1. At Item 24 of the abstract, there is shown an oil and gas lease from Fred C. Lieber and Mary Lieber, his wife, to The Ohio Fuel Supply Company, dated November 27, 1920, for the term of twenty (20) years, and so much longer as oil and gas, etc., is produced in paying quantities. Accompanying the abstract is what purports to be a copy of a release executed by said The Ohio Fuel Supply Company dated September 1, 1927, by the terms of which the lessee surrenders and cancels the lease as to that portion of the property which is to be transferred to the State of Ohio. This instrument apparently was acknowledged before a notary public, whose seal is not attached to the copy accompanying the abstract, nor is there anything to show that the release has been filed with the Recorder of Fairfield County. The description of the land released is also defective. It follows the description in the deed from Fred C. Lieber and wife, the defects of which are pointed out in the following paragraph. The release should be redrafted, re-executed, filed with the auditor of Fairfield County for record, and a true copy of said release showing the filing thereof should accompany the abstract.

2. The description in the deed from Fred C. Lieber and wife to the State of Ohio is defective in that it describes the land as being all the land owned by the grantor lying between the easterly line of the Buckeye Lake property, as owned by the State of Ohio, and another line which is described by courses and distances. The deed should contain a description of the entire boundary; that is, all of the sides of the tract should be specifically described.

3. According to the abstract, the June, 1927, installment of the 1926 taxes on the Lieber tract is unpaid, as well as the 1927 taxes, the amount of which is yet undetermined. All of these taxes are a lien.

With reference to the second tract which it is proposed to purchase from Stella M. Lathem, I am of the opinion that the abstract shows a good and merchantable title in said Stella M. Lathem, subject to taxes for the year 1927, which are unpaid and a lien.

With reference to the third tract which it is proposed to purchase from Caroline L. Huber, I am of the opinion that the abstract shows a good and merchantable title in said Caroline M. Huber, subject to taxes for the year 1927, which are unpaid and a lien.

I am returning herewith the abstract of title, warranty deeds, encumbrance estimates and other papers submitted in this connection.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1008.

CLERK OF COURT—AUTHORITY TO ADMINISTER THE OATH TO AN AFFIDAVIT—ISSUANCE OF SEARCH WARRANT.

SYLLABUS:

1. *By the terms of Section 2873, General Code, the clerk of the Court of Common Pleas has authority to administer the oath to an affidavit charging a violation of Sections 6212-13 to 6212-20, General Code.*

2. *Upon the filing of the proper affidavit with the clerk of the Court of Common Pleas a search warrant shall issue as a matter of right, the issuance thereof being only a ministerial act.*

COLUMBUS, OHIO, September 16, 1927.

HON. HARRY B. REESE, *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter dated September 7, 1927, which reads as follows:

> "Since the recent United States Supreme Court ruling depriving justices of peace and mayors of jurisdiction of cases arising under Crabbe Act, all of such cases have come before the Court of Common Pleas in this county, and the question has arisen in my mind as to the proper person before whom the affidavits in such cases should be made.
>
> Section 6212-18 of the General Code of Ohio seems to provide that the affidavits shall be at least, *filed* with the Common Pleas judge. I believe that this gives him authority to administer the oath. I am wondering if, by authority of Section 2873 of General Code of Ohio, the clerk of the Common Pleas Court has the same authority.
>
> If your answer is in the affirmative, does said clerk have the further right to issue search warrants under Sections 6212-16 and 6212-18?"

It should be borne in mind at the outset that the jurisdiction of one accused of a violation of Sections 6212-13 to 6212-20, General Code, before a Court of Common Pleas, other than by indictment by a grand jury, can be acquired only upon the filing of an affidavit in such court. The filing of an affidavit is prerequisite to the issuing of the warrant and without the filing of a proper affidavit no jurisdiction to issue the warrant is acquired.

The general rule as to who may take an affidavit is stated in 2 Corpus Juris 328 as follows:

> "Courts of record and the judges thereof have an implied power to take affidavits for use in proceedings before them. Where an affidavit is required to be made and the statute does not designate any particular officer or officers before whom the act shall be performed, it may be done before any officer having general authority under the statute to administer and certify oaths, and in some cases, before an officer authorized by rules of court."

Judge Allen in *State vs. Lanser,* 111 O. S. 23, at page 27, stated this rule somewhat differently but to the same effect as follows:

> "It is also essential to the validity of such affidavit that it be sworn to by the affiant before some person who has authority to administer oaths, and if such affidavit shows upon its face that it is not sworn to before a person authorized by law to administer the oath it has no legal force whatever."

In the case of *Miller vs. State,* 23 O. C. C. (N. S.) 76, at page 78, appears the following language:

> "On the part of the plaintiff in error a motion was made before the trial court to dismiss the accused upon the ground that the affidavit upon which the

prosecution was based purports, by language used in the beginning of such affidavit, to have been made before Judge Phillips, whereas it is certified to have been sworn to before a deputy clerk of the common pleas court. This motion was overruled, and we think properly overruled. The affidavit might have been made before any officer authorized to administer oaths, as this deputy clerk was."

By the terms of Section 2873, General Code:

"The clerk may administer oaths and take and certify affidavits, depositions and acknowledgments of deeds, mortgages, powers of attorney and other instruments of writing."

In view of the foregoing and answering your first question specifically, it is my opinion that, by the terms of Section 2873, General Code, the clerk of the Court of Common Pleas has authority to administer the oath to an affidavit charging a violation of Sections 6212-13 to 6212-20, General Code.

You further inquire whether or not the clerk of the Court of Common Pleas has authority to issue search warrants under Sections 6212-16 and 6212-18, General Code.

This question is answered by the case of *Rosanski vs. State,* 106 O. S. 442, the first and second paragraphs of the syllabus of which read as follows:

"1. The preliminary requirements for the issuance of a search warrant for the seizure of intoxicating liquors or property designed for the manufacture of intoxicating liquors are defined in Section 13483, General Code, and Section 4594, General Code, and a warrant may lawfully be issued upon filing an affidavit with a magistrate particularly describing the house or place to be searched, the person to be seized and the things to be searched for, and alleging substantially the offense in relation thereto and that affiant believes and has good cause to believe that such things are there concealed, without any supporting testimony of the truth of such affidavit and without any finding of probable cause on the part of the magistrate.

2. Upon the filing of such affidavit with a magistrate or with the clerk of any court having a lawful clerk, such search warrant shall issue as a matter of right and the issuance of such search warrant is a ministerial act."

Chief Justice Marshall, who wrote the opinion of the court, on page 450 used the following language:

"The further question is raised in some of the cases now under consideration that the writ was issued by a clerk of the court without any action whatever on the part of the court, and it is argued that the act of issuing the warrant is a judicial act and therefore an entry must appear upon the journal of the court authorizing and ordering the further action on the part of the clerk, and that without such order on the part of the court the action of the clerk is invalid. This question has never been decided by this court, and, so far as can be ascertained, has never been before the court for determination, neither has the question ever been before any of the inferior courts, so far as reported cases disclose, and it may therefore be assumed that it has always been considered the proper practice to issue such process without a preliminary order, in conformity to the similar practice in making arrest, and the question seems never to have been raised until in these latter days of searching for technicalities as a means of thwarting the enforcement of the prohibition

laws. Manifestly it would be wholly inconsistent for this court to declare that the issuance of a search warrant is a judicial act, when proceeding under Section 13483, General Code, while at the same time recognizing the validity as a ministerial act of the universal practice for more than fifty years of issuing a warrant for arrest under Section 13496, General Code. The protection of property against seizure is no more sacred than the protection of the person against arrest, and the sanctity of property, even though that property be the home, is upon no higher plane than that of the person's liberty. The legislature has recognized the superior privilege of the person in requiring that an affidavit for a warrant for arrest of the person shall be made upon knowledge, and that the magistrate shall have reasonable ground to believe that the offense charged has been committed, while, as already stated, the affidavit for a warrant for search and seizure requires only that the affidavit shall be upon belief, based upon good cause on the part of the affiant, without requiring any judicial determination on the part of the magistrate.

These causes are argued in this court upon the theory that the constitution has been violated, but inasmuch as the statute has been faithfully followed it is manifest that if the constitution has been violated such violation must be charged to the legislature in the enactment of Section 13483, and for the reasons already stated it would necessarily follow that if Section 13483 is unconstitutional, Section 13496 is also a transgression of constitutional authority. This court could not hold that the ministerial act of the clerk of the municipal court in these cases is invalid without overthrowing both statutes referred to, and this could only be done by the concurrence of six members of this court upon a finding that those statutes are clearly and palpably in violation of the constitutional mandate. The procedure followed in these cases must be approved unless this court is prepared to revolutionize the criminal procedure in making arrests, searches and seizures. It requires no word picture to show how disastrous it would be to require that in all instances the judges of the municipal court, or other courts having clerks, be found before a warrant can be issued for the arrest of persons accused of offenses against our criminal laws. To so hold would facilitate the escape of criminals, and to require a preliminary hearing in each case before issuing process would be so burdensome as to render difficult if not impossible the administration of criminal justice. The existing practice having been of so long standing, and so universally acquiesced in, this court would not be justified in overthrowing the practice at this time without legislative action."

To the same effect see the opinion of Judge Eyrich in the case of *Cincinnati vs. Bush, et al.*, 24 O. N. P. (N. S.) 81.

Answering your second question specifically I am of the opinion that upon the filing of the proper affidavit with the clerk of the Court of Common Pleas a search warrant shall issue as a matter of right, the issuance thereof being only a ministerial act.

Respectfully,
EDWARD C. TURNER,
Attorney General.