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Criminal Law - Limitations of Prosecutions - Limitations Applicable

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respect to membership.[17] 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.[18]

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

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 . . . ."[1] 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.[2] 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 repect 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.").

larger crime is commenced after the expiration of the limitations applicable to the lesser offense.[3] To hold otherwise would allow the state to proceed with a prosecution by some method which would deprive the accused of the benefit of the statute of limitations, while other persons guilty of the like offense may have the benefit of such statute because the state chose to proceed with the prosecution by a different method.[4] Such a procedure would, in effect, nullify the statute.[5]

Florida is the only other state which has been found to have a statute similar to that of New Jersey,[6] but they reach a result in accord with the majority view. In cases with facts substantially the same as those in the instant case, the Florida Supreme Court held, that where the statute of limitations had run on all lesser crimes, defendant could not be convicted of anything but the crime in the indictment which was excluded from the running of the statute.[7] One of these cases also held that to permit a conviction for the lesser offense was a denial of defendant's right of due process of law.[8] The Federal Government has a statute similar to New Jersey and Florida but no cases in point have been found.[9]

Georgia is the only other jurisdiction that supports the holding in the instant case. The Supreme Court there held that the statute of limitations applicable in a criminal case is that which relates to the offense charged in the indictment, and not to any minor offense included therein.[10]

The common law rule was that there was no limitation of time within which offenses might be prosecuted.[11] Statutes of limitations

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3. Spears v. State, 26 Ala. App. 376, 160 So. 727 (1935); People v. Angelo, 24 Cal. App.2d 626, 75 P.2d 614 (1938); Mitchell v. State, 157 Fla. 121, 25 So.2d 73 (1946); People v. Di Pasquale, 161 App. Div. 196, 146 N.Y.S. 523 (3rd Dep't. 1914); McKinney v. State, 96 Tex. Crim. 342, 257 S.W. 258 (1923).

4. Mitchell v. State, 157 Fla. 121, 25 So.2d 73 (1946); State v. King, 84 S.E.2d 313, (W. Va. 1954) (". . . if defendant had in the first instance been indicted for assault and battery . . . the defendant's conviction, being for a misdemeanor, would have been void . . . and we are of the opinion, that, notwithstanding in the case at bar the defendant was indicted for a felony, his conviction for assault and battery is barred by the limitation statute.")

5. People v. Picetti, 124 Cal. 361, 57 Pac. 156 (1899); Drott v. People, 71 Colo. 383, 206 Pac.797 (1922) (Defendant was indicted for grand larceny, an offense not barred by the statute of limitations, and convicted of petit larceny, which was barred. The Supreme Court dismissed the defendant, stating that "to prevent the operation of the bar by charging a crime of a higher grade not within the bar would nullify the statute.")

6. Fla. Stat. § 923.05 (1941).

7. Mitchell v. State, 157 Fla. 121, 25 So.2d 73 (1946); Perry v. State, 103 Fla. 580, 137 So. 798 (1931); Blackmon v. State, 88 Fla. 188, 101 So. 319 (1924); Nelson v. State, 17 Fla. 195 (1879).

8. Mitchell v. State, 157 Fla. 121, 25 So.2d 73 (1946).

9. 62 Stat. 828 (1948), 18 U.S.C.A. 3282 as amended 68 Stat. 1145 (1954).

10. Sikes v. State, 20 Ga. App. 80, 92 S.E. 553 (1917); Troup v. State, 17 Ga. App. 387, 87 S.E. 157 (1915); Reynolds v. State, 1 Ga. 222, 227 (1846) (dictum).

11. United States v. Fraiden, 63 F.Supp. 271 (D.Md. 1945); Buch v. International

have been adopted upon the theory that prosecutions should not be allowed to ferment endlessly in files of the government to explode only after witnesses and proofs necessary to the protection of the accused have by sheer lapse of time passed beyond availability.[12]

The decision in the instant case rests upon the interpretation of a criminal statute, and the rules of statutory construction should be followed. The New Jersey Supreme Court has come to a conclusion that is contra to the weight of authority and the better legal reasoning. The better view is that statutes of limitations in criminal cases must be liberally construed in favor of the defendant,[13] and against the state.[14] Had the legislature intended to exclude second degree murder from the statute of limitations they would have so provided. The court was not justified in implying the legislature's intent.

RICHARD A. RAHLFS.

EVIDENCE — ADMISSIONS AGAINST INTEREST — IMPLICATING CONFESSION OF ONE CO-CONSPIRATOR IN A JOINT TRIAL. — The United States District Court in a joint trial convicted petitioner and four co-defendants of violating a federal statute by conspiring to deal unlawfully in alcohol.[1] At the close of the prosecution's case the trial court admitted the confession of a co-defendant, made after the termination of the alleged conspiracy and without deleting references to the petitioner.[2] The jury was instructed to consider the confession only in determining the guilt of the confessor. The petitioner did not request a separate trial but moved to exclude the co-defendant's confession contending it was prejudicial error against him. The United States Supreme Court, four Justices dissenting, *held* that a restricted admission of a post conspiracy confession by one co-conspirator which implicated petitioner did not constitute reversible error. *Paoli v. United States,* 77 S.Ct. 294 (1957).

The decision in the instant case is supported by the weight of

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Alliance of Theater State Employees and Moving Picture Mach. Operators of U. S. and Canada, 55 Cal. App.2d 357, 130 P.2d 788 (1942).

12. United States v. Eliopoulos, 45 F. Supp. 777 (D. N. J. 1942).

13. State v. Colvin, 284 Mo. 195, 223 S.W. 585 (1920); Jacox v. State, 154 Neb. 416, 48 N.W.2d 390 (1951); State v. Patriarca, 71 R. I. 151, 43 A.2d 54 (1945).

14. State v. Brenner, 132 N.J.L. 607, 41 A.2d 532 (Ct. Err. & App. 1945); State v. Patriarca, 71 R. I. 151, 43 A.2d 54 (1945).

1. 62 Stat. 701 (1948), 18 U. S. C. § 371 (1952).

2. Once the conspiracy is over the acts or confessions of a conspirator are admissable only against the confessor and are inadmissable hearsay as to the other defendants. Krulewitch v. United States, 336 U. S. 440 (1949); Fiswick v. United States, 329 U. S. 211 (1946); Logan v. United States, 144 U. S. 263 (1891).