AGENCY AND BUSINESS ASSOCIATIONS

By GLEN W. CLARK*

The combination of Agency and Business Associations into a single article for survey purposes is new with this issue. It is appropriate that this be done due to the close relationship between the two subjects, and also because of the relative paucity of corporations cases in the Georgia Courts during the current year. Agency cases will be treated first, with initial attention being given to those involving torts, followed by cases decided against a contract background. The few cases which arose involving partnerships will then be considered, and the survey will conclude with a brief examination of the corporation cases.

AGENCY

Vicarious Liability

That a master is liable vicariously for torts committed by his servants in the course of employment is a legal principle too well settled to warrant discussion. Its applicability, however, to the servant of a medical doctor, in this case a nurse, was the principle issue in a case decided by the Georgia Court of Appeals early in 1968.[1] Arguments developed as to the adequacy of instructions given by the trial court which had stated both the law as to the standard of care owed his patients by a doctor (that degree of care ordinarily employed in the profession) and the law on *respondeat superior*, but did so in separate sections without relating the two. The court, reiterating that a doctor's liability to his patients includes responsibility for the negligence of his servants, upheld the instructions on the ground that the jury could reasonably be expected to deduce the applicable law from them in the form in which they were given.

Several cases arose during the survey period in which the crucial issue was whether or not a master-servant relationship existed. Two of them, *Savannah Electric and Power Co. v. Edenfield*[2] and *Yale & Towne, Inc. v. Sharpe*,[3] involved distinguishing between an agency (master-servant) status and that of an independent contractor. In the

* Associate Professor of Law, Walter F. George School of Law, Mercer University. B.A., University of Montana, 1940; LL.B., 1949; M.A. University of Colorado, 1966; LL.M. Yale University, 1968. Member of Montana and Georgia Bars.

1. McKinney v. Schaefer, 117 Ga. App. 595, 161 S.E.2d 446 (1968).
2. 118 Ga. App. 531, 164 S.E.2d 366 (1968).
3. 118 Ga. App. 480, 164 S.E.2d 318 (1968).

Savannah Electric and Power Co. case, plaintiff, an employee of an engineering firm performing work under a contract with defendant power company, sought to avoid workman's compensation as an exclusive remedy. He could do this only by establishing that his immediate employer, the engineering company, was an independent contractor rather than a servant of the power company. The Court of Appeals applied the control test in finding for defendant. In the court's opinion the "right to control the time, manner and method of executing the work, as distinguished from the right merely to require certain definite results"[4] was inherent in the terms of the contract between defendant and plaintiff's employer, and the relationship was therefore one of agency. The court went further to point out that it is the *right* to control which governs, whether or not control is in fact exercised.

In the *Yale & Towne* case the contract between Yale & Towne, a manufacturer of forklift trucks, and Ogden, its Atlanta distributor, specifically identified the distributor as an independent contractor. Nevertheless, the court affirmed a finding that the relationship was one of agency, basing its decision on the extent of control retained by the manufacturer. The negligence on which the action was founded occurred in conjunction with repair by Ogden of a used forklift loaned by the manufacturer directly to plaintiff's employer. Ogden's repairmen were trained by Yale & Towne, and Yale & Towne retained and had in the past exercised the right to require that Ogden discharge repairmen for ineffective work in the service department. Although the court intimated that it might be a jury question as to whether or not this was a sufficient exercise of control by Yale & Towne to overcome the independent contractor terminology of the contract had the repair work been done on vehicles sold through Ogden and thus encompassed by the contract, it was not a jury question here because the vehicle had been furnished directly to the consumer by Yale & Towne. Repair work accomplished by Ogden was thus a special service and outside the contract. A further question in the case involved an attempt by Yale & Towne to defend on the ground that it had no notice of defects in the forklift. The court said as to this, "notice to the agent is, of course, notice to the principal."[5]

A question as to the existence of a vicarious liability relationship arose in conjunction with the sufficiency of pleadings in two other

4. 118 Ga. App. at 533, 164 S.E.2d at 368.
5. 118 Ga. App. at 485, 164 S.E.2d at 324.

cases. In one[6] it was held that the showing of an "unequivocal and unambiguous" contract provision by which lease of a truck was to be terminated upon unloading at its destination entitled defendant leasee to summary judgment where the suit grew out of an accident which occurred an hour after the truck was unloaded. The other[7] held that the trial court erred in dismissing a complaint which alleged negligence in the operation of an automobile occupied at the time of the accident by "agents, servants and employees" of the defendant corporation because the complaint did not name the driver of the car. Two occupants of the car had left the scene of the accident and their identity was not known to plaintiffs. Since under Georgia's new Civil Practice Act[8] the defendant need only be given fair notice of the nature and basis of the claim, the complaint was ruled sufficient. It gave notice that the action was one for damages based on negligence of defendant's employees, even though the particular employees were unnamed.

Under the family car doctrine, which is followed in Georgia,[9] the head of a household is made responsible for the authorized use of a motor vehicle by members of the household, the resultant liability being substantially the same as that of a master for the negligent driving of his servant. In *Young v. Reese*[10] ownership of the car was in doubt. Evidence was introduced that the son whose negligent driving caused the accident had paid for the car and that the license tag was in his name. This was opposed by evidence that the father had acknowledged ownership in himself for insurance purposes. The court affirmed a judgment against the father, refusing to say as a matter of law that a jury finding of ownership in the father was unauthorized.

The question of "whose agent" came up in *Colonial Stores Inc. v. Holt*[11] where a city policeman, hired by defendant store to assist its director of security, was charged by plaintiff with having committed the tort of false imprisonment. The court pointed out that the scope of employment of the officer as defendant's servant was not dependent solely upon his having acted pursuant to the actual authority assigned him by defendant. As to third persons it would also include acts within such broader range of authority as might be implied from the manner in which the servant was permitted to conduct the master's business. Furthermore, even where implied authority cannot be established, it is

6. Jerry Lipps, Inc. v. Lewallen, 118 Ga. App. 479, 164 S.E.2d 232 (1968).
7. Bray v. Cent. Chevrolet, Inc., 118 Ga. App. 493, 164 S.E.2d 286 (1968).
8. GA. CODE ANN. tit. 81A (1966).
9. *See* Johnson v. Brant, 93 Ga. App. 44, 90 S.E.2d 587 (1955) and cases cited therein.
10. 119 Ga. App. 179, 166 S.E.2d 420 (1969).
11. 118 Ga. App. 826, 166 S.E.2d 30 (1968).

possible for the master to ratify the tortious act of his servant and thus become liable where he otherwise would not have been. In reaching a decision as to whether the officer here was working for defendant or for the city when he made the arrest on which plaintiff's claim was based, the jury could properly give weight to the fact that he was paid by the hour, was subject to the direction and control of defendant and that he was working with its security director. That the officer may have been on duty with the city when the alleged tort occurred would not preclude recovery if at the time he was acting for and in behalf of his off-duty employer.

In *Dean v. Gainesville Stone Co., Inc.*,[12] plaintiff, a self-employed auto mechanic on defendant's premises to deliver a part was asked by defendant's servant to help start a truck. Injury resulted because the servant failed to inform plaintiff of certain mechanical defects in the truck. Plaintiff's petition in a suit for personal injuries, held sufficient against general demurrer, alleged that plaintiff was defendant's invitee and was subject as a matter of law to a duty of ordinary care by defendant. The petition also alleged that the servant was authorized to request plaintiff's assistance. Had this authority not been present, plaintiff would have been a volunteer and subject to a less strict standard of care.[13] Whether or not plaintiff failed to exercise ordinary care for his own safety was a matter for jury determination. Plaintiff's possible status as a sub-servant seems not to have been considered.

Scope of Employment

The case of *Marketing Sales Industries of Georgia, Inc. v. Roberts*[14] involved the often troublesome scope of employment question, but here the Court of Appeals had little difficulty resolving it in favor of defendant employer. When the accident in question occurred, Thompson, a salesman of built-in vacuum cleaners, was driving his privately owned automobile en route from a bar managed by his brother to his home in order to change clothes prior to reporting for work. Although the time was approximately 4 p.m., Thompson was not scheduled to begin work until 6 or 6:30 p.m. when he would be given leads for his evening calls. On these facts it was held that the trial court should have sustained defendant's motion for summary

12. 118 Ga. App. 142, 162 S.E.2d 858 (1968).

13. Atlanta and West Point R.R. v. West, 121 Ga. 641, 49 S.E. 711 (1905); Callaham v. Carlson, 85 Ga. App. 4, 67 S.E.2d 726 (1951); Early v. Houser & Houser, 28 Ga. App. 24, 109 S.E. 914 (1921).

14. 118 Ga. App. 718, 165 S.E.2d 319 (1968).

judgment. According to the court, ". . . the test is not that the act of the servant was done during the general term of the employment, but whether the servant was at that time serving the master; the master is not liable . . . where the servant was engaged in some personal matter of his own and the act was entirely disconnected from the master's business."[15]

The same rule was relied on by dissenters in *Hunter v. A-1 Bonding Service, Inc.*,[16] a case of particular interest which was decided three days later. This was an action in which plaintiff sought damages for the wrongful homicide of her husband allegedly committed by servants of the defendant corporation. Her petition alleged that two of defendant's employees visited decedent in the prosecution of defendant's business, left, later returned with weapons for the purpose of killing decedent and did kill him. The issue before the court was a procedural one—whether or not the complaint adequately stated a claim against defendant upon which relief could be granted—but its resolution depended in part upon the position taken on a substantive question of agency law, i.e., could murder be within the scope of employment of servants of a corporation, absent an allegation that the homicide was ordered by the corporation? The majority thought that under the new Civil Procedure Act,[17] the complaint gave defendant sufficient "notice" of plaintiff's claim to warrant reversal of a trial court judgment dismissing it. In so deciding, the majority was holding that a legitimate claim could conceivably be developed out of the facts alleged. The dissenters thought otherwise.

Most of the discussion of agency law is found in dissenting opinions by Felton, C.J. and Deen, J. Their position is that, although by Georgia statute the master is liable for torts committed by his servant ". . . whether the same shall be by negligence or voluntary," such torts must be, as the statute specifies, ". . . by [the master's] command or in the prosecution and within the scope of his business. . ."[18] Briefly, the dissenters' arguments are as follows: (1) Since the complaint alleges that the actors, having left decedent's home, returned *for the purpose* of killing him, their action was patently outside the scope of any business in which a corporate master could engage; (2) a corporation, being a creature of law and having only limited powers not including the power to commit unlawful acts, could have no such

15. *Id.* at 719, 165 S.E.2d at 320.
16. 118 Ga. App. 498, 164 S.E.2d 246 (1968).
17. GA. CODE ANN. tit. 81A (1966).
18. GA. CODE ANN. § 105-108 (Rev. 1968).

purpose; (3) the murder thus could only have been committed by servants of the corporation for their own purposes and hence was outside the scope of their employment; (4) as discussed in conjunction with the preceding case[19] scope of employment relates to the specific act at issue and not to the general term of employment. Thus when a servant wilfully and intentionally does an unlawful act, unless by the command and authorization of his master, he "steps aside from the purpose of the agency committed to him and inflicts an independent wrong."[20] The complaint therefore stated no claim on which relief could be granted and should have been dismissed.

Since the decision turned on a procedural point and also because so little factual background is given, it is difficult to evaluate the case in terms of substantive law. It might be suggested, however, that the position taken by the dissenting justices would go too far toward immunizing the master against voluntary torts by his servants, particularly in view of the Georgia statute.[21] Both arguments are in essence based on the same proposition—that, except where commanded by the master, the commission of an intentional tort by a servant cannot be the basis of vicarious liability because it is impossible for it to be within the scope of employment. Such a proposition is highly doubtful, at best.[22]

Liability of Master to the Servant

Survey cases pertaining to this subject raise no legal questions of particular difficulty but apply well accepted doctrines of common law, some of them incorporated into the Georgia statutes, to the specific facts presented.

The rule that a servant assumes the ordinary risks of his employment and is bound to exercise his own skill and diligence to protect himself[23] was applied in *Taff v. Harris*[24] where the Court of Appeals held the master not liable for injuries suffered by a maid who, leaving the house by a side entrance, fell from a porch which had no guard rails. This porch was no less safe than those provided by ordinarily prudent homeowners, and the servant had equal means with the master for discovering any danger which existed.

19. Mkt. Sales Indus. of Ga., Inc. v. Roberts, 118 Ga. App. 718, 165 S.E.2d 319 (1968).

20. 118 Ga. App. at 509, 164 S.E.2d at 254, quoting from Goodloe v. Memphis & Charleston R.R., 107 Ala. 233, 18 So. 166 (1895).

21. GA. CODE ANN. § 105-108 (Rev. 1968).

22. *See* P. MECHEM, OUTLINES OF THE LAW OF AGENCY 266 (4th ed. 1952).

23. GA. CODE ANN. § 66-303 (Rev. 1966).

24. 118 Ga. App. 611, 164 S.E.2d 881 (1968).

Where, in another case,[25] the petition showed that the servant had traversed allegedly defective steps on two occasions just prior to suffering injuries from a fall on her third attempt to negotiate them, it was held that the servant had, or in the exercise of ordinary care should have had, knowledge of any unsafe condition and thus could not recover damages from the employer.

Whether or not a servant had means of knowledge of danger equal to that of the master was held to be a question for the jury in *Seagraves v. Abco Manufacturing Co.*[26] This case involved a welder hired to repair a tank which the owner knew had contained an inflammable substance. Relying on the owner's assurance that the tank had been cleaned, the welder proceeded with the task after only a perfunctory personal inspection to confirm that the operation was safe. He did not take precautions in executing the work which would have guaranteed safe performance. The welder was injured in the resultant explosion and brought this action for damages. It was for the jury to decide whether or not plaintiff, as an experienced welder knowledgeable of the dangers associated with his occupation, acted as a reasonable and prudent man in relying upon defendant's assurance that the tank had been cleaned. If he did, then the assumption of risk rule would be superseded by a "quasi agreement" between the two, implied in law, which would shift responsibility for injuries to the employer. The language used by the court in this case is broad enough to apply whether plaintiff is an agent or an independent contractor.

Milam v. Miss Georgia Dairies, Inc.[27] concerned another aspect of the same problem. An employee was injured when the lid blew off a tank which he had been assigned to wash. The plaintiff complained that the pressure gauge on the tank was defective in that it showed zero pressure when he undertook to remove the lid, and contended that defendant through the exercise of ordinary care should have discovered the defect and warned him about it. The court, however, found that the employer had no knowledge nor reason to know of any latent defect in the pressure gauge which had previously always worked properly and affirmed a summary judgment for the defendant.

Seaboard Coastline R.R. v. Daugherty[28] was an action for damages under the Federal Employer's Liability Act (hereinafter referred to as FELA).[29] Pointing out that Georgia law on the question was irrelevant,

25. Hartman v. Brady, 117 Ga. App. 828, 162 S.E.2d 246 (1968).
26. 118 Ga. App. 414, 164 S.E.2d 242 (1968).
27. 118 Ga. App. 791, 165 S.E.2d 463 (1968).
28. 118 Ga. App. 518, 164 S.E.2d 269 (1968).
29. 45 U.S.C. § 51 (1964).

the Court of Appeals looked to federal law in holding that the "last clear chance" doctrine has no application in FELA cases except to the extent that it defines a variety of negligence to be considered in determining the proportion that the employee's negligence bears to the total negligence of both parties in determining recoverable damages under the Act. In the words of the court:

> In our opinion in a FELA case the defendant's negligent omission to avoid injury to the plaintiff who is in peril can only be a part of the combined negligence of the plaintiff and defendant from which the plaintiff's portion of negligence is to be subtracted to arrive at the recoverable damages. In our opinion, under this law the last clear chance rule is obsolete except insofar as it defines one variety of negligence and is merged into the rule for apportioning damages.[30]

Liability of the Servant to Third Parties

It is well understood that an agent is liable for his own torts without regard to the rules of agency, and that he is not excused for his torts because he acts as an agent. This point is reiterated in *Hudson & Marshall, Inc. v. Pennington*.[31] There has, however, been doubt in the past as to whether or not an agent is liable for mere nonfeasance, or failure to act, where he is charged by the principal with the exercise of control over property.[32] The modern trend has been to impose liability in this situation, and the Georgia Court of Appeals followed this trend in *Herring v. R.L. Mathis Certified Dairy Co.*[33] by reversing dismissal of a complaint against the general manager of a dairy corporation who failed to take proper safety precautions as custodian of the corporation's picnic and swimming facility. Plaintiff's fourteen year old son was drowned as a result. According to the court:

> [A]n agent is ordinarily not liable for nonfeasance. (Citations omitted). However, he is liable for misfeasance or the improper doing of an act which he might lawfully do. Misfeasance also involves the idea of not doing, as where an agent engaged in the performance of an undertaking does not do something which it is his duty to do or does not take that precaution or exercise that care which due regard for the rights of others requires.[34]

30. 118 Ga. App. at 522, 164 S.E.2d at 273.
31. 119 Ga. App. 163, 166 S.E.2d 418 (1969).
32. W. SEAVY, LAW OF AGENCY 225-27 (1st ed. 1964).
33. 118 Ga. App. 132, 162 S.E.2d 863 (1968).
34. *Id.* at 140, 162 S.E.2d at 869.

A question as to the liability of an agent undertaking complete control and management of leased premises for an out-of-state landlord was raised in *Bazemore v. Burnet.*[35] Plaintiffs were injured by an explosion caused by a latent defect in gas distribution facilities; the previous tenant had left the gas connection for the kitchen stove unplugged and plaintiff installed an electric stove. The court held that the agent's liability was limited by the same rule which applied to the principal—proof of knowledge, actual or constructive, that the defect existed. The petition would have failed under the old Civil Practice Act[36] as not stating a cause of action, since knowledge on the part of the agent was not alleged. Under the new Act, which became effective between the time petition was filed and the ruling rendered, only "notice" sufficient for defendant to frame a responsive pleading is required and an allegation in the petition that defendants knew or in the exercise of ordinary care should have known of the defect was sufficient for this purpose.[37]

Authority and Ratification

Turning now to agency cases involving a contract rather than a tort background, it is convenient to look first at those concerned with authority of the agent and the associated question of ratification where doubt exists as to the agent's authority at the time he acted. Both questions were raised in *Atlanta Biltmore Hotel Corp. v. Martell.*[38] The court decided that the pleading presented a genuine issue of fact and that denial of defendant's motion for summary judgment by the trial court was therefore not error. In doing so it relied on Georgia's "equal dignity" rule which requires that an agent's authority be in writing if writing is required in execution of the act authorized,[39] and upon the companion rule that "while a written instrument may have been executed by an agent not having authority in writing to do so or not having been ratified by an act of comparable dignity, the principal may nevertheless be estopped by his acts from denying the authority of his agent."[40] Here it was a jury question as to whether or not the hotel's operations manager, or in a second count the general manager, because of their positions and by their prior conduct, had apparent authority

35. 117 Ga. App. 849, 161 S.E.2d 924 (1968).
36. GA. CODE ANN. tit. 81 (Rev. 1958).
37. GA. CODE ANN. § 81A-108(a) (Rev. 1968).
38. 118 Ga. App. 172, 162 S.E.2d 815 (1968).
39. GA. CODE ANN. § 4-105 (Rev. 1962).
40. 118 Ga. App. at 173, 162 S.E.2d at 816.

to sign a long term contract with an entertainer; neither had written authority. Weighing against the argument for apparent authority was the fact that plaintiff entertainer had previously been associated with the hotel and might have been expected to know the extent of actual authority vested in the hotel's agents, thus precluding a claim of apparent authority from being effective as against him.

In *Southeastern Fidelity Fire Insurance Co. v. State Farm Mutual Automobile Insurance Co.*[41] an agent had verbally declared an insurance policy to be immediately effective although the application was not completed until two days later and then only after an accident had occurred. Although the agent lacked power to do this under the Georgia Insurance Code,[42] plaintiff argued that the company had ratified the agent's unauthorized act by issuing the policy. Plaintiff relied on GA. CODE ANN. § 4-302 (Rev. 1962) which states that ". . . if the agent shall exceed his authority, the principal may not ratify in part and repudiate in part; he shall adopt either the whole or none." The court in reversing a judgment favorable to plaintiff pointed out that ratification under GA. CODE ANN. § 4-302 is effective only with full knowledge of all material facts. Since there was no indication on the application form that the agent had verbally "bound" the company to coverage two days before the effective date shown, the company would not be deemed to have ratified.

Kohlmeyer v. Lightfoot[43] also dealt in part with the ratification question, the relevant point made being that ratification is ordinarily a question for the jury. The case involved an allegation by a broker that defendant ratified the continued existence of his account as an active account, although he had previously directed that it be closed. A statement showing that the account was active had been rendered to him subsequent to his having directed that it be closed, and defendant had not objected. The court did not question that defendant's silence would constitute ratification, but considered the facts doubtful enough to warrant the case having gone to the jury.

The Agent as a Fiduciary

No cases were reported in which the fiduciary question was squarely before the court. The general subject of loyalty of the agent to his principal did, however, arise indirectly in three cases. In *McLeod v.*

41. 118 Ga. App. 861, 165 S.E.2d 887 (1968).
42. GA. CODE ANN. §§ 56-801b(1), 56-840b(3) and 56-2420(1) (Rev. 1960).
43. 118 Ga. App. 783, 165 S.E.2d 432 (1968).

Westmoreland[44] the Court of Appeals held that in the absence of proof that a client would have been willing to execute guarantees, there was no apparent failure to protect his interests by an attorney who arranged for the sale of stock to a corporation in exchange for debentures without securing personal guarantees of the buying corporation's shareholders. The corporation's subsequent failure had resulted in loss to the client.

In another case,[45] a restrictive covenant on future employment contained in a contract between defendant and his employer[46] was held to be in general restraint of trade and unenforceable by plaintiff who was not a party to the employment contract. The court reserved opinion as to whether the covenant would have been enforceable by the employer but indicated such would be the case only in support of "some interest of the employer which requires protection."[47]

The last of these cases was *Architectural Manufacturing Co. of America v. Airotec*[48] which concerned the degree of loyalty owed plaintiff, their former employer, by a general manager and a chief engineer who resigned and went to work for a competitor. The court held that, although there was no restriction on fair competition designed to attract plaintiff's customers, conduct amounting to a planned program of recruiting plaintiff's sales force to work for the new firm was compensable. The situation was aggravated by defendant's alleged use of business data obtained from the old employer to facilitate recruiting. The sales force in question was made up of independent contractors and not agents of the old employer, but this was not a bar to recovery in the court's opinion inasmuch as plaintiff relied on them to market its product.

PARTNERSHIPS

The related problems of sale of a partnership interest and dissolution caused most of the litigation pertaining to partnerships during the

44. 117 Ga. App. 659, 161 S.E.2d 335 (1968).

45. Horne v. Peavy, 224 Ga. 849, 165 S.E.2d 125 (1968).

46. Defendant agreed that he would not enter into business competition with the Star Gas Co. or with plaintiff in a specified geographical area for a period of five years after terminating his employment with Star Gas.

47. 224 Ga. at 850, 165 S.E.2d at 126.

48. 119 Ga. App. 245, 166 S.E.2d 744 (1969).

survey period. In *Stone v. First National Bank of Atlanta*[49] the question was whether or not a withdrawing partner could transfer his interest to an outsider while remaining personally indebted to the firm. The selling partner had not sought consent of the partners or notified them of the sale. The court pointed out that the Georgia Code provision[50] relating to dissolutions of partnerships did not state *all* the means by which a partnership was dissolved, one means ommitted being that of withdrawal of a member or admission of a new member. The selling partner's action here amounted to withdrawal which worked a dissolution of the partnership and the court held that the interest transferred was therefore subject to his indebtedness to the partnership. In the words of the court:

> The purchaser can acquire as against the other partners no greater interest in the partnership as such than the selling partner would be entitled to upon final accounting had between the three partners.[51]

Dissolution was also the source of controversy in *Rogers v. McDonald*.[52] The partnership agreement in this case included a provision for withdrawal by a partner, but it was ambiguous in that it left blank a space provided for naming a firm to do the accounting, and it did not fix the date on which evaluation of the assets should be based. When the partners could not agree as to these terms, the court affirmed that dissolution must be effected in a legal proceeding, but it reversed an order made by the trial court which required the dissenting partner to make an offer to buy or sell within thirty days. This order exceeded the court's authority. Rather, the value of assets and liabilities should be assessed in connection with the main determination of the case whenever that should occur. As for the withdrawing partner's prayer for appointment of a receiver, the court declined to do this, citing the Georgia Code provision which admonishes that such appointment be resorted to only in "clear and urgent cases."[53] The court indicated that it would require evidence that the rights of the parties could not otherwise be fully protected before it would approve appointment of a receiver.

In *Bloodworth v. Bloodworth*[54] the Georgia Supreme Court held that in transferring a deceased partner's interest to themselves for a fixed

49. 117 Ga. App. 802, 162 S.E.2d 217 (1968).
50. GA. CODE ANN. § 75-107 (Rev. 1964).
51. 117 Ga. App. at 804, 162 S.E.2d at 221.
52. 224 Ga. 599, 163 S.E.2d 719 (1968).
53. GA. CODE ANN. § 55-303 (Rev. 1964).
54. 224 Ga. 717, 164 S.E.2d 823 (1968).

consideration pursuant to an agreement contained in the articles of partnership, surviving partners who were also executors of the deceased partner's estate did not violate the "rule of law that a trustee is not allowed to bargain between himself and himself as executor."[55]

CORPORATIONS

Statutes

The new Corporation Code of Georgia[56] became effective on April 1, 1969. Before going into effect, however, it was modified by a series of amendments adopted at the 1969 session of the General Assembly.[57] These amendments did not effect major changes, but they do ". . . represent small, but meaningful, improvements in the new Title 22."[58] No summary of these amendments is undertaken here. They have been adequately covered by Professor Bowman of the University of Georgia Law School,[59] and are now incorporated in a revised version of the new Title 22 published as a separate pamphlet by the Harrison Company of Atlanta.[60]

The impact of the new code had not been felt in the cases decided during the survey period.

Foreign Corporations

Two very interesting cases decided during the period involved the right of an unqualified foreign corporation to the use of Georgia courts. Since this question had not previously been decided by the state courts,[61] these two cases are probably the most significant corporation cases to be considered, although the rules laid down would appear to have been superseded by the new code. In *Sherman Stubbs Realty & Insurance, Inc. v. American Institute of Marketing Systems, Inc.*,[62] the

55. *Id.* at 719, 164 S.E.2d at 825, citing GA. CODE ANN. § 37-707 and § 37-708 (Rev. 1962).

56. GA. CODE ANN. tit. 22 (1968). For brief summary of the new code see Clark, *Business Associations, Annual Survey of Georgia Law*, 20 MERCER L. REV. 35 (1968), or for greater detail, Bowman, *An Introduction to the New Georgia Corporation Law*, 4 GA. ST. B.J. 419 (1968).

57. Ga. Laws, 1969, p. 152 *et. seq. amending* GA. CODE ANN., tit. 22 (1968).

58. Bowman, *The New Georgia Corporation Law: 1969 Amendments*, 5 GA. ST. B.J. 433, 444 (1969).

59. *Id.*

60. CODE OF GEORGIA ANNOTATED, Title 22, CORPORATIONS (1969) [with Committee Notes and Comments].

61. *But see* Textile Banking Co. v. Colonial Chem. Corp., 285 F. Supp. 824 (N.D. Ga. 1967), in which the U.S. District Court for the Northern District of Georgia applied what it considered to be the Georgia law on the subject.

62. 117 Ga. App. 829, 162 S.E.2d 240 (1968).

Court of Appeals held that a Missouri corporation, assumed for the purposes of the decision to be doing business in Georgia, would not be denied access to Georgia courts for noncompliance with the qualification statute.[63] Two reasons were given in support of the decision: (1) statutes involving restrictions on "trade or common operations" are to be strictly construed, and (2) the qualification statute specifies a sanction for noncompliance with its terms[64] and it is to be inferred from this that had the legislature intended that additional penalties be imposed it would have included them. On motion for rehearing, GA. CODE ANN. § 22-1501 (Rev. 1966) was considered for the first time. This section reads as follows:

> Corporations created by other States or foreign Governments shall be recognized in the courts of this State only by comity, and so long as the same comity is extended in the courts of such other States or foreign Governments to corporations created by this State.

Although it was alleged that under Missouri law an unqualified Georgia corporation would be denied access to the courts of Missouri, the court adhered to its previous decision on the ground that the petition did not affirmatively show that the Missouri corporation was *doing business* in Georgia of a nature to require qualification, this having been assumed at the first hearing and later denied by plaintiff in an amendment to the petition. A further ground given by the court for its decision was that the pertinent Missouri statute had not been affirmatively disclosed in the petition and thus had not been produced to the court "as published by authority" to warrant its being accorded judicial notice.[65]

Duncan Cleaners, Inc. v. Shuman Co., Inc.,[66] decided eight months later considered the same question and again permitted the unqualified foreign corporation to bring an action in Georgia. This time the plaintiff was a North Carolina corporation and the court, looking to the comity provisions of GA. CODE ANN. § 22-1501 (Rev. 1966), based its decision on the fact that although North Carolina statutes contained a general denial of access to its courts by unqualified foreign corporations a number of exceptions (to the requirement for qualification) were provided.[67] The court apparently assumed that the

63. GA. CODE ANN. § 22-1506 (Rev. 1966).

64. Fine of $100 is imposed unless it appears that violation was not wilful. GA. CODE ANN. § 22-1506 (Rev. 1966).

65. 117 Ga. App. at 833, 162 S.E.2d at 242.

66. 119 Ga. App. 128, 166 S.E.2d 387 (1969).

67. N.C. GEN. STAT. §§ 55-131, 55-154 (Repl. 1965). The so-called exceptions are actually

situation at bar would fall within one of the exceptions and that comity therefore would exist, but it undertook no analysis to determine the validity of the assumption.

It is doubtful that either decision represents a satisfactory statement of the Georgia law. Since the Georgia rule is based on comity, the inquiry should be: would the home state of the foreign corporation deny an unqualified Georgia corporation transacting the same business there use of *its* courts? Of course, if denial of access to the courts is not used as a sanction for nonqualification by that state and a nonqualifying Georgia corporation would be permitted use of the courts, further inquiry is unnecessary. But the decision will turn in dealing with most states, as it did with Missouri and North Carolina in the cases discussed, on whether or not the business transacted falls within the foreign state's definition of the kind of *doing business* that will subject a foreign corporation to the qualification requirement. This definition will be found in the statutes of the foreign state together with a statement of the sanctions for nonqualification. Unless, therefore, the sanctions listed do not include denial of use of the courts, it is difficult to see how a decision granting or denying use of Georgia's courts to a foreign corporation could properly be made without analysis of the foreign state's definition of *doing business* and a specific assessment of the Georgia business conducted by the foreign corporation being set against it. Neither of the cases discussed undertook such analysis. It is to be noted however, that *Textile Banking Co. v. Colonial Chemical Corp.*[68] did approach the problem in this way and it would seem to constitute a better interpretation of the Georgia law than the state cases.

In any event, as already indicated, the question is now academic inasmuch as the new Code appears to settle the issue for the future.[69] This section which will be seen to abandon the comity principle, reads in part:

> No foreign corporation that under this Code is required to obtain a certificate of authority [to do business in Georgia] shall be permitted to maintain any action, suit or proceeding in any court of this State unless before commencement of the action it shall have obtained such a certificate.

examples of specific kinds of business transactions which a foreign corporation can conduct in the state without subjecting itself to the qualification requirement. They illustrate North Carolina's definition of *doing business*.

68. 285 F. Supp. 824 (N.D. Ga. 1967).

69. GA. CODE ANN. § 22-1421(b) (Rev. 1969).

The foregoing discussion of doing business applies to the subjection of a foreign corporation to the *legislative* jurisdiction of the state. Generally, more activity within the state is required before this kind of jurisdiction will attach than for either of the other two kinds of jurisdiction which a state may assume over a foreign corporation, i.e., jurisdiction for purposes of taxation, or *judicial* jurisdiction. Judicial jurisdiction is generally held to require the least local activity,[70] jurisdiction in the state courts over a foreign corporate defendant being recognized where the level of local activity is well below that needed to support legislative imposition of a qualification requirement. The question may then be asked, still dealing with unqualified foreign corporations, *how much* activity is required to subject such a corporation to personal jurisdiction as defendant in the state courts? The Court of Appeals was confronted with this question in *Hamilton v. Piper Aircraft Corp.*[71] Relying on authority[72] and with little discussion, it held that Piper, the foreign corporation, was not subject to jurisdiction of the Georgia courts merely because its district sales manager lived in the state and used his home as an office. These factors were considered immaterial since the manager made no sales for his employer within the state and thus did no business for it in Georgia. The claim concerning which jurisdiction was sought was for damages caused by defects in a Piper airplane.

It might be noted in passing that the Georgia law on this aspect of doing business would not appear to be affected by adoption of the new Corporation Code. GA. CODE ANN. § 22-1401(e) states that the provisions on transacting business within the state for qualification purposes "shall not be deemed to establish a standard for activities which may subject a foreign corporation to taxation or to service of process under any of the laws of this state."[73]

Corporate and Trade Names

It is perhaps questionable that trade names should be treated under the corporations heading. Yet the problems which develop in conjunction with trade names, though not peculiar to the corporate form, are as a practical matter closely allied to those associated with corporate names proper and are therefore included to the extent, at least, of a brief summation.

70. 2 G. HORNSTEIN, CORPORATION LAW AND PRACTICE § 581 (1959).
71. 119 Ga. App. 361, 167 S.E.2d 228 (1969).
72. S.E. Distrib. Co. v. Nordyke & Marmon Co., 159 Ga. 150, 125 S.E. 171 (1924).
73. GA. CODE ANN. § 22-1401(e) (Rev. 1969).

Three cases are noted: *Multiple Listing Service, Inc. v. Metropolitan Multi-List, Inc.*,[74] which in an earlier stage was commented upon in last year's survey,[75] *First Federal Savings & Loan Association of Atlanta v. First Federal Management Corp.*,[76] and *American Bitumuls Asphalt Co. v. Homer Leggett Construction Co., Inc.*[77] The first two cases pertain to trade names, the third to a corporate name.

The second *Multiple Listing Service, Inc.* appeal produced no change in the law from that stated by the Georgia Supreme Court in its earlier review of the case.[78] Full trial of the controversy[79] resulted in a finding of facts which failed to support plaintiff's contention that its trade name had acquired a secondary meaning entitling plaintiff to its exclusive use. The court in the second appeal, therefore, affirmed the trial court's judgment denying a permanent injunction against use of the name by defendant. The court made it clear that the test of infringement on use of a trade name is deception of the public as determined by whether or not goods or services are unfairly being represented as those of another through use of the same or similar trade names. The court quoted as follows from the case of *Atlanta Paper Co. v. Jacksonville Paper Co.*:

> Relief against unfair competition by the use of trade names really rests on the deceit or fraud which the later comer into the field is practicing upon the earlier comer and on the public.[80]

The second case on trade names made the point that use of a similar name by the "later comer" would not be an infringement justifying relief where the nature of the two businesses were different since in such a case there would be little chance of the public being misled.

In *American Bitumuls & Asphalt Co. v. Homer Leggett Construction, Inc.*, cited above, the rather obvious conclusion was reached that a corporation having changed its name can be sued in the new name on a cause of action which arose under its old name.

---

74. 225 Ga. 129, 166 S.E.2d 356 (1969).

75. Clark, *Business Associations. Annual Survey of Georgia Law*, 20 MERCER L. REV. 41 (1969).

76. 224 Ga. 725, 164 S.E.2d 561 (1968).

77. 119 Ga. App. 170, 166 S.E.2d 430 (1969).

78. 223 Ga. 837, 159 S.E.2d 52 (1968).

79. The earlier case was decided on the pleadings and resulted in reversal of a judgment denying a temporary injunction. At that stage defendant had not yet produced evidence to support his position.

80. 184 Ga. 205, 212, 190 S.E. 777, 782 (1937).

Miscellaneous

Other corporations cases decided during the survey period concerned a variety of subject matter and will be treated chronologically. None of them are considered to be of major significance.

In *Nash v. Jones*[81] the Georgia Supreme Court reversed a Court of Appeals judgment[82] in a case arising under a provision of the Georgia Securities Act.[83] The rule laid down was that one who is an officer and director of a corporation at the time unregistered stock is issued and who himself purchases such stock is not entitled to relief under the purchaser's remedies section of the Securities Act. As a corporate officer and director plaintiff was equally as guilty as defendant in violating the Act. "When both parties are at fault and equally so, equity will not interfere but will leave them where it finds them."[84] Nor will a court of law intervene where plaintiff and defendant are *in pari delicto*.

A contract which had the effect of sterilizing the board of directors of a nonprofit corporation was held to be void in *Milton Frank Allen Publication, Inc. v. Georgia Association of Petroleum Retailers, Inc.*[85] The purpose of the defendant association was to bring petroleum retailers together and to promote their mutual welfare. This, of course, required that retailers be importuned to become members, and the primary source of income from which the association would do its good works was the dues to be paid by members. The contract in question was made by the corporation with Allen, then executive secretary of the association and secretary to the board of directors, and later tranferred by Allen to plaintiff corporation. The contract gave Allen the exclusive right to solicit members, fixed his compensation at seventy-five per cent of the dues charged, and provided that the board could raise, but not lower, dues from a minimum of ten to a maximum of twenty-five dollars with Allen's share continuing at seventy-five per cent. The contract, with option of renewal in Allen, could run as long as ninety years. This contract, the court held, divested the association's board of directors of its statutory authority to "have full control over the affairs of the corporation"[86] and was void as against public policy.

81. 224 Ga. 372, 162 S.E.2d 392 (1968).

82. Jones v. Nash, 117 Ga. App. 258, 160 S.E.2d 225 (1968). The case was discussed in last year's Business Associations survey, 20 MERCER L. REV. 45 (1968).

83. GA. CODE ANN. § 97-114 (Rev. 1968).

84. GA. CODE ANN. § 37-112 (Rev. 1962).

85. 224 Ga. 518, 162 S.E.2d 724 (1968).

86. *Id.* at 527, 162 S.E.2d at 730.

In reaching its decision, the court rejected a contention that Allen had breached a fiduciary duty to the corporation in the initial execution of the contract. On this point, the court found no "fraud, bad faith, unfairness or irregularity whatever" and went on to suggest that Allen's duties were not such as to subject him to fiduciary responsibility since they were "clerical and administrative" rather than policy making.[87]

Brown v. McInvale[88] dealt with an option to purchase corporate stock "if within twenty-four months of the date" thereof certain events did not occur but which fixed no time limit for its execution. It was held that this option ". . . must be exercised immediately upon the expiration of the twenty-four months or within a reasonable time thereafter."[89] The court would not say as a matter of law that nine months delay was unreasonable, this being a question for determination by a jury.

The final case considered worthy of note here is *Farmer's Union Warehouse of Metter v. Bird*.[90] The Georgia Supreme Court in this case held that a declaratory judgment was not a remedy available to majority stockholders of a corporation seeking judicial approval of their past actions. Judicial approval was desired for the protection it would provide against minority stockholder criticism of the manner in which the corporation had been managed. In the court's opinion, the petition presented no "dilemma as to what course" plaintiffs should pursue in the future and thus provided no basis for a declaratory judgment; nor was the sanctioning of past actions possible under the visitorial power of the superior court over corporations.

87. 224 Ga. at 525, 162 S.E.2d at 728.
88. 118 Ga. App. 375, 163 S.E.2d 854 (1968).
89. *Id.*
90. 224 Ga. 842, 165 S.E.2d 148 (1968).