Mercer Law Review

Volume 3 | Number 1 Article 22

12-1951

Security Transactions

Eli M. Spark

SECURITY TRANSACTIONS

By ELI M. SPARK*

The cases in this field during the period covered were both more numerous and more varied than in the preceding corresponding period.

REAL PROPERTY SECURITY

Blanchard & Calhoun Realty Co. v. Fogel[1] held that where there was an acceleration clause in a security deed and a note, the two papers referring to each other, and the acceleration clause providing that any "deficiency" in the payment of any monthly installment should constitute a default if not paid prior to the due date of the next installment, the one-month grace period so provided was available to the grantor whether the "deficiency" was caused by nonpayment of an *entire* installment or of only a *part* of an installment. The grantor was awarded a temporary restraining order and injunction to prevent the grantee from exercising the power of sale in the deed.

Defendant, in *Parker v. Cherokee Building Supply Co.*,[2] in another action had sued to foreclose a laborer's lien against his son in violation of an agreement with Cherokee, supplier of materials for the son's home, and he obtained judgment. Before sale of the property under the judgment, Cherokee sued to enjoin the sale and to set aside defendant's judgment, but the court, with the consent of the parties here, directed the sale to be made, the proceeds to stand in lieu of the property to satisfy the respective lien claims, which, were then still *sub judice*. Cherokee purchased at the sale. The Supreme Court held valid the sale of the property as directed by the court below although the foreclosure judgment was later set aside, but the rights of the lien holders could thereafter be asserted only against the proceeds from the sale.[3] A second foreclosure judgment which defendant later obtained was therefore properly set aside as a cloud on Cherokee's title.

West Lumber Co. v. Schnuck[4] involved both the law of sales and security law. Plaintiff sought to recover the value of construction materials, approximating $8,800, sold to the defendant, who had earlier given to another a note and loan deed of the same property to secure a construction loan of $10,000. Plaintiff had acquired the note and loan deed by transfer, and in a foreclosure sale purchased the property at $12,000, later reselling the same for $26,500. Cross-action by defendant alleged that the sale of the materials was on open account,, that plaintiff had agreed to give defendant a reasonable time to sell the property before demanding payment therefor, that the property was worth $30,000 to $35,000, and that plaintiff's pur-

*Professor of Law, Walter F. George School of Law, Mercer University; A.B., 1926, College of the City of New York; LL.B., 1929, Fordham University; Member New York, Georgia and U. S. Supreme Court Bars, Georgia and American Bar Associations.

1. 207 Ga. 602, 63 S.E.2d 382 (1951).
2. 207 Ga. 710, 64 S.E.2d 51 (1951).
3. The opinion cited GA. CODE §§ 67-2301 (3), 110-501 (1933).
4. 82 Ga. App. 799, 62 S.E.2d 370 (1950).

chase of the security deed and foreclosure thereunder constituted a breach of contract and an estoppel to deny payment in full. Judgment for defendant was reversed and new trial granted because of insufficient evidence of defenses to submit to the jury and erroneous charges by the court. The Court of Appeals held proper, however, the charge that if the jury found an agreement made respecting time of payment for the materials, as contended by defendant, the sale was one on credit, and plaintiff's failure to observe the terms would constitute a breach entitling to recovery on the cross-action.

Several points of security deed law were developed in a land registration proceeding.[5] It was there held that claim of title by the applicant under a deed executed June 1, 1938, could not prevail as against a claim by the defendants under a chain of title beginning with foreclosure under a security deed with power of sale executed by the same grantor and dated March 27, 1920, where the grantor, if he paid the indebtedness (as alleged by the applicant), failed to secure cancellation of the security deed and satisfaction of record, the defendants being purchasers for value and without notice. Ruled out as evidence of payment and satisfaction of the security deed because not complying with Code Section 67-1306, was the following notation on the security deed: "Sept. 12/27, the note this deed secures having been paid but having been misplaced. It is not held by anyone else. [Signed] A. T. Small." The applicant here, the court held, could not object that the foreclosure sale was void or voidable because foreclosure was had only against one of the two tracts of land covered by the security deed (the omitted tract in the foreclosure sale had a prior lien thereon). The right to disaffirm such sale was personal to the grantor, and to be exercised within a reasonable time; even as to him it could not be availed of in the "absence of any allegation or proof that the . . . tract was worth in excess of the amount of the prior lien . . . "[6]

Williams v. O'Connor[7] was a common law ejectment suit brought by the heirs of the grantee in a prior security deed, against the purchasers at a foreclosure sale under a later security deed. The debt secured by plaintiffs' deed was over twenty years past due. The Supreme Court ruled that, as the statute[8] provides that in such case title reverts to the grantor, plaintiffs' deed should have been excluded from evidence.

Personal Property Security

In *East Atlanta Bank v. Nicholson*[9] defendant had left certain autos with a used car dealer to sell and divide the profits. Instead of selling them, the dealer executed a bill of sale to plaintiff bank to secure loans made against them. The bank relied wholly on the dealer's word that he owned the cars, and defendant did nothing to mislead the bank into lending on them. On these facts, in a trover action by the bank against defendant, it was held that defendant was not estopped from asserting his title as against

5. Burgess v. Simmons, 207 Ga. 291, 61 S.E.2d 410 (1950).
6. Reference is made by the court to GA. CODE §§ 67-1305 and 67-2501 (1933) in the opinion.
7. 208 Ga. 39, 64 S.E.2d 890 (1951).
8. GA. CODE ANN. §§ 67-1308, 67-1315 (Supp. 1947).
9. 83 Ga. App. 557, 63 S.E.2d 699 (1951).

the bank, under Ga. Code Section 37-113 (which provides that when one of two innocent persons must suffer by the act of a third, he who put it in the power of the third person to inflict the injury shall bear the loss), nor divested of his title by virtue of Ga. Code Section 96-207 (which provides that when an owner gives another "such evidence of the right of selling his goods as, according to the custom of the trade or the common understanding of the world, usually accompanies the authority of disposal," or "the external indicia of the right of disposing of his property," an innocent purchaser acquires the true owner's title). The jury's verdict for the defendant was thus held to be authorized, and the new trial motion held properly overruled.

In *Rose City Foods v. Bank of Thomas County*,[10] two security bills of sale upon four motor vehicles, held by the defendant bank, contained a "dragnet" clause which purported to secure the bank for "any and all other indebtedness now due . . . or hereafter incurred by me directly or indirectly . . . " Plaintiff, who was another creditor of the bank's debtor, purchased the motor vehicles subject to the security bills of sale held by the bank at a time when the bank's claim had been reduced to only $1,148.33. The bank, which had notice of plaintiff's purchase, subsequently acquired by transfer (as a payment on an antecedent debt) from a third party creditor of the same debtor an additional claim in the amount of $1,681,28. It was held that plaintiff was not entitled to have the two bills of sale cancelled of record until the bank received payment in full of the subsequently acquired claim as well as of the earlier balance of $1,148.33.

In *Pethel v. General Finance Thrift Corp.*[11] suit was brought to recover a balance due on promissory notes secured by bills of sale to autos. The security vendee had sold some of the cars and entered credits against the loans on its ledger. It had also entered on its ledger, on dates other than received, amounts paid by the security vendor in checks which were later dishonored. Different balances were due, as figured from the amounts received from the sale of the autos and from the security vendee's evidence. The Court of Appeals ruled that the vendee had failed to sustain the burden of showing in detail what the credits were. The sale by the vendee, under the security bills of sale, was as agent or attorney in fact for the security vendor; since as such he owed the vendor good faith and due diligence, he would have to show manner of sale, to whom sold, and selling price of each car before a deficiency judgment would be given against the vendor.

In a statutory foreclosure proceeding of a retention title contract,[12] plaintiffs were held not entitled to collect attorney's fees, for noncompliance with the statutory provisions[13] making obligations to pay attorney's fees in addition to interest void, unless the holder gives ten days notice in writing of intention to sue and the debtor fails to pay the debt on or before the return day of the suit.

Bell v. Tyson[14] had to do with the right to file a second affidavit of illegality in a statutory foreclosure of a security bill of sale. Although the first

10. 207 Ga. 477, 62 S.E.2d 145 (1950).
11. 83 Ga. App. 562, 63 S.E.2d 907 (1951).
12. Dupree v. Blankenship, 83 Ga. App. 664, 64 S.E.2d 457 (1951).
13. GA. CODE ANN. § 20-506 (Supp. 1947).
14. 83 Ga. App. 743, 64 S.E.2d 693 (1951).

affidavit was withdrawn or dismissed without trial, said the Court of Appeals, a second affidavit alleging that the facts stated therein were not known, and by the exercise of reasonable diligence could not have been known, when the first affidavit was filed, was insufficient to entitle defendant to have it considered, when the facts so alleged in the second affidavit, and their nature and circumstances, indicated that they existed and must have been known to defendant when the first affidavit was filed. The rule as to a second affidavit is found in Rule 48 of the Rules of the Superior Court (Ga. Code Ann. § 24-3348).

MECHANICS' AND MATERIALMEN'S LIENS

In *Cheshire v. Engelhart*[15] the Court of Appeals ruled that one engaged by a general building contractor to do electrical work could not claim and foreclose a lien, in a suit against the building owner, for a balance due for labor and material furnished by him to the general contractor, without previously or concurrently suing the contractor for such balance. As the court stated,[16] quoting from a Supreme Court case:

> The reason of the rule is that the landowner should not be called on to pay a debt he did not contract, and for which his property is liable only by force of a statute, until the materialman has established by judgment, in a proceeding to which the contractor is a party, that the contractor owes to him the amount for which he is seeking to assert his lien. *Pike Bros. Lumber Co. v. Mitchell*,132 Ga. 675, 676, 64 S.E. 998, 26 L.R.A. (N.S.) 409 (1909).

In *Langford v. Edmondson*,[17] however, it was held that where a prime contractor was adjudicated bankrupt during the time a subcontracting materialman was performing his contract, the materialman need not bring suit against the prime contractor before perfecting his lien against the property.[18] The court ruled also that the owner of the realty could defend against foreclosure of such lien by showing that he had paid the full contract price, and that the prime contractor had in turn applied the proceeds to accounts which would or might have become liens on the property; but he must produce factual evidence thereof, and mere conclusions will not suffice.

MISCELLANEOUS LIENS

United Bonded Warehouse, Inc. v. Jackson[19] was a suit based upon unpaid salary due to a secretary-stenographer, *i.e.*, a clerical employee. Such employee was ruled not to be entitled to a general laborer's lien or to a special laborer's lien, under the respective statutes,[20] since no manual labor was involved. Where such employee, as plaintiff, alleged that if a warehouseman was permitted to complete its public sale of the employer-defendant's goods, on which it had a storage lien, said property would not bring as much as could be obtained by a private sale, the trial court was held to have erred in appointing a receiver of the employer-defendant and an auditor, and in enjoining the sale, in the absence of any claim against the

15. 82 Ga. App. 458, 61 S.E.2d 434 (1950).
16. *Id.* at 458-459, 61 S.E.2d at 435.
17. 82 Ga. App. 494, 61 S.E.2d 558 (1950).
18. Citing GA. CODE ANN. § 67-2002 (3) (Supp. 1947).
19. 207 Ga. 627, 63 S.E.2d 666 (1951).
20. GA. CODE §§ 67-1801, 67-1802 (1933).

warehouseman or any charge of misconduct or fault. That error, said the Supreme Court, rendered all subsequent proceedings nugatory, so that failure to except to the auditor's report did not render it binding, and the warehouseman did not, upon a reversal, have to pay any share of the expenses and costs of the proceeding. Before an unsecured creditor can obtain an injunction, receivership or other equitable relief, it must appear clearly that there is a present manifest wrong or injury imminently impending.

The respective rights of landlord, cropper, and crop lienor were involved in another case.[21] While the title to crops, as between landlord and cropper, remains in the landlord until payment of all advances from him to the cropper and the division of the crop, a third party, who made advances to the cropper at the landlord's request and on the landlord's waiver of all liens against the crops in favor of such third party's lien, was held to have a lien thereon superior to the landlord's interest, under Ga. Code Section 61-502. After payment to the landlord for all advances by him, the cropper has title to his share of the crop, and thus has a mortgageable interest in crops grown by him despite his landlord's title thereto. The landlord cannot make claims against the crops for indebtedness for previous years, that will defeat a third party's lien for advances to the cropper. A special agreement may vary the landlord's statutory rights as to the crops. The landlord here having expressly waived his liens on the crops to induce the Credit Association to give the cropper advances necessary to make the crops, his later appropriation to his own use of the proceeds of their sale (which were sufficient to satisfy the Credit Association's lien for such advances), will result in his being declared a trustee *ex maleficio* for the Credit Association, under Ga. Code Section 108-107, and the Credit Association thus entitled to recover the full amount which it has advanced on the tenant's note and security bill of sale of the crops.

SURETYSHIP

The distinction between suretyship and guaranty was at the root of the decision in *Erbelding v. Noland Co.*[22] After goods had been sold and delivered to a corporation on open account which became past due, an officer and stockholder executed a contract guaranteeing payment of the account in consideration of an extension of time for payment, and waiving notice of nonpayment and of failure to collect the account. Such individual was held to have been made thereby only secondarily and collaterally liable, the contract being properly construed as one of guaranty and not suretyship; hence before action could be maintained on the contract, it had to appear that the corporate principal debtor was insolvent, or unable to respond to any judgment against it. The lower court had overruled a demurrer to the petition based on the omission of such allegations; the Court of Appeals reversed. It quoted the faulty doctrine of Ga. Code Section 103-101, which purports to distinguish between suretyship and

21. Trapnell v. Swainsboro Production Credit Assn., 208 Ga. 89, 65 S.E.2d 179 (1951).
22. 83 Ga. App. 464, 64 S.E.2d 218 (1951).

guaranty, but stated that that was only one of the distinctions, and reviewed other distinctions made by leading Georgia cases.[23]

The by-products of the W. T. Rawleigh Co. business seem to include a certain proportion of the Georgia cases on points of suretyship and guaranty law. One hardy perennial, which has gone through four trials, was passed on by the Court of Appeals for the third time.[24] The *Pain v. Packard*[25] doctrine was involved, as codified by Ga. Code Section 103-205. Williams, as principal, had bought goods from Rawleigh under successive contracts. One ran to December 31, 1930, the second to January 31, 1932. Overstreet, Davis and Cato, the defendants in this action, were sureties on the first contract; the same Cato and one Forbes were sureties on the second. By a provision in the second contract, the sureties thereunder were liable for "all goods . . . previously sold . . . under and by virtue of any and all prior contracts or agreements" to Williams. The sureties on the first contract gave written notice to the creditor to sue Williams, a resident of Chatham County. When later sued under the first contract, the sureties contended that they had been discharged under said statutory provision because no suit had been brought against Williams pursuant to the notice. Rawleigh contended that its commencement of a suit against Williams as principal and Cato and Forbes as sureties in Chatham County on the *second* contract was a compliance with the notice from the present defendants; furthermore, that the deputy's return in that action said that Williams could not be found in his bailiwick, and the present defendants, not having traversed it, were bound by such return. The trial court ruled otherwise, and gave judgment for the defendants, which the Court of Appeals affirmed. The suit on the second contract "was not on the obligation now involved," said the appellate court; also, since the present defendants were not parties to that suit, they were not bound to traverse the officer's entry of nonservice to avoid becoming bound thereby. Another suit which Rawleigh attempted to bring against Williams and the present defendants on the *first* contract, alleging that Williams was a resident of Richmond County, but which was not pursued against Williams (who was never served, not being in fact in that county) was likewise held no compliance by the creditor with the statute's requirement. Said the court:

> . . . Such a holding would be manifestly unfair to a surety. He is entitled under the law to have the creditor sue the principal debtor, if he can be found. See *McCarter v. Turner*, 49 Ga. 309, 312. Such was the purpose of the General Assembly in the enactment of the above Code section.[26]

And further:

> . . . There was no suit in the county of the principal debtor's residence, to which these sureties were parties, where the sheriff made an entry that the Principal debtor was not to be found therein. *Watkins Co. v. Seawright*, 40 Ga. App. 314, 149 S.E. 389. In such a case there would have been no necessity for the filing of a suit in response to the notice.[27]

23. Manry v. Waxelbaum, 108 Ga. 14, 33 S.E. 701 (1899); Etheridge v. W. T. Raleigh Co., 29 Ga. App. 698, 702, 116 S.E. 903, 905 (1923); Heard v. Tappan & Merritt, 116 Ga. 930 (1), 43 S.E. 375 (1903); Musgrove v. D. E. Luther Publishing Co., 5 Ga. App. 279, 281, 63 S.E. 52, 53 (1908).
24. W. T. Raleigh Co. v. Overstreet, 84 Ga. App. 21, 65 S.E.2d 50 (1951).
25. 13 Johns. 174 (N.Y. 1816).
26. 84 Ga. App. at 26, 65 S.E.2d at 54.
27. 84 Ga. App. at 25, 65 S.E.2d at 53.

SURETY BONDS

In the 1949-1950 Annual Survey of Georgia Law[28] there were reviewed the Court of Appeals decisions in *Southeastern Const. Co. for use of Gill Equip. Co. v. Glens Falls Indemnity Co.*[29] and *Southeastern Const. Co. for use of Beckham v. Glens Falls Indemnity Co.*[30] The Supreme Court thereafter reviewed on certiorari and reversed in a 4-3 decision, these two and a third related case.[31] It ruled that the surety company's completion bond covering the contract between the prime contractor and a subcontractor, which indemnified the prime contractor for the performance and fulfillment of the subcontractor's agreement to furnish, provide and pay for all labor and material, created no privity between the surety and materialmen who furnished such subcontractor with labor and materials; it was therefore not a bond under which such materialmen could sue the surety. It cited Ga. Code Section 103-103 and several earlier Supreme Court decisions[32] as determinative. The Court of Appeals accordingly, in three separate decisions,[33] then vacated its judgments which had reversed the trial court, and instead affirmed the trial court's judgments.

White v. Trippe[34] involved a building wrecking contract which provided that the wrecker as principal and another as "security, hereby agree to make bond" in $1,000 payable to the owner "in the event that he suffers damages for the failure of the (wrecker) . . . to comply with the provisions herein, or failure to complete by date agreed on." The surety paid the owner the $1,000 on the wrecker's breach, and took an assignment of the owner's claim. As assignee, he sued the wrecker to recover the amount paid. The contract provisions were ambiguous, the court ruled, so that whether they were intended themselves to be the bond or suretyship contract or merely an agreement to execute another instrument as a bond was a jury question. Furthermore, plaintiff's petition did not state a cause of action against the principal unless it showed that the owner had been damaged by the breach.

Whether a bond was a sealed instrument, for the purpose of determining the applicable statute of limitations, was the problem in *Chastain v. L. Moss Music Co.*[35] A forthcoming bond given in 1939 contained a recital at the bottom that it was signed and sealed. The principal signed on the right-hand side under this recital, with the word "Seal" after her name; on the left-hand side, where an officer approving the bond should have signed, the surety signed his name followed by the letters "L.C." There was apparently a place on the right-hand side, below the principal's signature, for the surety's signature, with the word "Seal" alongside and the word

28. 2 MERCER L. REV. 213-214 (1950).
29. 81 Ga. App. 764, 59 S.E.2d 747 (1950).
30. 81 Ga. App. 770, 59 S.E.2d 751 (1950).
31. Glens Falls Indemnity Co. v. Southeastern Construction Co. for use of Gill Equipment Co., 207 Ga. 488, 62 S.E.2d 149 (1950).
32. American Surety Co. v. Small Quarries Co., 157 Ga. 33, 120 S.E. 617 (1923), and American Surety Co. v. County of Bibb, 162 Ga. 388, 134 S.E. 100 (1926).
33. Southeastern Const. Co. for use of Beckham v. Glens Falls Indemnity Co., 82 Ga. App. 753, 62 S.E.2d 396 (1950); Southeastern Const. Co. for use of Gill Equip. Co. v. Glens Falls Indemnity Co., 82 Ga. App. 752, 62 S.E.2d 397 (1950); Southeastern Const. Co. for use of D-A Lubricant Co. v. Glens Falls Indemnity Co., 82 Ga. App. 752, 62 S.E.2d 397 (1950).
34. 83 Ga. App. 412, 63 S.E.2d 710 (1951).
35. 83 Ga. App. 570, 64 S.E.2d 205 (1951).

"Security" beneath it. The full Court of Appeals ruled that the bond was not a sealed instrument as to the surety, since no seal or scroll was placed after or affixed to his signature, and therefore, the suit begun against the surety in 1948 was barred. Georgia Code Sections 3-703 and 102-103 were cited. One judge dissented, stating that in the absence of evidence of a contrary intention by the surety, the "Seal" in the proper right-hand place provided for the surety's signature should be treated as applying to the signature actually made on the left-hand side.

Two cases involved unsuccessful attempts to establish liability under police officials' bonds. In *New Amsterdam Casualty Co. v. Mathis,*[36] the Court of Appeals held that the trial court had erred in overruling a general demurrer to a petition seeking to hold a surety on a police officer's official bond liable for collision damages resulting from his negligent operation of a car owned by a county police department. The fact that he was on an official mission did not convert such act into the performance of an official duty by virtue of or under color of his office, within the scope of his official bond, and was not a breach of his bond to discharge the duties of his office faithfully, even if he committed a tort by driving negligently and violating traffic regulations. The court ruled that *Culpepper v. United States Fidelity and Guaranty Co.*[37] was controlling; one judge expressed his concurrence as being for the *sole reason* that the *Culpepper* case was controlling. In *Walker v. Whittle,*[38] the Court of Appeals ruled that the act of a sheriff in requesting the sheriff of another county to arrest a named person did not give rise to a cause of action against the sheriff making such request or the surety on his official bond for a breach of the bond, predicated on an alleged invasion of the right of privacy of the arrested person's wife. This was so though no warrant for such arrest had been issued at the time of the request or of the arrest; still, said the court, the sheriff did not counsel any wrongful act, and could not reasonably foresee that an illegal arrest would in fact be made. The court cited Ga. Code Sections 24-2805, 26-1502, 27-209 and 89-418, and Ga. Constitution, Article 1, Section 1, Paragraph 16.

New Statutes

Act No. 53[39] amends Ga. Code Section 29-407 so that whenever a deed, mortgage, bond for title or other registrable instrument appears by its caption only to be executed in one state or county, and the official attesting witness appears to be an officer of a different state or of another county, not having jurisdiction to witness such instruments in the state or county named in the caption, the instrument shall be conclusively considered and construed to have been attested by the officer in the state or county where he had authority to act, the caption to the contrary notwithstanding. The amendment adds the provisions as to another "State," the section having previously referred to different counties only.

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36. 82 Ga. App. 421, 61 S.E.2d 422 (1950).
37. 199 Ga. 56, 33 S.E.2d 168 (1945).
38. 83 Ga. App. 445, 64 S.E.2d 87 (1951).
39. Ga. Laws 1951, p. 29.

Act No. 308[40] amends Ga. Code Section 113-1706, relating to a petition and order by the ordinary to sell land of a decedent when necessary for the payment of debts of the estate or for purposes of distribution. It adds two sentences, one of which is a proviso that: " . . . nothing in this section shall prevent a bona fide purchaser or mortgagee of said land who purchased prior to said order of the ordinary and who holds under a deed or mortgage duly recorded prior to said order, from asserting his title to said land by showing that the executor had assented expressly or impliedly to the devise in said will prior to said order to sell."

Act No. 301[41] provides that in counties having a population of not less than 29,700 and not more than 29,750 according to the 1950 United States census or any future United States census, the clerk of the superior court may provide separate index books for recording real property and personal property instruments, and when so provided, a duplex index book shall be used for real property instruments and a single index book, known as a direct index, for personal property instruments. This act amends Code Section 24-2715 (8).

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40. Ga. Laws 1951, p. 476.
41. Ga. Laws 1951, p. 468.