BUSINESS ASSOCIATIONS

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During its November-December 1953 session, the General Assembly enacted a number of statutes which relate to corporations. Perhaps the most important of these statutes was Act 620,[1] which confers on corporations power to make donations for public welfare or for charitable, scientific, or educational purposes. Under this Act, charitable or education gifts by corporations are clearly *intra vires,* and directors need have no fear that they will be held liable to the shareholders on the theory that such gifts are outside the corporate powers. Act 539[2] places a ceiling of $5,000 on the filing fee the Secretary of State may collect for the filing of a charter, charter amendment, merger, charter revision or renewal, re-incorporation, or (in the case of a foreign corporation) a domestication. Act 720[3] grants flexibility in the fixing of the par value of shares of stock in trust companies. Before Act 720 was passed, the Code[4] provided that the capital stock of trust companies "shall be divided into shares of $100 each." Act 720 states that the capital stock of such companies "may be divided into shares of not less than $10.00 each and the value of such shares shall be shown on the company statement." Act 705[5] sets up a method for dissolving railroad corporations and provides for their continued legal existence after dissolution for winding up purposes.

Several of the cases decided by the appellate courts of Georgia during the survey period are worthy of note. One of these is *Grimaud v. Knox-Georgia Homes,*[6] decided by the Supreme Court. In that case the Court re-affirmed a rule which is well established in this state; namely, that a corporation is subject to suit for equitable relief by injunction only in the county which its charter designates as its principal office. The court also reaffirmed the application of this rule to injunction suits even though they

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1. Ga. Laws. Nov.-Dec. Sess. 1953, p. 121. For a detailed discussion of this statute, see Barfield, *New Legal Sanction in Georgia for the Corporate Contribution to Private Educational Institutions,* 5 MERCER L. REV. 249 (1954).
2. Ga. Laws Nov.-Dec. Sess. 1953, p. 59.
3. Ga. Laws Nov.-Dec. Sess. 1953, p. 276.
4. GA. CODE § 109-105 (1933).
5. Ga. Laws Nov.-Dec. Sess. 1953, p. 213.
6. 210 Ga. 514, 81 S.E.2d 476 (1954).

also embrace a claim for past damages.[7] The facts of the case were: suit was brought in Richmond County against corporation A, corporation B, and an individual to restrain them from committing acts of continuing trespass and to recover damages for injuries already inflicted by the trespass. A's charter stated that its principal office was in McDuffie County; B's charter stated that its principal office was in Fulton, but one Brazzell, whose position with the corporation was not disclosed, had filed a return with the Secretary of State[8] which stated that B's principal office was in Richmond County. The Supreme Court held that there was no evidence on which the jury could properly base a finding that the principal office of either corporation was in Richmond; the exclusive method of changing the principal office of a corporation is by a charter amendment procedure set up by special statute,[9] and neither corporation had taken steps to comply with that statute. As the evidence would not justify a finding that the individual defendant was a resident of Richmond, the court did not find it necessary to deal with the law relating to equitable relief against joint trespassers residing in different counties.

A significant opinion by the Court of Appeals is *Choctaw Lumber Company v. Atlanta Band Mill*,[10] which deals with the power of a corporation to become a guarantor or surety. In considering that case, perhaps a little background is helpful. In the absence of express authority by statute or in the charter, a corporation does not have power solely for another person's accommodation to enter into a contract as surety or guarantor. On the other hand, a corporation may become surety or guarantor if the contract can be fairly regarded as a means of furthering some purpose incidental to its authorized business. The courts in other States have had difficulty in setting up a test to determine when a guaranty or suretyship contract is sufficiently beneficial to the corporation to be regarded as incidental to its authorized business.[11] They have not been able to give a clear answer, for instance, on whether the chance of benefit must be proportionate to the risk of loss. The late Professor Henry Winthrop Ballantine suggested that a proper test would be whether "the undertaking of the risk was, in the light of the circumstances, within the exercise of an honest discretion by the board of directors."[12]

7. This rule is based on GA. CONST. Art. VI, § 14, ¶ III, GA. CODE ANN. § 2-4903 (1948 Rev.), which provides that equity cases shall be tried in the county in which a defendant resides against whom substantial relief is prayed.
8. Ga. Laws 1949, p. 950, GA. CODE ANN. § 22-1703 (Supp. 1951).
9. Ga. Laws 1947, p. 1544, GA. CODE ANN. § 22-1814.1. (Supp. 1951).
10. 88 Ga. App. 701, 77 S.E.2d 333 (1953).
11. BALLANTINE, CORPORATIONS 232 (Rev. Ed. 1946).
12. *Ibid.*

Before the enactment of the Corporation Act of 1938, Georgia did not have a statutory provision which expressly related to a corporation's power to act as a surety or guarantor. The old law simply stated in general terms that "corporations . . . may exercise all corporate powers necessary to the purpose of their organization, but shall make no contract . . . except such as is necessary in legitimately carrying into effect such purpose, or for securing debts due to the company."[13] Under the old law, the Georgia courts uniformly held an indorsement purely for accommodation to be beyond the power of a corporation,[14] but did hold in one case[15] that a sawmill company might guarantee the bonded indebtedness of a railroad which enabled it conveniently to transport timber to market.

The Corporation Act of 1938[16] makes express provision for corporate guaranty or suretyship arrangements by providing that corporations shall have the power "to guarantee, become surety upon or indorse the contracts or obligations of any other corporation, firm or individual as to matters in which the corporation guaranteeing has a direct interest but shall not have the right to enter into any contract of guaranty, suretyship or indorsement where the corporation guaranteeing has no direct interest in the subject matter of the contract guaranteed or to make any purely accommodation guaranty, indorsement or contract of suretyship, unless such right . . . is contained in the charter of the corporation or an amendment lawfully made thereto." *Choctaw Lumber Co. v. Atlanta Band Mills* interprets the term "direct interest" as used in this statute. Suit was there brought against the Mill Company on two contracts of guaranty. Under those contracts, the Mill Company, in order to prevent suit from being brought against an affiliated corporation, the Sales Company, on a past-due open account indebtedness, had guaranteed notes which the Sales Company had given to secure that indebtedness. On the trial, the plaintiff established that the Mill Company and the Sales Company had identical incorporators, officers and directors and that their shareholders were substantially identical; and that the Sales Company was an outlet for a material part of the product of the Mill Company. No other interest of the Mill Company in the notes guaranteed was proved. At the conclusion

13. GA. CODE 22-701 (1933).
14. Nalley Land & Investment Co. v. Merchants' and Planters' Bank of Villa Rica, 178 Ga. 818, 174 S.E. 618 (1934); Piedmont Feed & Grocery Co. v. Georgia Feed & Grocery Co., 52 Ga. App. 847, 184 S.E. 899 (1936); Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co., 12 Ga. App. 818, 79 S.E. 45 (1913).
15. Mercantile Trust Co. v. Kiser, 91 Ga. 636, 18 S.E. 358 (1893).
16. Ga. Laws 1937-38, Ex. Sess., p. 214, GA. CODE ANN. § 22-1828 (c) (Supp. 1951).

of the plaintiff's evidence, the Civil Court of Fulton County granted a motion to nonsuit, holding that plaintiff had not proved that the Mill Company had a "direct interest" in the transaction between plaintiff and the Sales Company. That holding was reversed by the Court of Appeals, Division No. 2, which held that the evidence was sufficient to authorize a finding that the Mill Company had a direct interest in the subject matter of the contracts. The Court concluded that the Corporation Act of 1938 had enlarged the power of corporations to enter into guaranty contracts, that the term "direct interest" as used in the Corporation Act means an interest that was "not contingent, uncertain or conjectural," and that, as the Mill Company had created the Sales Company for its own convenience and as the failure of the Sales Company would have impaired its credit and interfered with the distribution of its products, it had a direct interest in the guaranty contracts.

One remark the court made by way of dictum is of interest. The Court indicated that if a guarantor corporation has no direct interest in the subject matter of the contract of guaranty, it cannot be held liable on the contract under the doctrine of estoppel, because a corporation cannot be estopped from repudiating an act which is entirely beyond its charter power.[17] The Court, relying on an earlier Court of Appeals decision,[18] drew a distinction between an act beyond the authority of a corporate officer and an act outside the powers of the corporation, saying that a corporation can estop itself from denying that one of its officers did not have authority to enter into a transaction but that it cannot estop itself to deny its own power to enter into a transaction. A doctrine prevails in some states that a corporation that has received full performance from the other party to a contract is estopped to set up that the contract is *ultra vires*. This doctrine, however, has generally been limited (somewhat illogically, incidentally) to instances in which the contract is calculated to benefit the corporation and has not been applied where the benefit of performance goes to someone else, as it does in an accommodation guaranty. At any rate, the dictum in this case indicates that the estoppel doctrine probably will not be applied in Georgia.

Walker v. State,[19] another decision by the Court of Appeals, raised the interesting question of when a corporate agent's knowledge will be imputed to the corporation. One of the fundamental principles of the law of agency is that the knowledge of

17. 88 Ga. App., at 705, 77 S.E.2d at 336-337 (1953).
18. Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co., 12 Ga. App. 818, 79 S.E. 45 (1913).
19. 89 Ga. App. 101, 78 S.E.2d 545 (1953).

an agent, within the scope of his authority, is to be imputed to his principal. This rule of agency on the imputation of knowledge has generally been applied to corporations. The ascribing of an agent's knowledge to a corporate principal, however, creates special problems. While an individual principal normally has only one person acting as his agent, a corporation typically has a large number of representatives; thus, a question that has caused the courts considerable difficulty is whether knowledge possessed by one agent is to be attributed to the corporation in its dealings through other employees who do not have the knowledge.

In *Walker v. State,* the indictment charged the offense of cheating and defrauding a corporation by deceitful means and artful practice. The charge was to the effect that accused by knowingly and fraudently using a charga-plate issued by Rich's caused a clerk in Rich's to deliver merchandise to him; that actually the accused's charge account had been closed and he knew that he was not entitled to use the charga-plate; and that the clerk was deceived by the accused's apparent right to use the charga-plate, to the loss of Rich's. The accused demurred, the trial court overruled the demurrer, and the accused was convicted. The Court of Appeals, both divisions sitting, held that the trial court erred in overruling the demurrer. The court reasoned as follows: notice to an agent of the corporation within the scope of his authority is notice to the corporation itself; when the corporation's credit department refused credit to the accused, its act was the act of the corporation and the corporation therefore had actual knowledge that accused's account had been closed and could not claim to have been misled into believing the defendant had credit with it.

The result reached was, of course, undesirable, and I do not believe that the authorities, if properly analyzed, dictate the result. The cases that the Court cited as authority dealt with the imputation of knowledge to the corporation in order to hold it liable in a civil or criminal action. They are not authority for ascribing to the corporation the knowledge of one of its agents for the purpose of shielding from criminal responsibility a person who had dealt with another corporate agent whom he knows does not possess the knowledge. This case illustrates the desirability of treating the relationship between the corporation and its agents in a realistic manner in deciding whether to impute the agent's knowledge to it. The rationalizations which are usually given for imputing knowledge are the unity of principal and agent (here the act of the credit department was said to be the act of the corporation) and a presumption that an agent

will convey information to his principal when it is his duty to do so. These fictions, if followed blindly, can lead to absurd results.

Wolf v. Arant[20] indicated that the Georgia courts may be prepared to take a somewhat more liberal attitude now than they have in the past toward the validity of stockholders' voting agreements. Georgia courts generally have held invalid schemes to consolidate stockholder voting strength. In *Morel v. Hoge*[21] the Supreme Court of Georgia invalidated an agreement between two groups of stockholders giving one of the groups power indefinitely to elect a majority of the directors; and in *English v. Rosenkrantz*[22] that Court declared void an agreement purporting to confer a proxy irrevocable for 45 years. In the *Morel* case, the Court reasoned that a stockholder owes a duty to the other stockholders and to the public to vote his shares in the election of directors so as to best promote the corporation's prosperity and the performance of its duties to the public.[23] In the *English* case, the Court re-affirmed its adherence to the principles set forth in the Morel decision and stated expressly that the principles there announced applied to private business corporations as well as to corporations with functions of a public character. The General Assembly took a step in 1952 to relax the rules against stockholder voting arrangements. In that year, the Assembly enacted legislation which permits the setting up of a ten-year voting trust.[24] As I have stated elsewhere,[25] I do not believe that the legislation—Act 784 of 1952—was intended to legalize all devices for consolidating voting strength or to overrule the *Morel* case or the *English* case. That is, Act 784 of 1952 legalized only the true voting trust, an arrangement in which title to the shares are transferred to a trustee who gets technical legal title to the shares.

In *Wolf v. Arant*, the plaintiff alleged that: (1) he and defendant were stockholders in a corporation engaged in importing photographic equipment; (2) defendant wanted a proxy from plaintiff to permit defendant to vote their combined shares for the dissolution of the corporation and the distribution of its assets; (3) defendant agreed in consideration of plaintiff's giving him the proxy to sell whatever corporate assets were distributed to the plaintiff as a result of the dissolution, and to pay plaintiff a sum equal to the amount by which the price plaintiff had paid for

20. 88 Ga. App. 568, 77 S.E.2d 116 (1953).
21. 130 Ga. 625, 61 S.E. 487 (1908).
22. 152 Ga. 726, 111 S.E. 198 (1922).
23. 130 Ga., at 632, 61 S.E., at 490 (1908).
24. Ga. Laws 1952, p. 198. GA. CODE ANN. § 22-1863.1 (Supp. 1954).
25. 4 MERCER L. REV. 12, 16 (1952).

his shares in the corporation exceeded the sum brought by the sale of plaintiff's share of the corporate assets plus the cash distributed to plaintiff on dissolution; (4) plaintiff assented to the proposition, gave the requested proxy, and was personally present at the stockholders' meeting and voted his stock in favor of dissolution, and (5) defendant refuses to carry out his part of the bargain. The defendant demurred to this petition on the ground, among others, that the contract was void as against public policy. The defendant's argument was that the sale of proxies in Georgia is illegal, as the Georgia Corporation Act merely provides for the giving of proxies, not for their sale. The Court of Appeals refused to pass on that particular question because it felt that the subsequent appearance of the plaintiff at the stockholders' meeting nullified the giving of the proxy and that the allegation in the petition that a proxy had been given should be treated as surplusage. In other words, the Court viewed the consideration for defendant's undertaking to be a promise by plaintiff to vote his shares in accordance with the agreement. The Court then held the agreement valid. The Court's opinion did not refer to the *Morel* case or to Act 784 of 1952. The *English* case was distinguished on the ground that it involved an agreement for the "long-time control" of the corporation.[26] Incidentally, the *Morel* case is distinguishable on the same grounds. The Court also emphasized that none of the allegations of the petition before it in the *Wolf* case authorized "the inference that there was any purpose or intention on the part of the parties to the agreement to defraud the stockholders of the corporation, or to take an unfair advantage of the others."[27] Further, the Court quoted with apparent approval a statement that the validity of stockholder voting agreements depends on "the objects thereby sought to be attained and the acts which are done under them."[28]

It is important to note that the Court sustained the agreement in the *Wolf* case even though only part, not all, of the stockholders were parties to it and even though the consideration which plaintiff received for his undertaking to vote his shares in a specified way was one that contemplated a benefit personal to him.[29]

26. A definite element of the rule enunciated in that case is the length of time that the questioned agreement is to be operative. 88 Ga. App., at 573, 77 S.E.2d, at 120 (1953).
27. *Ibid.*
28. 88 Ga. App., at 574, 77 S.E. 2d at 121 (1953).
29. See RESTATEMENT CONTRACTS § 569 (1932) which states: "A bargain by any official or shareholder of a corporation for a consideration enuring to him personally to exercise his powers in the management of the corporation in a particular way is illegal."

In *Griffin v. Burdine*[30] defendant entered into an agreement to furnish plaintiff with an automobile at dealer's cost as long as defendant continued in business. At the time the agreement was entered into, both plaintiff and defendant knew that defendant was not engaged in the automobile business except as a stockholder in a corporation. The Court of Appeals very properly construed the agreement as one obligating the defendant to furnish an automobile on the agreed terms as long as he remained a stockholder in the corporation. The Court found that there was no inconsistency between this interpretation of the agreement and the rules of corporation law well established in this State that (1) a stockholder, in the absence of a special statute making him so, is not liable for the debts of the corporation; and (2) a stockholder is not in a technical sense engaged in the business transacted by the corporation simply by reason of his relation to the corporation as a stockholder.

Lamar Electric Membership Corporation v. Carroll[31] raised the question of whether corporations created under the Electric Membership Corporation Act[32] are "electric companies" within the meaning of the statute[33] which permits suits to be brought against electric companies in counties where they injure persons or damage property. The Court of Appeals, Division No. 1, answered that they are "electric companies" and that they can be sued in counties in which they cause injury. Incidentally, the court stated that the general rules of practice apply to suits by or against electric membership corporations.[34]

The Court of Appeals decided a number of cases that involved the partnership. In *Florence v. Montgomery*[35] suit was brought individually by a wife of a deceased partner against the surviving partner on a partnership note payable to the plaintiff and signed by both partners. In his answer, defendant pleaded among other things that: (1) the note had been cancelled by an agreement which set it off against a similar note given by the

30. 89 Ga. App. 391, 79 S.E.2d 562 (1953).
31. 89 Ga. App. 440, 79 S.E.2d 832 (1953).
32. Ga. Laws 1937, p. 644, GA. CODE ANN. § 34A-101 — 34A-137.
33. GA. CODE § 94-1101 (1933).
34. The following cases decided during the survey period made reference to points of law in the corporation field but the points are not considered of sufficient importance for discussion in the text: Otwell v. Forsyth County Athletic & Recreation Ass'n, 210 Ga. 482, 80 S.E.2d 790 (1954) (in corporation's suit for specific performance of lease, written requests addressed to the court and signed by three of five of corporation's directors held properly overruled as requests were simply requests of three individuals and were in no way official acts of the corporation or of the directors of the corporation); Baker v. Schneider, 210 Ga. 493, 80 S.E.2d 783 (1954) (incorporation of a partnership business held to terminate the partnership and to constitute notice to all interested parties of its termination).
35. 89 Ga. App. 363, 79 S.E.2d 431 (1953).

Subsequent to this agreement, Snipes and Snow dissolved their partnership and Snow introduced Bryan as a partner. Snow now wants to withdraw from the business, and Bryan plans to bring partnership to defendant's brother, the cancellation agreement having been ratified by plaintiff and by defendant's brother; (2) plaintiff had sold her husband's interest in the firm to defendant, thereby cancelling any indebtedness that might otherwise have arisen out of the note; and (3) plaintiff had taken possession of her husband's assets without the appointment of an administrator, and as the husband had signed the note, his obligation on the note should be set off against plaintiff's claim. The Court of Appeals, Division No. 2, held that (1) the fact that an administrator had not been appointed for the estate of the deceased partner and joined as a party defendant was no defense to plaintiff's action; she could proceed at her election against the surviving partner alone; (2) as plaintiff was suing as an individual creditor of the firm, the surviving partner could not set off the eventual liability of the deceased partner's estate for contribution on the partnership debt;[36] (3) whether the note sued on was included in the settlement when plaintiff sold her interest in the partnership to defendant and was extinguished by the settlement was a question for proof on the trial and determination by the jury; and (4) the lower court erred in striking the plea that the note had been cancelled by agreement among the partners setting off a similar note owed by the partnership to the survivor's brother and that this agreement had been ratified by plaintiff and by defendant's brother; the agreement, if proved, would constitute a complete defense to the action.

In *Snow v. Nash*,[37] Nash leased certain real property to the Candlelight, a corporation, the contract prohibiting transfer of interest in the lease without the written consent of the lessor. Soon thereafter the Candlelight surrendered its charter, and Snipes and Snow, as partners, entered into an agreement with Nash under which they adopted all the provisions of the earlier lease to the corporation. The contract with Snipes and Snow, however, contained in addition the following provision, which is the subject of this suit:

> "In the event of the dissolution of the partnership between the lessees for any cause whatsoever, it is agreed that the conditions of this agreement may be performed by either lessee and the partner withdrawing from the business shall be discharged from any obligation for future performance of the covenants herein. The surviving partner continuing the business shall have the right to introduce a new partner, who shall have the same rights hereunder as the original lessees."

36. Citing for this point, Brinson v. Franklin, 177 Ga. 727, 171 S.E. 287 (1933).

37. 89 Ga. App. 638, 80 S.E.2d 502 (1954).

in a new partner. This is an action by Snow and Bryan for a declaratory judgment as to their rights under the lease. The Court of Appeals, both divisions sitting, held that the non-assignment limitation related to assignments by the partnership as a unit in the manner that a corporation might make an assignment and that the agreement did not preclude successive substitutions of new partners.

In a strong and well-reasoned dissent, Judge Quillian argued that the words of the contract, "It is agreed by the lessor that the conditions of this agreement may be performed by either lessee," clearly indicated that Snow could not escape the duty to continue to carry out the covenants of the lease. Judge Quillian then proceeded to point out forcefully that under the circumstances of this case the parties could have not intended "to extend to the lessees the right of assigning the lease to utter strangers of their own choosing, regardless of such assignees' solvency or insolvency, responsibility or irresponsibility."[38]

38. 89 Ga. App., at 644, 80 S.E.2d, at 560 (1954). The Court of Appeals also decided the following cases, which involved points of partnership law not considered sufficiently important for discussion in the text: Southeastern Wholesale Furniture Co. v. Atlanta Metallic Casket Co., 89 Ga. App. 248, 79 S.E.2d 27 (1953) (in suit raising question of whether defendant was engaged in a joint venture having the attributes of a partnership, evidence held sufficient to sustain verdict for defendant plea of not partnership); McCowen v. Aldred, 88 Ga. App. 788, 78 S.E.2d 66 (1953) (in suit for partnership accounting, evidence held to support verdict that no partnership existed between the parties). The McCowen case was before the Court of Appeals earlier in 85 Ga. App. 373, 69 S.E.2d 660 (1952).