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Municipal Corporations--Torts--Liability of City for Assault by Employee in Charge of Repairing Street (Osipoff v. City of New York, 286 N.Y. 422 (1941))

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committed.¹⁶ This power is conferred upon him by the Constitution and cannot be limited by statute or decision.¹⁷ It does not have the retroactive effect of determining whether the judgment was erroneous.¹⁸ The highest court of the state, in deciding that the legislative branch could not encroach upon the pardoning power of the Executive, in the person of either the President or Governor, did not intend to hold that the Executive could blot out a solemn record of the judicial branch of the Government.¹⁹ Consequently, in the instant case, a pardon which is granted by the President because he is satisfied that the convicted person is innocent, has no retroactive effect on the judgment of conviction which has not been set aside nor reversed by the judicial department. The pardon merely takes away the penalty directly attaching to the offense. It does not destroy the fact that the crime was committed nor that the person had been convicted of it.²⁰ Perhaps the legislature should declare by statute that a pardon should state the reason for which it is granted, and that it should have the effect of relieving the convicted person from further punishment and from all other legal consequences of the crime. But it should not absolve a party from guilt unless the pardon was granted on the ground of innocence.²¹

S. L.

MUNICIPAL CORPORATIONS—TORTS—LIABILITY OF CITY FOR ASSAULT BY EMPLOYEE IN CHARGE OF REPAIRING STREET.—Plaintiff drove down a street in Brooklyn in a freshly painted truck. The street was being repaired by the city and there remained for vehicular traffic a narrow portion, above which were overhanging branches, likely to scratch plaintiff's truck. There were no warning notices or barriers, at the intersections to the street, indicating that there were any obstructions to be encountered. The defendant, Sisto, in charge of the group doing the repair work, ordered plaintiff to proceed under the branches. When plaintiff refused, Sisto attempted to enter the

¹⁶ *Ex parte* Campion, 79 Neb. 364, 112 N. W. 585 (1907); *People v. Larkman*, 137 Misc. 446, 244 N. Y. Supp. 431 (1930).

¹⁷ *Ex parte* Garland, 71 U. S. (4 Wall.) 333 (1866); *People ex rel. Page v. Brophy*, 248 App. Div. 309, 289 N. Y. Supp. 362 (4th Dep't 1936), *app. dism'd*, 277 N. Y. 673, 14 N. E. 384 (1938).

¹⁸ *Roberts v. State*, 30 App. Div. 106, 51 N. Y. Supp. 691 (3d Dep't 1898).

¹⁹ *In re Spenser*, 22 Fed. Cas. 921 (1878); *Roberts v. State*, 160 N. Y. 217, 54 N. E. 678 (1899); *Baldi v. Gilchrist*, 204 App. Div. 425, 198 N. Y. Supp. 493 (1st Dep't 1923); *People v. McIntyre*, 99 Misc. 17, 19, 163 N. Y. Supp. 528 (1917); *People v. Carlesi*, 154 App. Div. 481, 139 N. Y. Supp. 309 (1st Dep't 1913).

²⁰ *People ex rel. Prisament v. Brophy*, 287 N. Y. 132, 38 N. E. (2d) 468 (1941); *People v. McIntyre*, 99 Misc. 17, 163 N. Y. Supp. 528 (1917).

²¹ *Weihofen, The Effect of a Pardon* (1939) 88 PENN. L. REV. 177.

truck by force for the purpose of driving it himself, and upon encountering resistance, struck plaintiff with a shovel. In an action brought against Sisto and the municipality for damages for assault, the plaintiff had won on trial but the Appellate Division reversed. On this appeal, *held*, judgment of Appellate Division reversed. A municipality is responsible in damages for assault by its employee, when the latter acts within the scope of his authority. A city employee in charge of a group of men engaged in repairing the street has authority to regulate traffic on the street over which he has control. It is at least a question for the jury to determine whether the employee acted within the scope of his authority. The fact that the assault was willful does not preclude recovery of damages against the city. *Osipoff vs. City of New York*, 286 N. Y. 422, 36 N. E. (2d) 646 (1941).

At common law a private action did not ordinarily lie against a public corporation for negligent performance of any public duty imposed upon it by statute, unless such corporation received some profit in consideration of the duty.¹ Nor would an action lie for the personal tort of any of its officers or agents in performance of such public duty.² Today, however, municipal corporations fall within the general rule that the superior or employer must answer civilly for the negligence of his agent, occurring in the course of his employment. However, to create such liability it is necessary that the act done which is injurious to others be within the scope of the corporate powers, as prescribed by charter or statute; it must not be *ultra vires*.³ Sisto was in command of a portion of the public highway which his master was obligated to keep reasonably safe for traffic. Therefore Sisto was clothed with authority to direct plaintiff on the street and to compel compliance by all lawful means. It was at least a question of fact for the jury whether Sisto attempted to drive plaintiff's truck in order that he might not be compelled to move the city trucks and thus lose time in doing the repair work.⁴ That the act was willful does not preclude recovery.⁵ Formerly, it was thought that a corporation being an artificial person could not act from malice, or have malicious or other intent, and therefore could not be liable for a tort which required a motive and intention.⁶ It is now well

¹ *Johnston v. City of Chicago*, 258 Ill. 494, 101 N. E. 96, 45 L. R. A. (N. S.) 1167 (1913).

² *Board of Park Commissioners of City of Louisville v. Prinz*, 32 Ky. 359, 105 S. W. 948 (1907).

³ 2 DILLON, MUNICIPAL CORPORATIONS (4th ed.) 968.

⁴ The question of whether the act of the servant is within the scope of the master's business is, as every question of fact, a question for the jury, if the evidence is in conflict or if conflicting inferences can be reasonably drawn. EDGAR AND EDGAR, LAW OF TORTS (3d ed.) 81; *Craven v. Bloomingdale*, 171 N. Y. 439, 64 N. E. 169 (1902).

⁵ *Mott v. Consumer's Ice Co.*, 73 N. Y. 543 (1878), *reaff'd* in *Muller v. Hillenbrand*, 227 N. Y. 448, 125 N. E. 808 (1920); BURDICK, LAW OF TORTS (4th ed.) 183.

⁶ In the early case of *Vanderbilt v. Richmond Co.*, 2 N. Y. 479, 51 Am.

settled, however, that a corporation may be liable for a tort or wrongful act of its officer or agent, although the wrongful act is dependent upon motive, intent or malice.⁷ The master will be responsible for the acts of the servant which were within the general scope of his employment, while engaged in his master's business, and done with a view toward furthering that business, whether the act be done negligently, wantonly or even willfully.⁸ The principle of immunity of municipal corporations can find no justification in sound social policy and is one that is productive of great injustice and hardship to individuals with but slight advantage to society. Loss and damage inflicted in the course of the operation of governmental institutions ought obviously to be counted in the cost of government and carried by society rather than that unfortunate individual upon whom the loss accidentally falls.

R. K.

NATIONAL LABOR RELATIONS ACT—ENFORCEMENT AND REVIEW OF ORDERS—APPLICATION TO ADDUCE ADDITIONAL EVIDENCE.—In August, 1938, the petitioner, a Texas corporation, was ordered by the National Labor Relations Board to cease and desist from unfair labor practices¹ and to take certain affirmative action.² In June, 1939, the petitioner entered into a written stipulation with the Board agreeing to obey the order except in so far as it related to back pay, and the Board in turn agreed to accept such performance as suffi-

Dec. 315 (1847), it was held that a corporation is not liable for a tortious act committed willfully and maliciously by its servant, even though it was done under orders from the president and general manager.

⁷ *White v. International Textbook Co.*, 173 Iowa 192, 155 N. W. 298 (1915).

⁸ *Mott v. Consumer's Ice Co.*, 73 N. Y. 543 (1878); *Doscher v. Superior Fire Proof Door and Sash Co.*, 221 App. Div. 63, 222 N. Y. Supp. 629 (1st Dep't 1927).

¹ Section 8 of the National Labor Relations Act defines unfair labor practices by the employer. See 49 STAT. 452 (1935), 29 U. S. C. A. § 158 (Supp. 1941).

² The order of the Board required the petitioner to cease and desist from: (a) Discouraging membership in Oil Workers International Union, Local No. 227, or in any other labor organization, by discharging its employees or by otherwise discriminating in regard to employment. (b) In any other manner interfering with, restraining or coercing its employees in the exercise of rights of self-organization, labor union membership, collective bargaining, etc. as guaranteed by Section 7 of the Act. The affirmative directions of the order were: (a) Offer to reinstate three employees found to have been discriminatorily discharged. (b) Pay them back pay for the period from the time of discharge to date of reinstatement, less earnings during such period. (c) Post appropriate notices at its Texas City refinery where the alleged unfair labor practices had been committed.