BUSINESS ASSOCIATIONS

By JOE R. YOUNG, JR.*

A great volume of cases decided during this survey period produced an interesting and varied cross section in this field. Few cases standing alone could claim the distinction of being leading cases; most followed established principles of Georgia law.

In an action by minority stockholders, the plaintiffs were able to bring their petition within the rule of *Collier v. Mayflower Apartments.*[1] Plaintiffs alleged in substance that they had given notice of their contentions to the majority stockholders, directors and officers of the defendant corporation at the annual meeting. Plaintiffs' contention regarded the indebtedness of the estate of the deceased majority stockholder to the defendant corporation and of the pledging of his stock as security for the debt. The president and two of the three directors of the corporation, the administrators, and the heirs at law of the deceased majority stockholder had denied that any such indebtedness to the corporation existed or that any pledge of the stock had ever been made. The plaintiffs alleged that this was in furtherance of a fraudulent conspiracy and scheme to sell or transfer the pledged stock to the newly elected president and director free of any lien. This would defeat the claim of the corporation and its lien upon the pledged stock. The court held that it would be useless for the plaintiffs to seek redress from those alleged to be joint conspirators to defeat any claim of indebtedness owing to the corporation by the deceased majority stockholder and any lien on the stock which the plaintiffs contend was pledged as security therefore.[2]

Three unincorporated associations of insurance companies, operating as rating bureaus, sought an order restraining the Insurance Commissioner from requiring the petitioners to comply with an order suspending insurance rates.[3] The Commissioner contended, among other things, that petitioners were unincorporated associations and as such were not legal entities entitled to bring suit. The Supreme Court held that in every suit there must be a legal entity as the real plaintiff and as the real defendant; further, that in this state only three classes of legal entities are recognized, namely (1) natural persons; (2) ar-

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1. 196 Ga. 419, 26 S.E.2d 731 (1943).
2. Screven Oil Mill v. Hudmon, 214 Ga. 414, 105 S.E.2d 328 (1958).
3. Cravey v. Southeastern Underwriters Association, 214 Ga. 450, 105 S.E.2d 497 (1958).

tificial persons (corporations); and (3) such quasi-artificial persons as the law recognizes as being capable to sue. An unincorporated association may not sue or be sued in its own name unless authorized by law, however, an express statutory provision is not indispensable to an association's capacity to sue and be sued in the association's name; such suit may be maintained by virtue of a necessary implication arising from statutory provisions, as in cases where an unincorporated association is recognized as a legal entity by statutes which do not in turn authorize it to sue or be sued as such. After reviewing the statutes under which the rating bureaus were licensed, the court concluded that while the statutes did not expressly confer upon the rating bureaus the power to sue and be sued generally, they did empower them to appeal from orders and decisions of the Commissioner to the courts of competent jurisdiction. The court stated, "It would indeed be an anomaly of the law to allow these entities to review by appeal orders and decisions properly and lawfully made by the Commissioner, and yet afford them no substantial relief in the courts as against allegedly invalid and illegal orders and decisions of the Commissioner." The court concluded that a proper construction of the statutes in question showed conclusively that the petitioners were legal entities and had the necessary standing to seek to enjoin an alleged invalid order or decision of the Commissioner, provided of course, that all the prerequisites for such relief were established.

A partnership is dissolved by operation of law on the death of one or more of its partners.[4] On the death of one of three partners it was the duty of the two surviving partners to wind up the partnership affairs and come to an accounting with those entitled to participate in a distribution of its assets. Upon the death of the second partner the sole responsibility for concluding the affairs of the partnership rested upon the surviving partner. In such a case, the surviving partner is legally entitled to possession of the partnership assets only for the purpose of winding up its affairs and for a general accounting, and for such purpose one year from the date of its dissolution ought to be sufficient time. A court of equity will not permit the sole surviving member of a dissolved partnership who is himself insolvent to continue operation of the partnership's business, keep no accurate record of his dealings, incur new partnership debts, and refuse to come to an accounting with those having an interest in the partnership's affairs. A petition alleging facts showing that the sole surviving partner continued to operate the partnership and incur new debts and refuse

4. Murphy v. Murphy, 214 Ga. 602, 106 S.E.2d 280, (1958).

to account to the legal representatives of the deceased partners states a cause of action for an injunction, accounting and receivership.

In the case of *Habif v. Maslia*[5] the Supreme Court was confronted with the construction of a covenant in a partnership agreement which provided,

> In the event that this partnership is dissolved, Maslia hereby agrees not to go into, either as principal or agent, any business involving the sale or servicing of automotive motors, transmissions, or other parts nor to be employed by or permit his name to be used in the operation of said type of business within a 25 mile radius of 312 Spring Street, Northwest, Atlanta, Georgia, for a period of three years following such dissolution . . .

in conjunction with the construction of a dissolution agreement providing,

> It is agreed that the partnership heretofore existing between the parties hereto be and the same is, hereby dissolved, and that this agreement constitutes a full and complete accounting and liquidation of said partnership business, and the party of the first part acknowledges that he has no claim or demand of whatsoever kind or nature against the party of the second part, and the party of the second part acknowledges that he has no claim or demand of whatsoever kind or nature against the party of the first part.

The trial court denied the right of the petitioner to a restraining order enforcing the restrictive covenant on the ground that the restrictive covenant along with the partnership agreement was merged into the partnership dissolution agreement. The Supreme Court held that the purpose of the dissolution agreement was to settle the affairs of the partnership business, and that the acknowledgment by each of the parties that he had no claim or demand of any kind against the other referred to claims or demands arising out of the partnership business; further, that the restrictive covenant had no bearing on the conduct of the partnership business as it came into effect, but only upon the dissolution of the partnership. The restrictive covenant was not one of the matters to be settled, agreed upon, liquidated, or otherwise dealt with in settling the partnership business.

In the cases of *Nikas v. Hindley,* and *Beverage Distributors, Inc. v. Hindley,*[6] suit was brought by an employee against the employer for an alleged breach of a contract of employment. The pertinent provisions of the contract provided that the employer employ the plain-

5. 214 Ga. 654, 106 S.E.2d 905 (1959).
6. 99 Ga. App. 194, 108 S.E.2d 98 (1959).

tiff as executive vice-president and general manager of all personnel in the offices and warehouse and in charge of all salesmen of the corporation with authority to hire and fire, fix salaries and commissions, and for the management and control of the corporate business; the plaintiff agreeing in the contract to disassociate himself from all other interests in conflict with his performance under the contract and to devote his full time and energies to the business of the corporation. The contract provided further that the parties mutally agree that the contract should remain in full force and effect for a period of five years from the date of execution with automatic renewal at the end of the first five year period for an additional five year period, and continuing on in renewals on the basis of five years for each renewal until and unless employee should fail or refuse to comply with his part. The employer should have the right of declaring the contract null and void upon showing that the employee had been negligent in the exercise of his duties or that the corporation was losing or about to lose business prospects, contracts, contacts or income due to the negligence or failure of the employee. The contract was executed by the corporate defendant and Angelo G. Nikas individually. The petition alleged the employment of the plaintiff under the contract and the wrongful termination of his employment approximately one year thereafter. In support of the general demurrers the defendants urged first that the contract was one of permanent employment, was intrinsically indefinite in duration and terminable at will by either party. The court in interpreting the contract held that the five year contract with automatic renewal, when given a reasonable construction, was not a contract of permanent employment as contended by the defendant, but was a contract for an initial term of five years. The provision for automatic renewal, when given a reasonable construction, would not be held to require the renewal or extension of the contract for additional five year periods, except upon the mutual assent of the parties thereto at or before the date of renewal. Another contention of the defendant was that the contract was an ultra vires delegation of the management and control of the corporation and an attempt to hire an officer and general manager for an unreasonable period of time, and was therefore void as a matter of public policy. The Court of Appeals in reply to this contention stated,

> We know of no law, the plaintiff in error has cited no authority, which would prevent a duly authorized agent (and the president who executed the contract for the defendant corporation here was alleged to have been a duly authorized agent) from entering into a contract delegating the corp-

> orate powers as was done in this case. The powers of a corporation and the manner in which they may be exercised, either by the directors or by the stockholders, is, under the provisions of Georgia law, provided for in the charter of the corporation and in its by-laws (Ga. L. 1937-38, Ex. Sess., pp. 214, 240, Code, Ann., § 22-1869) and in the absence of a showing in the petition or exhibits thereto of specific provisions in the charter or by-laws which, when fairly construed, prohibit the making of such a contract by an authorized agent of the corporation, the petition is not subject to general demurrer. No provision of the charter or by-laws of the defendant corporation are pleaded and it being alleged that the defendant Nikas who entered into the contract was a duly authorized agent of the corporation, this allegation must be taken as true on general demurrer. If, in fact, he was not the duly authorized agent of the defendant corporation, or if in executing this contract he exceeded his authority as agent of the corporation, or if the execution of the contract violated some provision of the charter or by-laws, these would be matters to be pleaded by way of affirmative defense and to be proved by the defendants as any other matter of fact.

The next contention of the defendant was that the contract purported to be a hiring of the plaintiff by the defendant Nikas in his individual capacity, and therefore was a violation of Nikas' fiduciary obligation as a stockholder and director, and void on the ground of public policy; further, that if it purported to be a guarantee by Nikas of the performance of the contract on the part of the corporation, that as such it was void. The court stated that the general rule would seem to be the contrary. This was not a contract by Nikas by which he agreed to bind himself to some future course of conduct as director or stockholder of the corporation and thus to compel the corporation to act in a particular way, but on the contrary, was a joint undertaking by him with the corporation, simultaneously entered into. The court held that the petition was not subject to general demurrer for any reason advanced by the defendant.

In a trover action[7] for automobiles where it was contended that the self-contradictory or equivocal testimony of an agent of a corporation should be construed most strongly against him and therefore bind the corporation, the court held,

> While the testimony of a party in his own behalf must be construed most strongly against him, if self-contradictory or equivocal, and without other evidence of right to recover, he is not entitled to a finding if his testimony, so construed, shows that the verdict should have been against him. Long

7. McCoy v. Romy Hames Corporation, 99 Ga. App. 513, 109 S.E.2d 807 (1959).

> Cigar and Grocery Co. v. Harvey, 33 Ga. App. 236 (2), 125 S.E. 870, and citations, and this rule is applicable against a corporate party, upon the testimony of its president, it has never been extended beyond the president to other officers.

In the case of *Long Tobacco Harvesting Company v. Brannen,*[8] a foreclosure action, the defendant contended that a novation had occurred which in effect changed the original contract from a sale to a consignment. The defendant testified that the president of the plaintiff corporation confirmed and ratified the acts of the plaintiff corporation's employee, said acts being the alleged basis of the novation. The plaintiff objected to testimony offered by the defendant to the effect that the president of the plaintiff had confirmed and ratified the statements and acts of the plaintiff's employee on the grounds that the defendant failed to show by the charter or by-laws of the corporation any authority in the president to make such new agreement and that no corporate authority was shown in the plaintiff's employee to enter into a new agreement which would alter or vary the terms of the written contract. The court held that the employee was a salesman or serviceman for the plaintiff corporation and unless the president had authority to ratify the employee's acts the testimony would be objectionable, otherwise not. The court quoted from the case of *Baker v. Lowe Electric Co.,*[9] as follows:

> Under the rule adopted in this state, the president of a corporation is presumed to be its alter ego; that is to say, while not ipso facto clothed with autocratic powers as to the making of contracts, he is neverthless its chief executive officer and agent, and, without any special delegation of authority, he is presumed to have power to act for it in matters within the scope of its ordinary business . . . The admissions of a president as the mouthpiece and alter ego of a corporation, as distinguished from an ordinary servant or agent, made even with reference to a previous transaction, are ordinarily admissible in evidence, provided they are made in the due course of his official duties with reference to the particular transaction in controversy.

The court concluded that the evidence was accordingly admissible, and while not sufficient of itself to constitute a novation, it supported the defendant's contention that a novation had been effected by reason of the mutual dealings of the parties.

In the case of *Ware v. Rankin*[10] the plaintiff brought action against Ware, a vice-president and managing officer, and two others who

8. 99 Ga. App. 541, 109 S.E.2d 90 (1959).
9. 47 Ga. App. 259, 170 S.E. 337 (1933).
10. 97 Ga. App. 837, 104 S.E.2d 555 (1958).

were directors of an insolvent corporation, seeking to recover sums paid out of the insolvent corporation by the defendants. The petition alleged that Ware, vice-president and owner of one-third of the stock, and two directors, owners of the other two-thirds, had complete control of the company and directed all of its operations, Ware participating in the meeting of the board of directors; that at a time when the corporation was insolvent and had ceased doing business they authorized payment to a creditor of the corporation thereby extinguishing a debt on which Ware and one of the directors were personally liable as endorsers, and that by so doing they used the corporate assets and trust funds in preferring the creditor so as to obtain an advantage or preference to themselves to the injury of other creditors. The court held that the petition was not subject to general demurrer since a jury question was presented as to whether payment to the creditor at a time when the corporation was insolvent and had for all practical purposes ceased doing business—conceding that the corporation had a right to prefer creditors at that time and that the sums paid were past due and owing to it—was in fact a mere scheme and device on the part of the defendants to indemnify themselves against loss, and therefore a legal fraud. The court in discussing the applicable law quoted Georgia Code section 22-709 as follows: "Directors primarily represent the corporation and its stockholders, but when the corporation becomes insolvent they are bound to manage the remaining assets for the benefit of its creditors, and cannot in any manner use their powers for the purpose of obtaining a preference or advantage to themselves." Managing officers of a corporation, who, although not directors, are in direct conjunction with such directors, occupy the same fiduciary position and when the corporation becomes insolvent are likewise charged with the duty of serving and managing the remaining assets in trust for creditors. Directors and managers of insolvent corporations are trustees of the funds, as well for the creditors as for the corporation, and are bound to apply them pro rata. They cannot use them to exonerate themselves to the injury of other creditors. However, the officers and directors of an insolvent corporation may prefer one creditor over another and may pay a debt which is due and payment of which is being demanded, even though the effect of the payment is to reduce the assets available to other creditors and even though such action by the directors or officers may result in some incidental benefit, such as the extinguishment of such liability as they may have previously incurred as endorsers or sureties on commercial paper in the hands of the preferred creditor. What the officers and directors may not do is to use their

position for the purpose of preferring themselves over any creditor, and any scheme or device for the purpose of indemnifying themselves against loss, whether as creditors or endorsers of notes given by the corporation or otherwise, constitutes legal fraud. There was a question of fact whether Ware, who was not in fact a director of the corporation, assumed the duty and authority of the office of director because he, with the two directors, had complete control of the company, directed all of its operations, and participated in the meetings of the board of directors. The board of directors is a governing body of a corporation and as such is vested with the management of its ordinary corporate affairs such as the corporation itself is authorized to perform under the rights and powers delegated by its charter. The officers appointed by the directors are clothed with only such power and authority as are expressly conferred upon them by the charter or the by-laws or as may be implied by usage and acquiescence. The ordinary affairs of the corporation are under control of the directors, not of the vice-president and unless there was clear proof that Ware had and exercised, as a matter of fact, the authority and control alleged, the fact that he was an officer, sat at the directors' meetings, and was benefited by the debt in question, would not render him liable. The court held a jury question was presented and affirmed the trial court's overruling the general demurrers.

In *Bowers v. Salitan*[11] suit was brought against the individual defendant on six promissory notes. The notes sued on were all signed as follows: "Bowers S. H. T. Medal Co." and immediately thereunder was the signature, "C. L. Bowers". The notes were not under seal. Plaintiff contended the notes were the undertaking of the corporation and the individual as co-makers, and that the defendant could not by extrinsic evidence show that he had signed in any capacity other than as co-maker. The court held this contention was without merit saying,

> The usual method of signing a corporate contract is for the duly authorized officer or agent to sign the corporate name, adding thereto, after the word 'by' or 'per', his own name and title as officer or agent. When the name of the corporation is signed to the contract, however, it need not, in the absence of charter or statutory requirement, appear on the face of the instrument by whom the name of the corporation was affixed, nor is the omission of the title of the officer executing it material.

The court held that the notes contained an ambiguity as to the capacity in which the individual defendant signed the notes and that

11. 97 Ga. App. 877, 104 S.E.2d 667 (1958).

parol evidence would be admissible to explain in what capacity the individual defendant signed to show thereby that the notes were corporate obligations and not his individual undertaking. Compare this case with the case of *Katz v. Teicher.*[12] In the *Teicher* case suit was filed against the corporation and an individual, Teicher, alleging the defendants were jointly and severally liable under a certain promissory note which was signed, "Timms Jewelry Company", apparently by rubber stamp, followed by the words, "Sidney Teicher" on the line below in handwriting. The defendant Teicher demurred generally to the petition and the trial court sutained the demurrer. The court held that both the signature of the corporation and the signature of the defendant Teicher were sufficient within themselves to bind each of them, nothing appearing upon the face of the instrument to indicate that Teicher signed in a representative rather than in an individual capacity. Where no such representative capacity appears, the note is prima facie a joint and several obligation, although as between the parties themselves, the capacity of the signatories may be proved upon the trial of the case, since the note is a contract and the agreed intention of the parties thereto would prevail.

A principal is liable in a proper case for malicious prosecution where the same is conducted by its president and other managing agents in furtherance of the business of the principal and within the scope of the authority of such officers.[13] Where the acts, consisting of threatening to prosecute the plaintiff, making out an affidavit of arrest, giving testimony before the grand jury and on the trial of the case, are done maliciously and without probable cause and in the furtherance of the business of the corporation, they must also be deemed to be within the scope of such agent's authority, the corporation having ratified such acts by advancing funds to pay special counsel to assist in the prosecution.

Where three persons, who own all of the stock of a corporation and constitute all of its officers and board of directors, enter into a contract placing the management of the business in the third person for a limited time for purposes of liquidating the assets of the corporation, such contract is not void as against public policy.[14] In this case the directors and stockholders executed a contract with the plaintiff, whereby the plaintiff agreed to act as general manager of the corporation for a five year period, with an option to purchase which he subsequently exercised. The contract provided, among other things, that

12. 98 Ga. App. 842, 107 S.E.2d 250 (1959).
13. Progressive Life Insurance Company v. Doster, 98 Ga. App. 641, 106 S.E.2d 307 (1958).
14. Self v. Smith, 98 Ga. App. 876, 107 S.E.2d 721 (1959).

two of the three stockholders would remain liable jointly and severally for all of such debts above the amount of money received from liquidation of capital assets or collection of accounts receivable and that the plaintiff, the third party manager, had the privilege of advancing funds for the payment of such debts in order to expedite same but was not obligated to do so. A dispute arose from the action of the plaintiff attempting to be reimbursed for the advancements made in accordance with the contract. The defendants contended that the contract was against public policy as the contract placed in the hands of the plaintiff complete control of the corporate affairs, including hiring and firing, during the liquidation process, and thus was subject to the same attack as in the cases of *English v. Rosenkratz*[15] and *Morel v. Hoge,*[16] where it was held that a group of stockholders could not by the creation of proxies or voting trust permanently do away with their right to vote and participate in the management of the corporate affairs. The court pointed out that such agreements were subject to attack (a) because the giving of proxies was not permitted at common law, and (b) because a combine of the character referred to frequently contemplates some fraud or injury to minority stockholders. The court distinguished this case from the two cases cited, stating that here voting proxies were not involved and that the agreement to place a liquidation of company assets in the hands of a manager was concurred in by all of the directors, who also constituted all of the stockholders. The objective was in no wise illegal and so far as the petition showed it was fully executed in accordance with the intention of the parties.

In the case of *Glover v. Maddox*[17] a disagreement as to division of fees resulted in litigation. The plaintiff alleged that the defendant entered into a written contract with clients to represent them in bringing certain actions for recovery of monies, said contract providing that proposed litigation should be on a contingent fee basis; further, that in addition to the defendant and the plaintiff's firm, another firm and an individual attorney were to be associated. Plaintiff alleged said litigation resulted in a recovery, that the plaintiffs were in fact and in law joint adventurers and co-partners with the defendant and with the other associates in the case, and concluded that the plaintiff was entitled to one-fourth of the total fee received. In the second count plaintiff sought recovery on a quantum meruit basis. The court held that lawyers jointly undertaking to represent a client, without a contract as to the division of fee, share equally. While lawyers associated

15. 152 Ga. 726, 111 S.E. 198 (1922).
16. 130 Ga. 625, 61 S.E. 487 (1908).
17. 98 Ga. App. 548, 106 S.E.2d 288 (1958).

in representing a client on a contingent basis are benefited by the services of each, their services are rendered under the contract of employment to and for the benefit of their mutual client and not to or for the benefit of each other, hence there can be no recovery on the basis of quantum meruit. The court added, however, that this was not a pronouncement that a lawyer may not recover against his associate in some form of assumpsit, as for instance by an action for money had and received for a fair share of the fees earned and owned by them jointly. The court in passing on the defendant's contention as to division of fees individually rather than as units, held such contention not sound and stated, "A firm of lawyers associated with other lawyers in handling a case, share in the fees as a unit and not individually, unless there be an agreement to the contrary." In discussing the issue of alleged nonjoinder of the defendant's partner the court held, in passing, that when the goods of another are converted by a partner and delivered to the partnership, the third person may elect to sue the offending partner individually or the partnership.

The following statutes passed during the survey period are mentioned briefly in connection with this field of law. The method of service of process on non-resident corporations not domesticated in Georgia but doing business therein has been slightly changed by requiring either an additional copy of the petiton or other pleading with copy of process or summons thereto attached or one copy with twenty-five cents per page for photostating such copy to be left with the Secretary of the State of Georgia instead of the former requirement of only one copy.[18]

GA. CODE ANN. § 108-803 was amended to the same effect by requiring two copies of the petition or one copy plus a fee of twenty-five cents per page for photostating said copy to be left with the Secretary of State in order to perfect service on corporations authorized to act in a fiduciary capacity.[19]

Act No. 25[20] provides that an action or suit may be maintained by or against any unincorporated organization or association. The act further provides that service of process in such an action may be made by serving any officer or official member of such organization or upon any officer or official member of any branch or local of such organization, but further provides that the organization may file with the Secretary of State a designated officer or agent upon whom service shall be had and his resident address within the state, and if so designated, service will be only on such officer or agent if he can be found

18. Ga. Laws 1959, p. 126.
19. Ga. Laws 1959, p. 174.
20. Ga. Laws 1959, p. 44.

within the state. The act provides that venue will be in any county where such organization does business or has a branch or local organization. In case of a judgment obtained against such an organization the act provides that the property of such organization shall be liable to the satisfaction of such judgment; further, that no judgment shall be enforced against the individual property of any member unless such member has personally participated in the transaction for which said action was instituted. The act further provides that it will apply to any action now pending or cause of action now existing or hereafter arising.

The act apparently was aimed at the labor organizations and labor unions. However, if its literal meaning is not unduly restricted by the courts it would seem to apply in situations such as have arisen in the cases tried during this period. In this connection see the case of *Cravey v. Southeastern Underwriters*[21] and also *Lumbermen's Underwriting Alliance v. First National Bank and Trust Company*.[22]

The Georgia Securities Act[23] was amended by Act No. 86.[24] Section 6 (i) was amended so that the act now provides that subscriptions for stock in a corporation prior to the incorporation thereof are exempt when the number of subscribers does not exceed 15 *or* when the amount raised by such subscription does not exceed $25,000.00, thus no longer requiring both categories to be met before exemption. The act further adds a new section 3 (a) which requires a prospectus or offering circular in certain instances, defines speculative securities and requires disclosure thereof, and requires delivery in escrow of securities issued to officers, agents, employees, salesmen, limited salesman or promoters.

The qualifications for directors of banks was changed by an amendment[25] reducing the requirement from 80 per cent to 60 per cent of the directors who must be citizens of the State of Georgia and residents of the city or town in which the bank is located or within 25 miles thereof.

GA. CODE ANN. § 13-2015[26] was amended by excepting from the limitations of the section, investment in real estate by banks or loans where the total amount of any single loan matures in three years or less and does not exceed $3,500.00.

Act No. 372[27] authorizes banks and trust companies organized under state law to invest in all the capital stock of a corporation holding,

21. 214 Ga. 450, 105 S.E.2d 497 (1958).
22. 98 Ga. App. 289, 105 S.E.2d 585 (1958).
23. Ga. Laws 1957, p. 134.
24. Ga. Laws 1959, p. 89.
25. Ga. Laws 1959, p. 323.
26. Ga. Laws 1959, p. 250.
27. Ga. Laws 1959, p. 328.

leasing, or owning premises in which such bank or trust company carries on its business, subject to the prior approval of the superintendent of banks.

Act No. 330[28] amends GA. CODE ANN. § 13-2023 by adding a new sub-paragraph "f" authorizing the purchase and ownership by certain qualified state banks, of shares of stock in small business investment companies organized under the acts of Congress and doing business in this state provided that no bank shall hold such shares in an amount aggregating more than one per cent of its capital and unpaid surplus.

28. Ga. Laws 1959, p. 238.