a similar statute is in force, or where filing or recording of the chattel mortgage or conditional sale contract is constructive notice, in the majority of jurisdictions, the only methods suggested for protecting the vendor of personal property, that will be affixed to realty, are to take a real estate mortgage of the property, properly recorded, *Brennan* v. *Whitaker, supra; Tibbets* v. *Horne, supra,* or to perfect a lien upon it under the Mechanics' Lien Law. *Garven* v. *Hogue & Donaldson,* 14 W. L. Bull 175 (Ohio C.C. 1885).

Although a mechanic's lien would afford protection for the erecting of fixtures upon property, it would not create a lien upon the separate articles for the purchase price. Ohio G.C. 8310. The suggestion in the Ohio cases, *Brennan* v. *Whitaker, supra; Garven* v. *Hogue & Davidson, supra,* of perfecting a lien upon fixtures by a real estate mortgage, while affording security to the vendor against a subsequent mortgagee, is, in effect, precluding the use of conditional sale contracts of articles affixed to the realty. In the writer's opinion, there is a real need for legislation similar to Section 7 of the Uniform Conditional Sales Act, 2 U.L.A. 12, providing constructive notice to subsequent mortgagees or purchasers, by filing the contract in the office of the records of realty. With such a statute, in case of doubt whether the property, as affixed, is a chattel or fixture, the vendor could file two contracts, just as he can in a sale by mortgage file both a chattel and real estate mortgage upon the article.

ITHAMAR D. WEED

MUNICIPAL CORPORATIONS

LIABILITY OF MUNICIPAL CORPORATIONS FOR UNEMPLOYMENT INSURANCE

With the enactment of the Ohio Unemployment Compensation Act (Ohio Gen. Code 1345-1—1345-35), the municipalities of this state have been faced with a perplexing situation. The Act, in providing for exemptions, has defined the term employment as not including "service performed in the employ of any governmental unit, municipal or public corporation, political subdivision, or instrumentality of the United States or of one or more states or political subdivisions in the exercise of *purely governmental functions.*" In thus dealing with the government employee Ohio has adopted an unique course; the other states have in all instances framed their statutes so as to give complete exemption to

employees of federal, state, and municipal governments. The limitation of the exemption, in Ohio, to employees of governmental units engaged in *purely governmental functions* has resulted in a problem of no little consequence to the municipalities of the state, faced as they have been in the last several years with a struggle ot keep within budgets already strained to the limit.

Faced with the problem of interpreting the scope of the statutory exemption, the Unemployment Commission, chiefly on the basis of Opinion No. 1069 of the Attorney-General, finally concluded that employees in the following departments were exempt: Police, fire, health, street cleaning and maintenance, sewage disposal, sewer construction, garbage and waste collection as a health measure, and hospitals. The contrary was concluded as to employees connected with light plants, auditoriums, markets, stadiums, garbage collection and disposal as a revenue measure, cemeteries, operation and upkeep of sewers, parks and public property, and waterworks. Issue was joined especially on waterworks, the cities contending that the employees thereof were exempt from the act because engaged not in a proprietary, but in a purely governmental function. Subsequently the Attorney-General, in Opinion No. 1341, reaffirmed his previous decision, holding such employees to be within the scope of act.

Unsuccessful in this approach, the municipalities then shifted the argument to a technical one of the proper construction of the exemption clause itself, claiming that the phrase "in the exercise of purely governmental functions" modified the word "instrumentality" only. This contention they based upon the grammatical construction of the exemption clause, reinforced by the theory that since the instrumentalities of government may exercise either governmental or proprietary functions, the qualifying phrase has clear meaning in relation to the use of the word "instrumentality," and, therefore, that employees coming under other divisions of the clause are not within the act regardless of whether or not such employees are engaged in "purely governmental functions". Quite recently the Attorney-General, in Opinion No. 1769, dealing with enforcement of the act against federal agencies, took occasion to answer this contention with the contrary one that the qualifying phrase modifies the entire subsection. But while representing the most recent development in the problem, and undeniably carrying difficulties of its own, this matter of the proper reading of the provision seems to be but a temporary phase of the underlying struggle over the question of what constitutes "governmental" and what "proprietary" in relation to specific functions now carried on by Ohio municipalities.

In support of their position the cities have relied heavily upon the case of *Brush* v. *Commissioner of Internal Revenue*, 300 U.S. 352, 575 Sup. Ct. 495, 81 Law Ed. 691 (1937), which involved the power of Congress to tax an employee of the New York City Municipal Water Supply. The Court, through Mr. Justice Sutherland, there held that such an employee was not subject to the federal income tax, declaring also that the cases on tort liability are not authoritative in the field, and incidentally dismissed the test of using the presence or absence of profit as a factor in determining the classification of a particular function as governmental or proprietary. The Attorney-General and, through him, the Commission, on the other hand have looked for guidance to the principles controlling municipal liability in tort; this seems clear both from the Attorney-General's specific reliance upon some of the Ohio cases in this field and from the high degree of correlation between the rulings above indicated and the Ohio decisions as a whole. Analysis of these decisions on tort liability of cities reveals that in the construction and operation of public utilities, such as light power and heating plants, and water works, municipalities are deemed to act in their private or proprietary capacities. *City of Piqua* v. *Morris*, 98 Ohio St. 42, 127 N.E. 300 (1918); *City of Salem* v. *Harding*, 121 Ohio St. 412, 169 N.E. 457 (1927), *dictum*. This view was clearly embraced in the *dictum* contained in the late case of *City of Niles* v. *Union Ice Corp.*, 133 Ohio St. 169 (1938), which decision was announced almost a year after the *Brush* case was handed down. So also have the courts of Ohio held the following to be proprietary in nature: Cemeteries, *City of Toledo* v. *Cone*, 41 Ohio St. 149 (1884); operation and upkeep of sewers, *City of Portsmouth* v. *Mitchell Manufacturing Co.*, 113 Ohio St. 250, 148 N.E. 846 (1935); markets, *City of Wooster* v. *Arbenz*, 116 Ohio St. 281, 156 N.E. 210 (1927), *dictum*. The bases of such holdings are that such functions are not supported out of the general funds, nor are they necessary to the safety, welfare and health of the general public, and that with the exception of the operation of sewers the services are in part at least in competition with private business.

On the other hand the Ohio decisions point to the conclusion that the following functions are deemed governmental: parks, *Selden* v. *City of Cuyahoga Falls*, 132 Ohio St. 223, 6 N.E. (2d) 976 (1937); *City of Cleveland* v. *Walker*, 52 Ohio App. 477, 3 N.E. (2d) 990 (1936); sewer construction, *City of Salem* v. *Harding*, 121 Ohio St. 412 169 N.E. 457 (1929); hospitals, *Lloyd* v. *City of Toledo*, 42 Ohio App. 36, 180 N.E. 716 (1931); garbage collection and disposal, *State ex rel. Moock* v. *City of Cincinnati*, 120 Ohio St. 500, 166 N.E.

583 (1929); *Sarley* v. *City of Cleveland*, 30 Ohio Law Rep. 640 (1929); collection of ashes, *Shilling* v. *City of Cincinnati*, 22 Ohio C. C. (N.S.) 526 (1915); maintenance of streets and highways, *City of Wooster* v. *Arbenz*, 116 Ohio St. 281, 156 N.E. 210 (1927); see *Hamilton* v. *Dilley*, 120 Ohio St. 127, 165 N.E. 715 (1929); and street cleaning, *City of Akron* v. *Butler*, 108 Ohio St. 122 (1923). Thus in only one situation has there been a departure from the administrative policy of interpreting the exemption clause in the light of the tort liability cases; though the operation of parks is, in Ohio, deemed governmental so far as liability for tort is concerned, the Attorney-General and the Commission have declared it to be proprietary for the purpose of the Unemployment Insurance Act.

This divergency in the approach of the cities on the one hand and the state enforcement officials on the other poses this question: Which of the two approaches is the most pertinent in interpreting the exemption clause? In considering the propriety of the instrumentality analogy it is important to note that the theory therein is concerned with the optimum relation of one sovereign to another in a dual form of government. The underlying theory therein looks to an altogether different problem; consequently, the use of such an analogy in attempting to set a standard in the problem under discussion seems inapplicable. As a basis of comparison, the analogy to the tort cases comes much closer, for the tort field deals with the relation between government and the individual, where, as here, the municipality is engaged in various lines of activity.

Indeed, in the interpretation of the exemption provision of the Unemployment Insurance Act there is much to be said in support of even stricter delimitation of the scope of the term governmental than has been made in the tort liability cases. Support for such a view can be found both in the legislature's use of the restrictive word "purely" in the exemption subsection and in recent legislation on the matter of municipal liability in tort. For the statutes have gone beyond decisions of the courts and as a result have imposed liability in fields presumed to be governmental. By Ohio Gen. Code, Sec. 3714 liability is imposed with respect to street maintenance; while Sec. 3714-1 imposes liability upon cities for the acts of its servants in the operation of vehicles upon the public highways, save only in the case of police and fire department activities.

Furthermore, as "state socialism" gains ground, and as municipal corporations expand continually into those activities which were once considered the area of private enterprise, it seems not only reasonable but necessary to impose in such situations the same business costs upon

the government as are placed upon the private employer. See Borchard, "Government Liability in Tort," 34 Yale L. J. 129 (1924). Such a tendency is already marked in the field of Workmen's Compensation wherein employees of state and municipal units are afforded protection against accident. The expected result is that the double standard implicit in the ancient concept of immunity of government has become increasingly untenable. In the words of Judge Wanamaker contained in *Fowler* v. *City of Cleveland*, 100 Ohio St. 158, 126 N.E. 72 (1919): "The whole doctrine of immunity given to a sovereign state was based upon the assumption of the divine right of kings—a king can do no wrong, he is infallible, or, if he do wrong, no subject has any right to complain. This doctrine has been shot to death on so many different battlefields that it would seem utter folly now to resurrect it, even by the judgment of a court of last resort."

ROBERT G. ROSENBERG

NEGOTIABLE INSTRUMENTS

RECOVERY BY DRAWEE BANK OF PAYMENT ON A CHECK WITH FORGED INDORSEMENTS

Defendant bank, a purchaser for value, indorsed guaranting prior restrictive indorsements and received payment of a check drawn by the plaintiff on itself payable to four payees. The indorsements of three of the payees were forged by the fourth. The plaintiff brought an action for the recovery of the money paid out on the check. *Held*: the plaintiff may recover unless precluded because of waiver, estoppel, or laches on its part. Whether recovery is barred is a jury question. *State Planters Bank & Trust Co. of Richmond, Va.* v. *Fifth-Third Union Trust Co. of Cincinnati*, 56 Ohio App. 309, 10 N.E. (2d) 935 (1937).

The Uniform Negotiable Instruments Law was passed by the Ohio legislature in 1902. Only a few of the many questions which may arise under the act have been passed on by our appellate courts. Heretofore there has been no direct adjudication by any Ohio appellate court on the question of the right to the recovery of payment by the drawee on an instrument with a forged indorsement although the question arose in the *Provident Savings Bank* v. *The Fifth-Third Union Trust Co.*, 43 Ohio App. 533, 183 N.E. 885 (1932). In that case it was unnecessary to directly pass on the question as the drawee was held unable to recover on other grounds.