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CORPORATIONS — RATIFICATION OF UNAUTHORIZED WITHDRAWAL OF FUNDS BY AN OFFICER OF A CORPORATION — The president of a corporation withdrew funds from the corporation with which to purchase stock for his own personal benefit. He used this money so as to save the brokerage cost of his securities. A great deal of the money was repaid a few days after its withdrawal. The board of directors, discovering these activities, approved all past actions and present loans of the president. *Held*, the attempted ratification by the board of directors did not relieve the president from his duty of accounting for the profits realized on the stock purchased with the funds, since there had not been approval by all the stockholders. *Bailey v. Jacobs*, 325 Pa. 187, 189 A. 320 (1937).

It has long been recognized that officers and directors of a corporation stand in a fiduciary capacity and owe certain duties to the corporation.[1] One of the elementary duties is that a director or other officer cannot deal with the corporate funds and property for his own private gain so as to realize a personal profit from his position, not enjoyed in common by all the stockholders.[2] There

[1] Note in 2 L. R. A. 534 (1889); BALLANTINE, CORPORATIONS, § 114 (1930); 3 FLETCHER, CYCLOPEDIA CORPORATIONS, § 838 (1931); Ford v. Ford Roofing Products Co., (Mo. App. 1926) 285 S. W. 538; Bromschwig v. Carthage Marble & White Lime Co., 334 Mo. 319, 66 S. W. (2d) 889 (1933). See cases cited in note 2, infra.

[2] Atkins v. Hughes, 208 Cal. 508, 282 P. 787 (1929); Louisiana Mortgage Corp. v. Pickens, (La. 1936) 167 So. 914; Holman v. Moore, 259 Mich. 63, 242 N. W. 839 (1932); Flannery Bolt Co. v. Flannery, (D. C. Pa. 1935) 16 F. Supp. 803; Dodge v. Scripps, 179 Wash. 308, 37 P. (2d) 896 (1934), rehearing denied 295 U. S. 739, 55 S. Ct. 649 (1934); Winter v. Anderson, 242 App. Div. 430, 275 N. Y. S. 373 (1934); Johnson v. Crook, 216 Wis. 534, 257 N. W. 453 (1934); Dixmoor Golf Club v. Evans, 325 Ill. 612, 156 N. E. 785 (1927).

is no doubt that in the principal case there has been a violation of this duty[3] and the question is who may ratify such a breach. The question of ratification of this breach by the board of directors is a problem not very often discussed by the courts.[4] However, it seems that the result in the principal case, denying the right of the board to ratify, is in accord with the prevailing views on the subject. The duty of the officers or directors is apparently one owed to the corporation or the stockholders as a group and not to the stockholders individually.[5] Therefore, it has been held that, if all the stockholders of a corporation assent, officers or directors of a corporation may appropriate the corporate assets, provided it does not prove detrimental to any creditors.[6] Likewise, where there are no stockholders except the directors and officers, the latter may do anything with the corporate property which they by unanimous consent should decide.[7] If a stockholder has once approved a breach of this kind he is estopped from raising the corporate wrong, despite the fact that it is said to be a duty owing

[3] The court (189 A. 320 at 323 said, "The testimony portrays a story of financial transactions by defendant which are more remarkabe for the ingenuity they reveal than acceptable as models of ethical propriety."

[4] Atkins v. Hughes, 208 Cal. 508, 282 P. 787 (1929), indicating that the board itself could not use corporate funds to improve property of an individual. Pollitz v. Wabash R. R., 207 N. Y. 113, 100 N. E. 721 (1912), requiring unanimous approval by stockholders of board action. Von Arnim v. American Tube Works, 188 Mass. 515, 74 N. E. 680 (1905); Luyckx v. R. L. Aylword Coal Co., 270 Mich. 468 at 476, 259 N. W. 135 (1935), where, the manager having spent money for whiskey to help advertise, the court said, "It may also be said that the money spent for whiskey was illegal and could not be ratified under any circumstances" (by the directors); Murray v. Smith, 166 App. Div. 528, 152 N. Y. S. 102 (1915), loans prohibited by statute could not be ratified. In Fergus Falls Woolen Mills Co. v. Boyum, 136 Minn. 411, 162 N. W. 516 (1917), the manager contracted debts in excess of limit prescribed in charter; held could be ratified only by unanimous action of stockholders.

[5] The court in the principal case (189 A. 320 at 324) said: "Directors and officers occupy toward stockholders what is commonly characterized as a fiduciary relationship. They must act in the utmost good faith, and cannot deal with the funds and property of the corporation, nor utilize the influence and advantage of their offices, for any but the common interest." Ford v. Ford Roofing Products Co., (Mo. App. 1926) 285 S. W. 538; Red Bud Realty Co. v. South, 96 Ark. 281, 131 S. W. 340 (1910); Bromschwig v. Carthage Marble & White Lime Co., 334 Mo. 319, 66 S. W. (2d) 889 (1933); see cases in note, 2 L. R. A. 534 (1889).

[6] McConnell v. Combination Min. & Mill. Co., 30 Mont. 239, 76 P. 194, 104 Am. St. Rep. 703 (1904); Atkins v. Hughes, 208 Cal. 508, 282 P. 787 (1929); Pollitz v. Wabash R. R., 207 N. Y. 113, 100 N. E. 721 (1912); Von Arnim v. American Tube Works, 188 Mass. 515, 74 N. E. 680 (1905); Ford v. Ford Roofing Products Co., (Mo. App. 1926) 285 S. W. 538; Fergus Falls Woolen Mills Co. v. Boyum, 136 Minn. 411, 162 N. W. 516 (1917).

[7] Brown v. Byrne, (Tex. App. 1934) 75 S. W. (2d) 484, with cases cited in the opinion; Storey Brook Lumber Co. v. Blackman, 286 Pa. 305, 133 A. 556 (1926); Watts v. Gordon, 127 Tenn. 96, 153 S. W. 483 (1913); Jorndt v. Reuter Hub & Spoke Co., 112 Mo. App. 341, 87 S. W. 29 (1905).

to the corporation.[8] Some courts have even found estoppel by acquiescence.[9] Logically, something the board could not itself do without violating its fiduciary duties, it should not be able to ratify as a valid act when done by an officer of the corporation.[10] Judging by the decisions, it would seem the courts have just assumed that a breach of this sort can only be approved by the unanimous action of the stockholders.[11] Such a rule as a matter of sound policy will operate as a deterrent upon personal speculation with corporate funds.

Walter Probst, Jr.

[8] Jorndt v. Reuter Hub & Spoke Co., 112 Mo. App. 341, 87 S. W. 29 (1905); Barrett v. Smith, 185 Minn. 596, 242 N. W. 392 (1932), affirming 183 Minn. 431, 237 N. W. 15 (1931); Murray v. Smith, 166 App. Div. 528, 152 N. Y. S. 102 (1915); Fish v. Harrison, 87 N. J. Eq. 103, 100 A. 185 (1917); Fagan v. Stuttgart Normal Institute, 91 Ark. 141, 120 S. W. 404 (1909).

[9] Jorndt v. Reuter Hub & Spoke Co., 112 Mo. App. 341, 87 S. W. 29 (1905); Murray v. Smith, 166 App. Div. 528, 152 N. Y. S. 102 (1915).

[10] The court said (189 A. 320 at 327): "As the court below properly held, this 'ratification' was invalid, because the directors could not ratify what they could not originally have authorized. They had no authority to permit the moneys of this company, contributed by the stockholders to a manufacturing enterprise, to be used in huge amounts by the president at will for his own financial purposes." See 3 THOMPSON, CORPORATIONS, § 2107 (1927) and 2 FLETCHER, CYCLOPEDIA OF CORPORATIONS, § 762 (1931).

[11] See cases in note 6, supra.