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Corporations: Compensation of Directors; Recovery by Minority Stockholder

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should pay. In a case like this the question of forfeiture resolves itself into a question of whether the insured intentionally and wilfully made the misrepresentations. Bannon v. Ins. Co. of No. Amer., 115 Wis. 250.

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Corporations: Compensation of Directors. Recovery by Minority Stockholder.

Thauer vs. Gaebler et al, 232 N.W. 561. Action commenced on September 21, 1929 by plaintiff as a minority stockholder, on behalf and for the benefit of the defendant corporation, to require defendants (directors) to account for and repay to the corporation moneys unlawfully paid out of the assets of the corporation to themselves, and for other equitable relief. The complaint alleged that Ellington was employed in July, 1928, to work for the corporation at agreed salary, without additional compensation, and that in January 1929, at stockholder's meeting, Ellington was elected as one of three directors, and then at director's meeting was elected vice-president and secretary, and thereafter at same meeting, Ellington and corporation's president increased their salaries, and approved bonus of Five Hundred Dollars to Ellington.

Two questions were presented to the court: First, Can a gratuitous payment or bonus to director for services during preceding year, under a contract for definite salary, be recovered by a minority stockholder for corporation's benefit? Second, Does the complaint justify recovery of director's salary increases without proof of abuse of power, bad faith, willful abuse of discretion or positive fraud?

The law on the first question is clear; directors or managing officers of a corporation cannot legally vote to themselves or other officers compensation for past services, where there is no agreement that such officers should be paid. Ellington was employed upon an express contract at a stipulated certain salary, and performed his duties under it until January 1929 when he became a director. Hence, the payment of the bonus was to compensate him for these past services and was without consideration. There was no implied promise on the part of the corporation to pay him this bonus.

This rule results from the general rule that the officers are not impliedly entitled to compensation for services rendered, and accordingly a payment for services which have been voluntarily rendered is void as without consideration and is also ultra vires as a misapplication of the corporate funds. Fletcher Ency. Corporations, Vol. 4, Par. 2762, 7 Ruling Case Law 466,467, L.R.A. 1915 D, 633,635, Marshall, Private Corporations, Page 934, Par. 350, Thompson on Corporations, Third

Edition, Vol. 3, Page 416, Par. 1833, and Godley vs. Crandall and Godley Co., 212 N.Y. 121, 105 N.E. 818.

The Wisconsin Court in answering the second question appeared to shy clear of the issue involved, made a choice between two possible decisions, and then shifted the necessity for a decision upon the issue by pointing out the lack of sufficient allegations in the complaint to support their choice.

The court stated 'although Gaebler and Ellington are charged in terms with having passed the resolution for the increased salaries and bonus, in bad faith, to promote their own interests, and in disregard of their duties as corporate officers to conserve the assets of the corporation, there are no allegations of facts or acts of a fraudulent or deceitful character." The court was able to see the facts or acts necessary to apply the law as to compensation for past services, but ignored the same facts or acts to apply the law as to the directors voting themselves an increase, although the right to each arose out of the same official act, the self-voted directors' resolution. The court seems to have omitted comment on the issue whether or not the resolution passed by the directors, part of which was void, and the other voidable, had tainted the entire transaction with fraud. It did not observe that the elevation of Ellington from an employee to director and their subsequent immediate action, over objection of minority stockholder, in passing a resolution, part of which was void and the other voidable was constructive fraud upon the minority stockholder, especially when during this period the corporation was taking a loss of twenty thousand dollars during 1929 and five thousand dollars up to September 1930. In a leading case, Godley vs. Crandall and Godley Co., 212 N.Y. 121, where the directors voted themselves past and future compensation, the court said, "We are not disposed to hold that the resolution of 1906 was fraudulent as to past services and honest as to the future. Manifestly the increases paid for all of the years rested on the same basis. The resolution was tainted with fraud and wholly void." And in Hardee vs. Sunset Oil Co., 56 Fed. 51, at a meeting of the Board at which the President, Secretary and the Treasurer were alone present, they proceeded to vote themselves salaries, the court stated; "it does not need authorities to show that the action of these three officers in thus voting themselves salaries was absolutely void, and the ocmplainants are entitled to a decree so declaring the resolution." And Wight vs. Heublein, 238 Fed. 321, "they will interfere at the suit of a minority stockholder, where the directors, who are trustees for all the stockholders, have voted to themselves as officers salaries which are excessive in view of the services rendered, and which therfore amount to a legal fraud on the minority." And Schaffhauser vs. A. and S. Brew-

ing Co., 218 Pa. 298, holds that an officer of a corporation cannot authorize an increase of pay for himself against the protest of a minority of the directors and stockholders. And in Sotter vs. Coatesville Boiler Works, 101 Atl. 744, where in a meeting of the Board of Directors a resolution was passed to increase the salaries of the directors, it was held to be constructive fraud in that the vote in support thereof was participated in by interested directors.

The matter is quite new in Wisconsin. We have no decided cases, as to the validity of a resolution for increase of directors salaries, proposed and voted on by themselves. The court did not wish to decide the case under directors' compensation, but took the broader field of corporate management. The Wisconsin Statute, Section 180.13 leaves the directors in full control of compensation matters under their general right to the management of the corporation. In order to carry out the spirit of the Statute, the court thought it best to designate the directors' self-serving act as simply an act of mismanagement and a part of the corporation's internal affairs, of which the equity courts had no jurisdiction. In the face of this we have Justice Kerwin's statement in Figge vs. Bergenthal, 130 Wis. 594, 631, "It is elementary law that an officer of a corporation while acting as a director cannot fix his own salary so as to bind the corporation in an action by it or by a non-consenting stockholder in its name challenging the validity of the salary." and the general rule that an increase effected by interested directors will be held voidable, and, in case of fraud, the directors may be held liable for the increase received."

Under the general heading of Corporate Management the court had to make a choice between two principles, either that the corporate officers are not permitted to use their position of trust and confidence to further their private interests, or that the courts will not interfere with internal management of corporate affairs in the absence of allegations clearly disclosing abuse of power by corporate officers, bad faith, or willful abuse of discretion or positive fraud. Of the first, Wisconsin had no positive adjudication and to support that view the court would necessarily have to pass on the validity of the directors' resolution. Of the second, Wisconsin has numerous decisions based primarily on actual mismanagement of corporate affairs by the directors; but nothing in these decisions concern the validity of a resolution proposed and voted on by themselves for an increase in salary. In Polacheck vs. Michiwaukee Golf Club, 198 Wis. 78, the stockholders objected to the leasing of the grounds without a profit and claimed it was mismanagement, but the court held no allegation of positive fraud, and would not interfere with internal management of corporate affairs. In Goodwin vs Von Cotzhausen 171 Wis. 351, the court decided that it would

interfere here because defendant as director would, if he persisited in acts of mismanagement, ruin the stockholders. In Fleischer vs. Pelton Steel Co., 183 Wis. 451, the directors agreed to pay one of its managers a certain per cent of net profits; he objected because they deducted Income Tax before they paid him the agreed rate; contention that it was mismanagement, but the court held no ulterior motive on part of directors and would not interfere. Gesell vs. Tomahawk Land Co., 184 Wis. 537, the minority stockholder attempted to force the directors to declare a dividend in order to keep stock value up, the court refused to interfere; no acts of mismanagement or fraud were present.

It is not difficult to see why the court chose the latter proposition to support its decision in the present case. It did not have to blaze new trails. The question whether salaries paid by the directors to themselves was excessive or not rested upon the corporate body and the court escaped an intricate solution. In Wisconsin, therefore, you must allege and prove bad faith or willful abuse of discretion or positive fraud on the part of directors in voting themselves an increase in salary in order that a minority stockholder can recover the excessive increase.

Under the decision in this case it would appear that it is possible for the directors on their own motion to increase their salaries each year $30 more each week, and that such sum would not be excessive, but if the increase was $300 more per week, with the same facts, and no increase in corporate duties, the court would immediately see that it was exorbitant, since on the face of the complaint it would show fraud or an ultra vires act on their part and would be reached by demurrer. Here Gaebler voted himself $30 more per week and Ellington $37.50 more per week as a director, and this court held the matter was purely concerned with the internal management of corporate affairs, and was not excessive. But had the same directors, under the same conditions, voted themselves $300 per week, over the protest of the minority stockholders, it is doubtful that the court would sustain a demurrer to the complaint because of insufficiency of allegations, as they would consider that as an act of fraud. Thus, the directors in a small corporation might with ease vote themselves each year an additional $30 per week and in a few years attain the same result, while the minority stockholders would be helpless; they can not set up the matter as a fraud and it would be difficult to prove.

Ordinarily an official is not allowed to fix his own salary and therefore it would be more in conformity with equitable principles to have the Board of Directors, without the presence of the interested Director, or some other corporate body besides directors immediately interested,

vote upon the increase in their salaries; and if a case comes to trial require the minority stockholders to come in with clear proof of wrong-doing or oppression and have more than a claim based on mere differences of opinion upon the question whether equal services could have been procured for somewhat less. The Equity Courts should stress proof, and a general allegation of the facts why such a salary is excessive, this should be sufficient to give the minority stockholders an opportunity to present their proof at the trial.

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Easements: Prescription, Implied Grant, Necessity, Dedication and Estoppel

Frank C. Shilling Co. v. Detry, 233 N.W. 635, was an action brought by the plaintiff, Frank C. Shilling Co., to determine their interests in a twenty foot strip of land lying on the western boundary of certain land belonging to the defendant Detry. This strip separates the defendant's land from the Chicago & Northwestern Ry. Co.'s right of way, and runs to another tract to the south owned by the plaintiffs. The plaintiffs acquired title to this twenty foot strip, and also to the larger lot to the south thereof, by a deed from Phoebe Elmore, whose ancestor in title was Andrew E. Elmore, dated September 1926. The defendant's claim dates back to August 1902 at which time he acquired by a deed from Andrew E. Elmore an irregular lot immediately to the east of this stirp. The title conveyance, recording, possession, etc., are all admitted.

The only question in issue is, as to the construction and effect of certain language used in describing the boundaries of the land conveyed to the defendant to the effect that: "Commencing at a point, * * * which point shall also be sufficient distance from the land of the Chicago & Northwestern Railway Co. conveyed * * * so that an alley might be established twenty feet in width extending southwesterly along the railroad right of way." At the time this conveyance was made, both the twenty foot strip and the lot conveyed were submerged.

Detry entered into possession immediately after conveyance was made to him. He filled in this twenty foot strip with cinders so as to make it usable as a driveway. During the ensuing twenty-two years both Detry and his tenants used this strip as an alley, and their user was interrupted only once for a period of less than two years when a restaurant erected in 1904 blocked their entrance to the northern end of this strip. This restaurant was erected by a lessee of one of Detry's tenants, and rental was paid for the use of the ground to both Detry's tenant and to Elmore through his agent. After that two year period the restaurant was moved so that it occupied only three fifths of the twenty