Commercial Law

By John M. Hewson, III*

During the past two decades, Georgia has been transformed from an agrarian economy to a bustling commercial state. Our legislature, the bar, and the courts have struggled to keep pace with the ever increasing needs of the commercial community. During the survey period important legislation was enacted, and the courts decided a number of cases involving complex commercial issues. The increasing sophistication of the legislature and judiciary is evident from the statutes and cases reviewed in this article.

I. Legislation

The most important piece of legislation enacted by the 1978 Georgia Legislature was the revisions to Article 9 of the UCC.[1] The Georgia act closely parallels the 1972 amendments proposed by the National Review Committee. The main thrust of the revisions is to simplify Article 9 transactions. Thus, the signature of the secured party is no longer required on financing statements,[2] and the signature of the debtor need not appear in a number of cases of reperfection.[3] The act specifically provides for filings in the name of a partnership and deletes any requirement for filings in a trade name.[4]

The fixture filing rules have been amended to give added certainty to real estate searches. Fixture filings must contain a brief description of the real estate, the name of the owner of the real estate if different from the debtor, and must be filed in the real estate records. The act also provides a simplified method of perfecting a security interest in fixtures where the secured party is taking a deed to secure debt on the real estate. By making the debt deed form comply with the requirements of Ga. Code Ann. §109A-9-402(6), the lender can perfect its interest without filing a separate financing statement. The filing of the debt deed in the real estate records acts as a fixture filing.

Most importantly, the perfection rules have been amended to give lend-

* 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 State Bar of Georgia.

1. Ga. Code Ann., ch. 109A-9 (Supp. 1978).
2. Ga. Code Ann. §109A-9-402(1) (Supp. 1978).
3. Ga. Code Ann. §109A-9-402(2) (Supp. 1978).
4. Ga. Code Ann. §109A-9-402(7) (Supp. 1978).

ers greater protection in fixture financing situations. Ga. Code Ann. §109A-9-313(4)(b) provides that a security interest perfected by a fixture filing has priority over all subsequent liens. Section 109A-9-313(4)(a) gives priority to a *purchase money lender* perfected by a fixture filing over all real property interests (even those arising prior to the lender's filing), if the security interest is perfected prior to the time the goods are affixed to the real estate, or within ten days thereafter, and the debtor has an interest of record in the real estate or is in possession of it.

As amended, Ga. Code Ann. §109-A-9-313 grants priority in two cases where a lender has a perfected security interest but has not met the fixture filing requirements. Subparagraph (4)(c) gives priority to the secured party where the fixtures are readily removable factory or office machines or readily removable replacements of domestic appliances which are consumer goods, if the security interest was perfected before the goods became fixtures. Subparagraph (4)(d) gives the secured party priority over liens obtained by legal or equitable proceedings subsequent to the perfection of the security interest.

The perfection rules as to proceeds and motor vehicles have also been changed.[5] No longer is it necessary to check a box on the face of the financing statement to perfect an interest in proceeds. The interest, however, is more limited than it was in the past. A financing statement is effective as to proceeds only if the proceeds are collateral with respect to which a security interest could be perfected by filing in the office in which the original financing statement was filed. The meaning of this convoluted provision is unclear. Certainly, reperfection is required where, for instance, accounts are converted into a motor vehicle or inventory is converted into equipment located in another county. The safest course would be to reperfect whenever the proceeds are not cash.

The rule in the past was that when a security interest in a motor vehicle was perfected by noting the lien on the title, the perfection was good no matter where the vehicle was located. Ga. Code Ann. §9-103(2)(b) now provides that security interests in motor vehicles perfected on foreign certificates of title must be reperfected by issuance of a Georgia certificate of title noting the lien within four months of the time the vehicle is brought into Georgia. This provision may cause some practical problems, especially with commercial vehicles that are used in more than one state.

In addition to the Article Nine revisions, the Georgia Legislature amended Ga. Code Ann. §25-9903, which defines the penalties for violations of the Industrial Loan Act. The following provision has been added to subparagraph (a), which provides that any contract made in violation of the Act is null and void, "provided, however, there shall be no forfeiture of the principal amount of the loan contract if the lender shows by a preponderance of the evidence that the violation is the result of a bona fide clerical or typographical error."[6]

5. *See* GA. CODE ANN. §109A-9-306, -9-103(2)(b) (Supp. 1978).
6. GA. CODE ANN. §25-9903(a) (Supp. 1978).

New paragraphs (b) and (c) have also been added:

> (b) A claim of violation of Chapter 25-3 may be asserted in an individual action only and may not be the subject of a class action under Section 81A-123 of the Georgia Civil Practice Act, or any other provision of law.
> (c) If a contract is made in good faith in conformity with an interpretation of Chapter 25-3 by the appellate courts of this State or in a rule or regulation officially promulgated by the commissioner after public hearings, no provision in this section imposing any penalty shall apply, notwithstanding that after such contract is made, such rule or regulation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.[7]

These amendments, combined with a considered set of regulations from the Commissioner, should ameliorate the harshness of the penalties where a lender commits an inadvertent or technical violation of the Act.

II. SALES

A. Contracts and Agreements

When is a lease a sale? The court of appeals in *Pierce v. Leasing International, Inc.*[8] held that an "open-end" lease is "sufficiently analogous to a secured sale to subject it to the provisions of Article 9 of the UCC."[9] The lease agreement obligated Pierce, the lessee, to make monthly payments and to be responsible for the "depreciated value" (residual) at the end of the lease term. Upon termination, the leased property would be sold on the wholesale market. Pierce would receive any excess and would be responsible for any deficiency between the sales price and the residual.

The court found that Pierce had, in effect, agreed to purchase the leased property at a pre-arranged price. Since this amounted to a sale, the transaction was subject to the repossession and disposition of collateral requirements of Article 9.

In a very sophisticated opinion, the court of appeals in *Citizens & Southern Equipment Leasing, Inc. v. Atlanta Federal Savings & Loan Association*[10] reached a decision harmonious with the holding in *Pierce*. A partnership made a loan with Atlanta Federal to construct a motel. To secure this loan, it executed a debt deed, security agreement, and financing statement in favor of Atlanta Federal covering the land, buildings, and operating equipment. Subsequently, the partnership "leased" the beds, rugs, draperies, kitchen and restaurant equipment from Citizens & Southern. After default, a dispute arose between Atlanta Federal and Citizens & Southern over the right to the personalty. Citizens & Southern main-

7. GA. CODE ANN. §25-9903(b),(c) (Supp. 1978).
8. 142 Ga. App. 371, 235 S.E.2d 752 (1977).
9. *Id.* at 372, 235 S.E.2d at 754.
10. 144 Ga. App. 800, 243 S.E.2d 243 (1978).

tained that the transaction was a "true lease" and, therefore, the partnership never acquired a sufficient interest in the personalty to subject it to Atlanta Federal's security interest. Atlanta Federal alleged that the transaction was "disguised sale" and that the lease was intended as security within the meaning of Ga. Code Ann. §109A-1-201(37).

The court carefully scrutinized the transaction. The lessee had a purchase option at the end of the lease term for the fair market value of the goods. Opinion evidence placed this value at less than ten percent of the sale price. While this was indicative of a true lease, the court found it was not dispositive. The court then reviewed the other lease terms. The lease contained a number of provisions which are more common to security devices than to true leases. There was an acceleration clause exercisable upon default. One event of default would occur if the lessor had "good reason to feel insecure."[11] The lessee was responsible for ad valorem taxes and insurance charges. The lease contained a hold harmless clause. The total rents would pay for the cost of the goods plus interest.

Going outside the lease document, the court reviewed the circumstances under which the lease had been made. The court found that Citizens & Southern was not in the equipment business but in the finance business. It had no warehouse, no inventory, and no personnel other than executive and clerical employees. The goods were paid for by Citizens & Southern and it had paper title, but they had been delivered directly to the lessee. Taking all of these variables into account, the court found that the transaction was not a true lease.

These cases make clear the increasing sophistication of the Georgia appellate courts in approaching the sale versus lease problems. Sellers and lenders will have to exhibit greater sophistication and care in handling these types of transactions if they hope to avoid the vagaries of litigation.

B. Warranties

The modern trend in the United States is to hold a remote seller liable for breach of warranty without requiring vertical privity. Georgia, however, has a different rule. In this state, privity is required in order to impose liability under the theory of express or implied warranty. To ameliorate the harshness of this rule, the Georgia courts have found the privity requirement met where the remote seller issues an express warranty to the consumer.[12] In *Jones v. Cranman's Sporting Goods*,[13] the court of appeals used questionable logic to extend this exception to the requirement of privity.

The facts were undisputed. A third party foreign corporation manufactured a rifle. It was imported into the United States by Firearms Interna-

11. *Id.* at 807, 243 S.E.2d at 247.

12. Ford Motor Co. v. Lee, 137 Ga. App. 486, 224 S.E.2d 168 (1976), *rev'd on other grounds*, 237 Ga. 554, 229 S.E.2d 379 (1976); Chrysler Corp. v. Wilson Plumbing Co., 132 Ga. App. 435, 208 S.E.2d 321 (1974).

13. 142 Ga. App. 838, 237 S.E.2d 402 (1977).

tional Corporation, a wholly owned subsidiary of Garcia Corporation. Garcia sold the rifle to Cranman's, who sold it to the plaintiff. In attempting to load the rifle, the plaintiff was injured. A card accompanying the rifle stated that it was "fully guaranteed" by Firearms International. Relying on the automobile distributorship cases,[14] the court found that the privity requirements as to Firearms International were met. Then, seemingly without any evidence before it, except for an affidavit stating that Firearms International was the wholly owned subsidiary of Garcia, the court held that the corporate veil between Firearms International and Garcia was pierced and that Garcia was subject to the implied warranties of Article 2.

It has long been the practice of manufacturers and sellers of potentially dangerous products to separately incorporate such operations to limit liability. The result-oriented decision in *Jones* brings this practice into question. Certainly, more care will have to be given to drafting the expressed warranties of such manufacturers and sellers, with special attention given to the disclaimer of the implied warranties,[15] if liability is to be avoided.

C. *Breach, Excuse and Remedy*

Attaway v. Tom's Auto Sales, Inc.[16] involved the plaintiff's purchase of an automobile from Tom's Auto Sales. In his complaint, Attaway alleged the salesman made the following representations to induce him to purchase the automobile: (1) the automobile was in perfect running order; (2) the milage shown on the odometer was accurate; (3) the brakes had been rebuilt and worked perfectly; and (4) Tom's Auto Sales would take care of any problems with the automobile. When the car malfunctioned, Attaway sued, alleging: (1) unfair and deceptive trade practices in violation of the Fair Business Practices Act of 1975,[17] (2) breach of expressed warranty, and (3) fraud in the inducement. Tom's Auto Sales responded by tendering a copy of the sales contract which provided "all cars sold as is . . . no guarantee;" "automatic transmission not guaranteed;" and "no agreement between salesmen and customer binding on the company." An odometer disclosure form was attached to the contract which stated the odometer reading, but admitted that the actual mileage differed from such reading.

After upholding the summary judgment in favor of the defendant on counts two and three, the court held:

> We reach the conclusion from a reading of the Act [the Fair Business Practices Act of 1975] that although the plaintiff might not be able to rescind the contract or otherwise set it aside, the Act itself is in no way tied to contractual rights and is wholly self-sustaining. . . . From an

14. *See* note 12, *supra.*
15. GA. CODE ANN. §109A-2-316 (1973).
16. 144 Ga. App. 813, 242 S.E.2d 740 (1978).
17. GA. CODE ANN., ch. 106-12 (Supp. 1978).

> overview of this statute, we find that there is thereby created a separate and distinct cause of action under its provisions. A consumer who is damaged thereby has an independent right to recover under the Act, regardless of any other theory of recovery.[18]

III. COMMERCIAL PAPER

Holt v. Rickett[19] presented an interesting twist to an otherwise straightforward case of usury. Holt executed a note in favor in Mrs. Rickett providing for ten percent simple interest. Even though the note had been prepared by Holt's attorney, it was usurious on its face. Was Mrs. Rickett precluded from collecting any interest? The court of appeals said no. To constitute usury it is essential that there be, at the time the contract is executed, an intent on the part of the lender to charge a higher rate of interest than that allowed by law. Since Mrs. Rickett was an unwary lender, Holt was estopped from asserting the defense of usury.

A number of interesting cases came before the courts last year dealing with "open-end" or "dragnet" provisions contained in loan documents. In *Bryant v. Branch*,[20] Bryant purchased a tract of land from Branch. The closing statement reflected a purchase money loan of $1,000,000.00 secured by a deed to secure debt and in "unsecured note from purchaser to sellers" in an amount of $50,000. The deed to secure debt contained an open-end clause. The purchaser defaulted, and the sellers foreclosed nonjudicially and bid the property in at the sale. The sellers then filed suit on the $50,000 note. The court held that while the $50,000 note would normally have been picked up by the open-end clause, it was not in this case. The closing statement, signed by both parties, acted as a purchase agreement which excluded the $50,000 note from being secured by the debt deed. Therefore, Branch's suit was not an action for a deficiency but was simply a suit on a note. Presumably, this distinction was important to avoid the strictures of Ga. Code Ann. §67-1503(Supp. 1978), which places certain restrictions on sales under powers contained in security deeds.

The court faced a similar issue in *Vaughn & Company, Ltd. v. Saul*.[21] Vaughn made three loans with the Saul Trust at different times. Each loan was evidenced by a separate deed to secure debt. All three debt deeds contained an open-end provision. Vaughn defaulted on all three loans. Saul Trust exercised the power of sale in one of the debt deeds and foreclosed on the property. It did not file a petition for confirmation. Saul Trust then filed suit on one of the remaining notes. Vaughn defended on the grounds that the suit was a suit for a deficiency and therefore barred by Ga. Code Ann. §67-1503.

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18. 144 Ga. App. at 814, 815, 242 S.E.2d at 742.
19. 143 Ga. App. 337, 238 S.E.2d 706 (1977).
20. 142 Ga. App. 189, 235 S.E.2d 688 (1977).
21. 143 Ga. App. 74, 237 S.E.2d 622 (1977).

Emphasizing the fact that each of the loans was secured by a separate piece of property, the court held:

> the present action is not to recover a *deficiency* judgment on the debt for which foreclosure was had, but to recover on a separate, subsequent and different note made a year later for a different debt and for which a conveyance of other property was made as security. The note sued upon is a separate transaction from that which was the basis for foreclosure, [and] is not within the prohibition of Code Ann. §67-1503. . . .[22]

This is to be contrasted with the language in *Bryant,* in which the court stated: "where [an open-end clause is] effective an amount which was recited in the instrument as having been a part of the down payment, may, if not in fact paid, be tacked on to the instalment note indebtedness which gave rise to the foreclosure proceeding."[23] Query whether the *Vaughn* rule would prevail where a debtor incurs a separate indebtedness which initially is totally unsecured, but which is capable of being absorbed by the open-end provision in a debt deed given by the debtor to secure another indebtedness?

IV. SECURED TRANSACTIONS

Mrs. Curl made late and irregular payments on her home mortgage to Federal Savings & Loan Association of Gainesville. Federal Savings accepted these payments until October 28, 1976, when it wrote to Mrs. Curl demanding payment of the past due installments within ten days and accelerating the balance of the debt. In its letter, Federal Savings offered to reinstate the loan upon the payment in two past due installments in an amount of $260.79 plus a $25.00 late charge. Mrs. Curl tendered $210.00 believing this to be the amount due. Federal Savings retained the payment but proceeded with foreclosure.

Mrs. Curl brought an action to set the foreclosure sale aside claiming Federal Savings had made a new agreement under Ga. Code Ann. §20-116(1977). In *Curl v. Federal Savings & Loan Association of Gainesville,*[24] the supreme court agreed. The court found a new quasi agreement and went on to hold: "[r]easonable notice requires more than the assertion of an acceleration clause, for the other party must be given a reasonable opportunity to cure any deviations from the exact terms before foreclosure can be commenced due to defaults which were tolerated under the quasi new agreement."[25]

In a strong dissent, Judge Bowles found the ten days' notice to be reasonable and adequate. Additionally, he noted: "For plaintiff to resort to a court of equity she must offer to do equity. She tenders nothing and offers

22. *Id.* at 77, 237 S.E.2d at 626.
23. 142 Ga. App. at 189, 235 S.E.2d at 689.
24. 241 Ga. 29, 243 S.E.2d 70 (1978).
25. *Id.* at 30, 244 S.E.2d at 813.

to tender nothing. She cannot prevail."[26]

In *Commercial Bank & Trust Company v. Buford,*[27] Buford executed a purchase money security deed in favor of Commercial Bank. He made the first installment on time, was slightly late (by three days) as to the second, a month late as to the third, and almost three months late as to the fourth. After being contacted by the bank, Buford made four payments including late charges, but this still left the note in default. The bank foreclosed. Buford made a payment after the foreclosure sale, which was returned.

Buford brought suit in tort, claiming that the bank had negligently negotiated with him concerning the default and accepted payments while simultaneously proceeding with the foreclosure without notice to him. Even though the note provided for foreclosure without *actual* notice (presumably the legal advertisements constituted constructive notice), the trial court found the bank had assumed a noncontractual obligation to Buford and presented the question of negligence to the jury. The court of appeals reversed, holding that in order to maintain an action in tort for breach of a duty arising out of a contractual relationship, the breach must be of a duty imposed by law, and not one imposed by the contract itself.

Citizens & Southern National Bank, Augusta v. Arnold[28] is another case dealing with a bank's duties to its customers with secured loans. Mr. and Mrs. Arnold made application to the bank for a loan on a motor home they proposed to buy. Since the title for the home was registered outside the state, the bank officer counselled the Arnolds that the title should be checked. The bank officer offered to check the title and presumably did so. He reported to the Arnolds the title was in order. Subsequently, the police discovered that the motor home had been stolen and took possession of it. Had the bank committed a constructive fraud on the Arnolds by failing to check the title adequately? The supreme court said no. For there to be a constructive fraud, there must be a legal or equitable duty, trust, or confidence justly imposed. The court found no confidential relationship between the bank and the Arnolds. The bank owed them no legal or equitable duty to check the title. In a short and cogent dissent, Justice Jordan said:

> [w]hile I agree the bank had no legal or equitable duty to check the title on the Vehicle which was the subject of the loan, once the bank voluntarily assumed this duty it was then under an equitable obligation to the borrower to perform this duty in a nonnegligent manner. This the bank failed to do.[29]

In a well reasoned opinion, the court of appeals in *Roberts v. International Harvestor Credit Corporation*[30] held that perfection of a security

26. *Id.* at 31, 244 S.E.2d at 813, 814 (Bowles, J., dissenting).
27. 145 Ga. App. 213, 243 S.E.2d 637 (1978).
28. 240 Ga. 200, 240 S.E.2d 3 (1977).
29. *Id.* at 202, 240 S.E.2d at 4 (Jordan, J., dissenting).
30. 143 Ga. App. 206, 237 S.E.2d 699 (1977).

interest under the Certificate of Title Act[31] is accomplished by substantially complying with the filing requirements, even though the certificate contains minor errors which are not misleading. In this case, the omission of the word "Credit" from the name of the secured party did not invalidate the filing where the address was correct.

In *Coppage v. Mellon Bank*,[32] the bank was hoisted on its own petard. The bank filed suit, alleging that Coppage was in default under a retail installment contract for a mobile home, and sought recovery of the entire unpaid balance which it had accelerated pursuant to the terms of the contract. Coppage answered, denying both the default and any indebtedness to the bank in any amount. Thereafter, the bank under Ga. Code Ann. §67-705 (Supp. 1978), moved for an order requiring Coppage to pay into the registry of the court all past due amounts and such future amounts as would become due before final determination of the issues. The trial court granted the motion. When Coppage failed to make any payments, the trial court issued a writ of possession. The court of appeals reversed. The court reasoned that no amounts were admitted as due, and since the balance had been accelerated, no unaccelerated payments could become due. As there was nothing for Coppage to pay into the registry of the court, his failure to make such payments could not entitle the bank to a writ of possession.

The supreme court has finally brought some rationality to the question of whether a creditor after default must "(1) give notice of its intention to accelerate any amounts not then due and (2) give notice of its intention to repossess the collateral." In *Horn v. Fulton National Bank*[33] Horn had executed a security agreement which provided:

> In event of a default, any of the Liabilities . . . may, *at the option* of the Bank and *without demand or notice* of any kind, be *declared*, by Bank, and thereupon immediately shall become due and payable and Bank may take possession of or retain and sell or otherwise dispose of the Collateral . . . .[34]

After default, Fulton National Bank repossessed Horn's automobile without first notifying him. Horn filed suit in tort for wrongful repossession without notice and wrongful retention of the vehicle. The trial court granted summary judgment in favor of the bank. Relying on *C & S Motors, Inc. v. Davidson*,[35] the court of appeals reversed. It held that the language "without notice or demand" was not operative. Since the contractual provision provided that the balance may "be declared" immediately due and payable, the bank had to take some affirmative action to accelerate the loan. The court of appeals held that the bank was therefore obligated to

31. GA. CODE ANN., ch. 68-4A (1975).
32. 142 Ga. App. 12, 234 S.E.2d 824 (1977).
33. 140 Ga. App. 568, 231 S.E.2d 405 (1976), *rev'd*, 239 Ga. 648, 238 S.E.2d 358 (1977).
34. The description of the agreement comes from the supreme court opinion. 239 Ga. at 648, 238 S.E.2d at 359.
35. 133 Ga. App. 891, 212 S.E.2d 502 (1975).

communicate this action to the borrower prior to repossession.

Carefully reviewing the precedents, the supreme court held that the court of appeals had mistakenly determined that the contractual waiver of notice was ineffective.[36] The court left undisturbed the prior law that required notice if the contract either provided for notice or was silent that notice was required.[37] However, the court ruled that where the contract waived notice, this waiver would be honored.

The supreme court also found that the court of appeals had mistakenly interpreted the contractual provisions dealing with repossession. The court of appeals had held that acceleration and notice of acceleration was a prerequisite to repossession. In reversing, the supreme court said:

> [m]oreover, under the terms of the agreement here in issue, the bank had the right to "exercise . . . *any* . . . rights . . . available to it under this agreement . . ." and thus it had the right to repossess independently of its right to accelerate. There being no agreed requirement of notice attached to the right to repossess, notice was not required prior to repossession.[38]

The court tacitly recognized that acceleration and repossession are two separate and distinct creditor's remedies which can be exercised independently of each other.

V. Industrial Loan Act & Truth In Lending

Marshall v. Fulton National Bank of Atlanta[39] settled an issue which has long troubled commercial lawyers in this state. Fulton National Bank made a loan to Marshall and computed the finance charge under the provisions of the Georgia Industrial Loan Act.[40] The bank did not comply with one of the Act's disclosure requirements. Did this failure to disclose violate the Act so that the note was null and void? The court of appeals said no. Banks are *expressly excluded* from regulation by the Industrial Loan Act. This exclusion, however, does not affect the privilege of a national bank to charge the highest rate of interest allowed by the laws of the state in which it is located.[41] Following the reasoning in *Marshall,* the same rule should apply to state-chartered banks.[42] Query whether this rule applies only to disclosures or would insulate a bank from a claim of an improper or excessive charge?

Does the inclusion of a title fee which is disbursed to a third party

36. Fulton Nat'l Bank v. Horn, 239 Ga. 648, 238 S.E.2d 358 (1977).
37. Lee v. O'Quinn, 184 Ga. 44, 190 S.E. 564 (1937).
38. 239 Ga. at 650, 238 S.E.2d at 360.
39. 145 Ga. App. 190, 243 S.E.2d 266 (1978).
40. *See* Ga. Code Ann., ch. 25-3 (1976).
41. 12 U.S.C.A. §85 (Supp. 1978).
42. Ga. Code Ann. §41A-1313 (1974) allows state chartered banks to charge interest at "rates not exceeding the limits set by the laws of this State."

constitute an additional charge which is prohibited by Ga. Code Ann. §25-316 and thus render an Industrial Loan Act contract null and void? In *Kennesaw Finance Company of Douglasville v. Mirabelli*,[43] the loan company deducted $34.00 from the loan proceeds for a real estate title search. This fee was paid to a third party who seemingly had no connection with the lender. Ga. Code Ann. §25-315 sets out the permitted fees. A fee for a title search is not among them. Ga. Code Ann. §25-316 provides: "[n]o Licensee shall charge, contract for, or receive any other or further amount in connection with any loans authorized by this Chapter, in addition to those hereinbefore provided, . . ." Preemptorally citing *Georgia Investment Co. v. Norman*,[44] the court of appeals found a violation.

In *Norman*, a $1.00 notary fee was collected by the finance company and paid to one of its employees for notarizing the documents. In deciding this case, the supreme court said:

> [w]hile the Loan Company states that Gene Pethel's regular compensation was not affected by receipt . . . of notary fees, in our view the Loan Company received benefit from the collection of the notary fees at least indirectly, in that the job held by Gene Pethel would be more attractive and easier to fill with a qualifed person by reason of the additional compensation or supplement to [the] regular salary in the form of notary fees.[45]

However, it is not clear from the *Norman* opinion whether the benefit to the lender was the deciding point. Later in the opinion, the court said:

> [a]lthough the Loan Company here did not retain, it did "charge"; it did "receive" the notary fee and then disbursed it by check to its employee. This was not authorized by the Industrial Loan Act. To approve this charge would open the door to other charges not authorized by the Act and imposed by Loan Companies for the purpose of being passed on to third parties.[46]

The court in *Mirabelli* clearly interpreted *Norman* as holding that the Industrial Loan Act was violated where the lender collected the fee irrespective of any benefit derived by the lender. The effect of the *Mirabelli* decision is to prohibit real estate loans under the Industrial Loan Act, since no conscientious lender would make such a loan without a title search. In the future, such loans shall have to be made under other interest and usury statutes, primarily the Second Security Deed Act.[47]

Two dramatic decisions were handed down in the Truth in Lending area during the survey period. The Fifth Circuit Court of Appeals in an en banc

43. 143 Ga. App. 254, 238 S.E.2d 256 (1977).
44. 231 Ga. 821, 204 S.E.2d 740 (1974).
45. *Id.* at 824, 204 S.E.2d at 743.
46. *Id.*
47. GA. CODE ANN., ch 57-2 (1977).

decision in *McDaniel v. Fulton National Bank*[48] overruled the holding of *Martin v. Commercial Securities Co.*,[49] and held that a creditor must disclose its acceleration clause in a consumer transaction unless the clause itself or state law requires the creditor to rebate the unearned portion of the finance charge. In so holding, the Fifth Circuit aligned itself with the Third Circuit and the Georgia Court of Appeals.[50] Clearly, all consumer contracts should provide for a rebate of unearned interest upon acceleration after default.

The Fifth Circuit also determined that the waiver of the Georgia homestead exemption found in most consumer notes must be disclosed as a retained security interest. In *Elzea v. National Bank of Georgia*,[51] the court held that the following language was a sufficient disclosure: "This note is also secured by an assignment of [Elzea's] homestead exemption."[52] District Judge Newell Edenfield in the Northern District of Georgia has ruled that the rule pronounced in *Elzea* will be applied retroactively rather than prospectively.[53] This means that loans made prior to April 7, 1978, are in violation of the Truth in Lending Act where the loan documents provide for a waiver or assignment of the borrower's homestead exemption without disclosing that the lender has retained a security interest in the exemption. Creditors' attorneys just learning of this ruling should consider giving notice under §130(b) of the Truth in Lending Act.

VI. Conclusion

The basis for sustaining economic development is a well reasoned and cohesive set of rules governing commercial transactions. As the cases and legislative acts reported in this article illustrate, the commercial bar has come of age in Georgia. Its perspicacity has led to sophisticated, lucid decisions by our courts and a well considered revision of Article 9 of the UCC. With continued effort on the part of the bar to better educate itself in the field of commercial law, these will be the harbingers of continued economic growth.

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48. 571 F.2d 948 (5th Cir. 1977).

49. 539 F.2d 521 (5th Cir. 1976).

50. Johnson v. McCrackin-Sturman Ford, Inc., 527 F.2d 257 (3d Cir. 1975); Thomas v. Universal Guardian Corp., 144 Ga. App. 869, 243 S.E.2d 101 (1978).

51. 570 F.2d 1248 (5th Cir. 1978).

52. *Id.* at 1249.

53. Travis v. Trust Company Bank, U.S. Dist. Court, Northern Dist. of Ga., Civil Action #C77-226A, order entered June 22, 1978.