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Irving M. Mehler

DIRECTORIAL GROUP ACTION AND LEGAL RESPONSIBILITY

IRVING M. MEHLER*

One of the important pillars of the modern corporate structure is sound corporate management. Concerted group action as a vital force behind diversified corporate activity has tended to cast a hue of pallor over the oft-quoted but misleading definition that the corporation "is an artificial being, invisible, intangible and existing only in contemplation of law."[1] The equally oft-quoted but specious description that a corporation is a "legal fiction" is also steadily losing ground by virtue of the fact that present day corporations by force of concerted group action account for not a small segment of the commercial activity that takes place over the entire face of the globe. The contention that the corporation is a mere metaphor, a fiction, has also been refuted by historical considerations.[2]

Intangibility is said to be an essential feature of corporate existence. But then again, no more so than many other forms of economic objects or values of our society. One need go no further than to delve into property rights which are generally expressed in the form of paper documents. Nevertheless, it cannot be gainsaid that they have their deeper reality in their legal recognition and acceptance in our present day society. The nebulous theory that the corporation is a "mere mental conception" has already been vigorously challenged on more than one occasion.[3]

Since the corporate entity satisfies the test of personality in having capacity for legal rights and duties, it is most natural to treat it as though it were a person, with a slowly growing recognition that the analogy is more real than ficticious. The Promethean aspect of corporate activity as a vital factor in the economic stratosphere cannot be separated from the individuals who in legal recognition consitute a unity or oneness in reference to group action. For when unified directional groups become active in daily economic spheres of endeavor, there is little escape from ascribing legal reality to the collective group capacity of those individuals who comprise the particular group.[4] It is the legal responsibilities flowing from such

* LL.B., St. John's University; LL.M., Brooklyn Law School; J.D., University of Chicago. Assistant Dean and Professor of Law, Westminister College of Law, Denver, Colorado. Member of Colorado, New York and Supreme Court Bars.

1. Trustees of Dartmouth College v. Woodward, 17 U. S. (4 Wheat.) 518, 536 (1819).
2. Maine, Ancient Law (4th Ed.) 181.
3. Raymond, The Genesis of the Corporation, 19 Harv. L. Rev. 350 (1906).
4. *Id.* at 354.

directional group action so basically inherent in corporate management that this paper will attempt to explore.

I. Corporate Management and Group Action

It is fundamental that the management functions of a corporation are vested in its board of directors.[5] The board, as a collective group, are the determinants of its basic policies and may be compared to the general staff of a military command in whom reside the powers for top level planning and peremptory action. Their power to do particular acts is vested in them, not individually, but as a board. Should they act separately or in an individual capacity, or at a meeting which lacks legal sanction, the corporation as an entity will not be bound.[6] The law has recognized the importance of group thinking and planning by the board of directors to such a certain degree that only the concerted legal action of the board acting as such will be held to be binding on the corporation. The corporation, on the other hand, may estop itself from denying the validity of unconcerted group action, or may ratify the acts of the individual directors by receiving and accepting the benefits of their acts.[7]

The reasoning that underlies the rule that the separate action of all taken independently is unenforcible board action, is well set forth by the court in the case of *Ames v. Goldfield Merger Mines Co.*,[8] as follows:

> "The stockholders of a corporation have a right to expect from their directors a conscientious consideration of every proposition which is presented which involves any interest of the company, in conformity to the oath to which they have subscribed. They have a right to have the individual viewpoint of the several directors expressed at a conference, for the purpose of obtaining the exchange of view of the several persons in arriving at conclusions after deliberate consideration of any issue. It is fundamental that officers of boards can only act as such constituted boards when assembled as such, and by deliberate and concerted action dispose of the issue under consideration, and that they cannot act in an individual capacity outside of a formal meeting, and a majority of the individual

5. Beveridge v. New York El. Ry., 112 N.Y. 1, 19 N.E. 489 (1889); Continental Securities Co. v. Belmont, 206 N. Y. 7, 99 N. E. 138 (1912); Elggren v. Woolley, 64 Utah 183, 228 Pac. 906 (1924).

6. See Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 261, 276 (1897), in which a conveyance of land belonging to a corporation was held ineffectual because it was executed in the name of the corporation by all directors acting separately and not as a board.

7. C. A. Dodge Co. v. Western Ave. Tabernacle Baptist Church, 247 Mass. 330, 142 N. E. 64 (1924); Electrical Products Consolidated v. El Campo, Inc., 105 Mont. 386, 73 P.2d 199 (1937); Hubbard v. Camperdown Mills, 26 S. C. 581, 2 S. E. 576 (1887); Trethewey v. Green River Gorge, 17 Wash.2d 697, 136 P.2d 999 (1943).

8. 227 Fed. 292, 301 (W. D. Wash. 1915).

expressions be the action of the board. The law believes that the greatest wisdom results from conference and exchange of individual views, and it is for that reason that the law requires the united wisdom of a majority of the several members of the board in determining the business of a corporation . . ."

The rule was further enunciated in the case of *Jackson v. Republic Mutual Fire Insurance Co.*,[9] as follows:

"It is elementary law that a director of a corporation has no authority to obligate it by the mere fact that he is a director. The corporate authority is exercised by the board itself, not by the individuals comprising its personnel."

And in *Lawrence v. Montgomery Gas Co.*,[10] the rule was again clearly set forth in the following manner:

"The directors of a corporation cannot separately and individually give consent to or make a contract to bind the corporation; they can act only as a body, their power being not joint and several, but only joint."

The authorities are therefore in agreement that the governing body of a corporation, as such, are agents of the corporation only as a board, and not individually. Hence it follows that they have no authority to act collectively save when assembled at a duly convened board meeting; and the separate action of the persons comprising the directorial body is therefore not the action of the duly constituted collective group.[11]

A. Exceptions to the Rule of Group Action

The general rule that a corporation cannot act except through the concerted group action of the board of directors at a duly convened meeting is subject to numerous exceptions. An important one is custom and usage. Hence, it has been held, that formal meetings of directors were not necessary where their usual course of business was to act informally.[12] The courts have also stated that a fairly consistent course of informal dealing may bring into play the doctrine of estoppel so as to prevent unjust enrichment in reference to those persons who unwittingly relied on this informal pattern.[13] Where directors were permitted to establish a custom of assenting individually to the making and performance of contracts by their

9. 138 Kan. 571, 27 P.2d 296, 297 (1933); Citizens' Securities Co. v. Hammel, 14 Cal. App. 564, 112 Pac. 731 (1910); But see Denver & Colorado Inv. Co. v. Rudolph, 47 Colo. 380, 107 Pac. 816 (1910) where two directors signed a mortgage and the other being consulted in regard thereto did not object, it was held sufficient.

10. 88 W. Va. 352, 106 S.E. 890 (1921).

11. Sargent & Co. v. Heggen, 195 Iowa 361, 190 N.W. 506 (1922).

12. Baker v. Smith, 41 R. I. 17, 102 Atl. 721 (1918); Kozy Theater Co. v. Love, 191 Ky. 595, 231 S.W. 249 (1921).

13. First National Bank of Burns v. Frazier, 143 Ore. 662, 22 P.2d 325 (1933); Buckley v. Jennings, 95 Vt. 205, 114 Atl. 40 (1921).

agents, this was held to constitute a waiver of the necessity of a formal meeting of the board for the purpose of transacting the business of the corporation. And the acceptance by the stockholders of the benefits of the irregular action taken by the board of directors has been held to constitute a ratification of the action so taken.[14]

The doctrine that the directors must act as a board at a duly constituted meeting in order to bind the corporation is subject to the further exception of the case of the single stockholder who owns substantially all the shares of the company. And it has been held that where all the stock is owned by one person, the rule of collective action ceases to be important and no formal corporate action is, as a general rule, necessary: as formal action by officers of a corporation is generally for the protection of stockholders.[15]

Another exception to the general rule which requires collective action by the board of directors at a duly convened meeting is the instance where all the corporate stock is owned by the directors.[16] Accordingly, it has been maintained that the execution of a lease without the formal sanction of the board at a duly convened meeting was a valid execution where all the corporate stock was in the hands of the directors.[17]

The authorization by statute that permits certain acts to be done by the directors acting otherwise than as a duly constituted board is a further exception to the general rule which requires concerted group action.[18] Conversely, it has been held that shareholders cannot waive the requirement of collective group action by the board acting as unified body, if the statutory provisions would thereby be violated.[19]

Investing the executive officers of a company with the powers of the directors as the customary method of conducting business;[20] acquiring the separate consent of all the directors;[21] and ratification by vote or acquiescence upon full disclosure of the circumstances[22]

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14. Holcombe v. Trenton White City Co., 82 N. J. Eq. 122, 82 Atl. 618 (1912), *aff'd*, 82 N. J. Eq. 364, 91 Atl. 1069 (1913).
15. Vennerbeck & Clase Co. v. Juergens Jewelry Co., 53 R. I. 135, 164 Atl. 509 (1933).
16. Jordan v. Collins, 107 Ala. 572, 18 So. 137 (1895).
17. Temple Enterprises v. Combs, 164 Ore. 133, 100 P.2d 613 (1940).
18. Mich. Gen. Corp. Act, Sec. 13(4c) provides that if the directors shall severally and/or collectively consent in writing to any action to be taken by the corporation such action shall be valid corporate action as though it had been authorized at a meeting of the directors; see also Maryland Corporation Act, Sec. 54 (1951).
19. Audenried v. East Coast Milling Co., 68 N. J. Eq. 450, 59 Atl. 577 (1904).
20. Barkin Construction Co. v. Goodman, 221 N. Y. 156, 116 N.E. 770 (1917).
21. National State Bank v. Sandford Fork & Tool Co., 157 Ind. 10, 60 N.E. 699 (1901); Gorrill v. Greenlees, 104 Kan. 693, 180 Pac. 798 (1919).
22. Morisette v. Howard, 62 Kan. 463, 63 Pac. 756 (1901). But see First Trust & Savings Bank v. Iowa-Wisconsin Bridge Co., 98 F.2d 416, 427 (8th Cir. 1938) where it

have all been held to be additional instances where non-concerted group action has been held to be binding on the company, and hence deemed to be valid exceptions to the general rule which requires concerted group action by the board of directors duly convened as such.

B. Delegation of Authority to Executive Committee

The multifarious needs of a corporation ofttimes necessitates the delegation of managerial functions by directors to others. It has therefore been held that the board as such, may delegate their authority to officers of the corporation,[23] to an executive committee,[24] to one of their own board members or even at times to those having no affiliation with the corporation.[25] Especially in reference to the needs of large corporations, it is a matter of common knowledge that directors cannot give their personal attention to all the details of the company. Normally, the articles of incorporation and the bylaws provide for the appointment of an executive committee. And a resolution of the board of directors, either specifically defining the powers of the particular committee or granting them plenary powers will be sufficient to delegate the authority.[26] It has also been held that "the directors have the power, without statutory authority, to delegate to officers, agents or an executive commitee the power to transact, not only ordinary and routine business, but business requiring the highest degree of judgment and discretion."[27] As indicated by recent laws and decisions, the trend relating to the delegation of powers by boards to others, is toward a more liberal extension of such powers.[28] As in the case of the board of directors, an executive committee can act only as a unified or collective group. And although not formally convened, there have even been instances where the lack of a formal meeting has not invalidated the written consent of all the members of the group subsequently given.[29]

was held that the acquiescence of the stockholders obtained without full disclosure does not excuse or ratify a fraud.

23. Hoyt v. Thompson's Executor, 19 N.Y. 207 (1859).

24. Union Pacific R. R. v. Chicago, P. R. R., 163 U. S. 564 (1895); Sheridan Electric Light Co. v. Chatham Nat'l Bank, 127 N.Y. 517, 28 N.E. 467 (1891). Modern statutes permit delegation to an executive committee. See N.Y. Stock Corporation Law, § 60; Ohio General Code, §§ 8623-60; Colo. Rev. Stat. § 31-2-1 (1953).

25. *In re* Lone Star Shipbuilding Co., 6 F.2d 192 (2d Cir. 1925). *Contra*, Long Park v. Trenton-New Brunswick Theatres Co., 297 N.Y. 174, 77 N.E.2d 633 (1948), noted 61 Harv. L. Rev. 1251 (1948).

26. Haldeman v. Haldeman, 176 Ky. 635, 197 S.W. 376 (1917). *Contra*, Temple v. Dodge, 89 Tex. 69, 32 S.W. 514 (1895).

27. Jones v. Williams, 139 Mo. 1, 25, 39 S.W. 486, 490 (1897).

28. San Antonio Joint Stock Land Bank v. Taylor, 129 Tex. 335, 105 S.W.2d 650, 654 (1937).

29. Caldwell v. Mutual Reserve Fund Life Ass'n., 53 App. Div. 245, 65 N.Y. Supp. 826 (1900).

Unless otherwise provided, a majority constitutes a quorum; and two members of the executive committee may act without the presence or consent of the third. Generally, it may be stated that a committee of a corporation is subject to the same rules as the directors.[30]

C. Limitation on Delegation of Authority to Executive Committee

Although the exigencies of corporate management generally necessitate the power in the board of directors to delegate their authority,[31] it has been held that the board cannot abdicate completely by delegating supervision and control of the company to an executive committee unless expressly authorized to do so. To permit complete abdication by the board by the transference of its authority to an executive committee is contrary to custom and is inconsistent with the articles of incorporation or other statutory law which requires that the general supervision and control shall be vested in a board of directors.[32] In a case where the board of directors of an insurance company surrendered their entire authority to a management company for a perod of twenty years, the contract of surrender was held void on grounds of public policy. In its opinion,[33] the court distinguished a Missouri case[34] where the board of directors relinquished their power to determine the editorial policy of the newspaper to a managing editor of a newspaper publishing company for a period of five years. The distinction, the court pointed out, was that in the latter case it was not held to be a relinquishment of the entire control of the company, whereas in the former case it was, due to the inordinate period of time in which managerial control by the board was absent. The function of an executive committee is to aid the board of directors in its corporate managerial functions. Its creation may not be utilized to either usurp or supersede the regular functions of the board.

II. Legal Responsibilities of Corporate Management

Corporate control and management largely entails duties of a fiduciary nature. Directors, as the central power of management, stand in a fiduciary capacity to the body of shareholders and their economic interests. The United States Court of Appeals in the case

30. Wingate v. Bercut, 146 F.2d 725 (9th Cir. 1944).
31. McNeil v. Boston Chamber of Commerce, 154 Mass. 277, 282, 28 N.E. 245 (1891).
32. Lane v. Bogert, 116 N.J. Eq. 454, 174 Atl. 217 (1934).
33. Sherman & Ellis, Inc. v. Indiana Mut. Cas. Co., 41 F.2d 588 (7th Cir. 1930), *cert. denied* 282 U.S. 893 (1930).
34. Jones v. Williams, 139 Mo. 1, 39 S.W. 486 (1897).

of *Ashman v. Miller*[35] commented upon this principle and its rationale in the following manner:

> "A director of a corporation occupies a fiduciary relation to it and its stockholders. His position is one of trust and he is frequently denominated a trustee and so held accountable in equity. The ordinary trust relationship of directors of a corporation and stockholders is not a matter of statutory or technical law. It springs from the fact that directors have the control and guidance of corporate business affairs and property and hence of the property interests of the stockholders. Equity recognizes that stockholders are the proprietors of the corporate interests and are ultimately the only beneficiaries thereof. Those interests are in virtue of the law intrusted through the corporation to the directors and from that condition arises the trusteeship of the directors with the concomitant fiduciary relationship."

Ingrained in this fiduciary relationship are two important touchstones of conduct to which equity holds directors in their management of corporate affairs. These criteria are: (1) the highest loyalty to the interests of the corporation; (2) at least reasonable care and business prudence.[36]

A. Loyalty of Directors to Corporate Interests

The duties and responsibilities of directors appertaining to their fiduciary position to the corporation have been repeatedly stressed by the courts. And from the decided cases certain well-settled rules have emerged which may be concisely stated in the following manner: First, directors are charged with the highest degree of good faith and fair dealing in all transactions involving their management of the business affairs of the corporation.[37] Second, directors must not act for their own financial benefit, but must act solely for the benefit of the shareholders of the corporation.[38] And third, any and all profits made by directors through furtive dealings involving the transaction of corporate affairs or which involve a conflict of personal interest and fidelity to the interests of the company must be accounted for by the directors to the company.[39]

35. 101 F.2d 85, 90 (6th Cir. 1939).

36. Berle and Means, The Modern Corporation and Private Property 221 (1933).

37. Globe Woolen Company v. Utica Gas & Electric Co., 224 N.Y. 483, 121 N.E. 378 (1918); McMynn v. Richardson-Phenix Co., 186 Wis. 442, 201 N.W. 272 (1924). See also, Legal Safeguards About Transactions Between a Director and His Corporation, 83 U. Pa. L. Rev. 56 (1934).

38. Jackson v. Ludeling, 88 U.S. (21 Wall.) 492 (1874); American Circular Loom Co. v. Wilson, 198 Mass. 182, 84 N.E. 133 (1908).

39. Tenison v. Patton, 95 Tex. 284, 67 S.W. 92 (1902); Porter v. Healy, 244 Pa. 427, 91 Atl. 428 (1914). See also Bird Coal & Iron Co. v. Humes, 157 Pa. 278, 27 Atl. 750, 752 (1893), where the Supreme Court of Pennsylvania stated the position of directors as follows: "A director is a trustee for the entire body of stockholders, and both good morals and good law imperatively demand he shall manage all the business affairs of the company with a view to promote, not his own interests, but the common interests; and he cannot, directly or indirectly, derive any personal profit or advantage by reason of his

In hewing to the line of fidelity to the interests of the company, directors are expected to acquaint themselves fully with the duties of their office. In no instance will directors be permitted to assume that their function is merely ornamental; but on the contrary, they will be held strictly to the active duties of their office and the concomitant legal responsibilities that their office entails. Accordingly, directors should familiarize themselves with the provisions of the charter and observe the requirements of the bylaws. They should attend meetings with regularity. They should inform themselves of the workings of the business, its products, its policy standards, its past history, its present needs and actively participate in charting the future goals of the company with an eye toward continued stability and growth. The law will not tolerate the passive attitude of directors who permit the use of their names merely as advertising adornment without active and conscientious participation in the managerial functions of the company. As directors, it is their duty to control and supervise the day to day business activities of the company or to promulgate definite policies and rules of guidance with a vigilent eye toward seeing to it that these policies are carried out. It is only then that directors may be said to have fulfilled their duty of fealty to the corporation. For it is the policy of the law to encourage and enforce responsible corporate management and to look with disfavor upon nominal directorial membership.[40]

1. Breach of Fiduciary Obligation by Directors

The law is replete with variegated instances of directors who breached their fiduciary obligation to the corporation of which they were part. In view of this fact only a few actual cases will be set forth to concretely illustrate instances of breach of fiduciary duty in action. In *Farwell v. Pyle-National Electric Headlight Co.*,[41] where a director brought suit against his own company to enforce a royalty contract which was to inure to his benefit rather than the benefit of the corporation, enforcement of the contract was refused by the court. The court stated:

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position, distinct from his co-shareholder. . . . And by assuming the office he undertakes to give his best judgment in the interests of the corporation in all matters in which he acts for it, untrammeled by any hostile interest in himself or others. There is an inherent obligation on his part that he will in no manner use his position to advance his own interests as an individual, as distinguished from that of the corporation. . . . And all secret profits derived by him in any dealings in regard to the corporate enterprise must be accounted for to the corporation, even though the transaction in which they were made also advantaged the corporation of which he was a director."

40. Kavanaugh v. Gould, 223 N.Y. 103, 119 N.E. 237 (1918). See also, Douglas, Directors Who Do Not Direct, 47 Harv. L. Rev. 1305 (1934) and Lynch, Diligence of Directors in the Management of Corporations, 3 Calif. L. Rev. 21 (1914).

41. 212 Ill. App. 450, *aff'd*, 289 Ill. 157, 124 N.E. 449 (1919).

"It is the duty of directors to administer the corporate affairs for the common benefit of all the stockholders, and exercise their best care, skill and judgment in the management of the corporate business solely in the interest of the corporation . . . . They cannot have or acquire any personal or pecuniary interest in conflict with their duty as such trustees."[42]

In *Wheeler v. Abilene National Bank Bldg. Co.*,[43] where the board of directors approved a sale of corporate property to a majority stockholder for a sum less than could have been obtained from another prospective purchaser, the court held the sale voidable at the instance of minority stockholders who had brought suit.

Other instances of breach of fiduciary obligation have occurred where directors have used their controlling power to divert to themselves unissued shares for which they paid par value to the company and then made a profit by reselling the same shares to the public. In such cases the courts have held that the directors may be compelled to account to the corporation for the profits made in the transaction.[44] In another case[45] the directors were required to surrender up their shares for cancellation where the court found that they had breached their fiduciary duty.

A situation involving a breach of loyalty by directors which recurrs quite often is one in which a director while acting for the corporation, acquires an interest adverse to that of the corporation. An interesting case in point is *du Pont v. du Pont*[46] which occurred during the First World War. In that case the president of the company who was its largest stockholder and who was leaving for an extended absence, offered to sell to the company a large block of his stock at a stated price in order to insure its resale at the same price to key employees of the company. After the proposal had been turned down by the company's finance committee, the acting president, by an unconscionable concealment of facts and furtive manipulation, acquired the stock for himself and his associates. In the meantime the stock had risen rapidly due to war conditions. The court held that the company had the right at its election to take over the stock purchased at the price paid and to require an accounting for all dividends received on said shares. In its opinion, the court set forth the following basic principle of law:

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42. *Id.* at 452.
43. 159 Fed. 391 (8th Cir. 1908).
44. Federal Reserve Life Ins. Co. v. Gregory, 132 Kan. 129, 294 Pac. 859 (1931). See also Provident Trust Co. v. Geyer, 248 Pa. 423, 94 Atl. 77 (1915), where the directors were required to account for the profit they made, to those persons who had been shareholders of record at the time the transaction took place.
45. Arkansas Val. Agr. Soc. v. Eichholtz, 45 Kan. 164, 25 Pac. 613 (1891).
46. 242 Fed. 98 (D. C. Del. 1917).

"When a director attempts in violation of his duty to acquire interests adverse to the corporation in respect to any matter involved in the confidence which has been reposed in him, as to which equity imposes a disability upon him to deal in his own behalf, the court will hold him as a trustee for the corporation, and he must account for the profits which otherwise would have accrued to the corporation."[47]

Cases involving a conflict of directors' interests are also occasionally found where directors utilize their information of the company's business affairs and planning operations for the benefit of a competing concern. In such cases, the courts have been constantly alert to enjoin a director from moving into a rival business which might tend to injure or extirpate the affected corporation. The courts have even gone as far as to sequester any property which the disloyal director had acquired and turn it over to the hapless company.[48]

Finally, problems of conflicting loyalties growing out of cases involving interlocking directors have at times caused the courts grave concern. In such instances the courts scrutinize agreements entered into by corporations whose boards of directors have common members, as minutely as they delve into transactions involving a director and his company. Where the fairness of such contracts are challenged, the courts generally hold that those who seek to maintain the transaction must sustain the burden of proof.[49]

B. Touchstone of Reasonable Care and Business Prudence

In dealing with problems involving the care and skill required of directors in the management of corporate affairs, the expressions used by the courts have at times caused no less than semantic confusion. Words such as "reasonable" and "prudent" are not susceptible of easy definition; especially, in reference to human conduct which is so minutely variable. Furthermore, the meaning of the words "reasonable" and "prudent" take on different hues when dealing with the variegated character of different corporations and the nature of their business affairs.

In some states the courts have held that the directors are only liable for "gross negligence."[50] But then again what may be con-

47. *Id.* at 136.
48. Red Top Cab Co. v. Hanchett, 48 F.2d 236 (N. D. Cal. 1931); Coleman v. Hanger, 210 Ky. 309, 275 S. W. 784 (1925).
49. Geddes v. Anaconda Copper Mining Co., 254 U. S. 590 (1921). See also Corsicana Nat'l Bank v. Johnson, 251 U. S. 68 (1919).
50. Jones v. Foster, 70 F.2d 200 (4th Cir. 1934); Burkhart v. Smith, 161 Md. 398, 157 Atl. 299 (1931); Spiegel v. Beacon Participations, Inc., 297 Mass. 398, 8 N.E.2d 895, 904 (1937).

sidered "gross negligence" in one case may be regarded as ordinary negligence or possibly even slight negligence in another. Actually, the degree of negligence depends upon what measure of care and diligence is due and owing in the particular case. Ordinary or possibly slight negligence in a director of a manufacturing company might at times be considered as gross negligence in the case of a director of a bank or trust company. Hence, failure to exercise reasonable care and prudence is always to be determined with reference to the circumstances of the particular corporation and to some extent to the particular director. An equitable rule has therefore evolved that directors shall exercise such diligent care and skill as ordinarily prudent men would exercise under similar circumstances in like positions.[51] It is well to note here that since directors cannot be expected to personally supervise all the minute details of a going corporate concern, application of the rule does not, of course, preclude delegation of certain duties to subordinates by the directors. Notwithstanding the right of directors to delegate authority, they are not free from the duty of keeping tabs on the performance of their underlings nor are they exempt from the necessity of exercising proper care in the choice of their subordinates.[52]

III. Conclusion

With the continually increasing use and growth of the corporate structure to further business ends, legal developments in recent years point to the imposition upon directors of an increasingly more exacting fiduciary duty in reference to corporate management. In those instances where the question of a director's fiduciary position has been subject to judicial scrutiny, the courts have consistently refused to permit a director to obtain personal gain from a transaction to the detriment of the company. Hence, an agreement between a third person and directors, whereby the latter place themselves in a position where their duties as officers are, or may be in conflict with their obligation under the agreement, has been held to be void as against public policy.[53] The directors represent all of the stockholders and creditors and cannot enter into agreements, either among themselves or with stockholders by which they relin-

51. Atherton v. Anderson, 99 F.2d 883 (6th Cir. 1938); Lippitt v. Ashley, 89 Conn. 451, 94 Atl. 995 (1915); Anderson v. Bundy, 161 Va. 1, 171 S. E. 501, 507 (1933). See Uniform Business Corporation Act, Sec. 33.

52. Briggs v. Spaulding, 141 U. S. 132 (1891). For an interesting discussion on the standard of care and skill required in corporate management, see, Rhoads, Personal Liability of Directors for Corporate Mismanagement, 65 U. Pa. L. Rev. 128 (1916).

53. Sauerhering v. Rueping, 137 Wis. 407, 119 N. W. 184 (1909); Koelbel v. Tecktonius, 228 Wis. 317, 280 N. W. 305 (1938).

quish their independent judgment or control.[54] In determining what would be the effect of such agreements, the courts will scrutinize the entire arrangement with a discerning eye with a view toward ascertaining whether the agreement withdraws from the directors that control and independent judgment of the corporate affairs and business which the statutes and the law normally vests in them; and the good faith or intention of the parties does not purge it of its unlawful design.[55] Courts have even gone as far as to say that the directors as trustees owe not alone the negative duty to refrain from benefiting themselves at the expense of their beneficiaries, the stockholders, but also owe their beneficiaries the positive duty of saving them from loss.[56] Additional proof of the tightening of the fiduciary position of directors may also be seen in the tendency of some courts, particularly in the western states where the law relating to trusts has been codified, to apply to directors the statutory rules governing ordinary trustees.[57] There are also continuing indications that directors are being held accountable by the courts for a much higher degree of care, diligence and judgment than they were a half century ago. A director charged with negligent mismanagement can no longer exonerate himself by pleading good intent and honest motives.[58]

It is interesting to note that the trend toward holding directors to a more stringent fiduciary duty has received its main impetus not from judge made law but from statutory enactments passed during the last twenty years. Corporate directors seem to have been the "bêtes noires" against whom a no small portion of the legislation of that period has been directed. And it has been asserted that this hard-headed attitude toward directors may be partly attributed to a rather substantial reaction against the prevalence of "directors who do not direct."[59] All in all, the trend toward imposing upon directors a more exacting fiduciary duty seems to be a salutary one; as it sharpens the awareness to responsibilities of those assuming business leadership in their relationship toward the company and its stockholders in particular, and the public, as an ultimate consumer, in general.

54. Ford v. Magee, 160 F.2d 457 (2d Cir. 1947).
55. Manson v. Curtis, 223 N.Y. 313, 119 N.E. 559 (1918).
56. Bodell v. General Gas & Electric Corp., 15 Del. Ch. 420, 140 Atl. 264 (1927).
57. See North Confidence Mining & Development Co. v. Fitch, 58 Cal. App. 329, 208 Pac. 328, 329 (1922), in which the court stated: "Directors of a corporation are trustees thereof within the meaning of section 2230 (one of the provisions of the California Civil Code applicable to technical trustees)."
58. Note, Liability of Directors for Negligent Mismanagement, 82 U. Pa. L. Rev. 364, 368 (1934).
59. Douglas, Directors Who Do Not Direct, 47 Harv. L. Rev. 1305 (1934).