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Article 6

Insurance: Proof of Loss

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NOTES AND COMMENT

Insurance: Proof of Loss

In Fink v. La Crosse Mut. Fire Ins. Co. and its companion case, Fink v. Sheboygan Fall Mut. Fire Ins. Co., 234 N.W. 339, ____Wis. ____, plaintiff insured his garage for $2,000 in each of defendant companies, and the complaint in each case alleged loss of $6,400. The amended answer of defendants set up fraud after loss, and false swearing in proof of loss and adverse examination of plaintiff. The evidence introduced under the answer showed that plaintiff had included several items in his proof of loss described as new machines, whereas some of the were many years old; That certain items were valued at list price, whereas they were subject to plaintiff's dealer's discount of 20 per cent; and that the machines were bought from certain specified dealers, where other dealers had sold them to plaintiff. There was, therefore, in this case no question as to the falsity of the proof of loss or the falsity of the plaintiff's testimony at adverse examination: the question involved in the case on appeal was whether the proof of loss was made with knowledge of its falsity and with fraudulent intent, so as to cause plaintiff to forfeit his insurance.

Statute 1929, 202.01 provides that the policy shall be void in case of any fraud or false swearing by the insured touching any matter relating to this insurance, whether before or after the loss. This is a highly penal clause, and in several Wisconsin decisions, it has been held that the penalty should not be invoked unless the false swearing is wilfully and knowingly done. A mere mistake, or even carelessness resulting in false swearing is not enough to warrant forfeiture of the insurance. Wiesman v. Amer. Ins. Co. 184 Wis. 523; Oberleiter v. Security Ins. Co., 199 Wis. 220.

The court in the instant cases could see no possibility of attributing the false swearing to honest overvaluation of property or to a mistake of fact. On the contrary, the court came to the conclusion summarily that in view of the fact that plaintiff was a dealer in tractors etc., and that therefore plaintiff should have been famliar with the value of these machines, hence the plaintiff wilfully and knowingly misrepresented the amount of loss. It was further said that, since the misrepresentations were made knowingly and with intent that defendants should act upon them, the fraudulent intent would be presumed. For these reasons forfeiture of plaintiff's insurance was declared.

It is noteworthy that damages to the defendant insurance company are immaterial as an element of forfeiture. It is sufficient merely that the falsification be intentional, and such as is manifestly likely to deceive the insurer, so as to cause him to pay more than he in justice

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