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APPLICATION OF LEGAL AUTHORITY IN ARSON INVESTIGATION

W. L. Martin

The following paper was based upon a lecture given by the author at the Seventh Annual Arson Seminar at Purdue University on April 23, 1951. Mr. Martin is a graduate of the University of Louisville School of Law and a member of the Kentucky State Bar Association. He was appointed State Fire Marshall of Kentucky in April, 1949, having served previously as assistant in that office. During World War II he served in the U. S. Navy for nearly six years, and was assigned to duty in both the Atlantic and Pacific theatres of war. At present he holds the permanent rank of lieutenant commander in the Naval Reserve. He is a charter member of the International Association of Arson Investigators, is vice president of that group, and has been active on behalf of the association. He is also a member of the fire prevention committee of the National Fire Protection Association and other social and civic groups.—EDITOR.

I. POWER TO ENTER PROPERTY OR PREMISES FOR PURPOSES OF INVESTIGATION

The so-called fire marshal acts in each of the states having provisions for investigation of fires universally contain a provision giving the responsible official authority to enter buildings, property, or premises. This power is a double-barreled proposition insofar as its purpose is concerned, in that it is designed in most cases to provide for inspection of premises in connection with fire safety regulations and, in addition, to give the investigator authority to enter in order to make a determination as to origin. It seems clear that insofar as the first purpose is concerned such a statute is valid as against all constitutional objections provided it is used reasonably in connection with the statutory purpose.

In view of the lack of case law on the subject, it would seem to be generally accepted that the authority extends to searches made for the purpose of discovering evidence on the premises where a fire may have occurred. It is a well-known fact to every investigator who has been involved in arson investigations that a complete search of the premises after a fire is of the utmost necessity in order to determine origin, and that certain evidence will disappear or be discredited if it is not discovered and safeguarded soon after the fire.

It would seem that this is some legal justification for these statutory powers as against constitutional objections based upon the right to refuse to incriminate oneself and to permit unreasonable search and seizure. It must be admitted, however, that there are no court decisions which clearly set out this authority, at least to the knowledge of the speaker, who has made a rather thorough if not exhaustive search and it may be

helpful, therefore, that we have an understanding of what is involved in such constitutional objections.

The right to make inspections of certain properties has been held valid on the basis of the police power of the state designed to promote the public health, safety, and welfare by providing for the examination or inspection of property by an authorized official, so that he may determine whether prescribed standards have been complied with. The power to enact and enforce inspection laws is within the general police power of the separate states, and this power may be delegated to municipal corporations.¹

The fourth amendment of the U. S. Constitution, prohibiting unreasonable search and seizure, has been held to be a limit on the powers of the Federal Government and not on the States. However, similar provisions exist in most state constitutions.² All such constitutional limitations do not apply to the reasonable rules adopted in the exercise of the police power for the protection of the public health, safety, and welfare.³ Thus, an inspection of a place of business during the business hours in the enforcement of reasonable regulations is not a violation of the guaranty against improper searches and seizures.⁴ It might be suggested at this point that it is important that the officer exercising any such authority be familiar with the statutory provisions governing such conduct. A study of some twenty-eight states' laws on the subject revealed very little difference between the statutes of the several states, but such discrepancies as are present are important in effect. A great many laws limit inspections to reasonable hours, which would leave it to the discretion of the investigator, subject to being overruled by the courts, as to whether entry at night time, on holidays, or at other times would be reasonable. It would seem where a fire occurs during the night hours, that it would be reasonable to inspect the burned property during the nighttime. In the laws of some states, however, such inspections are limited to daylight hours, or to buildings other than dwellings, or where the official is requested to act following a proper complaint. While it may be considered that such restraints are not advisable and are an unnecessary hindrance to the investigator, it is still important that the provisions of such laws be complied with in order to protect the official actions of such an officer, as well as to insure legality of the investigation.

1. 28 American Jurisprudence 849 *et seq.*

2. *Weeks v. U.S.* (1913) 232 U.S. 383, 34 S.Ct. 341; 58 L. Ed. 652.

3. *Camden County Beverage Co. v. Blair* (3d Cir. 1931) 46 F.2d 655; *Com. v. Abell* (Ky. 1938) 122 S.W. 2d 757.

4. *State ex rel. Melton v. Nolan* (Tenn.) 30 S.W. 2d 757; 47 AMERICAN JURISPRUDENCE 510.

The right to make an arrest carries with it the right to enter land and buildings, except dwellings, if necessary to make an arrest. The right to enter property in making an arrest depends upon the legality of the arrest itself.⁵ The right of police officers to enter dwellings is strictly limited. Officers have the right to break and enter (and search) a dwelling or use force to the person to enter the dwelling, in order to make a lawful arrest, as follows: (a) if the arrest is made under a warrant, or to prevent commission of a serious crime, or to effect recapture on fresh pursuit of one who has been arrested, *although* the person sought is not in the dwelling, *provided* the officer reasonably believes him to be there; or (b) if the person sought is actually in the dwelling; or (c) if someone in possession of the dwelling has lead the officer reasonably to believe that the person to be arrested is therein. In other words, where no special relation exists, there is no authority in making an arrest to break and enter a dwelling unless the person sought is actually in the building, or the owner leads the officer to believe him there.⁶

The right to enter and inspect will probably be questioned in most cases where the prosecution is seeking to introduce evidence found upon the premises. The objection will be on the constitutional grounds that prohibit unreasonable searches and seizures and the right of self-incrimination. It is necessary that the investigator take proper steps, having in view the emergency nature of the situation, to insure a legal search. If the court finds the accused's constitutional rights have been invaded, then a later arrest based upon evidence discovered thereby may be considered also illegal and it may, in addition, require that such evidence be excluded from a criminal prosecution of the accused.⁷

The constitutional protection is not from all searches and seizures but only from unreasonable ones.⁸ The exact meaning of a "reasonable" search cannot be strictly defined since the Federal court has suggested that each case must depend upon its particular facts.⁹ The following have been held to be unreasonable: A general search in the hope that evidence of crime might be found;¹⁰ ransacking a house for everything which might incriminate the accused;¹¹ opening and examining sealed letters and packages in the mail.¹²

5. Restatement, Torts, ss. 204.

6. Restatement, Torts, ss. 206.

7. ARREST, SEARCH & SEIZURE, DAX & TIBBS, Hammersmith-Kortmeyer Co., Milwaukee.

8. 47 American Jurisprudence 531 *et seq.*

9. *Steine v. U.S.* (7th Cir. 1932) 58 F.2d 40; cp. 82 American Law Reports 783.

10. *U.S. v. Lefkowitz* (1932) 285 U.S. 452, 52 S.Ct. 420.

11. *U.S. v. Kirschenblott* (2d Cir. 1926) 16 F.2d 202.

12. *Olmstead v. U.S.* (1928) 277 U.S. 438, 48 S.Ct. 564.

In general, the propriety of a search depends on the nature of the place involved.¹³ A dwelling cannot lawfully be searched without a warrant, except as an incident to a lawful arrest made therein.¹⁴ If the arrest is made lawfully at some other place, the arresting officer cannot thereafter go to the residence and search it, in the absence of consent. Except as an incident to a lawful arrest or under a search warrant, any search of a private dwelling is considered not lawful.¹⁵

Business offices are, in general, similar to dwellings in that search should not be made where it would involve a trespass.¹⁶ In other words, those parts of a business office which are normally not open to the public will be protected. There is authority for search upon reasonable or probable cause in buildings other than a dwelling, but even in this case search must be reasonable; and a failure to obtain a search warrant may render such search (not incident to arrest) unreasonable.¹⁷ When a building—even a dwelling—has been voluntarily opened to the public, search may be proper because of the owner's consent; such a consent may be found because the building has been so opened by practice, or by statutory license. Whether a building which has been opened to the fire department for the purpose of extinguishing a fire therein may also be subject to search and seizure would seem to be an open question. Thus, in a place of business which has been open by practice to the general public, police may enter and seize such contraband as is visible without further breaking and entering.¹⁸ On the basis of this authority it would seem that in the case of business property open to the gaze of fire department personnel, who are present for a legal purpose, then any evidence of crime which is apparent without a general search of the building could be seized without further process of law.

Search based upon "probable cause" should be conducted *only* when there is a strong showing of probable cause of crime being committed at the time, *and* when it is not feasible first to obtain a search warrant, *and* when search cannot be based upon prior arrest.¹⁹ The principal situation where a search and seizure on probable cause is made is where contraband goods are being, or may be, transported in an automobile or other vehicle.²⁰

13. *People v. Chiagles* (N.Y. 1923) 142 N.E. 583.

14. *Agnello v. U.S.* (1925) 269 U.S. 20, 46 S.Ct. 4.

15. See Note 7.

16. *Go-Bart Co. v. U.S.* (1931) 282 U.S. 344, 51 S.Ct. 153; *Flagg v. U.S.* (2d Cir. 1916) 233 Fed. 481, approved in 251 U.S. at 392.

17. *Schnorenberg v. U.S.* (7th Cir. 1927) 23 F.2d 38; *Taylor v. U.S.* (1932) 286 U.S. 1, 52 S.Ct. 466.

18. *Ludwid v. U.S.* (7th Cir. 1924) 3 F.2d 231; *Lee Kwong Nom v. U.S.* (2d Cir. 1927) 20 F.2d 470; *Hoch v. State* (Wisc. 1929), 225 N.W. 191.

19. *Johnson v. U.S.* (1943) 333 U.S. 10, 68 S.Ct. 367.

20. *Whitcombe v. U.S.* (3d Cir. 1937) 90 F.2d 290, 293.

The limits do not apply to situations where police officers obtain evidence or knowledge of a crime without a search—it is not a search to observe that which is open to view.²¹ Nor does it apply to search by persons other than police or government agents, that is, to search by private persons.²² The fact that evidence is obtained by other persons illegally does not prevent its use by the government.²³ Of course, if police officers had had “anything to do with” an unlawful seizure, evidence may be excluded by the court. The constitutional right is personal, however, and cannot be claimed by one who is not the owner, lessee, or lawful occupant of the premises or property searched.²⁴

Courts are sharply divided on the question whether evidence is admissible against the accused in a criminal case where it was obtained by an illegal search by the government. The following jurisdictions apparently will admit such evidence: Alabama, Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Oregon, South Carolina, Texas, and Virginia. Contrary are: United States (in more recent cases), Indiana, Kentucky, and Mississippi. The following appear to be uncertain: Iowa, Tennessee, Vermont, Washington, and West Virginia.²⁵

Constitutional rights against search and seizure may be waived where consent or permission is shown by clear and positive testimony.²⁶ Such consent should probably amount to an “invitation” and must be voluntary.²⁷ Claiming to possess a warrant amounts to coercion, though a threat to get a warrant does not.²⁸ It is well to remember that the privilege is personal and cannot be waived by another person—except possibly where the employer or principal is absent indefinitely.²⁹

In taking of property pursuant to search it is desirable that seizure be made in view of the person accused and that he be questioned as to ownership of the property concerned; this may prevent, or disprove, later claims by the accused. Note that police officers (this term is used

21. *State v. Quinn* (S.C. 1918) 97 S.E. 62, 3 American Law Reports 1500; *Patterson v. Comm.* (Ky. 1933) 66 S.W. 2d 513.

22. 150 American Law Reports 576.

23. *Burdeau v. McDowell* (1921) 256 U.S. 465, 475; 41 S.Ct. 574.

24. *Kelley v. U.S.* (8th Cir. 1932) 61 F.2d 843; *Goldberg v. U.S.* (5th Cir. 1924) 297 F.98.

25. Anno, 24 American Law Reports 1408.

26. *U.S. v. Lydecker* (W. Dist. N.Y. 1921) 275 F. 976; *Carter v. Com.* (Ky. 1930) 28 SW 2d 976.

27. *Welch v. State* (Wisc. 1924) 199 N.W. 71; *U.S. v. Thompson* (7th Cir. 1940) 113 F.2d 643; *Amos v. U.S.* (1921) 255 U.S. 313, 41 S.Ct. 266; 58 American Law Reports 742.

28. *Gatterdam v. U.S.* (6th Cir. 1925) 5 F.2d 673; 47 Am. Jur. 548.

29. *U.S. v. Ruffner* (Dist. Md. 1931) 51 F.2d 579.

to indicate all officers having police powers) may call upon private persons to accompany them both to assist and make observations in conducting a lawful search.³⁰ Where articles are seized pursuant to search they should be promptly marked for identification, carefully safeguarded, and delivered over to proper authorities for custody. After its use is no longer needed it should be disposed of as the court may order.³¹

The constitution authorizes search under warrant provided (a) there is a substantial basis for such warrant, and further (b) that the warrant "particularly described the place to be searched, and the persons or things to be seized." It prevents the seizure of one thing under a warrant describing another.³² It is important that search warrants be properly obtained and properly executed; an illegal search by warrant cannot later be justified on other grounds.³³ The reason for this is that the search warrant has been described as "one of the most drastic and offensive powers of government" and perhaps no other process incites such intense feeling in consequence of its humiliating and degrading effects.³⁴

Generally, search warrants authorize search only of places; but, by statute, warrants may also be issued for search of persons.³⁵ The following should be observed in obtaining a search warrant: (a) Become familiar with local statutes on the subject; (b) obtain advice from the local legal advisor if possible; (c) make application for the warrant promptly after obtaining knowledge of facts upon which the application is based, or the right may be lost;³⁶ (d) the warrant should be properly directed to the person executing it;³⁷ (e) the warrant should properly describe the place to be searched and the things to be seized;³⁸ (f) the warrant should be of current date and signed by a magistrate having jurisdiction;³⁹ (g) it should be promptly executed; what is a reasonable time will vary according to circumstances;⁴⁰ (h) it should be executed at a reasonable time of day where practicable;⁴¹ and (i) it is desirable that the warrant be exhibited to the occupant and the latter advised of

30. Ludwig v. U.S. (7th Cir. 1924) 3 F.2d 231 (for corroboration).

31. McGuire v. U.S. (1927) 273 U.S. 95, 47 S.Ct. 259.

32. Marron v. U. S. (1927) 275 U.S. 192, 48 S.Ct. 74.

33. State *ex rel.* Meyer v. Keeler (Wisc. 1931), 236 NW 561.

34. U.S. v. Borkowski (Dist. Ohio 1920) 268 F. 408.

35. Boyd v. U.S. (1886) 116 U.S. 616, 6 S.Ct. 524.

36. 85 American Law Reports 113.

37. U.S. v. Dziadus (N. Dist. W. Va. 1923) 289 F. 837.

38. Steele v. U.S. (1924) 267 U.S. 498, 45 S.Ct. 414; Elrod v. Moss (4th Cir. 1921) 278 F. 123; Frost v. People (Ill. 1901) 61 N.E. 1054.

39. Miller v. State (Miss. 1922) 93 S. 2.

40. Hiller v. State (Wisc. 1926) 208 N.W. 260.

41. Voorhies v. Faust (Mich. 1922) 189 N.W. 1006.

its contents;⁴² ordinarily, there should be a request for admission by the officer and denial by occupant, before forcible entry is made under search warrant;⁴³ and (j) upon the execution of a search warrant, the officer should file a return.⁴⁴

Where time allows, and other circumstances do not make such action impracticable, an officer should first obtain a search warrant, rather than risk making a search which may later be held "unreasonable." Search upon probable cause may be justified on the basis of the lack of time (as is often the case in investigating arson) and the probable cause of a serious crime having been committed. The statutory right to enter may be justified on the fact that it is an indispensable element of the right to investigate the origin of a fire, that the search is not a general one but rather an attempt to locate articles in the nature of contraband, and possibly on the basis that the property is open to the public for one purpose or another (as, for instance, to the fire department). Where subsequent visits to the property are necessary in order to search for specific items which have not been revealed on the preliminary examination of the premises it would seem to be properly within the scope of the search warrant. Where a decision has been made not to obtain a search warrant, or where obtaining such is not practicable for legal or other valid reasons, the consent of the owner should be solicited, and where obtained should be completely voluntary.

II. USE OF SUBPOENA

1. CALLING WITNESSES AND SUSPECTS

Administrative officers have no inherent powers; their authority is limited in scope to that expressly conferred by statute;⁴⁵ or those necessary powers to be inferred from the specific duties of such an officer or agency.⁴⁶ Thus the authority of an officer to (a) subpoena witnesses, (b) swear witnesses, (c) interrogate witnesses, (d) call for production of books, papers, and records, (e) inspect premises, are limited first of all by the statute creating such powers. This type of authority has been held valid, however, against such constitutional objections as delegation

42. *Novotny v. State* (Wisc. 1923) 196 N.W. 233.

43. *Hiller v. State*, *supra*.

44. *Davis v. State* (Wis. 1925) 203 N.W. 760. See also, *LAW OF ARREST*, CLARENCE ALEXANDER, Dennis & Co., Buffalo.

45. *Matthews v. Board* (Mich. 1901) 86 N.W. 1036; *F.T.C.V. Raladam Co.*, 283 U.S. 587.

46. *Potts v. Breen* (Ill. 1897) 47 NE 81.

of legislative power,⁴⁷ lack of due process of law,⁴⁸ and unreasonable search and seizure.⁴⁹

It appears that statutes giving an officer power to call witnesses and compel their testimony is valid provided there is some issue of fact for determination.⁵⁰ It is only where the witness refuses to comply with a request within the scope of the officer's authority to ask or to determine that the witness can be forced to comply by contempt or other proper proceedings.⁵¹ In such a proceeding, however, the deputy fire marshal or other authorized official is protected from civil suits based upon malicious prosecution due to the fact that he is making a judicial determination, that is, whether or not to initiate criminal proceedings.⁵²

The power to compel attendance of witnesses is limited by the statutory power of the officer concerned as we have seen. In addition, there are constitutional limits based upon the privilege against self-incrimination and unreasonable search and seizure. In connection with the former, it may be stated that the right to refuse to give information which may incriminate the witness is a personal right of the witness and it protects no one else.⁵³ A corporation cannot plead a privilege against self-incrimination, nor can it assert the personal privilege of its officers. This is subject to some exceptions, however.⁵⁴ The privilege does not excuse a witness from appearing. He must appear when properly summoned and claim his privilege.⁵⁵ If the information sought cannot possibly be used in a criminal prosecution against the witness, the privilege does not exist, even though the disclosure may tend to disgrace him or bring him into disrepute.⁵⁶ The witness may waive his privilege, and if he has done so, and disclosed his criminal connections, he may not stop, but must go on and make a full disclosure.⁵⁷

Where a suspect is called before the fire marshal for a formal hearing on the origin of the fire, we come face to face with the privilege. In a Minnesota case⁵⁸ the defendant was compelled under oath to testify before the state fire marshal and a copy of the proceedings was presented to the grand jury, whereupon the suspect was indicted. In the

47. *Kansas City So. R. Co. v. U.S.* (1913) 231 U.S. 423, 34 S.Ct. 125.

48. *Natural Gas Pipe Co. v. Slaterry* (1937) 302 U.S. 300, 58 S.Ct. 199.

49. *Baltimore & O. Railroad Co. v. I.C.C.* (1910) 221 U.S. 612, 31 S.Ct. 621; 92 American Law Reports 1466 *et seq.*; 42 Am. Jur. 314 *et seq.*

50. *Harriman v. ICC* (1908) 211 U.S. 407, 29 S.Ct. 115.

51. *Re Clark* (Conn. 1894) 31 A. 522, 28 Law Reports, Annotated 242.

52. *Phelps v. Dawson* (8th Cir. 1938) 97 F.2d 339.

53. *Brown v. Walker* (1896) 161 U.S. 591, 16 S.Ct. 644.

54. *Balt. & O. RR. Co. v. I.C.C.* (1910) 221 U.S. 612, 31 S.Ct. 621.

55. *People v. Cahill* (N.Y. 1908) 86 NE 39.

56. *Brown v. Walker*, *supra*.

57. *U.S. ex rel. Vajtauer v. Commissioner* (1927) 273 U.S. 103, 47 S.Ct. 302; *Brown v. Walker*, *supra*.

58. *State v. Rixon* (Minn. 1930), 231 NW 217.

hearing the defendants were warned that they need not answer incriminating questions; in fact, the court said that none of the answers at the hearing tended to incriminate the witness. Basing the decision upon the fact that a transcript of the hearing was given to the grand jury, the court said: "As used in the instant cases it (the fire marshal law) amounts to the same thing as compelling defendants to testify in person before the grand jury where the fire marshal would conduct the examination and by his questions assert their guilt of the very crime under investigation. Whereupon the court quashed the indictment upon the ground the witness' privilege from self-incrimination had been violated.

A Kansas case reached the opposite conclusion in a case involving an investigation by the state fire marshal and the county attorney.⁵⁹ The court said that the accused by voluntarily giving his testimony, without claiming his privilege, had waived such privilege, and that the cross-examination of the witness with respect to testimony given by him at the investigation was proper in a subsequent prosecution against him for arson.

In connection with the calling of a suspect to an investigative hearing, a South Dakota case is in point.⁶⁰ The suspect was called to testify before a magistrate regarding the theft of an automobile. The magistrate was authorized by statute to subpoena witnesses and examine witnesses for the purpose of determining whether any crime may have been committed in his jurisdiction. It does not appear that the suspect was arrested until after the hearing. The court stated that no statute can lawfully be availed of for the purpose of depriving a person charged of crime of his constitutional rights. It further said that the investigative hearing called for a judicial determination as to whether a crime had been committed, and further that: "It can properly be employed if an effort is made in good faith to determine whether or not a crime has been committed, and, if so, by whom." The court stated, however, that the party whose guilt or innocence is in fact the primary subject of the investigation *shall not be summoned* before the investigating magistrate or tribunal and subjected to inquiry in any manner regarding the offense. To the same effect,⁶¹ a New York court stated: "If a person testifying is a mere witness, he must claim his privilege on the ground that his answers will incriminate him, whereas, if he be in fact the party proceeded against, he cannot be subpoenaed, even though he claim no

59. *State v. Harris* (Kans. 1918) 175 P. 153.

60. *State v. Smith* (S.D. 1929) 228 N.W. 240.

61. *Boone v. People* (Ill. 1894) 36 NE 99 (called by grand jury); *People v. Bermel* (1911) 128 N.Y.S. 524.

privilege." A Wisconsin case, however, does not go so far.⁶² This was a suit charging a conspiracy to defraud several insurance companies brought against a fire insurance agent and another. The agent moved to quash on the ground he had been compelled to testify against himself before the state fire marshal. The local court held this a valid objection, but on appeal the supreme court of Wisconsin said his testimony could be admitted on the ground he had failed to assert his privilege. Quoting from the opinion: "The voluntary testimony of a party accused of crime, given on his preliminary examination, may be put in evidence against him by the state on his trial."⁶³ . . . The right to avail oneself of this privilege by refusal to answer is personal to the accused, and he himself must assert it.⁶⁴ . . . Under ordinary circumstances, where no statute requires it, and where the witness is possessed of ordinary intelligence and is under no duress, even when the questions are searching and inquisitorial in character, there is no duty on the part of the questioner or upon the part of the tribunal holding the inquiry to inform the witness of his constitutional privilege. To say that there is such a duty is to add to the constitutional requirement.⁶⁵ It would seem then that unless there is a statute specifically requiring that the investigator advise or warn an offender of his constitutional rights before obtaining incriminating information; it is unnecessary to do so. The rule laid down in the Wisconsin case would seem to be a good one to follow.⁶⁶

Other cases indicate a contrary opinion. The use of testimony given to the fire marshal at a hearing against an accused person depends to a great extent upon whether the statements were given voluntarily. The fact that an accused was warned that incriminating statements made during a hearing would later be used against him would tend to show that an admission or confession was voluntary in nature. Where the witness is a person of low intelligence, has a poor educational background, or is otherwise handicapped it would appear to be good policy to explain the privilege prior to questioning him. Of course, the use of such testimony is often limited by statute as, for instance, where provision is made that testimony taken before a fire marshal shall not be used in any subsequent action; but this provision has been held not to apply to admissions made where the accused was not required to testify under oath.^{66a}

62. *State v. Lloyd* (Wisc. 1913) 139 N.W. 514; Ann. Cas., 1914-C, 415, 8.

63. *State v. Glass* (Wisc. 1880) 6 NW 500.

64. *Ingalls v. State* (Wisc. 1880) 4 NW 785.

65. *State v. Duncan* (Vt. 1906) 63 A. 225, 4 LRA (NS) 1144, 112 Am. St. Rep. 922, 6 Ann. Cas. 602; *Regina v. Coote*, 12 Cox, Crim. Cas. 557.

66. See *LIE DETECTION AND CRIMINAL INTERROGATION*, FRED INBAU, Williams & Wilkins Co., Baltimore, p. 176.

66a. *People v. Ades*, N. Y. 1928, 160 N.E. 395.

Such a situation would arise where the accused made an admission in a conversation with the officer or during questioning after an arrest.^{66b}

It is difficult if not impossible to state a definite policy with regard to the warning against self-incrimination to a witness at a fire marshal's hearing. The decision is one to be made by the investigator after weighing the practical and legal considerations of the particular case.^{66c}

2. SUBPOENA DUCES TUCEM

The seizure or compulsory production of a man's private books or papers to be used as evidence against him is subject to the same objection as in the case when he is called upon to testify.⁶⁷ Seizure of a man's private papers for such a purpose is distinguished from search and seizure of stolen goods, contraband and similar articles, which rightfully belong in the custody of the law.⁶⁸ However, a person in possession of papers, but not the owner thereof can be compelled to produce them, even though they incriminate himself.⁶⁹ If the papers have been obtained without the use of process against the person claiming the privilege they may be used in evidence,⁷⁰ though some courts will exclude evidence obtained by illegal search.⁷¹

The compulsory production of private books and papers to be used in a criminal proceeding is analogous to the situation where a witness is called to testify against himself. Whether or not a particular search is reasonable is a judicial question which the courts have refused, or been unable, to define exactly; and each case is decided upon its own facts.⁷² An exploratory and general search made solely to find evidence of guilt even under a search warrant, is usually held to be unreasonable.⁷³ In general, then, the description of property to be produced should be reasonably specific, according to the kind of property involved.⁷⁴

Some courts have stated that an administrative officer cannot be given authority to commit a witness for contempt because that is a judicial function which the courts alone may exercise.⁷⁵ It appears that such

66b. *Commonwealth v. Friedman* 1930, 100 Pa. Super 164.

66c. *LAW OF ARSON*, A. F. Curtis, Dennis & Co. Inc., Buffalo, sec. 402; *SELF-INCRIMINATION*, FRED INBAU, Charles C. Thomas, Pbr., Springfield, Ill., esp. p. 87.

67. *U.S. v. White* (1944) 322 U.S. 694, 64 S.Ct. 1248; *Com. v. Sou. Exp. Co.* (Ky. 1914) 169 SW 517.

68. *Boyd v. U.S.* (1886) 116 U.S. 616, 6 S.Ct. 524.

69. *Ex Parte Hedden* (Nev. 1907) 90 P. 737.

70. 14 Am. Jur. 877.

71. *Gambino v. U.S.* (1927) 275 U.S. 310, 48 S.Ct. 137; 88 American Law Reports 353.

72. *Go-Bart v. U.S.* (1931) 282 U.S. 344, 51 S.Ct. 153.

73. *U.S. v. Rabinowitz* (1950) 339 U.S. 56, 70 S.Ct. 430; *U.S. v. Lefkowitz* (1932) 285 U.S. 452, 52 S.Ct. 420.

74. 31 LRA (NS) 835.

75. *Re Sims* (Kans. 1894) 37 P. 135; *State v. Lloyd*, *supra*.

objections, however, are based upon technicalities which require instead that an administrative officer apply to a court for enforcement of an order to produce evidence rather than have the authority to enforce the administrative order through the agency calling for such evidence.

Enforcement of subpoenas duces tecum issued in connection with investigations by the Securities Exchange Commission have been held not to involve unreasonable search and seizure.⁷⁶ And testimony given in an investigation by the Commission may be the basis for a criminal prosecution for perjury, although the investigation is *ex parte*.⁷⁷

3. ENFORCING COMPLIANCE

The procedure in the enforcement of an order or subpoena is governed by the particular statutes of each jurisdiction.⁷⁸ The usual procedure is to apply to the court for an order enforcing the subpoena in which case the court may punish for contempt if not obeyed.⁷⁹ In some cases penalties are provided for a failure or refusal to obey an order or subpoena, in which case the refusal is punished by a fine or imprisonment as for any other misdemeanor.

As a rule, a witness may be heard only upon oath or, under statutes authorizing it, affirmation, unless such oath is waived or dispensed with by statute.⁸⁰ The object of the rule is to compel the witness to speak the truth, and to lay him open to punishment if he willfully falsifies. Thus, to permit an unsworn witness to testify in a criminal case for the government is a violation of the legal rights of a defendant, and may cause a reversal of the verdict.⁸¹ A witness who does not act on account of religious or other convictions may be punished as provided by law in refusing to be sworn, although he expects that the questions to be asked will require incriminating answers.

In view of the fact that enforcement of a fire marshal's subpoena will depend to a great extent upon the individual laws of the state concerned, it is important that the investigator be familiar with the provisions in his own jurisdiction.

III. EXAMINATION OF WITNESSES

In the examination of witnesses the fire officer is given a broad authority in most states and in some cases his power is so broad that there has

76. *McMann v. S.E.C.* (2d Cir. 1937) 87 F.2d 377.

77. *Woolley v. U.S.* (9th Cir. 1938) 97 F.2d 258.

78. *Goodyear v. N.L.R.B.* (6th Cir. 1941) 122 F.2d 450, 136 American Law Reports 883.

79. *F.P.C. v. Metropolitan Ed. Co.* (1938) 304 U.S. 375, 58 S.Ct. 963.

80. *Ellicott v. Pearl* (Ky. Cir. 1836) 35 U.S. (10 Pet.) 412, 9 L. Ed. 475; *Com. v. Scott*, (Mass. 1877) 25 Am. Rep. 81; *State v. Hope* (Mo. 1890) 13 SW 490.

81. *Langford v. U.S.* (Ind. Terr. 1903) 76 SW 111.

justifiably been some question as to whether the statutory powers are valid. Two of the questions which are often considered are: The jurisdiction, or rather venue, of the court of inquiry conducted to determine the cause or blame for a fire; and whether to conduct the hearing privately by excluding attorneys for persons called and excluding and separating all witnesses except the one being questioned.

1. VENUE

The problem of locality for conducting a court of inquiry by the state fire marshal to determine the cause of a fire came up in a Kentucky case in 1913. A witness at such a hearing was charged with false swearing before a deputy fire marshal. Although such official has statewide authority to investigate fires, the statute made no mention of the place for conducting an inquiry where witnesses might be summoned. In this case the hearing was conducted in a county other than the one where the fire occurred. The court refused to uphold the indictment, saying that the fire marshal has jurisdiction "co-extensive with the state, and they may conduct an examination of a witness in any county where they can get the witness before them." . . . But they may bring witnesses from other parts of the state only from the county where the fire occurred.⁸²

In a study of similar laws of twenty-eight states by the speaker it was discovered that a majority make no provision for the locality where the fire official may conduct his hearing. At least one is deficient in that it provides that the examination shall be conducted in the county where the witness resides. It is not clear whether the statutes providing for a hearing in "any county" of a state will allow the summoning of witnesses to any county therein. Possibly the court may have been fearful that such authority would permit the administrative officer to put witnesses to an undue burden and inconvenience in extorting information from such persons. It is submitted that where no provision or only a general provision is made by statute setting out the place to conduct an inquiry that such should be conducted in the county where the fire occurred. There should be no variance of this rule except where it is manifestly impractical to do so, and in this situation an attempt should be made to obtain a waiver from the witness.

2. PRIVATE HEARING

In conducting a hearing on the cause of a fire the question of the right of the accused to counsel often arises. The Supreme Court

⁸² *Com. v. Ransdall* (Ky. 1913) 155 S.W. 1117; *Rhinehart v. State* (Tenn. 1908) 117 SW 508.

has held that the right to consult with an attorney under certain conditions is an inherent right.⁸³ If the person questioned is under arrest it would seem that he can be reasonably searched, examined, and questioned without presence of counsel. However, the prisoner should be permitted to contact his attorney, though he gives no reason therefor, where his request is made at reasonable hours, at reasonable intervals, and in conformity with reasonable regulations.⁸⁴ In consulting his attorney, the prisoner is entitled to privacy, and the presence of a police officer is erroneous, although precautions may be taken to prevent his escape or other mischief.⁸⁵ Remember that the courts are suspicious of questioning where the prisoner is held "incommunicado . . . for long periods of time," questioned in relays and subjected to similar treatment before bringing the prisoner to a magistrate within a reasonable time after arrest for fixing bail or for a preliminary hearing.⁸⁶

The accused can waive the right to an attorney during trial but the courts will examine a waiver closely and the prosecution should be prepared to show his ability and opportunity to obtain counsel. He should be given an opportunity to obtain counsel at every stage of the proceedings.⁸⁷

There is some authority for the proposition that the right to counsel applies only to criminal prosecutions in the federal courts.⁸⁸ Some states, however, have constitutional or statutory provisions giving a right to counsel, in which case the provisions of such a limitation should be strictly complied with.

At a coroner's inquest a suspected person has no right to appear by counsel and cross-examine witnesses, as the only object of such a course would be to prevent a full investigation, insofar as it might tend to incriminate him, thus defeating the purpose of the investigation.⁸⁹ In an investigative proceeding there are no issues of fact between parties and, therefore, no person has a right to appear with counsel and examine witnesses. This is not to say that a suspect must answer self-incriminating questions or that he is thereby subject to unreasonable search and

83. *Ashcraft v. Tennessee* (1946) 327 U.S. 274, 66 S.Ct. 544; 130 American Law Reports 1427.

84. 14 Am. Jur. 886.

85. *Turner v. State* (Tex. 1922) 241 SW 162; *Ex Parte Snyder* (Cal. 1923) 217 P. 777; *People ex rel. Burgess v. Risley* (N.Y. 1883) 66 How. Pr. 67.

86. 6 C.J.S. 617; *Barber v. U.S.* (4th Cir. 1944) 142 Fed.2d 805; *Peloquin v. Hibner* (Wisc. 1939), 285 NW 380.

87. *Carter v. People of Illinois*, 329 U.S. 173, 67 S.Ct. 216; *Glasser v. U.S.* 315 U.S. 60, 62 S.Ct. 457; *Powell v. Alabama* 287 U.S. 45, 53 S.Ct. 55.

88. *Johnson v. Zerbst* (1938) 304 U.S. 458, 58 S.Ct. 1019; but, see *Williams v. Kaiser*, (1945) 323 U.S. 471, 65 S.Ct. 363.

89. *Aetna L. Ins. Co. v. Milward* (Ky. 1904) 82 SW 364; *State v. Griffin* (S. Car. 1914) 82 SE 254, Ann. Cas. 1916-D, 392.

seizure.⁹⁰ Note that such an investigation differs from the preliminary hearing before the magistrate, as it is not the duty of the magistrate to elicit evidence but rather to determine if there is sufficient evidence to hold the accused for the grand jury.⁹¹ But a voluntary confession before a magistrate is admissible.⁹² On the basis of the foregoing cases it appears that attorneys for all witnesses may be excluded from an inquest by the fire marshal where the hearing is conducted privately.

Another problem in the investigation is excluding unnecessary witnesses and separating witnesses to be examined. Most of the so-called fire marshal acts provide that witnesses may be excluded from the place where such investigation is held, and witnesses may be kept separate and apart from each other, and not allowed to communicate with each other until they have been examined. In a reported Wisconsin case the court limited this power somewhat.⁹³ In this case the suspect was placed in a room under restraint for some thirty-six hours prior to being questioned and was refused permission to see his attorney. The home of the suspect had burned while his furniture was discovered in the barn; the exact details are not pertinent, however, for this purpose. In any case he was tried and acquitted of the arson charge whereupon he brought action against the deputy fire marshal and others for false imprisonment and recovered a judgment for \$1,800. The upper court upheld the decision on the legal grounds, but reversed on the question of damages and, in discussing the question, the court conceded a power to exclude witnesses from the place of a hearing, but said the marshal had no authority to restrict witnesses in order to separate them. This, said the court, would give the fire marshal authority greater than that of a magistrate, grand jury, or a court. For our purposes the following statement of the court is important: "If the witnesses are excluded from the place of hearing or investigation and are in the presence of someone charged with the duty of preventing communication, that would appear to be as far as the authority of the fire marshal or his deputy extends." It would seem that this is a sufficient guide on this question.

IV. POWER OF ARREST

The authority of a fire marshal or similar officer to make an arrest depends upon many factors so that a general discussion of the law of arson is pertinent. The right to arrest without warrant depends upon the offense involved. This power exists in general only where the offense

90. *Wood v. U.S.* (D.C. 1942) 128 F.2d 265.

91. *Ibid.*

92. *Rector v. Com.* (1882) 80 Ky. 468.

93. *Geldon v. Finnegan* (Wisc. 1934) 252 NW 369.

is a felony or a breach of peace.⁹⁴ In felony cases, a police officer may make an arrest without warrant, under two circumstances: First, where the officer knows, or reasonably suspects, that a felony has been committed and that the person being arrested has committed it, even though the person arrested is actually innocent, and further, even though no felony was in fact committed; and second, where there is an attempt to commit a felony in the officer's presence and the arrest is made at once upon fresh pursuit.⁹⁵ Arrests so made on suspicion by police officers, for purposes of investigation, may be proper, even though the suspicion later turns out to be unfounded and the arrested person is discharged without issuance of a warrant.⁹⁶

A private person, or agent without arresting powers, may arrest for a felony actually committed in his presence, but he has no protection where he makes an arrest on suspicion, regardless of how reasonable the action may have been, unless he can establish that a felony in fact has been committed. The danger of making an arrest on suspicion by a person without the arresting powers of a police officer are apparent.⁹⁷

To have a "reasonable suspicion" that a person has committed a felony does not require that the officer "believe" him guilty of the offense. The basis of such suspicion for felony arrests may be information received from persons whom the officer has reason to believe are telling the truth, and upon which information he would act in his ordinary private life. Reasonable suspicion could be based presumably upon descriptions given by the victim or by witnesses to the felony, wanted notices from police agencies, suspicious actions on the part of persons arrested, or the inability or refusal of the arrested person to give satisfactory account of himself.⁹⁸

Warrants of arrest are usually obtained upon complaint. Issuance of the warrant imposes upon the officer a duty to make arrest which is not affected by the officer's belief in the guilt of the person accused.⁹⁹ The complaint may be made by any individual including a peace officer, but ordinarily should be made by a person acquainted with the facts.¹⁰⁰ The peace officer is protected in making an arrest under warrant, provided the warrant is valid and fair upon its face. A warrant fair on its face must show certain facts as required by statute or common law. The

94. *Rouda v. U.S.* (2d Cir. 1926) 10 F.2d 916.

95. ARREST, SEARCH AND SEIZURE, DAX & TIBBS, and cases cited therein.

96. *Peloquin v. Hibner*, *supra*.

97. Restatement, Torts, Sec. 119 et seq.

98. Arrest, Search & Seizure, cited *supra*; *U.S. v. Bell* (Dist. Calif. 1943) 48 F.S. 986; *U.S. v. Li Fat Tong* (2d Cir. 1945) 152 F.2d 650.

99. Restatement, Torts, sec. 123, 4.

100. *State v. Baltes* (Wisc. 1924) 198 N.W. 282.

officer is not required to consider facts outside the warrant, or facts of which he himself has personal knowledge.¹⁰¹ However, a person serving a warrant is bound at his peril to know the formal requirements of a valid warrant, as a warrant cannot be made good by alteration after its issuance.

It is impossible to consider in detail the requirements of a valid warrant according to the laws of the several states, but, in general, the following should be included: (a) direction to a particular officer or officers that service be made; (b) description of the accused by name, if known, or other description; (c) thorough description of the nature of the crime conducted; (d) description of the place and time of the offense; (e) description as to disposition of the prisoner; (f) issuance by a court or tribunal having general authority over the offense; (g) signature of issuing officer, seal of the court, attestation by the judge, and date of issue. In making the arrest, the officer should inform the arrested person of his intention to arrest him, of his possession of the warrant (if he has it) and of the offense charged therein. A return should be made on warrant reciting that the arrest has been made on a certain date as soon as practicable after the arrest.¹⁰²

Arrest, otherwise legal, for a felony may be made at any time and should be made as soon as circumstances permit.¹⁰³ After the lapse of a reasonable time after issue or delivery, or the time prescribed, a warrant becomes spent. Statutes governing time of arrest control as to when an arrest should be made; some statutes limit arrest on Sunday or other days to specified felonies.

A person may not be punished without a formal and sufficient accusation, even if he voluntarily submits to the jurisdiction of the court.¹⁰⁴ The manner and form of such accusations are prescribed by local law. When anyone knows, or believes upon reasonable cause, that someone has committed, or threatens to commit, a crime, it is generally his statutory duty to communicate that knowledge to the proper official. In many states it is a crime to conceal such information.¹⁰⁵ Complainants acting in good faith and upon proper cause are generally protected from liability, criminal and civil, in the performance of their statutory duty to complain.¹⁰⁶ It will be seen that no complaint should be delayed beyond a reasonable time, although there should be sufficient cause for

101. *Campbell v. Sherman* (1874) 35 Wisc. 103.

102. *Arrest, Search & Seizure*, cited *supra*.

103. 4 Am. Jur. 47; *State v. Kopelow* (Me. 1927) 138 A. 625.

104. *LAW OF ARREST*, Alexander, Dennis & Co., Buffalo; *Albrecht v. U.S.* 273 U.S. 1, 47 S.Ct. 251.

105. *LAW OF ARREST*, cited *supra*, sec. 720.

106. *LAW OF ARREST*, cited *supra*, sec. 29.

believing a crime has been committed before the complaint is filed. Practical circumstances will often compel one course of action over another, but such considerations are beyond the scope of this discussion.

We have seen that a private person may arrest for a felony committed in his presence. The right to arrest upon suspicion, however, is restricted generally to peace officers. Originally, the right of arrest was considered to inhere in peace officers, limited only by statutory provisions and general law.¹⁰⁷ More recently, officers of the law and their powers are designated by statute. A good working knowledge of the law of arrest and his own official authority is essential to a law enforcement officer.¹⁰⁸ The authority, therefore, of a fire marshal to make an arrest is largely dependent upon statutory provisions. Without statutory authority to make arrests upon reasonable cause it is running great risk for the investigator to make an arrest upon suspicion. In the absence of such statutory authority an arrest should be made only for felonies committed in the presence of the officer.

There are many statutes designating agents, officers and employees, under various names, as having the power to make arrests in connection with their departmental and official duties, and in such cases there is little distinction between them and regular peace officers.¹⁰⁹ Some states authorize private persons to make an arrest upon reasonable grounds for believing the arrested person has committed a felony.¹¹⁰ However, a private person will have no authority to make an arrest *under warrant* even though he would have a right to arrest for reasonable cause.¹¹¹

V. RECORDS

Following the completion of an investigation, there will often be a request made by the suspect or his attorney for permission to inspect the files on the case for the purpose of preparing a defense to a criminal prosecution which may follow, or in order to obtain information with which to prosecute a claim against the insurer. There is very little uniformity in statutory provisions covering the private nature of such records, although in a good many states provisions are made to withhold investigative records at the discretion of the public agency concerned. Much of the information obtained during an investigation is of a confidential nature, some of which is mere rumor and a witness

107. *Maul v. U.S.* (1927) 274 U.S. 501, 47 S.Ct. 735.

108. *ARREST, SEARCH AND SEIZURE*, cited *supra*. See also *Lawton v. Harkins* (Okla. 1912) 126 P. 727, 42 LRA (NS) 69; *Taylor v. Shields* (Ky. 1919) 210 SW 163, 3 ALR 1619.

109. *LAW OF ARREST*, cited *supra*, sec. 49 et seq; *State v. Wills* (W. Va. 1922), 114 SE 261.

110. Ky. Cr. Code, sec. 37.

111. *Mann v. Com.* (Ky. 1904) 82 SW 438; 24 Ky. L. Journal 229.

is less likely to pass along such information if it is immediately to be made part of a public record. While it is necessary to advise an accused person of the general nature of the charge against him, it is inadvisable from the standpoint of the prosecution that he be given complete knowledge of the information in the hands of the prosecuting officials. Many lawyers want a copy of the investigator's report merely as part of a searching expedition or else to obtain information which they would otherwise have to work for. The right to withhold such records from public inspection is one which the fire marshal guards jealously, and I propose to discuss the factors involved in keeping such information private.

Any record which the law requires to be kept, or is necessary to be kept in the discharge of a duty imposed by law is a public record.¹¹² Such records belong to the office and to the public and, generally speaking, are open to public inspection provided the persons seeking to inspect the records have a valid interest therein.¹¹³ There is no common-law right, however, in all persons to inspect public records, and such a right, if it exists, depends entirely upon statutory grant.¹¹⁴ The right to inspect includes the right to copy.¹¹⁵ No one has a right to examine or obtain copies of public records from mere curiosity, or for the purpose of creating public scandal, or from motives merely speculative.¹¹⁶

It has been held that there is no general right of inspection of records of executive departments of the government which are not intended as notice, but are kept merely as evidence of the transactions in the departments.¹¹⁷ A statute providing for the inspection of certain specifically enumerated public records is construed as excluding from its effect all records not specifically mentioned in such statute.¹¹⁸

Some cases hold that all city records must be open to the public.¹¹⁹ In some states public inspection of city records is regulated by statute, but in general every city taxpayer has a right to examine the records of the municipality of which he is an inhabitant.¹²⁰

The right to inspect state records that are of such a nature as to be of interest to the public in general is a right that belongs to each citizen and taxpayer of the state, if his inspection is made in the public inter-

112. *Robison v. Fishback* (Ind. 1911) 93 NE 666, LRA 1917-B, 1179.

113. *Fayette Co. v. Martin* (Ky. 1939) 130 SW 2d 838.

114. *Ibid.*

115. *Direct-Mail Service v. Registrar* (Mass. 1937) 5 NE 2d 545, 108 ALR 1391.

116. *Brewer v. Watson* (Ala. 1882) 46 Am. Rep. 318; 45 Am. Jur. 420 *et seq.*

117. *McGannahan v. New Idria Min. Co.* (1878) 96 U.S. 316, 24 L. Ed. 630.

118. 25 Ruling Case Law 996. *Nowack v. Auditor Gen.* (Mich.) 219 NW 749.

119. *Burton v. Tuite* (Mich. 1889) 44 NW 782, 7 LRA 73.

120. *State ex rel. Wellford v. Williams* (Tenn. 1903) 75 SW 948.

est.¹²¹ Automobile records are usually considered public records which any citizen has a right to examine and copy.¹²² The right of inspection does not extend to all public records or documents, for public policy demands that some of them, although of public nature, must be kept secret and free from common inspection, such as records related to the apprehension, detection, and detention of criminals.¹²³

Statutes forbidding disclosure by public officials of certain records, reports and information have generally been held to be valid by the courts, except in unusual situations where constitutional provisions have been held to prohibit withholding of such reports. The courts have repeatedly said that the wisdom or policy of such legislation is strictly a question for the legislature.¹²⁴ The creation of rules of privilege as to information in the hands of administrative officers was unknown to the common law, and is largely if not entirely statutory in origin.¹²⁵ These statutes are strictly construed by the courts inasmuch as they have the effect of reducing the amount of evidence available to the courts.¹²⁶ Thus, a record must come within the express terms of a statute forbidding disclosure in order to be privileged.¹²⁷ In case of ambiguity, however, the courts will adopt the construction which tends to uphold the purpose of the law in question.¹²⁸

If certain information is declared privileged it may lose its secret character where there has been previous disclosure. Thus, where a statute made certain communications between a prosecutor and a county attorney privileged, the court held that the information was not privileged in an action for malicious prosecution, because the prosecutor had testified at a former trial to the same facts protected by the law. It may be seen that where one of the parties protected by the privilege has voluntarily disclosed the information, this will constitute a waiver of the right to withhold such information.¹²⁹

A few cases have dealt with the question of availability in litigation of notes, books, reports and records pertaining to investigations made

121. *Nowack v. Auditor Gen., supra.*

122. 108 ALR 1395.

123. *Lee v. Beach Pub. Co.* (Fla. 1937) 173 So. 440.

124. *Re Reid* (D.C. Mich., 1906) 155 F. 933 (tax statements) *Re Valecia Cond. Milk Co.* (7th Cir. 1917) 240 F. 310 (tax info); *Featherstone v. Norman* (Ga. 1930) 153 SE 58, 70 ALR 449 (income tax returns); *Re Manufacturers Trust Co.* (1945) 53 NYS 2d 923; *Okla. Tax Comm. v. Clendinning* (Okla. 1943) 143 P. 2d 143, 151 ALR 1035.

125. *Conn. Importing Co. v. Continental Dist. Corp.* (DC Conn. 1940) 1 FRD 190.

126. *Maryland Casualty Co. v. Clintwood Bank* (Va. 1930) 154 SE 492.

127. *Samish v. Superior Ct.* (Calif. 1938) 83 P. 2d 305.

128. *Rowell v. Pratt* (1937) 3 All Eng. R. 660-HL; *Hickok v. Margolis* (Minn. 1946) 22 NW 2d 850.

129. *Cole v. Andrews* (Minn. 1898) 76 NW 962; *State v. Hoben* (Utah 1909) 102 P. 1000 (disclosure by attorney's client); *Commercial Union Ins. Co. v. Connolly* (Minn. 1931) 235 NW 634.

by fire prevention officers. Where the policy of the legislature to exclude such data from use has been made clear, the information has been held to be privileged. On the other hand, information secured by such officers but not included within the statutory definition of private records is not considered privileged information.

In a Wisconsin case a party sought to examine the files of the state fire marshal for use in an action against a fire insurance company.¹³⁰ The Wisconsin laws provided that "facts, statistics and circumstances" determined by the fire marshal from investigations should be *open* to public inspection, but stated that all investigations may, at the marshal's discretion, be conducted privately. The court refused to force disclosure of the investigative files since only the marshal's conclusions or determinations, and not the investigations themselves, were to be made matters of record. The court emphasized that disclosure of information obtained by the marshal would defeat the purpose of the statute which was intended to help provide information to apprehend and punish those guilty of arson. It is submitted that the court went beyond the rule of strict construction of statutes of this type, for the reason stated by the court, and possibly because it was aware of the purpose for which the information was desired.

The same court upheld this policy in a later case in 1931, where a deputy fire marshal was called as a witness for the insured in an action on a fire insurance policy.¹³¹ The marshal had been committed for contempt by his refusal to testify for the insured. The upper court reversed the decision committing him for contempt upon the ground that the marshal's notes and books were privileged and not open to public inspection unless the state fire marshal himself saw fit to disclose such information relating to a fire investigation. The right of the state to preserve the secret, said the court, is superior to that of the litigant's right to produce relevant evidence. With reference to the fact that the witness refreshed his memory from notes on direct examination, it was pointed out that at no time was it suggested to him that such use of the notebook would affect his right to withhold it from opposing counsel on cross-examination. The speaker suggests that no investigator should use privileged information on the witness stand to refresh his memory or for other purposes, except where absolutely necessary, since he runs the risk of waiving his privilege not to disclose their confidential records.

But in a Minnesota case the court refused to allow a deputy fire marshal to withhold remarks and statements made to him because the

130. State *ex rel.* Spencer v. Freedy (Wis. 1929), 223 NW 861.

131. Gilbertson v. State (Wis. 1931) 236 NW 539.

statements had not been taken pursuant to the provisions of the fire marshal law inasmuch as the witness had not been under subpoena by the fire marshal, and because it did not appear that the statements were made under oath.¹³² This illustrates a strict construction of the statutes by the courts and emphasizes the importance of strict compliance with statutes in the use of confidential information.¹³³ There is no doubt of the legality of statutes providing that such information shall be kept private at the discretion of the fire marshal, but it is clear that such a right can be waived if there has been previous disclosure of the information except to other persons who are protected by the privilege.

132. *State v. Poelaert* (Minn. 1937) 273 NW 641.

133. Anno: 165 American Law Reports 1302.