1043.

FIREMEN—MUNICIPALITY LIABLE FOR NEGLIGENCE THEREOF IN OPERATING FIRE APPARATUS WHEN RETURNING FROM FIRE —SECTION 3714-1, G. C. LIMITED BY PROVISO OF SECTION 3741-1, G. C. ENACTED BY 90TH GENERAL ASSEMBLY.

SYLLABUS:

1. *The proviso of section* 3714-1, *General Code, enacted by the* 90th *General Assembly, operates to limit the general liability which is imposed upon municipalities by section* 3714-1, *General Code.*

2. *A municipal corporation is liable for the negligence of members of the fire department in operating fire apparatus when returning from a fire or other emergency alarm.*

COLUMBUS, OHIO, July 18, 1933.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your request for my opinion relative to Amended Senate Bill No. 105. The questions are as follows:

> "1. Does the proviso operate to limit the liability of the municipality indicated by the language of the first paragraph of Enacted Section 3714-1 G. C., filed April 14, 1933?
>
> 2. Are members of a municipal Fire Department exempt from liability when returning from a fire or other emergency alarm?"

In my opinion No. 1010, rendered July 1, 1933, I was called upon to construe section 3714-1, General Code, enacted by the 90th General Assembly, signed by the Governor April 13, 1933, and filed in the office of the Secretary of State April 14, 1933. Section 3714-1 reads as follows:

> "Every municipal corporation shall be liable in damages for injury or loss to persons or property and for death by wrongful act caused by the negligence of its officers, agents, or servants while engaged in the operation of any vehicles upon the public highways of this state under the same rules and subject to the same limitations as apply to private corporations for profit but only when such officer, agent or servant is engaged upon the business of the municipal corporation.
>
> Provided, however, that the defense that the officer, agent, or servant of the municipality was engaged in performing a governmental function, shall be a full defense as to the negligence of members of the police department engaged in police duties, and as to the negligence of members of the fire department while engaged in duty at a fire or while proceeding toward a place where a fire is in progress or is believed to be in progress or in answering any other emergency alarm."

It is fundamental that a municipal corporation while engaged in the operation of what is classed as a governmental function is not liable for the negligence of its employes. It is obvious that newly enacted section 3714-1, General Code,

within certain limitations, removes that defense from a municipal corporation when its officers, agents, or servants are negligent in the operation of any vehicle upon the public highways of this state. However, the legislature in this section provides that the municipality could still raise that defense where the police department is engaged in police duties and within certain limitations with reference to fire departments. These limitations will be discussed in the answer to your second question. The legislature by the enactment of section 3714-1 created a liability against municipal corporations where their employes are guilty of negligence in the operation of any vehicles upon the public highways of this state, in the same manner that a private corporation would be liable for the acts of its agents within the scope of their employment. The proviso in section 3714-1 limits this liability as to policemen and firemen.

In answering your second question, I assume that your question does not relate to the personal liability of members of a fire department when returning from a fire or other emergency alarm, but rather to the liability of the municipality itself for the negligent acts of its firemen. It is clear that the newly enacted section 3714-1 does not in any way change the personal liability of members of a municipal fire department. Firemen are personally liable for their negligent acts in the same manner as they were previously to the enactment of section 3714-1. However, a more serious question arises as to the municipality itself. The first part of section 3714-1 creates what might be termed a blanket or general liability. It contains a proviso relative to policemen and expressly states that a municipality may still raise the defense that it was acting in a governmental function, "as to the negligence of members of the fire department while engaged in duty at a fire or while proceeding toward a place where a fire is in progress or is believed to be in progress or in answering any other emergency alarm." The question presents itself of whether or not these exceptions are exclusive or whether or not it can be said the return of the fire department from a fire is necessarily included within these exceptions. I am aware that in most states the liability of a municipal corporation depends upon whether or not the municipality is in the exercise of a governmental function. Also, that some courts have made a distinction between going to a fire and in returning from a fire, in the former situation holding that there is no liability and that liability attaches in returning from a fire. However, I do not feel that it is necessary to go into these cases in view of the well defined principle of statutory construction which is expressed by the maxim "expressio unius est exclusio alterius." The legislature has very clearly stated when the municipality may raise the defense of a governmental function and does not include the return from a fire. No doubt, the legislature was prompted by the view that it is unnecessary for a fire engine to return from a fire at an unreasonable rate of speed, whereas such emergency does exist in a laudable attempt to save human life and property.

The first branch of the syllabus of the case of *State, ex rel. Keller,* vs. *Forney,* 108 O. S. 463, is as follows:

> "Exceptions to the operation of laws, whether statutory or constitutional, should receive strict, but reasonable, construction."

Wanamaker, J., in the opinion at page 467 states the rule as follows:

> "But there is another rule that would forbid liberal extension of the words 'providing for tax levies' to such extent and degree as contended for by relator, and that is the well-known rule pertaining to exceptions to a general law or class. The rule is well and wisely settled that exceptions to a general law must be strictly construed. They are

not favored in law, and the presumption is that what is not clearly excluded from the operation of the law is clearly included in the opreation of the law."

Specifically answering your inquiries, it is my opinion that:

1. The proviso of section 3714-1, General Code, enacted by the 90th General Assembly, operates to limit the general liability which is imposed upon municipalities by section 3714-1, General Code.

2. A municipal corporation is liable for the negligence of members of the fire department in operating fire apparatus when returning from a fire or other emergency alarm.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1044.

APPROVAL, CERTAIN RESERVOIR LAND LEASE TO LAND AT PORTAGE LAKES, FOR THE RIGHT TO OCCUPY AND USE FOR BOATHOUSE, DOCKLANDING AND WALKWAY PURPOSES—DORA L. HACKETT.

COLUMBUS, OHIO, July 18, 1933.

HON. EARL H. HANEFELD, *Director, Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of a communication from the Chief of the Bureau of Inland Lakes and Parks, submitting for my examination and approval a certain reservoir land lease in triplicate, executed by the Conservation Commissioner under the authority conferred upon him by section 471, General Code, to one Dora L. Hackett, of Barberton, Ohio. By this lease instrument there is leased and demised to the lessee therein named, the right to occupy and use for boathouse, docklanding and walkway purposes the water front and state land in the rear thereof that is located on the east bank of Turkey Foot Lake, Portage Lakes; said water front having a frontage of fifty (50) feet, and being in section 13, Franklin Township, Summit County, Ohio.

Upon examination of this lease, which is one for a stated term of fifteen (15) years and which calls for an annual rental of six dollars ($6.00), payable semi-annually, I find that the same has been properly executed by the Conservation Commissioner and by said lessee. Upon examination of the provisions of this lease and all the conditions and restrictions therein contained, I find the same to be in conformity to leases of this kind.

I am accordingly approving this lease as to legality and form as is evidenced by my approval endorsed upon the lease and upon the duplicate and triplicate copies thereof, all of which are herewith enclosed.

Respectfully,
JOHN W. BRICKER,
Attorney General.