2184.

MUNICIPAL CORPORATION—LIABLE FOR INJURIES CAUSED BY EMPLOYE THEREOF IN OPERATION OF PRIVATELY OWNED AUTOMOBILE WHEN.

SYLLABUS:

A municipal corporation is liable in damages for injury or loss to persons and property sustained through the operation of his privately owned automobile by an officer or employe of the corporation when engaged upon the business of the municipal corporation in the scope of his employment, whether or not such official or employe was receiving any allowance or compensation for the use of his own car on business of the municipality.

COLUMBUS, OHIO, January 19, 1934.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion upon the following question:

> "Would a municipal corporation be liable in damages for injury or loss to persons and property sustained through the operation of his privately owned automobile by an officer or employe of the corporation when engaged upon the business of the municipal corporation, whether or not such official or employe was receiving any allowance or compensation for the use of his own car on business of the municipality?"

Section 3714-1, General Code, as enacted in Amended Senate Bill No. 105 by the 90th General Assembly, 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 the established law in Ohio that in the absence of statutory provision to the contrary, a municipality is not liable for injuries occurring in connection with the exercising of governmental functions, but is liable for torts committed in connection with the exercise of its private or proprietary functions under the same provisions of law that would render a private corporation liable in damages. As stated by Marshall, C. J., in the case of *Wooster* vs. *Arbenz,* 116 O. S. 281 at page 283:

"This court is for the present committed to the doctrine that there is no liability on the part of a municipality in actions for tort, if the function exercised by the municipality at the time of the injury to the plaintiff was a governmental function. The nonliability for governmental functions is placed upon the ground that the state is sovereign, that the sovereign cannot be sued without its consent, and that the municipality is the mere agent of the state and therefore cannot be sued unless the state gives its consent by legislation. Prior to 1912 the state of Ohio was entirely immune from judgments upon any ground, and although the people at that time made provisions by amendment to Section 16 of the Bill of Rights, whereby suits might be brought against the state, the provision was not self-executing, and required legislation, which has never been enacted.

The court is equally committed to the doctrine that if the function being exercised is proprietary and in pursuit of private and corporate duties, for the particular benefit of the corporation and its inhabitants, as distinguished from those things in which the whole state has an interest, the city is liable."

This is also the general rule of law in other jurisdictions. See McQuillan on Municipal Corporations; Dillon on Municipal Corporations. This principle of law has in recent years been severely criticized by legal scholars. It is a remnant of the common law and has its foundation in a medieval English theory that "the King can do no wrong." Since then, many courts have placed this doctrine of non-liability upon the grounds of public policy. There has, however, arisen a strong feeling that public policy should not and does not require that where a citizen is injured through no fault of his own by an agent of a municipal corporation, engaged in the business of such municipal corporation, that the entire loss should fall at the door of the unfortunate citizen alone. A severe denunciation of such a legal philosophy is eloquently presented by Professor Borchard in a series of articles appearing in Vols. 34 and 36 of the Yale Law Journal. The following statements by the author are interesting:

"* * * This hardship becomes the more incongruous when it is realized that it is greatest in countries like Great Britain and the United States, where democracy is assumed to have placed the individual on the highest plane of political freedom and individual justice. * * *

Realization spasmodically by the courts, and occasionally in particular cases by legislatures, of the unwarranted hardship often worked by the rule that the State is not liable for the torts of its officers, and the desire to square the demands of justice with the maintenance of a legal anachronism canonized as a legal maxim, have brought about the result, by the introduction of fictions, artificial distinctions and concessions to expediencey, that the law governing the redress of the individual against the public authorities, national, State, or municipal, for injuries sustained in the exercise of governmental powers, is in a state of incongruity and confusion unique in history."

It was no doubt the intention of the legislature to partially remedy this situation by the enactment of section 3714-1, General Code, supra. There is also no doubt but that this section applies where an agent of a municipal corporation is

driving a motor vehicle which is owned by such subdivision upon business of the municipality. Your question raises the further point that such vehicle is not owned by the municipality. It is true that section 3714-1 being in derogation of the common law, should not be extended beyond the plain import of the language used in the statute. However, it is to be noted that the statute uses the language "in the operation of any vehicle upon the public highways." The fact that the person driving may not be allowed any compensation is indicative that he is not driving his car upon business of the municipality. The statute requires that the person be engaged in the business of the municipality. Thus, the statute does not create absolute liability against the municipality but rather a liability based upon the doctrine of *respondent superior.* However, in your letter you assume that such vehicle is driven upon the busineess of the municipality. In the interpretation of any statute, it is wise to inquire into the evil that the legislature intended to remedy by the enactment of the new law. Clearly, as pointed out in the first part of this opinion, the legislature intended to protect persons injured by employes of a municipality through the negligence of such employes. It is the affairs of the municipality that causes these employes to be in a position where it is possible for them to injure innocent people. The language is broad enough in itself to cover citizens where the car is privately owned, and together with the obvious intent of the legislature, it would follow that the municipality would be liable in the cases presented in your inquiry.

In this connection, it might be well to point out that this opinion in nowise is intended to be a limitation on the non-liability of a municipal corporation for the acts of policemen and firemen as expressly contained in the proviso of section 3714-1, General Code.

It is therefore my opinion, in specific answer to your question, that a municipal corporation is liable in damages for injury or loss to persons and property sustained through the operation of his privately owned automobile by an officer or employe of the corporation when engaged upon the business of the municipal corporation in the scope of his employment, whether or not such official or employe was receiving any allowance or compensation for the use of his own car on business of the municipality.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2185.

COSMETOLOGY ACT—SANITARY AND HEALTH RULES ADOPTED BY COSMETOLOGY BOARD NOT APPLICABLE TO FREE DEMONSTRATORS WHEN—SCHOOL OF COSMETOLOGY DEFINED.

SYLLABUS:

Where manufacturers of cosmetic creams or permanent wave machines employ demonstrators, who give freee facials and free demonstrations for the purpose of selling such products and appliances, such demonstrators are not engaged in the practice of cosmetology as defined by the Cosmetology Act, Sections 1082-1 *to* 1082-23, *inclusive, of the General Code, and hence are not amenable to the sanitary and health rules promulgated by the State Board of Cosmetology, nor are such persons conducting or operating a "school of cosmetology."*