice whatsoever to the surety who is there to protect the bank. *Greene v. Bank of Upson*[67] gives us an example of the current practice.

Even against a holder in due course, it is a good defense to the maker of a note that the transaction is infected by such illegality as renders the obligation a nullity.[68] *Abrams v. Commercial Credit Plan, Inc.*[69] supplies an interesting example. In that case the date of the loan was stated to be April 20, 1971. The first installment was due to be paid on June 4, 1971, and the final installment was scheduled to fall due on May 4, 1973, which was argued to be a contract of less than two years, as indeed it would appear to be from its face. However, under the Industrial Loan Act (chapter 25-3), a loan contract may not extend for a period of more than two years,[70] and if it does so the contract is null and void.[71] In this case, the contract was made in April and was not to be due until two years, fourteen days later. It was null and void, therefore unenforceable. The court did suggest, however, that the principal sum might be recovered in an action of assumpsit for monies had and received, but no ruling was made on that point. This point has been a matter of some conflict. A somewhat more extreme case of the same sort was found in *Grey v. Quality Finance Co.*[72] In this case the trouble was only one day. The date of the loan was November 14, 1969, and the final installment was due on November 15, 1971, one day too late. One can understand how the lender made that mistake because November 14 was a Sunday and the lender knew that the office would not be open and also, when paper is due on a Sunday it, in fact, is presentable on Monday.[73] The contract was written to reflect

63. 129 Ga. App. 707, 200 S.E.2d 921 (1973).
64. GA. CODE ANN. §109A-3-307(2) (Rev. 1973).
65. GA. CODE ANN. §109A-3-415(2) (Rev. 1973).
66. Berger v. Mercantile Nat'l Bank, 231 Ga. 680, 203 S.E.2d 479 (1974).
67. 231 Ga. 287, 201 S.E.2d 463 (1973); *see also* Twisdal v. Georgia R.R. Bank & Trust Co., 129 Ga. App. 18, 198 S.E.2d 396 (1973).
68. GA. CODE ANN. §109A-3-305(2)(b) (Rev. 1973).
69. 128 Ga. App. 520, 197 S.E.2d 384 (1973).
70. GA. CODE ANN. §25-315 (Rev. 1971).
71. GA. CODE ANN. §25-9903 (Rev. 1971).
72. 130 Ga. App. 762, 204 S.E.2d 483 (1974).
73. GA. CODE ANN. §109A-3-503(3) (Rev. 1973).

that understanding and, therefore, exceeded the permissible statutory term. It was void. Since the lender merely wrote the contract only in recognition of realities, there is much justice in the dissenting judge's position. However, it is a statute of exception from the strict rule and perhaps it should be applied according to its precise terms. In addition, the point is overlooked in the dissent that the additional day is provided for only in those cases where presentment is *due* on a day which is not a full business day. This contract is so written that the presentment was due on Monday, not on Sunday; the statutory allowance of an additional day would not apply. The sad part of these cases, of course, is that if presentment is stated to be due on Sunday, a great many debtors will rush into the office on Saturday and pay ahead of time for fear of being late, as would be their legal right.

Groover v. Peters[74] indicates a very real problem that exists when so few lenders retain the debts that are generated by their activity. The appellee executed a note to one Norwood for $1,000 payable on or before July 1, 1965. Soon thereafter Norwood transferred the note and security deed to the appellant. Prior to the due date, but before the assignment to appellant was placed of record, the appellee paid Norwood $800 under a settlement arrangement and received a receipt indicating that the note was paid in full. Appellant, the holder of the note, had no knowledge of that payment. Norwood made two payments on the note to the holder who now seeks the balance due from the appellee, the original maker. The trial court held that the payments made to Norwood by the maker were valid against the present holder. This was error. Liability of a party to a note is discharged only to the extent of payment for satisfaction made to the holder of the note.[75] Unless the original payee is an authorized agent of the holder, the burden rests with the maker to determine who is the holder and to pay him. That is why the presentment procedure is provided for. The maker of a note is entitled to an exhibition of the instrument before making payment.[76] As the court states, "[t]he long and short of the matter is that the borrower must be as careful in repaying the debt as the lender presumptively was in making the loan."[77] In *American Oil Co. v. Studstill*,[78] the supreme court reviewed the decision discussed at some length in this survey last year[79] in an effort to clarify the law on the question, when does the tender and the retention of a check amount to an accord in satisfaction? The three rules laid down by the court are so concisely stated that there is nothing to be gained by an effort to describe them here.

74. 231 Ga. 531, 202 S.E.2d 413 (1973).
75. GA. CODE ANN. §109A-3-603(1) (Rev. 1973).
76. GA. CODE ANN. §109A-3-505(1)(a) (Rev. 1973).
77. 231 Ga. at 532, 202 S.E.2d at 414.
78. 230 Ga. 305, 196 S.E.2d 847 (1973).
79. Kock, *Annual Survey of Georgia Law: Commercial Law*, 25 MERCER L. REV. 49, 61 (1974).

III. Bank Deposits and Collections

Traditional ways of making payments in this coumtry have come under a great deal of examination in recent years. This is partly because of the increasing cost of collecting and clearing checks, since it is a relatively labor intensive operation, and also because of a fear that the tremendously increasing bulk of paper that needs to be handled could cause a breakdown in the banking system of the same sort that happened to the securities industry in the late 1960's. The number of checks written in the United States has increased from twelve billion in 1960 to an estimated twenty-six billion in 1973. At current growth rates, the volume is anticipated to double by 1985, rising to fifty-four billion items. In an effort to anticipate this demand and eliminate the burden, a number of different types of electronic transfer arrangements have been developed. All of them result in a holding of the paper at some limited point, or even eliminating the check entirely as in payroll cases and providing for computer tape to be handled from a central automated exchange, thus handling through the collection process only the electronic message captured from the check so that the information contained on the check would then flow through the banking system by electronic media.[80] Such a change in practice necessarily requires a change in law. Our present bank collection system is set up to handle instruments for the payment of money.[81] The collection system handles "items" and if it is to be able to deal with electronic messages rather than "instruments" the definition of that term must be changed. That is the effect of an act of the General Assembly just this year. The definition of "item" was expanded to add at the end the provision that "item shall also include any stored electronic message unit for the payment of money."[82]

There seems to be some kind of magic that dazzles and blinds the court whenever a bank is found to have signed an instrument. It is true, of course, that the underlying obligation for which an instrument is taken is discharged, *pro tanto*, if a bank is the drawer, maker or acceptor of the instrument.[83] That would be the case in *Harris v. Hill*,[84] since on instructions from its customer the bank issued cashier's checks payable to the plaintiff. The difficulty arose because the checks, though drawn, were not issued. In spite of that fact, since the bank had withdrawn the amount of the checks from the accounts of the defendant and had drawn checks to the order of the plaintiff, though the plaintiff was not yet a holder of the checks, it was the owner of the checks and the bank was holding them. In

80. These facts are taken from Knight, *The Changing Payments Mechanism: Electronic Funds Transfer Arrangements*, Monthly Review of the Federal Reserve Board of Kansas City, July-August 1974, pp. 10-20.

81. Ga. Code Ann. §109A-4-104(1)(g) (Rev. 1973).

82. Ga. Laws, 1974, p. 618 *amending* Ga. Code Ann. §109A-4-104(1)(g) (Rev. 1973).

83. Ga. Code Ann. §109A-3-802(1)(a) (Rev. 1973).

84. 129 Ga. App. 403, 199 S.E.2d 847 (1973).

this situation the bank was quite obviously in possession of property of the plaintiff which could be reached by the United States under its tax lien. The trouble with the case is the extended discussion of the mystical nature of certified checks, cashier's checks, and other instruments on which banks are obligated, and the plain error in the case is the suggestion that a certified check is equivalent to a bill of exchange accepted in advance. That was ancient and not very agreeable law. The virtual acceptance known under the negotiable instruments law has dropped out of the system. It does not appear anywhere in the Commercial Code; an acceptance must be written on the draft.[85] Since certification of a check is the same as acceptance of the draft,[86] and no draft operates of itself as an assignment of any funds,[87] the complex discussion of commercial instruments in the case contributes only confusion to the law of commercial paper and doesn't help bank collections in the slightest. Even though a draft does not constitute an assignment of funds, a draft drawn on a bank may not be reached by a notice, stop order, legal process or otherwise, once that item has been accepted or certified by the bank, at least by any creditor of the original issuer or procurer of the item.[88] That is not relevant to the case at bar, where it was a creditor of the payee who sought to seize the property.

IV. INVESTMENT SECURITIES

Godwin v. Westberry[89] was a suit seeking the specific performance of an alleged oral contract for the sale of corporate stock. The Statute of Frauds contained within article 8 of the Code is similar to that governing sales of goods. In the absence of a written confirmation, delivery or payment, or some writing signed by the party against whom enforcement is sought, or an admission of the contract in the pleadings or otherwise, a parol contract is not enforceable,[90] and the court so held.

V. SECURED TRANSACTIONS

Limitations of the editorial staff make it quite impossible to give thoughful consideration to the cases under this heading and those involving consumer protection under the industrial loan act.

It must be noted though that the legislature has moved to keep up with the latest constitutional theories about judicial foreclosure of security interests in personal property. Chapter 67-8 has been repealed and chapter 67-7 has been comprehensively revised.[91]

85. GA. CODE ANN. §109A-3-410(1) (Rev. 1973). *See* ALI UNIFORM COMMERCIAL CODE §3-410, comment 3 at 301-302 (1962 Draft).
86. GA. CODE ANN. §109A-3-411(1) (Rev. 1973).
87. GA. CODE ANN. §109A-3-409(1) (Rev. 1973).
88. GA. CODE ANN. §109A-4-303(1)(a) (Rev. 1973).
89. 231 Ga. 492, 202 S.E.2d 402 (1973).
90. GA. CODE ANN. §109A-8-319 (Rev. 1973).
91. Ga. Laws, 1974, p. 398.