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Municipal Corporations—Tort Liability—Conduct of Parks

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thing to make the burglary possible, since he would be constructively present. *State v. James* (1928), 165 La. 822, 116 So. 199.

The facts of this case are not given in the report; but if its language is to be believed it goes farther than the ordinary cases of constructive presence in which the accused has acted in aiding the accomplishment of the crime; in the principal case the accused is held where he has been a party to a conspiracy, but has gone no farther than appearing in a location with the unexpected purpose of assisting in the perpetration of the crime.

Under the rules of the common law, for one to be guilty as a principal in the second degree it is necessary that he shall have been present at the commission of the crime. But this presence need not be actual; it may be constructive. Clark, *CRIMINAL LAW*, p. 112. Ordinarily the accused is held if, contemporaneously, he has acted in aid of the felony, although not actually present. *State v. Talley* (1893), 102 Ala. 25, 15 So. 722; *Knight v. State* (1924), 165 Ark. 226, 263 S. W. 782. Common methods which would render the accused constructively present are keeping watch, giving information, preventing warning, and leaving a post of duty in order to facilitate the commission of the offense. In *People v. McCourtney* (1923), 307 Ill. 441, 138 N. E. 857, it was held that one who acts as a lookout and assists in an attempted burglary is a principal in the commission of the crime.

In support of the principal case the accused has been held as a principal where he is so situated when the crime is committed as to be able to assist in its commission. *U. S. v. Boyd* (1890), 45 F. 851; *Gilbert v. State* (1916) 79 Tex. Cr. 523, 186 S. W. 324.

But the mere fact that one is a party to a conspiracy to commit a felony does not in itself show constructive presence. *Barnett v. State* (1904), 46 Tex. Cr. 459, 805 S. W. 1013; *Carey v. State* (1924), 194 Ind. 626, 144 N. E. 22. Nor will the mere presence of a person be sufficient to constitute him a principal, unless there is something in his conduct showing a design to encourage, incite, or in some manner aid, abet, or assist the actual perpetration of the crime. *People v. Barnes* (1924), 311 Ill. 559, 143 N. E. 445.

In *Commonwealth v. Knapp* (1830), 9 Pickering (Mass.) 496, 20 Am. Dec. 491, it was held that if a conspirator be in a situation to assist the perpetrator at the time the crime was committed, the burden is on the conspirator to rebut the presumption that he was then to carry into effect the concerted crime.

It is thus to be inferred that it is sufficient that the accused was so situated as to aid in the commission of the crime and had merely formed the purpose of assisting in the crime. No act on his part is necessary to hold him as a principal where his location coincides with a purpose of assistance. S. E., '30.

MUNICIPAL CORPORATIONS—TORT LIABILITY—CONDUCT OF PARKS.—Plaintiffs sue city of Waco, Texas, for own benefit and as best friend, for minor daughter, who was injured when a municipal park employee negligently blocked the road while she was riding in a car on one of the driveways of Cameron Park in defendant city. *Held*, that maintenance of a public park

by a city is a proprietary function exercised primarily for the peculiar advantage of the inhabitants of the municipality, and negligence is imputed to the city with respect to the safety of those in lawful use of the park so as to furnish ground of liability for resulting injury. *City of Waco v. Branch* (Tex. 1928), 5 S. W. (2d) 498.

With the exception of South Carolina, all courts concede that a municipal corporation can act in two capacities, one governmental and the other proprietary. There is no liability for the negligent performing of governmental functions, because the city is then merely acting as the agent of the State. *Vilas v. Manila*, (1910), 220 U. S. 345, 55 L. Ed. 491, 31 S. Ct. 416; *Curren v. Boston* (1890), 151 Mass. 505, 24 N. E. 781. But in the administration of those powers and duties concerning matters of peculiar advantage to the inhabitants of the city, from which matters various individual members of the public derive benefit but casually, the city acts in its proprietary capacity and is liable for its failure to exercise ordinary care. *Harris v. District of Columbia* (1921), 256 U. S. 650, 65 L. Ed. 1146, 41 S. Ct. 610; *Hunt v. Boston* (1903), 183 Mass. 303, 67 N. E. 244; *Oakes Mfg. Co. v. New York* (1912), 206 N. Y. 221, 99 N. E. 540.

The rule is that no liability attaches for torts committed by servants of a municipal corporation in connection with the maintenance of parks, upon the assumption that parks are maintained for the benefit of the public at large. *Keller v. Los Angeles* (1919), 179 Cal. 605, 178 P. 505; *Kerr v. Brookline* (1911), 208 Mass. 190, 94 N. E. 257; *Emmons v. Virginia* (1922), 152 Minn. 295, 188 N. W. 561. It is generally held that municipalities, in establishing and maintaining public parks, act in their governmental and not in their proprietary capacity, *Godfrey v. City of Shreveport* (1928), 6 La. App. 356; *Hensley v. Incorporated Town of Gowrie* (Ia., 1927), 212 N. W. 714.

In *Vanderford v. Houston* (1926), 286 S. W. 568, an earlier Texas case, the court decided that no liability attached in a case similar to the principal one; but it was pointed out that the charter issued to the city of Houston expressly prescribed that the maintenance of parks was a governmental function. In result and legal effect that case is, however, contrary to the principal case, for by Rev. Stat. Tex., 1925, Art. 1175, the maintenance of parks by a municipality is made a governmental function. But it is possible that the Texas Court of Civil Appeals in the principal case through some oversight, overlooked that statutory provision.

A few states have decided in accord with the holding of the principal case and contrary to the general rule. In New York it is held that the maintenance of a public park by a city is a proprietary function, because it is exercised primarily for the peculiar advantage of the inhabitants of the municipality. *Van Dyke v. Utica* (1922), 203 App. Div. 26, 196 N. Y. S. 277; accord, *Krause v. Springfield* (1914), 18 Ohio N. P. N. S. 129.

Some courts have maintained liability on facts similar to those in the principal case on grounds other than a breach of duty while acting in a proprietary capacity. *Seattle v. Dutton* (Wash., 1928), 265 P. 729, for example, recognizes the dual nature of municipal corporations with reference to tort liability, but evades the problem raised by this dual nature and holds the city liable. *Norberg v. Hagna* (S. D., 1923), 195 N. W. 438, like-

wise recognizes the fact that a city may act in two capacities, but attaches liability because "the same law imposing liability on a municipal corporation for injuries due to defective conditions in highways imposes a duty upon the municipal corporation to keep its public parks in a reasonably safe condition for all who frequent them." S. H., '30.

STATUTES—CONSTITUTIONALITY—UNCERTAINTY IN TITLE.—The plaintiff sought to establish the paternity of her illegitimate child under laws of Missouri 1921, p. 117, which described the manner in which a bastard's paternity could be established. The title to the act upon which the plaintiff relied reads:

"An act to repeal Sections 311, 312 and 314 of Article XV, of Chapter 1 of the Revised Statutes of Missouri for the year 1919, entitled 'Descents and Distributions,' and to enact four new sections in lieu thereof, all relating to the descents and distributions of estates and to form a part of the said Article XV of said Chapter 1, said sections to be designated and numbered, respectively, as Sections 311, 311a, 312 and 314." *Held*, the act is unconstitutional because it violates Article IV, Section 28, of the Missouri Constitution, which reads: "No bill . . . shall contain more than one subject, *which shall be clearly expressed in its title.*" *Southward v. Short* (1928), 8 S. W. (2d) 903.

In ruling for the defendant, the Court held the statute unconstitutional for these reasons: (1) the title to the bill contained a wrong numbering of a section of the Revised Statutes, since Art. XIV of Chap. 1 is referred to as Article XV; (2) the substance of the statute does not seem logically to fit under "Descents and Distributions."

The provision in the Missouri Constitution is a typical one, a similar provision is to be found in the constitutions of most states. Const. Ala., Sec. 45; Const. Ill., Art. 4, Sec. 11; Const. N. Y., Art. 3, Sec. 16. The provision has for its foundation, the Court says in quoting from COOLEY on Constitutional Limitations, the purpose of preventing fraud on the legislature and surprise on the people in considering and voting upon a bill. The subject which a proposed bill embodies is to be presented clearly to the legislature and to the people.

The constitutional provision in question, then, is well founded in sense. But its application in the instant case is questionable. The method used *i.e.*, referring to the statute by number, is one which has the sanction of the courts. "The practice of amending statute laws by reference to the sections contained in the volume of authorized revisions of the state is the established law." *Burge v. Wabash R. R.* (1912), 244 Mo. 76, 148 S. W. 925; *State v. Doerring* (1905), 194 Mo. 92 S. W. 489; *State v. Murlin* (1897), 137 *State v. Doerring* (1905), 194 Mo. 398, 92 S. W. 489; *State v. Murlin* (1897), 137 Mo. 297, 38 S. W. 923; *State v. Broadnax* (1910), 228 Mo. 25, 128 S. W. *guson v. Gentry* (1907), 206 Mo. 189, 104 S. W. 104. Not another case has been found which holds unconstitutional a statute because of a mistake in numbering the section being amended. The probability is that such mistakes are very rare. The substitution of XV for XIV should not give the court