

the part of the custodian as will guard the safety of the records and secure equal opportunity for all.”

In view of the above and in specific answer to your inquiry, I am of the opinion that a member of the public may inspect and make lists of certificates of titles covering motor vehicles for commercial purposes subject only to the limitations that such inspection and copying does not endanger the safety of the record or unreasonably interfere with the discharge of the duties of the custodian of such records.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

1618.

MUNICIPAL POLICE OFFICERS—WITNESS AND MILEAGE FEES—WHEN TESTIFYING BEFORE GRAND JURY, SUBJECT TO PROVISIONS SECTION 3024 G. C.—EXCEPTION—CRIMINAL PROCEEDINGS INSTITUTED BY GRAND JURY UPON ITS OWN MOTION—FEES FOR ATTENDANCE IN PROSECUTIONS INVOLVING A FELONY—SHALL BE DEPOSITED WITH TREASURER, POLICE RELIEF FUND—MILEAGE FEES NOT REQUIRED TO BE SO DEPOSITED.

SYLLABUS:

1. *The witness and mileage fees allowed to municipal police officers when called to testify before a grand jury are subject to the provisions of Section 3024, General Code, except in those instances in which the criminal proceedings are instituted by the grand jury upon its own motion.*

2. *Under the provisions of Section 3024, General Code, municipal police officers shall deposit the fees for attendance allowed them in prosecutions under a criminal law of the state involving a felony with the treasurer of the Police Relief Fund for the credit of the fund; said officers, however, are not required so to deposit mileage fees allowed in such cases.*

COLUMBUS, OHIO, December 28, 1939.

HON. WARD C. CROSS, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR: This will acknowledge receipt of your request for my opinion on the following:

“Several municipalities in the County have inquired of my office as to whether or not, under House Bill 82, effective September 6, 1939, known as General Code Section 3024, the witness fees

and mileage fees paid to the municipal police officers, when called to testify before the Grand Jury, should be deposited with the Treasurer of the Police Relief Fund to the credit of said Fund.

If so, should both witness fees and mileage fees be so deposited, or is the Section applicable only to the witness fees.

In the event that you should rule that Section 3024 is not applicable in cases of attendance at Grand Jury Session, but only applicable where the police officer is called as a witness in the trial of a case in Common Pleas Court, should both the witness fee and mileage fee be deposited with the Treasurer of the Police Relief Fund to the credit of said Fund?"

The first question presented in your communication is concerned with the applicability of Section 3024, General Code, to which you make reference therein to the witness and mileage fees allowed to municipal police officers for testifying before a grand jury. Said section provides as follows:

"No police officer is entitled to witness fees in a cause prosecuted under an ordinance of a city before a magistrate. In all *prosecutions* under a criminal law of the state involving a felony, municipal police officers shall be allowed the same *fees for attendance* as are allowed in civil cases. They shall immediately deposit the fees so received with the treasurer of the police relief fund for the credit of the fund. Such fees shall be taxed in the bill of costs. In any municipality in which no police relief fund is maintained such fees shall be deposited with the treasurer of the municipality to the credit of the general fund." (Italics the writer's.)

It will be noted that the above quoted section is confined to fees received by municipal police officers for attendance at *prosecutions* under a criminal law of the state involving a felony. The question now arises whether or not the proceedings before a grand jury constitute a prosecution as that term is used in Section 3024, *supra*.

The several ways by which a prosecution may be commenced are set forth in 16 C. J. 286, as follows:

"Broadly speaking, there are four modes by which an offender may be brought to justice: The accuser may give information to the public prosecuting officer which will result in an indictment being prepared and sent to the grand jury; or he may file a written complaint on oath before the examining magistrate and obtain a warrant of arrest, followed by a preliminary examination and the binding over of accused; or the grand jury may act upon their own knowledge that a crime has been committed, or upon information from others, and make a presentment against

the offender; or the prosecuting attorney may file an information.”

In general, it will be noted that in some instances the action is commenced by a grand jury and in the others, are transmitted to such jury after preliminary examination.

In 14 Am. J. 758, the text writer has the following to say with regard to criminal prosecutions:

“Some difference of opinion prevails as to just when a criminal prosecution or proceeding may be said to be commenced. According to some decisions, criminal proceedings are not brought or instituted until a formal charge is openly made against the accused by indictment presented, information filed in court, or complaint made before a magistrate. According to others, a prosecution by information for a felony is commenced on the date the warrant which is executed is placed in the hands of an officer for service, and not on the date the information is filed. It has been said that a criminal charge, strictly speaking, exists only when a formal written complaint has been made against the accused and a prosecution initiated. In the eyes of the law a person is charged with crime only when he is called upon in a legal proceeding to answer to such a charge. Mere investigation by prosecuting officers or even inquiry and consideration by examining magistrates of the propriety of instituting a prosecution do not of themselves create a criminal charge.”

A prosecution for crime is adversary in its nature and “it has been said that the usual commencement of criminal procedure is a preliminary oath before a magistrate, upon which, if it appears on the face of such oath that a criminal offense has been committed by the defendant within the magistrates jurisdiction, a warrant may issue.” (12 O. J. 98 and authorities therein cited.) The same authority from which the above quotation was taken continues at page 99 as follows:

“The accused may be arrested and discharged by the examining magistrate, yet the grand jury would have the right to inquire into the offense, or, where there has been neither an arrest nor a commitment, the grand jury may call witnesses before it and inquire into the probable guilt of the accused, the same as if he had been recognized to the common pleas court, or committed to the jail of the county to await the action of the grand jury, and in either case, where no transcript is filed, the prosecution would not be deemed commenced until return of the indictment into the court.”

Your first question is concerned with municipal police officers who are called to testify before the grand jury. To determine whether such attendance is in a prosecution as explained above it becomes necessary to examine the origin of each proceeding and to draw therefrom a distinction between proceedings originating with the grand jury and those directed to it by an examining magistrate.

In line with the authorities above referred to, it may be said that a criminal proceeding or prosecution is commenced when a formal charge is openly made against the accused. It follows if the criminal proceeding originated with the grand jury, no charge could result until after that jury had heard the testimony offered by the municipal police officers who were called to attend such proceedings. However, if the proceedings originated before a magistrate, the prosecution has begun and municipal police officers called to testify before a grand jury in such cases would be attending a prosecution within the meaning in Section 3024, *supra*.

Turning now to the next proposition, you seek my opinion as to whether or not both witness and mileage fees received by a municipal police officer for attendance at the type of prosecution referred to in Section 3024, *supra*, must be deposited with the treasurer of the Police Relief Fund under the provisions of said section.

For attendance at such prosecutions Section 3024, *supra*, allows municipal police officers the same fees as are allowed in civil cases. The schedule of fees for witnesses in civil actions is contained in Section 3012, General Code, which provides as follows:

“Each witness in civil cases shall receive the following *fees*: For each day’s attendance at a court of record, before a justice of the peace, mayor or person authorized to take depositions, to be paid on demand by the party at whose instance he is subpoenaed, and taxed in the bill of costs, one dollar, and five cents for each mile necessarily traveled from his place of residence to the place of giving such testimony and return, provided the distance be more than one mile; for attending coroner’s inquest, *the same fee and mileage*, provided above, to be paid from the county treasury on the certificate of the coroner.” (Italics the writer’s.)

The section contemplates two separate and distinct fees: (1) For each day’s attendance, and (2) for each mile necessarily traveled. This position is strengthened by a close examination of the statute in its use of the plural “fees” in the opening sentence and the words “the same fee and mileage” appearing at the end of the section when providing for attending a coroner’s inquest.

Section 3024, *supra*, requires the deposit by municipal police officers of *fees they received for attendance* at prosecutions with the treasurer of the Police Relief Fund for the credit of the fund. In line with the fore-

going, it would follow that they are only required to deposit the attendance fees and not the mileage fees allowed under Section 3012, supra.

I feel the conclusion herein reached is in accord with the spirit of Section 3024, supra. The Legislature certainly did not intend to enhance the Police Relief Fund at the personal expense of a police officer who appears as a witness in a prosecution of a criminal law of the state involving a felony. It appears more reasonable that the only moneys required to be paid to said fund are fees for attendance as distinguished from fees for mileage.

In view of the foregoing and in specific answer to your inquiries, I am of the opinion that: (1) The witness and mileage fees allowed to municipal police officers when called to testify before a grand jury are subject to the provisions of Section 3024, General Code, except in those instances in which the criminal proceedings are instituted by the grand jury upon its own motion; (2) under the provisions of Section 3024, General Code, municipal police officers shall deposit the fees for attendance allowed them in prosecutions under a criminal law of the state involving a felony with the treasurer of the Police Relief Fund for the credit of the fund; said officers, however, are not required so to deposit mileage fees allowed in such cases.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

1619.

STATE HIGHWAY PATROLMAN—NO RIGHT OR POWER OF SEIZURE—EXCEPTION—TO TAKE DEADLY OR DANGEROUS WEAPON FROM PERSON UNDER ARREST OR ABOUT TO BE ARRESTED—CUSTODY OF SUCH WEAPON—MAY NOT BE REPLEVINED BY OWNER—DUTY OF PATROLMAN TO DELIVER WEAPON, UPON REQUEST, TO PROSECUTING ATTORNEY—SHOULD RECEIVE RECEIPT—SECTION 1181-3, G. C.

SYLLABUS:

1. *Under the provisions of Section 1181-3, General Code, a state highway patrolman does not have the right or power of seizure, except to take from any person lawfully under arrest or about to be arrested deadly or dangerous weapons in the possession of such.*

2. *Any dangerous or deadly weapon so seized is in custodia legis until the termination of the criminal action or actions against the person so arrested and may not be replevied by the owner. While in the custody of the law such weapon is held by the responsible officer as an agent of the court before whom the cause or causes are pending and such officer*