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# Municipal Corporations--Ultra Vires Acts--Highway Law Sec. 282e as Affecting Liability for Ultra Vires Acts (Downing v. City of New York, 219 A.D. 444 (1927))

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give sane party a right they would have so enumerated in statute as statute is a large and complete set of laws in itself. Judge Cardozo in principal case stated: "Theory of annulment on the ground of insanity is not that the sane spouse has made a bad bargain in getting an insane partner. The theory is that the insane partner to the union has manifested a consent that is unreal for lack of a contracting mind." It is clearly for public good that such as principal case be the law. Otherwise a man knowingly may marry an insane woman and after having cohabitation dispose of her at will. The only way that the sane spouse can get relief is by an amendment of the statute that will extend the right of action. We are living in a period when public welfare and interest demand legislature to make strict regulations protecting the unprotected from such persons who would take advantage if law were not as in principal case. Fact that the law might work an undue hardship or an unjustice upon many sane persons is counterbalanced by the fact that it prevents the perpetration of many frauds.

MUNICIPAL CORPORATIONS—ULTRA VIRES ACTS; HIGHWAY LAW SEC. 282E AS AFFECTING LIABILITY FOR ULTRA VIRES ACTS—Plaintiff's intestate was killed through the negligence of defendant's employee engaged in the operation of a motor vehicle. The vehicle was being used by defendant's servants in the cleansing of sewer basins but at the time of the accident the driver had taken it on a personal errand. The foreman in charge of the sewer work testified that he had no authority to let the truck leave the task but had not objected when the driver said he would take the car and time off to buy a Christmas tree and carry it home. In fact it did appear that he told the driver to "go ahead." *Held*, that Sec 282e of the Highway Law (L. 1924, ch. 534 and amendments thereto) applied and a verdict was found for the plaintiff. Judgment reversed and complaint dismissed. The Appellate Division unanimously held that the Highway Law did not apply inasmuch as the negligence complained of did not occur within the scope of the corporate powers, was "ultra vires," and hence could not be made the basis of an action for damages. Downing *v.* City of New York, 219 App. Div. 444 (1927).

While a municipal corporation is liable to third persons resulting from the negligence of employees engaged in cleaning or maintaining public sewers, Lloyd *v.* Mayor, &c., 5 N. Y. 369 (1851); Seifert *v.* City of Brooklyn, 101 N. Y., 136, 4 N. E. 321 (1885); Munn *v.* City of Hudson, 61 App. Div. 343 (3rd Dept. 1901), it must be shown, as a condition precedent to recovery, that the act complained of was within the scope of the corporate powers conferred by statute. It is the policy of the law to limit municipal corporations strictly to the exercise of powers granted them by their respective charters (19 R. C. L. 1138), and if the act done was committed outside of the authority and power of a corporation as conferred by charter, the corporation was not liable whether its performance was directed by municipal officers, or it was done without any express direction or command. Smith *v.* City of Rochester, 76 N. Y. 506, 509 (1879); Mayor, &c., *v.* Cunliff, 2 N. Y. 165 (1849); Tilford *v.* Mayor, &c., 1 App. Div. 199 (1896) aff'd 153 N. Y. 671, 48 N. E. 1107 (1897); O'Donnell *v.* City of Syracuse, 184 N. Y. 1, 76 N. E. 738 (1906). Thus even though the persons causing

the work to be done were its officers or agents, and assumed to act as such in doing it, the municipality would not be liable if the acts were "ultra vires." Stoddard *v.* Village of Saratoga Springs, 127 N. Y. 266, 27 N. E. 1030 (1891); Smith *v.* City of Rochester, supra. If it appears that the wrongdoer held an office or employment under the municipality, if he was engaged in his personal business when he caused the injury complained of, the municipality was not liable. (19 R. C. L. 1339).

The decision of the Appellate Division is in accord with the foregoing authorities. A municipality having no authority to divert its property held for public purposes to the use of a private individual, the act of the foreman in permitting the driver in the Downing case, supra, to use the car for his own purposes was "ultra vires" whether or not the foreman had the power to bind the city as an agent under ordinary circumstances.

FEDERAL COURTS—COMITY.—In an action in Trespass to try title to an undivided one-third interest in a certain tract of land in Jefferson County, Texas, Plaintiffs in error claim title first through a conveyance from Mary Green executed in 1850; second through a judgment obtained in the District Court of Hardin County, Texas, and third by operation of the Statute of Limitations. Defendants claim title through the heirs at law of Mary Green and also rely on possession under Statute of Limitations. *Held,* for the defendants. Where Federal court first construes a state statute, as to construction of which State Courts' decisions were conflicting, it is not thereafter obliged to follow contrary decision of highest State Court; but where later decisions of State Court have become a rule of property, in order to avoid conflict between State and Federal Jurisdiction, Federal Court should recede from former decision. Judgment affirmed. Andrus *v.* Hutchinson, 17 Fed. (2) 472, (C. C. A. 5th, 1927).

The question of the construction of a Texas Statute, Laws 1907 C. 865, sec. 1, Amending Rev. St. 1895, Art. 2312, was involved and the United States Circuit Court held that by virtue of this act defect in Deed was cured and the deed was valid and admissible in evidence, Downs *v.* Blount, 170 Fed. 15, (C. C. A. 5th, 1909). Subsequently the Supreme Court of Texas, Holland *v.* Votaw, 103 Tex. 534, 131 S. W. 406 (1910), decided, in refusing a writ of error to Court of Civil Appeals, that the act of 1907 (supra) does not undertake to validate conveyances by married women that before were invalid, even where the invalidity consists only of want of proper acknowledgment. After decision by State Court the case of Downs *v.* Blount, Blount *v.* Downs, 194 F. Ed. 1020 (C. C. A. 5th, 1912) came back to Circuit Court and opinion originally handed down was adhered to. A writ of certiorari was denied by U. S. Supreme Court 226 U. S. 609, (1912). When the principal case was brought on appeal. Court stated * * * Where a Federal Court has first construed a State Statute, it is not obliged thereafter to follow a decision of the Supreme Court of the State to the contrary, although * * * We prefer now to recede from the decision in Downs *v.* Blount, and to follow the Texas decisions, and to hold that the deed in this case was absolutely void and conveyed no title. In another case, John