BUSINESS ASSOCIATIONS

By CARROLL SIERK*

There were a number of interesting developments on both legislative and judicial fronts during the survey period. However, none would seem to drastically or dramatically change the law.

CORPORATIONS

FOREIGN CORPORATIONS

During the survey period two cases dealt with the problem of whether or not the Georgia courts had jurisdiction over a foreign corporation, and an act[1] increased the fee to be collected by the Secretary of State for acting as agent for service of process on an undomesticated foreign corporation from $2 to $4. In *Lamex, Inc. v. Sterling Extruder Corp.*,[2] there was an attempt to secure service upon, and Georgia jurisdiction over, a foreign corporation by serving the corporation's president who was temporarily present in Georgia. Sterling, a New Jersey corporation, had sold a machine in New Jersey to an Illinois partnership which loaned the machine to Lamex which in turn installed it in the Lamex plant in Georgia. Sterling's president and other Sterling employees came to Georgia for brief periods of time to observe the testing of the machine, which had certain experimental features, and to make necessary adjustments in the machinery as required by Sterling's contract with the Illinois partnership purchaser of the machine. A dispute arose over the question of who was to pay certain local costs related to the adjustment of the machinery. Lamex sued Sterling in Georgia serving Sterling's president while he was present in Georgia to discuss the question of who should pay the costs in dispute. The Court of Appeals affirmed the trial court's dismissal of the suit, observing that Sterling was not doing business in Georgia since "its activities in the state were clearly limited to carrying out the terms of a contract negotiated and made in interstate commerce in Illinois and New Jersey with a third party . . . "[3] and "personal jurisdiction of Georgia courts over a foreign corporation is not secured by personal service on the defendant's president while he is sojourning in

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1. GA. LAWS, 1965, p. 259.
2. 109 Ga. App. 92, 135 S.E.2d 445 (1964).
3. *Id.* at 94, 135 S.E.2d at 447.

Georgia, whether he came voluntraily or was lured into the state under false pretenses, as defendant contends."[4]

ORGANIZATION OF DOMESTIC CORPORATIONS—CORPORATE NAME

A recently enacted statute[5] amends section 2 of the 1938 Corporation Act[6] and other statutes so as to provide that the name of a new Georgia corporation or a foreign corporation being domesticated in Georgia, must not only not be identical with the name of an existing Georgia corporation or domesticated foreign corporation but must not be "deceptively or confusingly similar to" the name of any such existing corporation.

Another enactment[7] amends section 1 of the 1938 Corporation Act[8] so as to require that words implying banking powers not be used in the names of corporations which are not banks.[9]

STOCKHOLDERS AND STOCK—TRANSFER OF SHARES

In *Whitley v. Whitley*,[10] the Supreme Court showed no sympathy for one who intended to be a participant in a tax-saving scheme involving the transfer of stock to his sons and found himself no longer in control of the corporation which he had formerly dominated. Charging that his sons had fraudulently deprived him of his interest in the corporation by representing that the transfer of his stock to them was solely for tax purposes and would not interfere with his control of corporate affairs when they in fact intended to seize control of corporate affairs themselves, the father sought to have the contract providing for the transfer voided. Likening the situation to that "where two persons complotted to hinder, delay, and defeat a creditor of

4. *Id.* at 93, 135 S.E.2d at 447. An unsuccessful attempt to challenge the constitutionality of GA. CODE §22-1211 (1933) (service of process on dissolved corporation) and GA. CODE ANN. §22-1874 (Supp. 1963) (corporate existence continued after dissolution for certain purposes) as applied to a dissolved foreign corporation was made in R. O. A. Motors, Inc. v. Taylor, 220 Ga. 122, 137 S.E.2d 459 (1964). The Supreme Court held that the corporation could not raise the constitutional issue for the first time after having begun with a plea to the jurisdiction and carrying that issue through the Georgia courts. In Taylor v. R.O.A. Motors, Inc., 108 Ga. App. 635, 134 S.E.2d 486 (1963), it was held that GA. CODE §22-1211 (1933) applies to foreign corporations and that the corporation was properly served.
5. GA. LAWS, 1965, p. 278.
6. GA. CODE ANN. §22-1802 (Supp. 1963).
7. GA. LAWS, 1965, p. 602.
8. GA. CODE ANN. §22-1801 (Supp. 1963).
9. Legislative acts during the survey period applying only to banking corporations include: GA. LAWS, 1965, p. 501, amending the code section relating to incorporation of banks in various particulars, especially setting a minimum par value of one dollar for bank stock and providing that trust powers may not be exercised until the stock subscription shall have been paid in; GA. LAWS, 1965, p. 523, authorizing banks to acquire the stock of bank-service corporations; and GA. LAWS, 1965, p. 524, requiring a change in the "control" of a bank to be reported to the Superintendent of Banks.
10. 220 Ga. 471, 139 S.E.2d 381 (1964).

one of them,"[11] the court announced: "According to the petitioner's own allegations, he comes into equity with unclean hands. Therefore, he must fail."[12]

STOCKHOLDER'S RIGHT TO INSPECT CORPORATE BOOKS

In *G. S. & M. Company v. Dixon*,[13] the administrator of an estate owning three-quarters of a share of the corporation sought judicial aid to enforce his right to inspect the corporate books, records, and bylaws for enumerated proper purposes[14] since the corporation refused to allow such examination. The Supreme Court held that the stockholder's common-law inspection right[15] is not dependent upon the amount of stock held and is totally independent of the minority stockholder's suit provided for in GA. CODE §22-711 (1933), so that the requirements of that statute need not be met by a stockholder seeking to enforce his inspection rights.[16]

CORPORATE MANAGEMENT

A limited exception to the general rule that stockholders as such have no role in corporate management other than voting to elect directors and on fundamental changes in the corporate structure[17] is provided by a new statute[18] which amends the Cooperative Marketing Act[19] to provide that association officers may be elected by the members and from persons other than directors.

Two problem areas regarding corporate management are those of the delegation of management functions to outsiders (persons other than directors and officers)[20] and of long term contracts purporting to bind the

11. *Id.* at 474, 139 S.E.2d at 383, quoting from Bagwell v. Johnson, 116 Ga. 464, 468, 42 S.E. 732, 734 (1902).
12. 220 Ga. at 473, 139 S.E.2d at 382.
13. 220 Ga. 329, 138 S.E.2d 662 (1964).
14. The purposes included: "to ascertain the legality of such meeting [of stockholders outside of the state of Georgia], to determine the worth of the decedent's share for inventory and estate tax purposes, to ascertain whether the corporation's assets have been properly administered. . . . " *Id.* at 331, 138 S.E.2d at 664.
15. Recognized in Georgia at least as early as Winter v. Southern Securities Co., 155 Ga. 590, 118 S.E. 214 (1923).
16. The stockholder's common-law inspection right is usually enforceable through mandamus proceedings. 5 FLETCHER, PRIVATE CORPORATIONS §2251 (Wolf rev. 1952). However, in Bregman v. Orkin Exterminating Co., 213 Ga. 561, 100 S.E.2d 267 (1957), the court said, "[I]n Georgia the subject of mandamus is controlled by statute, and the common-law rules are no longer applicable. . . . We reach the conclusion that in Georgia mandamus is not the remedy to enforce a purely private right of a stockholder against a corporation when the right sought to be enforced is in no way affected with a public interest. The remedy of the stockholder in such circumstances is in a court of equity." *Id.* at 563, 100 S.E.2d at 268.
17. HENN, CORPORATIONS 290 (1961).
18. GA. LAWS, 1965, p. 395.
19. GA. CODE ANN. §§65-201 to -231 (Supp. 1963).
20. HENN, *op. cit. supra* n. 17, at 243.

corporation for periods of time which extend beyond the term of office of the directors authorizing them.[21] Both of these issues presented themselves to the Supreme Court in *Milton Frank Allen Publications, Inc. v. Georgia Ass'n of Petroleum Retailers, Inc.*[22] This case involved a contract between the association, a non-profit, non-stock corporation, and Milton Frank Allen Publications, Inc. (Allen). The contract provided that Allen was to publish the association's trade magazine at least monthly, that such right to publish was to be exclusive, no other printed medium being used by the association, and that the term of the contract was to be thirty years with Allen having the option of renewing for two additional and consecutive thirty-year periods. With regard to the allegation that the contract was invalid because it turned the management of corporate affairs over to outsiders, the court said:

> Nowhere does the contract seek to abrogate the right of the Association's officers and directors to determine the policies and take the action deemed for the best interest of the Association and its members. Nor does it surrender the management of the corporation to other parties so as to divest the officers and directors of the Association of the exercise of judgment as to what is in the best interest of the organization, and thus violate public policy. . . .[23]

With regard to the second issue, the court said:

> Neither is the contract invalid as contemplating the rendition of personal services . . . for a length of time beyond the Association's corporate existence. . . . The power of a corporation, by virtue of its existence, to enter into contracts (*Code Ann.* §22-1827 (c)) is not limited to the term of its incorporation, in view of the charter renewal power of *Code Ann.* §22-1827 (h). . . .[24]

TORT LIABILITY OF CORPORATIONS

Gem City Motors, Inc. v. Minton[25] involved a tort action for fraudulent misrepresentation allegedly made by a corporation through its agents to the buyer of an automobile. The corporation contended "that when the fraud of an agent is sought to be imputed to the principal, the fraud must be complete in the agent; that is, the agent who made the false and fraudulent misrepresentation must have knowledge of its falsity."[26] The court rejected this contention as being without merit and quoted from its earlier

21. Realty Acceptance Corp. v. Montgomery, 51 F.2d 636 (3d Cir. 1930).
22. 219 Ga. 665, 135 S.E.2d 330 (1964).
23. *Id.* at 671-72, 135 S.E.2d at 336.
24. *Id.* at 672, 135 S.E.2d at 336.
25. 109 Ga. App. 842, 137 S.E.2d 522 (1964).
26. *Id.* at 845, 137 S.E.2d at 525.

decision in *Walker v. State*:[27] "A company is chargeable with the composite knowledge acquired by its officers and agents acting within the scope of their duties."[28]

In several Court of Appeals decisions[29] during the period under review the desirability of the Supreme Court's reconsidering the rule of *Behre v. National Cash Register Co.*[30] was strongly suggested. In 1897, in the *Behre* case, the Supreme Court of Georgia held that a corporation could be liable for a libel published by its agents under the usual scope of the agency rules but could not be liable for a slander uttered by its agent unless such slander was "expressly directed or authorized," quoting with approval the following passage from *Odgers, Libel & Slander*:

> A corporation will not be liable for any slander uttered by an officer, even though he be acting honestly for the benefit of the company, and within the scope of his duties, unless it can be proved that the corporation expressly ordered and directed that officer to say those very words, for a slander is the voluntary and tortious act of the speaker.[31]

The Odgers statement apparently was not supported by any authority at the time he originally made it[32] and is today clearly a minority view, being rejected in England and in most of the United States.[33] Even though the potential harshness of the *Behre* rule has been to some extent ameliorated by other rules such as that imposing upon department stores and other business establishments a special duty to protect business invitees upon their premises from slanderous remarks made by the business's employees,[34] it would seem that the time has come for Georgia to overrule its 1897 decision and put itself in accord with the current majority view.[35]

27. 89 Ga. App. 101, 105, 78 S.E.2d 545, 549 (1953).
28. 109 Ga. App. at 845, 137 S.E.2d at 525.
29. Abner v. W. T. Grant Co., 110 Ga. App. 592, 139 S.E.2d 408 (1964) (concurring opinion by Judge Eberhardt); Zayre, Inc. v. Sharpton, 110 Ga. App. 587, 139 S.E.2d 339 (1964) (concurring opinion by Judge Eberhardt); World Ins. Co. v. Peavy, 110 Ga. App. 527, 139 S.E.2d 155 (1964). Perhaps the case of World Ins. Co. v. Peavy, 110 Ga. App. 651, 139 S.E.2d 440 (1964), where the *Behre* case is cited as providing support for a libel action against a corporation should be considered in connection with the preceding cases.
30. 100 Ga. 213, 27 S.E. 986 (1897).
31. ODGERS, LIBEL & SLANDER §368 (1st Am. ed. 1881), quoted at 100 Ga. at 214, 27 S.E. at 986.
32. The original text apparently began: "A corporation will not, it is submitted, be liable for any slander. . . ." ODGERS, LIBEL & SLANDER 324 (1st Am. ed., 1881). See Southwestern Tel. & Tel. Co. v. Long, 183 S.W. 421 (Tex. Civ. App. 1915).
33. 10 FLETCHER, PRIVATE CORPORATIONS §4888 (Bergoffen rev. 1961).
34. Zayre, Inc. v. Sharpton, *supra* n. 29.
35. It should be noted that changing the rule of the *Behre* case might also bring about a change in the more general area of agency law. See SEAVEY, AGENCY §89(e) (1964) where Rivers v. Mathews, 96 Ga. App. 546, 100 S.E.2d 637 (1958) is cited as stating the minority view with regard to the master's liability for his servant's unauthorized slander of a third party.

DISREGARDING THE CORPORATE ENTITY

One of the basic characteristics of a corporation is its status as a legal entity separate and apart from the legal personality of its owners.[36] Generally this separate legal-entity status is fully respected. However, there are exceptions. Two cases during the survey period dealt with the exceptions. In *Farmers Warehouse Inc. v. Collins*,[37] Mr. Collins had entered into an agreement to purchase stock from three individual stockholders of the corporation involved, the agreement providing that his note for the purchase price of the stock could be paid out of dividends earned by the stock being purchased and salaries earned by Collins' rendering services to the corporation. After Collins had worked for the corporation for three years for "nothing," all of his earnings being applied to his note for the purchase price of the stock, the corporation sold substantially all of its assets. Collins alleged that this corporate action was a breach of contract since it meant he would have no more salary from the corporation out of which to pay for the stock. The court held that there was no cause of action against the corporation for breach of contract since it was not a party to the contract. The court further held that the corporation could not be made a party to the contract by application of the alter ego doctrine.

> Where the courts have disregarded the corporate entity because the corporation is the mere alter ego or business conduit of a person, it has generally been on the idea that the corporate entity has been used as a subterfuge and to observe it would be to work an injustice. . . .[38]
> We do not think that the allegations are sufficient to show that there was such unity of the individual defendants and the corporation as to make them one, or that the corporation was the mere conduit or alter ego of the defendants to the extent that the separate personalities of the corporation and the owners no longer exist. Furthermore, . . . the plaintiff has a cause of action for enforcement of his rights under the note-stock purchase contract as against the parties thereto, the three individual defendants, and not against the corporation. . . . It is not necessary to disregard the corporate entity for him to acquire his rights under the contract.[39]

Willson v. Appalachian Oak Flooring & Hardware Co.[40] involved an action by corporate creditors against several defendants on the theory that

36. NADLER, GEORGIA CORPORATION LAW §27 (1950).
37. 220 Ga. 141, 137 S.E.2d 619 (1964).
38. *Id.* at 150, 137 S.E.2d at 625.
39. *Id.* at 150-51, 137 S.E.2d at 625-26. The court did hold that there was a cause of action against the corporation on a quantum meruit basis since Collins had received "nothing" for his services to the corporation. The court did not explain why it regarded the amounts credited on Collins' debt to the other stockholders as "nothing."
40. 220 Ga. 599, 140 S.E.2d 830 (1965).

the defendants had conspired to defraud creditors by, *inter alia,* operating a corporation whose minimum capital required by its charter had not been subscribed or paid in and issuing false financial statements. General and special demurrers of Willson, a director of the now bankrupt corporation, were overruled by the trial court. The correctness of this action was the question presented to the Supreme Court. The Supreme Court upheld the trial court's decision, suggesting that a director who acted as such with knowledge that the minimum capital had not been paid in or bona fide subscribed would be personally liable to injured corporate creditors even though he had not participated in the organization of the corporation, thus imposing an obligation beyond that required by the literal words of GA. CODE ANN. §22-1872 (Supp. 1963), which imposes liability to creditors only upon those who *organize and operate* a corporation. However, the decision does not rest upon this narrow a question since the creditors had charged a conspiracy to defraud, and each person joining in such a conspiracy would be personally liable.

CORPORATE REPORTS

Two statutory changes regarding the reports required of corporations were made during the period under review. An enactment[41] provides that corporations subject to the Georgia income-tax laws shall have the same tax period and reporting dates for the annual license or occupation tax as for the income tax. Another enactment[42] amends GA. CODE §22-1703 requiring annual corporate information returns to be filed with the Secretary of State by adding an eighth item of information to be included in such return: "8. Name and address of the four principal officers of the corporation."

RECEIVERSHIP

In *Stalvey v. Pedi Joy Shoes Corp.*,[43] the Supreme Court applied GA. CODE §55-106 (1933)[44] to a suit by corporate creditors to have a receiver appointed to prevent an insolvent corporation from worsening its condition by continuing to dispose of its assets in the course of carrying on its business operations. The court held that the trial court erred in appointing a receiver, observing:

> The petition does not allege that the defendant corporation is fraudulently disposing of its assets to defraud creditors, nor that the goods were fraudulently obtained. The allegation of insolvency

41. GA. LAWS, 1965, p. 344.
42. GA. LAWS, 1965, p. 640.
43. 220 Ga. 489, 140 S.E.2d 264 (1964).
44. "Creditors without lien may not, as a general rule, enjoin their debtors from disposing of property, nor obtain injunction or other extraordinary relief in equity."

> without more does not state a cause of action for the appointment of a receiver and injunction against defendant's disposing of its assets. . . .[45]

At first glance the language of this case might seem to leave creditors and stockholders completely unprotected against honest but inefficient corporate management. However, it should be noted that the Georgia courts have long recognized the minority stockholder's right to a corporate receivership in a proper case[46] and that even under very modern statutes such as the American Bar Association's Model Business Corporation Act[47] or Article 7.05 of the Texas Business Corporation Act[48] the creditors entitled to demand corporate receivership and similar relief are those whose claims are "reduced to judgment" or at least "admitted in writing."

PARTNERSHIPS

The survey period produced two cases in the field of partnership law, one dealing with the definitional problem of what is a partnership, the other with problems of partnership dissolution. In *Escoe v. Johnson*,[49] the evidence showed a joint leasing of land, erection of a store building by one lessee (Johnson), a contract of employment between Johnson and the other lessee involving the sharing of profits from the business to be conducted in the store building, and an absence of any active participation in the operation of the store on Johnson's part. The trial court submitted the issue of partnership to a jury which found that there was none. The court held that the combined relationships of joint lessees, employer-employee, and landlord and tenant did not as a matter of law create a partnership either between the parties or as to third parties and did not make Johnson liable for certain debts incurred in the operation of the store.

Although the facts in *Wilkinson v. Walker*[50] are somewhat involved, the basic issue clearly was whether the termination clause or the division of profits clause of the partnership agreement should be applied to the division of "surplus" remaining after debts and partner's investments had been paid. Since the partnership had in fact been terminated, the court had little difficulty in deciding that the termination clause should apply.

45. 220 Ga. at 491-92, 140 S.E.2d at 267.
46. NADLER, GEORGIA CORPORATION LAW §415 (1950). In Farrar v. Pesterfield, 216 Ga. 311, 116 S.E.2d 229 (1960), the propriety of receivership in a case of deadlock was recognized.
47. ABA-ALI MODEL BUS. CORP. ACT. §§90-96 (1953).
48. TEX. ACTS, 1955, ch. 64, p. 239.
49. 110 Ga. App. 252, 138 S.E.2d 330 (1964).
50. 110 Ga. App. 333, 138 S.E.2d 460 (1964).

BANKRUPTCY

The Georgia appellate courts decided two cases dealing with the subject of bankruptcy during the period under review. *Hickman v. Livingston*[51] was an action for malicious abuse of legal process by a debtor against a creditor who had an action on account pending against him at the time of the filing of his bankruptcy petition. The creditor had proceeded to obtain a default judgment and attempted to collect it. The court held that the creditor was not guilty of a malicious abuse of legal process since bankruptcy is a personal defense which the debtor is obliged to assert for his own protection. Here the debtor had failed to take any action to have the creditor's suit stayed during the bankruptcy proceedings and had permitted the default judgment to be taken.

Watson v. Planters & Citizens Bank[52] tells us that a bankrupt, after a discharge in bankruptcy, may pursue an independent claim existing prior to such discharge where the claim was known to the trustee and not deemed worthy of pursuit by him.

> The trustee may not, simply by failing to pursue an asset in the belief that it is valueless, deprive the bankrupt of whatever value it may have and the bankrupt who has in fact furnished the trustee with such information as he has regarding the asset is not estopped to claim it after abandonment simply because it was not listed on the schedule. . . .[53]

51. 109 Ga. App. 812, 137 S.E.2d 491 (1964).
52. 110 Ga. App. 725, 140 S.E.2d 30 (1964).
53. *Id.* at 732, 140 S.E.2d at 35.