

**Fees, of Witness in Suspected Arson Cases. Witness in Suspected Arson Cases, Fees of Not Payable Out of Fire Marshal Fund. Members of Fire Departments, Entitled to Witness Fees in Courts Not of Record. Fire Department, Members of Entitled to Witness Fees in Courts Not of Record.**

Costs incurred on preliminary examination in a suspected arson case are not paid out of the state fire marshal fund, but are paid in the same manner as in other criminal cases.

Members of fire departments, when appearing as witnesses in court not of record, are entitled to be paid witness fees.

January 31st, 1913.

Hon. John F. McCormick,  
State Fire Marshal,  
Helena, Montana.

Dear Sir:

I am in receipt of your letter of the 28th inst., submitting the following questions:

"1. In a preliminary examination in a suspected arson case, must all court costs, witness fees, etc., be paid from the state fire marshal fund?

"2. Are members of a paid fire department entitled to witness fees, when called upon to testify in court in a suspected arson case?"

You do not expressly so state, but it appears from your letter and from the inclosed communication for the county attorney that the preliminary examination referred to in your questions was had before a committing magistrate, and that the court costs and witness fees, about which you inquire were incurred in such court, and that the firemen, about whose witness fees you inquire, were members of a fire department of an incorporated city. My opinion is based upon this being the true situation.

The state fire marshal fund was created by Chap. 148 of the Laws of the Twelfth Legislative Assembly. Sec. 24 of the act provides:

"For the purpose of maintaining the department of the state fire marshal and the payment of the expenses incident thereto," etc. Also,

"The state auditor \* \* \* shall pay the money so received into the state treasury to the credit of a special fund for the maintenance of the office of the state fire marshal," etc. Also,

"That said salaries, compensation of special deputies or clerks, and all other expenses of the department of the state fire marshal, necessary for the performance of the duties imposed upon him by law, shall not exceed in any year the amount paid into the state treasury for that year by the fire insurance companies."

Secs. 3, 5, 20 and other sections of the act point out certain expenses which are properly chargeable against the fund. There

does not, however, appear to be anything in the act to indicate that the Legislature intended that costs incurred in a preliminary hearing upon a charge of arson, should be paid out of the fund. If it should be claimed that preliminary hearings in arson cases should be paid out of the state fire marshal fund, then upon the same theory, the costs incurred in the trial of the case in the district court would likewise be a proper charge against the fund. Thus the entire fund might be exhausted and little, if any of it at all, applied to the purposes for which the fund was intended and created, and thereby the entire purposes of the act would be defeated. I do not think the Legislature so intended.

Previous to the enactment of Chapter 148, above, the law of this state made the crime of arson a felony and the costs incurred in the prosecution of such crime were paid in the same manner as costs incurred in any other criminal cases. There is nothing in Chapter 148 indicating that costs incurred in the prosecution of arson cases are to be paid in any different maner than they were paid before the enactment of this chapter. In my opinion, so radical a change in the law would not be construed by implication, and in the absence of express enactment I think it cannot be considered that the Legislature intended to make such a change. Therefore, I am of the opinion that the costs incurred in the case which you mention are not payable out of the fire marshal fund.

Answering your second question: This department on March 23, 1909, in an opinion to the Hon. W. H. Trippett, county attorney of Deer Lodge County (Vol. 3, p. 65, Rep. and Off. Opinions) held that policemen were entitled to witness fees for appearing in courts not of record in criminal cases. Upon the same theory, it would seem that members of the fire department would be entitled to witness fees in the same courts in the same cases. Sec. 3327, R. C., further expressly provides that firemen shall not be deemed officers of the municipal corporation in which the fire department they are members of is established. Therefore, firemen would not come within the prohibition of Sec. 3182, and in my opinion are entitled to witness fees for appearing at hearings of the kind about which you inquire.

Nothing herein stated shall be construed as applying to investigations or inquiries conducted under Secs. 11, 12 or 13 of Chap. 148 above.

Very truly yours,

D. M. KELLY,  
Attorney General.