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Federal Courts--Comity (Andrus v. Hutchinson, 17 F.2d 472 (5th Cir. 1927))

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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

Deere Plow Co. *v.* Mowry, 222 Fed. 1 (C. C. A. 6th, 1915), it was held that "it is only to a settled rule of a State Court applicable to the *precise* facts disclosed by the record that Federal Court should yield its own judgment."

The weight of the authority seems to be that where there has not been a final adjudication by the highest court of State the Federal Courts will make their own rule and are bound thereby. Dernberger *v.* B. & O. R. R., 243 Fed. 21, (C. C. A. 4th, 1917); U. S. *v.* Cargel, 263 Fed. 856, (C. C. A. 8th, 1920); John Deere Plow Co. *v.* Mowry supra, Karch Co. *v.* Adams, 231 Fed. 950, (C. C. A. 6th, 1916).

Better Rule would seem to be that in construing a State Statute the Federal Courts should for sake of harmony lean to agreement with State Court. Pineland Club *v.* Roberts, 213 Fed. 545, (C. C. A. 4th, 1914); Holden *v.* Circleville Light & Power Co., 216 Fed. 490, (C. C. A. 6th, 1914).

CRIMINAL LAW—HOMICIDE—INTOXICATION AS A DEFENSE—The defendant was charged, in the indictment and on the trial was convicted, of killing one Mahaira while engaged in the commission of a felony, to wit, the crime of robbery, upon the person killed. Evidence as to the defendant's intoxication was adduced as a defense and the court charged that the defendant could be convicted of first degree murder or acquitted. An appeal is brought on a refusal to charge as to the different degrees of homicide. *Held,* that since a conviction of homicide was dependent upon specific intent, it was error to refuse the charge as to intoxication. Judgment reversed and new trial granted, three judges dissenting, the dissenting opinion is apparently based on the conclusion that no intoxication was shown by the evidence and that therefore the conviction should be affirmed. People *v.* Koerber, 244 N. Y. 147, 155 N. E. 97 (1926).

Voluntary intoxication has not always been considered a defense in a criminal prosecution "He who is guilty of any crime whatever, through his voluntary drunkenness, shall be punished for it as much as if he had been sober." 1 Hawk. P. C. ch. 1 par. 6. In fact, some old decisions, no longer law, hold that voluntary drunkenness is an aggravation of the crime; Beverly's Case, 4 Coke 123 B. 125 A; 4 Black. Com. 25; State *v.* Thompson, Wright (Ohio) 617 (1834). This rule was apparently based on the theory that voluntary intoxication is, in itself, a wrongful act, for the immediate consequences of which the law will hold the party liable. Lew U. S. Crim. Law 405; O'Herrin *v.* State, 14 Ind. 420 (1860). But settled insanity produced by habitual intoxication is a defense to crime to the same extent as insanity produced by other causes. State *v.* Potts, 100 N. C. 457, 6 S. E. 657 (1888); State *v.* Kavanaugh, 4 Pen. (Del.) 131, 53 Atl. 335 (1902).

The modern rule of intoxication in New York, has been embodied in the Penal Code, sec. 1220, which provides substantially that no criminal act shall be excused by reason of voluntary intoxication. But, wherever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute a particular species or degree of crime, the jury may take in to consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act. This statute has