180.

TOWNSHIP TRUSTEES—NO LIABILITY FOR NEGLIGENT OPERATION OF TOWNSHIP FIRE APPARATUS.

SYLLABUS:

The trustees of a township are not liable in their official capacity for damages resulting from the negligent operation of fire apparatus owned by the township.

COLUMBUS, OHIO, March 2, 1933.

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

GENTLEMEN:—I am in receipt of your request for an opinion in answer to the following question:

> "Would the trustees of a township be liable for personal injury and property damage by reason of the operation of a fire apparatus owned by the township?"

The operation of fire apparatus for the protection of the lives and property of the citizens against fire, is regarded as a governmental function. Accordingly, it has been held that a municipality is not liable, in the absence of statute, for negligence in the operation of a fire department. *Frederick, Admx.,* vs. *Columbus,* 58 O. S. 538, which was approved and followed in the case of *Aldrich* vs. *Youngstown,* 106 O. S. 342. The same rule of course applies to townships.

> "Towns and townships, being involuntarily quasi-municipal corporations, are not liable for injuries to private individuals through their failure to perform public or governmental functions; nor are they liable for default, negligence, or other torts of their officers in the performance of governmental functions, nor for the torts of officers acting beyond the scope of their authority, unless such liability is expressly imposed by statute."

38 Cyc. 640.

A board of township trustees not being liable in its official capacity in such cases at common law, the question arises as to whether liability is imposed by statute.

Section 3298-17, General Code, reads as follows:

> "Each board of township trustees shall be liable, in its official capacity for damages received by any person, firm or corporation, by reason of the negligence or carelessness of said board of trustees in the discharge of its official duties."

As this statute is in derogation of the common law, it must be strictly construed. *Commissioners* vs. *Transfer & Storage Co.,* 75 O. S. 244; *Ebert* vs. *Commissioners,* 75 O. S. 474; *Lexa* vs. *Zmunt, et al.,* 123 O. S. 510. This statute was passed in 1915 as part of an act which applied only to highways. The title of this act is "An act to provide a system of highway laws for the State of Ohio, and to repeal all sections of the General Code, and acts inconsistent herewith." This

act appears in 105-106 O. L., pages 574 to 666, and a reading of the 305 sections included therein shows that they apply to highways only. Taking into consideration the title of the act, and the fact that section 3298-17 is a part of said act, being section 237 thereof, it seems clear that the legislative intent was to limit the application of its provisions to negligence of the board of trustees in the discharge of the official duties imposed upon it by the laws relating to highways.

The title of an act should be considered in arriving at the correct interpretation of its provisions. *Bronson* vs. *Oberlin,* 41 O. S. 476; *Harris* vs. *State,* 57 O. S. 92; *Street Railway Co.* vs. *Pace,* 68 O. S. 200; *Lexa* vs. *Zmunt, et al.,* 123 O. S. 510. The case of *Harris* vs. *State* says "these titles are part of the statutes, and are to be considered in arriving at the intent of the legislature." The case of *Street Railway Company* vs. *Pace* is especially applicable to the question we have here. In that case the court construed the statute which provided that "the same court shall not grant more than one new trial on the weight of the evidence against the same party in the same case." While the words of this statute alone do not limit its application to any particular courts, the court pointed out that it is found in Revised Statutes under chapter 5, division 3, of title 1, which title is denominated: "Procedure in the common pleas courts, and in the circuit courts on appeal." The court said on page 204:

> "While its position and place under this title is not necessarily conclusive or controlling in its interpretation, it is nevertheless significant as an aid in determining the intent and purpose of the legislature as to its scope and operation, and as to the courts to which its provisions should apply, and having been placed under this title instead of under title IV, which latter title is designated: 'Procedure in the Supreme Court, circuit courts and common pleas courts, as courts of error,' would seem to evidence an understanding and purpose on the part of the legislature that it should have effect and application as to circuit courts, only when sitting as courts of appeal or trial courts."

Section 16 of article II of the Constitution provides that no bill shall contain more than one subject, which shall be clearly expressed in the title. If section 3298-17, General Code, were construed to apply to all the official duties of the trustees, and not to be limited to those in connection with the highways, it may well be said that the act of which this section is a part contains more than one subject not clearly expressed in the title, while, under the construction I have placed upon this statute, this constitutional provision was complied with. Although this provision of the Constitution has been held to be directory, it is fair to assume that the legislature, in the enactment of this act, has complied therewith. As stated in the case of *Newton* vs. *Toledo,* 18 C. C. 756, affirmed without opinion, 52 O. S. 649:

> "The provisions of section 16, article II of the Constitution, regarding the subject of a law being clearly expressed in its title, while directory only, yet, as said in *Miller* vs. *State,* 3 O. S. 475, and in other cases, 'its purpose was to provide a permanent rule of the houses' and we are to presume that the legislature has followed the behests of the Constitution, even though merely directory, and that the purpose of the bill is clearly expressed in the title."

There is another reason why there should be no liability in the case you present. To create liability there must be a tort committed which constitutes a breach of a legal duty created by statute.

Section 3298-54, General Code, reads as follows:

> "Township trustees may establish all necessary regulations to guard against the occurrence of fires, protect the property and lives of the citizens against damages and accidents resulting therefrom, and, when a volunteer fire company has been organized for service in the township, of such character as to give assurance of permanency and efficiency, may purchase and provide, for the use of such company, such fire apparatus and appliances as may seem to the trustees advisable, in which event they shall provide for the care and maintenance thereof, and, for such purpose, may purchase, lease or construct and maintain necessary buildings; and they may establish and maintain lines of fire alarm telegraph within the limits of the township."

Section 3298-55, General Code, provides for the levy of a tax to provide for protection against fire and to provide and maintain fire apparatus and appliances and buildings and sites therefor for the use of volunteer fire companies.

Section 3298-56, General Code, provides for submitting to the electors of a township the question of issuing bonds in an amount not exceeding $20,000, for the purpose of providing fire apparatus and appliances and buildings and sites therefor for the use of volunteer fire companies.

Under these statutes, the township trustees are authorized to purchase and maintain fire apparatus and appliances for the use of a volunteer fire company where such a company has been organized for service in a township of such character as to give assurance of permanency and efficiency. When, under the authority of these statutes, the trustees of a township furnish and properly maintain and care for the fire apparatus and appliances for the use of a volunteer fire company, has not their authority ceased, and have they not fully discharged their official duty provided they were not negligent in the selection of such fire company? The only reported case I find which holds township trustees liable is the case of *Gause* vs. *Peeler, et al.,* 41 O. A. 192. This case holds that they are liable for injuries sustained as the result of a road being out of repair and unsafe for travel. An opinion by my predecessor, appearing in Opinions of the Attorney General for 1931, Vol. I, page 303, holds in effect that township trustees may protect themselves against liability by procuring liability and property damage insurance upon township owned motor vehicles and road building machinery used in the construction and repair of township roads.

This case and this opinion can have no application here, as the statutes imposing mandatory duties upon the trustees relating to improvements, maintenance and repair of roads are quite different than the statutes above quoted. The statutes under consideration here only authorize the trustees to furnish, maintain and care for fire apparatus and appliances for use by others, namely, a volunteer fire company. The trustees have no part in the operation of the apparatus. It is well settled that the powers of township trustees must be strictly construed. *Johnson* vs. *Grunkenmeyer,* 8 N. P. 274. It follows, therefore, that the operation of such apparatus is not an official duty of the trustees. If that be true, then the negligence of an agent of a volunteer fire company is not the negligence of the trustees in the discharge of their official duties, and the doctrine of *respondeat superior*

cannot apply, provided the trustees were not negligent in the selection of a fire company. As stated in *Conwell* vs. *Voorhees*, 13 O. 523:

> "Public agents, though in one sense treated as principals, are not responsible for the omissions, negligence, or misfeasances of those employed under them, if they employed trustworthy persons of suitable skill and ability, and have not cooperated in the wrong."

I am of the opinion therefore that the trustees of a township are not liable in their official capacity for damages resulting from the negligent operation of fire apparatus owned by the township.

Respectfully,
JOHN W. BRICKER,
Attorney General.

181.

APPROVAL, BONDS OF CITY OF OAKWOOD, MONTGOMERY COUNTY, OHIO—$8,000.00.

COLUMBUS, OHIO, March 2, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

182.

APPROVAL, BONDS OF WICKLIFFE VILLAGE SCHOOL DISTRICT, LAKE COUNTY, OHIO—$175,000.00.

COLUMBUS, OHIO, March 2, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

183.

APPROVAL, BONDS OF CITY OF LIMA, ALLEN COUNTY, OHIO—$33,000.00.

COLUMBUS, OHIO, March 2, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.