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Miscellaneous—Corporations—Stockholders' Agreements

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requisite rules of construction in finding the memorandum insufficient as an agreement to arbitrate.

Three dissenters felt that the writing was not only sufficient as a note or memorandum, but was a complete contract itself, subscribed to by all of the parties. The issue was a colse one. The decision should be a stern lesson to other lawyers in the field. A contract to be acceptable should contain all of the essential terms of the agreement. It should be clear and if possible contain no ambiguities. Least of all, the parties should be directed to sign their names in full.

Corporations—Stockholders' Agreements

At common law the stockholders of a corporation had the power to remove an officer for cause.[34] Normally a majority vote of the stockholders could accomplish this end.[35] However the certificate of incorporation may provide that a greater number than a majority shall be required for the transaction of any business in which the vote or consent of the stockholders is required or authorized.[36]

In the instant case,[37] a director of a corporation attempted to remove another director from office for alleged misconduct. He sought to do this by the medium of arbitration provided for in a contract to resolve differences between them by arbitration. The contract also required a unanimous vote of the stockholders to transact any business of the corporation.

The Court held the director could not be removed. All actions by the stockholders had to be unanimous. Thus neither of the directors could remove the other, since both were stockholders. The Court also stated that arbitration was improper here. To be the subject of arbitration, the controversy must be such that it is capable of being the subject of an action in a court of law.[38] The controversy here did not meet that standard.

Considering the circumstances, the decision was a correct one, though the writer cannot help but feel a certain confusion exists in this area of the law. When a contract of incorporation exists wherein it is stated that a unanimous vote of all the stockholders is necessary to transact any business of the corporation where stockholder's consent is required, it appears, the corporation is handicapped. Under such a provision, when a director, who is a stockholder, is guilty of misconduct, he cannot be removed, because he will not vote for his own removal, and the

34. *Matter of Koch*, 257 N. Y. 318, 178 N. E. 545 (1931).
35. See note 34, *Supra.*
36. N. Y. STOCK CORP. LAW §9(d).
37. *Arbitration Between Burkin and Katz*, 1 N. Y. 2d 570, 136 N. E. 2d 862 (1956).
38. N. Y. CIV. PRAC. ACT §1448; *Matter of Fletcher*, 237 N. Y. 440, 143 N. E. 248 (1924).

requisite unanimous vote is not possible. Therefore the only remedy available to remove such a director would be under section 60 of the General Corporation Law.[39] It is suggested that if the contract of incorporation requires a unanimous vote of all the stockholders, a provision should be inserted excluding the unanimous vote in the case of the removal of a director. The requirement of a majority vote should be sufficient in instances such as this.

Master and Servant

Where the plaintiff's complaint has been dismissed by a lower court, the Court of Appeals must view the facts in a light most favorable to the plaintiff and, in determining whether the facts proved constitute a cause of action, give him the benefit of every favorable inference which may reasonably be drawn.[40]

The test of liability of the master for the tortious acts of his servant is whether there was an express or implied authority for doing the act relied upon by the plaintiff — *i.e.,* whether the servant was acting within the scope of his employment.[41] Although the wrongful act of the employee may have been one which was unauthorized, the subsequent approval and ratification by the employer may be sufficient to impose liability upon him.[42] What constitutes a ratification of an act which appears to have been unauthorized is a question of fact.

In *Simon v. Ora Realty Corp.*,[43] an action was brought against a tenement house owner for injuries sustained by an infant when a loaded ash can fell on him as he was assisting the janitor in removing the cans from the cellar of the house by means of a hoist. The trial court dismissed the complaint at the close of the entire case upon the ground that there was no proof that the janitor had express or implied authority to request assistance from others, nor that the corporate defendant acquiesced in any such course of conduct. The Appellate Division affirmed the dismissal by the trial court.[44]

Evidence adduced at the trial tended to show that the operation of the hoist would be a difficult task for one man to accomplish and that the janitor had been in the practise of inducing neighborhood boys to help him with the removal for

39. N. Y. GEN. CORP. LAW §60: An action may be brought against one or more of the directors or officers of a Corporation to remove him from office . . . ; Under GEN. CORP. LAW §61, however, such an action may be brought only by the Atorney General.

40. *Faber v. City of New York,* 213 N. Y. 411, 107 N. E. 756 (1915); *Shuman v. Hall,* 246 N. Y. 51, 158 N. E. 16 (1927).

41. *Ramsey v. New York Cent. R. Co.,* 269 N. Y. 219, 199 N. E. 65 (1935).

42. *Dawlen v. Johnson,* 225 N. Y. 39, 121 N. E. 487 (1918).

43. 1 N. Y. 2d 388, 135 N. E. 2d 580 (1956).

44. 281 App. Div. 962, 120 N. Y. S. 2d 656 (1st Dep't 1953).