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CORPORATIONS-THE EXECUTIVE COMMITTEE IN CORPORATE ORGANIZATION-SCOPE OF POWERS

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CORPORATIONS—THE EXECUTIVE COMMITTEE IN CORPORATE ORGANIZATION—SCOPE OF POWERS—From the very beginning of the use of the corporate structure as a device for carrying on the businesses and activities of man, it has been apparent that the nominal brain, the board of directors, could not feasibly run the affairs of the inanimate entity unless certain powers could be delegated to officers and agents. The early case of *Hoyt v. Thompson's Executor*¹ illustrates the judicial recognition of delegated powers. The charter authorized all business of ordinary nature to be transacted by a board of directors of twenty-three. The court wisely held:

“ . . . But it would be a very extraordinary construction of the charter in this respect, to hold that the board of twenty-three directors, or a majority thereof, must meet and act whenever any corporate power was to be exercised, and that no delegation of authority could be made to subordinate agents, to committees, or to a quorum consisting of a smaller number.”

The *Hoyt* case also established the prevailing doctrine that the board of directors is authorized to act by virtue of the charter from the state and not as an arm of the body of stockholders.² For the board of directors of a corporation does not stand in the same relation to the corporate body which a private agent holds toward his principal. In the strict relation of principal and agent, all the authority is derived by delegation from the former, and if the power of substitution is not conferred in the appointment, it cannot exist at all. But for corporate bodies the powers of the board of directors are, in a very important sense, original and undelegated. The stockholders do not confer, nor can they revoke those powers. They are derivative only in the sense of being received from the state in the act of incorporation. The directors convened as a board are the primary possessors of all the powers which the charter confers, and like private principals, they may delegate to agents of their own appointment the performance of any acts which they themselves can perform.

England, perhaps, has gone further in the delegation of powers field than has the United States, and many of the English companies relieve their boards of most of their functions by means of the managing director scheme. This official is usually one of the directors and is appointed by the board to superintend the business. His powers are set by the articles of the company, either (1) as to what the managing director can do, or (2) as to what the board may delegate to the manag-

¹ 19 N.Y. 207 at 216 (1859).

² But see *Tempel v. Dodge*, 89 Tex. 69, 32 S.W. 514, 33 S.W. 222 (1895), which seems to indicate that the charter provision authorizing a board of directors to manage the corporate business is conclusive.

ing director.³ English courts are quick to protect third parties dealing with the managing director, and will bind the corporation even though the managing director is only a *de facto* agent.⁴ It is interesting to note that the managing director is not regarded in the same light as officers of American corporations, for England does not consider him to be an officer or servant of the corporation, but regards him as generally a regular director, serving over and above his usual duties.⁵ This view seems to be in accord with the standard set up for executive committees in the United States.

Executive committees in the United States will be discussed from the standpoint of their development, their organization, and the nature and extent of their powers.

I.

The right of the board of directors to delegate the transaction of ordinary and routine business to officers and agents is undoubted and long recognized as necessary. Justice Story declared:

“ . . . If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed.”⁶

Another early case said, “all acts within the powers of a corporation may be performed by agents of its own selection.”⁷ It is clear in most instances that nondiscretionary duties may be delegated to officers.⁸ For

³ 82 Sol. J. 146 (1938).

⁴ *Biggerstaff v. Rowatt's Wharf*, [1896] 2 Ch. 93, where the managing director hypothecated debts owing to the company over to the creditors, and the question arose as to the validity or effect of the transaction. The articles of the company authorized the board of directors to appoint a managing director and to delegate to him such of the powers of the board as they should think fit. There was no minute showing that the managing director had so been appointed by the board, but he had acted in that capacity; nor was there any minute delegating any powers to a managing director.

⁵ *In re Newspaper Proprietary Syndicate*, [1900] 2 Ch. 349, managing director not such employee as to be entitled to preferential treatment in regard to sums owed him by the company; *Normandy v. Ind, Coope & Co.*, [1908] 1 Ch. 84, where it was held the company could not pension faithful, long-time managing director, because he did not fall within the phrase “persons in the employment of the company.”

⁶ *Bank of United States v. Dandridge*, 12 Wheat. (25 U.S.) 64 at 70 (1827).

⁷ *Barnes v. Ontario Bank*, 19 N.Y. 152 at 158 (1859), a bank corporation may constitute cashier its valid agent.

⁸ Seemingly nondiscretionary powers and duties could not be delegated in *Lyon v. Jerome*, 26 Wend. (N.Y.) 484 (1841), where canal commissioners could not authorize engineers to take charge of the surveying operations, and in *Gillis v. Bailey*, 21 N.H. 149 (1850), where board of directors was powerless to authorize re-entry for condition broken and subsequent releasing of the premises.

instance, the corporation may authorize the president to sell and assign its negotiable paper; ⁹ directors of railroads may delegate rate-fixing to agents; ¹⁰ directors may authorize two of their number to execute corporate notes; ¹¹ an agent may be appointed to execute a deed, and such appointment is not a corporate act that need be done within the state of incorporation, but is a delegation of authority.¹²

But in matters involving discretion there are decisions to the effect that the directors cannot delegate that discretion to officers and agents. For example, directors of a holding company cannot place the stock it holds in a voting trust for a period of years; ¹³ directors cannot delegate the question whether a conditional subscription to shares should be accepted; ¹⁴ directors must decide whether to forfeit and sell stock for nonpayment of calls; ¹⁵ power to locate the route of a railroad cannot be delegated; ¹⁶ directors alone can pass on paper offered for discount; ¹⁷ power to make assessments is nondelegable.¹⁸

It was but a short step from investing corporate officers and agents with certain powers to the appointment from the board itself of special committees whose function was to operate in a narrow, specific field. It was early decided that committees that merely examine and report to the board are only advisory and their reports are not binding unless approved.¹⁹ In *Greensboro Gas Co. v. Home Oil & Gas Co.*,²⁰ a resolution authorized a committee to make and report an agreement. The court decided that such committee was not thus authorized to make and enter a binding contract before reporting. A mere auditing committee

⁹ *Stevens v. Hill*, 29 Me. 133 (1848); *Northampton Bank v. Pepoon*, 11 Mass. 288 (1814), direct officer to assign over securities.

¹⁰ *Manchester & Lawrence R.R. v. Fisk*, 33 N.H. 297 (1856), and assent of directors to such rates is presumed.

¹¹ *Leavitt v. Oxford*, 3 Utah 265 (1883).

¹² *Arms v. Conant*, 36 Vt. 744 (1864).

¹³ *Knickerbocker Inv. Co. v. Voorhees*, 100 App. Div. 414, 91 N.Y.S. 816 (1905), because it is the duty of the directors to manage and control the property of the corporation instead of delegating that task to another.

¹⁴ *In re Leeds Banking Co.*, L.R. 1 Ch. 561 (1866).

¹⁵ *York & Cumberland R.R. v. Ritchie*, 40 Me. 425 (1855).

¹⁶ *Weidenfeld v. Sugar Run R.R.*, (C.C.Pa. 1892) 48 F. 615.

¹⁷ *Percy v. Millaudon*, 3 La. 568 (1832).

¹⁸ *Farmers' Mutual Fire Ins. Co. v. Chase*, 56 N.H. 341 (1876); *Silver Hook Road v. Greene*, 12 R.I. 164 (1878). But see *Read v. Memphis Gayoso Gas Co.*, 9 Heisk. (56 Tenn.) 545 (1872), where such delegation to make assessments to president was held valid.

¹⁹ *Southington Ecclesiastical Society v. Gridley*, 20 Conn. 199 (1850). But see *Re Cincinnati Iron Store Co.*, (C.C.A. 6th, 1909) 167 F. 486, where advisory committee authorized president to borrow money for the corporation and court said company was bound, holding that board of directors had at least given implied authority to the action.

²⁰ 222 Pa. 4, 70 A. 940 (1908).

cannot rescind a contract or determine future action of the company.²¹ The directors of the railroad in *East Cleveland Ry. v. Everett*²² authorized a special committee to negotiate for purchasers and to sell an issue of bonds. The court concluded that the committee had the power to employ a broker, but they could not, in absence of special authority, authorize the broker to secure purchasers at less than par. Finance committees of banking corporations, while sounding in the category of limited, special organs, nevertheless operate in much the same fashion as the board of directors, for their authority is quite general, and they generally exercise the functions of the board in the interim between board meetings.²³

The banking corporations blazed the way with finance committees, but the business world was quick to follow suit. The exigencies of modern business necessitated a streamlined body to govern in the place of the more or less unwieldy and slow-moving board of directors. To that end, many corporations,²⁴ because of practical necessity, heeded the words of Justice Story, quoted above, and delegated authority "to subordinate agents, to committees, or to a quorum consisting of a smaller number," and in one form or another adopted the executive committee. Power for the board of directors to employ such a device was found in many places. In the *Hoyt* case,²⁵ such power was implied from the idea that the board of directors was a principal which could utilize agents of its own choosing. The supreme court of Missouri in *Jones v. Williams*²⁶ supported an executive committee in these words:

"... The directors have the power, without statutory authority, to delegate to officers, agents or executive committees the power to transact, not only the ordinary and routine business, but business requiring the highest degree of judgment and discretion. . . . The power expressly given by statute to the board of directors 'to appoint such subordinate officers and agents as the business of the corporation may require,' does not limit or diminish the common law power to delegate authority."

Most of the states include a provision for corporate executive com-

²¹ *Skinner v. Walter A. Wood Mowing & Reaping Mach. Co.*, 140 N.Y. 217, 35 N.E. 491 (1893).

²² 15 Ohio Cir. Ct. 181 (1898).

²³ *Peurifoy v. Loyal*, 154 S.C. 267, 151 S.E. 579 (1930).

²⁴ All manner of associations adopted the executive committee. An unincorporated camp meeting association was authorized to delegate power to an executive committee to make regulations as to the use of the grounds of the association. *Round Lake Assn. v. Kellogg*, 141 N.Y. 348, 36 N.E. 326 (1894).

²⁵ See note 1, supra.

²⁶ 139 Mo. 1 at 25, 26, 39 S.W. 486, 40 S.W. 353 (1897).

mittees much in the same words as the legislature of Michigan adopted.²⁷

“... The directors . . . may appoint an executive committee of such board to have active management of the business affairs of such corporation in the interim between full board meetings, subject to such restrictions and limitations as the board may impose upon such executive committee.”

Charter provisions in many instances provide for the executive committee, and as the Alabama court said in *Taylor v. Agricultural & Mechanical Association*,²⁸

“... power [to execute a mortgage] devolves upon the executive committee, not by delegation from the directors, nor as their agents; but by operation of the constitution, and as agents of the association. . . . The execution of the mortgage . . . was included in the general grant of power to the executive committee to transact *official business*.”

Another charter provided that the business was to be managed by three executive officers, and no directors were ever elected; the court held that by virtue of the charter, the three officers were akin to an executive committee and could execute a mortgage binding upon the corporation.²⁹ Other courts³⁰ simply say that charter authority to appoint agents implies the right to appoint an executive committee.

Many executive committees function because of by-laws enacted by the corporation. A typical by-law reads:

“The board of directors may from time to time appoint, and remove at pleasure, an executive committee, consisting of as many of such members of the board as shall, in the resolution of their appointment, be designated, and shall from time to time appoint one of such committee to act as chairman thereof during the pleasure of the board. The executive committee shall have and may exercise all the powers of the board of directors in the management of the business and affairs of the corporation during the intervals between meetings of the board, except the power to fill vacancies in the board and the power to amend the by-laws.”³¹

²⁷ Mich. Comp. Laws (1929), § 9987.

²⁸ 68 Ala. 229 at 236, 237 (1880).

²⁹ *Bell & Coggeshall Co. v. Kentucky Glass-Works Co.*, 106 Ky. 7, 50 S.W. 2, 1092, 51 S.W. 180 (1899).

³⁰ *Olcott v. Tioga R.R.*, 27 N.Y. 546 (1863); *Sheridan Electric Light Co. v. Chatham Nat. Bank*, 127 N.Y. 517, 28 N.E. 467 (1891).

³¹ *Lawrence v. Atlantic Paper & Pulp Corp.*, (C.C.A. 5th, 1924) 298 F. 246 at 249. The by-laws may allow executive committee to consist of one person. *Re Taurine Co.*, 25 Ch. D. 118 (1883).

But, as the case of *Tempel v. Dodge*³² has stated, a very small minority of decisions holds that the corporation cannot substitute an executive committee through by-laws, when the charter says that the board shall manage. On the other hand, the stockholders may take the initiative and expressly authorize an executive committee,³³ and the corporation cannot then repudiate the committee's action.³⁴ But the stockholders cannot elect a committee not consisting of directors and compel the directors to act with the committee in corporate matters.³⁵

Acts of a de facto executive committee have been upheld on the basis that the corporation and board of directors had allowed the committee to act for a considerable period.³⁶ But the Florida court³⁷ declared that when the action of an executive committee was controverted the fact of creation of the committee must be proved by minutes of the board of directors.

2.

Ordinarily the executive committee is composed of a group of the existing directors, and the executive committee in the *Hoyt* case consisted of any five or more directors who attended meetings of which notice was given to all.³⁸ The charter may provide for the executive officers to serve as an executive committee;³⁹ or, the board may allow some of its members to so act and manage the company.⁴⁰ In at least one case a group of stockholders combined with a part of the corporate officers and acted in behalf of the corporation so as to bind the corpora-

³² 89 Tex. 68, 32 S.W. 514, 33 S.W. 222 (1895).

³³ *United States v. Union Pac. R.R.*, 226 U.S. 470, 33 S.Ct. 162 (1913), unless otherwise provided by law, stockholders may authorize board of directors to delegate their duties, thus executive committee derives its authority from the stockholders through the board of directors; *Union Pac. R.R. v. Chicago, R.I. & P. Ry.*, 163 U.S. 564, 16 S.Ct. 1173 (1896).

³⁴ *Bankers' Money Order Assn. v. Nachod*, 128 App. Div. 281, 112 N.Y.S. 721 (1908).

³⁵ *Charlestown Boot & Shoe Co. v. Dunsmore*, 60 N.H. 85 (1880).

³⁶ *Salem Iron Co. v. Lake Superior Consol. Iron Mines*, (C.C.A. 3d, 1901) 112 F. 239.

³⁷ *Cottdale State Bank v. Burroughs Adding Mach. Co.*, 61 Fla. 143, 54 So. 896 (1911).

³⁸ *Lovell v. Women's Pennsylvania Society for Prevention of Cruelty to Animals*, 235 Pa. 601, 84 A. 518 (1912), a particular by-law provided that the ten vice-presidents were to be on the executive committee; organization amended to increase to thirteen vice-presidents, and held, three additional vice-presidents automatically become executive-committeemen.

³⁹ *Bell & Coggeshall Co. v. Kentucky Glass-Works Co.*, 106 Ky. 7, 50 S.W. 2, 1092, 51 S.W. 180 (1899).

⁴⁰ *York v. Mathis*, 103 Me. 67 (1907), never any formal vote giving member of board power to act as executive committee, but corporation bound by his acts.

tion.⁴¹ Courts and custom have imposed a few sensible regulations upon the composition of the committee: the majority of directors cannot exclude the minority from attending meetings and from being heard by delegating power to an executive committee that completely eclipses the minority faction;⁴² the board cannot exclude one or more of their number and summarily form a committee of a part of the board;⁴³ the corporation is estopped from denominating a called meeting of the board a meeting of the executive committee when less than a majority of the directors report.⁴⁴

The executive committee must meet certain formal requirements before it can act, generally to the effect that the executive committee is governed by the same rules that apply to meetings of the full board regarding notice of meetings, quorum and number necessary to determine whether a quorum is present.⁴⁵ But courts have said that the majority rules only if all members of the committee are present,⁴⁶ while others say that a majority constitutes a quorum;⁴⁷ and, of course, many by-laws establish the formal requirements.⁴⁸ The court in *Shaw v. Bankers' Nat. Life Ins. Co.*⁴⁹ stated the solution very neatly as follows, that the executive committee cannot function after a majority have withdrawn, for joint action was contemplated; but the corporation may be bound if it accepts the benefits of a contract irregularly made by the

⁴¹ *Du Pont v. Du Pont*, (C.C.A. 3d, 1919) 256 F. 129. But see *Charlestown Boot & Shoe Store v. Dunsmore*, 60 N.H. 85 (1880), to the effect that stockholders cannot elect committees not consisting of directors and compel the directors to act with the committee in corporate matters.

⁴² *Great Western Ry. v. Rushout*, 5 DeG. & Sm. 290, 64 Eng. Rep. 1121 (1852).

⁴³ *Kyshe v. Alturas Gold*, 4 T.L.R. 331 (1888).

⁴⁴ *Matter of Election of Directors of New York & Westchester Town Site Co.*, 145 App. Div. 623, 130 N.Y.S. 414 (1911).

⁴⁵ *McNeil v. Boston Chamber of Commerce*, 154 Mass. 277, 28 N.E. 245 (1891), thus a majority of the committee can act.

⁴⁶ *Young v. Schenk*, 64 Wash. 90, 116 P. 588 (1911).

⁴⁷ *Union Pac. R.R. v. Chicago, R.I. & P. Ry.*, 163 U.S. 564, 16 S.Ct. 1173 (1896), holding the corporation bound although the governing director appointed by the president was not at the meeting; *Young v. Canada A. & P. S.S. Co.*, 211 Mass. 453, 91 N.E. 1098 (1912); *Marshall v. Industrial Federation of America*, 84 N.Y.S. 866 (App. Div. 1903); *Canada-Atlantic & Plant S.S. Co. v. Flanders*, (C.C.A. 1st, 1906) 145 F. 875. In *Peurifoy v. Loyal*, 154 S.C. 267, 151 S.E. 579 (1930), a majority of the committee constituted a quorum, and four of five were present at the meeting. The suit was brought on a surety question, and two of the executive committee were the guilty officers. The court held that the executive committee did not know of the loss in order to satisfy the surety within the prescribed ten days, for interest disqualified two of the four at the meeting in question, so it was not a legal meeting of the executive committee.

⁴⁸ *Rockford, R.I. & St. L. R.R. v. Sage*, 65 Ill. 328 (1872).

⁴⁹ 61 Ind. App. 346, 112 N.E. 16 (1916), and the court also points out that the board cannot make a contract with the executive committee (general managers) for longer than the terms of office of the directors.

executive committee.⁵⁰ It seems to be a general rule, however, that one member of the executive committee cannot bind the corporation any more than one individual director.⁵¹ A few jurisdictions have said that the executive committee can act only as a whole;⁵² another held that the executive committee could not act unless all were present, although a majority might govern;⁵³ still another said that the by-laws must expressly confer authority on a majority of the committee.⁵⁴ In companies where the executive committee can act only with the president, action without him is void.⁵⁵

It has generally been determined that the executive committee may act only in a limited period of time, viz., the interim between board meetings. In *Commercial Wood & Cement Co. v. Northampton Portland Cement Co.*⁵⁶ a board meeting was called for a particular afternoon. The executive committee met the morning of the scheduled meeting, and made a contract which the board disapproved that afternoon. The court decided that the impending board meeting precluded executive committee action, saying:

“ . . . the plaintiff was put upon its inquiry as to the scope of the powers of the executive committee to bind the corporation thereby. It was bound to know that the committee was always subject to the orders of the board and that the field for executive action was only free to it when the directors had not themselves appropriated it. It would be an extraordinary proposition to maintain, as it seems to me, that a committee, appointed to exercise the powers of the board, when it was not in session, could conclude the corporation by action taken in anticipation of the actual convening of the directors under the notice of the secretary.”

⁵⁰ *Metropolitan Telephone & Telegraph Co. v. Domestic Telephone & Telegraph Co.*, 44 N.J. Eq. 568, 14 A. 907 (1888).

⁵¹ *Young v. United States Mortgage & Trust Co.*, 214 N.Y. 279, 108 N.E. 418 (1915).

⁵² *Caldwell v. Mutual Reserve Fund Life Assn.*, 53 App. Div. 245, 65 N.Y.S. 826 (1900), so corporation correctly rejects a contract claim for employment when such contract was made by only one of three of the executive committee.

⁵³ *In re Liverpool Household Stores Assn.*, 62 L.T. 873, 59 L.J. (Ch.) 616 (1890).

⁵⁴ *Tracy v. Guthrie County Agr. Society*, 47 Iowa 27 (1877).

⁵⁵ *Corn Exchange Bank v. Cumberland Coal Co.*, 1 Bosw. (N.Y. Super.) 436 (1857), and all members of the executive committee must join, not just a majority. But see *Roebing's Sons Co. v. Barre & Montpelier Traction & Power Co.*, 76 Vt. 131, 56 A. 530 (1903), where one member of the committee ordered the goods, another acquiesced, and the third had no knowledge of the affair, the court held that the corporation was bound.

⁵⁶ 190 N.Y. 1 at 5, 82 N.E. 730 (1907).

Third parties in some instances may protect their rights by dealing with the executive committee rather than the board. One case demonstrated that a stockholder's request to the committee to bring action to remedy a corporate wrong was sufficient.⁵⁷ But it is not advocated that third parties content themselves with merely giving the notice required to a director who is also a member of the executive committee, for success depends upon overcoming the presumption that notice to individual directors is not notice to the corporation.⁵⁸

The members of the executive committee are liable for mismanagement on the same basis as directors or trustees.⁵⁹ This responsibility has been transferred to the directors, who may be held liable for negligence in not keeping closer check on the executive committee, which, in turn, was supposed to watch the president.⁶⁰ Responsibility has even been placed upon the stockholders themselves, as in situations where the executive committee was authorized to sell stock, and false representations were made by the committee.⁶¹

3.

Assuming that an executive committee has been authorized and then organized so as to meet the scrutiny of the courts, the most important question in the entire field of executive committees comes into view; that is, what is the nature and extent of the powers the committee may exercise? Leaving aside for the moment the welter of individual cases on just what can be done by this agency, two general precepts running through the question are easily discernible: (1) Is the business of such nature that the board of directors could delegate it to the executive committee? (2) Has the board in fact so delegated its power? To approach the problem of exercisable powers with any hope of evolving a set of principles as to the scope of the executive committee's functions, a division must be made between special powers, general powers with and without ratification by the corporation, and those powers delegable to agents by the executive committee itself.

Committees that exercise special powers are usually temporary in character, and in the usual run of cases, no difficulty is experienced. In addition to special routine duties, the committee may be authorized

⁵⁷ Hazard v. Durant, 11 R.I. 195 (1875).

⁵⁸ Shattuck v. Guardian Trust Co. of New York, 145 App. Div. 734, 130 N.Y.S. 658 (1911), judgment reversed, 204 N.Y. 200, 97 N.E. 517 (1912), where court sent case back for new trial to perhaps show that executive committee member was presumed to have communicated.

⁵⁹ Williams v. McKay, 46 N.J. Eq. 25, 18 A. 824 (1889).

⁶⁰ Kavanaugh v. Commonwealth Trust Co. of N.Y., 223 N.Y. 103, 119 N.E. 237 (1918), held, fact question for jury.

⁶¹ Garret Co. v. Appleton, 184 N.Y. 557, 76 N.E. 1099 (1905), affg. 101 App. Div. 507, 92 N.Y.S. 136 (1905).

to file a petition in bankruptcy;⁶² make contracts to secure patent rights under power to "make necessary arrangements for the transfer";⁶³ or fix the toll rates for driving of logs.⁶⁴ The problems under special powers arise when the executive committee seems to exceed its specific authority. Courts have upheld the right of an executive committee to employ expeditors to carry out specific contracts;⁶⁵ but in contrast the Connecticut court in *Chesnut-Hill Reservoir Co. v. Chase*⁶⁶ determined that the committee was only authorized to contract for purchase of the land and could not give the note of the corporation in payment therefor. Thus, the vendor could not recover on the note, but he could sue on the count for land sold and conveyed. The corporation may save excessive action by the executive committee through express ratification,⁶⁷ or, by accepting the benefits of the unauthorized acts, estop itself from defending suits on such transactions.⁶⁸ But if there is no ratification and no ground for estoppel, the corporation cannot be bound by excessive acts of the special committee.⁶⁹

A number of well-recognized limitations govern the use of general power by the executive committee which operates under a by-law or grant usually reading, "full powers of the board of directors when said board is not in session." In *Hayes v. Canada, Atlantic & Plant S.S. Co.*,⁷⁰ the executive committee under such a grant was held to be limited to ordinary business affairs of the corporation, not unrestricted powers, and could not fix the compensation of one of their number as an officer of the corporation, amend by-laws so as to change the mode of calling stockholders' and directors' meetings, nor act in their own pecuniary interests so as to absorb the entire powers of the corporation for an indefinite period. Similar limitations in other cases include: no power to discharge vice-president and general manager, for power to manage business is not authority to remove the officers;⁷¹ no power in executive committee to issue stock;⁷² and no power to purchase the

⁶² *Lawrence v. Atlantic Paper & Pulp Corp.*, (C.C.A. 5th, 1924) 298 F. 246.

⁶³ *Andres v. Fry*, 113 Cal. 124, 45 P. 534 (1896).

⁶⁴ *Black River Imp. Co. v. Holway*, 85 Wis. 344, 55 N.W. 418 (1893).

⁶⁵ *Conservation Co. v. Stimpson*, 136 Md. 314, 110 A. 495 (1920).

⁶⁶ 14 Conn. 123 (1840).

⁶⁷ *Merchants' Union Barbed Wire Co. v. Rice*, 70 Iowa 14, 29 N.W. 784 (1886).

⁶⁸ *Greensboro Gas Co. v. Home Oil & Gas Co.*, 222 Pa. 4, 70 A. 940 (1908); *Burrill v. Nahant Bank*, 43 Mass. 163 (1840), executive committee set up to sell property but mortgaged it—held valid, especially when board subsequently accepted papers connected with it.

⁶⁹ *East Cleveland Ry. v. Everett*, 15 Ohio Cir. Ct. 181 (1898).

⁷⁰ (C.C.A. 1st, 1910) 181 F. 289.

⁷¹ *Fensterer v. Pressure Lighting Co.*, 85 Misc. 621, 149 N.Y.S. 49 (1914).

⁷² *Ryder v. Bushwick R.R.*, 134 N.Y. 83, 31 N.E. 251 (1892), power to run corporation affairs includes only construction, repairing, equipping, and operation of the railroad.

corporation's own stock, for this was not done in the course of business.⁷³ Nor can the executive committee vote itself large compensation for promotion services, and cannot bind nonassenting stockholders by a merger accomplished solely through the executive committee.⁷⁴ *Commercial Wood & Cement Co. v. Northampton Portland Cement Co.*⁷⁵ also indicated that the selection of a sole selling agency for a term of years by the executive committee was outside the scope of ordinary and ministerial business. *Tracy v. Guthrie County Agr. Society*⁷⁶ took the position that an executive committee could not purchase real estate where the society would have suffered no detriment by delaying action until the next board meeting.

A highly controversial question is presented when the courts are faced with judging the validity of acts of agents appointed or purporting to act for the executive committee which was established with general powers. The Massachusetts court in 1808 held that power in the executive committee to delegate its authority must be expressly conferred and cannot be presumed.⁷⁷ The anomalous decision in *Olcott v. Tioga R.R.*⁷⁸ contains the statement that an executive committee cannot delegate its powers to one of their number. The president and executive committee conducted the business, the notes in question were drawn by the president with the authority of the executive committee, and the holder of the note succeeded in his suit. Thus, it might be said that the case stands for the proposition that the executive committee can delegate to agents of its own choosing. Assuming that delegation by the executive committee is valid, some courts say that the body must pass specific resolutions as to what they wish done, and that the executive committee cannot make wholesale delegation of power;⁷⁹ that one executive committeeman cannot bind the whole⁸⁰ even though he be chairman of the group.⁸¹ Other cases take opposite views and

⁷³ *Maryland Trust Co. v. National Mechanics' Bank*, 102 Md. 608, 63 A. 70 (1906).

⁷⁴ *Blatchford v. Ross*, 54 Barb. (N.Y. S.Ct.) 42 (1869).

⁷⁵ 190 N.Y. 1, 82 N.E. 730 (1907). But see, *Union Pac. R.R. v. Chicago, R.I. & P. Ry.*, 163 U.S. 564, 16 S.Ct. 1173 (1896), where executive committee was upheld in 999 year lease.

⁷⁶ 47 Iowa 27 (1877).

⁷⁷ *Tippets v. Walker*, 4 Mass. 595 (1808), and so held executive committee liable individually on the contract.

⁷⁸ 27 N.Y. 546 (1863).

⁷⁹ *Indian Refining Co. v. Buhman*, (C.C.A. 2d, 1915) 220 F. 426.

⁸⁰ *Young v. United States Mortgage & Trust Co.*, 214 N.Y. 279, 108 N.E. 418 (1915).

⁸¹ *Caskie v. International Ry.*, 261 N.Y. 47, 184 N.E. 489 (1933). But see *Title Ins. Co. of Richmond v. Howell*, 158 Va. 713, 164 S.E. 387 (1932), where the executive committee had full power to employ officer, held bound by statement of one of its members, made to such officer, in presence of committee members and without protest, to effect that executive committee was willing to employ him.

allow delegation from the executive committee with no formality,⁸² or else a simple resolution.⁸³

The real nub of any discussion concerning the powers of the executive committee is whether the committee can act at once to bind the corporation, or whether everything that the executive committee does is subject to disavowal by the board of directors or the stockholders themselves. Some cases, as *Haldeman v. Haldeman*,⁸⁴ indicate that once the executive committee has been delegated any part of the powers of the board of directors, the corporation is bound when the executive committee acts; or seem to say that delegation of powers to a committee expressly authorized by the stockholders themselves precludes the corporation from repudiating executive committee action.⁸⁵ It is possible to catalogue an imposing list of functions exercised by the executive committee and made binding on the corporation without further action: contract to purchase patent;⁸⁶ assign equity of redemption in the pledged bonds to the pledgee;⁸⁷ institute suit when only had power to collect;⁸⁸ make and execute a mortgage;⁸⁹ vote themselves compensation;⁹⁰ fix compensation for the officers and agents of the corporation;⁹¹ employ officers and agents;⁹² sign notes;⁹³ dismiss appeals;⁹⁴ certify creditors' bills.⁹⁵

There seems to be only one case that directly says that every action of the executive committee is subject to ratification,⁹⁶ and this type of policy, if generally practiced, would virtually hamstring the purpose for which executive committees were devised, namely, to facilitate the business matters of corporations. Some cases, understandably enough,

⁸² *Culver v. Pocono Spring Water Ice Co.*, 206 Pa. 481, 56 A. 29 (1903); *Conservation Co. v. Stimpson*, 136 Md. 314, 110 A. 495 (1920).

⁸³ *Burns v. Valley Bank of Fresno*, 94 Cal. App. 254, 271 P. 107 (1928); *Re Cincinnati Iron Stove Co.*, (C.C.A. 6th, 1909) 167 F. 486.

⁸⁴ 176 Ky. 635, 197 S.W. 376 (1917).

⁸⁵ *Bankers' Money Order Assn. v. Nachod*, 128 App. Div. 281, 112 N.Y.S. 721 (1908).

⁸⁶ *Andres v. Fry*, 113 Cal. 124, 45 P. 534 (1896).

⁸⁷ *Bibber White Co. v. White River Valley Elec. Ry.*, (C.C.Vt. 1909) 75 F. 470.

⁸⁸ *St. Louis Domicile & Savings Loan Assn. v. Augustin*, 2 Mo. App. 123 (1876).

⁸⁹ *Taylor v. Agricultural & Mechanical Assn.*, 68 Ala. 229 (1880); *Cabot, Inc. v. Gas Products Co.*, 93 Mont. 497, 19 P. (2d) 878 (1933).

⁹⁰ *Marshall v. Industrial Federation of America*, 84 N.Y.S. 866 (App. Div. 1903).

⁹¹ *Wallace v. International Trade Exhibition*, 170 La. 55, 127 So. 362 (1930), current business includes fixing compensation.

⁹² *Title Ins. Co. of Richmond v. Howell*, 158 Va. 713, 164 S.E. 387 (1932); *Young v. Canada A. & P. S.S. Co.*, 211 Mass. 453, 97 N.E. 1098 (1912).

⁹³ *First Nat. Bank of Binghamton v. Commercial Travelers' Home Assn. of America*, 108 App. Div. 78, 95 N.Y.S. 454 (1905).

⁹⁴ *Young v. Schenk*, 64 Wash. 90, 116 P. 588 (1911).

⁹⁵ *Rockford, R.I. & St. L. R.R. v. Sage*, 65 Ill. 328 (1872).

⁹⁶ *Indianapolis, E. R. & S.W. R.R. v. Hyde*, 122 Ind. 188, 23 N.E. 706 (1890).

hold invalid action that seems out of the ordinary unless ratification is present.⁹⁷ For instance, the executive committee of a railroad authorized sale of stock, but lack of ratification by the board nullified the contract;⁹⁸ and a merger engineered by the executive committee was held not binding on nonassenting stockholders.⁹⁹ But see *Roebbling's Sons Co. v. Barre & Montpelier Traction & Power Co.*,¹⁰⁰ where the by-laws provided that the executive committee should perform the general duties of the corporation, needing assent of directors for binding force, yet the executive committee was deemed to have power under the by-laws to purchase a certain wire necessary for the operation of the railroad, although the directors had not given their previous consent.

Subsequent ratification of ultra vires acts of the executive committee is a common practice, and is to be encouraged from the standpoint of protecting those who deal with executive committees purporting to represent the corporation in the same light as boards of directors. The stockholders in *Union Pac. R.R. v. Chicago, Rock Island & Pacific Ry.*¹⁰¹ ratified the action of the executive committee, and this was held valid regardless of the position of the board of directors on the matter. Also in the situation where an executive committee was authorized to settle with X, but instead settled with a firm in which X was interested, the company ratified and saved the action.¹⁰²

Upon familiar grounds of estoppel, many corporations have been bound by their executive committees. Accepting benefits of the extraordinary action,¹⁰³ or change of position by the other party in reliance upon the ostensible authority,¹⁰⁴ or mere silence and acquiescence on the part of the corporation may validate the committee's action.¹⁰⁵

⁹⁷ *Kelsey v. New England Street Ry.*, 60 N.J.Eq. 230, 46 A. 1059 (1900); *East Cleveland Ry. v. Everett*, 15 Ohio Cir. Ct. 181 (1898).

⁹⁸ *Ryder v. Bushwick R.R.*, 134 N.Y. 83, 31 N.E. 251 (1892).

⁹⁹ *Blatchford v. Ross*, 54 Barb. (N.Y. S.Ct.) 42 (1869).

¹⁰⁰ 76 Vt. 131, 56 A. 530 (1903).

¹⁰¹ 163 U.S. 564, 16 S.Ct. 1173 (1896).

¹⁰² *Merchants' Union Barbed Wire Co. v. Rice*, 70 Iowa 14, 29 N.W. 784 (1886).

¹⁰³ *Tilden v. Goldy Mach. Co.*, 9 Cal. App. 9, 98 P. 39 (1908); *Metropolitan Telephone & Telegraph Co. v. Domestic Telephone & Telegraph Co.*, 44 N.J.Eq. 568, 14 A. 907 (1888).

¹⁰⁴ *Greensboro Gas Co. v. Home Oil & Gas Co.*, 222 Pa. 4, 70 A. 940 (1908), where plaintiff had been allowed to expend great sums of money; *Shafer v. Spruks*, (C.C.A. 3d, 1913) 225 F. 480, executive committee inserted after-acquired property clause in mortgage, and corporation was held bound after issue of bonds by other party secured by such mortgage.

¹⁰⁵ *Salem Iron Co. v. Lake Superior Consol. Iron Mines*, (C.C.A. 3d, 1901) 112 F. 239, de facto executive committee; *Curtis v. Leavitt*, 15 N.Y. 9 (1857), issue of

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Very few cases involving powers of executive committees have appeared on the legal horizon in the last twenty years; consequently a trend for the present and future can only be hypothecated on older cases, modern by-laws, and a hope for a liberal judiciary. To continue in the vein established by some cases, that acts of the executive committee must be subject to corporate approval, is to leave undisturbed the complexities of corporate problems. Executive committees have a purpose to fulfill, i.e., to reduce the slow and cumbersome aspects of large business organizations to fast moving, dynamic business organs. Such stripping of excess weight cannot be accomplished while parties who deal with executive committees are forced to wait until the next board meeting, or take a hazardous chance that the corporation may in the future ratify the act or so conduct itself as to be estopped to deny the authority existed.

It is true that many corporations through their by-laws are making provision for more powerful executive committees. But in the background remain the cases which illustrate the type of board that is jealous of its checkrein and retains the right of disapproval over every executive committee act. Thus in some instances it is an empty gesture to establish executive committees as far as outsiders are concerned. That is the reason for the phrase "liberal judiciary." For the courts, by recognizing the validity of executive committee actions in the ordinary scope of business without the formal approval of the corporation, will force the corporations to the realization that the executive committee is a binding agent if used, and that third parties are justified in relying upon the ostensible authority thereof. The boards that would then refuse to appoint executive committees would be penalizing their business by forcing the transactions to go through the channels of the slow-moving board of directors machinery. In any event, such judicial action would serve two purposes: first, clarify the extent of executive committee powers, and second, clear the business world of the middle-of-the-road boards which breed delay and litigation.

For the corporations that will continue to employ the executive committee it is recommended that they make clear to the world that such committees have the power to act between meetings of the board without asking approval for all acts. This will materially speed the business affairs of that particular corporation, and the reward of increased efficiency to the stockholders will overshadow any loss of face thought to be suffered by the board of directors. Of course, the execu-

bonds by executive committee without resolution of board as required by the charter; *York v. Mathis*, 103 Me. 67 (1907); *McNeil v. Boston Chamber of Commerce*, 154 Mass. 277, 28 N.E. 245 (1891).

tive committee should not be given the power to decide questions of policy and matters that affect the character of the corporation itself.

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