CORPORATIONS, PARTNERSHIPS, AND BANKRUPTCY

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In that field of "business" law that is generally encompassed by the subjects of Bankruptcy, of Corporations, and of Partnerships, our survey year discloses the following current amendments to existing statutes, and the several cases decided by the appellate courts of Georgia.

BANKRUPTCY

The recent amendment[1] to Section 60a of the Bankruptcy Act has drastically affected the law of Georgia as it relates to the question of voidable preferences created by an unrecorded or belatedly recorded chattel mortgage or bill of sale to secure debt.[2] Prior to this 1950 amendment, the Bankruptcy Act had endowed the trustee in bankruptcy with the hypothetical status of a bona fide purchaser, as well as with the status of a judgment lien claimant, and with the status of the bankrupt himself. This 1950 amendment eliminated the bona fide-purchaser status in determining the time element involved in a voidable preference. Accordingly, in Georgia and such other states as have recording statutes that their courts have interpreted as invalidating unrecorded instruments of conveyance *only* against subsequent bona fide purchasers and not against judgment lien holders,[3] an unrecorded chattel mortgage or bill of sale to secure debt, being superior to a subsequent judgment lien, is not affected as a preference against the trustee.

The law, however, has expressly not been changed as to security instruments involving real estate; *i.e.,* real estate mortgages, deeds to secure debt, etc. Nor, by state court interpretation,[4] are conditional sales contracts affected. The question of whether this 1950 amendment to Section 60a of the Act is retroactive or not is pending before the Court of Appeals, Fourth Circuit.[5]

STATUTES

Corporations.—The 1951 General Assembly passed two statutes that related to private corporations. Both of them repealed existing portions of Title 22 of the Code. Section 22-1104, which provided for service by publication on a nonresident corporation having no public place of business,

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1. 64 STAT. 22 (1950), U. S. C. § 96 (Supp. 1951).
2. For detailed discussion of this entire question, see Nadler, *The Effect of Recent Bankruptcy Amendment on Georgia Security Transactions*, 13 GA. B.J. 184 (1950).
3. See Donovan v. Simmons, 96 Ga. 340, 22 S.E. 966 (1895); Mackler v. Lahman, 196 Ga. 535, 27 S.E.2d 35 (1943).
4. Rhodes v. Jones, 55 Ga. App. 803, 191 S.E. 503 (1937).
5. For decision appealed from, see *In re* Harvey Dist. Co., 88 F. Supp. 466 (1950).

no office, or agent in the state of Georgia, was repealed[6] for the primary reason that our Supreme Court[7] held this statute unconstitutional as being violative of "due process." It was therefore deemed advisable to expunge this statute from the Code. (Note that a nonresident or undomesticated corporation which *does business* in Georgia may be served pursuant to Section 22-1507; but one that *does not do business* in Georgia, can only be reached through attachment of property within the state.)

The other 1951 provision[8] repealed Code Sections 22-718, 22-719 and 22-720, which had to do with the certification and recording of private and public corporate bonds. Not only were these provisions of no legal worth, but they were particularly vicious in that they aggrandized the "squealer."

Partnerships.—Mention should be made of the fact that the 1951 General Assembly repealed the present statutes relating to limited partnerships and in their place, passed the Uniform Limited Partnership Act. However, because some typographical errors had crept into the bill as passed, the Governor vetoed the same, but assured us, as did Hon. Frank Twitty and Hon. Charles L. Gowen, that a corrected bill to the same effect will be passed at the next session of the legislature.

DECISIONS

Corporations.—In chronological order since our 1950 panel, the first case on corporation law in Georgia was *Atlanta Journal Co. v. Doyal*,[9] June 8, 1950. Principally, this was a case involving the principles of the law of libel and slander. It is mentioned here because the defendant was a corporation, and one of the issues of the case involved the legal question of whether, in contemplation of law, the malice of an agent of a corporation can be imputed to the corporation itself and thus make the corporation amenable to punitive damages. The facts of the case are interesting in that they relate to newspaper reports of Mrs. Robert Carpenter's testimony in the divorce proceedings.

Judge Townsend, in a learned and well considered opinion traced the development of this principle of libel law from English and American cases, and pointed out that "the Georgia rule is, of course, that the conduct of the servant is imputable to the master whether or not the act of the servant was malicious, provided it was within the scope of his authority. . . ." that "his bad faith may be considered to increase the damages. . ." and that "we can find no sound season for excepting from the general rule libel cases only," in view of the historical development of the law hereon.[10]

As to the corporation question, he reiterated the established law that "a corporation can act only through its agents and that the malice of one having the direction and control of the corporation is, in contemplation of law, the malice of the corporation."[11]

6. Ga. Laws 1951, p. 16.
7. In Piggly Wiggly Georgia Co. v. May Inv. Corp., 189 Ga. 477, 6 S.E.2d 579 (1939).
8. Ga. Laws 1951, p. 99.
9. 82 Ga. App. 321, 60 S.E.2d 802 (1950).
10. *Id.* at 335, 60 S.E.2d at 814.
11. *Id.* at 334, 60 S.E.2d at 813.

On June 13, 1950, the right of designated classes of corporations to exercise the right of eminent domain was reiterated in *Hagans v. Excelsior Electric Membership Corp.*[12] As pointed out by Mr. Justice Hawkins, the power of eminent domain may be conferred either by a special act creating the corporation or by general acts relating to all corporations of designated classes. Moreover, such authority to exercise eminent domain is applicable to corporations chartered prior to, and does not exclude those chartered after, the enactment by such statutory power.

Next in chronological order is the case of *Reid v. Hemphill,*[13] September 14, 1950. Actually this case involves a question of contract law but is considered in our category because the subject matter of the contract was the purchase of the entire capital stock of a corporation (Brantley Products Co.). The principles of sale are equally applicable to the sale of corporate stock. Accordingly the court held that where in the course of negotiations for the purchase of the entire capital stock of a business it was agreed that the price would be $15,000 plus the value of an inventory, $1,500 being paid as a deposit, and that at a subsequent date the purchaser and representatives of the seller would determine the value of the inventory, an additional $7,500 would be paid by the purchaser, and that payment of the balance of the purchase price would be on an installment basis, the amounts of the installments, time of payment, and rate of interest to be agreed upon at that time, and a formal agreement made showing these terms, and the purchaser became ill and died, without having done anything after making the $7,500 deposit, there was no enforceable agreement between the purchaser and seller for the purchase of the capital stock of the business.

Then, came the Supreme Court case of *W.O.U.F. Atlanta Realty Corp. v. R.A.C. Realty Co.,*[14] October 11, 1950. This case was once before the Supreme Court,[15] where it was held that an option, unsupported by consideration, could be terminated at any time before its acceptance where one of the parties was a proposed, but not yet organized, corporation.

This second case involved an assignment of this option contract by the promoter to the subsequently formed corporation; and the court found that the promoter-incorporator had no contract which he could transfer or assign to the corporation after it came into existence and the purported assignment was of no avail.

On the following week (October 19, 1950), the Court of Appeals considered the case of *Yearwood v. State.*[16] Here, again this case comes into our category of corporation law because the power of stockholders to bind a corporation as its agents was collaterally involved. Since the contracts were under seal, the court reiterated the established principle of Georgia law that the rule of an undisclosed principal standing liable for the contract of his agent, does not apply when the contract is under seal.

Subsequently, the Court of Appeals decided on November 16, 1950, and

12. 207 Ga. 53, 60 S.E.2d 162 (1950).
13. 82 Ga. App. 391, 61 S.E.2d 201 (1950).
14. 207 Ga. 334, 61 S.E.2d 499 (1950).
15. 205 Ga. 154, 52 S.E.2d 617 (1949).
16. 82 Ga. App. 789, 62 S.E.2d 462 (1950).

affirmed the Superior Court of Fulton County in overruling demurrers by the corporate defendant in *American Thread Co. v. Rochester.*[17] This was a suit for damages by a union organizer which charged that the nonunion codefendant corporation used two of its employees to attack the organizer who was passing out leaflets in front of its plant and alleged a conspiracy between the corporation and its two employees. In pointing out that plaintiff was not invoking the agency rule of respondeat superior, but is invoking the rule which makes each conspirator the agent and spokesman of all in the unlawful enterprise, Judge MacIntyre again reminds us that a corporation must necessarily act by its agents and for such acts it is responsible.

A problem of proper pleading relates to the next case in this group. "Where a plaintiff in an action against a defendant corporation alleges dealings between him and the agents of the corporation but fails to name or describe the agents referred to, it is the right of the defendant corporation by appropriate special demurrer to call on the plaintiff to do so if there appears in the petition no reason why the plaintiff, who has dealt with such agents, cannot furnish this information."[18]

Then, in the order of time, is included in the corporation category, only by way of emphasis, one of the basic characteristics of the corporate concept.

In *Myrtle Lodge No. 1663 v. Quattelbaum,*[19] February 13, 1951, our Supreme Court pointed out that an unincorporated group cannot sue in its own name since "no suit can be lawfully prosecuted (in Georgia) save in the name of a plaintiff having a legal entity, either as a natural or an artificial person." Accordingly, "the unincorporated Odd Fellows Lodges did not have capacity to sue out a dispossessory warrant seeking to recover possession of described realty."[20]

Another case that only collaterally relates to corporation law is *Oattis v. West View Corp.,*[21] February 12, 1951. Here a petition was filed against the West View Corporation and Asa G. Candler, Jr., for a temporary and permanent injunction against both defendants transferring their property and for the appointment of a receiver. In affirming the Superior Court of Fulton County, our Supreme Court held that the allegations of the case did not set forth such extraordinary circumstances as would justify the appointment of a receiver and enjoining defendants from disposing of their property as contemplated by the provisions of Code Sections 55-106 and 55-303. The syllabus opinion by Mr. Justice Atkinson contains citations of cases illustrative of such "extraordinary circumstances."

Again, in the corporation category is *Hale-Georgia Minerals Corp. v.*

17. 82 Ga. App. 873, 62 S.E.2d 602 (1950).
18. Chelsea Corp. v. Steward, 82 Ga. App. 679, 62 S.E.2d 627 (1950).
19. 207 Ga. 575, 63 S.E.2d 365 (1951).
20. *Cf.* Smith v. International L.G.W. Union, 58 Ga. App. 26, 197 S.E. 349 (1938), which interprets GA. CODE §§ 22-409 and 22-414 (1933), as providing under what circumstances any association of individuals could sue or be sued as an association, namely, that it must be incorporated *or* shall have entered the names of its trustees or officers, together with the name, style and object of the association or society, on the records of the clerk of the superior court. The correctness of this interpretation is challenged.
21. 207 Ga. 550, 63 S.E.2d 407 (1951).

Hale,[22] March 2, 1951. This was an action against the corporation by its vice president and stockholder for salaries under a contract allegedly entered into between the plaintiff and the president of the corporation. Since the Court of Appeals, Judge Felton, reversed the judgment that the Bartow County Superior Court rendered in favor of the plaintiff because "the verdict was not supported by the evidence," we enlisted and thankfully obtained the cooperation of Mr. Roscoe Lowery, law clerk to his Honor and obtained relevant portions of the transcript in order to evaluate the headnotes of this case relating to the principles of corporate law involving the power of a president to bind his corporation and the question of ratification by a corporation.

It would seem that the court was correct in his conclusions that the evidence was insufficient to establish that the president of the defendant corporation had either the express or implied authority to a course of dealing to make the contract in question, because it seems well established that the president of a corporation, merely by virtue of being such, has no power to bind the corporation by a contract, but the authority of a president to contract may be (a) conferred generally, or (b) specially in an individual case, or (c) the charter or by-laws may give such authority, or (d) such authority may be inferred from a course of dealing, and (e) the corporation may ratify his acts.

As to ratification, knowledge on the part of the corporation, otherwise than through knowledge of the agent whose acts are sought to be ratified, must be shown. Here the directors knew the transaction as a combination of a loan and voluntary contribution of services by an officer.

In the latest case decided May 23, 1951, the Court of Appeals affirmed the Superior Court of Fulton County on a question relating to the effect of the consolidation of two corporations upon an action in tort (libel) pending against one of the constituent corporations. In affirming the action of the trial court in striking the name of the constituent corporation and substituting the name of the resulting corporation, Judge Townsend, in *Atlanta Newspapers, Inc. v. Doyal*,[23] wrote a very able and exhaustive opinion on the effect of mergers and consolidations on the respective assets and liabilities of the constituent corporations. Since, he noted, that Section 22-1844 of the Georgia Code expressly carries over to the resulting corporation, the liabilities of each of the constituent corporations, and since a claim for unliquidated damages in a tort (libel) action is a "debt" within said statutory provision, the pending action is not, in effect, an action against a "new party" and so it was not necessary to issue a rule nisi but the substitution of names could be made instanter upon motion.

Partnerships.—The first case of our survey year in the category of partnerships directly involved a question of pleading. Upon the reasoning that the error of naming a nonexistent corporation and permitting an amendment to change such defendant to a partnership defendant, is not a substitution of a new party but is merely a misdescription of a firm name (the firm name being equally suited to a corporation or to a partnership) and that there is no change of party, but the same individuals are still

22. 83 Ga. App. 561, 63 S.E.2d 920 (1951).
23. 84 Ga. App. 122, 65 S.E.2d 432 (1951).

before the court, our Court of Appeals, in *Bell v. Ayers*,[24] decided July 7, 1950, shows how liberal its policy is in permitting amendments to process. Thus, a petition in a suit against the "Coca-Cola Bottling Company, a foreign corporation" is amendable by striking the words, "a foreign corporation," and alleging that the company is a partnership composed of named individuals. How can such a holding be reconciled with the established principle that a corporation is a legal entity, a separate entity, as is also a partnership?

The next case was *Simpson v. Pethel*,[25] September 14, 1950. Fundamentally this action involves the law of negotiable instruments in that plaintiff's petition was dismissed because it failed to allege presentment and notice of dishonor, or facts excusing such notice, all as contemplated by Georgia Code Sections 14-707, 14-708, 14-710 and 14-712. It finds itself in the partnership category because the action sought to recover payment of a check drawn against partnership funds by the defendant's former partner more than seven months before his death. It would seem that here is another instance where the law looks upon a partnership as a separate, rather than an aggregate, entity.

The third partnership case involved a suit for malicious prosecution and one of the issues related to the legal status of the codefendants. In holding them to be copartners, Judge Worrill affirmed the lower court and again enunciated one of the recognized definitions that a partnership is "a contract of two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions" and that a partnership "may arise from a joint ownership, use, and enjoyment of the profits of undivided property, real or personal. Code § 75-101."[26]

Then came the case of *Evans Motors of Georgia, Inc. v. Hamilton*[27] on December 5, 1950. Through a maze of confusing and contradictory testimony involving the determination of what constitutes a partnership under Georgia statutes and judicial interpretations, the Court of Appeals affirmed the trial court in holding that where one party to an oral agreement has only an interest in the net profits and no interest in or liability for losses of the enterprise, he is not, even as to third parties, a partner, and there is no "partnership." In coming to this conclusion, Judge Worrill properly examined the factual situation in the light of such standard tests of what is a partnership as "community of interest" and "community of control."

Next in chronolgical order is *Graham v. Raines*,[28] March 2, 1951, and relates to a trover action by an assignee of one of the former partners asserting claim to peanuts belonging to the partnership and delivered to the defendants. The court held that "after dissolution of a partnership, and a division between the two partners of the firm assets remaining after the payment of all indebtedness, and after an agreement between the partners that a claim for personalty against a third party, a part of the

24. 82 Ga. App. 92, 60 S.E.2d 523 (1950).
25. 82 Ga. App. 374, 61 S.E.2d 154 (1950).
26. Peppas v. Miles, 82 Ga. App. 438, 61 S.E.2d 429 (1950).
27. 82 Ga. App. 735, 62 S.E.2d 390 (1950).
28. 83 Ga. App. 581, 64 S.E.2d 98 (1951).

firm assets, would be divided equally between them, the partners thereafter became tenants in common, insofar as such personalty or their claim therefor was concerned, and it was permissible for an assignee of the interest in such personalty and of his claim therefor of one of such cotenants to sue in trover for the recovery of a one-half undivided share of such property without joining the other cotenant, and without suing in the name of the dissolved partnership."[29]

Judge Worrill went to great pains to point out that the Georgia rule is otherwise where the action is based on a partnership contract and is, therefore, *ex contractu* as distinguished from *ex delicto.*

The last case involving partnerships is *Columbus Wine Co. v. Sheffield,*[30] January 25, 1951. Since the question of partnership herein was minor and collateral, the only value of this case is the reiteration of the definitely established principle of partnership law that every member of a partnership is primarily liable for the partnership debts, and that an agreement between two partners that one of them shall assume and pay all debts of the partnership upon its dissolution is not within the Statute of Frauds nor need be in writing.

29. See GA. CODE § 3-111 (1933).
30. 83 Ga. App. 593, 64 S.E.2d 356 (1951).