Mercer Law Review

Volume 2
Number 1 *Annual Survey of Georgia Law*

Article 20

12-1950

# Security Transactions

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# SECURITY TRANSACTIONS

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Comparatively little litigation reached the Georgia appellate courts in this field, especially when one considers the extensive and continual use of the various security devices in real estate, business and legal activities. The cases will be classified and treated under descriptive headings.

## REAL PROPERTY SECURITY

*Reardon v. Bland*[1] was an action to cancel a security deed, and the sale of the property and deed executed under the power of sale therein, on the ground that the notes and security deed had been fraudulently procured for an excessive amount. An injunction was also sought to prohibit interference with the debtor's possession of the property, and to restrain the creditor from selling, encumbering or otherwise disposing of the property. The petition did not allege, however, that the debtor had paid or offered to pay any part of the actual indebtedness which the petition itself showed he owed the creditor, and the petition contained no offer to do so. The Supreme Court ruled that the petition therefore failed to state a cause of action.[2]

In *Butler v. Hazelrigs*[3] the petitioner sued to establish her equity in real estate. She alleged that her husband had sold her a one-half interest in the property and that she had paid him $700 for it, but that he refused to execute a deed thereof to her. The husband then gave another person a security deed to the property. In an earlier appearance of the case in the Supreme Court[4] a general demurrer to the petition had been overruled, since the petitioner *alleged* that the defendant had taken the security deed without consideration and with knowledge of the plaintiff's equity; but on the subsequent trial there had been no proof of such alleged lack of consideration or knowledge of the plaintiff's equity. Plaintiff having been nonsuited below, the Supreme Court accordingly affirmed. Also in *Schnuck v. West Lumber Co.*[5] it was sought to declare null and void a sale of real property under a power of sale contained in a security deed because $52.56 of a $10,000 building loan, for which the security deed had been given, had not been paid to the borrower. Such allegation was held insufficient to show that the debt was not in default at the time of the foreclosure, where it was not alleged that the borrower had attempted to procure the balance and had been refused, or that the application of such balance to the payment of the debt would have prevented a default.

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1. 206 Ga. 633, 58 S.E.2d 377 (1950).
2. *Citing* GA. CODE § 20-906 and 37-104 (1933).
3. 205 Ga. 425, 54 S.E.2d 266 (1949).
4. Hazelrigs v. Butler, 204 Ga. 98, 48 S.E.2d 727 (1948).
5. 205 Ga. 827, 55 S.E.2d 213 (1949).

In *Williams v. Rowe Banking Co.*[6] a loan had been made, and a note and security deed with power of sale were executed and delivered to the lender. The land was later sold to another, subject to the security deed, and the purchaser assumed the payment of the balance of the debt. The purchaser gave his own note for such balance to the security grantee, to replace the borrower's original note. After default, the purchaser sought to enjoin a sale of the land under the power and to cancel the security deed, contending that there had been a novation which extinguished the security deed and the power of sale. The Supreme Court held that the original note and security deed constituted a single contract; that the substitution of another payor in the note while the parties, terms and conditions of the deed remained the same, was a change in only one of the terms of the original contract; and that hence there had not been such an extinguishment thereof as to create a novation and destroy the power of sale. This result is, of course, proper, as the purchaser's contention was a mere flimsy technicality which did not accord with the understanding and intent of the parties to such a transaction.

In *Cordell v. Cordell*[7] the Supreme Court held that an answer alleging that a life tenant had paid from his own funds purchase money notes secured by a security deed to realty, and obtained an assignment of the notes and security deed, and that he had not agreed to make such payments as part of the consideration for the conveyance of the life estate to him, was sufficient to show that the life tenant was entitled to be subrogated to the rights of his assignors at the time of assignment, and to assert a lien against the realty for the payments which he had made. Defendant was not a mere volunteer, said the court, for he had a life estate in the property and was properly concerned with preserving that interest.

*Westbrook v. Beusse*[8] was a tort action by the grantee against a timber purchaser and the grantor in a deed to secure debt, because timber had been cut from the realty and sold by the security grantor in violation of an express provision of the security deed. Upon default, the grantee had accepted a warranty deed to the realty in satisfaction of the secured debt, but did not inspect the realty, and hence had not known that the timber had been cut. No fraud of the grantor prevented the grantee from so inspecting and no confidential relationship existed, according to the Court of Appeals, so that the statutes dealing with fraud by acts or silence, suppression of truth and concealment were not applicable. Since the courts will generally not give relief to a purchaser of realty who could have discovered by inspection the falsity of a vendor's representation, except where there is a confidential relationship between vendor and purchaser, or the purchaser is prevented by artifice or fraud from making an inspection, the grantee here was held not entitled to recover. A general demurrer to the petition having been sustained below, the whole Court of Appeals affirmed, four to two. One of the majority judges, who concurred specially, pointed out that Code Section 105-1412, which gives the holder of a security deed a right to sue for conversion of timber from the land held as security and to recover up to the unpaid balance of the debt, could not be applied here be-

6. 205 Ga. 770, 55 S.E.2d 123 (1949).
7. 206 Ga. 214, 56 S.E.2d 251 (1949).
8. 79 Ga. App. 654, 54 S.E.2d 693 (1949).

cause the debt for which the security deed was given had been extinguished. The two dissenting judges, however, felt that the express contractual obligation not to cut timber, which was contained in the security deed, made the grantor in effect a trustee, and he had a duty to disclose the cutting, so that there was no negligence on the plaintiff's part on failing to inspect. The policy of the rule, said the dissenting judges, is to prevent frauds, not to encourage them, as would be done under the result reached by the majority.

## PERSONAL PROPERTY SECURITY

In *Scoggins v. General Finance & Thrift Corp.*[9] a contract for a conditional sale of an automobile was properly recorded in the county of the buyer's residence within 30 days of the date of its execution. The buyer made a loan on the car from a bank, however, and executed to it a bill of sale to secure debt, which was recorded before the conditional sale contract. In a trover action it was held that the registration of the conditional bill of sale gave constructive notice of its existence from the date of its execution under Code Section 67-1403, while constructive notice of the security bill of sale was given only from the date of its filing for record under Code Sections 67-1304 and 29-401. Thus the plaintiff's later recorded conditional bill of sale, by virtue of this retroactive effect, prevailed over the earlier recorded security bill of sale. Defendant in the action had bought the car from the original conditional vendee, knowing only of the claim of the bank, and had paid the bank the amount due it. As the conditional vendor's rights were superior to the bank's, however, the Court of Appeals held that the plaintiff was not required to tender to the defendant the amount he had paid the bank as a condition precedent to maintaining the action.

*Colonial Finance Co. v. Anthony*[10] involved the requirement of Code Section 67-108 that any mortgage on personal property located outside the state must be recorded within six months after said property is brought into the state, otherwise the mortgage lien is divested as to *bona fide* purchasers for value without notice. There had been such a failure to record here an Ohio chattel mortgage upon an Ohio automobile which had been brought into Georgia. The car had been sold in Georgia to a *bona fide* purchaser who had no notice of the mortgage; it was therefore held that the mortgagee could not foreclose the mortgage as against such purchaser. The purpose of this statute is to protect innocent purchasers without notice from claims or liens which it might be impossible to discover in the course of a prudent investigation, and to provide for stable regulations under which title to personalty may be legally transferred. As the court put it:

> " . . . Most of our States now have recording statutes designed to protect their citizens against unknown claims and liens which it would be impossible for them to discover. Unless some such protection were afforded, in the present state of mobility of such articles as motor vehicles, it would be a practical impossibility to carry on the transfer and sale of goods with any degree of security. Therefore, in the absence of other circumstance, such as fraud or

9. 80 Ga. App. 847, 57 S.E.2d 686 (1950).
10. 79 Ga. App. 763, 54 S.E.2d 326 (1949).

> estoppel, the mortgagor who wishes to protect his lien must follow the procedure outlined. It is true, in some cases, he may have difficulty in following the property within the time allowed by law, but it is both easier and more equitable for him to do this, after voluntarily parting with its possession, than for a buyer of personal property to be required to locate liens and claims the only record of which exists in some unknown State."[11]

*General Motors Acceptance Corp. v. Monday*[12] was a case not without its amusing aspects, particularly to the veteran who never attained the rank of, or lost his aversion to, the exalted personage known as a sergeant. A private first-class in 1948 bought a used 1946 Oldsmobile; a balance of $1,400 over the down payment was covered by a conditional sale agreement. Twenty-five days later he sold the car to a sergeant, with the extraordinary name of Fine Monday, representing the title as free and clear. The duped sergeant acted in good faith and did not know of any claim or lien against the car; he gave the seller in exchange a Buick worth $1,250 plus $1,038 in cash, and took a bill of sale. Upon default under the conditional sale agreement, the conditional vendor foreclosed. The sergeant naturally defended what ought to have been his property. It does not appear from the report that the sergeant had before purchasing searched the records of Dougherty County, in which the air base was located at which both he and the private were stationed, to ascertain whether any lien appeared of record against the car; nevertheless his attorneys asserted, in support of his claim to the car, that the failure to record in Dougherty County invalidated the plaintiff's conditional sale agreement, even though it had been recorded in Grady County where the private had his actual legal residence, and where his family lived. The car had been kept by the private, and thus located, from purchase to resale, at his barracks in Dougherty County, except when he visited his family in Grady County. Since the registration and record of conditional bills of sale are controlled by the laws relating to the registration of chattel mortgages[13] and a provision of Code Section 67-108 requires that "All chattel mortgages of stocks of goods, wares and merchandise, or other personal property" shall be recorded not only in the county of the mortgagor's residence but, if said property is located at the time of execution of said mortgage in another county, in that county also, it was argued on Sergeant Monday's behalf that this provision applied, and recording in Dougherty County also was required. The trial court was persuaded to render judgment in the sergeant's favor. The Court of Appeals reversed, however, holding that this was obviously a misconstruction, and that the doctrine of *ejusdem generis* made the provision applicable only to situations such as that of a merchant or other tradesman living in one county and conducting a store or business in another. Since keeping and storing automobiles in Dougherty County was not the private's business, the only requirement in Code Section 67-108 which did apply in order to create constructive notice was that calling for recording in the county of the mortgagor's residence. The court pointed out that the base where a person in military service is stationed is not necessarily his "residence," since residence is controlled by a person's

11. 79 Ga. App. at 765, 54 S.E.2d at 328 (1949).
12. 79 Ga. App. 609, 54 S.E.2d 479 (1949).
13. GA. CODE ANN. § 67-1403 (Supp. 1947).

intention. Result: "Fine Monday" reverts to the more familiar "Blue Monday."

By Act No. 527[14] the statutory provisions as to filing an affidavit to extend the effectiveness of recorded personal property lien instruments after seven years,[15] formerly inapplicable only as to property of railroad corporations and their receivers and trustees alone, were made not applicable also to property owned by, or sold or leased to, or agreed to be sold or leased to, street railroad corporations, electric or gas corporations, or other public utility corporations, or their receivers, trustees or other legal officers in possession of or operating them.

## MECHANICS' AND MATERIALMEN'S LIENS

*Marshall v. Peacock*[16] ruled that in a proceeding to foreclose a materialman's lien, the plaintiff must show that the amount for which he asserts a lien comes, in whole or in part, within the contract price agreed upon by the contractor and the owner of the property improved;[17] hence a petition which failed to show that there was a contract with the owner of the property, or that the owner adopted the contract as one made for him, or that the lien covered in whole or in part the contract price of the materials furnished by the petitioner, did not state a cause of action to foreclose such a lien. As the court stated:

> "In *Central of Georgia Railway Co. v. Shiver, supra,* [125 Ga. 221, 53 S.E. 611] in a proceeding to foreclose a materialman's lien, it was held in part: 'It seems to be the purpose of the statute to charge the owner of real estate with a lien for material furnished only when there was a specific contract for the improvements made, either made by the owner or assented to by him . . . The statute provides that 'in no event shall the aggregate amount of liens claimed exceed the contract price of the improvements made.' There could be no limit upon the true owner's liability for material furnished, unless the material was furnished under some contract to which he was a party expressly or by implication . . . There need be no contract between the materialmen and the true owner, but there must be a contract for material with a person who has contracted with the true owner for the erection of the improvements. A contract is necessary to fix the liability of the owner, and establish a privity between him and the materialman. A stranger may not order work done upon real estate and thus charge the true owner. Neither may a tenant, unless there is some relation existing between him and his landlord other than that of lessor and lessee.' See Code, § 67-2001 (2); *Reppard v. Morrison,* 120 *Ga.* 28 (47 S.E. 554); *Picklesimer v. Smith,* 164 *Ga.* 600, 607 (139 S.E. 72); *Georgia State Savings Association v. Wilson,* 189 *Ga.* 21 (5 S.E.2d, 14); *Rutland Contracting Co. v. Sallie E. Gay Estate,* 193 *Ga.* 469 (18 S.E.2d, 835).
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> "The plaintiff does not allege that he had a contract with Jenkins or any other person to furnish materials, nor does he allege that the lien which he seeks to have foreclosed covers, in whole or in part, the contract price of the materials. In the absence of allegations of a contract, and the amount to be paid under the contract for materials, the petition failed to state a cause of action for any affirmatice relief. . . ."[18]

In *Chambers v. Williams Bros. Lumber Co.*[19] it was ruled that in an action to recover for lumber furnished to contractors, and to have a special

14. Ga. Laws 1950, p. 33.
15. GA. CODE ANN. §§ 67-2504 — 67-2508 (Supp. 1947).
16. 205 Ga. 891, 55 S.E.2d 354 (1949).
17. *Citing* GA. CODE ANN. § 67-2001(2) (Supp. 1947).
18. 205 Ga. at 893, 57 S.E.2d at 355-6 (1950).
19. 80 Ga. App. 38, 55 S.E.2d 244 (1949).

lien established against the owner of the house constructed by the contractors, the plaintiff must show, to recover against the owner, that specific material of the value alleged was delivered on the property of the owner and was used by the contractors in the construction of the house; that within three months from the date the materials were so furnished the plaintiff recorded a claim of lien; and that the plaintiff commenced an action for recovery of the claim within twelve months from the time it became due. While the plaintiff was held to have established its claim against the contractors in this case, it failed in the claim against the owner, since the court found that it did not appear sufficiently from the evidence that the specific material of the value alleged was delivered on the owner's premises or used in his house.

*Cowart v. Reeves*[20] involved Code Section 67-2002(3), which provides that if a contractor procuring materials for improving real estate shall "abscond" or "remove" from the state within twelve months after the debt becomes due, so that personal jurisdiction cannot be obtained of him in a suit for the materials, the person furnishing the materials shall be relieved of the need to obtain judgment against the contractor as a prerequisite to enforcing a lien directly against the property improved. Even though the statute must be strictly construed, it was held to apply to resident and non-resident contractors, and to one who has no permanent residence, and to mean removal from the place where the work was done to a place beyond the court's jurisdiction. A materialman's action to establish a lien on the property could therefore be maintained if brought within twelve months, said the court, even though the contractors, who could not be served within the twelve months, had been non-residents when they did the work. The fact that one such non-resident contractor subsequently returned to the jurisdiction, and was served with process after the twelve months had expired, was immaterial. The court also held that interest on the amount of such materialman's lien does not run until after rendition of the judgment, as the amount thereof becomes liquidated only after such judgment fixing it. The owner of the property had in this case transferred legal title under a security deed prior to making the improvements, and the grantee in such security deed had not been joined as a party to the action. The court held that such grantee was not a necessary party, but that his interest would not be affected; it accordingly directed that the judgment be amended so as to be specifically subject to the security grantee's interest.

## SURETY BONDS

In *Southeastern Construction Co.* for use of *Gill Equipment Co. v. Glens Falls Indemnity Co.*[21] a performance bond had been furnished by a subcontractor to a contractor on construction work. A materialman who furnished material to the subcontractor was held entitled to maintain an action on the bond. In order to determine its meaning, the bond was construed together with (1) the contract between the principal contractor and sub-

20. 80 Ga. App. 161, 55 S.E.2d 911 (1949).
21. 81 Ga. App. 764, 59 S.E.2d 747 (1950).

contractor and (2) the contract between the owner and the principal contractor. The first called it "a payment and a completion bond"; the provisions of the second, incorporated by reference into the first, were held to make it a contract to furnish *and pay for* labor and materials. The Court of Appeals stated:

> " . . . A performance bond guaranteeing performance of a contract agreeing to furnish and pay for labor and materials as effectively runs to laborers and materialmen as does a bond indemnifying a named obligee against loss and also guaranteeing that the contractor would pay laborers and materialmen, especially if it is a bond complying with a contract to furnish a payment bond, which could have but one purpose and that is to guarantee the payment of laborers and materialmen. We can see no distinction between an agreement to furnish and pay for labor and materials and one agreeing to pay laborers and materialmen for the labor and material they furnish. Payment could only be made to the ones who furnished the labor and materials."[22]

In a kindred case, *Southeastern Construction Co.* for use of *Beckman v. Glens Falls Indemnity Co.*,[23] there was involved a claim by another materialman to recover a penalty and attorney's fees under Code Section 56-706 because of the surety company's refusal to pay under the same bond. The Court of Appeals held, however, that the surety company's liability to a materialman thereunder was in such high degree of doubt as to constitute reasonable cause for refusing payment, and to negative any imputation of bad faith on its part, so that such penalty and attorney's fees could not be recovered.

*Gunby* for use of *Bogle v. Roberts*[24] ruled that a petition stated a cause of action against a surety on a guardian's bond under Code Section 49-237 when it alleged that the guardian received and wasted his ward's money, failed to collect notes and enforce payment of a judgment in possession of the ward, was beyond the jurisdiction of the court and was a debtor liable to attachment, even though it contained no allegation that the guardian had been removed, or that his letters had been revoked.

22. *Id.* at 768, 59 S.E.2d at 750 (1950).
23. 81 Ga. App. 770, 59 S.E.2d 751 (1950).
24. 79 Ga. App. 645, 54 S.E.2d 448 (1949).