BUSINESS ASSOCIATIONS

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DOING BUSINESS

A Delaware corporation had maintained an office in Georgia and had made commercial-financing contracts within the state, but discontinued this practice and organized a fully owned Georgia corporation, which then carried on these activities on its own behalf and also serviced the accounts of the Delaware corporation's Georgia customers. When a cause of action arose out of a contract apparently made by the Delaware corporation in Georgia prior to the formation of the Georgia corporation, service of process directed to the Delaware corporation was made upon the manager of the Georgia corporation's Atlanta office. The Delaware corporation filed a traverse of service and a plea to the jurisdiction, but had a summary judgment entered against it on these pleadings.

The Court of Appeals, in affirming, held[1] that the servicing of accounts, consisting of obtaining assignments of accounts receivable as collateral for loans, collecting on these accounts receivable, and disbursing to customers advances and loan proceeds, done by the Georgia corporation for the Delaware corporation constituted doing business in Georgia by the Delaware corporation. Thus service upon the manager of the Georgia corporation's Atlanta office was sufficient service on the Delaware corporation. Although no due-process issue was raised, the court indicated that the minimum-contacts test of *International Shoe Co. v. Washington*[2] had been met.

The holding is based upon the finding that the Atlanta manager, an employee of the Georgia corporation, was an agent of the Delaware corporation.[3] The significant factors leading to this conclusion were: (1) The servicing of accounts was the "essence" of the business of the Delaware corporation. (2) About half of the work of the Atlanta office was devoted to servicing the accounts of the Delaware corporation. (3) Loans and advances to the Delaware corporation's customers were made from an Atlanta bank account, the checks being signed by officials of either corporation. There appears to have been no clear division between the corporations and the

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1. National Acceptance Co. of America v. Spiller & Spiller, Inc., 111 Ga. App. 314, 141 S.E.2d 550 (1965).
2. 326 U.S. 310 (1945).
3. Service was apparently based upon GA. CODE section 22-1101 (1933), which provides for service on any officer or agent of a corporation. It would have been possible to hold that, since the Delaware defendant was doing business within the state through the Atlanta office of the Georgia corporation, service was properly effected under this same code section by "leaving the . . . [process] at the place of transacting the usual and ordinary public business of such corporation." See GA. CODE ANN. sections 22-1506 to 1508 (1966 Rev.) providing for service upon the secretary of state where a suit arises out of business done in Georgia and no agent or place of business is maintained in Georgia for service of process as provided in GA. CODE section 22-1101 (1933).

holding approaches a disregarding of the corporate entity of the Georgia corporation.

Because of its narrow factual situation, the decision may not be too important, but it appears to be a step in the direction of an expansive interpretation of "doing business" in Georgia.[4]

Stockholder's Derivative Suit

A minority shareholder brought suit[5] against the majority shareholder for damages as the result of his allegedly converting the corporate assets to his own use. The Court of Appeals held[6] that the action was clearly derivative; that in derivative suits the corporation is a necessary party;[7] and that the suit must fail for non-joinder of the corporation.

Examination of Corporate Records

A stockholder has the legal right to inspect records of the company in which he owns stock in good faith and for a legitimate purpose.[8] But how can a stockholder enforce this right against an unwilling corporation? In most states the remedy is a writ of mandamus.[9] But in Georgia, that writ is strictly construed and is restricted to the enforcement of *public* duties of officials and corporations.[10] The traditional method of enforcing the right of inspection in Georgia has been in a court of equity in an action for an injunction against the corporation to prevent it from interfering with the right asserted.[11]

There has been some confusion as to the proper remedy.[12] The courts and, through them, the plaintiff were apparently victims of this confusion in a case decided within the survey year. The petition against the corporation was properly filed in equity and the requested order was granted. Appeal

4. For earlier considerations of what constitutes "doing business" in Georgia, see Zuber v. Pennsylvania R.R., 82 F. Supp. 670 (N.D. Ga. 1949); Southern Ry. v. Parker, 194 Ga. 94, 21 S.E.2d 94 (1942); Southeastern Distributing Co. v. Nordyke & Marmon Co., 159 Ga. 150, 125 S.E. 171 (1924)
5. Apparently under Ga. Code §22-711 (1933).
6. Short v. McKinley, 111 Ga. App. 557, 142 S.E.2d 398 (1965).
7. This is the general rule. Henn, Corporations §365 (1961). The term used may be "necessary" or "indispensable", depending upon the jurisdiction, but, whatever it is called, the suit must fail without such joinder. For a good discussion of exceptions to the general rule, see Nadler, Georgia Corporation Law §414 (Supp. 1964). The opinion is there expressed that, although Georgia has never found occasion to recognize such an exception, given the proper "exceptional circumstances", such an exception would be judicially observed.
8. Henn, Corporations §201 (1961).
9. *Ibid.*
10. Ga. Code §64-101 (1933); Bregman v. Orkin Exterminating Co., 213 Ga. 561, 100 S.E.2d 267 (1957); Leverett, Hall, Christopher, Davis & Schulman, Georgia Procedure and Practice §5-22 (1957).
11. Bregman v. Orkin Exterminating Co., *supra* n. 10; Winter v. Southern Sec. Co., 155 Ga. 590, 118 S.E. 214 (1923).
12. See, *e.g.*, Nadler, Georgia Corporation Law §410 (1950): "The right of inspection of books and records is enforceable through mandamus proceedings," citing Winter v. Southern Sec. Co., *supra* n. 10, which was a proceeding in equity.

was taken to the Georgia Supreme Court as is proper with equity decisions, but that court, apparently under the impression that the petition asked for, and the order granted, relief in the form of mandamus,[13] held[14] that the Court of Appeals had jurisdiction since only *legal* relief was sought and granted.

The Court of Appeals recognized the action as one in equity and reversed[15] the judgment, stating that "the transfer of this case by the Supreme Court to this court is tantamount to a ruling that the petition does not state a cause of action for equitable relief."[16] Since the plaintiff sought no legal relief, it "follows" that this petition set forth no cause of action.

This result is extremely unfortunate. The plaintiff never received a hearing on the merits of his case through no apparent fault of his own and in spite of the fact that he was successful below. It appears to leave stockholders with a right without a remedy, since mandamus is clearly foreclosed to them.[17] But more seriously, perhaps, it is an indication of the lack of communication between our appellate courts, which all too often has resulted in a denial of a fair hearing on the merits to Georgia litigants.

CORPORATE LIABILITY FOR TORTS

In a case[18] which attracted nationwide publicity, the Supreme Court of Georgia held that a corporation could be a party to a conspiracy and so held liable for damages just as an individual could. A large verdict in favor of a retail grocer was allowed to stand by the United States Supreme Court[19] against the National Association for the Advancement of Colored People, among others, as a result of picketing of the plaintiff's place of business.

PROCEDURAL POINTS

JOINDER OF CORPORATION IN SUIT AGAINST OFFICERS FOR TORTS

In a case against corporate officers for maliciously procuring a breach of the plaintiff's employment contract, the Court of Appeals held[20] that the suit could be maintained against the officers alone, without joinder of the corporation, even though the acts complained of were committed as agents of the corporation and even though the corporation would have been a proper party to the suit. The possibility of imposing liability upon the

13. Which, in Georgia at least, is legal not equitable. Board of Educ. v. Fowler, 192 Ga. 35, 14 S.E.2d 478 (1941); Mayor & Council v. Dure, 59 Ga. 803 (1877).
14. Standard Factor & Fin. Co. v. Fincher, 221 Ga. 50, 142 S.E.2d 926 (1965).
15. 112 Ga. App. 205, 144 S.E.2d 554 (1965).
16. *Id.* at 208, 144 S.E.2d at 557.
17. Bregman v. Orkin Exterminating Co., *supra* n. 10.
18. NAACP v. Overstreet, 221 Ga. 16, 142 S.E.2d 816 (1965).
19. *Cert. granted,* 382 U.S. 937 (1965), *writ dismissed as improvidently granted,* 384 U.S. 118, *rehearing denied,* 384 U.S. 981 (1966).
20. Wrigley v. Nottingham, 111 Ga. App. 404, 141 S.E.2d 859, *rev'd on another point,* 221 Ga. 386, 144 S.E.2d 749 (1965). The opinion clarified the law in this area by correcting some imprecise language employed by the same court in Kenimer v. Ward Wight Realty Co., 109 Ga. App. 130, 135 S.E.2d 501 (1964).

corporation for the acts of its agents does not relieve the agents, as joint tortfeasors, from being sued separately.

FOREIGN CORPORATIONS—VENUE

The Court of Appeals held,[21] in a tort action against a foreign corporation, brought in Clayton County, where the cause of action allegedly arose, that venue was improperly laid since the petition showed that the defendant had an agent for the service of process in Fulton County and did not show that there was such an agent or place of business in Clayton County. Venue lies in the place of the tort under GA. CODE section 22-1101 (1933) only if there is an agent or place of business for service within the same county and under GA. CODE ANN. section 22-1509 (1966 Rev.) only where there is no agent or place of business for service within the state. The proper venue for such a suit is in Fulton County, where the defendant foreign corporation "resides."[22]

SERVICE OF PROCESS—"AGENT"

In a suit brought against a Georgia corporation, service under GA. CODE section 22-1101 (1933) was made on an insurance salesman who had agreed to accept calls for the defendant's services, to relay the urgent ones to a branch office in a nearby county, and to record routine calls in a book which would be checked periodically by the defendant's representative. The salesman had no authority to act for the defendant, but served only as a conduit for the transfer of requests for service from customers in the county to the defendant's nearest branch office.

The Court of Appeals held[23] that such an arrangement did not make the salesman the defendant's "agent" within the meaning of code section 22-1101 and that the traverse of the entry of service should have been granted. "Unless he can in some way bind the manufacturer in some business transaction, then he is not its agent."[24]

SERVICE OF PROCESS—"PLACE OF BUSINESS"

Construing the provision in GA. CODE ANN. section 22-1509 (1966 Rev.) that a foreign corporation may be served through an agent designated by such corporation for the service of process only if the corporation does not maintain a "place of business or agent in this State upon whom service may

21. Horton v. Delta Air Lines, Inc., 111 Ga. App. 291, 141 S.E.2d 783 (1965).
22. GA. CONST. art. VI, §14, para. 6 (1945), GA. CODE ANN. §2-4906 (1946 Rev.); *accord,* Diamond Alkali Co. v. Godwin, 100 Ga. App. 799, 112 S.E.2d 365 (1959), *aff'd,* 215 Ga. 83, 114 S.E.2d 839 (1960).
23. Orkin Exterminating Co. v. Thornton, 111 Ga. App. 636, 142 S.E.2d 422 (1965).
24. Burkhalter v. Ford Motor Co., 29 Ga. App. 592, 600, 116 S.E. 333, 336 (1923), quoted with approval, 111 Ga. App. at 637, 142 S.E.2d at 424. For a further discussion of what constitutes an "agent" within the meaning of code section 22-1101, see Southern Bell Tel. & Tel. Co. v. Jackson, 102 Ga. App. 699, 117 S.E.2d 550 (1960).

be perfected," in conjunction with the service provision of GA. CODE section 22-1101 (1933) for leaving a copy at "the place of transacting the usual and ordinary public business of such corporation," the Court of Appeals held[25] that a place of doing business must be "public," *i.e.*, "semipermanent and easily accessible to one searching for it."[26]

FOREIGN CORPORATIONS—PLEADING

The Supreme Court of Georgia held[27] that a foreign corporation bringing a suit involving land in a Georgia court need not affirmatively aver that the state of its incorporation would allow a Georgia corporation to bring a similar suit in its courts nor that its charter empowers it to purchase and own land. Such matters, however, may be raised by the defendant as a bar to the suit.

RIGHT TO SUE AND TO BE SUED

Since corporations have the right to sue and to be sued[28] and the code section[29] defining the practice of law specifically provides that nothing therein should prevent a corporation from representing itself in matters to which it is a party,[30] the Court of Appeals held[31] that a corporation could sue on a promissory note without being represented by an attorney.

This decision is clearly correct, but the statute[32] places Georgia in the minority on this point. Generally, corporations can appear only through licensed attorneys.[33] This is the rule in all federal courts, regardless of what the state law may be.[34] Perhaps some legislation is desirable in this area.

25. Rocker v. Windsor Forest, Inc., 112 Ga. App. 363, 145 S.E.2d 291 (1965).
26. *Id.* at 365, 145 S.E.2d at 293.
27. Brown v. Granite Holding Corp., 221 Ga. 560, 146 S.E.2d 289 (1965).
28. GA. CODE ANN. §22-1827(b) (1966 Rev.).
29. GA. CODE ANN. §9-401 (Supp. 1965).
30. With certain enumerated exceptions.
31. Dixon v. Reliable Loans, Inc., 112 Ga. App. 618, 145 S.E.2d 771 (1965).
32. *Supra* n. 29.
33. HENN, CORPORATIONS §90 (1961); see authorities cited at 19 C.J.S. *Corporations* §1323 (Supp. 1966).
34. Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, at 829-30 (1824); Ashley-Cooper Sales Servs. v. Brentwood Mfg. Co., 168 F. Supp. 742 (D. Md. 1958); Brandstein v. White Lamps, Inc., 20 F. Supp. 369 (S.D. N.Y. 1937).