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## Corporations - Acquisition of Membership - Co-operative Patron's Application for Membership Denied

Armond G. Erickson

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the North Dakota Supreme Court has sustained convictions of second degree manslaughter where a driver's recklessness caused the death of another.<sup>14</sup> These situations are therefore already provided for. It seems that if the statute is to be of material significance in improving the safety of the North Dakota highways, it will be applicable to situations such as those in the instant case.<sup>15</sup>

MERVIN A. TUNTLAND.

CORPORATIONS — ACQUISITION OF MEMBERSHIP — CO-OPERATIVE PATRON'S APPLICATION FOR MEMBERSHIP DENIED. — The Cherry-Todd Electric Co-operative, Inc., a non-profit, non-stock, corporation was converted to a co-operative under statute. The creating statute provided that patrons of the electric co-operative were not required to become members but such patrons should have the right to become members upon such terms as may be prescribed in the by-laws. The by-laws provided, *inter-alia*, that membership could only be attained by acceptance for membership by the Board of Directors or members. A special meeting was held to vote on a proposed change of the principal place of business. Plaintiff's application for membership and right to vote at this meeting were denied. In affirming the trial court, the Supreme Court of South Dakota held that the co-operative acting through its Board of Directors or its members does not possess the right to deny an applicant's membership. *Meyers v. Lux*, 75 N.W.2d 533 (S. D. 1956).

Corporations may prescribe through by-laws the qualifications necessary for membership and the procedure by which membership may be acquired.<sup>1</sup> In the absence of statutory provisions a corporation is said to have the implied or incidental power to admit members;<sup>2</sup> the consent of the parties is essential since the relationship is contractual.<sup>3</sup> A non-profit corporation has the right to estab-

14. *State v. Tjaden*, 69 N.W.2d 272 (N. D. 1955).

15. In North Dakota the only automobile accident cases of a criminal nature where the physical or mental disability of the drivers has been involved are cases in which the driver was under the influence of intoxicating liquor. In *State v. Hanson*, 73 N.W.2d 135 (N. D. 1955), the North Dakota Supreme Court held that only the slightest physical or mental disability due to the drinking of intoxicating beverage would sustain a conviction for driving while under the influence of intoxicating liquor. If the court in so holding has adopted a policy of construing the law so as to prevent drivers with physical disabilities from driving automobiles and thereby jeopardizing the lives and property of others, it is probable that a conviction of negligent homicide obtained under conditions similar to those in the instant case would be sustained.

1. *Stewart v. Monongahela Val. Country Club*, 177 Pa. Super. 632, 112 A.2d 444 (1955).

2. See *State v. Sibley*, 25 Minn. 387 (1879); *Ellerbe v. Faust*, 119 Mo. 653, 25 S.W. 390 (1894).

3. 18 C. J. S., CORPORATIONS § 478.

lish such classes of membership as its by-laws shall prescribe,<sup>4</sup> and no one can obtain the rights of a member in a corporation except in compliance with the governing law.<sup>5</sup> If that law prescribes conditions or special methods for becoming a member the law is imperative,<sup>6</sup> unless the conditions have been waived.<sup>7</sup> Even where the charter does not regulate or restrict the admission of new members, it has been held that the whole matter is in the control of the corporation.<sup>8</sup>

A corporation, however, has no power to exclude persons from membership in violation of its charter or enabling act, nor to enact by-laws as to the admission or qualification of members which conflicts with its charter, the general laws or articles of association.<sup>9</sup> An enactment which is contrary to public policy, or would become a shield for fraud will be declared invalid.<sup>10</sup> By-laws must apply to all persons of the class which they are intended to govern;<sup>11</sup> however, a by-law which discriminates between the stockholders who deal with the company and those who do not deal with it is valid.<sup>12</sup>

It has been held that an applicant was entitled to membership upon complying with corporation rules, in absence of substantial grounds for his exclusion.<sup>13</sup> Where a resort owner filed an application to become a member of an electrical co-operative, formed to furnish power to rural areas, it was held that he could not be denied membership.<sup>14</sup>

It is admitted that courts can, and do, declare by-laws invalid and ultra-vires when they are repugnant to the statutes or articles of incorporation,<sup>15</sup> or when they are unreasonable and contrary to public policy.<sup>16</sup> By statute, in the instant case, the defendant was permitted to prescribe additional requirements and limitations in

4. *W. G. Press & Co. v. Fahy*, 313 Ill. 262, 145 N.E. 103 (1924).

5. *See Peninsula Leasing Co. v. Cody*, 161 Mich. 604, 126 N.W. 1053 (1910).

6. *Ibid.*; *Mills v. Friedman*, 111 Misc. 253, 181 N.Y.S. 285 (Sup. Ct. 1920).

7. *Porterfield v. Blackbill & Doney Parks Water User's Ass'n.*, '69 Ariz. 110, 210 P.2d 335 (1949) (Incorporated to develop the community water supply. The court held that it must admit a qualified applicant.).

8. *See State v. Sibley*, 25 Minn. 387 (1879).

9. 12A *Fletcher Cyclopedia*, CORPORATIONS § 5687 (1957).

10. *Ibid.*; *See Mills v. Friedman*, 111 Misc. 253, 181 N.Y.S. 285 (Sup. Ct. 1920).

11. *Lindsay-Strathmore Irr. Dist. v. Wutchumna Water Co.*, 111 Cal. 688, 296 Pac. 933 (1931) (Rehearing Denied).

12. *Mooney v. Madison Farmers' Merchantile, etc., Co.*, 138 Minn. 199, 164 N.W. 804 (1917) (Where a cooperative is authorized by statute to provide by by-laws for the distribution of profits and earnings in such proportions as the stockholders deem just.).

13. *Board of Trade of City of Chicago v. Wallace*, 67 F.2d 402 (7th Cir. 1933) (Certiorari denied, 54 Sup. Ct. 529).

14. *Hagans v. Excelsior Electric Membership Corporation*, 207 Ga. 53, 60 S.E.2d 162 (1950).

15. *Dugan v. Fireman's Pension Fund of Philadelphia*, '372 Pa. 429, 94 A.2d 353 (1953) (Rehearing denied).

16. *Ibid.*; 12A *Fletcher Cyclopedia*, CORPORATIONS § 5687 (1957).

respect to membership.<sup>17</sup> When the by-laws set up an essential requirement of membership, in accordance with the charter or enabling act, applicants have no right to membership unless the by-laws requirement has been fulfilled or has been declared invalid.<sup>18</sup>

It is submitted that the court in the instant case should have reached an opposite result. A court should not compel a corporation to admit an applicant to membership against the will of those whose consent is essential.<sup>19</sup> Further, the court should not ordinarily substitute its judgment for the judgment of those who are authorized to adopt the corporate by-laws.<sup>20</sup>

ARMOND G. ERICKSON.

CRIMINAL LAW — LIMITATIONS OF PROSECUTIONS — LIMITATIONS APPLICABLE. — Defendant was convicted of second degree murder under an indictment charging him with first degree murder. The trial court, holding that the statute of limitations applied to second degree murder, arrested judgment before sentence. The statute provided that "no person shall be prosecuted, tried or punished for any offense not punishable with death unless the indictment therefor shall be found within five years from the time of committing the offense . . ."<sup>1</sup> On appeal the Supreme Court *held*, that murder was one offense under common law, and still remains so; the statute merely divided murder into degrees for the purpose of punishment.<sup>2</sup> Therefore, the offense charged in the indictment is "punishable with death," and excluded from the operation of the statute. *State v. Brown*, 22 N.J. 405, 126 A.2d 161 (1956).

The New Jersey decision is contrary to the overwhelming weight of authority which holds that one cannot be convicted of a lesser offense includible within a larger crime, where prosecution for the

17. S. Dak. Code § 11-2209 (Supp. 1953) ("Any patron of the Co-operative . . . may become a member . . . the by-laws may prescribe additional qualifications and limitations in respect to membership.").

18. *Meyers v. Lux*, 75 N.W.2d 533, 538 (S. D. 1956) (dissenting opinion).

19. *Sorrick v. The Consolidated Tel. Co. of Springfort*, 340 Mich. 463, 65 N.W.2d 713 (1954); *Mills v. Friedman*, 111 Misc. 253, 181 N.Y.S. 285, 294 (Sup. Ct. 1920) (dictum).

20. See note 1 *supra*.

1. N. J. Rev. Stat. § 2:183-2 (1937) (Effective June 30, 1953, the period of limitation was extended to five years, L. 1953, c. 204).

2. N. J. Rev. Stat. § 2:138-2 (1937) ("Murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilfull, deliberate and premeditated killing, or which shall be committed in perpetrating or attempting to perpetrate arson, burglary, rape, robbery, or sodomy, shall be murder in the first degree; and all other kinds of murder shall be murder in the second degree; and the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, designate by their verdict whether it be murder in the first degree or in the second degree.").