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Problems of Arson Investigation Arising Under State Fire Marshal Acts

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PROBLEMS OF ARSON INVESTIGATION ARISING UNDER STATE FIRE MARSHAL ACTS

In an effort to increase the effectiveness of fire prevention authorities, more than three-quarters of the states have enacted fire marshal legislation.[1] Such statutes have endeavored to clearly define and to enlarge the legal authority of fire prevention agencies. In addition to conferring upon the fire marshal or his counterpart[2] powers sufficient to prevent the outbreak of fire,[3] these statutes have been designed to facilitate the investigation of fires subsequent to their occurrence. However, existing legislation contains various provisions which are totally inadequate to accomplish their objectives. Some statutes do not confer sufficient powers to enable the fire marshal to act effectively, whereas others appear to confer powers which are so broad as to exceed the require-

[1] ALA. CODE tit. 55, §§ 29-59 (Supp. 1953); ARK. STAT. ANN. §§ 82: 801-805 (Supp. 1955); CAL. H. & S. CODE ANN. §§ 13100-13146 (Supp. 1953); CONN. GEN. STAT. §§3664-3693 (Supp. 1953); FLA. STAT. ANN. §§ 633.01-633.17 (Supp. 1954); ILL. ANN. STAT. c. 127½, §§ 6-21 (Smith-Hurd Supp. 1955); IND. ANN. STAT. §§ 20: 801-820 (Burns Supp. 1955); IOWA CODE ANN. §§ 100: 1 to -34 (Supp. 1955); KAN. GEN. STAT. §§ 31: 201 to -210 (Supp. 1953); KY. REV. STAT. c. 227, §§ 227: 200 to -990 (Baldwin 1955); LA. REV. STAT. §§ 40: 1561 to -1592 (Cum. Supp. 1952); ME. REV. STAT. c. 97, §§ 1-72 (Supp. 1955); MD. ANN. CODE GEN. LAWS art. 48A, §§ 83-96 (Supp. 1954); MASS. ANN. LAWS c. 148, §§ 1-8 (Supp. 1955); MICH. STAT. ANN. §§ 4: 559(1) to -(26) (Supp. 1955); MINN. STAT. §§ 73.01 to -.29 (1949); MISS. STAT. ANN. §§ 5699-5704 (Supp. 1954); MONT. REV. CODES ANN. §§ 82: 1201 to -1237 (Supp. 1955); NEB. REV. STAT. §§ 81: 501 to -541 (Cum. Supp. 1955); N.H. REV. STAT. ANN. c. 175, §§ 22-28 (1955); N.J. REV. STAT. §§ 40: 22-16 to -22 (Supp. 1955); N. M. LAWS 1955, c. 214; N. C. GEN. STAT. §§ 69.1 to -.7 (Supp. 1955); N. D. REV. CODE §§ 18: 0101 to -0132 (Supp. 1953); OHIO REV. CODE ANN. §§ 3737.01 to -.99 (Baldwin 1953); OKLA. STAT. ANN. tit. 74, §§ 311-323 (Supp. 1955); ORE. REV. STAT. §§ 476.010 to -.990 (Supp. 1955); PA. STAT. ANN. tit. 53, §§ 3591-3603 (Purdon 1954); R. I. GEN. LAWS c. 354, §§ 1-9 (1938); S. C. CODE §§ 1160-1198 (Cum. Supp. 1955); S. D. CODE §§ 1.0301 to -0307 (Supp. 1953); TENN. CODE ANN. §§ 53.2401 to -2446 (Supp. 1955); TEX. CIV. STAT. ANN., INSURANCE CODE art. 543-546 (Supp. 1955); VT. REV. CODE §§ 10,338 to -,365 (1947); VA. CODE §§ 27.30 to -.37, 27.55 to -.85 (1954); W. VA. CODE ANN. §§ 2787-2813 (1955); WIS. STAT. §§ 200.01 to -.25 (1953); WYO. COMP. STAT. ANN. §§ 45-411 to -416 (Cum. Supp. 1955).

[2] In some states the powers of the state fire marshal are incorporated into the office of the commissioner of insurance, or a similar statewide office. Commissioner of Insurance: MD. ANN. CODE GEN. LAWS art. 48A, § 83 (Supp. 1954); Commissioner of Police: MICH. STAT. ANN. § 4.435 (Supp. 1955); Department of Public Safety: ILL. ANN. STAT. c. 127½, § 6 (Smith-Hurd Supp. 1955); State Corporation Commission: VA. CODE §§ 27-66 (1954).

[3] Such as the power to regulate the use of explosives; the construction and maintenance of buildings; and the use of buildings by the public. *E.g.*, KY. REV. STAT. § 227.220 (Baldwin Supp. 1955).

ments of necessity and to be subject to attack on constitutional grounds.[4] The solution to this problem lies in the achievement of an effective balance between the interests of public safety and the protection of individual rights. The difficulties inherent in the attainment of this objective may be readily seen through an analysis of the application of the several powers of the fire marshal to the problems of arson investigation.[5]

Power to Enter Property or Premises for Purposes of Investigation

The present discussion will be largely confined to problems arising as the result of investigations into fires which have already occurred. However, a clear understanding of the problems of arson investigation requires a preliminary inquiry into the powers of the fire marshal prior to the outbreak of fire.

Power to inspect prior to the outbreak of fire

The right to inspect certain premises is included within the general police power retained by the individual states.[6] However, the exercise of this power is limited both by specific provisions of state constitutions and by state statutes. State constitutions without exception prohibit unreasonable search and seizure.[7] Such restrictions, however, are obviated by the use of a search warrant, which is issued only when probable cause is shown for the belief that the object sought is at a particular location.[8] It is generally recognized

[4] The language of the Mississippi fire marshal statute appears to vest judicial as well as investigative powers in the fire marshal, contrary to the doctrine of separation of powers. Miss. Stat. Ann. § 5701 (Supp. 1954). Another constitutional consideration is whether the powers granted by the legislature to the fire prevention agency are reasonable and bear a necessary relation to the desired objectives. Thus, if the statutory provisions are unreasonable or do not bear a substantial relation to the public health, safety or welfare they are beyond the boundaries of the police power and are in conflict with the due process clause of the fourteenth amendment. See, Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 Harv. L. Rev. 943 (1927).

[5] For a discussion of this subject see Martin, *Application of Legal Authority in Arson Investigation*, 42 J. Crim. L., C. & P. S. 468 (1951).

[6] Pure Oil Co. v. Minnesota, 248 U. S. 158 (1918). In general, matters relating to police and fire protection are of state-wide concern and are regulated by virtue of the police power, which accords jurisdiction to the state over such conditions as may affect the health, safety, and welfare of the community. However, in matters of local concern, this power may be delegated to appropriate municipal corporations. State v. Starkey, 112 Me. 8, 90 Atl. 431 (1914); Sayre v. Phillips, 148 Pa. 482, 24 Atl. 76 (1892). For a comprehensive discussion of police powers see Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 Harv. L. Rev. 943 (1927).

[7] The United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U. S. Const. amend. IV. While the fourth amendment applies only to federal powers, similar provisions exist in most state constitutions. Such constitutional restrictions do not apply to all searches and seizures, but only to unreasonable ones. Since the exact meaning of "reasonable" search is somewhat illusory, each case must be decided upon its particular facts. Steine v. United States, 58 F.2d 40 (7th Cir. 1932). Examples of unreasonable searches and seizures are to be seen in the following: a general exploration in the hope of finding evidence of crime, United States v. Lefkowicz, 285 U. S. 452 (1932); a search of the house of an accused for incriminating evidence, United States v. Kirshenblott, 16 F.2d 202 (2nd Cir. 1926); the opening and examining of sealed letters and packages in the mail, Olmstead v. United States, 277 U. S. 438 (1928), Ex Parte Jackson, 96 U. S. 727 (1877). For a searching analysis of this area see Comment, 45 J. Crim. L., C. & P.S. 51 (1954).

[8] The Illinois Constitution provides that ". . . no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched and the persons or things to be seized," Ill. Const. art. II, § 6. Thus, the conditions precedent to the issuance of a subpoena are two: 1) probable cause must be shown for believing the existence of the objects of the search at the location to be searched, and 2) the location and

that private dwellings and places of business cannot be searched without a warrant where such a search would involve a trespass to property.[9] However, where a place of business, or even a dwelling is normally open to the general public, the fire marshal may enter the public area without a warrant, and may seize such contraband as is visible without breaking and entering.[10] Such inspection of a place of business during business hours has been held not to violate the guarantee against unreasonable searches and seizures.[11] In addition, a search warrant is not needed in an emergency situation where a strong possibility of imminent danger exists, and where it is impractical to first obtain a warrant.[12] In such an emergency, the fire marshal is permitted to enter and investigate the premises without a search warrant even though such inspection would ordinarily constitute a trespass.[13]

Furthermore, most states have statutes which specifically limit the fire marshal's right to enter and inspect. For instance, many of these statutes contain provisions restricting inspection to reasonable hours.[14] However, the inspector is generally accorded authority to enter subject to judicial determination as to what hours of the day or night are reasonable.[15] In some jurisdictions, inspections are limited to buildings other than residential dwellings,[16] and many states provide that inspections may take place only as the result of a proper complaint.[17]

Power to investigate after the outbreak of fire

Where a fire has already occurred or is in progress and a search of the premises is necessary to discover evidence of the cause, origin or circumstances of the fire, the fire marshal is theoretically subject to the same general constitutional and statutory limitations as were previously discussed. However, because of the need to secure evidence of the cause of the fire before such evidence is destroyed, most states have broadened the powers of the fire marshal to enable him to enter the premises without a search warrant. In many instances, the power to enter and inspect for the purpose of investigation has been extended to include "all hours of the day or night" after a fire has occurred.[18]

description of the objects of the search must be specified. Moreover, officers making a search must have a belief reasonably arising out of circumstances known to them, justifying the search, before they commence it. Byars v. United States, 273 U. S. 28 (1926). It has also been held that a search warrant calling for the seizure of one thing will not authorize the seizure of something else. Marron v. United States, 275 U. S. 192 (1927).

[9] "The search of a private dwelling without a warrant is, in itself, unreasonable and abhorrent to our laws." Agnello v. United States, 269 U. S. 20, 32 (1925). In regard to the search of places of business see Go-Bart Co. v. United States, 282 U. S. 344 (1931); Flagg v. United States, 233 Fed. 481 (2nd Cir. 1916). Entrance without a warrant may be gained with the consent or permission of the owner but such consent should probably amount to an invitation and must be voluntary. Amos v. United States, 255 U. S. 313 (1921); United States v. Thompson, 113 F.2d 643 (7th Cir. 1940). Welch v. State, 184 Wis. 296, 199 N.W. 71 (1924). Falsely claiming to have a warrant amounts to coercion, though a threat to get one does not. Getterdam v. United States, 5 F.2d 673 (6th Cir. 1925). Entrance may also be gained as an incident to a lawful arrest. United States v. Rabinowitz, 339 U. S. 56 (1950); Agnello v. United States, 269 U. S. 20 (1925).

[10] Lee Kwong Nom v. United States, 20 F.2d 470 (2nd Cir. 1927); Ludwig v. United States, 3 F.2d 231 (7th Cir. 1924); Hoch v. State, 199 Wis. 63, 225 N.W. 191 (1929).

[11] State ex rel Melton v. Nolan, 161 Tenn. 293, 30 S.W. 2d 601 (1930).

[12] Johnson v. United States, 333 U. S. 10 (1948).

[13] Whitcombe v. United States, 90 F.2d 290 (3rd Cir. 1937).

[14] See, *e.g.*, FLA. STAT. ANN. § 633.06 (Supp. 1954); KY. REV. STAT. § 227.270 (Baldwin 1955); MASS. ANN. LAWS c. 148, § 4 (Supp. 1955); NEB. REV. STAT. §§ 81–512 (Cum. Supp. 1955).

[15] See Martin, *Application of Legal Authority in Arson Investigation*, 42 J. CRIM. L., C. & P.S. 468, 469 (1951).

[16] See, *e.g.*, KY. REV. STAT. § 227.270 (Baldwin 1955); LA. REV. STAT. § 40: 1575 (Cum. Supp. 1955); MD. ANN. CODE GEN. LAWS art. 48A, § 94 (Supp. 1954).

[17] See *e.g.*, ALA. CODE tit. 55, § 39 (Supp. 1953); MISS. STAT. ANN. § 5701 (Supp. 1954).

[18] See *e.g.*, MD. ANN. CODE GEN. LAWS art. 48A,

In addition, this power may include the right to "inspect neighboring premises and buildings."[19] However, where state statutes have not expressly conferred such broad powers, it is necessary that the fire marshal must take all precautions to insure the reasonableness of the search, for if evidence secured is found to be the product of an unreasonable and therefore illegal search, it may be excluded from a subsequent criminal prosecution.[20]

In addition to the power to enter and inspect, presently possessed by the fire marshal, the officer should be empowered to secure the fire scene intact from subsequent alteration.[21] He must have the power to exclude all unauthorized persons from the scene of the fire until examination and search of the premises has been completed. The principal reason for this requirement is to prevent the alteration, destruction or removal by unauthorized persons of evidence which may be present. The fire scene must not only be secured and protected from intentional alteration;[22] it must also be protected from the elements.[23] Furthermore, the fire marshal must be empowered to confiscate and take into possession any article, substance, or material at the fire scene which might constitute evidence as to the initial cause of the fire or its subsequent extension. Such powers have not been specifically granted to the fire marshal for such rights have been assumed to exist as a necessary part of the power to investigate into the cause, origin and circumstances of each fire.[24] However, in order to avoid any situation where evidence seized at a fire scene is denied admission into evidence at a trial because of the manner in which it has been secured, legislation should be encouraged which specifically empowers the fire marshal or other investigating officer to secure and protect the fire scene and to seize evidence thereon without first obtaining a search warrant.

Power to Conduct Hearings and to Examine Witnesses

When a fire has occurred, the fire marshal has authority to hold hearings in order to determine whether the fire was incendiary in nature. The authority of the fire marshal as an administrative officer to summon witnesses and take their testimony, and to compel the production of relevant papers, records and books is a purely statutory delegation accorded the official for the purpose of determining issues of fact.[25] However, in the exercise of this

§ 94 (Supp. 1954); MONT. REV. CODE ANN. § 82: 1217 (Supp. 1955); NEB. REV. STAT. § 81: 511 (Cum. Supp. 1955).

[19] See, *e.g.*, MD. ANN. CODE GEN. LAWS art. 48A, § 94 (Supp. 1954); MINN. STAT. § 73.07 (1949).

[20] More than two-fifths of the states have adopted the federal doctrine excluding evidence secured in violation of constitutional guarantees against unreasonable searches and seizures. In Wolf v. Colorado, 338 U. S. 25 (1949), the following states are listed as supporting this view: Fla., Idaho, Ill., Ind., Iowa, Ky., Mass., Mich., Mo., Mont., Okla., S. D., Tenn., Wash., W. Va., Wis., Wyo. To this list may be added Delaware [Richards v. State, 6 Terry 573, 77 A.2d 199 (1950)], North Carolina, and Texas, which have recently passed laws in support of the federal doctrine. MCCORMICK, EVIDENCE § 139 n. 7 (1954). Although the fourteenth amendment does not forbid the admission of evidence obtained by unreasonable search and seizure in a state court for the prosecution of a state crime, were the state to affirmatively sanction such police incursion into privacy it would violate the due process guarantee of the fourteenth amendment. Wolf v. Colorado, 338 U. S. 27–28 (dictum 1949). See also Comment, 45 J. CRIM. L., C. & P.S. 51 (1954).

[21] For an informed discussion of this problem see Brannan, *Securing the Fire Scene*, 6 IAAI. NEWSLETTER No. 2, p. 6 (1955).

[22] "It is a very common occurrence at the scene of a fire to find the owner or occupant probing around through the debris, ostensibly searching for missing valuables. It may be, however, that what they are searching for is the evidence of a set fire so that he may destroy or remove it before the investigator finds it." Brannan, *supra* note 21, at 7.

[23] "The wind may blow away a bit of paper containing incriminating evidence, the rain may dilute or wash away chemicals or residue, or exposure to snow and freezing temperatures may alter materials to such an extent that they lose their value as evidence." Brannan, *supra* note 21, at 7.

[24] Brannan, *supra* note 21, at 16.

[25] Harriman v. I.C.C., 211 U. S. 497 (1908); Matthews v. Board, 127 Mich. 630, 86 N.W. 1036 (1901). Similar statutes have been upheld against

authority, the fire marshal is frequently confronted with problems raised by the constitutional privilege of a *witness* not to give evidence against himself.[26] This privilege is not to be confused with the privilege against self-incrimination possessed by an *accused, i.e.*, one against whom a punitive criminal proceeding has been specifically directed.[27] The privilege of an accused prevents him from being called upon to testify.[28] Under the accepted view, an investigation into the circumstances and authorship of an alleged crime to determine whether a prosecution should be instituted is not in itself a criminal prosecution.[29] Therefore, the privilege against self-incrimination will not excuse a witness from appearing, for he must appear when summoned and may only thereafter claim his privilege.[30] Thus, in an investigation by a fire marshal, witnesses summoned must take the stand, even when they are suspected of incendiary activities.[31]

If a witness has voluntarily testified at a hearing before a fire marshal or other investigating officer, his statements may be used against him upon a subsequent indictment.[32] An investigating officer is usually under no duty to advise a witness or even an accused as to his constitutional rights.[33] However, the fact that no warning was given may be considered as an element affecting the admissibility of the statement at a later trial.[34] In some

such constitutional objections as improper delegation of legislative power, Kansas City So. Ry. v. United States, 231 U. S. 423 (1913); Lack of due process of law, Natural Gas Pipe Co. v. Slattery, 302 U. S. 300 (1937); and unreasonable search and seizure, Baltimore & O.R.R. v. I.C.C , 221 U. S. 612 (1910).

[26] The privilege against self-incrimination is provided by the fifth amendment to the United States Constitution. However, the provisions of the Constitution do not impose this privilege upon the states either under the privileges and immunities clause or the due process clause of the fourteenth amendment. Twining v. New Jersey, 211 U. S. 78 (1908) (setting forth the history and policy of the privilege). All state constitutions, except those of Iowa and New Jersey, have similar provisions which afford protection against self-incrimination. 8 WIGMORE, EVIDENCE § 2252 n. 1 (3rd ed. 1940). The usual provision states that "no person shall be compelled in any criminal case to give evidence against himself . . ." ILL. CONST. art. II, § 10. For a complete listing of the statutory provisions regarding self-incrimination, see 8 WIGMORE, EVIDENCE § 2252 n. 3 (3rd ed. Supp. 1955). The privilege against self-incrimination applies only to such information as can be used against the witness in a criminal prosecution. See 8 WIGMORE, EVIDENCE § 2254 (3rd ed. 1940). It is a personal privilege of the witness and can be invoked by no one else. Brown v. Walker, 161 U. S. 591 (1896). A corporation cannot plead the privilege nor can it assert the personal privilege of its officers. United States v. Morton Salt Co., 338 U. S. 632 (1950); Oklahoma Press Co. v. Walling, 327 U. S. 186 (1946); Wilson v. United States, 221 U. S. 361 (1911); Hale v. Henkel, 201 U. S. 43 (1906). Furthermore, if a witness waives the privilege and makes partial disclosure, he must continue and make full disclosure. Ex Parte Heddon, 29 Nev. 352, 90 Pac. 737 (1907). See also 8 WIGMORE, EVIDENCE § 2276 n. 2 (3rd ed. Supp. 1955).

[27] Root v. McDonald, 260 Mass. 344, 157 N.E. 684 (1927).

[28] Thus, while the ordinary witness must submit to being called and sworn by either party and must answer all questions except incriminating ones, the accused is exempt from being called at all. United States ex rel Vajtauer v. Commissioner, 273 U. S. 103 (1927); Brown v. Walker, 161 U. S. 591 (1896).

[29] Mulloney v. United States, 79 F.2d 566 (1st Cir. 1935); State v. McDaniel, 336 Mo. 656, 80 S.W. 2d 185 (1935).

[30] People v. Cahill, 193 N. Y. 232, 86 N.E. 39 (1908).

[31] A minority view would give the privilege of an accused of staying off the stand to one summoned to testify in such an investigation if the person is suspected of criminal complicity by the officers directing the investigation. State v. Allison, 116 Mont. 352, 153 P.2d 141 (1944).

[32] People v. Farrell, 349 Ill. 129, 181 N.E. 703 (1932); Commonwealth v. Selesnick, 272 Mass. 354, 172 N.E. 343 (1930); State v. Rosenweig, 168 Minn. 459, 210 N.W. 403 (1926); Ogle v. State, 193 Ind. 187, 127 N.E. 547 (1920); State v. Harris, 103 Kan. 347, 175 Pac. 153 (1918); State v. Lloyd, 152 Wis. 24, 139 N.W. 514 (1913).

[33] Rohlfs v. State, 202 Wis. 54, 231 N.W. 266 (1930). For a comprehensive coverage of this topic see INBAU & REID, LIE DETECTION AND CRIMINAL INTERROGATION pp. 223–26 (3rd ed. 1953).

[34] Ogle v. State, 193 Ind. 187, 127 N.E. 547

states there are statutory provisions which provide that testimony taken before a fire marshal shall not be used in a subsequent criminal action; but such immunity provisions have been construed as applicable only when an unwilling witness is required to testify under oath.[35] Furthermore, these provisions do not apply to admissions made in private conversation between the officer and a witness, where there is no obligation on the part of the witness to speak.[36]

Objection is frequently raised to the exercise of the statutory power of the fire marshal to render the hearing private by "excluding all persons other than those required to be present" when the official, in his discretion, deems such exclusion appropriate.[37] The usual reason offered for this requirement is to prevent the hearing from becoming unwieldy and to induce witnesses to testify more freely. However, it has been argued that the exercise of such a power may deprive suspects of the benefit of counsel. Federal courts have upheld the inherent right of an accused to counsel,[38] and many states specifically guarantee the right to counsel either by constitutional or by statutory provisions.[39] The usual provision limits the right to criminal proceedings and many statutes guarantee the right to counsel only in capital offenses.[40] In a recent case, the Ohio Supreme Court, observing that fire marshal investigations are neither trials nor criminal proceedings and that there is no accused party, held that the provisions of the state constitution guaranteeing the right to counsel do not apply to such investigations.[41] Furthermore, if it is correctly maintained that the nature of the hearing is solely investigative, then, were witnesses to employ counsel for the purpose of examination and cross-examination, or any other purpose, it is apparent that the processes of investigation would be greatly retarded. In an effort to facilitate the investigative process, the use of the provision excluding all persons other than those deemed to be required by the fire marshal should be encouraged. However, in order that the privilege against self-incrimination may be preserved in practice, the hearing officer should be required to advise those witnesses who are also suspects of the privilege against self-incrimination.

Another problem which arises in the course of an investigation is the exclusion of unnecessary witnesses and the separation of witnesses prior to the time when their testimony is to be taken. Most fire marshal acts provide that witnesses may be excluded from the place where the investigation is held, and may be separated from each other until they have been examined.[42] The purpose of such a pro-

(1920). This view is based on the rationale that such testimony is not voluntary unless given with full knowledge of its consequences, and that the fact that no warning was given should be taken into consideration in determining the voluntariness (and therefore the admissibility) of a confession. See also INBAU & REID, LIE DETECTION AND CRIMINAL INTERROGATION p. 224, n. 217 (3rd ed. 1953). However, such testimony is not open to the objection that it is involuntary merely because it was given in response to a subpoena, nor because a witness who might refuse to appear or to testify was subject to punishment, nor because of a statutory provision that no person shall be present at the investigation except the officers. State v. Harris, 103 Kan. 347, 175 Pac. 153 (1918).

[35] People v. Ales, 247 N.Y. 351, 160 N.E. 395 (1928) (referring to New York City ordinance). Immunity provisions were deleted from the Indiana statutes by a 1917 amendment. However, see MICH. STAT. ANN. § 4.559(7) (Supp. 1955); NEB. REV. STAT. § 81: 509 (Cum. Supp. 1955).

[36] People v. Ales, 247 N.Y. 351, 160 N.E. 395 (1928).

[37] See, *e.g.*, ILL. ANN. STAT. c. 127½, § 8 (Smith-Hurd Supp. 1955); KY. REV. STAT. § 227.280 (Baldwin 1955); LA. REV. STAT. § 40: 1571 (Cum. Supp. 1952).

[38] Ashcraft v. Tennessee, 327 U. S. 274 (1946).

[39] *E.g.*, OHIO CONST. art. I § 10, which reads in part: "In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel."

[40] Johnson v. Zerbst, 304 U. S. 458 (1938).

[41] In re Groban, 164 Ohio St. 26, 128 N.E. 2d 106 (1955), *cert. granted*, 351 U. S. 903 (1956).

[42] See, *e.g.*, MASS. ANN. LAWS c. 148 § 3 (Supp. 1955); MISS. STAT. ANN. § 5701 (Supp. 1954); N. C. GEN. STAT. § 69-3 (Supp. 1955).

vision is to prevent collusion on the part of the assembled witnesses. However, the means used to achieve this result must be reasonable and should impose no undue hardship upon the witnesses.[43] This difficulty may be resolved by permitting the fire marshal merely to exclude witnesses from the place of hearing or investigation and to place them in the care of someone charged with the duty of preventing communication between the witnesses.

In the use of the subpoena duces tecum to obtain documentary evidence, the fire marshal is subject to prohibitions similar to those which exist in regard to the examination of witnesses. Thus, he may not compel the production of private books or papers which may be used as evidence against the owner of such articles in a subsequent prosecution.[44] Although analogous to the situation where a witness is called upon to testify against himself, the privilege here can be invoked only by the owner who is also in possession of the documents.[45] A person in possession of the documents who is not the owner can be compelled to produce them even though they might incriminate him.[46]

Most states have provided measures to enforce compliance with the orders and subpoenas of the fire marshal. While the usual procedure is to apply for a court order to enforce the subpoena or order,[47] it appears that at least one state has given the fire marshal authority to hold original contempt proceedings, and to himself impose penalties of fines and imprisonment for non-compliance.[48] Such powers, however, have the effect of transforming an administrative hearing into a judicial proceeding. Therefore, in order to protect those affected from the arbitrary actions associated with the consolidation of administrative and judical powers, those functions should be separated by allowing the investigating officer only such authority as is necessary to obtain a court order enforcing compliance.

Most statutes are silent as to where the hearing is to be held and as to whether a witness can be summoned from an outlying county.[49] However, the Kentucky Supreme Court has held that, although the fire marshal may hold a hearing in any county of the state, he may only bring witnesses to the county in which the fire occurred.[50] While this requirement prevents unreasonable inconvenience to witnesses, it also places an undue burden upon the arson investigator. In many instances, witnesses and records may only be found in counties other than the one in which the fire occurred and the fire marshal may desire to summon witnesses to such county for a hearing. Therefore, in order to expedite the processes of investigation, the fire marshal should be empowered to hold hearings and summon witnesses in any county of the state. It is further suggested that there be nationwide reciprocity between the states in the matter of summoning witnesses to investigative and

[43] The fire marshal need not restrict witnesses in order to separate them. Geldon v. Finnegan, 213 Wis. 539, 252 N.W. 369 (1934).

[44] However, the seizure of such papers should be distinguished from the seizure of contraband or similar articles which clearly belong in the custody of the law. Boyd v. U. S., 116 U. S. 616 (1886).

[45] The property to be produced must be specifically described according to the kind of property involved. The fact that papers have been obtained by illegal search will not necessarily prevent them from being introduced into evidence, although courts following the federal rule will exclude evidence obtained by such methods. Gambino v. United States, 275 U. S. 310 (1927).

[46] Ex Parte Hedden, 29 Nev. 352, 90 Pac. 737 (1907). See also, United States v. Jeffers, 342 U. S. 48 (1951).

[47] See, *e.g.*, ALA. CODE tit. 55, § 49 (Supp. 1953); MINN. STAT. § 73.06 (1949).

[48] See, *e.g.*, MISS. STAT. ANN. § 5701 (Supp. 1954) (Powers of a trial justice). The penalties provided are of a severity similar to those imposed for any other misdemeanor. Moreover, witnesses called in fire marshall proceedings are usually heard only upon oath or affirmation as provided by statute, being subject to the same penalties for perjury as are witnesses in purely judicial proceedings.

[49] See Martin, *Application of Legal Authority in Arson Investigation*, 42 J. CRIM. L., C. & P.S. 68, 80 (1951).

[50] Commonwealth v. Ransdall, 153 Ky. 334, 155 S.W. 1117 (1913); see also Rhinehart v. State, 121 Tenn. 420, 117 S.W. 508 (1908).

criminal proceedings. Such a provision would be especially helpful in investigating fires which have occurred near state boundaries, or where witnesses have fled to other states.

Power to Cause Arrest

The power of the fire marshal to make an arrest is based largely upon statutory provisions. In many jurisdictions the fire marshal's power to cause arrest is limited to initiating the complaint.[51] However, some states have given the fire marshal specific authority to make arrests.[52] Supplementing these statutory powers are the powers which the fire marshal may have as a private person or as a law enforcement officer.[53] Other than in these instances, arrests must be made by police officers as the result of the issuance of warrants of arrest.[54] Inasmuch as the power to arrest is such a vital power, it should be exercised with a great deal of caution. However, where sufficient time is not available to obtain a warrant of arrest, and where there are reasonable grounds for believing that the crime of arson has been committed and that the suspect did commit such crime, the fire marshal, as a law enforcement officer familiar with the circumstances of the situation, should have the power to make the arrest.

Conclusion

When a fire has occurred, the public interest requires that the investigative agency have all reasonable powers necessary to determine its origin. Such powers must include the right to examine the immediate area in which the fire took place and to collect evidence for possible criminal prosecution. In addition, the fire marshal or any deputy fire marshal, must be empowered to hold hearings, to summon witnesses and to compel the production of all relevant documents. The investigating officer should have the authority to hold such hearings in, and to summon witnesses to any county in the state. The officer should have the discretion to render the hearing private when such action will facilitate the investigative process. Such privacy, however, should not operate to defeat the constitutional privilege of a witness. Thus, where counsel is not allowed to be present, the presiding officer should inform a suspect that his testimony may later be used in a criminal proceeding. Compliance with the orders of the fire marshal should be assured by permitting him to obtain a court order directing a citation for contempt upon non-compliance. Where there is evidence of criminal activities, the investigative agency should be empowered to initiate complaints against those involved and submit evidence to secure their conviction. Incidental thereto, the powers of arrest should be exercised when necessary. However, constitutional protections must remain inviolate. Powers granted in the public interest should not be exercised in a manner inconsistent with the guaranteed rights of individuals.[55]

[51] See, *e.g.*, Ill. Ann. Stat. c. 127½, § 7 (Smith-Hurd Supp. 1955); N. H. Rev. Stat. c. 175 § 28 (1955).

[52] See, *e.g.*, N. C. Gen. Stat. § 69.2 (Supp. 1955) (with warrant).

[53] Both police officers and private individuals may arrest without a warrant for a felony or misdemeanor involving a breach of the peace committed in their presence, and for a felony which was in fact committed although not in the presence of the officer or individual making the arrest. However, the police officer's authority goes beyond that of the individual in that the police officer may arrest when he has reasonable grounds to believe that a felony has been committed and that the person being arrested has committed it.

[54] Such a warrant directs the arrest of a person or persons upon the grounds stated therein, and relieves the officer making the arrest of civil liability, provided that the warrant is valid and fair upon its face.

[55] For an interesting analysis of this problem see Beisel, Control Over Illegal Enforcement of the Criminal Law: Role of the Supreme Court (1955).