2946.

FIRE PROTECTION—CITY CONTRACTS TO SO PROTECT A TOWNSHIP—NO LIABILITY IN DAMAGES FOR INJURY CAUSED BY CITY FIRE DEPARTMENT IN SUCH TOWNSHIP.

SYLLABUS:

When a political subdivision enters into a contract with a second political subdivision for fire protection by authority of Section 3298-60, General Code, the political subdivision furnishing such protection is not liable for injuries caused to persons or property by its fire department when operated outside the territorial limits of the subdivision, in pursuance of the contract so made.

COLUMBUS, OHIO, February 16, 1931.

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

GENTLEMEN:—I am in receipt of your request for my opinion, which reads as follows:

> "Section 3298-60, G. C., provides that any village or township may enter into a contract with a city for fire protection.
>
> Question: Would a city be liable in damages for injuries caused to persons or property by its fire department, when operated outside of the city limits, that is, in the township or village with which the city has a contract?'"

Section 3298-60, General Code, reads as follows:

> "Any township, in order to obtain fire protection shall have authority to enter into a contract for a period not to exceed three (3) years with any city, village or township, upon such terms and conditions as are mutually agreed upon, for the use of its fire department and fire apparatus, if such contract is first authorized by the trustee of such township and the council of such city or village.
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> A similar contract may be made between a village and any city if authorized by the council of the village and the council of the city. Such contract shall provide for a fixed annual charge to be paid at such times as may be stipulated in the contract. All expenses thereunder shall be construed as a current expense and the taxing authority of the township or village shall make an appropriation therefor from the general funds and shall provide for the same in their respective annual tax budgets."

First of all, it should be noted that municipalities in Ohio have such powers only 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 these provisions have been held to be self-executing, the provisions of that article do not confer any extraterritorial authority. *Realty Company* v. *Youngstown,* 118 O. S., 204-207.

It follows, therefore, that unless the Legislature, by statute, has authorized unicipal corporations to extend their municipal service for the protection of life and property against fires, beyond their territorial limits, they do not possess that power. They possess no inherent power that may be exercised extraterritorially,

nor will any action taken by them under the guise of home rule serve to imbue them with functions that may be exercised beyond their corporate limits.

The statute authorizes a township, city or village, "in order to obtain fire protection," to contract with a municipality or township "for the use of its fire department and fire apparatus." As a necessary corollary thereto, the statute must be held to authorize the municipality or township with whom the contract is made, to enter into such a contract as the statute contemplates.

Under those circumstances, the well established rule applies that a political subdivision in the operation of a fire department, acts in a governmental capacity, and is not liable in tort for injuries growing out of such operation in the absence of statute fixing such liability. Referring to the rule of non-liability of municipal corporations, under similar conditions, Chief Justice Marshall says, in the case of *Wooster* v. *Arbenz,* 116 O. S., 281-283:

> "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 non-liability 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. * * *
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> These questions have engaged the attention of this court numerous times in recent years, and except for the case of *Fowler, Admx.,* v. *City of Cleveland,* 100 Ohio St., 158, 126 N. E., 72, 9 A. L. R., 131, later overruled by *Aldrich* v. *City of Youngstown,* 106 Ohio St., 342, 140 N. E., 164, 27 A. L. R., 1497, this court has consistently adhered to the distinction between governmental and proprietary functions. * * *
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> First of all, let us ascertain the tests whereby these distinctions are made. In performing those duties which are imposed upon the state as obligations of sovereignty, such as protection from crime, or fires, or contagions, 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."

Municipal corporations are bodies politic and corporate. As bodies politic, they are mere agencies of the State, empowered to carry out governmental functions on behalf of the State in the public interest and for public purposes. As such, the Legislature, without a doubt, may invest them, as agencies of the State, with the power to furnish fire protection, which is recognized as the performance of a political or governmental act, to territory outside their corporate limits. Instances of extra-territorial authority exercised by municipalities with legislative sanction, are collated by Chief Justice Marshall, in the case of *Realty Company* v. *Youngstown, supra,* at page 210. The authorities there cited may, by analogy, be held to sanction the power of the Legislature to invest municipalities with extra-territorial powers with reference to the furnishing of fire protection.

That the furnishing of fire protection is a State function is recognized by Judge Jones, in his decision of the case of *Aldrich* v. *Youngstown,* 106 O. S. 340, where, on page 345, he says:

> "The state itself * * * ordinarily has no department within its con-

trol to see that the property of its citizens is not devastated by fire. Therefore, both at common law, and in some cases by statute, this political or governmental duty has been delegated to its political subdivisions and especially to municipalities. Not only the municipality but the entire state is interested * * in the protection of property from fire and conflagration. Its interest therein extends not only to a single community but over the entire commonwealth. While the employment of officers for the preservation of * * property may be in the hands of the municipality, the duties of those officers are in their nature state and governmental."

When municipalities are authorized by statute to operate their fire apparatus and make use of their fire departments for the extinguishment of fires outside their boundaries, they are, while so doing, exercising a state function as an agency of the state, and thus are absolved from any liability in tort, for the nonfeasance or misfeasance of their officers and agents or for acts of omission or commission in the carrying out of their powers in this respect.

This conclusion is in accord with the principle announced in *Wheeler* v. *Cincinnati,* 19 O. S., 19, which has been followed in later cases, and is cited with approval by Judge Jones in the Aldrich case, supra. The syllabus of the Wheeler case is as follows:

"The power conferred by the statute, on cities in 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."

To the same effect is the case of *Frederick, Admx,* v. *City of Columbus,* 58 O. S., 538, the syllabus of which reads as follows:

"A municipal corporation is not, in the absence of any statutory provision, liable in damages to one injured by the negligent acts of its fire department, or any of its members; nor is it liable for negligence in omitting to inform the members of its fire department of defects in the apparatus of the department, known to itself; nor for neglecting to instruct its fire department in the proper use and management of such apparatus."

I am therefore of the opinion, in specific answer to your question, that when a political subdivision enters into a contract with another political subdivision for fire protection, by authority of Section 3298-60, General Code, the political subdivision with whom the contract is made, is not liable for injuries caused to persons or property by its fire department when operated outside the territorial limits of the subdivision in pursuance of the contract so made.

Respectfully,
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