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1. FIRE MARSHAL, STATE—DEPUTIES—SUBORDINATES—FIRE DEPARTMENT—PROVISION “AN ORDER OF AN OFFICER UNDER THE LAST THREE PRECEDING SECTIONS” FOUND IN SECTION 836-2 G. C. RELATES TO AND INCLUDES ORDERS MADE AND PROCEEDINGS HAD UNDER SECTIONS 835, 836 AND 836-1 G. C., AND INCLUDES BY REFERENCE IN SECTION 835 G. C. ORDERS MADE BY OFFICERS NAMED IN SECTION 834 G. C.
2. PROVISION FOR PUNISHMENT OF PERSONS WHO FAIL TO COMPLY WITH ORDERS “OF ANY OFFICER NAMED IN THE LAST FOUR PRECEDING SECTIONS” FOUND IN SECTION 837 G. C. RELATES TO AND INCLUDES THOSE OFFICERS NAMED IN SECTIONS 835, 836 AND 836-1 G. C., AND DOES NOT INCLUDE OFFICERS OF LOCAL SUBDIVISIONS NAMED IN SECTION 834 G. C.

SYLLABUS:

1. The provision contained in Section 836-2, General Code, relative to enforcement of “an order of an officer under the last three preceding sections” relates to and includes orders made and proceedings had under Sections 835, 836 and 836-1, General Code, and includes, by reference in said Section 835, orders made by officers named in Section 834, General Code.

2. The provision of Section 837, General Code, for punishment of persons who fail to comply with orders “of any officer named in the last four preceding sections”, relates to and includes those officers named in Sections 835, 836 and 836-1, and does not include officers of local subdivisions named in Section 834, General Code.

Columbus, Ohio, March 19, 1945

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

Dear Sir:

Your request for my opinion reads as follows:

“The Division of State Fire Marshal is requesting an opinion as to the sections referred to in Section 836-2 and Section 837 of the General Code of Ohio, which read as follows:

'Sec. 836-2. If any person fail to comply with an order of an officer under the last three preceding sections and within the time fixed, then such officer is empowered and authorized to cause such building or premises to be repaired, torn down, demolished, materials removed and all dangerous conditions remedied, as the case may be and at the expense of such person, and if such person within thirty days thereafter, fail, neglect or refuse to repay said officer the expense thereby incurred by him, such officer shall certify said expenses, together with twenty-five per centum penalty thereon, to the county auditor of the county in which said property is situated and said county auditor shall enter said expense on the tax duplicate of said county as a special charge against the real estate on which said building is or was situate and the same shall be collected as other taxes and, when collected, shall, together with the penalty thereon, be refunded to such officer.'

'Sec. 837. Any person or persons, being the owner, occupant, lessee or agent of buildings or premises who willfully fails, neglects or refuses to comply with any order of any officer named in the last four preceding sections, shall be guilty of a misdemeanor and shall be fined not more than fifty dollars nor less than ten dollars for each day's neglect.'

More specifically, to what sections does the language 'in the last three preceding sections' of Section 836-2, and the language 'in the last four preceding sections' of Section 837 refer?"

Sections 836-2 and 837, General Code, to which you call attention, form part of an act passed May 31, 1911, found in 102 O. L. p. 430. That act amended Sections 835, 836 and 837 and supplemented Section 836, General Code, by introducing supplementary Sections 836-1 and 836-2. These supplementary section numbers were supplied by the act itself. There were therefore five sections which were dealt with in the entire act; four sections preceding Section 837 and three sections preceding Section 836-2. Accordingly, your question would appear to answer itself. It seems well, however, to examine these sections, in order to determine just what was the effect of the references to "the last three preceding sections" and "the last four preceding sections."

Inasmuch as your letter correctly quotes Sections 836-2 and 837, General Code, it does not seem necessary for our purpose to repeat them in this opinion. The sections embodied in the act in question, together with several preceding and succeeding sections of the General Code, related in their original enactment to the appointment of the State Fire

Marshal and his deputies, and their duties. Included in the original enactment, which is found in 94 O. L., p. 386, there were provisions in Section 5 of that act authorizing not only the state fire marshal and his assistants but also the chief of the fire department in villages and cities and the mayor of cities or villages where no fire department exists, and the clerks of each township to enter into buildings and premises within their jurisdiction for the purpose of inspection as to conditions which would be likely to cause fire, and authorizing all of such officers to make such orders as they saw fit relative to repairs and changes. A further provision found in Section 5 of the original act imposed a penalty upon the owner or occupant of a building who refused to comply with any order of the aforesaid officers.

In the codification of 1910 these general provisions became Sections 820 to 843 of the General Code. Section 834 was identical with its present reading. I think it important to note its provisions. It reads:

“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.”

Section 837, General Code, originally read:

“An owner or occupant of buildings or premises who fails to comply with the orders of the authorities named in the next *three* preceding sections shall be fined not less than ten dollars nor more than fifty dollars for each day's neglect.”

(Emphasis added.)

“Next three preceding sections” would include Section 834 and by such inclusion would clearly and specifically make the violation of the order of a chief of the fire department or of one of the other specified officers a misdemeanor. But the legislature saw fit in 1911, to insert two new sections between 836 and 837 and then to provide that the violation of an order of any of the officers “*named in the next four preceding sections*” should constitute a misdemeanor. This change seems to have the effect of dropping Section 834 out of the reference in Section 837 and since the chief of police and other local officers are not “named” in

either Sections 835, 836, 836-1 or 836-2, General Code, the inference seems strong that the legislature intended to limit the penal provisions of the act to violation of the orders of the officers "named" in those four sections, viz: the state fire marshal and his deputies and assistants. A reference to the provisions of Sections 835, 836, 836-1 and 836-2, General Code, reveals no specific mention of the officers of cities, villages and townships who are named in Section 834, General Code. They are distinctly referred to in those sections and there can be no doubt but that their enumeration is incorporated by reference, at least for some purposes. We may note the provisions of Section 835, General Code, which reads in part 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 electric 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. * * * Such order shall be made against and served personally or by registered letter upon the owner, lessee, agent, or occupant 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."

Section 836 provides that if such owner deems himself aggrieved "by an order of an officer under the preceding section" he may appeal to the state fire marshal. Section 836-1 provides a right of appeal from the final order of the fire marshal to the probate court. Section 836-2 provides in part:

"If any person fail to comply with an order of an officer under the last three preceding sections and within the time fixed, then such officer is empowered and authorized to cause such building or premises to be repaired, torn down, demolished, materials removed and all dangerous conditions remedied, as the case may be and at the expense of such person, * * *"

(Emphasis added.)

The section further provides that such expense shall be certified to the county auditor and placed as a tax on the real estate in question.

The principal of legislation by reference would, in my opinion make the provisions of Section 834 a part of the subsequent section above mentioned, so far as civil proceedings are concerned. The practice of incorporating in one section of the statute a reference to another section is very common and the effect is well established. It is said in 37 Ohio Jurisprudence, p. 340:

“The law referred to is in effect incorporated with and becomes a part of the one in which reference is made as fully as if the former had been repeated verbatim in the latter and so far as that statute continues will remain a part of it.”

Referring to this subject it was said by Robinson, J., in *State, ex rel. v. Gongwer*, 114 O. S. 642, 649:

“The effectiveness of legislation by reference has been so generally recognized in Ohio that no very specific declaration appears in the reported cases. As far back as the case of *Heirs of Ludlow v. Johnston*, reported in 3 Ohio, 553, 17 Am. Dec., 609, it was declared, in referring to legislation by reference:

‘For this purpose the law referred to is, in effect, incorporated with and becomes a part of the one in which the reference is made, and so long as that statute continues, will remain a part of it.’

* * * It is a class of legislation so generally recognized in the various state jurisdictions, and in the jurisdiction of the United States, that we think the rule may safely be stated that such legislation is effective wherever it is not by constitutional provision expressly prohibited. At any rate, in Ohio it is a recognized mode of legislation.”

But however well established the doctrine of legislation by reference may be, it is, like most other principles, capable of abuse, and in my opinion, it would be an unwarranted application of the rule to apply it to a construction of Section 837, General Code, which is purely a penal provision. Aside from the legislative intention as evidenced by the change of wording in the amendment of that section we must also keep in mind the well established principle that penal laws should have a strict construction. As said in 37 Ohio Jurisprudence, 744:

“It is a well settled general rule, recognized by the General Code, that a strict construction is to be accorded to all penal statutes. * * * They are not to be extended by implication or construction to persons or things not within their descriptive terms, even though such cases appear to be of equal atrocity, or within the reason or spirit of the statute, or within the mischief intended to be avoided.”

Numerous cases are cited in support of these propositions. For the reasons above set forth it appears to me that the penal provisions of Section 837, General Code, in expressly limiting the officers whose orders are enforceable by fine to those *named* in “the four next preceding sections” can not be extended to include those officers who are *referred to* but not named in those sections.

As to “the next three preceding sections” referred to in Section 836-2, General Code, a more elastic interpretation is permissible. That section, in referring to those particular sections, is not dealing with persons “named therein”, but with “an *order* of an officer *under the last three preceding sections.*” The orders referred to are authorized by Section 835, General Code. That section in stating who may make such orders, specifically includes “any officer mentioned in the preceding section”, and it appears to me therefore that the officers named in Section 834, *supra*, are necessarily drawn into the scope of Section 836-2, General Code, as far as it confers the right to make and enforce orders in the manner therein provided.

Up to this point no reference has been made to Sections 835-1 and 835-2, General Code. These two sections were not in existence at the time of the enactment of the act above referred to in 102 O. L. 430. These new sections were enacted May 23, 1935 and are found in 116 O. L. 584. They relate to requirements as to plumbing in state and other public buildings and impose upon the state fire marshal certain duties in reference thereto and provide their own penalties for failure to comply with his orders. They certainly can not be considered in determining what the legislature meant by its reference in Section 837, General Code, to the “last four preceding sections.”

Accordingly, and in specific answer to your question it is my opinion that the reference in Section 836-2, General Code, to the “last three preceding sections” embraces Sections 835, 836 and 836-1, General Code,

but that the officers mentioned in said Section 835 include by reference those named in Section 834, General Code. Further, that the reference in Section 837, General Code, to the "last four preceding sections" embraces Sections 835, 836, 836-1 and 836-2, General Code, but does not by reference include the officers of the subdivisions who are named in said Section 834.

Respectfully,

HUGH S. JENKINS

Attorney General

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PROSECUTING ATTORNEY, ASSISTANT—APPOINTED BY PROSECUTING ATTORNEY—MAY WHEN AUTHORIZED OR DIRECTED BY PROSECUTING ATTORNEY, ACT FOR AND IN HIS PLACE IN ALL CIVIL AND PROCEDURAL MATTERS, INCLUDING SERVICES BEFORE GRAND JURY AND PROSECUTION OF CRIMINAL CASES—SUCH POWER DOES NOT EXTEND TO VERIFICATION AND FILING OF INFORMATIONS UNDER SECTION 13437-34 G. C.

SYLLABUS:

An assistant appointed by the prosecuting attorney may, whenever authorized or directed by him, act for and in the place of such prosecuting attorney in all civil and procedural matters, including services before the grand jury and prosecution of criminal cases; but such power does not extend to the verification and filing of informations under Section 13437-34, General Code.

Columbus, Ohio, March 23, 1945

Hon. C. J. Borkowski, Prosecuting Attorney
Steubenville, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"On taking office on the first Monday of January, 1945, I appointed two members of the Bar of Jefferson County, Ohio, as