

2040

1. INSPECTION—FIRE CHIEFS, MEMBERS OF SUCH FIRE DEPARTMENTS AND OTHER OFFICERS NAMED IN SECTION 834 G. C. AUTHORIZED TO INSPECT PRIVATE HOMES AND OTHER BUILDINGS—CIRCUMSTANCES AND CONDITIONS DEFINED IN STATUTE.
2. CITY ORDINANCE—CONSENT OF OWNER OR OCCUPANT OR A LEGAL OR VALID ORDER—TO ENTER PRIVATE DWELLING FOR FIRE EXAMINATION—IN CONFLICT WITH GENERAL LAWS PROVIDING FOR SUCH EXAMINATIONS—INOPERATIVE AS TO ANY OFFICIALS AUTHORIZED TO MAKE SUCH EXAMINATIONS.

SYLLABUS:

1. Section 834 of the General Code authorizes the fire chiefs and members of such fire departments and other officers named in that section to inspect private homes and other buildings under circumstances and conditions defined in Section 834.

2. A city ordinance requiring the consent of the owner or occupant, or the securing of a legal or valid order, before entering a private dwelling for fire examination, is in conflict with the general laws providing for such examinations and therefore inoperative as to any of the officials authorized to make such examinations by Section 834 of the General Code.

Columbus, Ohio, July 17, 1950

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

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads as follows:

“There has been some doubt on the part of several fire chiefs, and in this particular case by the Chief of the Fire Prevention Bureau of the Columbus Fire Department, concerning the authority of the Chief and members of his department to make inspections of homes for fire hazards without the consent of the owner or occupant. I believe this matter actually consists of two issues which require an opinion by the Attorney General of Ohio for clarification.

“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, and such members of any such fire department as may be designated by such chief of the fire department, 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 and vehicles within their jurisdiction for the purpose of examination.’

“My first question is, does the foregoing section 834 in your opinion authorize the fire chiefs and members of such fire departments and other officers named in that section to inspect private homes and other buildings under the circumstances and conditions defined in Section 834.

“In an earlier opinion, No. 136, under date of February 21, 1945, a similar question was asked by this office concerning the authority of all officers named in Section 834 to enter and inspect state owned property and answered in the affirmative.

“The second question concerns a city of Columbus ordinance, No. 117-45, amending Section 377 of the City Code of 1930, in which the last paragraph—

‘But nothing herein shall be construed to permit the said Chief or any one under him to enter any private dwelling without first obtaining the consent of the owner or occupant thereof or securing a legal or valid order so to do.’

raises some doubt as to whether the chief or a member of the fire department would be prohibited from making inspections of *private homes* even though my first question regarding our Section 834 was answered in the affirmative.”

In answer to your first inquiry, a review will be had of the general rule in Ohio regarding laws applicable to fire protection. This will also bring in the issue of Home Rule and the powers of the state and municipalities relative to fire protection and police power.

In general, the rule in Ohio relative to matters of fire protection is laid down in the case of *Cincinnati v. Gamble*, 138 O. S. 220. The first paragraph of the syllabus of this case reads as follows:

“By virtue of Sections 3 and 7 of Article XVIII of the Constitution, a municipality, irrespective of whether it has adopted a charter, has powers of local self-government and may adopt and enforce within its limits such local police, sanitary and other similar regulations as are not in conflict with general law.”

The third and fourth paragraphs read as follows:

“3. 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.

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

In the body of this opinion Judge Williams states (p. 231):

“The state, considered in relation to its subdivisions, is the *imperium* and as such by its very nature has state control in state affairs. Since the municipality is *imperium in imperio* only in the exercise of powers conferred upon it by the state Constitution, it must in all other respects be subordinate to state authority. If fire, police and health departments be deemed purely matters of local self-government, they could be abolished and the state would be unable to step in. Obviously the abolishment of any or all of them would affect state interests. So would even impairment. 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. * * *. * * * prevention of fire may be ineffective without unified effort reaching into urban, suburban and rural sections; * * *.”

The same general rule is laid down in the case of *State ex rel. Daly v. City of Toledo*, 142 O. S. 123, and in *State ex rel. Arey v. Sherrill*, 142 O. S. 574. It is therefore a clearly defined rule in Ohio that in matters of police, fire and health, the general laws of the state are supreme, and that municipalities can only enforce their own local regulations regarding these matters when they do not conflict with the general laws.

It therefore follows, in answer to your first inquiry, that fire chiefs, and such members of their departments as may be designated under authority of Section 834 of the General Code, have the authority to examine private and other buildings under the circumstances and conditions defined in Section 834.

Your second inquiry regards the language of City of Columbus Ordinance No. 117-45, as set out in your letter. This language attempts to limit the authority of the fire chief or anyone under him from entering any private dwelling without first obtaining the consent of the owner or occupant thereof, or securing a legal or valid order to do so.

In view of the authorities cited earlier in this opinion, this ordinance conflicts with the general laws of this state inasmuch as it affects persons operating under authority of Section 834 of the General Code. A municipality by ordinance cannot limit or restrict the power or authority of the state as set out in general laws regarding police, fire and health matters.

However, the fire chief or person under him, if making an examination under authority of city ordinance No. 117-45, would naturally have to follow the requirements of that ordinance. A distinction must be drawn between the examination under Section 834 and Ordinance No. 117-45. If the examination is made under authority of Section 834, the limitations set out in the ordinance have no bearing or application on the persons so performing the examination. However, if the examination is made solely under authority of the local ordinance, then its provisions govern. It would be hard to understand a situation that would call for a purely local examination and would fall only under the authority of the ordinance and not under Section 834.

So, as a general rule, and unless it can be shown that the examination is made solely pursuant to the local ordinance, a chief of the fire department and such members of any such fire department as may be designated by such chief of the fire department, at all reasonable hours may enter into all buildings and upon all premises and vehicles within their jurisdiction for the purposes of examination.

I believe it is proper to explain that from the wording of Section 834, General Code, no unreasonable invasion of homes is contemplated. The examination is conducted solely for the purpose of fire prevention and public safety. We arrive at this conclusion from a reading of the next following section of the Code, Section 835, which authorizes the persons named in Section 834 to issue certain orders upon finding certain hazardous conditions on examination. The exposure and remedy of fire hazards is today one of the primary duties of a modern fire department. The authority given the fire marshal and others in Section 834 is not an arbitrary or unreasonable grant of power, and any abuse of this authority can adequately be remedied at law.

Therefore, it is my opinion that Section 834 authorizes the fire chiefs and members of such fire departments and other officers named in that section to inspect private homes and other buildings under the circumstances and conditions defined in Section 834.

It is further my opinion that a city ordinance, requiring the consent of the owner or occupant or the securing of a legal or valid order before entering a private building for fire examination is in conflict with the general laws providing for such examinations and therefore inoperative as to any of the officials authorized to make such examinations by Section 834 of the General Code.

Respectfully,

HERBERT S. DUFFY,
Attorney General.