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Municipal Corporations—Operation of Fire Department—Liable for Negligence of Employees

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fair. The return answered fully both grounds. At the hearing in the district court, the petitioner offered no proof in support of the second ground and the Court ruled against him on the first. The petitioner appealed to the Circuit Court of Appeals, and it affirmed the decision.

Later, the second petition was presented to the same district court. In it the petitioner relied entirely on the second ground set forth above. The return denied the charge and set up the prior petition and proceedings thereon as a bar to the second petition. The district court ruled that the doctrine of *res judicata* applied and held that the decision in the first case was conclusive in the second. On appeal to the Circuit Court of Appeals, the decision was affirmed.

The Supreme Court held that the doctrine of *res judicata* does not apply to a refusal to discharge a prisoner on habeas corpus. That in those courts where the prisoner presents a second petition, the weight to be given to the prior refusal is to be determined according to a sound judicial discretion, guided and controlled by a consideration of whatever has a rational bearing on the subject.

The judgment was affirmed, however, on the ground that the case was one in which, according to a sound judicial discretion, controlling weight must have been given to the prior refusal. The petitioner was making an abusive use of the writ of habeas corpus by withholding proof on one of the grounds set up in the first petition, and then attempting to use such proof to support a second petition.

MUNICIPAL CORPORATIONS—OPERATION OF FIRE DEPARTMENT—LIABLE FOR NEGLIGENCE OF EMPLOYEES.

A peculiar and startling decision is handed down by the Supreme Court of Florida in the case of *Marxwell v. City of Miami*, 100 So. 147. The plaintiff sued the City of Miami to recover damages for injuries sustained when his automobile, which he was driving, was struck by an automobile used by the fire department of the city to take officers of the department to a fire. At the time of the accident, the city automobile was on its way to a fire.

The plaintiff alleged that the automobile was being driven in a wanton, reckless and negligent manner. The City demurred to the petition, relying on the doctrine that a municipality is not liable for injuries received by persons from its agents while engaged in the performance of a purely governmental duty. The trial court sustained the demurrer but the case was reversed by the Supreme Court.

Whitfield, P. J., says: "Whether the operation of a fire department by the city may be technically denominated a governmental or a corporate function, the rule in this State is that a municipality is liable for injuries caused by

negligence in not keeping its streets in a reasonably safe condition for lawful uses, and for injuries caused by negligent operations or conduct upon the streets that amount to a nuisance * * * .

"The operation upon the public streets of an automobile as a part of the fire extinguishing equipment of a city is not such an essential or exclusive governmental function as to exempt the city from liability for injuries to persons lawfully using the streets when such injuries are solely caused by the grossly negligent manner in which the automobile is driven at a high and dangerous rate of speed upon the streets on which persons are lawfully traveling on foot or in permissible vehicles * * * . The public duties of municipalities are by law required to be performed so as to do no injury to private rights that is not immediately essential to conserve the public peace, health, safety, morals, and general welfare * * * .

"An exertion of municipal authority or of the police power is subject to the provisions of organic law that are designed to conserve private rights. In the exercise of the police power, property and individual rights may be interfered with or injured or impaired in the manner and to the extent that is reasonably necessary to conserve the public good. An unreasonable and unnecessary exertion of municipal authority or of the police power in the manner or extent in which private, personal or property rights are curtailed or impaired, violates organic law in that it deprives persons of liberty and property without authority or due process of law."

For these reasons the Judge goes on to say, the principles of non-liability and *damnum absque injuria* do not apply when property, etc., is injured in a manner and by acts not reasonably necessary to preserve the public safety and welfare.

The fallacy of the opinion seems to rest on the interpretation the Judge gives to the principles of non-liability and *damnum absque injuria*. The very purpose of these principles seems to have been to protect the municipality from the negligent and unreasonable conduct of its agents whom the city had employed to carry out its governmental duties. The doctrine does not free the agents from liability but merely protects the city, which having these duties to perform in its governmental capacity, must employ someone to do them.

If the decision in this case is permitted to prevail throughout the United States, which is indeed unlikely, the result will be that the barriers which have protected municipalities in the performance of their governmental duties will be torn down and such municipalities will be constantly in court. Such a result will prove detrimental to the best interests of the country and add another burden to the already harassed tax-payer.