BUSINESS ASSOCIATIONS

By JOE R. YOUNG, JR.*

The law established during the past year, both by litigation and legislation, continued its normal growth without any sweeping changes. The cases continue to follow the established principles of law with some gradual changes being unnoticeable except when viewed as a small part of the law of the last five years. The trend continues toward the adoption of uniform acts in the legislative field.

In the case of *Booker v. First Federal Savings and Loan Association*,[1] petitioners sought a declaratory judgment and an injunction, alleging that the nomination and election of the directors of the defendant were illegal because the rules and regulations denied to the members of the association the right to vote for persons of their choice. The rules and regulations of the association provided that the president should appoint a nominating committee at least thirty days prior to the date of the annual meeting, such nominating committee should make nominations for directors in writing and deliver such nominations to the secretary at least fifteen days prior to the annual meeting; no nominations for directors other than those by the nominating committee should be voted upon at the annual meeting unless other nominations by members were made in writing and delivered to the secretary at least ten days prior to the date of the annual meeting, such nominations to be included on the ballot along with the nominations of the nominating committee. Should the nominating committee for any reason fail to act in accordance with the regulations, nominations for directors could be made at the annual meeting by any member and voted thereupon.

Another regulation provided that no proxies should be voted on unless they had been placed on file with the secretary of the association for verification at least five days prior to the annual meeting.

The court stated,

> It is a general rule that a corporation may enact any bylaw for its internal management so long as such bylaws are not contrary to its charter, a controlling statute, its articles of incorporation, or violative of any general law or public policy. Subject to the above qualifications, a corporation may

*Associate in the firm of Hitch, Miller and Beckmann, Savannah; B.A., 1951, Vanderbilt University; LL.B. 1956, Walter F. George School of Law, Mercer University; Member of Georgia and Savannah Bar Associations.

1. 215 Ga. 277, 110 S.E.2d 360 (1959).

> adopt bylaws regulating the calling and conduct of corporate meetings and elections of its officers. *Hornady v. Goodman,* 167 Ga. 555, 572, 146 S.E. 173.

It did not appear that any nominations for directors were before the meeting other than those submitted by the nominating committee. Plaintiff had the right to make nominations in accordance with the bylaws but failed to do so. Even if it were conceded that all of the votes cast by the proxy committee were void, it did not appear from the petition that the number of votes cast by other members in person or by proxy was insufficient to elect. The president announced that the nominees of management had been elected by a large majority. The court held that this declared result of the election was prima facie the correct result. The burden was on the plaintiffs to rebut this prima facie case by alleging facts showing that the requisite number of members had not voted for the election of the nominated directors. An election or other action at a corporate meeting is not rendered invalid because of the receipt of illegal votes, or the rejection of legal votes, if the result would have been the same had they been rejected or received, as the case may be. Judgment for the defendant was affirmed.

Plaintiff filed suit on open account against the defendant corporation for engineering services performed. The defendant contended that the contract in question was beyond the charter powers of the defendant. The court held this defense to be without merit, quoting from *Towers Excelsior & Ginning v. Inman*[2] as follows:

> After a contract entered into by a corporation has been performed by either of the contracting parties, the fact that the making of the contract involved an unauthorized exercise of corporate power on the part of the company will not constitute a defense to an action brought by the party having performed the contract to recover compensation for a breach of the contract by the other party.

Defendant contended further that the corporate officer who ordered the plans and map prepared by the plaintiff had no authority from the corporation to do so. In rejecting this defense the court quoted from *Alexis, Inc. v. Werbell,*[3]

> No application of the doctrine of ultra vires acts will allow a corporation to retain and use the benefits of a contract . . . under which they were obtained.

Where the officers of a corporation, though without authority to do

2. 96 Ga. 506, 23 S.E. 418 (1895).
3. 209 Ga. 665, 669, 75 S.E.2d 168 (1953).

so, do in fact execute a contract in behalf of a corporation, and the fruits of it are received, retained, and applied to corporate uses, the corporation will be liable thereon not withstanding any want of authority in its officers. The facts of the case were: the corporation had all powers granted to corporations generally, which included the power to contract; its principal business was selling, among other things, refrigeration and dairy fixtures; it decided to persuade a prospective customer to build a building on land owned by the customer and installd the defendant's machinery therein; in order to make the sale the plans were prepared for the customer's use; the letter of authorization to the plaintiffs was on the company letterhead and signed in the defendant's name by Venno J. Flatauer; Flatauer was a person who dealt with the plaintiffs; the contract was completed by the plaintiffs; the plans and specifications were delivered to the defendant with no disavowal of liability or offer to return the same made until after the suit was fild. Under these circumstances, the mere statement of Flatauer that the corporation had not authorized him to order the work done at most presented a question of fact as to whether the corporation as such authorized or subsequently ratified the act of its officer in making the contract in question. Whether or not the plaintiff was a registered architect or engineer was an affirmative defense which the defendant should have alleged and proved.[4]

Service upon a member of a partnership binds the assets of the partnership and of the individual partner who was served, but is not sufficient to constitute the basis for a judgment *in personam* against other members of the partnership not personally served.[5]

It is proper to have a subpoena *duces tecum* directed to a corporation and either have it served upon a general manager of such corporation who has possession of the document sought, or to serve the subpoena *duces tecum* on the president of the corporation. Either party thus served is equally responsible for the production of the document.[6]

A salesman brought an action in tort against his corporate employer and against certain officers and agents of the corporation alleging that the corporation and the officers and agents maliciously conspired for the purpose of fraudulently depriving plaintiff of sales commissions due him.[7] The court held that no cause of action was stated

4. Flatauer Fixtures & Sales Corp. v. Garcia & Associates, 99 Ga. App. 685, 109 S.E.2d 818 (1959).
5. Broome v. Graham, 99 Ga. App. 682, 109 S.E.2d 824 (1959).
6. Jones v. State, 99 Ga. App. 858, 109 S.E.2d 859 (1959).
7. Rhine v. Sanders, 100 Ga. App. 68, 110 S.E.2d 128 (1959).

against the corporation since any cause of action the plaintiff had would be in contract and not in tort. As to the individual officers and agents named as party defendants the court held that since the plaintiff alleged that these defendants were acting as officers and agents of the defendant corporation, whatever they did with respect to the plaintiff's contract of employment they did as corporate officers and not in any of their individual capacities. Therefore, there was no individual liability on the part of the corporate officers since any other rule would make it impossible for corporate business to be carried on at all except at the peril that every agent who advised concerning corporate action would be suable.

Where a corporation's property is listed with a real estate broker for a sale by an agent of the corporation and the property is subsequently sold in accordance with the listing, the corporation may be held liable for the sales commission even though the agent listing the property acted initially without authority. Since the corporation benefited from the agent's acts it may be held to have ratified the transaction.[8]

In the event that a corporation does have an agent or office for the purpose of doing business within the state, the venue will be in the county where such office exists. However, where a foreign corporation doing business within this state does not have an agent or office for the purpose of doing business, but does have an agent for the purpose of service, venue may be laid in any county as prescribed by GA. CODE ANN. §22-1509.[9]

Before a Georgia tax payer can claim a deduction for contributions paid to educational institutions the institution in question must have at the time of payment a certificate from the state revenue commissioner certifying that the institution is such an educational institution within the meaning of the taxing statute. Apparently the state revenue commissioner is vested with complete discretion as to whether or not he will grant or refuse such a certificate to any institution applying for same. He may arbitrarily withhold same in his discretion.[10]

A suit by a member of a partnership is not a suit by the partnership and cannot be amended so as to change parties plaintiff from the individual partner to the partnership.[11]

---

8. Glassman v. Melrose Construction Company, 100 Ga. App. 763, 112 S.E.2d 282 (1959).
9. Diamond Alkali Company v. Godwin, 100 Ga. App. 799, 112 S.E.2d 365 (1959).
10. Patrick Henry Schools v. Oxford, 215 Ga. 399, 110 S.E.2d 632 (1959).
11. Smith v. Pope, 100 Ga. App. 369, 111 S.E.2d 155 (1959).

STATUTES

Georgia corporations, except banks and trust companies, may merge or consolidate with other Georgia corporations or with foreign corporations.[12] If the surviving corporation is a foreign corporation then the procedural requirements of the foreign state control.

If the Georgia corporation was one chartered by the superior courts a copy of the merger agreement must be filed with both the Secretary of State and the clerk of the superior court, if chartered by the Secretary of State, a copy must be filed with him.

A charter fee must be paid to the Secretary of State or the clerk of the superior court on filing the agreement, if the resulting corporation is to be a Georgia corporation, otherwise a filing fee of $5.00 must be paid.

Quaere: Does the above amendment apply to insurance, railroad, canal, navigation, express and telegraph companies? Consider GA. CODE ANN. §22-1884.

The Uniform Act for Simplification of Fiduciary Security Transfers was enacted as act 615.[13] A corporation registering a security in the name of a fiduciary is not chargeable with notice regarding the existence, extent, or correct description of the fiduciary relationship, and may assume the fiduciary continues as such until written notice to the contrary is received. Except as otherwise provided in the Act, a corporation making a transfer of a security pursuant to an assignment by a fiduciary may assume that such is within the authority and in compliance with any controlling instrument or law.

A transfer made pursuant to an assignment by a fiduciary who is not the registered owner requires the corporation to obtain evidence of the appointment or incumbency. Before transfer an adverse claimant may give written notice to the corporation identifying the claimant, his address, the registered owner, and the issue of which the security is a part.

If the corporation, after receiving notice of the adverse claim, sends notice of the presentation of a security for transfer to the adverse claimant by registered or certified mail, the corporation may then make the transfer thirty days later if not restrained by a court order.

Third persons participating in the acquisition, disposition, assignment or transfer of a security by or to a fiduciary without actual knowledge of a breach of fiduciary duty are not liable for failure to inquire whether the transaction involves such a breach.

12. Ga. Laws 1960, p. 1111, GA. CODE ANN. §22-1837, §22-1843.1.
13. Ga. Laws 1960, p. 827, GA. CODE ANN. §108-901-911.

Act 589,[14] the Georgia Insurance Code of 1960, completely rewrites Title 56 of the Georgia Code. Since an analysis of this extensive revision is beyond the scope of the present article, the reader is urged to carefully study this act which will be effective January 1, 1961.

The Banking Laws of Georgia were amended by act 442.[15]

Additional branch banks, defined as additional places of business in a city or town *other* than where the parent was chartered, are prohibited.

Upon obtaining approval and a permit from the Superintendent of Banks, a parent or a branch bank may establish and operate either a bank facility or bank office within the municipality where the parent or branch bank is situated. A bank office is one which has a permit to operate a complete banking service, as contrasted to a bank facility which is authorized to operate only a limited banking service.

The Superintendent of Banks is vested with discretion in granting the permit, determining the amount of funds to be committed for construction of the particular office or facility, and apparently in deciding whether an office or facility will be approved regardless of which is sought in the application.

A bank holding company is defined in the act as any company which owns or controls more than five per centum of the voting shares of each of two or more banks. The act declares unlawful: (1) any action resulting in the formation of a bank holding company; (2) the control by a holding company of more than five per cent of the voting shares of any bank (unless it already controlled a majority); (3) the acquisition by a holding company of substantially all the assets of a bank; (4) any merger of holding companies.

The act further requires the registration of all bank holding companies with the Superintendent of Banks, provides for certain specified information being furnished, authorizes examinations, and reports.

Act 930[16] prohibits the operation of a banking business without being chartered and organized under the banking laws of Georgia or of the United States, however, anyone so engaged in the banking business prior to the act may continue after complying with certain specified conditions.

14. Ga. Laws 1960, p. 289-764, GA. CODE ANN. §56-101 et seq.
15. Ga. Laws 1960, p. 67, GA. CODE ANN. §13-2, §13-9.
16. Ga. Laws 1960, p. 1170, GA. CODE ANN. §13-204.