

**State Fire Marshal, Powers of. Contempt, Power of State Fire Marshal to Punish For.**

The State Fire Marshal has no authority to punish for contempt in the course of his investigations, in as much as this is a judicial function, and that portion of Chapter 148 of the Session Laws of 1913, attempting to give the State Fire Marshal such power is void.

December 10, 1914.

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

Dear Sir:

I am in receipt of your communication, under date December 7th, as follows:

"I would like your opinion as to whether or not the State Fire Marshal may proceed under Sections 11 and 12 of the State Fire Marshal Law, pages 499 and 500, Session Laws of 1911, to compel a telegraph company to produce certain telegrams deemed pertinent by the State Fire Marshal in investigating the origin of a fire, also the method of procedure?"

The law in question apparently attempts to give the State Fire Marshal or his deputy power to punish for contempt, in other words, to invest an executive officer with judicial power. I am of the opinion that the legislature has no power to invest such authority in such

officer. Section I of Article VIII, prescribes where the judicial power in the state shall reside:

"The judicial power of the state shall be vested in the Senate sitting as a court of impeachment, in a Supreme Court, District Courts, Justices of the Peace, and such other inferior courts as the legislative assembly may establish in any incorporated city or town."

The power to punish for contempt is essentially an exercise of the judicial prerogative. It is summary, drastic and capable of abuse. Any attempt to extend the use of such power must, therefore, be clearly within the provisions of the Constitution. The question of the power of an executive officer to punish for contempt was before the Supreme Court of Kansas in the case entitled in re Huron, where a Notary Public had committed a witness to jail for refusal to answer questions or obeying a subpoena. The Constitutional provision of Kansas was almost identical with ours, providing:

"The judicial power of this state shall be vested in a Supreme Court, District Courts, Probate Courts, Justices of the Peace, and such other courts inferior to the Supreme Court as may be prescribed by law."

Commenting upon this provision, the court in that case, said:

"It will be observed that the judicial power is placed in the courts expressly mentioned, and in inferior courts that may be created by the legislature, but it is not lodged alone in courts. Until a tribunal is created which rises to the dignity of a court, it cannot be vested with the judicial power."

Further than this, the court said that while the taking of testimony was incidental to a judicial proceeding, the taking of testimony by another was not judicial in its character. The court summarized its conclusion by quoting from *Langenberg v. Decker*, 31 N. E. 190.

"The authority to imprison resides where the constitution places it, and the legislature cannot give it residence elsewhere. The authority is essentially a judicial one, abiding in the courts of the land. As it is a judicial power, it is not created by the legislature, nor vested by that body. \* \* \* Judicial power, law, all sovereign power comes from the people, and vests where the people's Constitution directs it shall vest. The legislature may name tribunals that shall exercise judicial powers unless a constitution otherwise provides, but the power itself comes from the constitution, and not from the statute."

Since the legislature in enacting Chapter 148 of the Laws of 1913, created the office of State Fire Marshal, and merely gave such officer the duty to investigate fires, but did not expressly invest such officer with judicial powers, or create a court under his jurisdiction for the investigation of such matters, I am of the opinion that such officer cannot punish for contempt, since this is the exercise of a judicial

function, and can only be exercised by courts regularly created under the provisions of the Constitution.

Yours very truly,

D. M. KELLY,

Attorney General.