

3100.

GRAND JURY INVESTIGATION—ACCUSED NOT ENTITLED AS OF RIGHT TO GIVE EVIDENCE IN OWN BEHALF—DISCRETIONARY WITH GRAND JURY.

SYLLABUS:

It is discretionary with the grand jury as to whether or not it will permit an accused to come voluntarily before it and give evidence under oath, or subpoena witnesses in his behalf, in reference to a criminal charge against him which is then under consideration by the grand jury.

COLUMBUS, OHIO, March 28, 1931.

HON. JESSE K. BRUMBAUGH, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—This will acknowledge the receipt of your communication of recent date, which reads as follows:

“Does a person accused of a felony have the right to appear before the Grand Jury and testify there in his own defense and to have the foreman of the Grand Jury subpoena witnesses in his defense to the end that no indictment will be returned against him?”

The law in reference to proceedings before grand juries is largely statutory. Provision is made in Section 13436-3 of the General Code that when a grand jury is impaneled in the manner provided by law, the court shall administer, or cause to be administered, to said grand jurors an oath providing in part as follows:

“* * * and you shall present no person through malice, hatred or ill will, nor shall you leave any person unrepresented through fear, favor or affection, or for any reward or hope thereof, but in all your presentments you shall present the truth, the whole truth and nothing but the truth, according to the best of your skill and understanding.”

In accordance with its oath, a grand jury functions largely in an inquisitorial capacity. After the charge of the court its duty is to retire to some convenient place, with the officer appointed to attend it, and present all offenses committed within the county in and for which it was impaneled and sworn. The clerk of the common pleas court must issue subpoenas, when required by the grand jury, the prosecuting attorney or the judge, to bring witnesses to testify before such court. Provision is made by the statute that before a witness shall be examined before the grand jury, an oath shall be administered to him by the foreman of the grand jury, truly to testify of such matters and things as may lawfully be inquired of before such grand jury.

The Constitution of Ohio, section 10 of Article I, provides, among other things, that no person shall be compelled, in any criminal case, to be a witness against himself.

In the case of *Lindsey vs. State*, 69 O. S., 215, the accused had been indicted by the grand jury, and before he was placed on trial he filed a plea in abatement, in which, among other things, it was averred that the defendant was required to and did take an oath as a witness and was required to and did appear before the grand jury against his will to give testimony concerning the charge against him. On the plea the court sustained a demurrer thereto by the state and, in the opinion at pages 222 and 223, it was observed:

"But the plea does not * * * 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 the 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. Where a privilege to refuse exists and the witness testifies without objection, the natural inference is that he testifies voluntarily. Indeed the only feature which, according to the facts stated, is shown to have been involuntary, was the appearance in obedience to the subpoena. That would, in and of itself, be regarded as compulsory process."

The court in the case *supra* held in favor of the state and against the plea in abatement of the accused. Later, in the case of *State vs. Cox*, 87 O. S., 313, the general law applied in the *Lindsey* case, *supra*, was adhered to and, as appears at page 34 of the opinion in *State vs. Cox*, Judge Donahue, among other things, says:

"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. A subpoena was issued in the case of *Lindsey v. State*, *supra*, and that fact was also considered by this court in its opinion, as follows:

'Where the privilege to refuse exists and the witness testifies without objection, the natural inference is that he testifies voluntarily. Indeed, the only feature which, according to the facts stated, is shown to have been involuntary, was the appearance in obedience to the subpoena. That would, in and of itself, be regarded as compulsory process.' And again on page 225: 'We think it quite unnecessary to consider further the much discussed question of the constitutional right and privilege of the citizen arising under Section 10 of the Bill of Rights. No case is made on the facts calling for such discussion.'

The law on the general subject was again reviewed by the Supreme Court in the case of *Burke v. State*, 104 O. S., 220. In this case it appears from the facts stated that a person was subpoenaed and appeared before a grand jury then investigating an alleged crime against him, and, pursuant to the subpoena, he appeared, was sworn and testified but did not claim his privilege to refuse to be sworn and testify, and the court held that he was thereby deemed to have testified voluntarily, and such examination did not constitute a violation of that part of section 10 of Article 1 of the Ohio Bill of Rights, which provides:

"No person shall be compelled in any criminal case to be a witness against himself."

While on the specific facts in the above case the court held that neither the members of the grand jury nor the prosecuting attorney owed to such person the duty to first caution him and advise him of his constitutional privilege, yet on page 231 of the opinion the court, among other things, says the following:

"As stated in the *Lindsey* case, we do not commend the practice of calling accused persons before the grand jury, neither do we feel justified in holding an indictment invalid which has been returned after the accused person has been called to testify."

The effect of the judicial expressions on the subject is that a person, if he believe a matter is being considered by the grand jury which pertains to or involves himself criminally, may ask the grand jury to accord him the privilege to voluntarily appear before it and give testimony under oath in reference to the charge, and also request the grand jury to subpoena witnesses to testify under oath in his behalf. However, the law does not require, nor is it the duty of, a grand jury so minutely to enter into extensive hearings of cases before it as to satisfy itself of the guilt or innocence of an accused. The duty of the grand jury is only to ascertain whether there is sufficient evidence against a person to warrant his being put on trial before a petit jury, the latter of which will declare his guilt or innocence.

By way of specific answer to your questions, I am of the opinion that it is discretionary with the grand jury as to whether or not it will permit an accused to voluntarily come before it and give evidence under oath, or subpoena witnesses in his behalf, in reference to a criminal charge against him which is then under consideration by the grand jury.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3101.

APPROVAL, BONDS OF CITY OF PIQUA, MIAMI COUNTY, OHIO—
19,500.00.

COLUMBUS, OHIO, March 30, 1931.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

3102.

BREAD LAW—EFFECT OF DECISION OF FEDERAL DISTRICT COURT
HOLDING "MAXIMUM SURPLUS TOLERANCE" PROVISIONS OF
ACT UNCONSTITUTIONAL—RESIDUE OF SUCH ACT UNAF-
FECTED.

SYLLABUS:

Effect of unconstitutionality of part of act, known as "An Act for the Regulation of Bakeries," upon the residue of the act, discussed.

COLUMBUS, OHIO, March 30, 1931.

HON. W. D. LEECH, *Chief of Division of Foods and Dairies, Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is hereby made of your letter presenting the following inquiry:

"Regarding sections 1090-37 and 1090-38 of the General Code relating to loaves of bread.

There is some discussion as to the effect of Judge Killits' decision in the Federal Court at Toledo regarding these two sections of the law.

We would like to have your official opinion as to the elimination of any part or parts of these sections and as to the possibility of enforcing the balance. Some are of the opinion that Judge Killits' decision affected