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1. STATE FIRE MARSHAL — INVESTIGATION TO DETERMINE CAUSE, ORIGIN AND CIRCUMSTANCES OF FIRE — SECTION 824 ET SEQ., G.C. — DISCRETION OF FIRE MARSHAL TO PRIVATELY CONDUCT INVESTIGATION — SECTION 832 G.C. — WITNESS NOT ENTITLED TO COUNSEL, COUNSEL MAY NOT APPEAR WITH WITNESS AND SPEAK FOR WITNESS, IF FIRE MARSHAL HOLDS INVESTIGATION TO BE PRIVATE.

2. PROVISIONS SECTION 832 G.C. DO NOT CONTRAVENE ARTICLE I, SECTION 10, OHIO CONSTITUTION.

3. AT COMMON LAW AND UNDER CONSTITUTION OF OHIO, NO PERSON CAN BE COMPELLED TO BE A WITNESS AGAINST HIMSELF — PERSONAL PRIVILEGE TO BE CLAIMED BY INTERESTED PERSON.

4. STATUS, TESTIMONY GIVEN BY WITNESS IN PUBLIC OR PRIVATE INVESTIGATION OF FIRE, ONE FOR OHIO COURTS TO DETERMINE RATHER THAN ATTORNEY GENERAL.

SYLLABUS:

1. *When an investigation is being conducted by or under the direction of the state fire marshal, to determine the cause, origin and circumstances of a fire (Sec. 824, et seq. G.C.), by the express provision of Section 832, General Code, such investigation may, in the discretion of the fire marshal, be privately conducted. A witness called to testify in such an investigation is not entitled to counsel, nor may counsel appear with and speak for a witness if the fire marshal determines that the investigation shall be private.*

2. *The provisions of Section 832, General Code, authorizing and empowering an investigation conducted by, or under the direction of, the state fire marshal, as to the origin, cause and circumstances of a fire, do not contravene Section 10, Article I, or any other section, of the Constitution of Ohio.*

3. *Both at common law and under the Constitution of Ohio, including Section 10, Article I, no person can be compelled to be a witness against himself. This privilege is a strictly personal privilege, to be claimed by the interested person.*

4. *The question of whether or not testimony given by a witness in the public or private investigation of the cause, origin and circumstances of a fire by, or under the direction of, the state fire marshal, may be introduced in the trial of such witness in case he be subsequently indicted and tried, either as a confession, an admission against interest, or for the purpose of impeachment, is one for the courts of this state, rather than this office, to determine.*

Columbus, Ohio, March 24, 1941.

Honorable William J. Hunter, Prosecuting Attorney,
Upper Sandusky, Ohio.

Dear Sir:

Your letter of recent date requesting my opinion duly received. Your communication reads as follows:

> "In connection with an investigation being made in this county by the State Fire Marshal through one of his duly ap-

pointed deputies, the following legal questions have been raised and we would appreciate your opinion on the same.

1. Under Section 832 of the General Code, a provision is made that an investigation at the discretion of the State Fire Marshal may be private and that he may exclude from the place of such investigation all persons other than those required to be present. The Deputy State Fire Marshal having subpoenaed witnesses to appear to testify under oath and some of these witnesses appearing with their attorney and request that they be permitted counsel during the investigation and questioning. Can the State Fire Marshal under the section above referred to exclude the witnesses' attorneys from this hearing and require the witnesses to testify under oath without the benefit of his counsel?

2. Could testimony taken by the Deputy State Fire Marshal under circumstances above referred to be used against such witnesses in a subsequent criminal action filed against them as a result of the testimony disclosed in such investigation, under the theory that such evidence was in the form of a confession or could such testimony be used to impeach their testimony given in the trial or would all such testimony be excluded on the theory that said witnesses having been subpoenaed and compelled to testify the same could not be used against them in a criminal action as requiring the criminal to testify against himself?"

Section 832, General Code, relating to the powers of the state fire marshal with reference to the investigation of the cause of and circumstances surrounding fires (Sec. 824, G.C. et seq.), provides:

"Investigation by or under the direction of the state fire marshal may in his discretion be private. He may exclude from the place where such investigation is held all persons other than those required to be present, and witnesses may be kept separate from each other and not allowed to communicate with each other until they have been examined."

Since it is fundamental that the first ten amendments to the Federal Constitution, constituting a Bill of Rights, are not a limitation upon the State governments, with reference to their own citizens, but are exclusively restrictions upon Federal power (Stokum v. State, 106 O.S. 249, 139 N.E. 855 (1922): Winous Point Shooting Club v. Casperson, 193 U.S. 189; 48 L. Ed. 675 (1903)), I assume that your inquiry is engendered by a consideration of the provisions of Section 10, Article I, of the Constitution of Ohio, which provides *inter alia* that in *"any trial, in any court,* the party accused shall be allowed to appear and defend in person

and with counsel," and that no person "shall be compelled, in any criminal case, to be a witness against himself."

It is at once manifest that it is unnecessary to resort to the rules of statutory construction and interpretation to ascertain the meaning of Section 832, supra. Its provisions are unambiguous. And, as stated by Judge Johnson, in the case of The Village of Elmwood Place v. Schanzle, a Taxpayer, 91 O.S. 354, 357 (1915), "where the words of a statute are plain, explicit and unequivocal and express clearly and distinctly the sense of the law-making body, there is no occasion to resort to other means of interpretation."

I. In so far as your first question is concerned, I have no difficulty reaching the conclusion that the answer must be in the affirmative. You will observe that Section 10, Article I, of the Constitution of Ohio, above quoted in part, has to do only with the "party accused" on trial "in any court." Your inquiry is concerned only with an investigation conducted by a state officer not only legally empowered but directed by the Legislature to "investigate the cause, origin and circumstances of each fire * * * by which property has been destroyed or damaged, * * * to determine whether the fire was the result of carelessness or design" (Sec. 824, G.C.). There is no "party accused." There is no "trial, in any court." Nothing in our constitution guarantees to a person the right to have the advice of counsel, when such person is called as a witness.

In Bouvier's Law Dictionary, Vol. 3, p. 3475, a witness is said to be:

> "One who testifies to what he knows. One who testifies under oath to something which he knows at first hand. 1 Greenl. Ev. § § 98, 328."

As said in Wood v. Davis, 161 Ga. 690, 694, 131 S.E. 885 (1925), "Our word *witness* comes from the Anglo-Saxon word *witan,* which means to know." And it is a general rule of law, as well as a rule of necessity of public justice, that every person is compellable to bear testimony in the administration of the laws of the country. One does not need counsel when called upon to tell under oath or affirmation (subject of course to the rules of evidence and the limitation that the constitutional rights of the witness may not be invaded) "the truth, the whole truth, and nothing but the truth."

Touching the right of a witness to be represented by counsel, or the right of counsel to appear or speak on behalf of a witness, it was said as follows in the case of Re Assiniboia Election, 4 Man. (Manitoba Law Reports) 328, at page 332:

> " * * * Counsel could attend for a witness to protect him only against his being called upon to produce documents which were privileged or to answer questions he was not bound to answer. But had any questions of that kind come up the counsel so attending could not have been heard on behalf of the witness. In *Doe Rowcliffe v. Egremont,* 2 M. & R. 386, it was held that a witness objecting to produce documents has no right to have the question of his liability to produce argued by counsel retained by him for that purpose. *Doe Egremont v. Date,* 3 O.B. 609, was a case in which a Colonel Wyndham was not a party but in which he was interested because he was bound to indemnify the defendant if the plaintiff got a verdict. * * * Coleridge, J., in giving his judgment said: 'I recollect a case on the Western circuit in which I was retained as counsel for a witness, to resist his being compelled to produce some evidence. Mr. Justice Park, who was perfectly familiar with the course of procedure at *Nisi Prius,* would not for a moment allow me to appear in that character. He said: "I must be left to take care of the witness, and I alone: I shall not hear counsel on his behalf." If counsel cannot be heard for a witness at *Nisi Prius,* certainly he cannot be heard for the witness in banc.'
>
> If the object to produce a document must be taken by the witness himself, and neither the counsel engaged in the cause can support the objection (See Taylor on Evidence p. 1233, *Marston v. Downs,* 1 A. & E. 31), nor can counsel retained for the witness be heard however important it may be for the witness not to disclose the document, how much less right has a counsel who says he only appears for the witness, to interfere and cross examine that witness and the other witnesses."

In view of the foregoing, it is my opinion that, both upon principle and authority, the state fire marshal, or one acting under his direction may, under the provisions of Section 832, General Code, exclude from the place where he is conducting an investigation of the cause and origin of, and the circumstances surrounding, a fire, all persons other than those required to be present, including counsel who desires to be present on behalf of a witness.

II. With reference to your second question, as above suggested, I am assuming that you are concerned because of the constitutional provision that no person "shall be compelled, in any criminal case, to be a witness against himself."

The maxim, "Nemo tenetur seipsum accusare" (no one is bound to accuse, i.e., incriminate, himself) was described in the case of In re Tahbel, 46 Cal. App. 755, 758, 189 Pac. 804 (1920) as "one of the oldest maxims of the common law." In the case of Villafore v. Summers, Sheriff of the City of Manila, 41 Philippine 62, 68 (1920), the court said:

> "The maxim of the common law, *Nemo tenetur seipsum accusare,* was recognized in England in early days, but not in the other legal systems of the world, in a revolt against the thumbscrew and the rack. * * * As forcing a man to be a witness against himself was deemed contrary to the fundamentals of republican government, the principle was taken into the American Constitution * * * in exactly as wide — but no wider — a scope as it existed in old English days. The provision should here be approached in no blindly worshipful spirit, but with a judicious and a judicial appreciation of both its benefits and its abuses * * *."

In so far as the privilege against self incrimination is concerned, it was fundamental at common law that such privilege was strictly personal; and that of course is the rule under our Constitution. The law of this state is well stated in 42 O.Jur. 49, in the following words:

> "The privilege against self-incrimination is a personal privilege to be claimed by the interested person; that is, constitutional provisions protecting witnesses from being compelled to give self-incriminating evidence afford a shield which is personal to such witnesses and designed for their protection, and not the protection of others. Therefore, the witness is the only one that can claim privilege. The privilege cannot be interposed solely by counsel, especially where the witness swears that to answer will not tend to incriminate her. * * * "

In support of the proposition stated in the last sentence of the above quoted excerpt, the case of Ammon v. Johnson, Guardian, 3 O.C.C. 263 (1888) is cited. In that case it was said as follows at page 268, et seq.

> " * * * The law makes, however, a merciful provision that a witness not called in his own behalf (44 Ohio St. 636) may decline to answer a question, the answer to which will tend to criminate, and in *Warner v. Lucas,* 10 Ohio, 337, it is laid down as the rule of this state that the witness himself may judge whether that will be the effect of the answer. The law does not presume that the witness has so conducted himself that the answer will injure him; but if the witness claims the privilege it may be given. It is personal to the witness, who alone may know what the answer may be, and cannot be interposed solely by counsel, who may have other reasons why they do not wish

the testimony given. See Wharton on Evidence, §535, and the many cases cited; Greenleaf on Evidence, §451."

See also in this connection Hanna's Ohio Trial Evidence, Section 509, page 430.

Two cases, decided by the Supreme Court of Ohio, are particularly illuminating here. These are State of Ohio v. Cox, 87 O.S. 313, 101 N.E. 135 (1913), and Burke v. State of Ohio, 104, O.S. 220, 135 N. E. 644 (1922). The third branch of the syllabus in the Cox case reads:

"A motion to quash an indictment charging prejury by a witness testifying before a grand jury, where the indictment does not show affirmatively upon its face that such witness was not advised by the grand jury of his constitutional right to refuse to testify in a matter affecting his own conduct, and that does not affirmatively show upon its face that such witness did not waive his constitutional privilege and voluntarily testify, presents no question of the invasion or denial of the constitutional right of the witness under Section 10 of Article I of the constitution."

In the opinion of Judge Donohue (later a judge of the United States Circut Court of Appeals, 6th Circuit) it was said as follows at page 341 et seq.:

"* * * The fact that the witness was called before the grand jury presupposes, of course, that he was believed to have knowledge of these transactions, but it does not necessarily imply he participated in them, or that his conduct, in relation thereto, had been, in any sense, criminal; nor would it justify the presumption that the grand jury making this inquiry acted in bad faith, with the intent and purpose of depriving this witness of his constitutional rights by compelling him to be a witness against himself. So far as appears by this indictment, this witness was brought before the grand jury as any other citizen might have been required to appear and testify before it. If it were the duty of a grand jury, before subpoenaing a witness to appear before it, to determine to a certainty whether such witness had any guilty knowledge of the transaction under inquiry, we would never get anywhere in the prosecution of crime. The legal presumption is that this witness was not guilty of any offense whatever. So far as appears in this indictment, no charge had been made against him. * * *

In the case of *Lindsey v. State,* 69 Ohio St., 215, this court held that a plea in abatement that did not show that the witness refused to take an oath, or that he claimed his privilege to refuse to testify, is bad on a general demurrer. Spear, J., in writing the opinion of this court in that case, said: 'But the plea does not state that he refused to take the oath, nor in what manner, nor

by what means, he was required, against his will, to take an oath; nor does it allege that the defendant, when before the grand jury, claimed his privilege, or refused to answer any question, or in any manner objected to appearing as a witness and to testifying. There is no law that could compel a witness to testify to matters which would incriminate himself, or to punish him for refusing. If he did not object how could there be compulsion? For all of any statement of fact which appears he took the oath voluntarily and testified voluntarily.'

If this is a correct statement of the law, and we think it is, then it would appear that further discussion of this case is unnecessary. * * * It is claimed, however, that the mere issuing of a subpoena for a witness shows compulsory process, and, therefore, an invasion of the defendant's constitutional rights. * * *

* * * The privilege conferred upon a citizen of this state, by Section 10 of Article I of our constitution, is a personal privilege, and he may waive this privilege if he desires to do so. The principle announced in the case of *Lindsey v. State* is predicated upon this theory and no other. Merely being compelled to appear in pursuance of a subpoena and to be sworn is no violation of this constitutional privilege. This is all preliminary to his testifying and is not prohibited by the constitution, and it is only after the administration of the oath that the witness can assert his privilege, for it can only be asserted under the sanction of an oath. We are still in full accord with the former statement of this court in the Lindsey case, that: 'We are not commending the practice of subpoenaing persons suspected of crime as witnesses before a grand jury which has been summoned to inquire respecting that crime; indeed, we do not hesitate to characterize it as improper practice. But the question is, what effect that mere fact ought to have in a test of an indictment otherwise regular and valid.' Our Bill of Rights does not extend the privilege to anyone from being subpoenaed and sworn in a criminal case, but it does provide that no person shall be compelled, in any case, to be a witness against himself. This privilege he may waive, if he desires to do so, and the time for the assertion of his rights, or the waiving of it, is after he has been sworn and not before. Suppose it should now appear that this witness expressly waived this privilege and testified voluntarily, and the presumption, in the absence of any showing to the contrary, is that he did so. Counsel would not likely make the contention that the oath administered to him, before he waived this privilege and voluntarily testified, was unauthorized by law. And yet this oath was either authorized or unauthorized by law, at the time it was administered. Whatever happened subsequent to that neither makes it lawful nor unlawful. If it is lawful in the case where the witness, subsequent to the administration of the oath, waives his constitutional privilege and voluntarily testifies, it is equally lawful in all other cases. What the remedy of the witness might be in case, after he was sworn he refused to testify, but was compelled in some way, to testify, we need not now consider.

We know of no way by which he could be compelled to testify, and we never expect to be presented with a case where a witness was compelled to testify, after claiming his privilege. When that condition of affairs shall appear, it will be time enough for the court to act, but this much is certain, the court will in some lawful way fully protect the citizen in the assertion of his constitutional rights."

The second branch of the syllabus in the Burke case reads:

"When a person is subpoenaed to appear before a grand jury then investigating an alleged crime and is examined as to his acts and conduct in relation thereto, and such person does not claim his privilege, he will be deemed to have testified voluntarily, and such examination does not constitute a violation of Section 10, Article I of the Ohio Bill of Rights, which provides: 'No person shall be compelled in any criminal case to be a witness against himself.' In such case the state does not owe to such person the duty to first caution him and advise him of his constitutional privilege."

The opinion in this case was written by Chief Justice Marshall, with whom the entire court concurred. At page 224, et seq., it was said as follows:

"We now come to the second question presented. A plea in abatement was filed against the indictment in the court of common pleas, before the trial, which alleged in substance that Burke was subpoenaed to appear before the grand jury in the usual way, that he appeared and testified as a witness, that he was by the grand jury examined as to all matters touching the alleged crime and gave material testimony relating to said matters, and there was not other sufficient testimony to justify the finding of an indictment against him, that he had no notice of the intention of the grand jury to investigate his conduct or to attempt to indict him for any offense and did not know that any act of his was under investigation, nor was he cautioned by the grand jury or other officials of his right to refuse to testify concerning any matter which might tend to incriminate him, that he was ignorant of such right to so refuse and otherwise would not have testified, and that by reason thereof he was deprived of his constitutional right not to be compelled to be a witness against himself in any criminal case.

* * * It is claimed that Burke was not advised as to his constitutional rights, or cautioned against testifying to any matters which might tend to incriminate him. This privilege has always been treated as a personal privilege to be claimed by the interested party, and in the absence of his claiming the privilege, or refusing to testify, he will be deemed to have voluntarily testified. We know of no authority or rule of law which makes

it obligatory upon the grand jury or the prosecutor in charge of the grand jury to advise the witness as to his constitutional rights and privileges, or to caution him in any respect. *In this matter, as in all other matters, the witness will be presumed to know the law and therefore will be presumed to have knowledge of his constitutional rights and guaranties, and if he does not claim them without being cautioned the presumption arises that his testimony was voluntarily given.*

It is urged, however, that he did not know the nature of the investigation and had no knowledge or notice that the grand jury was investigating his conduct or that there was any attempt to indict him for any offense. It would seem, however, that he must have known by the very nature of the inquiry that his own acts and conduct were the subject of the investigation. * * * "

(Emphasis mine.)

It seems to me that these cases, and more especially the Burke case, are dispositive of your second question. If a person, subpoenaed to appear before a grand jury then investigating an alleged crime, is to be deemed to have testified voluntarily, and if the state does not owe to such person the duty first to caution him and advise him of his constitutional privileges, and the Supreme Court has so held, I know of no reason why the same principle should not apply to an investigation of the cause and origin of a fire, which the Legislature had expressly authorized and directed the state fire marshal to make, with the plain provision that such investigation may, in the discretion of the fire marshal, be privately conducted.

I am not unmindful of the holdings contained in Opinion No. 4837, Opinions, Attorney General, 1935, Vol. II, p. 1397, in which it was held as stated in the first and fourth branches of the syllabus:

"1. An attorney may appear with a person called as a witness in an inquest held by a coroner. However, such attorney has no right to participate in any way in the hearing either by examining or cross-examining witnesses. * * *

4. The prosecuting attorney of a county cannot, under his power of investigation as provided in Section 2916, General Code, compel a person to appear before him and give testimony in reference to any matter then being investigated by the prosecuting attorney, and the prosecuting attorney has no authority if such a person appears before him at his request, to prevent counsel appearing with such person. * * *"

However, as disclosed in the opinion proper, the conclusions there reached have no application here. At page 1400 it is said that the "statutes pertinent to the holding of an inquest by a coroner disclose no provision which indicates that such hearings are not to be open to the public even though inquests are *ex parte* in character." After pointing out that "whenever the legislature has seen fit to exclude the public from a hearing conducted by a public officer or body, it has expressly so provided" (p. 1401), it was said at page 1404, that an "examination of the statutes reveals no express authority for a prosecuting attorney to conduct a secret investigation" and that no statute was found "which clothes any prosecuting attorney with the power and authority to conduct a 'star chamber investigation,' inquisition or inquiry." Certainly that opinion has no pertinency here other than to emphasize the law herein enunciated to the effect that the Legislature *may* provide for a private investigation at which any witness may, of course, personally avail himself of his constitutional right not to give testimony or produce evidence which might be used against him.

I also deem it proper to direct your attention to the case of Patterson v. State, 122 O.S. 96 (1930). In that case Patterson was called as a witness before the grand jury and, after being informed by the prosecutor of his "privilege of not testifying," stated that he was appearing voluntarily, was under no coercion, and that no promises of any kind were made to him. He and three others were indicted. In their trial none of the accused elected to take the stand, but Patterson's entire testimony, given before the grand jury, was introduced on behalf of the state and read in toto to the petit jury. The court charged that the jury might "consider the circumstances attending the failure of the defendants to take the witness stand and attach thereto such significance and weight, if any" as believed to be justified.

In a *per curiam* opinion, in which four judges concurred (one judge expressly dissenting), it was held that "it was reversible error on the part of the court to classify Patterson with the other three defendants who gave no testimony and did not take the witness stand *at any stage in the proceedings.*" (p. 100)

Whether or not the principle of the Patterson case would apply to any investigation before the state fire marshal is open to judicial determination, in the light of the other authorities discussed herein.

In view of the foregoing, and for the reasons and upon the authorities cited, in specific answer to your questions it is my opinion that:

1. When an investigation is being conducted by or under the direction of the state fire marshal, to determine the cause, origin and circumstances of a fire (Sec. 824, et seq. G.C.), by the express provision of Section 832, General Code, such investigation may, in the discretion of the fire marshal, be privately conducted. A witness called to testify in such an investigation is not entitled to counsel, nor may counsel appear with and speak for a witness if the fire marshal determines that the investigation shall be private.

2. The provisions of Section 832, General Code, authorizing and empowering an investigation conducted by, or under the direction of, the state fire marshal, as to the origin, cause and circumstances of a fire, do not contravene Section 10, Article I, or any other section, of the Constitution of Ohio.

3. Both at common law and under the Constitution of Ohio, including Section 10, Article I, no person can be compelled to be a witness against himself. This privilege is a strictly personal privilege, to be claimed by the interested person.

4. The question of whether or not testimony given by a witness in the public or private investigation of the cause, origin and circumstances of a fire by, or under the direction of, the state fire marshal, may be introduced in the trial of such witness in case he be subsequently indicted and tried, either as a confession, an admission against interest, or for the purpose of impeachment, is one for the courts of this state, rather than this office, to determine.

Respectfully,

THOMAS J. HERBERT,

Attorney General.