Commercial Law

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Interest and usury and the Bankruptcy Reform Act of 1978[1] attracted the primary attention of the general assembly during the survey period, but significant legislative developments occurred in other commercial law areas as well. In addition, a number of decisions worthy of note were handed down by the appellate courts.

I. Commercial Paper

In *FDIC v. West*,[2] the supreme court granted certiorari to review a decision of the court of appeals[3] concerning whether a drawee bank can attain the status of a holder or a holder in due course. The court of appeals said no, but the supreme court disagreed. The factual context in which the issue arose was as follows: A checking account in the name "Davidson-Sarasota" was badly overdrawn by checks signed by an individual without any indication of representative capacity. The bank contended that "Davidson-Sarasota" was a trade name for the individual, but the individual claimed that it was a trade name for a corporation. If the bank could sue on the checks rather than under section 4-401 of the Uniform Commercial Code,[4] it might be able to recover against the individual even if the account were established to be a corporate account because his signature gave no indication of representative capacity.[5] The supreme court ruled that if the FDIC, as successor in interest of the bank, could meet

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1. 11 U.S.C. §§ 101-151326 (Supp. III 1979).
2. 244 Ga. 396, 260 S.E.2d 89 (1979).
3. 149 Ga. App. 342, 254 S.E.2d 392 (1979).
4. Ga. Code Ann. § 109A-4-401 (1979). The U.C.C. as enacted in Georgia, Ga. Code Ann. ch. 109A, is hereinafter referred to as the "Code."
5. Ga. Code Ann. § 109A-3-403 (1979); Southern Oxygen Supply Co. v. de Golian, 230 Ga. 405, 197 S.E.2d 374 (1973).

the qualifications for holder or holder in due course status, there was no reason why it should be denied such status, and it then would have a claim *on the instrument itself* against the drawer. As the drawer's engagement under Code section 3-413(2) is "that upon dishonor of the draft and any necessary notice of dishonor or protest he will pay the amount of the draft to the holder or to any indorser who takes it up,"[6] query what claim remained on the instruments once they had been honored by the drawee bank. Perhaps implicit in the court's decision is a determination that the drawee bank could reverse, with reference to the drawer, its payment of the items,[7] thereby dishonoring them and resurrecting an action on them.

In *Trust Company Bank v. Port Terminal & Warehousing Co.*,[8] the court of appeals held that Code sections 3-404 and 3-406 must be read together such that a depositary bank seeking to avoid liability for conversion of checks bearing forged endorsements on grounds of the payee's negligence must establish that it has dealt with the instrument in good faith and in accordance with the reasonable commercial standards of its business. The payee had rehired a former employee who several years previously had forged checks payable to the payee and deposited them in her own account. After she was rehired, she again appropriated checks sent to the company by its customers, forged the company's indorsement, indorsed the checks in her own name and deposited them to her personal checking account with the bank. The bank argued that under Code section 3-404, the payee, because of its negligence in rehiring the employee, was precluded from denying the forgery without reference to whether the bank had acted in accordance with reasonable commercial standards, but the court of appeals disagreed. The bank did not lose completely, however, as the court also ruled that the trial court had misread *National Bank of Georgia v. Refrigerated Transport Co.*[9] in determining that as a matter of law the bank had not acted in accordance with reasonable commercial standards. Quite sensibly, the court declined to adopt a rule which would make the mere failure to check the validity of ostensibly valid indorsements on third party checks commercially unreasonable as a matter of law. The court of appeals also recognized that, because the bank was a "representative" (a depositary bank), it would not be liable to the payee, even if the payee was not held negligent, beyond the amount of any proceeds of the checks remaining in its hands if it was found to have dealt with the checks in good faith and in accordance with reasonable

6. GA. CODE ANN. § 109A-3-413(2) (1979).
7. *See* GA. CODE ANN. § 109A-3-418 (1979).
8. 153 Ga. App. 735, 266 S.E.2d 254 (1980).
9. 147 Ga. App. 240, 248 S.E.2d 496 (1978).

commercial standards applicable to its business.[10]

In *Trust Company Bank v. Atlanta IBM Employees Federal Credit Union*,[11] the facts involved a missing, rather than a forged, indorsement. The plaintiff credit union drew a check payable to two joint payees, but only one indorsed the check. The check was paid and, approximately fourteen months later, the credit union discovered that it had been indorsed by only one of the payees. Neither the depositary bank nor the drawee bank was held liable because the court determined that a missing indorsement on a joint payee check constitutes an "unauthorized indorsement" within the meaning of Code section 4-406(4)(b), and that the credit union was precluded from asserting against the banks the missing indorsement because it had not discovered and reported it within one year from the time it received its bank statement with the item in question.[12] Because Code section 4-406 by its terms appears to address the relationship between a drawee bank and its customer, the question arises as to how the depositary bank was insulated from liability by the mere passage of time. The Georgia courts take the position that a drawer can sue a depositary bank directly on an unauthorized indorsement because, in their view, the depositary bank has breached a warranty to the drawer under Code section 4-207.[13] Code section 4-207(4) provides that, unless a claim for breach of warranty is made within a reasonable time *after the claimant learns* of the breach, the person liable is discharged *to the extent of any loss caused by the delay*. The trial court apparently held that, by failing to discover the missing indorsement within a year, the drawer was barred under Code section 4-207(4).[14] This would seem to be a tortured reading of that section. The opinion of the supreme court need not be so read and appears to adopt the reasonable view that if the drawer, to avoid circuity of action, is permitted to sue a depositary bank directly on an unauthorized indorsement, the depositary bank may claim the benefit of the drawee's special defenses against the drawer under Code section 4-406.[15]

In *Donmoyer v. Columbus Bank & Trust Co.*,[16] a divided court of appeals affirmed the grant of summary judgment to the bank on the follow-

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10. GA. CODE ANN. § 109A-3-419(3) (1979).

11. 245 Ga. 262, 264 S.E.2d 202 (1980).

12. *Compare* the one year limitation in Georgia's version of GA. CODE ANN. § 4-406(4) (1975) with the three year limitation in §4-406 of the U.C.C.

13. Insurance Co. of N. America v. Atlas Supply Co., 121 Ga. App. 1, 172 S.E.2d 632 (1970).

14. *See* Atlanta IBM Employees Fed. Credit Union v. Trust Co. Bank, 150 Ga. App. 253, 254, 257 S.E.2d 346, 347 (1979).

15. *See, e.g.*, Allied Concord Fin. Corp. v. Bank of America N.T. & S.A., 275 Cal. App. 2d 1, 80 Cal. Rptr. 622 (1969).

16. 151 Ga. App. 38, 258 S.E.2d 725 (1979).

ing facts: An employee of the bank was served with a notice of delinquency by the Georgia Department of Revenue. She believed that she had been handed a *fi.fa.* and, rather than freezing the taxpayer's accounts, as required by law, she debited them and paid the money to the Revenue Department. On the same day, she notified the taxpayer of the debits. Thereafter, the taxpayer continued to make deposits to the account and to write checks on the account, and numerous checks were dishonored. The majority agreed with the dissent that the immediate surrender of the funds on the basis of the notice of delinquency had been wrongful. It analogized the wrongful treatment of the account to the wrongful dishonor of an item under Code section 4-402 or the payment of an item on an unauthorized signature, finding a legislative intent to hold a bank liable for damages proximately caused by wrongful treatment of a customer's account if the customer has exercised reasonable care to minimize its loss. The majority found as a matter of law, however, that on the facts of this case, any damages suffered by the customer resulted from his own failure to exercise reasonable care to minimize and avoid loss.

In *American Food Purveyors, Inc. v. Lindsay Meats, Inc.*,[17] the court of appeals was faced with the question of whether Code section 1-207 is to be construed as modifying the traditional "full payment check" rule. The case involved the remittance by an account debtor of a check, in full payment of the account, in an amount less than the amount of the account alleged to be owing. The check contained a notation on the back that it constituted payment in full of all indebtedness. The payee of the check deleted this notation and negotiated the check. The court noted that the supreme court, in *Anderson v. Shelby Mutual Insurance Co.*,[18] had recently approved the traditional rule that a party who cashes a check containing a payment-in-full condition cannot prevent an accord and satisfaction by obliteration of the condition on the check and held that the *Shelby* case precluded it from deciding that the obliteration of the full payment condition was an effective reservation of rights under Code section 1-207. It did express the opinion, however, that the result was contrary to the great weight of authority in other jurisdictions and questionable as a matter of legal theory.[19]

II. SECURED TRANSACTIONS

In the spring of 1980, two bills were enacted revising Article 9 of the

17. 153 Ga. App. 383, 265 S.E.2d 325 (1980).

18. 237 Ga. 687, 229 S.E.2d 462 (1976).

19. *But see, e.g.*, Skilton, *General Provisions, Sales, Bulk Transfers and Documents of Title*, 35 BUS. LAW. 1103 (1980).

Code, House Bill 180 and House Bill 492.[20] The former is a technical revisions bill relating to the new Article 9, which became effective on July 1, 1978, and does not make substantive changes. The latter is substantive. It first enlarges the grace period within which purchase money security interests may be perfected under Code sections 9-301(2) and 9-312(4) from ten to fifteen days after the debtor receives possession of the collateral.[21] House Bill 492 also changes Code section 9-404(1) to require the filing of termination statements by the secured party and payment of the required filing fee whenever there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value. If such a termination statement is not sent within sixty days after the debt has been paid in full, the secured party is liable to the debtor for $100.00 and, in addition, for any loss caused to the debtor by such failure. This provision requires the filing of a termination statement irrespective of whether the debtor so requests and is applicable to commercial as well as consumer transactions. It may be troublesome for commercial lenders who extend revolving secured loans to seasonal borrowers on uncommitted lines of credit and to lenders under statutes such as the Industrial Loan Act who wish to make provision for payment by the debtor of the filing fee.

On the judicial front, the supreme court, in *Sumner v. Adel Banking Co.*,[22] held constitutional the procedures under which secured parties may obtain writs of immediate possession of their collateral under the Personal Property Foreclosure Act.[23] Finding sufficient protection in the statute for the debtor's property rights, the court rejected the contention that the procedures violate due process by allowing the collateral to be seized prior to a hearing.

Application of the Personal Property Foreclosure Act was also the subject of *Brown v. Wilson Chevrolet-Olds, Inc.*[24] There, after the trial court

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20. All references to legislation are references to the acts of the 1979-1980 Georgia General Assembly.

21. No corresponding change was made in GA. CODE ANN. § 109A-9-313(4)(a) (1980) concerning priority conflicts between purchase money security interests in fixtures and the interests of encumbrancers or owners of the realty to which they are attached. Moreover, care must be taken not to assume that, because one has filed a financing statement within the grace periods permitted by the Code, one is automatically within the grace period of the preference provisions of the Bankruptcy Reform Act of 1978, 11 U.S.C. § 547(c)(3). Under the Bankruptcy Reform Act, the grace period is shorter and begins to run from the date the security interest "attaches", which conceivably may occur before the debtor receives possession of the collateral.

22. 244 Ga. 73, 259 S.E.2d 32 (1979).

23. GA. CODE ANN. §§ 67-701 to 718 (Supp. 1980). The particular provisions of the Act relevant here were GA. CODE ANN. §§ 67-709 to 718.

24. 150 Ga. App. 525, 258 S.E.2d 139 (1979).

granted a writ of possession, the debtor moved to set aside the judgment granting the writ on the ground that he had appeared at the hearing in response to the summons and had orally answered the petition, but the substance of his oral answer was not indorsed on the petition as required by Georgia Code Ann. section 67-704. The motion to set aside was denied, and the debtor appealed. Subsequently, the trial court indorsed the debtor's oral answer on the petition and had a "supplemental record" including the indorsement transmitted to the court of appeals. In a scholarly opinion discussing the background of the Act and its amendments, the court of appeals held that the original failure to indorse the substance of the debtor's oral answer on the petition was a nonamendable defect appearing on the face of the record[25] which could not be cured by the judgment or supplemental record and reversed the denial of the motion to set aside.

III. INTEREST AND USURY

A. *Generally*

The recent legislative session spawned a number of amendments to the various statutes regarding interest and usury. Most of these amendments included increases in maximum permissible interest rates.[26] There were, however, other important developments.

The Motor Vehicle Sales Finance Act[27] was amended to permit the computation of finance charges on an acturial basis where the installment contract provides for unequal or irregular installment payments, and to render the provision for credit of unearned finance charges on prepayment inapplicable in such circumstances.[28] The provision permitting deduction of a $25 acquisition cost from computation of the credit on prepayment has been deleted.[29]

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25. GA. CODE ANN. § 81A-160(d) (1977).

26. *See* House Bill 906, increasing by 2% interest rates chargeable on all classes of vehicles under the Motor Vehicle Sales Finance Act, GA. CODE ANN. §§ 96-1004 to 1009 (Supp. 1080); Senate Bill 355, increasing from 8% to 10% the rate of interest chargeable on loans covered by the Industrial Loan Act, GA. CODE ANN. §§ 25-301 to 324 (Supp. 1980); House Bill 708, amending GA. CODE ANN. § 57-111 (Supp. 1980) by establishing the rate of interest chargeable on past due commercial accounts at 1½% per month, and amending GA. CODE ANN. § 57-116 (Supp. 1980) to increase the maximum rate of interest chargeable on installment loans from 7% add-on to 9% add-on; and Senate Bill 389, adding to GA. CODE ANN. § 57-116 a second paragraph to the effect that the maximum rate chargeable thereunder from time to time shall also be applicable to loans under the Secondary Security Deed Act, GA. CODE ANN. § 57-201 to 205 (Supp. 1980).

27. GA. CODE ANN. §§ 96-1004 to 1009 (Supp. 1980).

28. House Bill 906 amending GA. CODE ANN. § 96-1004.

29. *Id.* amending GA. CODE ANN. § 96-1005.

A new Georgia Code Ann. section 57-101.2 was enacted authorizing financial institutions that accept governmentally insured deposits to charge 16% simple interest or a fee of $25, whichever is greater, on single payment or balloon payment loans, or on "demand notes payable at irregular intervals."[30]

One potentially significant case was decided by the court of appeals regarding compensating balances. In *Knight v. First Federal Savings & Loan Association*,[31] the court was faced with the question of whether a lender's requirement that the borrower maintain on deposit with the lender a non-interest-bearing reserve fund for the maintenance, repair and replacement of the collateral for the loan would constitute an impermissible compensating balance which would render the loan usurious.[32] The borrower and the lender had estimated the annual maintenance and repair expenses for the collateral at $30,000 and, accordingly, had provided for a required deposit by the borrower into the escrow fund each month of 1/12 of the amount, $2,500. However, the borrower was required to continue depositing that amount each month until the aggregate amount of the fund equalled $100,000, and to commence depositing again if the fund dropped below that amount. The court rejected the borrower's contention that such an arrangement was usurious *per se*, analogizing such deposits to monthly escrow deposits for the payment of taxes and insurance. However, the court also refused to hold that the arrangement was permissible as a matter of law. Tax and insurance escrows, the court noted, are generally structured for disbursement on an annual basis, subject to adjustments, with no provision for an accumulation of unexpended monies in excess of the annual estimate. Thus, in the normal tax and insurance escrow situation, the maximum amount of the fund is the total of the estimated annual charges. In the instant case, however, the court could not discern a sufficient objective basis supporting the selection of the sum of $100,000 as the amount of the aggregate maximum deposit required by the borrower. Accordingly, the court held that whether such a scheme was usurious presented a jury question.

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30. The bill expressly disavows any intention to amend, modify or repeal GA. CODE ANN. § 57-101.1 (Supp. 1980), relating to interest on real estate loans; § 57-116 (Supp. 1980), relating to interest on installment loans; § 57-118 (Supp. 1980), relating to interest on loans in excess of $3000 to profit corporations and to persons for nonconsumer purposes; or § 57-119 (1977), relating to interest on loans of more than $100,000. The bill also provides for its automatic repeal on July 1, 1981. Unfortunately, the bill provides no guidance concerning the definition of a "demand note payable at irregular intervals."

31. 151 Ga. App. 447, 260 S.E.2d 511 (1979).

32. The issue arose because the transaction was consummated prior to the effective dates of GA. CODE ANN. § 57-119 (1977), which exempts loans in excess of $100,000 from usury restrictions, and GA. CODE ANN. § 57-118 (Supp. 1980), which exempts loans in excess of $3,000 to profit corporations and to persons for nonconsumer purposes.

B. Georgia Industrial Loan Act

There were a number of significant judicial and legislative developments regarding the Georgia Industrial Loan Act.[33] In *Commercial Credit Plan, Inc. v. Parker,*[34] the court of appeals considered whether the Act is applicable to a loan made in South Carolina to borrowers who are residents of Georgia. The trial court had ruled that public policy considerations demanded that Georgia law control the enforceability of the loan. The court of appeals acknowledged the pronouncement of the supreme court in *Hodges v. Community Loan & Investment Corp.*[35] that loan transactions made in violation of the Act are illegal and against the public policy of the state. However, the court of appeals held that the comity considerations militating for the enforcement of a South Carolina contract in accordance with South Carolina law outweighed the Georgia public policy considerations which underlay the Act.

The issue of retroactivity of amendments to the Act arose in two contexts. In *Motor Finance Co. v. Harris,*[36] the court of appeals was faced with the question of whether the 1978 amendment to Georgia Code Ann. section 25-9903, proscribing class action relief, prohibited the certification of a class of plaintiffs in an action pending at the time of the enactment of the amendment. The court followed the holding and reasoning of *Public Finance Corp. v. Cooper,*[37] that statutes which determine who may be proper parties to actions will be applied to actions accruing or pending at the time of the enactment of the statute, in that such statutes do not eliminate a party's cause of action, but merely affect the nature of that cause of action.[38]

In *Southern Discount Co. v. Ector,*[39] the issue before the supreme court was whether the 1978 amendment to Georgia Code Ann. section 25-9903, protecting lenders from penalties under the Act in situations where the subject loan contract was made in good faith in conformity with an interpretation of the Act by the courts or a rule or regulation officially promulgated by the Georgia Industrial Loan Commissioner, would apply retroactively to loan contracts made prior to the effective date of the amendment. The court of appeals had reasoned that, at the time of the making of the loan contract in question, the state of the law was that loan contracts made in violation of the Act were void *ab initio* and, accord-

33. GA. CODE ANN. §§ 25-301 to 324 (1976).
34. 152 Ga. App. 409, 263 S.E.2d 220 (1979).
35. 234 Ga. 427, 216 S.E.2d 274 (1975).
36. 150 Ga. App. 762, 258 S.E.2d 628 (1979).
37. 149 Ga. App. 42, 253 S.E.2d 435 (1979).
38. 150 Ga. App. at 763, 258 S.E.2d at 630.
39. 246 Ga. 30, _ S.E.2d _ (1980).

ingly, could not be revived by a later amendment to the Act.[40] The supreme court reversed, holding that the principle that forfeitures and penalties are not favored and that courts should construe statutes relieving against forfeitures and penalties liberally so as to afford maximum relief justified the retroactive application of the amendment.

In a more technical vein, *Pollard v. Congress Finance Corp.*[41] clarified that the prepayment provisions of a note are inapplicable to situations of acceleration of maturity upon default. Accordingly, the presence of a provision calling for the refund of interest in the event of prepayment based upon the Rule of 78's will not be interpreted to render the loan in violation of the Act for failure of the lender to rebate unearned charges in the event of acceleration.

The most problematical case decided under the Act during the survey period was *Shelley v. Liberty Loan Corp.*[42] In that case, the court held that the lender was not permitted to include the non-refundable loan fee in the computational base for determining the amount of the fee itself. The court cited as authority for this proposition *Consolidated Credit Corp. v. Peppers*,[43] in which it was held that the inclusion of interest in the computational base for purposes of computing the loan fee was impermissible where the interest was not discounted in advance. The *Peppers* case, however, does not support the result in *Shelley*. The court in *Peppers* held that the "face amount of the contract" upon which the loan fee is chargeable[44] is the amount necessary for the borrower to borrow in order to obtain the amount desired, and that such amount does not include interest which is not discounted in advance. *Peppers* expressly recognized that the loan fee, which is the subject of the *Shelley* opinion, is unquestionably a portion of the amount which it is necessary for the borrower to borrow in order to obtain the amount desired[45] and is appropriately included in the computational base. In any event, the result in *Shelley* would appear to be irreconcilable with the earlier decisions in *Robbins v. Welfare Finance Corp.*,[46] and *McDonald v. G.A.C. Finance Corp.*,[47] both of which were cited with approval in *Peppers*, and neither of which is mentioned in *Shelley*. Whether the *Shelley* case will represent a permanent departure from this seemingly well-settled case law remains to be

40. Southern Discount Co. v. Ector, 152 Ga. App. 244, 262 S.E.2d 457 (1979).
41. 153 Ga. App. 357, 265 S.E.2d 296 (1980).
42. 153 Ga. App. 47, 264 S.E.2d 537 (1980).
43. 144 Ga. App. 401, 240 S.E.2d 922 (1977).
44. GA. CODE ANN. § 25-315(b) (Supp. 1980).
45. 144 Ga. App. at 404, 240 S.E.2d at 924.
46. 95 Ga. App. 90, 96 S.E.2d 892 (1957).
47. 115 Ga. App. 361, 154 S.E.2d 825 (1967). *Compare* Wessinger v. Kennesaw Fin. Co., 151 Ga. App. 660, 261 S.E.2d 649 (1979).

seen.

The primary legislative change to the Act is House Bill 1339, which completely restructures the penalty provisions of Georgia Code Ann. section 25-9903. Under the revision, a duly licensed lender who violates the Act is liable to the borrower in an amount equal to the greater of twice the amount of all interest and loan fees charged the borrower on the most recent loan or $100; simple violations will no longer render the contract null and void.[48] Further, the lender can eliminate all liability for a violation if, within 15 days of discovery of the violation, it notifies the borrower and makes appropriate adjustments.[49] Loans by persons not properly licensed,[50] and loans by licensed lenders which are fraudulently procured and violate the Act,[51] continue to be punishable as misdemeanors and continue to be null and void. Finally, the amendment makes the defense of an unintentional violation resulting from a clerical or typographical error available only if the lender demonstrates "the maintenance of procedures reasonably adopted to avoid any such error."[52]

IV. MISCELLANEOUS

A. *Liens*

In 1973, a three-judge court held unconstitutional the procedures for foreclosing mechanics' and materialmen's liens under Georgia Code Ann. section 67-2401.[53] On March 24, 1980, House Bill 476 was enacted, revising section 67-2401 to meet due process requirements. On that same day, House Bill 1182 was also enacted extending the time under Georgia Code Ann. section 67-2003 within which mechanics' liens on aircraft or farm machinery must be filed from 90 to 180 days after the work is done and material furnished.[54]

B. *Exemptions*

Among the more controversial pieces of legislation enacted during the last session of the general assembly is Senate Bill 249, dealing with homestead exemptions. The Bankruptcy Reform Act of 1978 provides much

48. GA. CODE ANN. § 25-9903(b) (Supp. 1980).
49. GA. CODE ANN. § 25-9903(c) (Supp. 1980).
50. GA. CODE ANN. § 25-9903(a) (Supp. 1980).
51. GA. CODE ANN. § 25-9903(g) (Supp. 1980).
52. GA. CODE ANN. § 25-9903(d) (Supp. 1980).
53. Mason v. Garris, 360 F.Supp. 420 (N.D. Ga. 1973).
54. With reference to the question of priorities between prior perfected security interests under the Code and mechanics' liens under GA. CODE ANN. § 67-2003 (Supp. 1980), *see* U.S. v. Crittenden, 600 F.2d 478 (5th Cir. 1979). Query whether GA. CODE ANN. § 109A-1-104 (1979) did not mandate a different result.

more generous exemptions to debtors than previously enjoyed in Georgia.[55] However, the Act authorizes a state to deny its domicilaries a choice between the exemptions available under the Act or state law and to restrict them to the exemptions under state law.[56] Senate Bill 249 purports to so restrict Georgia domiciliaries.[57] However, the Bill goes on to create an alternative state exemption, applicable only in bankruptcy, which may be claimed by the bankrupt debtor in lieu of the much less generous exemptions in Georgia Code Ann. sections 51-1301 or 51-101.[58] Whether the Georgia legislature may constitutionally create an exemption, applicable only in bankruptcy, in lieu of the federally created exemption is open to question. Because of the severability provision in the statute,[59] if the courts answer this question in the negative, Georgia debtors would appear to be limited in bankruptcy to the exemptions provided in section 51-1301 or 51-101. By its express terms, the entire new homestead exemption act will be repealed effective July 1, 1981.[60]

C. *Waiver and Default*

In an important decision,[61] the supreme court held that evidence of a debtor's repeatedly late and irregular payments which are accepted by the creditor creates a factual dispute as to whether a quasi-new agreement has been created under Georgia Code Ann. section 20-116. Moreover, a non-waiver provision in the contract or loan agreement will not be dispositive, as the evidence also creates a jury question as to whether such non-waiver provision has itself been waived. A creditor who is deemed to have entered into such a quasi-new agreement may not, thereafter, insist on the original terms of the contract without first giving reasonable notice of intention to rely on the exact terms of the agreement.[62]

D. *Guaranty and Suretyship*

Jackson v. First Bank[63] is an interesting case in the guaranty/suretyship area. The bank sued an individual on a "guaranty of payment" which he had executed in connection with a loan to his son. The bank contended that the loan proceeds were not disbursed until after the

55. 11 U.S.C. § 522(d) (1979).
56. 11 U.S.C. § 522(b) (1979).
57. GA. CODE ANN. § 51-1601 (Supp. 1980).
58. GA. CODE ANN. § 51-1301.1 (Supp. 1980).
59. Senate Bill 249, § 5.
60. GA. CODE ANN. § 51-1301.1 (Supp. 1980).
61. Smith v. General Fin. Corp., 243 Ga. 500, 255 S.E.2d 14 (1979).
62. Baxter v. Georgia Fed. Sav. & Loan Ass'n, 152 Ga. App. 753, 264 S.E.2d 242 (1979).
63. 150 Ga. App. 182, 256 S.E.2d 923 (1979).

"guaranty of payment" was signed, but the defendant alleged that he did not sign until the day after the proceeds were disbursed and that, therefore, there was no consideration for his agreement. In spite of the factual dispute, the trial court granted summary judgment to the bank, and the court of appeals affirmed. The court construed the agreement to be one of suretyship rather than guaranty but made specific reference to the fact that past consideration will not support either a contract of guaranty or a contract of suretyship. Perplexingly, it then found the defendant liable because consideration had clearly passed to the son, without discussing the question of whether the consideration received by the son was past or present consideration for the suretyship agreement.[64] As an alternative ground of liability, the court found the surety to be estopped. The day before the loan was made the board of directors of the bank approved it on the condition it be indorsed by the defendant. While the facts upon which the estoppel was based are not developed fully in the opinion, presumably the court determined that the defendant indisputably had induced the bank either to make the loan or to refrain from immediately demanding repayment.

E. Garnishment

Without question, the most significant developments in the garnishment area during the survey period were legislative. House Bill 701 amended Georgia Code Ann. section 46-101 to provide expressly that a writ of garnishment is available on a judgment entered by a federal court sitting in Georgia as well as on judgments entered by Georgia state courts. This change was doubtless a reaction to a federal district court decision[65] and a Georgia Court of Appeals decision[66] reaching a contrary result under the prior statute.

House Bill 701 also amended Georgia Code Ann. section 46-301(d) to limit the amount of an individual's disposable earnings which are subject to garnishment for alimony or support to 50% of those earnings. Under prior law, there was no exemption of wages from garnishment for such purposes. Additionally, Georgia Code Ann. section 46-509 was amended to provide that a default judgment issued against a garnishee can be reduced, upon timely motion by the garnishee, to $50 plus the amount owed by the garnishee to the defendant plus court costs. Under former law, the

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64. Gay v. Mott, 43 Ga. 252 (1871), cited by the court, is not dispositive because the supreme court simply held in that case that the surety had raised below only the question of whether *he* had received consideration for his promise and had not attacked the sufficiency of the consideration to the borrower to support the surety's promise.

65. Diversified Mortgage Investors v. Georgia-Carolina Indus. Park Venture, 463 F. Supp. 538 (N.D. Ga. 1978).

66. Hubert v. City of Acworth, 154 Ga. App. 101, 267 S.E.2d 823 (1980).

defaulting garnishee's liability could only be reduced to 125% of the amount owed plus court costs.

Finally, House Bill 701 created a new chapter 46-7, entitled "Continuing Garnishment", to become effective on January 1, 1981. This statute is designed specifically to provide for a continuing garnishment process where the garnishee is the employer of the defendant, and it will obviate having to serve an additional summons of garnishment approximately every thirty days.

In a significant judicial development, the supreme court, in *Fidelity National Bank v. Km General Agency, Inc.*,[67] considered and rejected the contention that it is wrongful for a plaintiff to "shotgun" garnish, that is, to garnish without reasonable cause to believe there to be an indebtedness owed by the garnishee to the defendant, and then to take and enforce a default judgment. The supreme court reasoned that a rule requiring the plaintiff to know at his peril that a garnishee is indebted to the defendant prior to executing the affidavit would "destroy the usefulness of garnishment as a means of discovering, freezing and obtaining money or property in satisfaction of judgment."[68]

V. CONCLUSION

Against the backdrop of a massive overhaul of the bankruptcy laws and an unprecedented escalation in interest rates, the general assembly made substantial changes in Georgia's commercial law during the survey period. Meanwhile, the law continued to develop judicially as the supreme court and the court of appeals, though sometimes exhibiting philosophies different from one another, rendered decisions providing clarification and guidance in the commercial area. Many of the statutory revisions discussed have sunset provisions, and further significant activity can be anticipated at the next legislative session. One can only speculate as to what new issues will confront the supreme court and the court of appeals during the next period,[69] but it is certain that they will be many and varied.

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67. 244 Ga. 753, 262 S.E.2d 67 (1979).

68. *Id.* at 755, 262 S.E.2d at 68. *Cf.* Wilkinson v. Davis, 148 Ga. App. 696, 252 S.E.2d 201 (1979), which presents an example of actionable wrongful use of garnishment process where the garnishor swore an affidavit of garnishment in a case in which it had no judgment against the defendant.

69. *See, e.g.*, the interpretaton of GA. CODE ANN. § 20-506(c) (1977) concerning obligations to pay attorney's fees in notes or other evidences of indebtedness in *In re* East Side Investors, Case No. B78-2831A (United States Bankruptcy Court N.D. Ga. June 19, 1980) (Robinson, B. J.)