PARTNERSHIP

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For many years American courts have tried to draw a clear line of demarcation between the partnership and other relations in which the efforts of individuals or legally recognized units are combined and directed toward a mutual benefit. In Georgia, as in other states, a surprising number of cases have been litigated, even in recent years, to determine whether the partnership relation existed in particular fact situations. The Georgia courts, like those in other jurisdictions, have failed nevertheless to isolate the minimum factual elements necessary to create a partnership or to evolve satisfactory tests for distinguishing the partnership from other relations. No really satisfactory statement can be found on the relative weights to be attached to the following factual elements: a participant's sharing in the profits, his undertaking to bear part of possible losses, his failure to undertake to share losses, his ownership of assets in the business, his *power* to control the business, and his actual participation in management and policy formulation. It is not surprising, therefore, that the issue of whether a partnership existed on the facts of the particular situation was raised in most of the partnership cases litigated during the survey period.

In *Elliott v. Floyd*[1] plaintiff brought suit against *F* and *T* as partners to recover proceeds from the sale of automobiles belonging to plaintiff. It appeared that *F* had bought a used-car lot and turned the operation of the lot over to *T*, who was to receive fifty percent of the net profits. *T* did not put any money into the business and did not undertake to bear any part of possible losses. *F* claimed that he later sold the lot to *T* and that plaintiff's dealings with *T* were after the sale. Plaintiff testified that *T* had introduced *F* as his partner, that he had never received notice of *F's* withdrawal from the business, and that he had frequently seen *F* at the lot after the alleged sale. *F* explained his visits to the lot from time to time as attempts to collect money *T* owed him. The jury returned a verdict in favor of the plea of no partnership. Plaintiff's motion for a new trial was overruled and he brought exceptions. The Court of Appeals, Division No. 1, held: (1) the evidence showed that during the period *F* owned the lot, *T* had never been a partner but instead had been an employee, and (2) although the testimony that *T* had introduced *F* as a partner was uncontroverted, there was no evidence that plaintiff dealt on the faith of that representation.

The second case raising an issue of what constitutes a partnership was *McCowen v. Alred*.[2] In that case plaintiff and defendant had been part-

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1. 85 Ga. App. 416, 69 S.E.2d 620 (1952).
2. 85 Ga. App. 373, 69 S.E.2d 660 (1952).

ners on two construction projects. Shortly before the completion of the second of these projects, defendant entered into an agreement in his own name to sub-contract work under the title of project manager on a housing project in Charleston. Plaintiff and defendant then commenced the development, plaintiff managing the construction and defendant taking care of the office. Plaintiff later brought suit for a partnership accounting, contending that the same partnership arrangement existed on the housing project as on the other two construction jobs. Plaintiff and his witnesses testified that partnership funds had been moved to Charleston to commence the enterprise and that partnership property had been used at the inception of the work. Defendant testified that he had negotiated the contract personally, that he had informed the plaintiff that he was dissolving the partnership, and that he had asked plaintiff to work for him and manage the construction work for a share of the profits. The jury returned a verdict in favor of the defendant's plea of nul tiel partnership.

In a motion for a new trial, plaintiff complained of the following parts of the trial judge's charge:

> (1) . . . to constitute a partnership there must be liability on the part of the partners to sustain the losses and also to enjoy the profits, if any.
> (2) A joint interest in partnership property or joint interest in the profits and losses of the business shall constitute a partnership as to third persons. A common interest in profits alone shall not.[3]

Plaintiff insisted that as third persons were not involved in the litigation, these charges were error, because (1) Georgia decisions established the principle that as between the parties, their intent is the true test of whether a partnership relation is created,[4] and (2) one Georgia case had squarely held that a valid partnership may exist although one or more of the parties is guaranteed by the others against loss.[5] The court pointed out, however, that whenever a partnership has been recognized where one of the participants was not to share in losses, a joint ownership of property or capital existed; and the court concluded that a partnership relation does not exist "where one party provides all the capital and bears all the losses, the other being entitled to a share of profits in return for his services."[6] The implication of the opinion is that a partnership may result even though one party is not to share in the losses provided he furnishes part of the capital. If that proposition is true, the charges of the trial judge, which seem to preclude partnership in the absence of loss-sharing, appear to be prejudicial to plaintiff; but nevertheless the charges were not held to be error. The court conceded that the evidence was conflicting on whether funds and property of the original partnership were risked in the Charleston venture or whether the plaintiff's share in that property merely was loaned to defendant. The court decided, however, that as plaintiff had contended that the alleged partnership on the Charleston project contemplated the sharing of both profits and losses, and had not contended that defendant had agreed to indemnify

3. This part of the charge is in the language of section 75-102 of the Code.
4. Moore v. Harrison, 202 Ga. 814, 818, 44 S.E.2d 551 (1947); Huggins v. Huggins, 117 Ga. 151, 43 S.E. 759 (1903).
5. Smith v. Hancock, 163 Ga. 222, 231, 136 S.E. 52, 56 (1926).
6. Citing Sauls v. Scott, 46 Ga. App. 243, 167 S.E. 311 (1933).

plaintiff against losses, the charges were adjusted to the issues of the case and were not harmful to plaintiff. Fortunately for plaintiff, a new trial was granted on other grounds.

This is not the place to criticize existing partnership criteria or to suggest new tests, but the charges approved in the *McCowen* case and the principles of law applied in that case do merit a few lines of critical comment. Charge number (1) indicates that a partnership cannot exist unless all the participants undertake to share possible losses; yet the language of the court at least implies that persons who contribute capital to a business may be partners even though they do not bear the risk of loss. Further, as has already been pointed out, at least one case circumvented the loss-bearing requirement. That case was *Smith v. Hancock*,[7] decided by the Supreme Court of Georgia something over a quarter of a century ago. Hancock agreed to furnish Smith, the owner of a peach orchard, money to operate the orchard; in return Smith agreed to pay Hancock one-half of the net profits from the sale of peaches. Losses, if any occurred, were to be borne by Smith. In a suit for an accounting and other relief, the court held that the agreement created a partnership; that as a return on Hancock's capital was contingent on the realization of profits, he had "an interest in profits and losses" sufficient to satisfy the rule requiring loss-sharing. Although *Smith v. Hancock* involved only the parties to a partnership, it seems clear that the relationship created would also have constituted a partnership as to third persons. Where a partnership relation exists *inter se*, partnership liability is imposed with respect to third persons. A final reason why charge number (1), with its loss-sharing requirement, is misleading is that in Georgia, as elsewhere, a person who holds himself out as a partner is treated as a partner as far as third persons are concerned and liability to third persons is imposed on him as though he were a partner irrespective of whether he has undertaken to share losses. Incidentally, unlike the Georgia courts, the courts in most jurisdictions hold that persons who are not partners as to each other are not partners as to third persons, the only exception being a person who holds himself out as a partner; he is treated as a "partner by estoppel."

Charge number (2) is in the identical words of Code section 75-102. Aside from the propriety of incorporating in a charge in a suit between the parties to an alleged partnership, language which by its terms defines a partnership as to third parties, the test set forth in the charge is undesirable even as a criterion of partnership as to third persons. First, the charge states that a "joint interest in partnership property . . shall constitute a partnership as to third parties." To attempt to apply this test is to move in a circle. The purpose of the test is to determine if there is a partnership, but a partnership must necessarily exist before there can be partnership property. In the second place, the charge is easily susceptible (at least to those uninitiated in the subtleties of the law) of the interpretation that a person can never be a partner as to third persons unless he undertakes to bear a part of the losses. That such conclusion would be inaccurate has been discussed in connection with charge number (1).

7. 163 Ga. 222, 136 S.E. 52 (1926).

The rule that as between the parties, their intent is the true test of partnership, also deserves comment. The courts have failed to specify precisely what relationships the parties must intend to assume in order to become partners, or to enumerate the operative facts essential to partnership. Although the courts themselves apparently cannot agree on and set forth with clarity the factual elements characteristic of the partnership relation, they lay down a test which assumes that the contracting parties know what a partnership is. The intention test also seems to be inconsistent with the principle, firmly established in most jurisdictions, that a partnership can be created even though the parties did not foresee or intend the effects which emanate from the partnership relation, and with the principle, recognized in many jurisdictions, that a partnership can be created even though the parties unquestionably desire to avoid partnership liabilities and expressly declare that their contract is not to create a partnership.

Perhaps the importance of "control" as a determinant of partnership liability to third persons should be urged upon Georgia courts. As can be seen from the tests that are applied, Georgia courts, like courts in most other jurisdictions, still base partnership liability on abstract legalistic doctrines without establishing whether the persons being burdened with the duties and liabilities of partnership have a voice in the control of the enterprise. Yet, an increasing number of courts elsewhere, perhaps feeling that the business losses should fall on entrepreneurs and that control is an incident to proprietorship, regard the presence or absence of control as a determining factor in the imposition of partnership liability.[8] This approach appears to be sound. The imposition on the participants in a business who share in its profits and who determine its policies and otherwise control it, of liability to third persons dealing with the enterprise or affected by it, places the responsibility where it belongs, and this irrespective of whether those participants are to share in the losses.

The third recent case in which the principal issue was whether or not a partnership existed was *Threads v. Williams*.[9] In that case the plaintiff sold thread on credit to Oconee Garment Company. When the thread was not paid for, plaintiff brought suit against defendants Marshall, Cofer, and Williams as partners in the company. Williams denied that he was a partner. Plaintiff contended that Williams was liable as a partner because: (1) he had led plaintiff to believe he was a partner and plaintiff had extended credit on that belief, and (2) he had financed the payrolls of Oconee in the manufacture of trousers for the Army and in return had been promised at his option $5,000 or half the net profits. The Court of Appeals, Division No. 1, held that the first contention was without merit because plaintiff's agent testified that he thought Oconee was a corporation and, as a corporation cannot enter into a partnership unless authorized by its charter, credit was not extended in the belief that Williams was

8. Goldwater v. Oltman, 210 Cal. 408, 292 Pac. 624 (1930); Williams v. Inhabitants of Milton, 215 Mass. 1, 102 N.E. 355 (1913); Frost v. Thompson, 129 Mass. 360, 106 N.E. 1009 (1914); Rowley, *The Influence of Control in the Determination of Partnership Liability*, 26 MICH. L. REV. 290 (1928).

9. 84 Ga. App. 804, 67 S.E.2d 591 (1951).

a partner. Thus no estoppel arose. The court held that the second contention was without merit because plaintiff, who had the burden of proving the partnership, had not proved that Williams was to share in the losses of the business. The court indicated that the fact that Williams had not recouped all he had advanced on the payrolls did not mean that he had shared in partnership losses or had agreed to do so.[10]

In *Freeney v. Jones*[11] the petition was in tort against two named persons as a partnership and stated that one individual defendant as a partner and agent of the firm caused plaintiff to be arrested without probable cause, but the petition also stated that the partnership was dissolved before the commission of the offense. The Court of Appeals, Division No. 2, held that, as the petition was to be construed most strongly against the pleader, it did not allege the existence of a partnership relation or facts from which such existence could be inferred, that therefore it failed to state a cause of action against the partnership or the alleged partner who had not participated in the offense, and that it did not even state a cause of action against the alleged partner who had committed the offense individually because it alleged that he did so as agent of a named firm.[12]

Act 914[13] repealed Chapter 75-4 of the Code, dealing with limited partnerships, and substituted the Uniform Limited Partnership Act prepared by the Commissioners on Uniform State Laws. Space limitations will not permit a detailed discussion of the effect of this new legislation on the pre-existing law in the state. Suffice it to say that the old statute, a law modeled on an early New York statute and enacted in 1837, was filled with technicalities and that little use was made of the limited partnership device because of a fear that a minor deviation from the requirements of the statute would result in unlimited liability for the limited partner. The new Act sets up a procedure to follow in forming a limited partnership; describes the business that may be carried on by a limited partnership; sets forth the relations between general partners, limited partners, and third persons; lays down rules to govern the withdrawal of a limited partner's contributions, the assignment of a limited partner's interest, the relations of the partners on a member's retirement, death or insanity; and sets forth regulations on numerous other aspects of the limited partnership.

Perhaps special mention should be made of section 11 of the Act, which governs the status of a person who erroneously believes himself to be a limited partner. That section provides in effect that a person who

10. A fourth case in which the issue of partnership or not was raised was Sykes v. Collins, 208 Ga. 333, 66 S.E.2d 717 (1951). The court there simply held, without discussion of principles of law, that the evidence was sufficient to support an answer in the nature of a cross-petition alleging the existence of a partnership.
11. 85 Ga. App. 1, 67 S.E.2d 783 (1951).
12. Smith v. Norman Motors Co., 84 Ga. App. 186, 65 S.E.2d 699 (1951), contains a statement on partnership but the point is not of sufficient importance to discuss in the text. The court in that case merely stated (as is obvious) that notice to one partner "of the facts surrounding a private transaction of that partner would not alone be notice to the other partner in his private capacity."
13. Ga. Laws 1952, p. 375.

contributes to the capital of a business believing that he has become a limited partner does not by reason of the exercise of the rights of a limited partner become liable as a general partner, if upon ascertaining the mistake he promptly renounces his interest in the profits of the business and in other compensation by way of income. The purpose of this provision of course is to encourage the use of the Act by removing fear that unlimited liability will result through failure to comply with a requirement of the Act or through some other mistake.