

Inasmuch as the conveyance of this property by The Pymatuning Land Company to the state of Ohio for the purposes indicated is in fact a gift of this property to the State for said purposes, no contract encumbrance records or Controlling Board certificate is required as a condition precedent to the right and authority of the Conservation Council to accept this conveyance on behalf of the state of Ohio.

Upon the considerations above noted, the title of The Pymatuning Land Company to this tract of land is approved and the abstract of title to the same is herewith returned to the end that the same, together with the deed executed by The Pymatuning Land Company conveying this property to the State, may on acceptance of such deed by the Conservation Council, be filed with the Auditor of State in the manner provided by law.

Respectfully,  
 JOHN W. BRICKER,  
*Attorney General.*

3459.

SEARCH WARRANT—FOR INTOXICATING LIQUOR MAY BE ISSUED ONLY BY COURTS OF RECORD—VIOLATIONS OF LIQUOR CONTROL ACT MAY BE HEARD BY COURTS NOT OF RECORD—SEARCHING AUTOMOBILE WITHOUT WARRANT WHEN.

*SYLLABUS:*

1. *A justice of the peace, a judge of a mayor's court and judges of courts which are not courts of record in Ohio cannot, under section 6064-61, General Code, issue search warrants for intoxicating liquor.*

2. *A justice of the peace and judges of courts inferior to the court of common pleas have jurisdiction to hear and determine cases arising from the violations of the Liquor Control Act, and for keeping a place where intoxicating liquor is sold, given away or furnished in violation of the penal laws of this state.*

3. *Under section 6212-43, General Code, as amended in House Bill No. 1, enacted in the second special session of the 90th General Assembly, an agent or employe of the Department of Liquor Control, deputized as provided in section 6064-8, General Code, or any other officer of the law, may search an automobile or other vehicle without a search warrant and seize beer and intoxicating liquor being possessed and transported in violation of law, providing such officers act in good faith and upon such information as induces the honest belief that the person in charge of the automobile or the vehicle is in the act of violating the law.*

COLUMBUS, OHIO, November 16, 1934.

HON. JOHN H. HOUSTON, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter which reads:

"In the enforcement of House Bill No. 1 enacted by the General Assembly, some questions have arisen which are rather confusing to the law enforcement officers.

We refer specifically to Section 61 of such act wherein it says that a judge of a court of record may issue Warrant to search a house, building,

place, *vehicle*, or \* \* \* conveyance. Also we refer to 13422-3 which specifically confers upon magistrates jurisdiction to hear and determine cases arising from violations of the Liquor Control Act.

Here is an apparent inconsistency and I am desirous of knowing whether or not a magistrate who has been construed not to be a judge of a court of record may issue a search warrant as provided in Section 61 or may only the Common Pleas Judge issue such search warrant?

The second part of my question is whether it is necessary in construction of Section 61 for an officer to have a search warrant in order to search a motor vehicle, watercraft, or conveyance in enforcement of this act."

Search warrants are generally issued in this state pursuant to the provisions of sections 13430-1 to 13430-11, inclusive, General Code, except in those instances where the legislature has otherwise expressly provided. Section 13430-1 General Code, reads:

"A judge of a court or magistrate may issue warrants to search a house or place:

1. For property stolen, taken by robbers, embezzled or obtained under false pretense;

2. For weapons, implements, tools, instruments, articles or property used as a means of the commission of crime, or when any of such objects or articles are in the possession of another person with the intent to use the same as a means of committing crime:

3. For forged or counterfeit coins, stamps, imprints, labels, trademarks, bank bills or other instruments of writing, and dies, plates, stamps or brands for making them;

4. For books, pamphlets, ballads or printed papers containing obscene language, prints, pictures or descriptions manifestly tending to corrupt the morals of youth, and for obscene, lewd, indecent or lascivious drawings, lithographs, engravings, pictures, daguerreotypes, photographs, stereoscopic pictures, models or casts, and for instruments or articles of indecent or immoral use, or instruments, articles or medicines for procuring abortions, or for the prevention of conception, or for self-pollution;

5. For gaming table, establishment, device or apparatus kept or exhibited for unlawful gambling, or to win or gain money or other property and for money or property won by unlawful gaming.

Provided that the enumeration of certain property and materials in this section, shall not in any wise affect or modify other provisions of law for search and seizure of other articles or things."

A justice of the peace, under the provisions of that section, may issue search warrants, since a justice of the peace is included in the term "magistrate," as defined by the legislature in section 13422-1, General Code.

Although a justice of the peace may issue search warrants for the purposes set forth in section 13430-1, General Code, it is questionable whether the language of that statute authorizes the issuance of search warrants for intoxicating liquor. However, the legislature has expressly provided for the issuance of search warrants for intoxicating liquor in section 6064-61, General Code (section 61 of House

Bill No. 1), enacted in the second special session of the 90th General Assembly. Section 6064-61, General Code, reads:

"The judge of a court of record may issue warrants to search a house, building, place, vehicle, watercraft, aircraft, or conveyance for beer, alcohol or intoxicating liquor manufactured, possessed, stored, concealed, sold, furnished, given away, or transported in violation of any provision of this act and the containers in which the same may be found, or machinery, tools, implements, equipment, supplies and materials used or kept for use in manufacturing beer or intoxicating liquor in violation of any provision of this act, and to seize any of such property and things found therein, together with the vehicle, watercraft, aircraft, or conveyance in which the same may be found. The issuance of such warrants shall be subject in all respects to the provisions of sections 13430-2 to 13430-7, both inclusive, of the General Code; excepting that any such vehicle, watercraft, aircraft, or other conveyance shall be returned to the owner thereof upon execution by him of a bond with surety to the satisfaction of the officer making the seizure in an equal amount to the value thereof, conditioned upon the return thereof to the custody of such officer on the day of trial to abide by the judgment of the court. Upon conviction of any violation of any provision of the liquor control act, any property or thing found in the possession of the person convicted or his agent or employee shall be disposed of as provided in section 6212-43 of the General Code. If the accused is discharged by the judge or magistrate, such vehicle, watercraft, aircraft, or other conveyance shall be returned to the owner thereof and any bond which may have been given pursuant to the provisions of this section shall be cancelled; if the accused is the holder of a permit issued under authority of the liquor control act, any beer, intoxicating liquor or alcohol so seized shall be delivered to the department of liquor control and disposed of as provided in section 40 of this act and any other property so seized shall be returned to the owner thereof by the officer having the same in possession or custody; if the accused is not the holder of such a permit in force at the time, any beer, intoxicating liquor or alcohol and other property, excepting as herein provided, shall be forthwith destroyed and any such beer, intoxicating liquor or alcohol or other property is hereby declared to be a public nuisance."

Section 13430-1, et seq., General Code, are general laws relating to the issuance of search warrants (*Nicholas vs. City of Cleveland*, 125 O. S. 474, 478), whereas section 6064-61, General Code, relates specifically to search warrants for intoxicating liquor.

It will be observed that section 6064-61, General Code, expressly provides that a judge of a court of record may issue search warrants for intoxicating liquor. In view of the decision of the Supreme Court in the case of *State of Ohio vs. Allen*, 117 O. S. 470, wherein it was held that a justice of the peace is not a court of record, a justice of the peace has no authority under section 6064-61, General Code, to issue search warrants for intoxicating liquor. The same statement holds true for a mayor's court, in view of the language of Marshall, C. J., in the case of *State of Ohio vs. Allen*, supra, at page 480:

"This conclusion necessarily results in inferentially overruling the case

of *Heininger vs. Davis, Mayor*, 96 Ohio St., 205, 117 N. E., 229, because the jurisdiction of a mayor is defined to be that of a justice of the peace, and in all essential respects similar provisions are made for conducting judicial proceedings before a mayor. If a justice of the peace is not a court of record within the purview of Section 6 of Article IV, error could not be prosecuted directly to the Court of Appeals, and the Court of Appeals therefore acquired no jurisdiction to hear and determine these error proceedings."

Whether a municipal court is a court of record depends on whether the act creating such court expressly provides that such court shall be a court of record. 29 O. Jur. 12; see also *State, ex rel. Finley, et al. vs. Miller*, 128 O. S. 442.

Sections 13430-1 and 6064-61, General Code, in respect to who may issue search warrants, are irreconcilable, Section 6064-61, General Code, being a later act and relating to a particular subject, it follows that search warrants for intoxicating liquor can be issued only as provided in section 6054-61, General Code. It is a well established rule of statutory construction, as stated by the Supreme Court in *Ex Parte Fleming*, 123 O. S. 16, 21, quoting from 36 Cyc., 1151:

"Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one."

To the same effect is *Thomas, Sheriff, vs. Evans*, 73 O. S. 140:

"Where the general provisions of a statute are found to be in conflict with the express provisions of a later act relating to a particular subject, the latter will govern, although the words of the earlier general act, standing alone, would be broad enough to include the subject to which the more particular provisions relate."

The fact that a justice of the peace and a judge of a mayor's court do not have authority under section 6064-61, General Code, to issue search warrants for intoxicating liquor, does not in any wise affect the power or jurisdiction of such magistrates to hear and determine cases arising from violations of the Liquor Control Act or the penal laws of this state relating to the sale and distribution of intoxicating liquor. Section 13422-3, General Code, as amended in House Bill No. 1 in the second special session of the 90th General Assembly, specifically provides in part as follows:

"Magistrates shall have jurisdiction within their respective counties, in all cases of violation of any law relating to:

\* \* \*

\* \* \*

\* \* \*

8. Any violation of the liquor control act, or keeping a place where

intoxicating liquor is sold, given away or furnished in violation of any law prohibiting such acts."

It will be observed that the term "magistrate" and not the phrase "a judge of a court of record" is used in section 13422-3, General Code, as amended. It is therefore evident from a reading of section 6064-61, General Code, and section 13422-3, General Code, as amended, that the legislature intended to curtail the power of a justice of the peace, a judge of a mayor's court and magistrates of courts which are not courts of record, only in respect to the issuance of search warrants for intoxicating liquor.

Your second inquiry raises the question of whether it is necessary for an officer to secure a search warrant in order to make a search of automobiles and other like vehicles which are being used to transport intoxicating liquor in violation of law. Section 6212-43, General Code, as amended in House Bill No. 1, enacted in the second special session of the 90th General Assembly, reads in part:

"When any agent or employce of the department of liquor control deputized for that purpose, or any other officer of the law, shall discover any person in the act of transporting in violation of law, beer or intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all beer or intoxicating liquors found therein being transported contrary to law. Whenever beer or intoxicating liquors transported or possessed illegally shall be seized by an officer named herein, he shall take possession of the vehicle and team, or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the liquor control act, in any court having jurisdiction of offenses under said act, but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond with sufficient sureties, in a sum equal to the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide by the judgment of the court. The court upon conviction of the person so arrested shall order the beer or intoxicating liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale at public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of beer or intoxicating liquor, and shall distribute the balance as is distributed money arising from fines and forfeited bonds under the liquor control act."

Section 14 of article I of the Constitution of Ohio provides that:

"The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by

oath or affirmation, particularly describing the place to be searched and the person and things to be seized."

It has been held that the provisions of section 14 of article I of the Constitution of Ohio and the provisions of the Fourth Amendment to the Constitution of the United States, which are similar to those contained in the Ohio Constitution, do not prohibit all searches and seizures, but only such as are unreasonable. *Houck vs. State*, 106 O. S. 195, 199; *Carroll vs. United States*, 269 U. S. 132, 69 L. Ed. 543, 549.

Section 6212-43, General Code, prior to its amendment, read in part as follows:

"When the commissioner of prohibition, his deputy inspectors, or any officer of the law, shall discover any person in the act of transporting in violation of law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer named herein, he shall take possession of the vehicle and team, or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the law of the state prohibiting the liquor traffic, in any court having jurisdiction under such law, but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond with sufficient sureties, in a sum equal to the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide by the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall distribute the balance as is distributed money arising from fines and forfeited bonds under the law of the state prohibiting the liquor traffic."

In the case of *Houck vs. State, supra*, it was held that section 6212-43, General Code, did not violate any provisions of the Constitution of Ohio. The second and third paragraphs of the syllabus read:

"2. A search of an automobile by an officer and a seizure by him of intoxicating liquors then being possessed and transported in violation of law, without a search warrant, is authorized though the officer has no previous knowledge of such violation, provided he acts in good faith and upon such information as induces the honest belief that the person in charge of the automobile is in the act of violating the law.

3. A search and seizure under such circumstances is not unreasonable and therefore does not transgress Section 14, Article I of the Ohio Constitution."

The holding of the Supreme Court of Ohio in that case would likewise apply to section 6212-43, General Code, as amended, since the statute, as amended, in substance differs very little from the statute under consideration in the case of *Houck vs. State, supra*.

A statute identical to the one involved in the Houck case, *supra*, was held to be constitutional in the case of *Carroll vs. United States, supra*, wherein the Supreme Court of the United States held that section 26, Title II of the National Prohibition Act did not violate the Fourth Amendment to the Constitution of the United States. The first, second, third, fifth, eighth, fourteenth and sixteenth paragraphs of the syllabus read:

"1. The search, without warrant, of an automobile engaged in the illegal transportation of intoxicating liquor, is not prohibited by the 4th Amendment to the Federal Constitution.

2. If a search and seizure without warrant are made upon probable cause, that is, upon the belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which, by law, is subject to seizure and destruction, the search and seizure are valid.

3. The 4th Amendment to the Federal Constitution is to be construed in the light of what was deemed to be an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as interests and rights of individual citizens.

5. Those lawfully within the United States, entitled to use the public highways, have a right to free passage without interruption of search, unless there is known to a competent officer authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

8. The seizure, without warrant, of an automobile for the illegal transportation of intoxicating liquor, is legal if the seizing officer has reasonable or probable cause for belief that there is contraband liquor therein, which is being illegally transported.

14. The right to search for and seize, without warrant, intoxicating liquor or being transported along a public highway, does not depend upon the right to arrest the one in charge of it.

16. Officers engaged in patrolling for seizure of contraband liquor a highway along which liquor is transported may seize and search, without warrant, an automobile of persons whom they knew, or have convincing evidence to make them believe, are plying the unlawful trade of transporting and selling such liquor, and which is the same car which they used in trying to fill an order for liquor to the officers themselves a short time before, and is, at the time, coming from known sources of liquor supply, and it is immaterial that the officers were not looking for them at the time, and that the liquor was so concealed as not to be evident to the senses of the officers."

See *Cornelius' Search and Seizure*, Second Edition, page 201. Taft, C. J., at page 549, said:

"On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The 4th Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens."

The reason for the rule of law announced in that case is stated by Taft, C. J., at page 551:

"We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the 4th Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

It is apparent from the Houck and Carroll cases, *supra*, that an officer, in order to make a search of an automobile on the highway for liquor illegally possessed or transported, without a search warrant, must have probable cause to believe the law is being violated. What constitutes probable cause for stopping and searching an automobile without a search warrant is primarily a question of fact depending on the circumstances of each particular case. See *Cornelius' Search and Seizure*, Second Edition, page 222. In other words, what constitutes probable cause cannot be categorically answered. However, the right to search vehicles in proper cases without a search warrant does not justify indiscriminate search of an automobile or other vehicle on the highway suspected of being used for the illegal transportation of intoxicating liquor.

Therefore, I am of the opinion that:

1. A justice of the peace, a judge of a mayor's court and judges of courts which are not courts of record in Ohio cannot, under section 6064-61, General Code, issue search warrants for intoxicating liquor.
2. A justice of the peace and judges of courts inferior to the court of common pleas have jurisdiction to hear and determine cases arising from the violations of the Liquor Control Act, and for keeping a place where intoxicating liquor is sold, given away or furnished in violation of the penal laws of this state.
3. Under section 6212-43, General Code, as amended in House Bill No. 1, enacted in the second special session of the 90th General Assembly, an agent or employe of the Department of Liquor Control, deputized as provided in section 6064-8, General Code, or any other officer of the law, may search an automobile or other vehicle without a search warrant and seize beer and in-

toxicating liquor being possessed and transported in violation of law, providing such officers act in good faith and upon such information as induces the honest belief that the person in charge of the automobile or the vehicle is in the act of violating the law.

Respectfully,  
 JOHN W. BRICKER,  
*Attorney General.*

3460.

APPROVAL, BONDS OF PARMA CITY SCHOOL DISTRICT, CUYA-HOGA COUNTY, OHIO, \$1,000.00.

COLUMBUS, OHIO, November 16, 1934.

*Industrial Commission of Ohio, Columbus, Ohio.*

3461.

APPROVAL, ABSTRACT OF TITLE TO LAND IN ANDOVER TOWNSHIP, ASHTABULA COUNTY, OHIO, OWNED BY THE PYMATUNING LAND COMPANY, FOR PUBLIC PARK, HUNTING AND FISHING GROUNDS.

COLUMBUS, OHIO, November 17, 1934.

HON. WILLIAM H. REINHART, *Conservation Commissioner, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and approval an abstract of title to certain tracts of land in Andover Township, Ashtabula County, Ohio, which tracts, together with other tracts of land in Williamsfield, Andover and Richmond Townships in said county, the state of Ohio is acquiring from The Pymatuning Land Company. These lands are being acquired for the purpose and to the end that such lands and the waters inundating and submerging the same as a result of the construction and maintenance by the Water and Power Resources Board of the commonwealth of Pennsylvania of the dam at and across the outlet of the Pymatuning Swamp into the Shenango River in Crawford County, Pennsylvania, may be used as a public park and as public hunting and fishing grounds or territory.

The tracts of land above referred to are parts of Lots 45 and 46 of the original survey of said township, and are bounded and described as follows:

Parcel 1.

Beginning at the intersection of the center line of the highway running East and West between Lots Nos. 45 and 46 with the center