

136

FIRE PREVENTION—CHIEF OF FIRE DEPARTMENT OF ANY CITY OR VILLAGE WHERE FIRE DEPARTMENT ESTABLISHED—MAYOR OF CITY OR VILLAGE WHERE NO FIRE DEPARTMENT EXISTS—CLERK OF TOWNSHIP IN TERRITORY WITHOUT LIMITS OF CITY OR VILLAGE—MAY AT ALL REASONABLE HOURS ENTER INTO BUILDINGS OWNED BY STATE OR ITS SUBDIVISIONS TO MAKE INSPECTIONS—SECTION 834 G. C.

SYLLABUS:

The chief of the fire department of any city or village where a fire department is established, the mayor of a city or village where no fire department exists, or the clerk of a township in territory without the limits of a city or village, at all reasonable hours may, in accordance with the provisions of Section 834, General Code, enter into buildings owned by the state or its subdivisions for the purpose of making inspections with a view to fire prevention.

Columbus, Ohio, February 21, 1945

Hon. Harry J. Callan, State Fire Marshal
Columbus, Ohio

Dear Sir:

I have before me your letter requesting my opinion, reading as follows:

“The State Fire Marshal’s office desires your interpretation of Sections 834 and 835 of the General Code.

Fire departments of various cities and other political subdivisions furnish fire protection to properties used or owned by the State of Ohio. Members of these fire departments desire to make inspections of state property to remove or control fire and life hazards, and to familiarize themselves with the physical arrangement of these properties. Under the provisions of Sections 834 and 835, may such inspections be made by them?"

Section 834 of the General Code provides as follows:

"The state fire marshal, his deputies and subordinates, the chief of the fire department of each city or village where a fire department is established, the mayor of a city or village where no fire department exists, or the clerk of a township in territory without the limits of a city or village, at all reasonable hours *may enter into all buildings and upon all premises* within their jurisdiction for the purpose of examination."

(Emphasis added.)

The language there used, taken in its ordinary meaning, would seem to leave little doubt that the officers named would have a right to enter, for the purpose of inspection, any public building whether belonging to the state or any of its subdivisions. The use of the words "all buildings" and "all premises" certainly includes public buildings and premises as well as private.

The necessity for inspection of public buildings in the interest of fire protection is just as obvious as is the necessity of inspecting privately owned buildings. Danger from fire may just as easily lurk in a public building as in a private building, and it is a matter of common knowledge that fires are frequently not confined to the premises in which they originate.

The statement in your letter that members of the local fire departments desire to make inspections not only to remove and control fire and life hazards, but "to familiarize themselves with the physical arrangements of these properties" seems to me to suggest a strong argument as to the propriety and necessity of permitting officers of these departments to have access to and to make inspection of public buildings. I understand that one of the important purposes of inspection, particularly of large buildings, is to enable firemen to gain a familiarity with the structure and layout of such buildings so that in the event of serious conflagrations their services may be rendered with greater efficiency.

There is in the statute relative to the organization of local fire departments no positive provision authorizing or requiring such departments to render service to public buildings located within their jurisdiction. On the contrary there is certainly nothing in the statutes that suggests that they are not to render such service or are relieved therefrom. The statutes contain very slight provisions as to the precise scope of the duties of a fire department. Municipalities are authorized by Section 3617, General Code, "to organize and maintain police and fire departments, erect the necessary buildings and purchase and hold all implements and apparatus required therefor." The only provision contained in the statutes, so far as I can find, relative to the duty of the fire departments is found in Section 4378, General Code, where it is provided :

"The fire department shall protect the lives and property of the people in case of fire, and both the police and fire departments shall perform such other duties, not inconsistent herewith, as council by ordinance prescribes."

By immemorial practice, fire departments have been called upon to protect not only the property of the citizens who pay local taxes, but also public buildings, and other property which is exempt from taxation, and the departments have responded to such calls. In performing this service, a municipality has been held to be engaged in the performance of a governmental function. Thus it was held in the early case of *Wheeler v. Cincinnati*, 19 O. S. 19:

"The power conferred by the statute, on cities of this State, to organize and regulate fire companies, and provide engines, etc., for extinguishing fires, is, in its nature, legislative and governmental; and a city is not liable to individuals for damage resulting from a failure to provide the necessary agencies for extinguishing fires, or from the negligence of officers or other persons connected with the fire department."

A similar holding as to the status and non-liability of a city in the operation of its police department was announced in the earlier case of *Western College v. Cleveland*, 12 O. S. 375. A pertinent observation as to the duties and immunity of a municipality in such matters is found in the case of *Wooster v. Arbenz*, 116 O. S. 281, where the court, at page 284 of the opinion, said :

“In performing those duties which are imposed upon the state as obligations of sovereignty, such as protection from crime, or fires, or contagion, or preserving the peace and health of citizens and protecting their property, it is settled that the function is governmental, *and if the municipality undertakes the performance of those functions, whether voluntarily or by legislative imposition*, the municipality becomes an arm of sovereignty and a governmental agency and is entitled to that immunity from liability which is enjoyed by the state itself. If, on the other hand, there is no obligation on the part of the municipality to perform them, but it does in fact do so for the comfort and convenience of its citizens, for which the city is directly compensated by levying assessments upon property, or where it is indirectly benefited by growth and prosperity of the city and its inhabitants, and the city has an election whether to do or omit to do those acts, the function is private and proprietary.”

It appears to me that the views thus expressed, to the effect that the operation of a fire department by a local subdivision is the exercise of a part of the sovereignty of the state, has some bearing in strengthening my conclusion that the legislature, in phrasing Section 834, General Code, must have intended to give the local officers full power to enter into public buildings for the purpose of carrying out their duty of protecting persons and property within their jurisdiction. The use of the word “jurisdiction” in this connection can certainly have no other meaning than the territorial limits of the subdivision of which they are officers.

Further light is thrown upon the status of a municipal fire department and its relation to the state by the several rather recent decisions of our Supreme Court, in which the court holds that the maintenance and operation of police and fire departments are matters of state-wide concern and under control of the legislature.

In the case of *Cincinnati v. Gamble*, 138 O. S. 220, it was said:

“In matters of state-wide concern the state is supreme over its municipalities, and may in the exercise of its sovereignty impose duties and responsibilities upon them as arms or agencies of the state.

In general, matters relating to police and fire protection are of state-wide concern and under the control of state sovereignty.”

In the course of its opinion the court, after referring to the home rule powers of municipalities, says at page 228:

“But the authority of the state is supreme over the municipality and its citizens as to every matter and every relationship not embraced within the field of self government.”

Further on in the opinion, the court makes this observation:

“Indeed, police and fire protection and health preservation are essential to the administration of state government in such a way as to accomplish vital purposes expressed in its organic law.”

To like effect, see *Thompson v. Marion*, 134 O. S. 122; *State ex rel. Strain v. Houston*, 138 O. S. 203.

Certainly if a municipal fire department is so completely under the control of the legislature and is “essential to the administration of state government,” it would be absurd to assert that the chief of such fire department, in the performance of his duty, should be barred from entering buildings belonging to the state either for the purpose of extinguishing fires or for the purpose of taking necessary steps to prevent them.

Section 835, General Code, reads as follows:

“If the state fire marshal, a deputy state fire marshal, or assistant fire marshal, or any officer mentioned in the preceding section, upon an examination or inspection finds a building or other structure, which for want of proper repair, by reason of age and dilapidated condition, defective or poorly installed electrical wiring and equipment, defective chimneys, defective gas connections, defective heating apparatus, or for any other cause or reason is especially liable to fire and which building or structure is so situated as to endanger other buildings or property, such officer shall order such building or buildings to be repaired, torn down, demolished, materials removed and all dangerous conditions remedied. If such officer finds in a building or upon any premises any combustible or explosive material, rubbish, rags, waste, oils, gasoline or inflammable conditions of any kind, dangerous to the safety of such buildings or premises, buildings or property, he shall order such materials removed or conditions remedied. Such order shall be made against and served personally or by registered letter upon the owner, lessee, agent, or occu-

pant of such building or premises, and thereupon such order shall be complied with by the owner, lessee, agent or occupant and within the time fixed in said order.”

The sections which immediately follow relate to the rights of owners of property who are aggrieved by an order of any of the officers named in Section 834 to complain of or appeal from such order. We need not now be concerned with the question whether the chief of a fire department could enforce an order which he might make as to conditions in any public building. In our present inquiry we are only concerned with his right to enter public buildings for the purpose of making inspections therein with the view of preventing fires which might destroy those buildings or their occupants or might endanger the lives and property of other residents of the municipality.

In specific answer to your question, it is my opinion that the chief of the fire department of any city or village where a fire department is established, the mayor of a city or village where no fire department exists, or the clerk of a township in territory without the limits of a city or village, at all reasonable hours may, in accordance with the provisions of Section 834, General Code, enter into buildings owned by the state or its subdivisions for the purpose of making inspections with a view to fire prevention.

Respectfully,

HUGH S. JENKINS

Attorney General