4837.

ATTORNEY—CORONER'S INQUEST—AUTHORITY TO HOLD WITNESS INCOMMUNICADO—EXTENT OF PROSECUTING ATTORNEY'S INVESTIGATING POWER.

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.*

2. *A coroner cannot either before or after an inquest or before or after charges are preferred against a person, detail or hold a person suspected of committing a crime or a person who is a witness to a crime, incommunicado.*

3. *A material witness cannot be held incommunicado by any officer, prosecuting attorney or court, either before or after charges are preferred against a third person who is accused of committing a crime in this state.*

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.*

5. *A person who is confined in a jail either as a witness or as a suspect, cannot be deprived of his right to consult with counsel privately and no officer or prosecuting attorney has the right to demand that interviews between such a person and his client shall be in his presence.*

6. *No person can be held incommunicado either before or after a charge is preferred against him, and it is the duty of an officer or private person who arrests a person without a warrant as provided in Sections* 13432-1 *and* 13432-2, *General Code, without unnecessary delay, to take such person before a court or magistrate or other competent officer and prefer charges against such person.*

7. *After an arresting officer or private person has had a reasonable length of time to prefer charges against one who is arrested without a warrant, there is no authority for holding such person in jail without charges being preferred against him.*

COLUMBUS, OHIO, October 26, 1935.

HON. MARGARET M. ALLMAN, *Director, Department of Public Welfare, Columbus, Ohio.*

DEAR MADAM:—This will acknowledge receipt of a letter from Howard G. Robinson, Acting Superintendent of the Bureau of Criminal Identification

and Investigation requesting my opinion. The letter reads in part as follows:

"* * * * * * * * *

Has a Coroner the authority to prohibit attorneys for material witnesses to a homicide from being present, and in any way participating in an autopsy when no charges have been filed and no warrant has been issued?

Is the Sheriff, Coroner, or County Prosecutor authorized by the law of Ohio to hold a material witness incommunicado when no charges have been filed and no warrant has been issued; do they have such authority if charges have been filed and a warrant issued; and in each instance, how long may such witness be held?

Is a Coroner authorized to prevent attorneys from asking questions at, or, in any way participating in an inquest when no charges have been filed, although, it may appear that the inquiring attorney represents a material witness, or a suspect in the case at hand?

Prior to the filing of any charges, is the Sheriff or the Prosecuting Attorney authorized to demand that interviews between those held as material witnesses or suspects and the attorneys representing such persons be had in the presence of such Sheriff or Prosecuting Attorney?

When there appears to have been no investigation of a crime prior to the filing of a charge, and the issuance of a warrant, is the Sheriff or an investigator for the Prosecuting Attorney's Office, required to notify defense counsel, if any, and give such counsel an opportunity to be present at such investigation?

In what cases, and for what length of time may a suspected law violator be held incommunicado prior to the completion of an investigation and the filing of charges against such suspect? If no charges are filed when is it mandatory that he be released? * * *"

Sections 213, 2856, 2857 and 2859, General Code, are pertinent to the first three questions contained in your letter. These sections read as follows:

Sec. 213:

"Death by unlawful or suspicious means, if it appears that the death was caused by unlawful or suspicious means, the registrar shall refer the case to the coroner. A coroner whose duty it is to hold an inquest on the body of a deceased person, and to make the certificate of death required for a burial permit, shall state therein the nature of the disease, or the manner of death; and, if from external causes or violence, whether (probably) accidental, suicidal or homicidal. He

shall, in either case, furnish the information required by the state registrar to properly classify the death."

Sec. 2856:

"When informed that the body of a person whose death is supposed to have been caused by unlawful or suspicious means has been found within the county, the coroner shall appear forthwith at the place where the body is, issue subpoenas for such witnesses as he deems necessary, administer to them the usual oath, and proceed to inquire how the deceased came to his death, whether by violence from any other person or persons, by whom, whether as principals or accessories before or after the fact, and all circumstances relating thereto. The testimony of such witnesses shall be reduced to writing, by them respectively subscribed except when stenographically reported by the official stenographer of the coroner, and, with the finding and recognizances hereinafter mentioned if any, returned by the coroner to the clerk of the court of common pleas of the county. If he deems it necessary, he shall cause such witnesses to enter into recognizance, in such sum as may be proper, for their appearance at the succeeding term of the court of common pleas of the county to give testimony concerning the matter. The coroner may require any and all such witnesses to give security for their attendance, and if they or any of them neglect to comply with his requirements, he shall commit such person to the prison of the county, until discharged by due course of law. A report shall be made from the personal observation of the corpse; statements of relatives, of other persons having adequate knowledge of the facts, and such other sources of information as may be available or by autopsy if such autopsy is authorized by the prosecuting attorney of the county."

Sec. 2857:

"The coroner shall draw up and subscribe his finding of facts in writing. If he finds that the deceased came to his or her death by force or violence, and by any other person or persons, so charged, and there present, he shall arrest such person or persons, and convey him or them immediately before a proper officer for examination according to law. If such persons, or any of them, are not present, the coroner forthwith shall inform one or more justices of the peace, and the prosecuting attorney, if within the county, of the facts so found, in order that the persons may be immediately dealt with according to law."

Sec. 2859:

"When an inquest is held, as part of his finding the coroner shall give a description of the person over whose body the inquest is held, which description shall specify the name, age, sex, residence,

> place of nativity, color of the eyes, hair, marks and all other particulars which may assist in the identification of the person. The coroner shall also make an inventory of all articles of property found on or about such person, describing them as minutely as can conveniently be done, and of all moneys, specifying the amount, kind, and denomination thereof."

Under the laws of this state it is the duty of the Coroner of a county to hold an inquest to determine the cause of death of a person whose body is found in the county where there is reason to believe that death was caused by unlawful or suspicious means, and the Coroner is required by law to proceed to inquire how the deceased party came to his death, whether by violence at the hand of some person or persons. *State ex rel.* vs. *Perry,* 113 O. S. 641, 647, (Section 2856, G. C.)

For the purpose of holding an inquest a Coroner, by virtue of the provisions contained in Section 2856, General Code, may summon witnesses to appear to testify and be examined as to matters pertinent to the subject of the inquest, and to compel the attendance of witnesses before the Court of Common Pleas in the County to testify in reference to the subject of the inquest by requiring the witnesses to enter into recognizances to so appear and upon failure to give such recognizances, commit the witnesses to the county jail.

The purpose of an inquest is not merely to determine the cause of the death of the deceased party, but also to aid in detecting crime and causing the punishment of the parties guilty thereof. Under Section 2856, General Code, the inquest held by a Coroner may be the foundation for the arrest of one who is accused of killing a person in the county. An inquest held by a Coroner is an *ex parte* proceeding intended by the legislature to be merely an investigation to determine the cause of death of a deceased party, and although the finding of the Coroner may be the basis for criminal prosecution, nevertheless such a hearing is not a trial within the meaning of Section 10 of Article I of the Constitution of Ohio, which provides in part:

> "* * * In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; * * *"

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. Incidentally, the testimony

given in an inquest is a matter of public record and open to the public for inspection according to the provisions of Section 2856-2, General Code, which provides in part:

"* * * * * * * * *

In counties having a population according to the last federal census of 10,000 or more, the coroner may appoint in writing an official stenographer-secretary who shall record the testimony of witnesses in attendance upon the coroner's inquests and preserve and file properly indexed records of all official reports, acts and communications of the office, and perform such other services as may be required by the coroner.

All records in the coroner's office shall be open to inspection by the public, and any person shall be entitled to receive a copy of any such record or part thereof upon demand and payment of transcript fee at the rate of fifteen cents per hundred words.

In counties where there is maintained a county morgue, the coroner may also appoint necessary assistant custodian of the morgue."

Moreover, 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, as for example, in Section 13436-7, General Code, which provides:

"The prosecuting attorney or assistant prosecuting attorney, except as hereinafter provided, shall be authorized at all times to appear before the grand jury for the purpose of giving information relative to a matter cognizable by it, or advice upon a legal matter when required. Such attorney may interrogate witnesses before such jury when it or he deems it necessary, but no person other than the grand jury shall be permitted to remain in the room with the jury while the jurors are expressing their views or giving their votes on a matter before them. In all matters or cases which the attorney general is required to investigate or prosecute by the governor or general assembly, he shall have and exercise any or all rights, privileges and powers conferred by law upon prosecuting attorneys, and any assistant or special counsel designated by him for that purpose, shall have the same authority; and all proceedings in relation to such matters or cases, shall be under the exclusive supervision and control of the attorney general."

In view of the fact that there is no statutory provision which excludes the public from attending an inquest held by a Coroner, it follows that a Coroner of a county would have no authority to prevent an attorney from at-

tending such proceeding even though the attorney is present at the hearing with the client who may be called as a witness therein. Although an attorney may be present with his client at the inquest held by a Coroner it does not follow that the attorney may participate in such hearing. Since an inquest is an *ex parte* proceeding and not a trial in any sense of that word, the courts have held that neither a witness nor a suspect has a right to be represented by counsel at the inquest. The rule of law is stated as follows in 13 *Corpus Juris,* 1252:

> "The general rule is that neither the witnesses nor others whose rights may be affected by the verdict or findings of the inquest have a right to be represented by counsel at the inquest, * * *."

In support of the text the cases of the *Aetna Life Insurance Company* vs. *Milward,* 82 S. W. 634 (Ky.) and *State* vs. *Griffin,* 82 S. E. 254 (S. C.) are cited. In the case of *Aetna Life Insurance Company* vs. *Milward,* supra, it was held that a verdict of a coroner's jury was not admissible on the issue as to the cause of death in an action on an accident insurance policy. O'Rear, J., in giving his reasons for that rule of exclusion, stated at page 366:

> "We are of the opinion that the record and the finding of the coroner's jury was irrelevant as evidence. While the coroner's inquest is a public function, made on behalf of the state, and while a record of it is required to be made and kept, it cannot, on any well-grounded principle of American common law, become evidence in another inquiry or suit as to the cause of the death investigated. The business of this tribunal is by statute to collect promptly the facts concerning deaths which the coroner has reason to believe were the result of crime. Like the grand jury, it projects an *ex parte* investigation of supposed or alleged crime resulting in homicide, for the purpose of aiding in the administration of the criminal laws of the state. *The accused is neither represented, nor has the right to be, at the inquiry.* For even better reasons, other persons who have property interests dependent upon the cause of the death would not be allowed to participate in the hearing before the coroner's jury, with a view to establishing rights by the verdict. That tribunal is unprovided with much of the necessary machinery for conducting such inquiries. It would, it seems to us, be abhorrent to the principle of the common law, as administered in this country, that one not so represented should be bound by the finding of the coroner's jury, his rights concluded without a trial at which he could be heard—a trial 'behind his back,' as has been said." (Italics ours.)

To the same effect is the fifth paragraph of the syllabus of the case of *State* vs. *Griffin,* supra:

> "5. A coroner's inquest is merely a preliminary investigation and not a trial involving the merits, and a suspected person has no right to appear by counsel and cross-examine the witnesses, as the only object of such a course would be to prevent a full investigation, in so far as it might tend to incriminate him, thus defeating the purpose of the inquest."

Incidentally, the Supreme Court of Ohio has held that the finding or verdict of a Coroner in an inquest is not admissable in a civil case (*Insurance Co.* vs. *Schmidt,* 40 O. S. 112) or in a criminal case (*State* vs. *Turner, Wright* 20 and *Wheeler* vs. *State* 34 O. S. 394, 398) to establish the cause of the death of the deceased party. The reason given by the Supreme Court for that rule of evidence is the same as stated in the case of *Aetna Life Insurance Company* vs. *Milward,* supra, as the following from the opinion of the Court in *State* vs. *Turner,* supra, indicates:

> "Our law makes the coroner's inquest the foundation for an arrest of the accused, and for recognizing the witnesses to appear at court: it does not make the verdict evidence against the accused on his trial."

It is evident from the authorities cited that neither a witness nor a suspect at an inquest has a right to be represented by counsel, nor do such persons have a right to participate in the proceedings to the extent of questioning and cross-examining other witnesses.

When a Coroner, after an inquest, is of the conclusion that a crime has been committed his duty to and power over a witness or suspect is fully set forth in Sections 2856 and 2857, General Code. There is no authority in law for a Coroner to hold a witness or suspect incommunicado either before or after an inquest or either before or after charges are preferred. See Sections 13432-2, 13432-3, 13432-9, 13432-18, 13432-19, 13433-1, 13435-1 et seq., 13436-19 and 13436-21, 13438-1 et seq., and 13439-1, General Code, relating to the commencement of criminal proceedings and the rights of one accused of committing a crime.

The extent of the authority of a sheriff of a county to conduct a criminal investigation must be measured by the provisions contained in Sections 2833, 13432-1, 13432-2, 13432-3, and 13432-5, General Code. A reading of those statutes discloses no provision therein which could be considered as empowering a sheriff to conduct a criminal investigation in the sense that that word is ordinarily used. That is to say, a sheriff does not have the power to conduct

an inquiry to determine whether the laws of the state have been violated as distinguished from a search, investigation, examination or inquiry made at the scene of a crime for the purpose of learning the name of the perpetrator of the crime and the name or names of the witness or witnesses to the crime. A sheriff, by law, is the law enforcing officer of a county clothed with the power to act as the conservator of the peace in the county (Sections 2833, 13429-1 and 13429-5 of the General Code) and to arrest persons found violating the laws of this state. (Section 13432-1, General Code.) The power to conduct criminal investigations in a county, is by law, a duty and function of the prosecuting attorney.

Under the laws of this state a prosecuting attorney is not only authorized to conduct criminal prosecutions, but he is also empowered to inquire into the commission of crimes within the county. Section 2916, General Code, provides in part:

> "The prosecuting attorney shall have power to inquire into the commission of crimes within the county and except when otherwise provided by law shall prosecute on behalf of the state all complaints, suits, and controversies in which the state is a party, and such other suits, matters and controversies as he is directed by law to prosecute within or without the county, in the probate court, common pleas court and court of appeals. * * *."

Supplementing this power to investigate, the legislature has provided in the Code of Criminal Procedure (Sections 13422 to 13744, inclusive, General Code) for the prosecuting attorney to take charge of a felony case pending in a court inferior to the Court of Common Pleas (Section 13433-5, General Code), to attend an examining court (Section 13435-14, General Code), and to appear before the Grand Jury (Section 13436-7, General Code), which is proceeding to inquire of offenses committed within the county.

An examination of the statutes reveals no express authority for a prosecuting attorney to conduct a secret investigation during the course of which he may call and examine persons to determine, ascertain or discover the name or names of the person or persons who have committed an offense in the county. I find no statute which clothes any prosecuting attorney with the power and authority to conduct a "star chamber investigation," inquisition or inquiry. It must be borne in mind that it is the duty of a prosecuting attorney to prosecute and not persecute a person charged with a crime. *State of Ohio* vs. *Barger, et al.,* 111 O. S., 448, 451. There is no authority for a prosecuting attorney, at any time, either before or after a criminal action is instituted, to call persons into the office of the prosecuting attorney for the purpose of examining them as to their knowledge of offenses committed in the county. The proper means of compelling the attendance of a witness is by

subpoena, and I find no statute which authorizes a prosecuting attorney to subpoena a person to appear before him in a criminal investigation which he is conducting prior to the institution of criminal charges or any statute which compels a person to appear before a prosecuting attorney who is conducting such an inquiry.

The legislature has provided that the Grand Jury shall be the medium by which a prosecuting attorney may secretly conduct an investigation if an offense has been committed within a county. Moreover, if the prosecuting attorney does not desire to have a Grand Jury convened for such a purpose he is empowered by Section 13432-22, General Code, before an arrest is made in a felony case, to subpoena and examine witnesses under oath before any court or magistrate. Section 13432-22, General Code, reads:

> "After a felony has been committed, and before any arrest has been made, the prosecuting attorney of the county, or any judge or magistrate, may cause subpoenas to issue, returnable before any court or magistrate, for any person to give information concerning such felony. The subpoenas shall require the witness to appear forthwith. Before he is required to give any information, he must be informed of the purpose of the inquiry, and that he is required the truth to say concerning the same. He shall then be sworn and be examined by the prosecuting attorney, or the court or magistrate under oath, subject to the statute as to perjury, and subject to the constitutional rights of the witness. Such examination shall be taken in writing in any form, and shall be filed with the court or magistrate taking the testimony. Witness fees shall be paid to such persons as in other cases."

The fact that the legislature has expressly set forth the mediums by which a prosecuting attorney may conduct a criminal investigation, it follows that only the medium so provided can be used or invoked by the prosecuting attorney in conducting criminal investigations. The legislature, in the enactment of the Code of Criminal Procedure, also has zealously erected safeguards against persons being called by prosecuting attorneys to ascertain what knowledge they may have of offenses committed in the county by specifically providing in Section 13432-22, General Code, that before the examination of a witness by a prosecuting attorney before a court or magistrate authorized therein, the witness "must be informed of the purpose of the inquiry, and that he is required the truth to say concerning the same. He shall then be sworn and be examined by the prosecuting attorney, or the court or magistrate under oath, subject to the statute as to perjury, and subject to the constitutional rights of the witness." It will be observed that the legislature, in Section 13432-22, General Code, has taken precautions to prevent a person from

being deprived of his constitutional right not to be a witness against himself (Section 10 of Article I, Constitution of Ohio) by providing therein that the examination of the witness by the prosecuting attorney shall be subject to the constitutional rights of the witness.

It is fundamental under the law of this state that unless a witness is protected by a statute which extends to him immunity from prosecution, that a witness cannot be compelled to testify if his testimony tends to incriminate, degrade or disgrace him or subjects the witness to a forfeiture or penalty. The Supreme Court of Ohio in the recent case of *Hebebrand* vs. *State,* 129 O. S., 574, held in the third and fourth paragraphs of the syllabus as follows:

> "3. Where no written complaint or affidavit, information or indictment has been lodged against any one, the provisions of such section (section 13444-4, G. C.) do not apply, as the witness is not called to testify 'upon complaint, information, affidavit or indictment' and in such a case a witness may refuse to answer questions that have a tendency to incriminate himself.
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> 4. Where a statute fails to grant complete immunity to a witness who refuses to answer a number or series of questions, some of which are self-incriminating and others not, on the ground that the answers would tend to incriminate him, it is error for the judge in contempt proceedings instituted against the witness for such refusal, to order the witness to answer all the questions, including those that have a self-incriminating tendency." (Insertion the writer's.)

The privilege accorded by the Constitution of Ohio, however, is personal to the witness and does not permit a witness in a proper proceeding to make a claim of immunity on the ground that it might incriminate a third party. *Burke* vs. *State,* 104 O. S., 220, 229. It has been held that the constitutional immunity, that no person shall be a witness against himself, extends to any preliminary investigation or any collateral or independent proceeding by which it is sought to secure evidence which may result in criminal prosecutions. *People, ex rel. Ferguson,* vs. *Reardon,* 124 App. Div. 819 (N. Y.). The same rule is stated as follows in 70 *Corpus Juris,* 734:

> "The guaranty that a person shall not be compelled to be a witness against himself precludes a person from being subjected to an inquisition or called as a witness by the state in any judicial inquiry which has for its primary object the determination of that person's guilt or innocence of a given offense, and this rule has been held to apply to a preliminary investigation prior to the issuance of a warrant for his arrest, or to a preliminary examination, a coroner's in-

quest, or to an investigation of the witness' guilt or innocence by a grand jury."

It is quite obvious from the foregoing that a prosecuting attorney has no authority or power to call or subpoena a person to appear before him in a criminal investigation which he is conducting on his own initiative and not before any court or grand jury. If a person did voluntarily appear before a prosecuting attorney in such an inquiry, he certainly would be entitled to appear with counsel and the prosecuting attorney would have no authority to examine such a witness without the presence of his counsel if the witness objected to such a procedure. Whatever has been said in reference to a witness would also apply to a person suspected or charged with committing a crime before or after he is arrested.

It is also a fact that under the laws of this state a subpoena for a witness can issue only where there is pending some action or proceeding either before a court or an administrative officer or board. A witness in a criminal case may be required by virtue of the provisions of Sections 13433-15, 13433-17, 13435-24 and 13438-13, General Code, to give a recognizance for his appearance at the trial of a case and upon faliure or refusal to give such security a prosecuting attorney, in a felony case, or a judge or magistrate in a misdemeanor case, may cause the witness to be committed to jail so that he will be available as a witness at the trial. Such a commitment is merely for the purpose of insuring the presence of the witness at the trial of the case and is not a commitment for a crime, and the witness, while so committed, is entitled to his witness fee. That the legislature did not consider such a person to be a criminal is evident from the provisions of Section 13433-17, General Code, which reads:

> "If the witness ordered to give recognizance fails or refuses to comply with such order, the judge or magistrate shall commit him to jail until he complies therewith or is discharged according to law. Such witness shall not be confined in association with prisoners charged with crime, and shall be allowed witness fees for each day of such confinement under such order."

and Section 13438-13, General Code, which provides:

> "In any case pending in the court of common pleas, the court, either before or after indictment, may require any witness designated by the prosecuting attorney to enter into a recognizance, with or without surety, in such sum as the court deems proper for his appearance to testify in such cause. A witness failing or refusing to comply with such order shall be committed to the county jail until

> he gives his testimony in such case or is ordered discharged by the court. If a witness be committed to jail upon order of court for want of such recognizance, he shall be paid like fees while so confined as are allowed witnesses by law in state cases. The trial of such case shall have precedence over other cases and the court shall designate any early day for such trial."

Consequently, a witness who is committed to jail because of inability or refusal to give a recognizance bond for his appearance as a witness is not to be deprived of his right to secure counsel or to communicate with him, or to consult with his counsel privately. The rule is stated in 70 *Corpus Juris,* 67, as follows:

> "A person so detained as a witness should be subjected to no greater disabilities or inconvenience than the exigencies of the situation absolutely require, and should not in any sense be sequestered, or prevented or hindered from communicating or conferring with other persons."

Because the witness is incarcerated for failure to give a recognizance bond does not justify or give to the prosecuting attorney the right to examine, quiz or question the witness, either within or without the presence of counsel for the witness, unless the witness voluntarily submits to such an examination by the prosecuting attorney. In other words, merely because a person as a witness is confined in jail so as to insure his presence at the trial of a criminal case does not deprive him of his personal rights and privileges such as the right to hire and consult an attorney, a right which is common to any other person. Moreover, there is no judicial or statutory authority which empowers an officer, or prosecuting attorney to confine such a witness in jail and deprive him of benefit of counsel or to hold him incommunicado.

A person accused of a crime can be taken into custody by arresting the offender under a warrant issued by some competent or authorized person or court. An arrest without a warrant is unlawful except as provided in Sections 13432-1 and 13432-2, General Code. Section 13432-1, General Code, reads:

> "A sheriff, deputy sheriff, marshal, deputy marshal, watchman or police officer, herein designated as 'peace officers' shall arrest and detain a person found violating a law of this state, or an ordinance of a city or village, until a warrant can be obtained.
>
> A constable within the limits of the township in which said constable has been appointed or elected, shall arrest and detain a person found by him in the commission of a misdemeanor, either in

violation of a law of this state or an ordinance of a village until a warrant can be obtained."

Section 13432-2, General Code, provides:

"When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained."

A person who is arrested with or without a warrant is entitled to be promptly advised of the charge against him and is likewise entitled to have recourse to counsel and to consult with him. The rights of one accused of a crime are definitely enumerated in Sections 10 and 16 of Article I of the Constitution of Ohio. Section 10 of Article I, reads:

"Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense."

Section 16 of Article I, provides:

> "All courts shall be open, and every person for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner as may be provided by law."

The legislature pursuant to the mandate of the people as expressed in the Bill of Rights, has provided in misdemeanor and felony cases that one charged with a crime shall be entitled to process, to a speedy trial and to employ and consult with counsel. Sections 13432-3 and 13432-4, General Code, expressly provide that if an officer or private person arrests one without a warrant, such arresting officer or private person "must without unnecessary delay" take the person arrested before a competent officer or court and prefer charges against such person. What constitutes unnecessary delay is a question of fact depending upon the circumstances in each particular case and also would depend upon the availability of a judge or magistrate or other competent person before whom a charge could be made against one arrested without a warrant as provided by Sections 13432-1 and 13432-2, General Code.

Section 13433-1, General Code, provides:

> "When the accused is taken before a court or magistrate and the warrant has been returned, such court or magistrate shall inform him of the charge against him, and of his right to have counsel, and with the consent of the accused, shall have the authority to proceed forthwith to examine into the merits of the charge; but upon application on behalf of the prosecution or the defense, and for good cause shown, the court or magistrate shall postpone the examination for a reasonable time, not to exceed ten days except by the consent of both parties. The absence of counsel or material witnesses, shall be held to be reasonable cause for such continuance. Any postponement of the examination herein provided for contrary to the provisions of this section shall have the legal effect of a dismissal of said proceeding for want of prosecution, but in event a proceeding is so dismissed it shall not have the effect of a bar to any further proceeding upon the same charge."

These statutes, as well as other statutes dealing with the rights of a person arrested for a crime, clearly indicate that it was not the intention of the legislature to deprive a person accused of committing a crime of any of his rights assured him by the Constitution of this State. Sections 13433-6

and 13433-7, General Code, provide that in bailable cases the accused shall be permitted to go out on bail pending the adjournment of the preliminary hearing. Under Section 13438-1, General Code, a person charged with an offense in a Court of Common Pleas can be arrested on a warrant issued to the sheriff any time after an indictment, bill of information or affidavit is filed therein. After the filing of the charge the accused or his counsel is entiled to a copy of the same (Section 13439-1, General Code) and if the accused is without counsel and unable to employ one, it is the duty of the Court to assign counsel to defend him. (Section 13439-2, General Code). Under Section 13440-1, General Code, the accused must be arraigned within a reasonable time after he has had an opportunity to file exceptions to the indictment, bill of information or affidavit, and must be tried not later than thirty (30) days after being arraigned. (Section 13442-1, General Code).

These statutes clearly indicate a legislative intent that a person charged with a crime is entitled to a speedy and fair public trial, and that he is to be accorded every privilege and opportunity to prove his innocence. There is no provision in the statutes pertaining to the arrest and trial of a person accused of violating the laws of this state which would allow a person who is arrested to be held incommunicado for a single moment, or which would allow such person to be held without a charge being preferred against him for any unnecessary length of time. As previously pointed out, a person ordinarily cannot be arrested without a warrant except as provided in Sections 13432-1 and 13432-2, General Code, and when an arrest is made without a warrant it is the duty of the arresting officer or private person to take the accused without unnecessary delay before a competent officer, court or magistrate and prefer charges against such person. Except in the instances enumerated in Sections 13432-1 and 13432-2, General Code, there is no legal authority for anyone to be confined in prison without a criminal charge pending against him. Furthermore the legislature has provided that one arrested for a crime shall have the right to employ counsel and counsel shall have the right to visit with his client, and the legislature has also provided that if such a privilege is denied to a prisoner, the jailer, keeper or police officer responsible for depriving a prisoner of that privilege shall be guilty of a misdemeanor.

Section 13432-15, General Code, provides:

> "After the arrest of a person, with or without a warrant, any attorney at law entitled to practice in the courts of this state may, at the request of the prisoner, or any relative of such prisoner, visit the person so arrested, and consult with him privately. Any officer having a prisoner in charge, who refuses to allow any such attorney to immediately visit the prisoner, when proper application is made

therefor, shall be fined not less than $25, nor more than $100, or imprisoned not more than thirty days, or both."

Section 13432-16, General Code, reads:

"The court or magistrate must also allow the accused a reasonable time to send for counsel, and for that purpose may postpone the examination, and upon the request of the defendant, such court or magistrate, or officers having the accused in charge, shall require a peace officer to take a message or to send a telephone message to any counsel the defendant may name, within the municipality or township where such person is detained. The officer must without delay, and without fee, carry such message or deliver such telephone message, and upon failure so to do he shall be liable to the penalty provided in the next preceding section."

Section 12856-1, General Code, provides:

"Whoever, having charge of a county jail, or a municipal jail, prison or station-house, in which jail, prison or station-house, any person suspected or accused or charged with the commission of a crime or offense, is imprisoned or confined, refuses, upon the request of such person, or any relative of such person, to permit such person to consult or in any way prevents or attempts to prevent such person, upon request of such person, from consulting privately at any reasonable and proper hour, with any attorney-at-law, duly admitted to practice in this state, for the purpose of enabling such person to employ such attorney-at-law, or with any attorney-at-law duly admitted to practice in this state and employed by such person, shall be guilty of a misdemeanor, and shall, on conviction, be fined not less than twenty-five dollars nor more than one hundred dollars."

From these statutes it is clear that a person accused of a crime is entitled, as a matter of right, to consult with his attorney privately and that there is no authority in law for any officer or prosecuting attorney to be present at the time an attorney consults with his client who is incarcerated in a jail or prison.

The Supreme Court of this State in the case of *Thomas* vs. *Mills,* 117 O. S. 114, held that under the Bill of Rights of this State that a person convicted of a crime and who is incarcerated in the Ohio Penitentiary was entitled, as a matter of right, to consult with his attorney privately. The syllabus of that case reads:

"1. Under Article I, Section 16, of the Ohio Constitution, a prisoner confined in the Ohio Penitentiary after conviction for felony, has a constitutional right to confer with his attorney with regard to an error proceeding pending in the said felony prosecution.

2. Such right must be exercised in conformity with reasonable rules and regulations of the penitentiary.

3. In a case where a convict in the Ohio Penitentiary, who has been convicted of the offenses of first degree murder and sentenced to the Ohio Penitentiary for life, has prosecuted error proceedings in the Court of Appeals seeking to set aside his conviction, and where the attorney of such convict in the error proceedings in question has applied for a private interview with his client, and where the convict has been confined in the Ohio Penitentiary for a period of over two months and during such time his attorney has not been permitted to see or confer with such client on account of the refusal of the warden of the penitentiary to permit such interview, it is unreasonable and constitutes an abuse of official discretion on the part of the warden of the penitentiary to deny to the attorney the right to privately confer and consult with his client."

Allen, J., in the course of her opinion at page 119, said:

"It may be conceded that consultation with counsel is a necessary part of every defense, and such consultation rightly should take place not merely during the actual stages of the trial, but at every point in the proceedings. Moreover, such consultation should in all fairness be held in private."

Again at page 120, Allen, J., said:

"That section (Section 16, Article I of the Constitution) provides that every person shall have justice administered without denial or delay. Surely the right to be represented by counsel in every stage of a criminal proceeding is a right inherent in justice itself, and any person who is denied the right is denied justice. The right must, of course, be exercised in accordance with the reasonable rules and regulations of the penitentiary. Application for the conference must be made at reasonable hours and at reasonable intervals, and the record shows that such was the case herein.

In addition to the fact that the denial of the right privately to consult with the attorney is a refusal of a constitutional right

> under Article I, Section 16, we think that the holding of the Court of Appeals must be sustained upon the ground that the refusal of the warden is an abuse of discretion. If it is just that a person should be represented by counsel, and have the right at every stage of the proceedings to confer with him, it is unjust and arbitrary to deny a person in custody the right privately to confer with counsel concerning his legal rights, when application is made for such conference in accordance with reasonable penitentiary regulations." (Insertion the writer's.)

Incidentally, that case was decided prior to the adoption of the Code of Criminal Procedure wherein it was specifically provided by the legislature that counsel for an accused person shall have the right to visit with his client privately.

Concluding it is my opinion that:

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.

2. A coroner cannot, either before or after an inquest or before or after charges are preferred against a person, detain or hold a person suspected of committing a crime or a person who is a witness to a crime, incommunicado.

3. A material witness cannot be held incommunicado by any officer, prosecuting attorney or court, either before or after charges are preferred against a third person who is accused of committing a crime in this state.

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.

5. A person who is confined in a jail either as a witness or as a suspect, cannot be deprived of his right to consult with counsel privately and no officer or prosecuting attorney has the right to demand that interviews between such a person and his client shall be in his presence.

6. No person can be held incommunicado either before or after a charge is preferred against him, and it is the duty of an officer or private person who arrests a person without a warrant as provided in Sections 13432-1 and 13432-2, General Code, without unnecessary delay to take such person before a court or magistrate or other competent officer and prefer charges against such person.

7. After an arresting officer or private person has had a reasonable length of time to prefer charges against one who is arrested without a warrant,

there is no authority for holding such person in jail without charges being preferred against him.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4838.

FINANCIAL RESPONSIBILITY LAW—LAW NOT APPLICABLE TO OFFENSES COMMITTED PRIOR TO EFFECTIVE DATE THEREOF.

SYLLABUS:

1. *The Registrar of Motor Vehicles has no authority to exercise any power of revocation under Section* 6298-1, *General Code, based upon any offenses which have occurred prior to the effective date thereof, even though the conviction for such offense and certification to the Registrar of Motor Vehicles occurs subsequent to such effective date.*

2. *There may be no such revocation predicated upon the failure to satisfy a judgment resulting from an accident or collision occurring prior to such effective date, even though such judgment and certificate thereof to the Registrar of Motor Vehicles occurs subsequent thereto.*

COLUMBUS, OHIO, October 26, 1935.

HON. FRANK WEST, *Registrar, Bureau of Motor Vehicles, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication which reads as follows:

> "I kindly request your opinion relative to the Financial Responsibility Law known as Amended Senate Bill No. 67 in the following particular:
>
> Sections 1 thereof or sections 6298-1 of the General Code is as follows:
>
> Section 1. The registrar of motor vehicles of the State of Ohio is hereby authorized and empowered to and shall, in accordance with the provisions of this act, revoke and terminate the right and privilege of operating a motor vehicle upon the public roads and highways of this state, each license, certificate, or permit to operate a motor vehicle, as chauffeur or otherwise, and each certificate of registration