

**Auditor, County—Process—Witness Before—Contempt
Cannot Punish For.**

A county auditor may compel the attendance of a witness before him, but Sec. 7980 authorizing him to punish the witness for contempt upon refusal to testify is unconstitutional in that it confers a judicial power upon a non-judicial officer; he cannot compel the witness to testify.

July 9, 1919.

Mr. Joseph R. Jackson,
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Dear Sir:

In your letter of June 11, 1919, you request an opinion from this office as to the effect of Section 3104 of the Revised Codes of 1907. This section attempts to confer authority upon the county auditors of our State to issue process compelling the attendance of witnesses in the following language, to-wit:

“The county auditors are hereby authorized to administer any oath or affirmation rendered necessary to the performance of the duties of their respective offices, and shall have power to issue process and compel the attendance of witnesses before them and examine into any matter they may deem necessary, and any witness attending before such auditor shall receive the same fees and mileage as witnesses attending before justices of the peace in trial or examinations in criminal cases.”

Your specific question is as to the means which can be used by a county auditor to compel the attendance of a witness after process has been issued.

The statute itself confers authority upon the county auditor to administer oath or affirmation. It confers power to issue process compelling the attendance of witnesses before them and examination into any matter deemed necessary. This, to be sure, would be limited to such matters as

are connected with the lawful discharge of their duties as such officers. Section 7974 provides that the "process by which the attendance of a witness is required is by subpoena," etc. Section 7975 of the Code, Subdivision 2, provides as follows:

"To require attendance out of the court, before a judge, justice or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it is issued by the judge, justice or any other officer before whom the attendance is required."

It is provided by Section 3010:

"The sheriff must:

8. Serve al process or notices in the manner prescribed by law."

So far as the sections above referred to are concerned and the procedure thereunder, there appears to be no difficulty. The question now arises as to how such witnesses may be compelled to obey the process served and attend. If he attends can he be compelled to subject himself to the examination of the county auditor and answer his questions? Insofar as the matter of compelling such witness's personal attendance is concerned, it would appear that under Section 7982 taken in connection with Section 3104 the county auditor has the power to issue a warrant to the sheriff of the county to arrest the witness and bring him before the officer where his attendance is required. Section 7892 reads as follows:

"In case of a failure of a witness to attend, the court or officer issuing the subpoena, upon proof of the service thereof, and of the failure of the witness, may issue a warrant to the sheriff of the county to arrest the witness and bring him before the court or officer where his attendance was required."

The state legislature, unless restricted by the Constitution, has full power to enact such legislation as is contained in Section 7982.

Coming now to the last question we encounter an obstacle which, for the purpose intended, emasculates Section 3104. When a witness has been properly subpoenaed under the authority of the county auditor to appear and give testimony and he actually does appear voluntarily, or under Section 7982 is compelled to attend, can he then be compelled to testify? My opinion is that he cannot be compelled under such circumstances to give testimony. Section 7982 reads as follows:

"Disobedience to a subpoena, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court or officer issuing the subpoena or requiring the witness to be sworn; and if the witness be a party, his complaint or answer may be stricken out."

This section while in its own express words attempts to confer power on officers who issue subpoenas to compel witnesses to testify and punish as a contempt for a refusal to so testify, yet insofar as this section applies to officers other than judicial, it is unconstitutional and void as a county auditor would come within the category of non-judicial officers.

The decisions of the courts generally are almost unanimous to the effect that the power to punish for contempt is purely a judicial function and under provisions of a Constitution such as Section 1 of Article 4 of our State it is said that the legislature has no power to confer purely judicial functions upon non-judicial officers. The section of our Constitution above referred to reads as follows:

“The powers of the government of this state are divided into three distinct departments: The legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this Constitution expressly directed or permitted.”

Under such a constitutional provision it is held that the people of the state decided to maintain a distinct and separate division of their governmental functions in three departments, namely, the executive, legislative and judicial. By our own Supreme Court it has been held that officers of the one department cannot be compelled to discharge duties of another department. (*Jordan vs. Andres*, 26 Mont. 39, 66 Pac. 502; *In re. Weston*, 28 Mont. 219, 72 Pac. 517.)

One of the early and leading cases upon the question here involved is the case of *Langenberg vs. Decker*, 131 Ind., 31 N. E. 190; 16 L. R. A. 108.

Under the Indiana laws the State Board of Equalization of Indiana consisted of the Secretary of State, the Auditor of State, the Governor, and two private citizens. By the statute defining the duties of the State Board of Equalization it was provided as follows:

“They shall have the power to send for persons, books, and papers, to examine records, hear and question witnesses, to punish for contempt any one who refuses to appear and answer questions by fine not exceeding one thousand dollars, and by imprisonment in the county jail of any county not exceeding thirty days, or both. Appeals shall lie to the criminal court of Marion County from all orders of the board inflicting such punishment, which appeals shall be governed by the laws providing for appeals in criminal cases from justices of the peace, so far as applicable. The sheriffs of the several counties of the state shall serve all process and execute all orders of the board.”

Under this statute the State Board of Equalization summoned the appellee in this case for the purpose of examining him as to certain taxable property, which was properly in line with its duties. The appellee refused to answer and the board adjudged that he was in contempt and fined him in the sum of five hundred dollars, committing him to the custody of the sheriff until said fine should be paid. The appellee applied for a writ of habeas corpus which was granted and on the hearing he was released. An appeal was taken to the Supreme Court which resulted in the opinion referred to. The Constitution of Indiana contained a constitutional provision in practically the same words as our provision above referred to. (Section 1 of Article 4.) Upon the authority of this constitutional provision the Supreme Court of Indiana held that the legislative enactment,

insofar as it attempted to confer power upon the board to hold a witness before it in contempt, was void. The power of holding one in contempt is purely a judicial function, and under such constitutional provision as the one in question, the legislature is prohibited from granting judicial functions to an administrative body.

There is still another provision of our Constitution which Section 7980 violates, insofar as it gives the county auditor power to punish for contempt. The section in question is found in Article 3, Section 27 of our Constitution and reads as follows: "No person shall be deprived of life, liberty or property without due process of law." To give an executive officer power to compel a witness to testify and then further empower him to punish such witness for contempt for failure to testify would be depriving the witness of liberty or property without due process of law. Such an executive officer not being learned in the law might put questions to the witness which would be incompetent under the particular proceeding or immaterial and irrelevant to any issue therein without having knowledge of this fact or might further put questions to such witness the answers to which would tend to incriminate him, and yet compel an answer. This would not be giving such a witness due process of law and would prevent the legislature from giving an executive officer power to compel answers to such questions as are referred to.

For the reasons above given I am of the opinion that a witness cannot be compelled to answer before a county auditor. The county auditor, however, would not necessarily be prevented from properly discharging his duties. He might issue subpoenas and serve witnesses and when such witnesses prove to be unwilling, he might properly refuse to approve or audit the particular claims upon which he is holding an investigation. If the claimant, by proper proceedings, brought the auditor into court he then could compel the attendance and testimony on the part of any witness he desired.

Respectfully,

S. C. FORD,

Attorney General.