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*

is required to use that degree of care for its safekeeping and preservation, which an ordinarily prudent man would use under the same or similar circumstances.

3. If the county prosecuting attorney requests that said weapons be turned over to him during the investigation or prosecution of the case, it is the duty of the state highway patrolman to deliver said weapons to such prosecuting attorney as the chief law enforcement officer of his county, who should give his receipt therefor.

COLUMBUS, OHIO, December 28, 1939.

COL. LYNN BLACK, *Superintendent, Division of State Highway Patrol, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your request for the opinion of this office, reading as follows:

> "In connection with the enforcement of the motor vehicle laws of the state, members of the Patrol on many occasions apprehend violators who are found to be in the possession of firearms and other weapons. When these persons are taken into custody, of course, the weapons are taken from them. On some occasions the weapons find their way into the office of the prosecuting attorney of the county where the charge is preferred. On some occasions our department may retain possession of same. After the owner has paid his fine or served his time, he makes demand for this property. In order that the responsibility for such property be fixed we desire your formal opinion on the following questions:
>
> (1) When an arrest is made by a member of the Highway Patrol and the violator is found to be in possession of firearms or other weapons which have no connection whatsoever with the offense charged and are not used in evidence and such weapons are taken from the person of the violator by the highway patrolman making the arrest, what is the responsibility of the State Highway Patrol to the owner with respect to the preservation and/or return of such property?
>
> (2) When an arrest is made by a member of the State Highway Patrol and the violator is found to have in his possession certain firearms or other weapons which have no connection with the offense charged and are not used in evidence, does the prosecuting attorney of the county where the charge is filed have the right to demand such weapons from the arresting officer and if said demand is complied with, what steps should be taken by

the highway patrolman to relieve the State Highway Patrol from all responsibility with respect to the preservation and return of this property?

In some cases the arresting patrolman signs and files the affidavit against the party charged in the above situations and in other instances same is signed and filed by the injured person or someone other than the patrolman.

Would your answer to the above questions be any different in a case where the patrolman signed the affidavit and was prosecuting witness or if he merely arrested the party and the affidavit was signed and filed by some other person?"

In so far as pertinent to your inquiry, Section 1181-3, General Code, after prescribing the duties and powers of the State Highway Patrol, reads in part as follows:

"Sec. 1181-3. * * *

Any person arrested by a patrolman shall forthwith be taken by such patrolman before any court or magistrate having jurisdiction of the offense whereof such person so arrested is charged, there to be dealt with according to law.

State highway patrolmen shall not have the right or power of search nor shall they have the right or power of seizure except to take from any person under arrest or about to be arrested deadly or dangerous weapons in the possession of such person. * * * The powers and duties conferred on the state highway patrol shall be supplementary to and in no way a limitation on the powers and duties of sheriffs or other peace officers of the state."

It is clear from the provisions of Section 1181-3, above quoted in part that a state highway patrolman has "the right or power * * * to take from any person under arrest or about to be arrested deadly or dangerous weapons in the possession of such person." The right of an officer, even without express statutory authority to search the person of one lawfully arrested and to seize articles found upon him or in his custody, such as weapons, evidences of crime, et cetera is well established. See case notes in 32 A. L. R. 680; 51 Id. 424; 74 Id. 1387, and 82 Id. 782, and the long lists of cases cited. As held in numerous cases cited in the above case notes, as "an incident of an arrest the officer may take from the person arrested instruments that might facilitate an escape or that tend to establish commission of the crime for which the arrest was made." The language used in the case of *United States* v. *Murphy*, 264 Fed., 842 (D. C., E. D., New York, 1920), is squarely in point. In that case at page 844, Garvin, District Judge, said as follows:

"The right of an arresting officer to search a defendant under ordinary circumstances, when the defendant is under arrest, charged with a violation of law, cannot be questioned. Wharton, Crim. Prac. (10th Ed.), 97, 98; Corpus Juris, Arrest, par. 74; Weeks v. U. S., 232 U. S. 383, 392, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915 B, 834, Ann. Cas. 1915 C. 1177.

This applies with particular force to the case of a man arrested for intoxication, who might have in his possession dangerous weapons with which he might do incalculable harm, either to himself or to others. * * *"

In the cases annotated in the A. L. R. case notes above cited, and other authorities referred to in such notes, it is conclusively held that the right and duty of an officer lawfully making an arrest to seize and hold weapons and instruments which might be used to effect or aid in an escape, or to endanger the lives of the public, or reasonably necessary as evidence in the prosecution of the crime for which the person was arrested does not violate the provisions of the Federal or State constitutions, guaranteeing freedom from unreasonable search and seizure. See the Fourth Amendment to the Constitution of the United States and Section 14, Article 1 (Bill of Rights), of the Constitution of Ohio. Clearly, therefore, that part of Section 1181-3, supra, authorizing the taking by a state highway patrolman of deadly or dangerous weapons from a person under arrest or about to be arrested is a valid legislative enactment. Indeed, this particular provision would seem to be a limitation upon the common law powers of such an officer, in that it *limits* "the right or power of seizure" in proper cases to taking from a person under arrest or about to be arrested "deadly or dangerous weapons in the possession of such person."

Properly to resolve your question requires an examination, among others, of the sections of the General Code of Ohio, relating to concealed or dangerous or deadly weapons. The sections relating to the carrying of concealed weapons are Sections 12819 and 13448-4 of the General Code. These sections respectively provide:

Sec. 12819. "Whoever carries a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person shall be fined not to exceed five hundred dollars, or imprisoned in the county jail or workhouse not less than thirty days nor more than six months, or imprisoned in the penitentiary not less than one year nor more than three years. Provided, however, that this act (G. C. Sec. 12810) shall not affect the right of sheriffs, regularly appointed police officers of incorporated cities and villages, regularly elected constables, and special officers as provided by sections 2833, 4373, 10070, 10108 and 12857 of the

General Code to go armed when on duty. Provided further, that it shall be lawful for deputy sheriffs and specially appointed police officers, except as are appointed or called into service by virtue of the authority of said sections 2833, 4373, 10070, 10108 and 12857 of the General Code to go armed if they first give bond to the state of Ohio, to be approved by the clerk of the court of common pleas, in the sum of one thousand dollars, conditioned to save the public harmless by reason of any unlawful use of such weapons carried by them; and any person injured by such improper use may have recourse on said bond."

Sec. 13448-4. "Upon the trial of an indictment or information for carrying a concealed weapon, the jury shall acquit the defendant if it appear that he was at the time engaged in a lawful business, calling or employment, and that the circumstances in which he was placed justified a prudent man in carrying such weapon for the defense of his person, property or family."

Sections of the General Code relating to the owning, possessing, transporting or having custody of machine guns are Sections 12819-3, 12819-4 and 12819-5, which respectively read in part as follows:

Sec. 12819-3. "For the purpose of this act, a machine gun, a light machine gun or a sub-machine gun shall be defined as any firearm which shoots automatically, or any firearm which shoots more than eighteen shots semi-automatically without reloading. Automatically as above used mean that class of firearms which, while the trigger on the firearm is held back continues to fire successive shots. Semi-automatically means that class of firearm which discharges one shot only each time the trigger is pulled, no manual reloading operation being necessary between shots."

Sec. 12819-4. "No person shall own, possess, transport, have custody of or use a machine gun, light machine gun or sub-machine gun, unless he first procures a permit therefor from and at the discretion of the adjutant general of Ohio, who shall keep a complete record of each permit so issued. * * * Before obtaining such permit each applicant shall give bond to the state of Ohio, to be approved by the adjutant general in the sum of five thousand dollars, conditioned to save the public harmless by reason of any unlawful use of such weapon while under the control of such applicant or under the control of another with his consent; and any person injured by such improper use may have recourse on said bond. Provided, however, that this section shall not affect the right of the national guard of Ohio, sheriffs, regularly appointed police officers of incorporated cities and villages, regularly elected

constables, wardens and guards of penitentiaries, jails, prisons, penal institutions or financial institutions maintaining their own police force and such special officers as are now or may be hereafter authorized by law to possess and use such weapons when on duty. * * *"

Sec. 12819-5. "Whoever owns, possesses, transports or has custody of or uses a machine gun, light machine gun or submachine gun without a permit, as provided by section 12819-4 of the General Code, or whoever having such permit, uses or consents to the use by another of such weapon in an unlawful manner, shall be guilty of a felony and upon conviction thereof, shall be imprisoned in the penitentiary not less than one nor more than ten years."

Section 12819-6, General Code, makes it a crime to sell or give a machine gun contrary to the provisions of such section, and provides that such a crime shall be punishable by imprisonment in the penitentiary for from one to five years.

It will be noted by the express terms of Section 12819, supra, that the provisions thereof do not affect the right of certain peace officers to go armed when on duty, including sheriffs, regularly appointed police officers of cities and villages, constables, special officers and others enumerated in the provisions of such section. Further, by the terms of Section 13448-4, supra, a jury is required to acquit a defendant charged with carrying a concealed weapon "if it appear that he was at the time engaged in a lawful business, calling or employment, and that the circumstances in which he was placed justified a prudent man in carrying such weapon for the defense of person, property or family." It will also be noted that by the terms of Section 12819-4, private citizens who comply with the requirements of such section, and certain public officers, are permitted to own, possess, transport, have custody of, and use machine guns as that type of gun is defined in Section 12819-3. In view of the terms of the sections under consideration, it does not necessarily follow from the mere fact that one who carries a dangerous weapon concealed on or about his person, or from the fact that one possesses a machine gun of the kind prohibited by law, that such person carries such concealed weapon or possesses such machine gun in violation of law. From the provisions of Sections 12819 and 13448-4, it is clear that persons may, and oftentimes do, lawfully carry weapons concealed on or about their person, just as it is clear that in Section 12819-4, a public officer or a private citizen under the circumstances prescribed in such section may lawfully own, possess, transport, have custody of or use a machine gun. That is to say, it does not follow from the bare fact that a person, who is lawfully arrested by a member of the state highway patrol, is found to be in the possession of a dangerous or deadly weapon is *ipso facto* guilty of violating one

of the sections of the Criminal Code relating to dangerous or deadly weapons. Nor does it follow that such a weapon is not property, or that it may be confiscated, or destroyed, or injured by the arresting officer at will. Upon the ultimate disposition of the action or actions against the person so arrested it may be found that the person so arrested was lawfully carrying a concealed weapon, or lawfully in possession of a machine gun, as the case may be, in which event he would unquestionably be entitled to a return of his property; and if through wilful acts or negligence the arresting officer suffers such weapon or machine gun to be lost, or destroyed, or damaged, he and his bondsmen are liable for such loss, destruction or injury.

Having determined that a state highway patrolman making a lawful arrest may seize a dangerous or deadly weapon, and having pointed out that under certain circumstances persons carrying concealed weapons, or having a machine gun in his possession, may be lawfully carrying such concealed weapon or possessing such machine gun, we come now to the responsibility of a state highway patrolman who seizes such a weapon under such circumstances. The law is well settled that a weapon so taken is in *custodia legis*. The officer rightfully holding such a weapon, holds it as the agent of the court before whom the cause is pending. As stated in 54 C. J., 434:

> "Property seized in enforcing the criminal laws is in the custody of the law and cannot be replevied, until such custody is ended. This custody has been held not to end with the discharge of the alleged criminal, where the property is such that its possession is prohibited. Property seized, the possession of which is illegal, cannot be replevied. *Property held as evidence in a criminal prosecution cannot be replevied.*" (Italics mine.)

See also case notes in 11 A. L. R. 681, and 13 Id. 1168, and cases cited, including *Simpson, et al. Appellant* v. *St. John, Respondent,* 93 N. Y. 363 (1883).

In such a case it is the duty of such an officer to use that degree of care in the safekeeping and preservation of the weapon pending the final determination of the cause and judgment and orders of the court, which an ordinarily prudent man under the same or similar circumstances would use. Manifestly, the officer has no right to convert the weapon to his own use; nor does he have the right to commit wilful trespass with reference to that which may later be determined by the court to be the property of the defendant. Should the officer convert the weapon to his own use or should he wilfully damage such a weapon, or should he fail to use the degree of care above specified, and should it be determined by the court by whom the criminal cause or causes were tried, or by any other tribunal of competent jurisdiction, that the weapon should be returned to the defendant, such officer and his official bondsmen would be liable.

In so far as your second question is concerned, it is provided by Section 2916 of the General Code that "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 * * *." Under this section the prosecuting attorney is the chief law enforcement officer of the county in which he is elected. It is his duty to inquire into and prosecute the commission of all crimes within his county and in the performance of his duty it is self-evident that he should have control of all the evidences of crime, including exhibits, which he feels necessary to the proper performance of his duties in the premises. By the express terms of Section 13433-5, General Code, it is provided:

> "The prosecuting attorney of the county may appear before the court or magistrate in any case of felony pending there, and assume charge of the prosecution for such felony."

Violations of Sections 12819, 12819-4, 12819-5 and 12819-6 are felonies; and since under the provisions of Section 13433-5, a prosecuting attorney may "assume charge of the prosecution" for any felony in any court or before any magistrate of his county under the circumstances mentioned in your letter, requests by the prosecuting attorney for the delivery of a weapon taken from a person lawfully arrested by a state highway patrolman should be complied with upon a proper receipt from such prosecuting attorney.

In this connection, it is suggested that in any case of the kind described in your letter, the state highway patrolman making the arrest, should at the earliest possible moment get in touch with the prosecuting attorney, inform him of the facts in the case, and consult with him as to the proper disposition of the weapon taken from the person so arrested.

Your last question requires the citation of no authority. As above pointed out, under the law of this state crimes relating to dangerous or deadly weapons of the kinds here under discussion are felonies. This being true, and the prosecution of such cases being in the hands of the prosecuting attorney as the representative of the state of Ohio, it matters not whether the affidavit be filed by a private individual, by a state highway patrolman making the arrest, or by the prosecuting attorney, or otherwise.

In view of the foregoing and in specific answer to your question, it is my opinion that:

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 is required to use that degree of care for its safekeeping and preservation, which an ordinarily prudent man would use under the same or similar circumstances.

3. If the county prosecuting attorney requests that said weapons be turned over to him during the investigation or prosecution of the case. it is the duty of the state highway patrolman to deliver said weapons to such prosecuting attorney as the chief law enforcement officer of his county, who should give his receipt therefor.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

1620.

CONTRACT — BASE AND ALTERNATE — AWARDING AUTHORITY MAY SELECT ALTERNATE BID WHEN SUCH BID IS LOWER THAN ESTIMATE FILED WITH AUDITOR OF STATE, EVEN THOUGH ALL BIDS ON BASE CONTRACT EXCEED ESTIMATE.

SYLLABUS:

Where the plans, specifications and details for a proposed project are accurate, full and complete, both as to the base and alternate contracts, and an estimate of costs on both the base and alternate contracts has been filed with the Auditor of State pursuant to Section 2325, General Code, the awarding authority may then select such alternate plans and specifications and award the alternate contract if the bid thereon is lower than the estimated cost thereof, even though all bids on the base contract exceed the estimated cost of such base contract.

COLUMBUS, OHIO, December 28, 1939.

HON. CARL E. STEEB, *Secretary, The Ohio State University, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your request for my opinion, which reads as follows:

> "On November 21, 1939, sealed proposals were received by the Ohio State University for construction of 'B' Addition to