Commercial Law

By John M. Hewson, III*

The rush of cases in the area of commercial law that has plagued both the courts and the practitioner for the past few years abated somewhat during the survey period. Hopefully, this signifies the beginning of a period of retrenchment which will afford a greater opportunity for studious contemplation of the serious questions brought before the courts in the last decade, and encourage the generation of innovative solutions to our most pressing commercial law problems. This article will attempt not only to review the more important developments over the past year, but also to pinpoint some of the problem areas that deserve further consideration.

I. Legislation

The Georgia Legislature during its 1977 session enacted two important bills dealing with interest rates. Georgia Code Ann. §57-116 (Supp. 1977) was amended to provide that a lender may charge seven percent added interest or "its equivalent." The new language is not dissimilar to that in Ga. Code Ann. §57-202(d) (1977) providing for the equivalent of six percent added interest under the Secondary Security Deeds Act. However, in amending §57-116, the legislature went on to provide that "such equivalent rate shall be calculated on the assumption that all scheduled payments will be made when due." Presumably, this language is meant to forestall any usury questions in the event of prepayment or upon acceleration after default when a simple interest rate in excess of nine percent is used. While this language goes a long way toward achieving this result, it seems that a general statute providing for rebates (or the lack of rebates) in these events would be helpful. The new statute could have general application to all the usury statutes, thereby providing the financial community with a consistent set of rules for rebates.

Georgia Code Ann. §57-101.1 (Supp. 1977) has been amended to allow ten percent simple interest on loans secured by an interest in real estate. In addition, the legislature cleared up an oversight by adding Ga. Code Ann. §57-119 (1977) to subsection (d) which provides a list of code sections which remain unaffected by the general rule of §57-101.1.

* Member of Hunter, Houlihan, Maclean, Exley, Dunn & Connerat, P.C., Savannah, Georgia. University of Virginia (B.A., 1965); University of Georgia (LL.B., 1968). Member of the Georgia Bar.

Bad checks have haunted merchants and lenders from time immemorial. The legislature has now strengthened the bad check law[1] by allowing the holder of a bad check to collect a service charge not to exceed $5.00 or five percent of the face amount of the instrument. In addition, the Act sets out a form letter for use in giving notice of dishonor and provides a means of identifying the issuing party. Most importantly, the Act gives immunity from liability to any person giving such notice of dishonor and testifying in subsequent criminal proceedings. Attorneys for banks and other financial institutions should read this Act in conjunction with Ga. Code Ann. §41A-9909 (1974) which deals with the standard for determining civil liability for wrongful dishonor and prosecution on a check.

In response to recent cases in which Georgia's post-judgment garnishment statute was held unconstitutional,[2] the legislature enacted a bill providing for a new post-judgment garnishment procedure.[3] The new law basically parallels the present law on pre-judgment garnishments. It requires judicial supervision in issuing a writ of garnishment, and service of the writ upon the defendant-debtor prior to the dispersal of any funds received by the court in response to the writ.

Georgia Code Ann. §46-509 (Supp. 1977) provides that a defaulting garnishee may have any judgment entered against him modified to reduce such judgment to 125% of the amount which would have actually been due. The legislature has amended this code section[4] to change the time for filing a petition for modification, from one year after the entry of the judgment on the general execution docket to sixty days after receipt of actual notice of entry of the judgment. Since the amendment specifies actual notice, plaintiffs should immediately notify the defaulting garnishee and carefully document receipt of the notice. Presumably, sending a certified or true copy of the judgment by certified mail, return receipt requested, will suffice.

II. SALES

A. *Contracts and Agreements*

Hopkins v. Kemp Motor Sales, Inc.,[5] involved a dispute over title to an automobile. Hopkins, a used car dealer, purchased an automobile for $500. At the time of the sale, the seller delivered to Hopkins a Georgia motor vehicle title certificate. The title certificate was in proper form and showed no lienholder of record. Hopkins invested $200 repairing the vehicle and then resold it to a third-party purchaser for $1,495.

1. GA. CODE ANN. §26-1704 (Supp. 1977).
2. *See* City Finance Co. v. Winston, 238 Ga. 10, 231 S.E.2d 45 (1976).
3. GA. CODE ANN. §§46-102, -104 (Supp. 1977).
4. GA. CODE ANN. §46-509 (Supp. 1977).
5. 139 Ga. App. 471, 228 S.E.2d 607 (1976).

While the new purchaser was attempting to register title to the car, he learned of a lien claimed by Kemp Motor Sales. He turned the car over to Kemp and rescinded his sale with Hopkins. Hopkins filed an action against Kemp Motor Sales for return of personal property, and Kemp counterclaimed to have the certificate of title revoked. The evidence adduced at the trial showed that Kemp Motor Sales had sold the car to Hopkins' seller. At the time of the sale, it had delivered to Hopkins' seller the certificate of title properly endorsed and a MV-1 form showing Kemp Motor Sales as lienholder. This MV-1 form was lost, and a new one, showing no lienholder, was substituted by Hopkins' seller. The current certificate of title was then issued. The value of the car at the time it was sold to Hopkins was disputed. Kemp claimed it was worth $950 and Hopkins maintained that its value was $500.

The question presented was who had paramount title to the automobile. The court found that, while Kemp Motor Sales had a security interest in the automobile, it was not perfected. Perfection can only be had by noting one's lien on the title. Therefore, Hopkins would be a bona fide purchaser for value and would cut off Kemp's security interest unless he had actual notice of Kemp's lien. Kemp argued that Hopkins should have been put on notice by the low price that his seller was willing to accept for the car. (Five hundred dollars as opposed to Kemp's estimate of $950 as the wholesale price.) The court held that inadequacy of price alone is rarely sufficient to constitute notice unless the price paid is merely nominal or absurdly low. Here, the price was not deemed absurdly inadequate; therefore Hopkins was a bona fide purchaser and had superior title.

B. Warranties

The implied warranty of merchantability and its stepbrother, Ga. Code Ann. §105-106 (1968), once again came before the court of appeals in *Pierce v. Liberty Furniture Co.*[6] Ms. Pierce purchased a porch swing kit from Liberty Furniture and assembled it on her porch. Liberty Furniture had purchased the kit in a sealed package from Gore & Easterling Chair Co. Gore had purchased the hardware components from another manufacturer. When Ms. Pierce attempted to sit on the swing, one of the hardware pieces broke, the swing collapsed, and Ms. Pierce was injured. She sued both Liberty and Gore under §105-106. Subsequently, she amended her complaint to include counts of negligence and breach of warranty by Liberty. The trial court granted summary judgments to both defendants and Ms. Pierce appealed.

The court found that Liberty was not the manufacturer of the swing and therefore §105-106 was inapplicable to it. Nor could Liberty be held liable under the negligence count since, in purchasing and reselling, it had no

6. 141 Ga. App. 175, 233 S.E.2d 33 (1977).

duty to test the article for latent defects. However, the court did find Liberty liable under the U.C.C. implied warranty of merchantability.[7]

The court noted that pre-U.C.C. authority uniformly approved the "sealed container doctrine," under which a retail seller did not warrant goods resold in their original container if the retail seller had not broken the seals. However, after reviewing extensive authority, the court held that the "sealed container doctrine" does not apply under the U.C.C. implied warranty of merchantability.

The court then turned to the question of whether Gore was liable under §105-106. Noting that it was an issue of first impression in this state, the court held that an assembler of component parts who sells them as a single product is a "manufacturer." Thus Gore was liable under §105-106 even though it had not actually manufactured the hardware.

C. Breach, Excuse, and Remedy

In *Martin Burks Chevrolet, Inc. v. Clayton Electric Co.*,[8] Clayton Electric brought suit against the automobile dealer for damages resulting from the purchase of a pickup truck. The suit contained three counts, one of which was eliminated during the trial. Of the two remaining counts, one was for breach of an implied warranty and the other was for fraud. The electric company's president agreed to purchase a used pickup truck from Martin Burks Chevrolet. When he tried it out, he found something wrong with the gearshift mechanism. The salesman said that it just needed adjusting and would be fixed. Based on this agreement, Clayton Electric accepted the truck. They returned the truck on three separate occasions but on none of these was the vehicle repaired properly. Finally, Clayton Electric left the vehicle at Martin Burks, telling them that they did not want it. Mr. Burks then informed Clayton Electric to remove the truck or he was going to have it hauled off. Clayton Electric then removed the vehicle to its own premises and paid off the local bank where the truck had been financed. Evidence at trial disclosed that the transmission was defective and that it could have been repaired for $187.20. Martin Burks Chevrolet had refused to correct the defect and Clayton Electric had refused to make any additional payments. The jury returned a verdict for Clayton Electric for $180 in actual damages, $5,000 punitive damages and $2,000 as attorney's fees.

The court of appeals pointed out that the sales contract contained the following language: "Seller makes no express or implied warranties, merchantability, fitness or otherwise, which extend beyond the description of the property on the face hereof."[9] In the face of this disclaimer, the court

7. GA. CODE ANN. §109A-2-313 (1973).
8. 140 Ga. App. 464, 231 S.E.2d 478 (1976).
9. *Id.* at 466, 231 S.E.2d at 480.

found that the plaintiff was not entitled to a judgment based upon breach of an implied warranty.

The court then turned to the question of fraud. The court noted that a buyer seeking damages must disaffirm the contract, return the merchandise, and prove actual fraud. In holding that the jury verdict was supported by the evidence, the court stated:

> We point out, additionally, that this case differs from those typified by *Brown*, in that here there was an agreement *prior* to the sale relating to an *acknowledged* defect, that would be adjusted, so that at least under the Plaintiff's evidence the actual subject matter of the sale was the vehicle *with the defect eliminated.* In the ordinary fraud case, the defect leading to rejection of the merchandise is discovered after the sale is completed, and after the waiver of warranties has been made. . . .[10]

The court's reasoning was that Clayton Electric did not waive its rights to have the defect corrected by executing a sales contract with the disclaimers of warranties in it since the defect was known to both the seller and the purchaser prior to the time that the contract was executed and both parties had agreed that the defect would be corrected as a condition of the sale.

III. COMMERCIAL PAPER

Charles E. Scheider unconditionally guaranteed the payment of a note. The guaranty agreement also provided that Scheider guaranteed all extensions and renewals of the note, and agreed that the holder may from time to time extend or renew the note without affecting the liability of the guarantor. Two years after the guaranty was executed, the maker of the note executed a renewal note for the remaining principal balance. The annual percentage rate on the original note had been 11.11%. The annual percentage rate on the renewal note was 17.06%. Was the guarantor released because the time of payment on the renewal extended beyond the time of payment of the original obligation and the interest rate was increased? In *Citizens & Southern National Bank v. Scheider,*[11] the court of appeals said no.

> Here Scheider unconditionally guaranteed payment of the note, all extensions or renewals thereof, and agreed that the Bank, without notifying him or getting his consent, might extend or renew the note without affecting his liability.
>
> The new note was given for an existing indebtedness from the same principal to the same payee. "A new note given in lieu of an existing note between the same parties and for the same indebtedness, even at a higher

10. *Id.* (emphasis in the original).
11. 139 Ga. App. 475, 228 S.E.2d 611 (1976).

> rate of interest and due at a later date, is not given for a new consideration, and therefore does not constitute a novation."[12]

In a well-reasoned opinion, the court of appeals held in *Christian v. Atlanta Army Depot Federal Credit Union,*[13] that a federal credit union which makes loans in Georgia is not subject to the Georgia usury statutes. In *Interstate Security Police, Inc. v. Citizens & Southern Emory Bank,*[14] the supreme court held that a loan contract, which stated "until the loan is repaid in full, the borrower will not, without the consent of the bank, (a) in operation of the business, incur other indebtedness for borrowed money," is not a restraint on trade within the purview of Ga. Const. art. III, §8, ¶8, Ga. Code Ann. §2-1409 (1977) and §20-504 (Supp. 1977). The court found that the contract provision fell within the private enterprise area in which corporate parties are free to obligate themselves in this manner as an inducement to lenders to make commercial loans to them for use in the operation of their businesses.

Georgia Code Ann. §57-119 (1977) provides that any person may, in writing, agree to pay such rate of interest as such person may determine for any obligation under which the principal balance to be repaid is $100,000 or more, or on any series of advances of money pursuant to a loan agreement or undertaking, if the total principal balance to be repaid thereunder shall originally be $100,000 or more. Charles H. Watkins executed a note to the Citizens & Southern National Bank in the principal amount of $49,271.50, bearing interest at the rate of thirteen percent per annum. At the time that Watkins executed this note, he owed the bank more than $100,000. In *Citizens & Southern South DeKalb Bank v. Watkins,*[15] the supreme court held that §57-119 did not apply to this loan since it was neither originally for an amount of $100,000 or more, nor was it an advance pursuant to a loan agreement whereby the bank agreed to make advances totaling $100,000 or more. Under *Watkins,* the bank may not aggregate the principal amounts of a number of separate and distinct loans to take advantage of the exclusion from the usury statutes provided by §57-119.

In *Watkins,* the note was secured by two secondary security deeds. Once the court had found that the loan was usurious, the question was whether the loan should be considered as having been made under Ga. Code Ann. §57-101.1 (1977) or under the Second Security Deeds Act.[16] The determination of this question was of critical importance to the bank since a violation of §57-101.1 (which allowed nine percent interest per annum on transactions secured by real estate at the time of this agreement) would result in forfeiture of only the usurious interest, while a violation of the Secondary

12. *Id.* at 476, 228 S.E.2d at 612 (citation omitted).
13. 140 Ga. App. 277, 231 S.E.2d 7 (1976).
14. 237 Ga. 37, 226 S.E.2d 583 (1976).
15. 236 Ga. 759, 225 S.E.2d 266 (1976).
16. GA. CODE ANN., ch. 57-2 (1976).

Security Deeds Act would result in a forfeiture of both principal and interest. Since the note was a ninety-day time note, was not due in installments, and no service charge had been charged as provided for under the Secondary Security Deeds Act, the court determined that the loan had been made under §57-101.1.

The court of appeals was presented with another computer case in *Georgia Railroad Bank & Trust Co. v. First National Bank & Trust Co. of Augusta*.[17] A $25,000 check drawn on First National was deposited in Georgia Railroad Bank & Trust Co. When Georgia Railroad Bank processed the check, it marked the check with magnetic coding ink. The check was subsequently handled by each bank in the chain of collection, by using electronic equipment which read the magnetic coding ink. The amount incoded on the check was $2,500 rather than $25,000. Upon discovery of its error, Georgia Railroad Bank demanded payment of the additional $22,500 from First National. First National contacted its customer who had the funds on deposit. The customer told First National not to "bother" his account. Accordingly, First National declined. Georgia Railroad Bank filed suit to collect the underpayment of $22,500.

Noting that it was a case of first impression, the court of appeals held that the payment of the lesser incorrect amount was sufficient to constitute final payment within the meaning of Ga. Code Ann. §109A-4-213(1) (1973). This code section provides in pertinent part:

> An item is finally paid by a payor bank when the bank has done any of the following, whichever happens first: . . . (c) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith . . . upon a final payment under subparagraphs (b), (c) or (d) the payor bank shall be accountable for the amount of the item.

Attempting to avoid liability under §109A-4-213(1), First National contended that the drawer had stopped payment on the check when he told the bank not to "bother" his account. The court noted that a drawer of a check has the right to stop payment at any time before it has been certified or paid by the drawee. Since the court had previously determined that the check had been paid, the drawer's attempted stop payment order was ineffective.

In dictum, the court noted that this case did not present a situation in which the accepting bank could not recover the amount of deficiency from the drawer of the check. The court stated that, in such a situation, there would possibly exist a defense or counterclaim in favor of the accepting bank against the collecting bank which had undercoded the check.

17. 139 Ga. App. 683, 229 S.E.2d 482 (1976).

IV. SECURED TRANSACTIONS

What are the rights of a lender who takes a security interest in a joint banking account? If the lender is a "financial institution"[18] these questions can usually be answered by referring to Ga. Code Ann., ch. 41A-38 (Supp. 1977). If not, pre-existing common law principles should still apply.

The issue presented in *Spurlock v. Commercial Banking Co.*,[19] a case to which ch. 41A-38 did not apply, was: "Can a lender bank holding a security agreement executed by only one of two joint owners of a certificate of deposit with right of survivorship deduct upon the loan's maturity the debt owed by its borrower from the proceeds of the joint deposit certificate after the death of the individual borrower?"[20] On November 15, 1972 Commercial Banking Co. had issued a certificate of deposit in an amount of $28,000 to S. T. Spurlock and Victoria B. Spurlock (husband and wife), jointly with the right of survivorship. In January of 1973, the husband alone executed a $9,000 promissory note payable to the bank, secured by the certificate of deposit. The husband died on February 12, 1973 and the loan matured in September of that year. Approximately one year later, the savings certificate matured. The wife made demand for the full amount of the certificate but the bank refused payment. The wife then filed suit for the face amount of the certificate.

The court first reviewed the nature of a joint certificate of deposit with the right of survivorship. It noted that due to the abolition of joint tenancies, the interest created was a life estate with an alternative contingentainder in fee simple. In a true joint tenancy, one joint tenant can sever the tenancy by conveying his interest to a third party, thus defeating the right of survivorship. This result is not possible with a life estate with alternative contingent remainders, since a contingent remainder is indestructible. Accordingly, the right of survivorship could not be destroyed by "severance." After reviewing some cases from other jurisdictions, the court held:

> A joint depositor's interest in a joint account with right of survivorship terminates on his death and there is an immediate vesting of the account in the surviving depositor. It follows that a mere lien upon a joint depositor's interest terminates upon the death of that depositor and the survivor succeeds to the entire account.[21]

It is now clear that a secured party, taking a security interest in a joint savings account or savings certificate, must have a pledge of the interests of both joint depositors to insure his rights in the collateral.

---

18. GA. CODE ANN. §41A-3801(c) (Supp. 1977).
19. 138 Ga. App. 892, 227 S.E.2d 790 (1976).
20. *Id.* at 893, 227 S.E.2d at 792.
21. *Id.* at 898, 227 S.E.2d at 795.

When is a lease a lease and when is it a sale with a retained security interest? This was the question presented in *Rollins Communications, Inc. v. Georgia Institute of Real Estate, Inc.*[22] Rollins, as lessor, entered into an agreement with Georgia Institute of Real Estate, denoted as an "Equipment Lease Agreement." Georgia Institute of Real Estate defaulted and Rollins brought suit for the unpaid rentals. The defendant claimed that the lease was not a true lease, but was intended as a security agreement, so the suit should be construed as one for a deficiency judgment. If the defendant's construction were adopted, Rollins would be unable to maintain an action to recover a deficiency since Rollins had not complied with Code §109A-9-504(3) in disposing of the collateral. The court reviewed the lease and found that while the defendant did have an option to purchase at the end of the lease, this option was for more than a nominal consideration. In addition, the lessee was not required to purchase the equipment as was the case in *Redfern Meats v. Hertz Corp.*[23] The only indicia of a sale with a retained security interest as opposed to a true lease were three paragraphs in the agreement. Paragraph (8) provided "[t]hat acceptance of this agreement by Rollins is conditioned upon . . . (4) Evidence of the filing of Form UCC-1." Paragraph 13 provided "Lessee shall execute and deliver to Rollins duly executed financing statements and security agreements to secure the then unpaid portion of the lease rentals as set forth in Schedule 'A'; provided, however, that failure of Rollins to request such financing statement and security agreement or of the lessee to execute the same shall not affect the reservation of title in Rollins." Paragraph 18 provided that the lessee defaulted if it became insolvent as defined under the U.C.C. The court, after reviewing Ga. Code Ann. §109A-9-102(2) (1973), which sets forth the basis for determining whether an agreement is a lease or a security agreement for purposes of Article 9 of the U.C.C. held:

> The point to note is that a company doing business in more than one state, such as the Delaware Corporation in the instant case, may have its rights declared by a court which subjects leases to the UCC; and the consequences of a lease being thus considered a secured transaction is that the lessor should file under Article 9—"If he fails to do so, he may lose the lease equipment to the lessee's creditors, receivor, or trustee in bankruptcy."
>
> It is our view that the lessor, faced with such uncertainty, should be permitted to make provisions for precautionary filing without the risk that such provisions would in and of themselves, as urged in the instant appeal, convert the lease into a secured transaction. The review committee for Article 9 proposes in a new §9-408 that filing is not itself a factor in determining whether a lease is intended as security. . . . We so hold now.[24]

22. 140 Ga. App. 448, 231 S.E.2d 397 (1976).
23. 134 Ga. App. 381, 215 S.E.2d 10 (1975).
24. 140 Ga. App. at 451, 231 S.E.2d at 399 (citation omitted).

Is a surety on a performance bond who completes a contract after default by the principal entitled to priority over a secured creditor of the principal who has a perfected security interest in the proceeds of the account? This was the issue presented in *Argonaut Insurance Co. v. C & S Bank of Tifton.*[25] Southeastern Electrical Contractors, Inc. (SECO) was the subcontractor for the construction of an office building and battery manufacturing plant. Argonaut Insurance Co. was the surety on a payment and performance bond for SECO in favor of the general contractor. After commencing the job, SECO began experiencing financial difficulties. It reorganized itself and as a part of the reorganization borrowed $300,000.00 from the C & S Bank of Tifton. The loan was secured by an assignment of the contract retentions on a number of jobs, including the job upon which Argonaut had written the bond. After this reorganization, SECO's financial position deteriorated until it was unable to perform on its subcontract. Argonaut stepped in and completed the contract in conjunction with the general contractor. C & S filed suit against the general contractor and Argonaut, claiming a priority in the contract retentions. The trial court found for C & S. The general contractor and Argonaut appealed.

The court stated the issue presented as follows: "Thus we have the issue on appeal, whether the surety on the subcontractor's bond, by virtue of its subrogation, or the bank and the subcontractor's note endorser, by virtue of having filed financing statements, had superior rights to the funds withheld by the prime contractor."[26] The court reviewed the laws of subrogation including Ga. Code Ann. §§103-501 and 502 (1968). These sections provide respectively:

> A surety who has paid the debt of his principal shall be subrogated, both at law and in equity, to all the rights of the creditor, and, in controversy with other creditors shall rank in dignity the same as the creditor whose claim he paid.
>
> A surety who has paid the debt of his principal shall be entitled also to be substituted in place of the creditor as to all securities held by him for the payment of the debt.

Were these equitable doctrines of subrogation modified by the enactment of the U.C.C.? The court of appeals found that they were not. SECO's right to payment depended upon its performance of its contract. The bank, as assignee of SECO's right to the proceeds of the contract, could not gain any better position than its assignor had. If SECO was not entitled to payment, then C & S was not entitled to payment. In contrast, Argonaut was subrogated to all of SECO's rights under the contract when it and the general contractor completed the performance of SECO's obligations. Ar-

25. 140 Ga. App. 807, 232 S.E.2d 135 (1976).
26. *Id.* at 810, 232 S.E.2d at 138.

gonaut was entitled to payment in spite of SECO's default because it was substituted for SECO under the contract and had completed it in SECO's stead. The court made clear that a surety need not comply with the filing requirements under the U.C.C. in order to sustain its right to subrogation and priority over a secured creditor of the principal.

General Finance Corp. v. Hester[27] points up what this writer considers to be a defect in the Motor Vehicle Certificate of Title Act.[28] Westside Auto Sales sold a used car to Gloria Tamplin. It was financed by General Finance Corporation (GFC). When GFC attempted to perfect its lien by having a title certificate issued, the original documents were returned by the Motor Vehicle Department because they were improperly signed. Subsequently, the used car dealer resold the automobile to Roy E. Hester. The used car dealer presented Mr. Hester with a replacement certificate, showing no lien holder, issued in the name of Westside Auto Sales. Prior to payment Hester telephoned the Motor Vehicle Certificate of Title Department and was told that no outstanding lien existed against the motor vehicle in question. After the purchase of the automobile by Hester, GFC informed Hester of its lien and resubmitted its application for title. Its security interest was finally perfected after the purchase by Hester. In a suit by GFC to foreclose its security interest in the automobile, the court of appeals held that Hester was a bona fide purchaser for value without notice of any claim or lien of GFC and therefore was entitled to priority. This result is the correct result under current law. However, it seems that the Motor Vehicle Certificate of Title Act should make some provision for a temporary filing when the documents presented to the Motor Vehicle Department are technically insufficient to permit the issuance of a title certificate but on their face evidence a new purchaser or lien holder. In this way purchasers and secured creditors would be protected while they comply with the administrative formalities necessary for the issuance of a title certificate.

First National Bank & Trust Co. in Macon v. State[29] illustrates one of the dangers that a secured creditor can face in making a self-help repossession. The bank had a perfected security interest in automobile. When the debtor defaulted, the bank exercised its rights under the contract and repossessed the automobile without legal process. The bank and two of its employees were indicted in three separate indictments for theft of a motor vehicle, theft by taking of certain contents of the motor vehicle, and criminal trespass. At trial all of the defendants were acquitted of theft of the motor vehicle and criminal trespass, but the bank was convicted and sentenced for theft of the contents of the motor vehicle. The court of appeals reversed. The court noted that, as to personalty within the car, the State

27. 141 Ga. App. 28, 232 S.E.2d 375 (1977).
28. GA. CODE ANN., ch. 68-4 (1975).
29. 141 Ga. App. 471, 233 S.E.2d 861 (1977).

had to prove, under Ga. Code Ann. §26-1802(a) (Supp. 1977), that there was an unlawful taking or unlawful appropriation of this property with the intention of depriving the owner of his property. The court of appeals found that the bank and its agents did not intend to deprive the owner of his property but merely intended to repossess the automobile in accordance with the terms of the contract and as was authorized by Ga. Code Ann. §109A-9-503 (1973). Significantly, on the day following the repossession the debtor was notified by the bank that it was holding his property for him and the property was returned to the debtor several days afterward. It seems likely that a different result would have been reached had the bank failed to give the debtor this notice, therefore, implying the necessity of prompt notice to the debtor of his right to reclaim any personal property which might have been located in the vehicle at the time it was repossessed.

V. INDUSTRIAL LOAN ACT

The Georgia Industrial Loan Act[30] has been a constant source of litigation in recent years. This survey period has been no exception. Previous surveys have reported the cases dealing with Industrial Loan Act contracts containing acceleration clauses which failed to specifically provide for a rebate of unearned interest.[31] The court of appeals, in *Bragg v. Household Finance Corp.*,[32] has finally reviewed a contract which meets the requirements of the Act. The contract language was sufficient, though not particularly artful. In *Freeman v. Decatur Loan & Finance Co.*,[33] the court of appeals held that Federal Truth-in-Lending Act cases are not good authority in Industrial Loan Act actions. The court noted that the history and purposes of the two statutes are too dissimilar to make the terms contained in the Acts interchangeable. The court also held that a contract provision, which was meaningless because it was too vague and indefinite, could not give rise to a violation of the Act.

In *Liberty Loan Corp. of Shoals v. Childs*,[34] the lender included an acceleration clause in its contract which contained the required rebate provision. However, the lender failed to rebate the unearned interest when it filed suit after the debtor's default. After the debtor answered, Liberty attempted to amend its complaint to rebate the unearned interest. The trial court denied the amendment and held the contract void. Liberty appealed.

30. GA. CODE ANN., ch. 25-3 (1975).

31. Hewson, *Commercial Law*, 28 Mercer L. Rev. 21, 32 (1976); Hewson, *Commercial Law*, 27 Mercer L. Rev. 23, 32 (1975). *See, e.g.*, Lawrimore v. Sun Fin. Co., 131 Ga. App. 96, 205 S.E.2d 110 (1974).

32. 140 Ga. App. 75, 230 S.E.2d 55 (1976).

33. 140 Ga. App. 682, 231 S.E.2d 409 (1976).

34. 140 Ga. App. 473, 231 S.E.2d 352 (1976).

Georgia Code Ann. §25-9903 (1976) provides:

> Any person . . . who shall knowingly charge, contract for, receive or collect charges in excess of those permitted by such Chapter [Chapter 25-3] shall be punished as for a misdemeanor. Any loan contract made in violation of such Chapter shall be null and void.

The court of appeals found that the last sentence of §25-9903 was inapplicable since the contract itself did not violate the Act. The remedy in this case was limited to one or possibly both of the lesser penalties of punishment as a misdemeanor (§25-9903) or forfeiture of all interest (Ga. Code Ann. §57-112 (1977)).

The court of appeals decided a case of far-reaching consequences in *Douglas v. Dixie Finance Corp.*[35] The facts were uncontroverted. Dixie refinanced a prior loan which violated the Industrial Loan Act because the original contract contained an acceleration clause which did not require the rebate of unearned interest. At the time of the refinancing Douglas executed a new promissory note in the face amount of $2640, of which $1350 involved refinancing of the prior loan. The new note met all the requirements of the Act. The trial court found that the renewal note superseded the original contract because it constituted an accord and satisfaction, and therefore, there was no violation of the Act. Douglas appealed this ruling.

The court of appeals reversed, finding that the second transaction represented by the renewal note was not an accord and satisfaction. Georgia Code Ann. §20-1201[36] sets out three separate sets of circumstances under which an accord and satisfaction can exist. The first is where the parties enter into a subsequent agreement which is executed. The term "executed" as used in this portion of the statute means performed. Here the subsequent contract was not "executed" since Douglas defaulted in making the payments. It could only have been executed had it been paid in full.

The second circumstance under which accord and satisfaction can exist is where the parties specifically agree that the execution (here the term means signing) of the contract shall act as a satisfaction. The new contract signed by Douglas did not so provide and the court found this portion of the statute inapplicable.

The last sentence of the statute sets out the third set of circumstances under which an accord and satisfaction can exist: "and without such agree-

35. 139 Ga. App. 251, 228 S.E.2d 144 (1976).

36. GA. CODE ANN. §20-1201 (1977) provides as follows: "Accord and satisfaction is where the parties, by a subsequent agreement, have satisfied the former one, and the latter agreement has been executed. The execution of a new agreement may itself amount to a satisfaction, where it is so expressly agreed by the parties; and without such agreement, if the new promise is founded on a new consideration, the taking of it is a satisfaction of the former contract."

ment, if the new promise is founded on a new consideration, the taking of it is a satisfaction of the former contract." Performance of the contract need not be completed nor must the subsequent contract specifically provide that it shall act as a satisfaction. The test is whether there was new consideration for the subsequent contract. The court held that there was no new consideration, citing Ga. Code Ann. §20-305 (1977) and *Hanley v. Savannah Bank & Trust Co.*[37] Section 20-305 provides:

> If the consideration be good in part and void in part, the promise will be sustained or not, according as it is entire or severable, as hereinafter prescribed. If the consideration be illegal in whole or in part, the whole promise fails.

The *Hanley* case cited by the court involved a contract for the purchase of a child. Such a contract is illegal and void as against public policy. Obviously the court of appeals is convinced that a contract which violates the Industrial Loan Act is also illegal.

Is this so? Georgia Code Ann. §25-9903 (1976) provides that any contract which violates the Act shall be null and void. Does such a contract fit into the same category as a contract to purchase a child or commit a murder? It does not seem so. If the consideration represented by the original contract is void (as opposed to illegal) then the court under §20-305 must determine if the considerations for the subsequent contract are several. If they are the new consideration should survive and satisfy the third requirement of §20-1201.

VI. Conclusion

This year's cases have brought into focus a number of problems in the commercial law area that need further consideration by the bench and bar and possibly final resolution by the legislature. A careful analysis of the cases shows that the problems arising from rebates due borrowers upon prepayment or upon acceleration after default have not been finally put to rest. The Motor Vehicle Certificate of Title Act and the Industrial Loan Act have both spawned voluminous litigation in the past few years. These cases may have brought to light more problems than they have solved. Hopefully, a concerted effort by all involved will resolve many of these issues in the next year.

37. 208 Ga. 585, 68 S.E.2d 581 (1952).