4489.

MUNICIPALITY—ELEVATOR INSPECTION ORDINANCE NON-EFFECTIVE BEYOND TERRITORIAL LIMITS—WARRENSVILLE TUBERCULOSIS HOSPITAL REQUIRED TO PAY FEE TO STATE FOR ELEVATOR INSPECTION.

SYLLABUS:

1. *Ordinances of a municipality providing for the inspection of elevators have no effect beyond the territorial limits of such municipality.*

2. *The City of Cleveland in the operation of elevators in its tuberculosis hospital in Warrensville, Ohio, is subject to the provisions of Sections* 1038-1, *et seq., General Code, and is required to pay to the Division of Factory and Building Inspection the statutory fee for the inspection of such elevators.*

COLUMBUS, OHIO, August 1, 1935.

HON. O. B. CHAPMAN, *Director, Department of Industrial Relations, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your letter requesting my opinion as to whether the city of Cleveland, in the operation of elevators in the Cleveland Tuberculosis Sanitarium located in Warrensville, Ohio, is amendable to the provisions of House Bill No. 406 (section 1038, et seq., General Code) enacted by the 90th General Assembly. Your letter reads in part as follows:

> "By virtue of this Section the City of Cleveland are claiming they are not required to register elevators owned by them with this Division, even though the same are located at the Cleveland Tuberculosis sanitarium, Warrensville. Inasmuch as Warrensville is located outside the corporate limits of the City of Cleveland this Department billed the City of Cleveland for $1.00 each covering the registration of the seven elevators located in Warrensville."

A determination of the questions presented by your letter requires an examination of House Bill No. 406 which, among other things, regulates the inspection of elevators used in Ohio and imposes certain duties upon the Department of Industrial Relations and the Division of Factory and Building Inspection in connection with the enforcement of the provisions contained in that act.

Section 1038-1, General Code, defines certain terms used in the act and reads:

> "That for the purpose of this act, 'department' shall mean the department of industrial relations of the state of Ohio.

'Division' shall mean the division of factory and building inspection of the state of Ohio.

'Elevator' shall mean all the machinery, construction, apparatus and equipment used in raising and lowering a car, cage or platform vertically between permanent rails or guides, and shall include all elevators, power dumb waiters, escalators, gravity elevators and other lifting or lowering apparatus permanently installed between rails or guides, but shall not include hand operated dumb waiters, construction hoists or other similar temporary lifting or lowering apparatus.

'Passenger elevator' shall mean an elevator constructed and used for carrying persons. A combined passenger and freight elevator shall be classed as a passenger elevator.

'Freight elevator' shall mean an elevator constructed and used for carrying materials.

'General inspector' shall mean a state inspector examined and hired to inspect elevators and lifting apparatus for the state of Ohio.

'Special inspector' shall mean an inspector examined and commissioned by the chief of the division of factory and building inspection to inspect elevators and lifting apparatus in the state of Ohio.

'Inspector' as used in this act shall be construed to mean either a general or special inspector."

Section 1038-2, General Code, reads as follows:

"Every elevator, as described in section 1 (G. C. §1038-1) of this act, shall be constructed, equipped, maintained and operated, with respect to the supporting members, elevator car, shaftways, guides, cables, doors and gates, safety stops and mechanisms, electrical apparatus and wiring, mechanical apparatus, counterweights, and all other appurtenances, in accordance with the state laws and regulations relating thereto."

Section 1038-3, General Code, provides in substance that the Department of Industrial Relations shall have the power to promulgate such rules and regulations as it may deem necessary to carry out the provisions of the act in reference to the inspection of elevators in Ohio.

Section 1038-4, General Code, provides for the holding of written examinations by the Department of Industrial Relations for persons desiring to qualify as general or special inspectors of elevators in Ohio, and for the issuance of certificates of competency to those applicants who are successful in such examinations. It is further provided in that section that no one shall act either as a general or special inspector without being the holder of a

certificate of competency issued by the Department of Industrial Relations. This section also provides that applicants for certificates of competency shall be examined in subjects dealing with the construction, installation, operation, maintenance and repair of elevators and their appurtenances.

Section 1038-5, General Code, provides that the Chief of the Division of Factory and Building Inspection may, with the consent of the Director of Industrial Relations, appoint not more than five general inspectors of elevators who must be holders of certificates of competency. These five positions are placed in the classified civil service of the State by the provisions of this section.

Section 1038-6, General Code, in substance provides that any company which is authorized to insure elevators in Ohio may employ special inspectors holding certificates of competency to inspect elevators covered by policies issued by such company. The same power to employ special inspectors to inspect elevators in either cities or villages is granted to the Department of Safety of any city and to the Clerk of any village. This section further provides that a person employed as a special inspector shall be issued a commission by the Division of Factory and Building Inspection and that such inspector shall not be compensated by the State.

Section 1038-7, General Code, provides that a commission to serve as a special inspector may be revoked by the Chief of the Division of Factory and Building Inspection for incompetency or untrustworthiness of the special inspector, or for false statements contained in his application or in a report of any inspection.

Section 1038-8, General Code, provides for an appeal to the Director of Industrial Relations from an order revoking a commission to act as a special inspector. This section further provides for a hearing before the Director on such appeal with power in the Director to affirm or disaffirm an order of revocation. The action of the Director on such appeal is final.

Section 1038-9, General Code, provides for the reissuance of certificates of competency or commissions in lieu of those lost or destroyed.

Section 1038-10, General Code, in substance provides that an insurance company authorized to insure elevators in Ohio may inspect any elevator covered by it but such inspection must be made by persons authorized to act as special inspectors. This section further provides that no fee may be charged for such inspection except a fee of one dollar charged by the State for a certificate of operation.

Section 1038-11, General Code, provides that general inspectors shall inspect elevators which are not inspected by special inspectors. The fee for such general inspections is fixed at three dollars by section 1038-15, General Code.

Section 1038-12, General Code, provides that:

"Every passenger elevator, escalator, freight elevators, including gravity elevators, shall be inspected once every six months. Power dumb waiters, hoists and other lifting or lowering apparatus permanently installed, between rails or guides, shall be inspected at least once every twelve months."

Section 1038-13, General Code, reads:

"Every inspector shall forward to the division of factory and building inspection a full report of each inspection made of any elevator, as required to be made by him under the provisions of this act, showing the exact condition of the said elevator. If this report indicates that the said elevator is in a safe condition to be operated, the division of factory and building inspection shall issue a certificate of operation for a capacity not to exceed that named in the said report of inspection, which certificate shall be valid for one year after the date of inspection unless the certificate is suspended or revoked by the division of factory and building inspection. No elevator may lawfully be operated on or after January 1, 1934, without having such a certificate conspicuously posted thereon; where there is an elevator cab it shall be posted conspicuously therein."

Section 1038-14, General Code, provides:

"If any elevator be found which in the judgment of an inspector is dangerous to life and property or is being operated without the operating certificate required by this act, such inspector may require the owner or user of such elevator to discontinue its operation, and the inspector shall place a notice to that effect conspicuously on or in such elevator. Such notice shall designate and describe the alteration or other change necessary to be made in order to insure safety of operation, date of inspection, and time allowed for such alteration or change. Such inspector shall immediately report all facts in connection with such elevator to the division of factory and building inspection. In the event a certificate has been issued for such elevator, the said certificate shall be suspended and not renewed until such elevator has been placed in safe condition. In such case, where an elevator has been placed out of service, the owner or user of such elevator shall not again operate the same until repairs have been made and authority given by the division of factory and building inspection to resume operation of the said elevator."

Section 1038-15, General Code, fixes the fee to be charged for a certificate of operation ($1.00), for an inspection of an elevator by a general

inspector ($3.00), and for special inspections of permanent, new or repaired elevators ($5.00). This section further provides that final or special inspections of permanent, new or repaired elevators shall be made by general inspectors, subject, however, to the priviso that the Chief of the Division of Factory and Building Inspection may designate a special inspector of a municipality to make a final inspection of any permanent elevator in his municipality.

Section 1038-16, General Code, reads:

> "Before any permanent elevator shall be erected, removed to a different location, or whenever any changes or repairs are made which alter its construction or the classification, grade or rated lifting capacity thereof, detailed plans and specifications of the said apparatus, in duplicate, shall be submitted to the division for approval. Except in those municipalities which maintain their own elevator inspection departments, in which event, such plans and specifications shall be submitted to the elevator department of such municipality for its approval, and if approved a permit for the erection or repair of such elevator shall be issued by the municipality. Where plans and specifications are submitted to and approved by the division of factory and building inspection, of the state of Ohio, a permit for the erection or repair of such elevator shall be issued by the chief of that division.
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> A final inspection shall be made of the apparatus when installed or repairs completed, before final approval shall be given by the division.
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> The elevator shall not be operated until such final inspection and approval be given, unless a temporary permit be granted by the division."

Section 1038-17, General Code, provides:

> "The owner or user of any elevator in this state shall register with the division of factory and building inspection, every elevator operated by him, giving the type, capacity and description, name of manufacturer and purpose for which each is used. Such registration shall be made on a form to be furnished by the division."

Section 1038-18, General Code, specifies the mediums of exchange which may be used in paying the various fees provided for in the act.

Sections 1038-20 and 1038-21, General Code, provide for prosecutions and penalties for violation of the provisions of the act.

Section 1038-22, General Code, provides that a dealer in elevators or his inspectors may inspect elevators.

Section 1038-23, General Code, repeals all acts or parts of acts which are inconsistent with the provisions of House Bill No. 406, except Section 3636, General Code, which empowers municipalities to regulate the erection and construction of elevators.

Section 1038-24, General Code, reads:

> "The provisions of this act shall not apply to municipalities authorized by Article 18, section 3 of the constitution of Ohio, to adopt police regulations which have provided for the regular inspection of elevators as provided in this act."

It is a well established rule of law that a municipal corporation has such power and only such power as is conferred upon it by the legislature or derived from the constitution or charter and such other powers as are necessary to make effective the powers which are expressly conferred. *The Prudential Cooperative Realty Company* vs. *Youngstown,* 118 O. S., 204, 207; *Billings, et al.,* vs. *The Cleveland Railway Company,* 92 O. S , 478, 484, 485; *State, ex rel. Brickell,* vs. *Frank,* et al., 129 O. S., 604, 611 (Ohio Bar, June 17, 1935); *City of Beaumont* vs. *Priddie,* 65 S. W. (2d Ed.), 434 (Tex.); and 46 C. J., 176. See also *Ravenna* vs. *Pennsylvania Company,* 45 O. S., 118; *Townsend* vs. *City of Circleville,* 78 O. S., 122; and *Sanning* vs. *City of Cincinnati,* 81 O. S., 142.

The rule, as stated by Marshall, C. J., in the case of *The Prudential Cooperative Realty Company* vs. *Youngstown,* supra, at page 207, is as follows:

> "Municipalities in Ohio have only such powers as are conferred upon them, either directly by the Constitution, or by the Legislature under authority of the Constitution. While the home-rule provisions of the Ohio Constitution, found in Article XVIII, confer certain powers upon municipalities, and while the provisions of that article are self-executing, the provisions of that article do not confer any extra-territorial authority. The direct authority given by that article is expressly limited to the exercise of powers within the municipality. The city of Youngstown therefore has only such authority in the matter of examining and checking plats of lands outside of the city as may be found to be conferred by statute."

Likewise, it is a well established rule that municipalities have no extraterritorial jurisdiction except as expressly or impliedly given by statute. *The Prudential Co-operative Realty Company* vs. *Youngstown,* supra, pages 209, 210, 211; *State, ex rel. Brickell* vs. *Frank,* supra, page 616; *City of Chicago* vs. *Brent,* 190 N. E., 97 (Ill); and 43 C. J., 235, 236.

That municipalities, if such power is expressly granted by the legislature, may have police or regulatory power over land and buildings outside of but adjacent to the boundaries of the municipalities, finds support in the opinion of Marshall, C. J., in the case of *The Prudential Co-operative Realty Company* vs. *Youngstown*, supra, at pages 210, 211, and 212:

> *"In recognition of the mutual interests of cities and surrounding territory, Legislatures have given to municipalities certain regulatory authority over their environs.*
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> It is not contended that a city may by virtue of necessity arrogate to itself any regulatory authority over the people or property located in close proximity, *and it is conceded that it has only such authority as may constitutionally be conferred by legislation. The claims of the city of Youngstown in this case rest upon the statutes hereinbefore quoted*, and these statutes being clear and applicable the only legal problem is one of legislative power. *Legislation has conferred upon cities regulatory powers over adjacent territory for so long a period, in so many jurisdictions, and in such a variety of matters, that the general principle has become firmly established,* and, the question being one of legislative power, the inquiry must relate to the reasonableness of the regulation, and the justiciable question is whether the regulatory authority conferred has a reasonable relation to the governmental purpose to be served. If it has such reasonable relation, it becomes only a question of legislative wisdom with which the courts have no concern." (Italics the writer's)

The right of a municipality to maintain and operate a hospital is expressly conferred by Section 4023, General Code, and the power of a muncipality to maintain a tuberculosis sanitorium or hospital outside the corporation limits is impliedly authorized by Section 3148-1, General Code, which reads:

> "The county commissioners of any county having more than 50,000 population as shown by the last federal census may, with the consent of the state department of health, provide the necessary funds for the purchase or lease of a site and the erection and equipment or lease and equipment of the necessary buildings theron for the operation and maintenance of a county hospital for the treatment of persons suffering from tuberculosis. Any municipality within said county at present maintaining and operating a hospital for the treatment of tuberculosis may continue to maintain said hospital

as a municipal hospital, or may lease or sell the same to the county."

See Opinions of the Attorney General for 1934, page 499.

However, an examination of the statutes pertaining to the maintenance, establishment and operation of hospitals by municipal corporations, fails to disclose any provision which extends to municipal corporations the power to regulate the environs which are occupied by municipal hospitals, such as is found in Sections 3968, 3970, 3972 and 4000, General Code, pertaining to water works and other utilities owned and operated by municipalities. Neither can the language of Section 1038-24, General Code, be construed as granting such authority, since that section merely limits the effect of House Bill No. 406 with reference to certain territory within the state and does not grant to any municipality extra-territorial power or jurisdiction.

As was stated in an opinion found in Opinions of the Attorney General for 1914, Vol. II, pages 1525, 1526:

> "Aside from the question just noticed, it is apparent that the provisions of the Cincinnati ordinance can have no application by force of their own terms and the sanctions therein imposed to buildings erected outside of the municipal limits. The provisions of the ordinance with respect to the subject of sanitary plumbing are governmental in their nature, rather than proprietary, and as to such regulations it is clear that they can have no operation outside of the city limits in the absence of express statutory authority giving such regulations extra territorial operation.
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> *City of Coldwater* vs. *Tucker*, 36 Mich. 474.
> *Donable* vs. *Harrisonburg*, 104 Va. 533.
> *Decker* vs. *LaCrosse*, 99 Wis. 414.
> *Snyder* vs. *Menasha*, 118 Wis 298."

The first branch of the syllabus of this opinion reads as follows:

> "The provisions of the state building code, with respect to the subject of sanitation, including the matter of sanitary plumbing, apply to the buildings here in question, to wit, those now being erected by the city of Cincinnati at Glendale, Ohio, for the purpose of being used as a boys' refuge home, and so applying the provisions of the state code as to sanitary plumbing, operate to exclude the conflicting provisions of municipal ordinances and of the plans and specifications with respect to plumbing in said buildings. The provisions of the Cincinnati plumbing code, being governmental in their nature, have no operation outside of the corporate limits of the city of Cincinnati."

The act in question is clearly applicable to all elevators except those which are exempted by Sections 1038-16 and 1038-24, General Code, namely, elevators within the limits of municipalities which have provided for the regular inspection of elevators as provided in the act.

It is true that a municipality in exercising governmental functions is an agency of the state and that the general rule is that a general statute does not apply to the state unless it is expressly or by clear implication included within its terms, but this general rule has been held not to apply to statutes made for the public good and the prevention of injury and wrong. 59 C. J. 1104. It is upon the theory that a municipality is a state instrumentality that it is quite generally held that a municipality is not liable for negligence in the performance of its governmental duties, but I am unable to find that this doctrine has been extended so far as to hold that a municipality is not required to comply with statutory regulations as to buildings, boilers or elevators adopted by the state for the safety of the public. Where the legislature has expressly included within the act all elevators as they are defined therein with certain exceptions, which exceptions do not include municipally owned elevators as such, can it be said that such elevators not located within municipalities which have provided for the regular inspection of elevators are not by necessary implication included within the provisions of the act?

It is also another rule of statutory construction that an exception which follows a provision general in its nature should be strictly construed so as to take out of the general provisions only those cases which are fairly within the terms of the exception. 59 C. J. 1092. Municipally owned elevators which are not located within the limits of a municipality which has provided for the regular inspection of elevators are not within the exception of Section 1038-16 or 1038-24, General Code. Of course, rules of construction are applied as a means of discovering the legislative intent and should not be used to defeat it, but in two sections of this act the legislature excepted from its operation certain municipalities and in neither case did it except elevators simply because they were municipally owned. The municipalities exempted are confined to those which provide for elevator inspection, thus evidencing the intention that all elevators as defined in the act should be inspected by someone. Consequently, I do not believe it can be said that municipally owned elevators were not in the contemplation of the legislature when it passed these statutes. To hold otherwise, would in effect mean that the legislature intended that a municipality might set at naught all regulations for the construction, operation and inspection of all elevators located in municipal buildings, and might construct them and operate them in any manner it saw fit without any safety devices and thus jeopardize the lives of the public using them.

In Opinions of the Attorney General for 1929, Vol. III, page 1880,

which opinion was rendered prior to the enactment of this act, the following is said:

> "The state inspects elevators in county, municipality and school buildings, this authority being derived under the general sections dealing with powers of the Department of Industrial Relations, Sections 871-1 to 871-28, General Code, inclusive."

In this opinion it was also held that:

> "A municipality may exact a fee for inspection of elevators in buildings belonging to a county or school district which are located in such municipality."

In Opinions of the Attorney General for 1928, Vol. IV, page 2827, the following was held:

> "A city which has and is enforcing an ordinance providing that no plumbing alterations shall be made until a permit is obtained from a city plumbing inspector, and a fee paid into the city treasury, may require the local board of education to obtain a permit, and pay the fee prescribed, in the event that schoolhouse plumbing is to be altered."

In Opinions of the Attorney General for 1927, Vol. I, page 171, the syllabus reads as follows:

> "1. That it is the duty of the Department of Industrial Relations to inspect boilers owned by boards of education, except such boilers as are exempted from said inspection by Section 1038-7 of the General Code.
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> 2. When such inspection is made by the Department of Industrial Relations, it is the duty of the board of education to pay to said department the fees provided by law therefor."

In construing Section 3812, General Code, a general statute which authorizes a municipality to levy special assessments against property within its limits for street improvements, the court held in the case of *Jackson* vs. *Board of Education*, 115 O. S. 368:

> "Section 3812, General Code, confers upon a municipality general authority to levy assessments for street improvements against property within such corporation belonging to a board of education

and being used for school purposes, and no provision exists in the General Code of Ohio exempting such property from that general authority."

A school district is also an instrumentality of the state performing governmental functions. *Finch* vs. *Board of Education,* 30 O. S. 37; *Board of Education* vs. *Volk,* 72 O. S. 469. If an ordinance or statute general in its nature can be held to apply to a board of education, an agency of the state, certainly the act in question should be held to include a municipally owned elevator which does not come within its express exemptions.

Therefore, I am of the opinion that:

1. Ordinances of a municipality providing for the inspection of elevators have no effect beyond the territorial limits of such municipality.

2. The City of Cleveland in the operation of elevators in its tuberculosis hospital in Warrensville, Ohio, is subject to the provisions of Sections 1038-1, et seq., General Code, and is required to pay to the Division of Factory and Building Inspection the statutory fee for the inspection of such elevators.

Respectfully.
JOHN W. BRICKER.
Attorney General.

4490.

APPROVAL, ARTICLES OF INCORPORATION OF MAHONING INSURANCE COMPANY.

COLUMBUS, OHIO, August 2, 1935.

HON. GEORGE S. MYERS, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have examined the articles of incorporation of Mahoning Insurance Company which you have submitted to me for my approval, and it appearing that said articless are not inconsistent with the Constitution or laws of the United States or of the state of Ohio, I am herewith returning it to you with my approval endorsed thereon.

Respectfully,
JOHN W. BRICKER,
Attorney General.