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Commercial Law

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Last year's Survey reported that the field of commercial law was expanding rapidly and that the courts were receptive to innovative solutions to protect consumers from the rigors of the traditional commercial-law concepts. This year has been mixed. Some courts have pushed "consumerism" to new lengths, while other have retraced their steps from the extremes of the past few years and returned to more traditional commercial law concepts. This article discusses some of the more important developments in the peripheral area of Truth-in-Lending as well as report the cases and statutes for the 1975-76 year within the traditional realm of commercial law.

I. Legislation

The Georgia legislature during its 1976 session enacted a number of statutes which are of interest to commercial lawyers. Under the provisions of one new act, purchasers at judicial sales need not tender cash and instead may tender a cashier's or certified check drawn for the amount of the purchase price and issued or certified by any financial institution insured by the Federal Deposit Insurance Corporation or the Federal Savings & Loan Insurance Corporation.[1] Georgia Code chapter 67-99 was amended by adding new §67-9901.1,[2] which makes it unlawful for any person who has given a bill of sale to secure a debt or some other security instrument for any motor vehicle "to sell or otherwise dispose of said motor vehicle, or cause the same to be removed from the limits of the state before payment of the debt secured by the security instrument, if such sale or removal is without the consent of or with the intent to defraud the holder of the security instrument." The penalty for violating the law is imprisonment for not less than one year or more than three years.

The General Assembly[3] amended Code §57-202(a), part of the Secondary Security Deed Act,[4] to clear up some inconsistencies. It also amended Code §57-203 to provide for some new penalty provisions. The penalty of forfeiture of the entire principal amount of the loan plus interest and other

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1. Ga. Laws, 1976, p. 367; Ga. Code Ann. §39-1317 (Supp. 1976).
2. Ga. Laws, 1976, p. 637.
3. Ga. Laws, 1976, p. 726.
4. Ga. Code Ann. ch. 57-2 (Supp. 1976).

charges is retained but is limited to those cases where the lender has contracted for, charged, received, or collected more than the charge of those expressly allowed by the Act for reasons other than bona fide error. All other violations result in the forfeiture only of the interest charged or taken or contracted to be reserved, charged or taken.

Code §57-116, which provided for 6% added interest on installment loans, has been amended to provide for 7% added interest.[5] The language contained in the amendment is identical to the language in the original Act except the interest rate. This amendment apparently will not change the rate of interest that may be charged under Charges and Interest on Secondary Security Deeds provided in Code §57-201. The allowable interest rate under that section is 6% added interest or its equivalent.

The new Motor Vehicle, Farm Machinery and Construction Equipment Franchise Practice Act[6] is meant to comprehensively revise and codify state laws regulating motor vehicle franchises, farm machinery franchises and construction equipment franchises and to regulate the sales of these types of goods. The Act provides for a Franchise Practices Commission and sets out a licensing procedure for franchised dealers. A number of unauthorized acts are also set out, and provisions are made for the denial, censure, suspension or revocation of a license in the event of violations.

II. SALES

A. Contracts and Agreements

In *Simson v. Moon,*[7] a wrecker-truck dealer sold the same vehicle twice. The dealer, Hollowell, first sold a wrecker truck to Moon for cash, delivered to Moon an invoice and a signed manufacturer's certificate of origin, then told Moon that the truck was in the possession of a company in Tennessee that was mounting the wrecker equipment. Subsequently, Hollowell sold the same truck to Simson, delivered to him a signed application for a tag and title, and told Simson that the truck was in Chattanooga, where the wrecker equipment was being installed. Simson, who didn't know about the prior sale, went to Chattanooga and accepted delivery of the truck.

When Moon discovered that Simson had possession of the wrecker truck, he applied for and obtained a Georgia certificate of title. Hollowell absconded with the proceeds from both sales, and Moon brought suit to recover the vehicle from Simson. The question was which of the two purchasers had title to the vehicle. The majority of the court held that the issue was whether there was an "entrusting" of the truck under UCC § 2-403(2) and (3),[8] which state:

5. Ga. Laws, 1976, p. 1197.
6. Ga. Laws, 1976, p. 1440; GA. CODE ANN. ch. 84-66 (Supp. 1976).
7. 137 Ga. App. 82, 222 S.E.2d 873 (1975).
8. GA. CODE ANN. §§109A2-403(2) and -403(3) (1962).

> (2) Any entrusting of possession of goods to merchants who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.
>
> (3) "Entrusting" includes any delivery or any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

The majority found that Moon had entrusted the truck to Hollowell and that Simson therefore had good title.

Dissenting, Chief Judge Bell and Judge Evans pointed out that Hollowell did not have possession of the truck, so there was no "entrusting." More importantly, these dissents recognized that Moon was the only person who could have had a certificate of title issued under the Motor Vehicle Certificate of Title Act,[9] which protects purchasers of motor vehicles in Georgia by requiring the issuance of a certificate of title. The majority failed to recognize the importance of requiring all motor vehicles to be titled and all transfers to be made only by a transfer of the certificate of title. By finding that Simson had superior title to Moon, the majority has placed those who purchase a motor vehicle from a dealer in a position of jeopardy.

B. Warranties

The court of appeals decided two cases about the limits of the warranty provisions of Article II of the Uniform Commercial Code. In *Parzini v. Central Chemical Co.*,[10] the court found that the express and implied warranties of the sales article of the UCC do not extend to an employee of a purchaser, because no privity exists between the manufacturer and the employee. A similar result was reached in *Weaver v. Ralston Motor Hotel, Inc.*,[11] in which the employee purchased gasoline for the account of his employer. The court found that the true purchaser was the employer, since the employee was merely an agent of the employer and his principal was disclosed. In *Parzini,* after holding that the Article II warranties were not available to the employee, the court went on to discuss the affects of Georgia Code §105-106, which provides in part:

> [T]he manufacturer of any personal property sold as new property, either directly or through a dealer or any other person, shall be liable in tort, irrespective of privity, to any natural person who may use, consume or reasonably be affected by the property and who suffers injury to his person or his property because the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended and its condi-

9. GA. CODE ANN. ch. 68-4A (1975).
10. 134 Ga. App. 414, 214 S.E.2d 700 (1975).
11. 135 Ga. App. 536, 218 S.E.2d 260 (1975).

> tion when sold is the proximate cause of the injury sustained; a manufacturer may not exclude or limit the operation thereof.

The court recognized that this language had adopted the warranties of merchantability and suitability for an intended use of §2-314 and §2-315 of the UCC.[12] The court discussed the question whether negligence must be shown to recover under the provisions of §105-106, since the action was in tort, and determined that it did not. The 1968 amendment to that code section imposes upon the manufacturers of new personal property "strict liability" for injuries to persons and property regardless of privity. The result is a hybrid statute that grants an injured party a cause of action for breach of an implied warranty without requiring privity and imposes strict liability upon a manufacturer without a showing of the manufacturer's negligence.

Redfern Meats, Inc. v. Hertz Corp.,[13] considered the question whether the implied warranty provisions of the UCC applied to a transaction that is denoted as a lease. Redfern entered a "truck lease service agreement" with Hertz for the rental of several tractors and refrigerated trailers. One of the refrigerating units on a trailer failed, and $7,574.74 worth of meat spoiled. Redfern brought suit against Hertz in two counts, alleging that Hertz had breached its implied warranty of merchantability and implied warranty of fitness for a particular purpose and that Hertz had breached its bailor warranty under Georgia Code §12-204. Hertz responded by pointing out a paragraph in the lease entitled "Non-liability for Contest," which provided: "Hertz shall not be liable for loss of or damage to any property left, stored, loaded or transported in or upon any vehicle furnished by Hertz to Customer pursuant to this Agreement, whether or not due to the negligence of Hertz, its agents or employees, and the Customer hereby agrees to hold Hertz, its agents and employees, harmless from and to defend and indemnify them from and against all claims based upon or arising out of such loss or damage." Code §12-204 provides: "The obligations of the bailor of things are . . . to warrant the right of possession, and that the thing bailed is free from any secret fault rendering it unfitted for the purposes for which it is hired."

The "non-liability for contest" paragraph of the leasing agreement was not in bold type or set apart from the rest of the body of the contract in any way. Redfern claimed that the disclaimer was ineffective, since Georgia Code §109A-2-316(2) requires an exclusion of the warranty of merchantability or the warranty of fitness to be in writing and be conspicuous. Hertz contended that Georgia Code §109A-2-316 did not apply to a Code §12-204 warranty. The court agreed with Hertz. Therefore, the exculpatory

12. GA. CODE ANN. §109A-2-314 (1973) (implied warranty of merchantability); GA. CODE ANN. §109A-2-315 (1973) (implied warranty of fitness for a particular purpose).

13. 134 Ga. App. 381, 215 S.E.2d 10 (1975).

clause contained in the leasing agreement effectively disclaimed the §12-204 warranty.

The court then considered the question whether the implied warranties of merchantability and fitness for a particular purpose applied. The court first held that implied warranties of the Uniform Commercial Code apply only to contracts for sale and do not apply to "true" leases. The court did, however, extend the UCC provision to include transactions that are analogous to a sale. In *Redfern,* the agreement was called a lease and the weekly rent greatly exceeded the weekly credit for depreciation allowed Redfern toward the purchase price; but Redfern was required to purchase the equipment if the lease were terminated before the end of the eighth year of the lease. On that basis, the court found the agreement to be analogous to a sale and the implied warranties of the UCC to be applicable.

In *Southern Protective Products Co. v. Leasing International, Inc.,*[14] the court faced a similar problem. Leasing International had leased two trucks to Southern Protective. The drive shaft "flew off" one of the trucks and damaged nearby vehicles owned by Southern Protective. Southern Protective sued Leasing International for the cost of repairing its vehicles, the cost of renting a replacement for the defective truck and the cost of repairing the defective truck, which was not covered by the manufacturer's warranty. Leasing International defended on the basis of a hold-harmless provision in the lease agreement. The court found that the bailor warranties of §12-204 had been disclaimed by the language in the master lease agreement. In this case, the lessee did not have available the warranty provisions of the UCC, since it was not obligated to purchase the equipment.

C. *Breach, Excuse and Remedy*

Wallace v. Aetna Finance Co.[15] was a case about an affidavit to foreclose a security interest in personal property. The debtor failed to answer or appear at the hearing, and Aetna made application for a default judgment for the balance due "as provided by Code, Title 67-704." The court of appeals held:

> Code §67-704 provides: "If the defendant fails to answer, the court shall grant a writ of possession and, *if otherwise permitted by this Chapter,* the plaintiff shall be entitled to a verdict and a judgment by default for all of the amount due, together with costs, in open court or chambers, as if every item and paragraph of the affidavit provided for in Section 67-702 was supported by proper evidence without the intervention of a jury." (Emphasis supplied.) This section allows a money judgment by default only "if otherwise permitted by this Chapter"; and since there is no provision elsewhere in the Chapter which would permit such a judgment, it may not be entered.[16]

14. 134 Ga. App. 945, 216 S.E.2d 725 (1975).
15. 137 Ga. App. 580, 224 S.E.2d 517 (1976).
16. *Id.* at 581, 224 S.E.2d at 518.

Lewis v. First National Bank of Miami[17] dealt with a motor vehicle purchased in Florida by a Georgia resident and financed by a Florida creditor. Subsequently, the motor vehicle was moved to Georgia, where it was repossessed by an agent of the creditor, a Georgia corporation, and resold. The creditor sued for a deficiency judgment. The sole issue presented was whether the rights of the creditor to a deficiency judgment were determined by the laws of Florida or by the laws of Georgia. The court held that without an agreement that the law of another state shall govern, the law of Georgia applies to repossession, resale and the right to a deficiency judgment if the collateral was located in Georgia at the time of the repossession and resale.

In another case dealing with a deficiency on a financed automobile, the court of appeals held that a novation is avoided where a creditor accepts late payments when the contract specifically provides:

> It is agreed that the waiver or indulgence of any default or the failure to exercise any right hereunder shall not be construed as an agreement to modify the terms of this agreement or to operate as a waiver of any subsequent default. It is further agreed that this instrument contains the entire agreement of the parties and may be modified or altered only in writing.[18]

The debtor was 30 days late in his payments twice, four months behind twice, and five months behind once. There was no notice to him that strict compliance with the original terms of the contract would be insisted upon. The debtor contended that Georgia Code §109A-2-209(2) made the contract provision inoperative, since it was not separately set out and separately executed by the parties. The court found that this provision of the Uniform Commercial Code applies only to merchants, and the creditor was not a merchant.

In a dissent, Judge Evans pointed to Code §20-116, which provides that when parties depart from the terms of the original contract and pay or receive money and the creditor later intends to insist upon payments on time as provided in the original contract, reasonable notice must be given to the debtor. Judge Evans felt that the contract provisions prohibiting a novation were contrary to public policyas expressed in §20-116 and therefore were void.

Georgia Code §53-503 was amended in 1969[19] to allow a married woman to bind her personal estate, composed of real property and intangible personal property, by a contract of suretyship guaranteeing the payment of the debts of her husband. In *Citizens and Southern National Bank v. Mann,*[20] Katherine E. Mann unconditionally guaranteed the full and

17. 134 Ga. App. 798, 216 S.E.2d 627 (1975).

18. Trust Co. of Georgia v. Montgomery, 136 Ga. App. 742, 743, 222 S.E.2d 196, 197 (1975).

19. Ga. Laws, 1969, pp. 72-73.

20. 234 Ga. 884, 218 S.E.2d 593 (1975).

prompt payment to the bank of all obligations of a Georgia corporation owned by her husband. The corporation defaulted, and the Citizens & Southern National Bank filed a complaint against Mrs. Mann. She defended the action on numerous grounds claiming that the 1969 amendment to §53-503 was unconstitutional. The supreme court rejected all of these arguments and found that the 1969 amendment conformed to all the provisions of both the state and federal Constitutions.

III. COMMERCIAL PAPER

Georgia Code §103-205 provides that a surety, guarantor or endorser, at any time after the debt on which he is liable becomes due, may give written notice to the creditor to proceed to collect the same from the principal; if the creditor refuses or fails to begin an action for three months after such notice, the endorser, guarantor, or surety giving the notice, as well as all subsequent endorsers are discharged. The following is the complete decision in *Central Bank and Trust Co. v. Price*:[21]

> This is an action against the guarantor of a promissory note. Pursuant to Code Section 103-205, the guarantor had notified the creditor in writing to proceed to collect the debt from the principals, setting forth their county of residence. The creditor failed to commence an action against them within three months after the notification, resulting in discharge of the guarantor. Code Section 103-205. Accordingly the lower court did not err in granting his motion for summary judgment.

An editorial note after §103-205 refers readers to a note under §103-201 "for the effect of the U.C.C. upon the subject matter of this section." That second editorial note states:

> This and the following sections insofar as they relate to the discharge of persons secondarily liable on negotiable instruments were superseded by former §14-902, which made provision for the discharge of the persons secondarily liable on negotiable instruments. The matter of such discharge is presently governed by the U.C.C. See §§109A-3-601(3), 109A-3-604(2), 109A-3-605, 109A-3-606.

It appeared that §103-205 had been repealed by the Negotiable Instrument Law and that this area would be controlled by the Uniform Commercial Code provisions on commercial paper. This obviously does not conform to the views of the court of appeals.

Citizens & Southern National Bank v. Plott[22] is another example of the dangers of computers. The plaintiff, Plott, took a judgment against "Julian R. Jordan, 1554 Piedmont Road, N.E., Atlanta, Georgia" in the

21. 136 Ga. App. 302, 303, 221 S.E.2d 71 (1975).
22. 135 Ga. App. 778, 218 S.E.2d 901 (1975).

amount of $30,000 plus interest and court costs. He later filed an affidavit of garnishment and had a summons served upon the Citizens & Southern National Bank. All of the bank's individual accounts were stored on electronic data-processing equipment. The bank made a search of these accounts for the name of "Julian R. Jordan" and then for the first-name initials "J" and "R" but no such account came to light. Going further, the bank searched its business records, which were not computerized. There it found an account in the name of "Jordan Jewelers," with "J. R. Jordan" listed as "self-owner." The signature card for the account contained nothing to indicate what the initial "R" stood for. Nor did it indicate any other account that may have been listed in a different name. The bank did, in fact, have an individual account in the name of "Mr. Bob Jordan." The court held:

> The fact that the garnishee bank's retrieval system for its account files failed to disclose to its officer in charge of answering garnishments the contents of the "Mr. Bob Jordan" file does not relieve the bank of its responsibility. Whether or not its retrieval system functions, it is on notice of the contents of its account files.[23]

The bank was obligated to pay the plaintiff the amount that went through the accounts of Mr. Bob Jordan during the time the garnishment was in effect.

IV. SECURED TRANSACTIONS

As usual, there have been a number of interesting cases decided in the area of secured transactions over the period covered by this survey. In *Leiden v. General Motors Acceptance Corp.*,[24] the court of appeals held that an attorney's lien under Georgia Code §9-613 for services to his client in collecting insurance proceeds under an automobile-casualty policy is subordinate to the rights of a lender who holds a security interest in the automobile and to whom a loss is payable under a mortgagee clause attached to the policy. The court pointed out that the debtor's attorney could gain no greater position than that held by his client. Since the debtor's interest under the casualty policy was subordinate to that of the lienholder, the attorney's lien was subordinate, too.

Enterprises Now, Inc. v. Citizens & Southern Development Corp.[25] presents an interesting question of priorities. A debtor with a long history of financial dealings with C&S Bank granted C&S a security interest in all of its inventory and equipment. When C&S learned that the debtor was planning to open a new store, it feared that the store would be stocked with

23. *Id.* at 778, 218 S.E.2d at 902.
24. 136 Ga. App. 268, 220 S.E.2d 716 (1975).
25. 135 Ga. App. 602, 218 S.E.2d 309 (1975).

inventory in which it had a security interest. So C&S obtained from the debtor a financing statement covering inventory and equipment in the new store. The financing statement was filed on June 5, 1972; the security interest that the statement was meant to cover was not perfected until March 5, 1973, when the debtor executed a security agreement to C&S and C&S advanced funds to the debtor.

Enterprises Now agreed to loan the debtor some money and to take a security interest in the same collateral covered by C&S's financing statement. The loan was negotiated on or about June 1, 1972, but was not perfected until June 27, 1972, when Enterprises Now filed its financing statement for record. The court reviewed the history of the loans and determined that both creditors had perfected security interests. The court then looked to Georgia Code §109A-9-312(5)(a) to determine which party had priority. That section states that when a security interest is perfected by filing, the order of filing determines priority. The court found that C&S's interest had priority, since its financing statement was filed for record before that of Enterprises Now, even though its security interest was perfected nine months later. The court said, "[T]he official comments of the Uniform Commercial Code provides that the justification for the rule lies in the necessity of protecting the filing system—That is, of allowing the secured party who has first filed to make subsequent advances without each time having, as a condition of protection, to check for filings later than his."[26]

Ford Motor Credit Co. v. Milline[27] dealt with the question of notice of default before repossession. Milline purchased a new 1971 Mercury, which he financed through Ford Motor Credit Company. In February 1972, the car was in a collision and Milline took the car to the dealer for repairs. While the car was being repaired, Milline rented a Comet sedan from the dealer. He became indebted for this rental car and for damages to the Comet while it was in his possession. After the repairs had been completed, Ford Credit repossessed the Mercury by taking it from the dealer's shop. In May 1972, Milline paid Ford Credit $1,235.24 to cover the delinquent payments, the insurance deductible on the Mercury, and the rental of the Comet plus the damages caused to the Comet. Through a clerical error by Ford Credit, the entire payment was credited on the finance company's books to the installment contract.

Several months later, the Mercury was in a second collision and Milline again took it to the dealer. While the car was there for repairs, Ford Credit discovered it had failed to obtain reinstatement of the plaintiff's physical damage insurance, which had been canceled after the first repossession. The mistake was admitted by Ford Credit, which voluntarily paid $1,913.28 to the dealer for repairs arising out of the "second wreck." After

26. *Id.* at 604, 218 S.E.2d at 311.
27. 137 Ga. App. 585, 224 S.E.2d 437 (1976).

the repairs were completed, Ford Credit decided to repossess the vehicle because of Milline's failure to make the payments. That was done on October 31, 1972, without prior written or oral notice to Milline and without notifying Milline of the finance company's decision to declare the entire balance due because of default. The automobile was removed from the dealer's possession without judicial process.

On the date of repossession, Ford Credit mailed Milline a form letter giving him notice of the repossession and the acceleration of the balance due under the contract. This notice informed Milline of his rights under the Motor Vehicle Sales Finance Act[28] and of Ford Credit's intention to pursue a deficiency. Milline, through his attorney, immediately demanded return of the automobile. Ford Credit refused to return the automobile unless the contract was made current. Milline declined and filed suit against the dealer and the finance company. A jury awarded Milline $4,500 for the value of the automobile, $3,650 for the hire, $4,415 as attorney fees, and $10,000 as punitive damages for the wrongful conversion of the automobile by Ford Credit. Ford Credit appealed.

The court, in making its decision, relied upon *C&S Motors, Inc. v. Davidson,*[29] which dealt with a self-help repossession under an installment-sales contract containing the following provision:

> If any installment of the debt hereby secured be not paid when due, or should there be any breach or default by Buyer in any of the terms, conditions, representations, warranties, or covenants contained herein, or if any execution, attachment or other writ be levied on the property, or if a petition under the Bankruptcy Act be filed by or against any Buyer hereon, or if any Buyer makes an assignment for the benefit of creditors, or if the holder of this contract at any time deems itself insecure, then said holder shall have the right, at its option, without demand or notice of any kind, to declare this contract in default, and to declare the unpaid Total of Payments immediately due and payable and to sue therefor; or to take possession of the Vehicle wherever it may be found, including all parts and equipment placed thereon, and thereafter sell the Vehicle all in accordance with Article 9 of the Uniform Commercial Code, or any other applicable laws of the State.

Interpreting this contractual provision, the court in *Davidson* held:

> The acceleration clause gave defendant the right, "at its option" to "declare" the contract in default and to "declare" the unpaid balance immediately due and payable. This required affirmative action by the defendant of notifying plaintiff of its election to declare the contract in default and to accelerate it to maturity. The peremptory taking of the automobile without notice does not suffice. The language in the instrument that no notice was required is meaningless and of no effect.[30]

28. GA. CODE ANN. §96-1001 *et seq.* (1976).
29. 133 Ga. App. 891, 212 S.E.2d 502 (1975).
30. *Id.* at 892, 212 S.E.2d at 503.

In the *Milline* case, the court affirmed its ruling in *Davidson*. It held that notice of both default and acceleration was required before a self-help repossession of the automobile. The court recognized the creditor's right to peaceably repossess the automobile, but it found that to do so without prior notice to the debtor was a conversion. These cases are disturbing, because the court equates default and acceleration. In *Milline*, the court stated it this way:

> However, the contract at bar also contains additional language which was passed upon by this court in *Chrysler Credit Corp. v. Barnes* and *C & S Motors, Inc. v. Davidson* [citations omitted] . . . [T]his court concluded that the acceleration clause language "required affirmative action by defendant of notifying plaintiff of its election to declare the contract in default and to accelerate it to maturity. The peremptory taking of the automobile without notice does not suffice."[31]

Default and acceleration should be recognized as two separate occurrences. Default is a failure upon the part of one party to the contract to discharge his obligations; acceleration is a contractual remedy of the creditor to be used when a borrower defaults. A creditor may declare a default with or without accelerating the remaining payments. Georgia Code §109A-9-503 provides: "Unless otherwise agreed a secured party has on default the right to take possession of the collateral." This section does not require notice to the debtor upon default, nor does it require acceleration prior to repossession. Acceleration is usually an optional remedy of the creditor and therefore is one that may require notice. Default generally is an automatic event that results from not complying with the contract provisions. While the language of the contract supports the court's ruling, the holding in these cases is antithetical to normal commercial practice. These cases should be limited to their facts. Indeed, another division of the court of appeals has reached a decision opposite the decisions in *Milline* and *Davidson*. *Horn v. Fulton National Bank*[32] held that a creditor's right to repossess is absolute once a default has occurred, and the secured party is not required to give notice of its intention to retake the property.

VI. Industrial Loan Act and Truth-in-Lending Act

The court of appeals in *Hodges v. Community Loan and Investment Corp.*[33] held that even though a loan contract was null and void under the Industrial Loan Act[34] because of usury, the lender could recover from the borrowers the principal due on the loan, as money had and received, and interest at 7%. The Supreme Court of Georgia reversed.[35] The court con-

31. 137 Ga. App. at 588-89, 224 S.E.2d at 440.
32. No. 52605 (Ga. App., Sept. 22, 1976).
33. 133 Ga. App. 336, 210 S.E.2d 826 (1975).
34. Ga. Code Ann. §25-301 *et seq.* (1976).
35. Hodges v. Community Loan and Inv. Corp., 234 Ga. 247, 216 S.E.2d 274 (1975).

cluded that the unambiguous language of Georgia Code §25-9903 required a holding that a contract made in violation of the Industrial Loan Act is null and void and that there can be no recovery of the principal in a suit for money had and received. Subsequently, the court of appeals decided a peripheral issue in *Household Finance Corp. of Atlanta v. Raven.*[36] Household Finance had made a loan that the borrower claimed was usurious under the Industrial Loan Act. The lender denied that the contract was void and sued to collect the balance due. The defendant filed a counterclaim for $100 as damages authorized by Code §109A-9-404.[37] The court found that the contract was indeed usurious and that the debtor therefore was entitled to the $100 penalty. The court said the penalty was due because the loan was void from its inception under Code §25-9903.

Last year's survey discussed a number of cases dealing with acceleration clauses that were decided under the Georgia Industrial Loan Act. Since then two more significant cases have been decided on the acceleration clause issue. The first was *Bell v. Loosier of Albany, Inc.*,[38] an en-banc decision of the court of appeals considering an acceleration clause in a retail installment contract made under the Georgia Retail Installment and Home Solicitation Act.[39] Judge Clark, in a well-reasoned opinion, reviewed all of the acceleration clause cases. He said the cases decided under the Georgia Industrial Loan Act held that a lender violated the usury provisions of that Act by including in its contract an acceleration clause that did not affirmatively provide for a rebate of all unearned interest upon acceleration when the creditor had contracted for the right to collect the unearned interest in the event of default. Judge Clark stated that these decisions were based on the peculiar language of the Georgia Industrial Loan Act, which provides that a creditor may not "contract for" usurious interest.[40] He then stated the general rule that any contract provision should be interpreted to conform to law if at all possible. The acceleration clause in the Loosier contract provided for acceleration of "the entire amount of the purchaser's indebtedness." Speaking for the court, Judge Clark held: "Accordingly, the proper construction of this language is to read therein the statutory rates."[41] Even though the language of the acceleration clause did not specifically provide for a rebate of all unearned interest, the majority held that such a requirement must be read into the acceleration clause to make it meet the requirements of the statute. A strong dissent was issued by Judge Quillian, who was joined in by Judge

36. 136 Ga. App. 424, 221 S.E.2d 488 (1975).

37. GA. CODE ANN. §109A-9-404 (1973) provides for a penalty of $100 if, within ten days after a proper demand for a termination statement, the secured party fails to send the statement.

38. 137 Ga. App. 50, 222 S.E.2d 839 (1975).

39. GA. CODE ANN. §96-901 *et seq.* (1976).

40. GA. CODE ANN. §25-315 (1976).

41. 137 Ga. App. at 54, 222 S.E.2d at 842.

Stolz and Judge Evans.

A similar result was reached in *Price v. Guardian Mortgage Corp.*,[42] which was decided under Georgia Code chapter 57-2 dealing with secondary security deeds. The acceleration clause in the case provided that "the entire unpaid principal sum evidenced by this note and interest shall be due upon default." The court held:

> The construction which will uphold a contract in whole and in every part is to be preferred. Code §20-704(4). "An intention contrary to the law should not be read into a contract by placing such a construction upon a provision therein, when the provision is just as susceptible of a construction that will show a lawful intention on the part of the parties." *Southern Loan Company v. McDaniel,* 50 Ga. App. 285, 286 (177 S.E. 834). We accordingly hold that the term "interest" as used in acceleration clauses means earned and accrued interest so that the 6% note is not usurious under Code Ann. §57-202(d).[43]

Taken together, *Bell* and *Price* go a long way toward clearing up the uncertainties created by the Industrial Loan Act cases beginning with *Lewis v. Termplan, Inc., Bolton.*[44] The effect of these decisions was to limit the holdings of Georgia Industrial Loan Act cases to contracts made under that particular statute. Presumably, the reasoning of *Bell* and *Price* extends to the general usury statutes and to the Georgia Motor Vehicle Sales Finance Act. The supreme court has affirmed the decision of the court of appeals in *Bell.*[45]

Two cases of particular interest have been decided under the Truth-in-Lending Act. In *John H. Paer v. Aetna Finance Co.*,[46] the U. S. District Court held that a post-maturity rate in excess of 7% simple interest in a sales contract is a "default, delinquency, or similar charge payable in the event of late payments" within the meaning of §226.8(b)(4) of Regulation Z.[47] In *Jones v. Community Loan & Investment Corp.*,[48] the Fifth Circuit held that a loan fee charged a debtor under the Georgia Industrial Loan Act must be disclosed as a prepaid finance charge under §§226.8(d) and (e)(1) of Regulation Z.[49] A motion for rehearing has been filed, and the Federal Reserve Board has submitted a brief in opposition to this ruling.

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42. 137 Ga. App. 519, 224 S.E.2d 451 (1976).
43. *Id.* at 521, 224 S.E.2d at 453.
44. 124 Ga. App. 507, 184 S.E.2d 473 (1971).
45. Bell v. Loosier of Albany, Inc., No. 30868 (Ga., Sept. 8, 1976).
46. No. C74-1144A (N.D. Ga., May 1976).
47. 12 C.F.R. §226.8(b)(4) (1976).
48. Nos. 74-3586, 74-3975, 74-4183 (5th Cir., Jan. 20, 1976), 5 CCH CONSUMER CREDIT GUIDE ¶ 98,485.
49. 12 C.F.R. §§226.8(d), 226.8(e)(1).

VII. Concluson

The heavy volume of case law in the commercial area is continuing unabated. It seems that both the attorneys handling these cases and the courts deciding them are gaining a greater degree of sophistication. If this trend continues, those of us handling commercial transactions will have a stable base of both statutory and case law from which to work.