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Corporations - Non-Delegable Powers of Board of Directors

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since he does the same work as those whom he employs.[12] In fact an organization of men whose labor is personal service sold directly to the public, rather than directly to the employer who in turn sells the product of their labor to the public as in a manufacturing plant, is more like as association of semi-professional men than a labor union.[13] This common interest between employer and employee becomes of less and less importance as the number of employees is increased and the attention of the owner of the shop is increasingly directed more to the running of the shop than to the rendition of personal service by himself. Yet the test of the Wisconsin Supreme Court here as to the per cent of union support attributable directly to the employer also grows less and less pertinent as the number of employees is increased. And so it would appear that as their interests become more dissimilar, and hence the need for the protection of the Wisconsin Employment Peace Act greater, there is increasingly less reason to invoke the prohibition of Section 111.06 (1) (b). This case discloses the need for legislation more pertinent to the specialized relation of the independent and semi-independent craftsmen, comprising so large a part of our laboring class. They have been neglected in the present statute, fashioned primarily to meet the needs of others.

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Corporations — Non-Delegable Powers of Board of Directors — The directors of two corporations considered it in the best interests of both for defendant Carlisle to obtain 80% or more of Dart's outstanding stock by an exchange of defendant's stock for Dart's stock. They caused the two corporations to enter into an agreement whereby defendant promised to make available shares of its stock in exchange for shares of Dart's "on the basis of such number of shares of Carlisle for each 1 share of Dart as may be determined to be fair and equitable by an independent appraiser to be designated by Carlisle, provided, however, that such exchange shall not exceed a maximum of 218 shares of Carlisle for each 1 share of Dart." The rest of the agreement bound defendant irrevocably to issue, but neither Dart or its stockholders bound themselves to accept, up to 174,400 shares of defendant's stock.

[12] The similarity of those interests was used by the appellant union as one of the reasons why the employer should be amenable to the coercion of the union by means of peaceful picketing, so as to require him to share in the expense of furthering those common interests; ". . . the working employer enjoys many benefits as a journeyman which were obtained only by unceasing and costly struggles of the . . . union. The prices he can get for his services, the regulated training under apprenticeship laws, the beneficent legislation regulating the trade and entrance to the trade . . ."; p. 80 of the principal case.

[13] As pointed out above the courts of at least two states have come to the same conclusion; supra note 5.

The minutes of the meeting at which the agreement was authorized by the defendant's board, show that the maximum figure of 218 shares was Dart's offer, while defendant's offer was 175. Before the appraiser reached a conclusion, plaintiff, a stockholder of defendant, sued to enjoin the proposed agreement on the ground that it constituted an unlawful delegation of power by the board of directors. At the time complaint was filed, a restraining order was issued. At the same time the court issued a rule to show cause why a preliminary injunction in the same tenor should not issue. *Held:* Injunction granted. Under the Delaware statutes[1] the directors may not delegate the duty to determine the value of property acquired as consideration for the issuance of stock. Neither the statutes nor the certificate of incorporation[2] contained any language purporting to authorize such delegation and the importance to the corporation of the subject matter—ownership of the corporation—tends to negative any implication that it might be delegated in a manner not explicitly authorized by statute. The court dismissed defendant's contention that the directors did perform their determinative duty by setting an upper limit, pointing out that the maximum figure was merely Dart's offer. *Field v. Carlisle Corporation,* 68 A. 2d 817 (Del. 1949).

In testing the question of delegability of authority by the board of directors, the early cases ran into some difficulty as to the exact nature of that body.[3] That they acted as agents of the stockholders and thus were bound by the maxim *delegatus non potest delegare* was early rejected, because the stockholders neither confer nor can they revoke the board's powers. Rather the powers were considered original, and "derivative only in the sense of being received from the State in the act of incorporation."[4] On the other hand to make the board principals with unbridled power of delegation seems inconsistent with the idea it has no common law but only granted powers.[5] Perhaps a satisfactory

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[1] Revised Code of Delaware (1935) §2041 Sec. 9. "The business of every corporation . . . shall be managed by a Board of Directors. . . ."; §2046 Sec. 14 ". . . Subscriptions to, or the purchase price of, the capital stock of any corporation . . . may be paid for . . . by labor done, by personal property, or by real property or leases thereof; . . . . And in the absence of actual fraud in the transaction, the judgment of the directors, as to the value of such . . . shall be conclusive . . . shares of capital stock without par value, whether common or preferred or special, may be issued by the corporation from time to time for such consideration as may be fixed from time to time by the Board of Directors thereof. . . ."

[2] "The common stock may be issued from time to time for such consideration as may be fixed from time to time by the board of directors of the corporation, and any and all such shares so issued, the full consideration for which has been paid or delivered, shall be deemed full paid stock and not liable to any further call or assessment thereon, and the holder of such shares shall not be liable for any further payments."

[3] 20 Harvard Law Review 225 (1907).

[4] Hoyt v. Thompson's Executor, 19 N.Y. 207 (1859).

[5] Town of Royalton v. Royalton & Woodstock Turnpike Co., 14 Vt. 311 (1843).

conclusion is that the board exercises its powers in a fiduciary capacity, for the benefit of stockholders,[6] and by analogy, the general rule against a trustee delegating his authority[7] may be applied.[8]

Whatever the nature of the body, it is clear that authority exists to delegate the conduct of ordinary, routine, ministerial business matters.[9] Beyond this there is some confusion, probably due to the vagueness of the terms "ministerial" and "discretionary", and their application in a business world. Incorporation statutes generally provide that the business of the corporation shall be managed by a board of directors,[10] and some add a power in the board to appoint such subordinates as the business may require.[11] Though the latter type gives express authority to delegate, the decisions under either are the same.[12] But the power to delegate even in a business or managerial sense is not unlimited; the board will be required to leave undelegated, matters which are on a "policy" level.[13]

Some cases are cited by textwriters as denying the delegability of any discretionary powers by the board,[14] and a Wisconsin case[15] is

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[6] Cook v. The Berlin Woolen Mill Co., 43 Wis. 433 (1877) at 439; "A distinction is recognized . . . between corporate officers, whose offices are of the essence of the corporation, and whose offices are merely ministerial . . . Courts of equity deal with the former as trustees; with the latter as agents."

[7] 3 BOGART, The Law of Trusts and Trustees §555 (1935).

[8] Gulf & S.I.R. Co. v. Laurel Oil & Fertilizer Co., 171 Miss. 741, 158 So. 778 (1935).

[9] First Nat'l. Bank of Binghampton v. Commercial Traveller's Home Ass'n. of America, 95 N.Y.S. 454, Aff'd. 185 N.Y. 575, 78 N.E. 1103 (1906).

[10] See Del. statute, supra, n. 1; Wis. Stat. 180.13 (1) (1947).

[11] 1 Cahill, NEW YORK CONSOLIDATED LAWS, DECENNIAL SUPPLEMENT (1948). General Corporation Law, §14, "Every corporation as such has power, though not specified in the law under which it is incorporated: (4) To appoint such officers and agents as its business shall require. . . ."

[12] Jones v. Williams, 139 Mo. 1, 39 S.W. 486, 490 (1897); "At common law the power to have a board of directors was inherent in the corporation. The statute of Missouri requiring the business and property of a corporation to be managed and controlled by directors is but an affirmance of the common law power. So, likewise, the directors have power, without statutory authority, to delegate . . . not only ordinary and routine business, but business requiring the highest degree of judgment and discretion . . . The power expressly given by statute to the board of directors 'to appoint such subordinate officers and agents as the business of the corporation may require' does not limit or diminish the common law power to delegate authority."

[13] Sherman & Ellis, Inc. v. Indiana Mutual Casualty Co., 41 F. 2d 588 (CCA-7 1930). The court distinguishes Jones v. Williams, supra, n. 12, wherein delegation of the editorial policy of a newspaper for five years was upheld, stating that that case illustrated the extent to which courts have gone, but declared void the contract in question which gave defendants "the underwriting and executive management" for 20 years; Manson v. Curtis 223 N.Y. 313, 119 N.E. 559 (1918).

[14] Ames v. Goldfield M.M. Co., 227 F. 292 (1915).

[15] Perfex Radiator Co. v. Goetz, 179 Wis. 338, 191 N.W. 755, 759 (1923). Though the court decided the case on other grounds, it said, "That it is ordinarily illegal for a board of directors to delegate the powers vested in them either by statute or the articles of organization is too plain for argument, and such delegation ordinarily is as illegal as is the delegation of power of a legislative

among them. The language of the Wisconsin case caused some comment calling for a statute authorizing executive committees in this State,[16] which statute was passed in 1943.[17] That there are restrictions on executive committees, created by statutes less explicit than that of Wisconsin, or by charter, or by-laws, is also apparent.[18]

There are, however, certain non-delegable powers, and these exist when discretionary power is vested exclusively in the board by statute, charter, vote of stockholders, or usage.[19] Thus an executive committee acting under a by-law granting it "full powers" of the board was held not to have the board's granting powers to amend the by-laws, change members of the committee, or remove officers;[20] and stock was held illegally issued where issued without the authority of the directors, but with authority of an executive committee which had not been given such express power.[21]

It is clear that the contract in the principal case clearly falls into the latter category, and that the duty of fixing the consideration for the defendant's stock could not be delegated under the statute. However, the interesting point in the case is the defendant's contention that the board had performed its determinative duty by setting a maximum limit beyond which the delegatee could not go. Admittedly, under the facts of the case, the directors had not exercised independent judgment in setting the maximum figure. But if they had conscientously determined a reasonable range or norm, and since an analogy has been drawn to the delegation of legislative powers,[22] would not such deliberation satisfy the rule in the latter field;[23] and therefore, by analogy, satisfy the

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body unless expressly authorized by law." The court then cited the Ames case, supra n. 14, with approval.

[16] See 11 Wisconsin Law Review 457 (1936); 1939 Wis. Law Review 173.

[17] Wis. Stat. 180.13 (2) (1947). "If authorized by the by-laws of the corporation, the board of directors may elect an executive committee to consist of not less than 3 directors, which committee may to the extent provided in the by-laws have and exercise the powers of the board of directors when not in session, except action in respect of dividends to stockholders, election of officers, or the filling of vacancies in the board of directors or executive committee."

[18] See extensive note, 42 Mich. Law Review 133 (1943).

[19] 2 FLETCHER, PRIVATE CORPORATIONS §497 (perm. ed. 1931); Jones v. Williams, supra, n. 12, recognized the distinction between acts involving "corporate rights and powers" and acts "pertaining to business".

[20] Hayes v. Canada, Atlantic & Plant S.S. Co. Ltd., 181 F. 289 (CCA-1 1910).

[21] Ryder v. Bushwick R. Co., 134 N.Y. 83, 31 N.E. 251 (1892).

[22] Perfex Radiator Co. v. Goetz, supra, n. 15.

[23] State ex rel. Wis. Inspection Bureau v. Whitman, 196 Wis. 472 at 505, 220 N.W. 929, 941 (1928); "The power to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; *to fix the limits* within which the law shall operate,—is a power which is vested by our constitutions in the legislature and may not be delegated. When, however, the legislature has laid down these fundamental of a law, it may delegate . . . the authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose, in the language of Chief Justice MARSHALL 'to fill up the details': . . . . It only leads to confusion and error

rule in the corporate field? If so, need for ratification would be dispensed with; third parties could safely deal with delegates in the first instance; and delay, the thorn in the side of modern business, could be minimized.

RALPH H. DELFORGE

Constitutional Law — Protection Against Unreasonable Searches and Seizures — The defendant was suspected of unlawfully receiving and concealing narcotics. He was apprehended by local and federal officers who did not have a warrant for his arrest or a search warrant. At the time of the arrest the defendant swallowed two capsules of heroin in order that the heroin would not be found in his possession. He was then *forced* to submit to a "stomach pump treatment" so that the officers could obtain the heroin from his stomach. A federal officer took part in the entire proceeding. The defendant was then indicted for knowingly and unlawfully receiving and concealing two grains of heroin. *Held:* Forcing a person to submit to a stomach pump treatment is an unreasonable search in violation of the Fourth Amendment.[1] Any evidence obtained by such a search is inadmissible. *United States v. Willis, 85 F. Supp. 745 (S. D. California 1949).*

The question raised by this decision is: to what extent will the courts protect an individual against compulsion of physical evidence both *of* and *from* the body? The answer to this question will depend upon what right an individual has to such protection. The principal case bases this right on a liberal interpretation of the Fourth Amendment. Since the Fourth Amendment is a prohibition against only those searches and seizures that are unreasonable, the protection of the individual hinges upon what is meant by "unreasonable". The courts say that the question of unreasonableness is relative and each case is to be decided on its own facts and circumstances.[2] The search may be unreasonable if it is out of proportion to the end sought.[3] The term unreasonable cannot, therefore, be precisely defined. However, the general trend in the United States Supreme Court is to extend or broaden the power of federal authorities to search for and seize goods *without a search warrant* or, stating this trend in other words, the Supreme Court

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to say that the power to fill up the details . . . is not legislative power." (italics ours).

[1] U.S. Const. Amend. IV provides: "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by Oath or, affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[2] United States v. Costner, 153 F. (2d) 23, 26 (C.C.A. 6th 1946).

[3] Zimmermann v. Wilson, 105 F. (2d) 583, 585 (C.C.A. 3rd 1939).