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Charles Gromley
University of Kentucky

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Notes

IMPLIED POWERS OF THE CORPORATE PRESIDENT

As nearly every phase of modern day business is largely conducted by private corporations, it is of the utmost importance to members of the public to know to what extent they can safely rely upon the power of corporate officers to bind the corporation in relation to ordinary business transactions. Perhaps, the one officer whose power and authority is most disputed is the president of the corporation. Undoubtedly the popular understanding concerning the power of the corporate president is found in *Pegram-West Inc. v Winston Mut. Life Ins. Co.*, a recent North Carolina decision.¹ In that case the plaintiff corporation was engaged in the sale of lumber and building materials. Defendant corporation was in the business of issuing contracts and policies of insurance and making loans secured by real estate. One Dixon advised plaintiff that defendant was making him a loan on a proposed building and that the defendant would pay for all materials used in construction thereof. The plaintiff contacted defendant and the latter, acting by and through its president and manager, agreed to pay plaintiff for such material as was furnished for use in the building to be constructed by Dixon. Plaintiff furnished materials as agreed for a time. Subsequently, however, defendant renounced any further responsibility for materials furnished and refused to pay for certain items supplied prior to such declaration. In the resulting suit by plaintiff, the court rendered judgment against defendant. Concerning the power of defendant's president to act for the corporation, the court stated: "The president of a corporation is *ex vi* terminis its head and general agent, and, nothing else appearing, may act for it in the business in which it is authorized to engage." It was further stated, "it is sufficient to say that some affirmative action by the stockholder or directors of the corporation in meetings duly called and held, would be required to restrict the general authority vested in the president to act for the corporation."²

A detailed examination of the judicial authorities reveals that there are two opposing theories with reference to the implied powers of the president of a business corporation, one of which conforms to the popular understanding stated in the above case and ascribes to him,

¹ 231 N.C. 277, 56 S.E. 2d 607 (1949).
Id. at — 56 S.E. 2d at 612-13.

prima facie, the powers of its ordinary business agent,³ and the other of which denies to him any power whatever to bind it as its contracting agent, unless that power is specially conferred by the board of directors.⁴ The judicial pendulum swings with a marked degree of inconsistency between these two extremes. It is difficult to deduce a general principle from the cases in which the power of the corporate president is in issue, since the decision in any particular case is dependent upon which attitude the court adopts with respect to the widely divergent theories and on the fact situation involved. To show the extent of this divergence, it is proposed to throw into contrast passages from two judicial opinions. In *Wait v Nashua Armory Ass'n* where architects were employed by the president of the corporation, who assumed to act in its behalf, the court said:

"The evidence for the plaintiffs simply tended to show that they were employed by the president to prepare plans and specifications for the proposed armory, and that he assumed to act for the corporation, but there was no evidence that the corporation in any way authorized him to procure such plans and specifications, nor was there any evidence of such authority on his part from any source unless it could be implied from his office. But no such authority is incident to the office. The directors, and not the president, have the powers of the corporation, and exercise an original, rather than a delegated, authority and the president has no implied authority, as such, to act as the agent of the corporation, but, like other agents, he must derive his power from the board of directors, or from the corporation."

In the case of *Steam Boat Co. v McCutcheon & Collins*, where the president leased an office for the corporation, it was said by the court:

³ *Cotton States Belting & Supply Co. v. Florida Ry.*, 69 Fla. 52, 67 So. 568 (1915); *Baker v. Lowe Electric Co.*, 47 Ga. App. 259, 170 S.E. 337 (1933); *Bloom v. Nathan Vehon Co.*, 341 Ill. 200, 173 N.E. 270 (1930); *Sherman Center Town Co. v. Swigart*, 43 Kan. 292, 23 P. 569 (1890); *Kentucky Tobacco Ass'n v. Ashby*, 9 Ky. L. Rep. 109 (1879); *Stevens Davis Co. v. Sid's Petroleum Corp.*, 157 S.W. 2d 246 (Mo. App. 1942); *Mayger v. St. Louis Mining & Milling Co.*, 68 Mont. 492, 219 Pac. 1102 (1923); *Bintz v. Mid-City Park Corp.*, 223 App. Div. 533, 229 N.Y. Supp. 390 (1928); *Meating v. Tigerton Lumber Co.*, 113 Wis. 379, 89 N.W. 152 (1902).

⁴ *Brush Electric Light & Power Co. v. City Council*, 114 Ala. 433, 21 So. 960 (1897); *Homesteaders Life Ass'n v. Salinger*, 212 Iowa 250, 235 N.W. 485 (1931); *Kelly v. Citizens Finance Co.*, 306 Mass. 531, 28 N.E. 2d 1005 (1940); *Knopf v. Alma Park Inc.*, 105 N.J. Eq. 299, 147 Atl. 590 (1929); *Harding v. Oregon-Idaho Co.*, 57 Ore. 34, 110 Pac. 412 (1910); *Frairie Lea Production Co. v. Lincoln Tank Co.*, 294 S.W. 270 (Tex. Civ. App. 1927); *Crown Paving & Construction Co. v. Walla Walla County*, 122 Wash. 144, 210 Pac. 357 (1922); *Varney & Evans v. Hutchinson Lumber & Mfg. Co.*, 70 W.Va. 169, 73 S.E. 321 (1911). Note that some courts have gone so far, on one hand, as to take judicial notice of the ordinary powers of the president [*Ceeder v. Loud & Sons Lumber Co.*, 86 Mich. 541 (1891)], while various courts have denied to him, on the other hand, any ex officio power except that of presiding over the board of directors. [*Lyndon Mill Co. v. Lyndon Literary Inst.*, 63 Vt. 581 (1891)].

⁵ 66 N.H. 581, 23 Atl. 77, 78 (1891).

"Who, then, was the proper person to make the contract? Certainly, the president. We must bear in mind that these kinds of artificial men, or persons, are becoming very common in this State. The legislature turn them out almost as rapidly as a miller does his grist. They compose a new element, or ingredient, of modern society. They contract with everybody, and about all manner of things; and they can contract by their chief officers; and such is their usual course of business. The president of a company presents himself to make a contract, evidently connected with the business. He declares the object and purpose of the contract. Who doubts him? We are a dealing people. Is he asked to produce the charter and the books of the company to show that he is authorized to make the contract *secundum artem*? Such is not the custom."⁶

The decided lack of uniformity found throughout the various jurisdictions has resulted, to a certain extent, from the fact that in many instances there are no provisions in either statutes or charters indicating the scope of the president's authority. Typically, the by-laws simply give the president power to preside at meetings, to supervise the operations of the corporation and to perform the functions of a president. Furthermore, it is not uncommon for the by-laws to expressly provide that the president shall be the general manager, the result being that in various decisions it is difficult to determine what powers the court considers to be in the president solely because he is president.

A slight majority of the states⁷ take the view that the president's power to act for the corporation is dependent upon the authority granted to him, either by the charter or by the stockholders or directors. At one time this was the only rule prevailing. In these states the president may, of course, be expressly given the general management of the corporation or he may be expressly authorized to do par-

⁶ 13 Pa. St. 13, 15 (1850).

The following states are the ones most consistently holding to the view that the president has no greater power than any other director: ARK., *Dent v. People's Bank of Imboden*, 118 Ark. 157, 175 S.W. 1154 (1915); IND., *State ex rel. Guaranty Building & Loan Co. v. Wiley*, 100 Ind. App. 438, 196 N.E. 153 (1935) *semble*; MASS., *Horowitz v. State St. Trust Co.*, 283 Mass. 53, 186 N.E. 74 (1933); MINN., *Grant v. Duluth, M. & N. Ry. Co.*, 66 Minn. 349, 69 N.W. 23 (1896); N.H., *Hillard v. Upper Coos R.R.*, 77 N.H. 129, 88 Atl. 993 (1913); OHIO, *Kroeger v. Brody*, 130 Ohio St. 559, 200 N.E. 836 (1936); OKLA., *McMahan & Co. v. Hibbard*, 182 Okla. 503, 78 P. 2d 409 (1937) *semble*; ORE., *Wilson v. Investment Co.*, 80 Ore. 233, 156 Pac. 249 (1916); PA., *Kelly, Murray, Inc. v. Lansdowne Bank & Trust Co.*, 299 Pa. 236, 149 Atl. 190 (1930); TENN., *Nickey Bros. v. Lonsdale Mfg. Co.*, 149 Tenn. 391, 258 S.W. 776 (1924); TEX., *El Fresnal Irrigated Land Co. v. Bank of Washington*, 182 S.W. 701 (Tex. Civ. App. 1916); UTAH, *Copper King Mining Co. v. Hanson*, 52 Utah 605, 176 Pac. 623 (1918); VT., *Goodenough's Adm'x. v. Vermont People's Nat. Bank*, 106 Vt. 5, 168 Atl. 914 (1933) *semble*; WASH., *Lawiston Water & Power Co. v. Brown*, 42 Wash. 555, 85 Pac. 47 (1906); W. VA., *Kelly Convertible Wagon Co. v. Rhodes Mfg. Co.*, 102 W. Va. 16, 135 S.E. 242 (1926). Note that the states in which corporate enterprise has been less prevalent have clung to the older view that there is no authority in the president by virtue of his office to bind the corporation.

particular acts such as make stipulated contracts, borrow money execute mortgages, or to execute conveyances. Not only that, but the president may be clothed with apparent authority to act for the corporation, as where it allows him habitually to do certain acts or to manage the business generally although no authority has been expressly given to him. In such cases, the acts of the president are binding upon the corporation, provided the third party has relied upon such apparent authority. In the absence of these elements of authority however, the president is treated as a mere figurehead whose sole duty is to preside at directors meetings. The fact that he occupies the office of president of a corporation does not confer upon him any greater authority than that possessed by any other director.⁸

The rule stated in many jurisdictions⁹ is that if the president is given general control and supervision over the affairs of the corporation, it will be presumed that he has authority to make contracts and do acts with the course of its ordinary business. At the turn of the century only a few states had adopted such a view. However, the

Cases cited *supra* note 6. Not all the states follow any clear course. Some states have taken no stand on the question. The following states have cases which appear to take the liberal view as well as cases which seem to adhere to the more narrow rule. ALA. (reverse cases), *Brush Electric Light & Power Co. of Montgomery v. City Council of Montgomery*, 114 Ala. 443, 21 So. 960 (1897). *But cf.* *Naveo Hardwood Co. v. Bass*, 214 Ala. 553, 108 So. 452 (1925); CAL., *Walker v. Kimball Fruit Co., Inc.*, 283 Pac. 895 (Cal. App. 1929). *Contra:* *Padgham v. Invo Marble Co.*, 116 Cal. App. 328, 2 P. 2d 531 (1931); IOWA, *White v. Elgin Creamery Co.*, 108 Iowa 522, 79 N.W. 283 (1899). *But cf.* *Homesteaders Life Ass'n v. Salinger*, 212 Iowa 251, 235 N.W. 485 (1931); LA., *sec. Slagle v. Peyton*, 182 La. 358, 162 So. 12 (1935). *Contra:* *Massman v. Louisiana Mfg. Cooperage Co.*, 177 La. 999, 149 So. 886 (1933) *semble*; MICH., *Melvindale State Bank v. Eckfield*, 283 Mich. 179, 277 N.W. 876 (1938). *Contra:* *Jacob v. Gratiot Central Market Co.*, 267 Mich. 262, 255 N.W. 331 (1934); NEV., *Ex parte Rickey*, 31 Nev. 82, 100 Pac. 134 (1909). *But cf.* *Reno Water Co. v. Leete*, 17 Nev. 203, 30 Pac. 702 (1882); N.J., *Iback v. Elevator Supplies Co., Inc.*, 118 N.J. Eq. 90, 177 Atl. 458 (1935). *Contra:* *Knopf v. Alma Park, Inc.*, 105 N.J. Eq. 299, 147 Atl. 590 (1929).

⁸ It seems probable, but not certain, that the following states would adhere to the liberal view of inherent authority: DEL., *Italo-Petroleum Corp. of America v. Hannigan*, 14 A. 2d 401 (Del. Sup. Ct. 1940); FLA., *Miami Jockey Club v. Lillias Piper, Inc.*, 115 Fla. 612, 155 So. 806 (1934); GA., *Newton v. Social Circle Cotton Mill Co.*, 174 Ga. 320, 162 S.E. 667 (1932) *semble*; ILL., *Bloom v. Nathan Vehon Co.*, 341 Ill. 200, 173 N.E. 270 (1930); Kan., *Childress v. Lucky Jew Lead & Zinc Co.*, 134 Kan. 743, 8 P. 2d 376 (1932); KY., *Ross v. Eagle Coal Co.*, 237 Ky. 660, 36 S.W. 2d 48 (1931); MD., *Conservation Co. v. Stimpson*, 136 Md. 314, 110 Atl. 495 (1920) *semble*; MO., *Shumake v. Basic Metals Mining Corp.*, 129 S.W. 2d 36 (Mo. App. 1939); MONT., *Bingham v. National Bank of Mont.*, 105 Mont. 159, 72 P. 2d 90 (1937); NEB., *Omaha Wool & Storage Co. v. Chicago W. Ry.*, 97 Neb. 50, 149 N.W. 55 (1914); N.Y., *Schwartz v. United Merchants & Mfg.*, 72 F. 2d 256 (C.C.A. 2d, 1934); N.C., *White v. Johnson & Sons, Inc.*, 205 N.C. 773, 172 S.E. 370 (1934); N.D., *Farmers State Bank of Richardson v. Brown*, 52 N.D. 806, 204 N.W. 673 (1925); VA., *Richmond, F & P. R.R. v. Snead & Smith*, 60 Va. 354 (1869); WIS., *Kline v. Thompson*, 206 Wis. 464, 240 N.W. 128 (1932).

tremendous growth of corporate business, both in size and in compass, in the past fifty years, coupled with the emergence of dominating personalities at the head of many corporations, has resulted in an inevitable concentration of executive power in the corporate president. The result has been that an ever-increasing number of states have broken away from the early rules laid down when corporations were few in number. The jurisdictions which have cast aside the older view have based their decisions upon two different theories. Some courts state that there is a rebuttable presumption of authority to perform any act within the general scope of the company's business.¹⁰ Other jurisdictions have taken a broader view in holding that the president has the authority to do anything the directors could authorize.¹¹

Just how much proof is needed to rebut a *prima facie* case when the president has acted beyond his actual authority has not been determined in most jurisdictions. On one hand, it may be held that the corporation must show an actual denial of authority.¹² At the other extreme, it might be that a mere showing that the president had not been granted such authority would be sufficient to rebut the presumption. The solution seems to lie somewhere between these two extremes. The former seems to be unnecessarily strict and could curb corporate presidents sharply since the corporation, as a precautionary measure to avoid liability would place affirmative curtailments upon the authority of its president. The latter is undesirable in that it would work a hardship on the party dealing with the corporation in virtually every case.

In the jurisdictions which have adopted the liberal and modern rule, it has been held that the president has the implied power to make ordinary sales, in the course of business, of the goods or commodities in which the corporation deals;¹³ to pay a broker for affecting sales, which the president himself has the power to make, of the goods in which the corporation deals;¹⁴ to take a conveyance of land to himself upon foreclosure of a mortgage held by the corporate bank in an at-

¹⁰ It is difficult to say just what is meant by the "general scope of the company's business," or whether in such a case the president occupies a position putting him in the class with general managers. *Knopf v. Alma Park, Inc.*, 105 N.J. Eq. 299, 147 Atl. 590 (1929).

¹¹ *Adams v. Barron C. Collier, Inc.*, 73 F. 2d 975 (C.C.A. 8th, 1934). Note that under the former theory, third persons are protected only in ordinary situations where they would be likely to expect the president to be acting with authority while the latter view affords protection in all cases where he could conceivably be acting with authority.

¹² See *Newbold v. Brennan Constr. Co.*, 48 App. D.C. 90, 94 (1918); *Omaha Wool & Storage Co. v. Chicago Great W. Ry.*, 97 Neb. 50, 149 N.W. 55 (1914).

¹³ *Horton Ice-Cream Co. v. Merritt*, 63 Hun. (N.Y.) 628, 17 N.Y. Supp. 718 (1892).

¹⁴ *Northern Central Ry. v. Bastian*, 15 Md. 494 (1860).

tempt to save a debt due the corporation — and his estate will be protected against consequent loss;¹⁵ to employ counsel in behalf of the corporation and to direct litigation in which it is interested;¹⁶ to purchase chattels used in the ordinary course of business;¹⁷ and to arrange to renew a debt due the corporate bank.¹⁸ It should be kept in mind that, under the opposing theory already referred to, there is a contrary judicial authority on nearly everyone of the preceding points.

Irrespective of what powers a president of a corporation may be presumed to have, even the jurisdictions adhering to the more liberal and modern view admit that there are certain things he cannot do without special authority from the directors. For example, the president, in the absence of express authority, cannot bind the corporation on a secret agreement to pay an employee an unusually large annual salary.¹⁹ He cannot employ a person to procure a loan of a large sum of money on commission,²⁰ nor may he engage a physician to treat an employee whose illness did not arise out of the business of the corporation.²¹ The president has no power to purchase real property for the corporation;²² to borrow money in the name of the corporation and pledge its responsibility;²³ or assign its assets as security therefore;²⁴ in the case of a railroad company to grant trackage rights over corporate land for 999 years;²⁵ to agree to give stock in the corporation to an employee in payment of wages;²⁶ to bind a company to pay an employee a bonus based on percentage of company's profits;²⁷ to mortgage or pledge personal property of the corporation;²⁸ to bind the corporation by mere contract of guaranty in which the corporation has no apparent interest;²⁹ to make a gift of corporate property;³⁰ or

¹⁵ *Brown v. Mechanics & Traders Nat. Bank*, 58 Hun. (N.Y.) 610, 12 N.Y. Supp. 861 (1st Dep't 1890).

¹⁶ *Bankers Trust Co. v. Cooper*, 179 S.W. 541 (Tex. Civ. App. 1915).

¹⁷ *Sparks v. Despatch Transfer Co.*, 104 Mo. 531, 15 S.W. 417 (1891).

¹⁸ *Cake v. Pottsville Bank*, 116 Pa. St. 264, 9 Atl. 302 (1887).

¹⁹ *Mayhew v. Budd Mfg. Co.*, 258 Mich. 381, 242 N.W. 737 (1932).

²⁰ *Tobin v. Roaring Creek & C. R.R.*, 86 Fed. 1020 (C.C.E.D. Pa. 1898).

²¹ *Donohue v. Nash Sales Corp., Inc.*, 5 N.J. Misc. R. 692, 137 Atl. 891 (Sup. Ct. 1927).

²² *See Blen v. Bear River & A. Water & Min. Co.*, 20 Cal. 602, 612 (1862).

²³ *See Star Mills v. Bailey*, 140 Ky. 194, 196, 130 S.W. 1077, 1079 (1910).

²⁴ *Hyde v. Larkin*, 35 Mo. App. 365 (1889).

²⁵ *See Chicago, R. I. & P. Ry. v. Union Pac. Ry.*, 47 Fed. 15, 17 (1891).

²⁶ *Warszawa v. White Eagle Brewing Co.*, 299 Ill. App. 509, 20 N.E. 2d 343 (1939).

²⁷ *Noyes v. Irving Trust Co.*, 250 App. Div. 274, 294 N.Y. Supp. 2 (1st Dep't 1937).

²⁸ *Webb v. Duvall*, 177 Md. 592, 11 A. 2d 446 (1940).

²⁹ *Atlantic Refining Co. v. Ingalls & Co.*, 7 W. W. Harr. 503, 185 Atl. 885 (Del. Super. 1936).

³⁰ *Henry R. Worthington v. Worthington*, 100 App. Div. 332, 91 N.Y. Supp. 443 (1st Dep't 1905).

to segregate corporate funds and constitute them a trust fund for the benefit of a particular creditor, or to represent that a loan will be paid out of the sale of certain corporate property and thus give the creditor an equitable lien upon such proceeds or make him an equitable assignee.³¹ Note that the preceding points all involve matters which are extraordinary in nature. Thus under the liberal theory, the determining factor concerning the scope of the president's implied authority appears to be whether or not the particular act is one which is within the ordinary course of the corporate business. Without express authority, the president can act and make contracts, binding the corporation thereby *only in the usual course of his duties and the corporation's business*. When he performs an act not incidental to or pertaining to the usual business of the corporation, it must, as a general rule, be proved that such act was duly authorized by the directors.

The jurisdictions adhering to the modern view have, in some instances, reached conflicting results where matters of presidential authority are concerned. These matters involve those acts on the part of the president which cannot be termed either ordinary or extraordinary in character with any degree of consistency. The courts have not agreed as to where the line should be drawn in the controversial area where the "ordinary" acts shade over into the "extraordinary" category. For example, the jurisdictions are not agreed as to the implied authority of the president to take or negotiate for a leasehold interest in property. In the main, such authority is dependent upon the particular circumstances, one of the most important of which is the character of the business in which the corporation is engaged. A bus line has been held bound by a lease for a station executed without express authority by the president, in view of the fact that in executing the lease, he was acting in line with the corporation's business and discharging for the corporation a duty imposed upon it by lawful authority.³² On the other hand, it has been held that the president of a moving picture producing and distributing corporation has no implied power to negotiate for the leasing or acquisition of theaters.³³ Some courts have held the corporate president has no implied authority to enter into contracts of employment or agency,³⁴ while other jurisdictions have held he has *prima facie* authority to make such a contract.³⁵ The same conflicting views are evident in

³¹ *Vogt v. General Necessities Corp.*, 262 Mich. 409, 247 N.W. 707 (1933).

³² *Raleigh Bkg. & T. Co. v. Safety Transit Lines*, 198 N.C. 675, 153 S.E. 158 (1930).

³³ *Stoneman v. Fox Film Corp.*, 419 Mass. 295, 4 N.E. 2d 63 (1936).

³⁴ *Johnson v. Sage*, 4 Idaho 758, 44 Pac. 641 (1896).

³⁵ *Vincent v. S. Alexander Sons Co.*, 85 Conn. 512, 84 Atl. 84 (1912).

cases involving the president's authority to execute negotiable instruments³⁶ or to transfer or indorse commercial paper payable or belonging to the corporation.³⁷

From the foregoing material, it is evident that, in regard to the authority of the corporate president, there is no uniformity from state to state and the cases in a given state are far too often inconsistent and irreconcilable in result and language. Not only that, it is difficult in many instances, in construing the various decisions, to ascertain what rule the courts intend to lay down, i.e., whether they intend to define the inherent or implied powers of a president or his powers as general manager or his apparent powers. It seems impossible therefore, to find a rational basis for the subject in this country. What can be done to unravel the confusion?

Today when corporations are so common and when so much of the business of the country is transacted by them, it is high time to break away from the early rule which practically relegates the president to the position of a glorified office-boy. The cases which uphold the older view apparently proceed on the theory that the third person who deals with the president is in a better position to protect himself than is the corporation. It is felt that because the third person deals of his own volition with the president, he cannot complain that he was deceived as to the president's authority in the absence of an investigation of the authority of the president. From a practical point of view, however, it seems that third persons who deal with the corporation president are not in a better position to protect themselves than is the corporation. The popular view would appear to be that the president of a corporation has broad power in the absence of notice to the contrary. The title "president" connotes extensive power. In many corporations, the president is also the general manager and it is doubtful whether the public is aware of the distinction in powers between the two offices. One solution to this problem would be for the law to give any president the status of a general manager and thus invoke the much broader scope of power of a general manager to bind the corporation than the cases recognize in a mere president. Certainly this would go far to bring about some uniformity among the jurisdictions and would give the problem a rational basis by reference to the general manager decisions.

As the corporate movement has now outgrown limitations laid down when corporations were more or less in their infancy, it is ex-

³⁶ *City Elec. St. Ry. v. First Nat. Exch. Bank*, 62 Ark. 33, 34 S.W. 89 (1896).
Contra: George E. Lloyd & Co. v. Matthews, 223 Ill. 447, 79 N.E. 172 (1906).

³⁷ *National Bank v. Navassa Phosphate Co.*, 56 Hun. (N.Y.) 136, 8 N.Y. Supp. 929 (1st Dep't 1890). *Contra: Merrill v. Hurley*, 6 S.D. 592, 62 N.W. 958 (1895).

pedient that new principles corresponding with actual corporate practice be introduced. If the president is the chief executive officer of a corporation, the courts should take judicial notice of his status without the necessity of his authority being proven by one who has relied on it in an ordinary transaction with him. The highly complex business world of today has cast upon the president new and more extensive powers which the courts should recognize as being within an extended scope of authority. In other words, when one's name is put on corporate stationery as its president, where an office at the principal place of business has his name on the door with the word "president" added, and where he appears to be something more than a mere figurehead, the public should be protected in dealing with him, at least as to the ordinary everyday business of the corporation.

CHARLES GROMLEY

RE-EXAMINATION OF THE RIGHT OF AN OFFICER TO KILL A FLEEING SUSPECTED FELON

The statement that an officer of the law is justified in killing a fleeing felon if it is otherwise impossible to prevent his escape appears frequently in the Kentucky decisions.¹ The question arises as to whether the decedent must have been a felon *in fact* in order to justify such a homicide. Another way of stating the question is, should an officer be justified in killing a fleeing innocent person or a mere misdemeanor on the officer's proof that he had reasonable cause to believe his victim was a felon? The issue may arise under two different circumstances: (1) where no felony has been committed, but the officer had reasonable grounds to believe that such a crime had been committed and that the fleeing person was the suspected felon; (2) where a felony in fact has been committed, but the officer mistook the fleeing person for the felon.

The question was treated at length in companion notes, previously published in the JOURNAL,² wherein opposing views were advocated and authority cited in support of the respective positions. It is felt that

¹The view has been taken that to justify such a killing a major felony must have been committed. See 38 Ky. L.J. 619 (1950). However, this is not a subject for treatment herein. For an interesting discussion on the distinction between major and minor felonies, see *Commonwealth v. Emmons*, 157 Pa. Super. 495, 43 A. 2d 568 (1945).

²Notes, 38 Ky. L.J. 609 and 38 Ky. L.J. 618 (1950).