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A note by M. S. Breckenridge, a member of the Law School faculty, appears in this issue.

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NOTES AND COMMENTS

**Corporations—Compensation of Officers—Attacks by
Minority Stockholders**

In a recent case¹ decided by the Circuit Court of Appeals for the Fifth Circuit, the plaintiff, owner of non-voting, cumulative preferred stock brought a derivative action attacking the compensation paid by the corporation to its officers. The plaintiff alleged suppression of dividends, excessive salaries and bonuses, and fraudulent conversion of cor-

¹ Hurt v. Cotton States Fertilizer Co., 159 F. 2d 52 (C. C. A. 5th 1947).

porate assets by the directors who were also the officers of the corporation and owned all its common stock. The judgment of the lower court holding the compensation reasonable and denying the plaintiff's prayer for an accounting was affirmed, except as to bonuses awarded retroactively. As to these, a retrial was ordered.

Attacks by minority stockholders against the compensation² paid corporate executives reached a peak following the "booming twenties." With corporate profits currently reaching an all-time high, and with this tendency correspondingly characteristic of executive compensation, such attacks may again become prominent. An inquiry into the situations in which courts of equity will review³ remuneration received by corporate officers at the instance of minority stockholders would seem appropriate. Generally, these may be divided into three categories: (1) where excessiveness or unreasonableness of compensation alone is the primary complaint; (2) where excessiveness is coupled with bad faith; (3) where payment of the compensation is not authorized by charter, by-law, statute or agreement.

The proposition governing the fixing of executive compensation may be generally stated: compensation must be reasonably related to the value of the services rendered.⁴

² The same general principles are applicable to both salaries and bonuses and "compensation" as used herein denotes both. "Salary" refers to fixed or flat-rate compensation; bonus embraces incentive compensation derived from some type of profit-sharing plan. The more usual incentive compensation plans provide payment in stock options, stock, pensions, annuities or cash.

The liability of independent corporation directors, as such, for payment of excessive salaries to officers is beyond the scope of this discussion. For a discussion of the protection afforded directors by the "business judgment" rule see Carson, *Current Phases of Derivative Actions Against Directors*, 40 MICH. L. REV. 1125 (1942).

³ Relief may take the form of an accounting, injunction, receivership or in extreme cases dissolution.

⁴ *Rogers v. Hill*, 298 U. S. 582 (1933), reversing 60 F. 2d 109 (C. C. A. 2d 1932); 28 ILL. L. REV. 712 (1934); 17 MINN. L. REV. 433 (1933); 42 YALE L. J. 419 (1933); *Holthusen v. Edward G. Budd Mfg. Co.*, 52 F. Supp. 125 (E. D. Pa. 1943), modified 53 F. Supp. 488, Comment 32 CALIF. L. REV. 88 (1944); *Backus v. Finkelstein*, 23 F. 2d 531 (D. Minn. 1924); *Wight v. Heublein*, 238 Fed. 321 (C. C. A. 4th 1916); *Lillard v. Oil, Paint & Drug Co.*, 70 N. J. Eq. 197, 56 Atl. 254 (1903); *Baker v. Cohn*, 42 N. Y. S. 2d 159 (1942), modified 40 N. Y. S. 2d 623, 292 N. Y. 570 (1944); *Godley v. Crandall & Godley Co.*, 153 App. Div. 697, 139 N. Y. Supp. 236, 212 N. Y. 121, 105 N. E. 818 (1914) (compensation may not be a mere incident of the office); *Carr v. Kimball*, 153 App. Div. 825, 139 N. Y. Supp. 253 (1912); *Stratis v. Andreson*, 254 Mass. 536, 150 N. E. 832 (1926) (where several positions are held, although aggregate compensation may not be excessive, compensation for each office must also be reasonable); *Seitz v. Union Brass & Metal Mfg. Co.*, 152 Minn. 460, 189 N. W. 586 (1922); 7 MINN. L. REV. 347 (1923); *Putnam v. Juvenile Shoe Co.*, 307 Mo. 74, 269 S. W. 593 (1925); *Nichols v. Olympia Veneer Co.*, 139 Wash. 305, 246 Pac. 941 (1926) (value of services cannot be predicated on holding of stock in corporation); *Hurt v. Cotton States Fertilizer Co.*, 159 F. 2d 52 (C. C. A. 5th 1947) (fact profit would be taken for taxes if not paid in compensation is no justification). See *Notes*, 27 A. L. R. 305 (1923); 44 A. L. R. 570 (1926). See *Baker, A Just Gauge for Executive Compensation*, 22 HARV. BUS. REV. 75 (1943).

⁵ *Myers v. Ft. Hill Engraving Co.*, 249 Mass. 302, 143 N. E. 915 (1924).

The question of the reasonableness of compensation is one of fact⁵ and the circumstances of each case must necessarily govern. While no one factor is determinative, courts have laid particular stress upon one or more in reaching a decision. Thus the time and effort devoted by the officer to the corporation affairs has an important bearing;⁶ likewise, the character and extent of services rendered is pertinent.⁷ The compensation previously paid,⁸ and the compensation of executives in similar positions in competing corporations⁹ have also been considered. The personal attributes and ability of the particular executive involved receive particular attention.¹⁰ Factors germane to the status of the corporation itself may also be applicable. The relation of compensation to the profits made and dividends paid¹¹ and the relative bearing of the efforts of the executive to the success of the corporation¹² merit consideration. What effect does ratification of the compensation by the stockholders have upon the court's consideration of the subject? Under the doctrine of *Rogers v. Hill*,¹³ where the court said that unreasonable compensation was waste and the majority had no power to make a gift of corporate property or authorize waste over the protests of a minority, it apparently has no effect as to the right of the minority to a *review* by equity. But in later litigation¹⁴ involving some of the same executives,

⁵ *Blancard v. Blancard & Co.*, 96 N. J. Eq. 264, 125 Atl. 337 (1924); *Atwater v. Elkhorn Valley Coal-Land Co.*, 184 App. Div. 253, 171 N. Y. Supp. 552 (1918), *aff'd*, 227 N. Y. 611, 125 N. E. 912 (1919); *Collins v. Hite*, 109 W. Va. 79, 153 S. E. 240 (1930).

⁷ *Francis v. Brigham-Hopkins Co.*, 108 Md. 233, 70 Atl. 95 (1908) (president had sole charge of all business and financial policies); *Koplar v. Warner Bros. Pictures, Inc.*, 19 F. Supp. 173 (D. Del. 1937) (personal services and financial assistance rendered corporation); *Hurt v. Cotton States Fertilizer Co.*, 159 F. 2d 52 (C. C. A. 5th 1947) (officers personally endorsed corporation obligations).

⁸ *Lillard v. Oil, Paint & Drug Co.*, 70 N. J. Eq. 197, 56 Atl. 254 (1903); *Raynolds v. Diamond Mills Paper Co.*, 69 N. J. Eq. 299, 60 Atl. 941 (1905).

⁹ *Winkelman v. General Motors Corp.*, 44 F. Supp. 960 (S. D. N. Y. 1942); *Koplar v. Warner Bros. Pictures, Inc.*, 19 F. Supp. 173 (D. Del. 1937). But what officer might make in a different business could not be considered. *Lillard v. Oil, Paint & Drug Co.*, *supra* note 8.

¹⁰ *McQuillen v. Nat'l Cash Register Co.*, 112 F. 2d 877 (C. C. A. 4th 1940), *certiorari denied*, 311 U. S. 729 (1940); *Diamond v. Davis*, 62 N. Y. S. 2d 181 (1945); *Heller v. Boylan*, 29 N. Y. S. 2d 653 (1941), *aff'd*, 32 N. Y. S. 2d 131 (1941).

¹¹ *Backus v. Finkelstein*, 23 F. 2d 531 (D. Minn. 1924); *Wight v. Heublein*, 238 Fed. 321 (C. C. A. 4th 1916); *Raynolds v. Diamond Mill Paper Co.*, 69 N. J. Eq. 299, 60 Atl. 941 (1905).

¹² *Pouch v. Nat'l Foundry & Machine Co.*, 147 Ky. 243, 143 S. W. 1003 (1912); *Luyckx v. Aylward Coal Co.*, 270 Mich. 468, 259 N. W. 135 (1935); *Heller v. Boylan*, 29 N. Y. S. 2d 653 (1941), *aff'd*, 32 N. Y. S. 2d 131 (1941). But *see* *Raynolds v. Diamond Mill Paper Co.*, *supra* note 11, where court said success of corporation was measured by what the stockholders received and mere accumulation of assets by the directors would not justify large compensation.

It should be noted that success may be a false standard when corporation is struggling and in bad condition since it is here that greatest effort and most valuable services may be rendered by the officers and directors.

¹³ 298 U. S. 582 (1933).

¹⁴ *Heller v. Boylan*, 29 N. Y. S. 2d 653 (1941), *aff'd*, 32 N. Y. S. 2d 131 (1941); *accord*, *Koplar v. Warner Bros. Pictures, Inc.*, 19 F. Supp. 173 (D. Del. 1937); *Putnam v. Juvenile Shoe Co.*, 307 Mo. 74, 269 S. W. 593 (1925).

the New York court said ratification by disinterested majority after full disclosure¹⁵ could be considered significant as bearing on the "equities" of the case. It would seem, then, that ratification of the majority, *per se*, should have no bearing on the right of the minority to "their day in court"; but it may have considerable weight in determining the question of reasonableness.

It is often said that the court will not act as the general manager of the corporation or assume regulation of its business; and if the directors, without adverse interest to the stockholders, act in good faith in fixing compensation of the officers their judgment will not be disturbed.¹⁶ While the amount of the compensation may be so large as to justify an inquiry by equity to determine if misuse or waste is present, the burden of proving that it is clearly oppressive or wasteful remains upon the attacking minority.¹⁷ The courts feel the lack of any clear standard of reasonableness by which to judge the questioned remuneration, and the result is that a clear showing of oppression or waste is required before the courts will substitute their judgment for that of the directors. The distinction between waste and mere excessiveness is aptly put by District Judge Coleman in the *McQuillen* case:

"We must distinguish between compensation that is actually wasteful and that which is merely excessive. The former is unlawful, the latter is not. The former is the result of a failure

¹⁵ Full and complete disclosure of all aspects of the compensation plan is necessary if ratification by the disinterested majority is to be afforded any weight in determination of reasonableness. *Winkelman v. General Motors Corp.*, 44 F. Supp. 960 (S. D. N. Y. 1942); *Berendt v. Bethlehem Steel Corp.*, 108 N. J. Eq. 148, 154 Atl. 321 (1931). For a discussion of the extent to which disclosure is compelled by regulations of the S. E. C. and other governmental agencies, see Geo. T. Washington, *The Corporation Executive's Living Wage*, 54 HARV. L. REV. 733, 764 (1941).

¹⁶ "In determining whether salaries are excessive and unreasonable so that there should be a restoration courts proceed with some caution. An intolerable condition might result if the courts should too lightly undertake the fixing of salaries at the suit of dissatisfied stockholders. An issue as to the reasonable value of the services of officers is easily made. It is not intended that courts shall be called upon to make a yearly audit and adjust salaries. The dissenting stockholder should come into court with proof of wrongdoing or oppression and should have more than a claim based on mere differences of opinion upon the question whether equal services could have been procured for somewhat less." *Seitz v. Union Brass & Metal Mfg. Co.*, 152 Minn. 460, 464, 189 N. W. 586, 587 (1922); *Poutch v. Nat'l Foundry & Machine Co.*, 147 Ky. 242, 143 S. W. 1003 (1912) (must be fraud before court will interfere); *Putnam v. Juvenile Shoe Co.*, 307 Mo. 74, 269 S. W. 593 (1925); *Holmes v. Republic Steel Corp.*, 69 N. E. 2d 396 (C. Pl. Ohio 1946); *cf. Bates St. Shirt Co. v. Waite*, 130 Me. 352, 156 Atl. 293 (1931).

¹⁷ *Rogers v. Hill*, 298 U. S. 582 (1933) (salary and bonuses of president of American Tobacco Co. amounted to \$842,507.72 in one year); *Heller v. Boylan*, 29 N. Y. S. 2d 653, *aff'd*, 32 N. Y. S. 2d 131 (1941) (salary and bonus of same official as in *Rogers* case had been reduced to approximately \$400,000 a year); *Gallin v. Nat'l City Bank*, 152 Misc. 679, 273 N. Y. Supp. 87 (1934) (salary and bonuses of president amounted to \$1,417,149.72 for one year. Court said no inference of fraud or oppression arose but inquiry was merely to ascertain if same were present).

to relate the amount of compensation to the needs of the particular situation by *any* recognized business practices, honestly, even though unwisely adopted; namely, the result of bad faith, or a total neglect of or indifference to such practices. Excessive compensation results from poor judgment, not necessarily from anything else."¹⁸

The result of this attitude by the courts is an overwhelming majority of cases upholding the compensation and affirming the judgment of independent directors.¹⁹

Where fraud or bad faith is evidenced, the reluctance of courts of equity to interfere in the internal affairs of corporations is overcome.²⁰ Thus, where a fraudulent scheme to absorb the profits of the corporations appears or where there is willful oppression of the rights of the minority, as for example, an attempt to "freeze out" a minority holder, appropriate relief is afforded.²¹ Where directors are also officers and participated in fixing their own compensation; i.e., where there is "self-dealing," most courts feel this alone is enough to justify a review by equity of the reasonableness of the questioned compensation.²² Because

¹⁸ *McQuillen v. Nat'l Cash Register Co.*, 27 F. Supp. 639, 653 (1939), *aff'd*, 112 F. 2d 877 (C. C. A. 4th 1940), *certiorari denied*, 311 U. S. 729 (1940).

¹⁹ See Geo. T. Washington, *The Corporation Executive's Living Wage*, 54 HARV. L. REV. 733 (1941).

²⁰ *Richardson v. Blue Grass Mining Co.*, 29 F. Supp. 658 (E. D. Ky. 1939), *aff'd*, 127 F. 2d 291 (1942), *cert. denied*, 317 U. S. 639 (1942); *Balch v. Investor's Royalty Co.*, 7 F. Supp. 420 (N. D. Okla. 1934); *Church v. Harnet*, 35 F. 2d 499 (C. C. A. 6th 1929), *cert. denied*, 281 U. S. 732 (1929); *Wight v. Heublein*, 238 Fed. 321 (C. C. A. 4th 1916); *Beha v. Martin*, 161 Ky. 838, 171 S. W. 393 (1914); *Mathews v. Headley Chocolate Co.*, 130 Md. 523, 100 Atl. 645 (1917); *Lillard v. Oil, Paint & Drug Co.*, 70 N. J. Eq. 197, 56 Atl. 254 (1903); *Booth v. Beattie*, 95 N. J. Eq. 776, 118 Atl. 257 (1922), *aff'd*, 123 Atl. 925 (1924); *Carr v. Kimball*, 153 App. Div. 825, 139 N. Y. Supp. 253 (1912); *Neff v. 20th Century Silk Corp.*, 312 Pa. 386, 167 Atl. 578 (1933). *But cf. Luyckx v. R. L. Aylward Coal Co.*, 270 Mich. 468, 259 N. W. 135 (1935).

²¹ *Backus v. Finkelstein*, 23 F. 2d 531 (D. Minn. 1924) (where directors sought to absorb all profits); *Holcomb v. Forsyth*, 216 Ala. 486, 113 So. 516 (1927) (where excessive compensation was part of scheme for fraudulent suppression of dividends); *Miller v. Crown Perfumery Co.*, 57 Misc. 383, 109 N. Y. Supp. 760 (1908) (where board sought to absorb profits through compensation, plaintiff having refused to sell his stock); *Carr v. Kimball*, *supra* note 20 (where officers gained working control and sought to exclude plaintiff from all profits and knowledge of corporate affairs); *Eaton v. Robinson*, 19 R. I. 146, 31 Atl. 1058 (1895) (where salaries were fixed to deprive plaintiffs of dividends on their mortgaged stock in event they obtained right to redeem); *Newcomer v. Mountain States Ice & Cold Storage Co.*, 63 S. D. 81, 256 N. W. 359 (1934) (where defendant directors, engaged in competing business, had bought into control of defendant corporation and compensation part of plan to ruin business).

²² *Wight v. Heublein*, 238 Fed. 321 (C. C. A. 4th 1916); *Booth v. Beattie*, 95 N. J. Eq. 776, 118 Atl. 257 (1922), *aff'd*, 123 Atl. 925 (1924); *Lillard v. Oil, Paint & Drug Co.*, 70 N. J. Eq. 197, 56 Atl. 254 (1903); *Davis v. Thomas A. Davis Co.*, 63 N. J. Eq. 572, 52 Atl. 717 (1902); *Francis v. Brigham-Hopkins Co.*, 108 Md. 233, 70 Atl. 95 (1908); *Sagalyn v. Meekins*, 290 Mass. 434, 195 N. E. 769 (1935); *Carr v. Kimble*, 153 App. Div. 825, 139 N. Y. Supp. 253 (1912); *Collins v. Hite*, 109 W. Va. 79, 153 S. E. 240 (1930); *Beha v. Martin*, 161 Ky. 838, 171 S. W. 393 (1914). *But cf. Bates Street Shirt Co. v. Waite*, 130 Me. 352, 156 Atl. 293 (1931).

of the fiduciary relationship existing between the directors or officers and the stockholders, some courts take the position that self-dealing imposes the burden of establishing the fairness and reasonableness of the compensation upon the interested director, or that bad faith is presumed.²³

May such transactions of interested directors be ratified by the stockholders; and if so, what is the effect? Where the interested director voted for the compensation-fixing resolution, or his presence was necessary to a quorum, the minority view holds such resolutions or contracts to be void;²⁴ and it follows that there can be no ratification. The prevailing view, however, is that they are merely voidable at the instance of the corporation or minority stockholders.²⁵ If there is a full, free and frank disclosure, ratification by a disinterested majority has been held convincing proof of the reasonableness of the compensation and is usually binding on the minority.²⁶ It would seem, then that the burden of justifying the compensation as reasonable would be lifted from the interested director and the dissenter would be called upon to justify review by the courts through a showing of unreasonableness or oppression.²⁷ While decisions have emphasized that there is no fiduciary relationship between stockholders and the corporation and that directors may vote their stock freely as stockholders,²⁸ it should not follow that they may effectively affirm their acts of self-dealing through ownership of a majority of stock.²⁹

²³ Church v. Harnit, 35 F. 2d 499 (C. C. A. 6th 1929), *cert. denied*, 281 U. S. 732 (1929); Francis v. Brigham-Hopkins Co., *supra* note 22; Blancard v. Blancard & Co., 96 N. J. Eq. 264, 125 Atl. 337 (1924). Bad faith presumed: Schall v. Althaus, 208 App. Div. 103, 203 N. Y. Supp. 36 (1924); Davids v. Davids, 135 App. Div. 206, 120 N. Y. Supp. 350 (1909).

²⁴ Voorhees v. Mason, 245 Ill. 256, 91 N. E. 1056 (1910); McKey v. Swenson, 232 Mich. 505, 205 N. W. 583 (1925); Newcomer v. Mountain Springs Ice & Cold Storage Co., 63 S. D. 81, 256 N. W. 359 (1934); Holcomb v. Forsyth, 216 Ala. 486, 113 So. 516 (1927) *semble*; Fields v. Victor Bldg. & Loan Co., 73 Okla. 207, 175 Pac. 529 (1918) *semble*.

²⁵ Church v. Harnit, 35 F. 2d 499 (C. C. A. 6th 1929), *cert. denied*, 281 U. S. 732 (1929); Cahall v. Lofland, 12 Del. Ch. 299, 114 Atl. 224 (1921); Mathews v. Headley Chocolate Co., 130 Md. 523, 100 Atl. 645 (1917); Francis v. Brigham-Hopkins Co., 108 Md. 233, 70 Atl. 95 (1908); Lillard v. Oil, Paint & Drug Co., 70 N. J. Eq. 197, 56 Atl. 254 (1903); Godley v. Crandall & Godley Co., 153 App. Div. 697, 139 N. Y. Supp. 236, 212 N. Y. 121, 105 N. E. 818 (1914); Russell v. Henry C. Patterson Co., 232 Pa. 113, 81 Atl. 136 (1911). *But see* Wood v. Myers Paper Co., 3 Tenn. App. 128 (1926).

²⁶ Diamond v. Davis, 62 N. Y. S. 2d 181 (1945); Putnam v. Juvenile Shoe Co., 307 Mo. 74, 269 S. W. 593 (1925) (where ratification effected after institution of suit by minority); Beha v. Martin, 161 Ky. 838, 171 S. W. 393 (1924) *semble*; *cf.* Bates Street Shirt Co. v. Waite, 130 Me. 352, 156 Atl. 293 (1931).

²⁷ *See* Lillard v. Oil, Paint & Drug Co., 70 N. J. Eq. 197, 208, 56 Atl. 254, 258 (1903).

²⁸ Lillard v. Oil, Paint & Drug Co., *supra* note 27; Sotter v. Coatesville Boiler Works, 257 Pa. 411, 101 Atl. 744 (1917); Russell v. Henry C. Patterson Co., 232 Pa. 113, 81 Atl. 136 (1911).

²⁹ Backus v. Finkelstein, 23 F. 2d 531 (D. Minn. 1924); Godley v. Crandall & Godley Co., 153 App. Div. 697, 139 N. Y. Supp. 236, 212 N. Y. 121, 105 N. E.

Where the payment is unauthorized, the right of recovery is clear.³⁰ It is a well-settled principle that directors and managing officers are not entitled to compensation for ordinary and usual services incident to their office in the absence of charter provision, by-law, or statute authorizing payment or in the absence of express agreement.³¹ The underlying concept is that, directors and managing officers occupying a fiduciary relation to the corporation and stockholders, no promise to pay will be implied. There is an increasing tendency, however, to allow the reasonable value of the services rendered when it is shown that the services were in fact valuable and circumstances raise a fair presumption that payment was expected and intended.³² Where compensation has been fixed by charter, by-law, resolution or agreement, additional compensation may not be granted retroactively.³³ Retroactive compensation is without consideration and a gift, and as such constitutes a waste of corporate property. Such payment being wrongful, it may be recovered by the corporation or by the stockholders in a derivative action.³⁴ Since payment may originally be authorized by the stockholders, it would seem that ratification by them would cure any defect or lack of authority of the directors and preclude an attack upon this ground. It has been held, however, that the majority has no power to ratify waste or a gift over the protest of the minority and in oppression of their rights,³⁵ and a ratification by less than all would be ineffective.

818 (1914); *Holdridge v. Lloyd Garrison Co.*, 163 Wash. 1, 299 Pac. 657 (1931); *cf. Hurt v. Cotton States Fertilizer Co.*, 159 F. 2d 52 (C. C. A. 5th 1947); *see Camden Land Co. v. Lewis*, 101 Me. 78, 101, 63 Atl. 523, 533 (1905) (ratification by interested directors as stockholders not effective where action sought to be ratified leads to inference that interests of the directors were foreign and hostile to the corporation); *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 99, 25 N. E. 201, 202 (1890) (ratification not effective if evidence raises inference of bad faith).

³⁰ Actions involving the computation of bonuses, while essentially questions of accounting, proceed on the theory of lack of authority for payment.

³¹ 5 FLETCHER, *CYCLOPEDIA CORPORATIONS* §2109 (perm. ed. 1931); 3 THOMPSON, *CORPORATIONS* §1841 (1927); 19 C. J. S. *Corporations*, §803 (1940).

But where special, unusual or extraordinary services are rendered, an implied promise to pay will be found. 5 FLETCHER, *op. cit.* §2114; 3 THOMPSON, *op. cit.* §1853.

It is the general practice for charter or by-laws of the corporation to provide for nominal fees for attendance of the directors at meetings. Note 32 MICH. L. REV. 672 (1934).

³² *Church v. Harnit*, 35 F. 2d 499 (C. C. A. 4th 1929), *cert. denied*, 281 U. S. 732 (1929); *cf. Rowland v. Demming Exploration Co., Trustees*, 45 Idaho 99, 260 Pac. 579 (1919).

³³ *Hurt v. Cotton States Fertilizer Co.*, 159 F. 2d 52 (C. C. A. 5th 1947); *Godley v. Crandall & Godley Co.*, 153 App. Div. 697, 139 N. Y. Supp. 236, 212 N. Y. 121, 105 N. E. 818 (1914); *Holmes v. Republic Steel Corp.*, 69 N. E. 2d 396 (C. Pl. Ohio 1946).

³⁴ See note 33 *supra*.

³⁵ *Collins v. Hite*, 109 W. Va. 79, 153 S. E. 240 (1930); *cf. Rogers v. Hill*, 298 U. S. 582 (1933); *Hurt v. Cotton States Fertilizer Co.*, 159 F. 2d 52 (C. C. A. 5th 1947).

It is to be noted then that excessiveness standing alone will rarely afford relief. The courts feel justified in interfering in the internal affairs of corporations only when there is bad faith or lack of authority for the remuneration. It is submitted that the principle case accords with this view.

AUGUST L. MEYLAND, JR.

Declaratory Judgment—Challenging Restrictive and Regulatory Statutes—Requirement of a Specific Threat of Enforcement to Justiciability

Certain individual civil service employees and the United Public Workers of America sought an injunction against members of the Civil Service Commission to restrain them from enforcing against petitioners the provisions of the second sentence of §9(a) of the Hatch Act¹ and a declaratory judgment that this sentence was unconstitutional. The sentence reads, "No officer or employee in the executive branch of the Federal Government . . . shall take any active part in political management or in political campaigns." Only one of the employees had actually violated the provisions of the Act challenged. The others filed affidavits in support of their complaint in which they expressed a desire to engage in specified political activities which they understood were forbidden by the challenged sentence. *Held*, that the latter had not made out a justiciable case or controversy on which to grant the relief prayed for.² Only six justices out of seven³ sitting on the case made a direct pronouncement on this particular point, four⁴ holding no justiciable case or controversy, two⁵ holding that there was.⁶ The majority found no actual interference with petitioners' rights, and only a hypothetical threat

¹ 53 STAT. 1148 (1939), as amended, 18 U. S. C. A. §61h(a) (Supp. 1946).

² *United Public Workers v. Mitchell*, — U. S. —, 67 Sup. Ct. 556, 91 L. Ed. (Adv. Ops.) 509 (1947).

An adjudication on the merits, declaring the challenged sentence constitutional, was had in this case, all the justices finding a justiciable case presented by the employee who had actually violated the challenged sentence. On the merits the decision was four to three, Justices Rutledge and Douglas dissenting because of the particular status of the violating employee, that of an industrial worker, and Justice Black on the grounds that the challenged provision was unconstitutional on its face.

³ Mr. Justice Murphy and Mr. Justice Jackson took no part in the consideration or decision of the case. Mr. Justice Frankfurter concurred with the majority on the merits, but thought that the case should be dismissed as to all the petitioners for want of jurisdiction on another procedural basis.

⁴ Justices Reed, Rutledge, Vinson, and Burton.

⁵ Justices Black and Douglas.

⁶ Although injunctive as well as declaratory relief was prayed for, consideration of justiciability seems to have been confined to the prerequisites for declaratory relief as presenting the minimum requirements. Therefore this note is also confined to that area. For an exhaustive analysis of the point under consideration see Borchard, *Challenging "Penal" Statutes by Declaratory Action*, 52 YALE L. J. 445 (1943); and Note, 50 YALE L. J. 1278 (1941).