proceeding. Apparently, with respect to rights of way across railroad tracks the foregoing section of the Code makes necessary a judicial finding as to whether or not the appropriation will unnecessarily interfere with the reasonable use of the railway property, and in this respect the provision is different from that applicable to ordinary proceedings by municipalities where the determination of council as to the necessity is not ordinarily subject to judicial review.

It, of course, follows from the fact that the municipality is required to appropriate property that it must pay the reasonable value of the property rights taken. It also follows that where the right to appropriate is given for a specific purpose, it necessarily follows that the city also has a right to acquire by purchase, lease, etc., as authorized by Section 3615 of the Code. Accordingly, if the municipality and the railroad company can reach a mutually satisfactory price for the property involved, I see no reason to prevent the municipality from carrying out such an agreement.

In your first inquiry you raise the question as to whether the municipality may validly agree with the railroad company to pay the entire cost of extending the street across the railroad tracks and property, and I am assuming from your statement that the agreement does not call for any separate payment to the railroad company for the right of way across its tracks. This necessarily brings us to a consideration of whether or not the percentage division of the cost mentioned in Section 8897, General Code, has any application where the crossing is at grade. As I have before observed, the section is discussing primarily the avoidance of a crossing at grade, and I am of the opinion that the percentages are only applicable in the case of a new structure at other than grade. While the section is not clear, I believe that this is the proper interpretation of the language used. This is especially true in view of the language of the succeeding sections dealing with grade crossing which do not in any way attempt to deal with the subject of a division of the costs of the proposed improvement, and I believe it manifest that whichever party is the one attempting to cross the property of the other they must assume the obligation of paying the entire cost of the improvement, including the cost of the right of way over the other's property. This is, of course, subject to the exception that the court may order the railroad to make proper provision for safeguarding the public using the highway.

From what has been said, it follows that your second inquiry must also be answered in the affirmative. A municipality being required to condemn the right of way for a new street over the tracks of a railroad company may, instead of proceeding by condemnation proceedings, purchase the right for an agreed amount under its general powers to purchase property for municipal purposes.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2469.

COURT—WORDS "DULY CONSTITUTED MUNICIPAL COURT" DOES NOT INCLUDE MAYOR'S COURTS OF CITIES AND VILLAGES.

SYLLABUS:

1. *In the interpretation of the terms of Section* 6212-19 *of the General Code, as amended by the* 87*th General Assembly,* (112 *O. L.* 260), *the words "duly constituted municipal court" should not be construed as including mayor's courts of cities and villages.*

2. The provisions of Section 6212-19, General Code, are not in conflict with any provisions of the Constitution of Ohio or the Constitution of United States.

COLUMBUS, OHIO, August 21, 1928.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your communication requesting my opinion in answer to the following questions:

> "QUESTION No. 1: Do the words 'any duly constituted municipal court' in the last paragraph of Section 6212-19, G. C., as amended in 112 O. L. 260, include the mayor's court of a city?
>
> QUESTION NO. 2: If these words do not include mayor's courts, then is the section unconstitutional, as being unduly descriminatory between cities having municipal courts and those not having such courts?"

Section 6212-19, General Code, as amended in 1927 (112 O. L. 260), reads as follows:

> Sec. 6212-19. "Money arising from fines and forfeited bonds shall be paid one-half into the state treasury credited to the general revenue fund and * * * one-half into the county treasury credited to the county general fund.
>
> Provided, however, that in state cases prosecuted in any duly constituted municipal court one-half of the money arising from such fines and forfeited bonds shall be credited to the general fund of the municipality in which such municipal court is established."

Prior to its recent amendment, said Section 6212-19, General Code, read as follows:

> Sec. 6212-19. "Money arising from fines and forfeited bonds shall be paid one-half into the state treasury credited to the general revenue fund, one-half to the treasury of the township, municipality or county where the prosecution is held, according as to whether the officer hearing the case is a township, municipal, or county officer."

Section 6212-19, General Code, as originally enacted, was a part of an act commonly known as the Crabbe Act, and pertained to the disposition of fines and forfeited bonds in liquor cases prosecuted under said act, (Sections 6212-13 et seq., General Code).

It will be observed that prior to the amendment, the statute provided that the political subdivision where the prosecution was held, should receive one-half of the fines and forfeited bonds growing out of prosecutions under the Crabbe Act, whereas the statute as amended provides that these fines and forfeited bonds shall be divided equally between the State and the county wherein the prosecution is held, regardless of whether the officer hearing the case is a township, municipal or county officer, except that in State cases prosecuted in "any duly constituted municipal court" one-half of the moneys arising from such fines and forfeited bonds shall be credited to the general fund of the municipality in which such municipal court is established.

The right to exercise judicial authority possessed by the State as an incident to its sovereignty is, by Section 1, Article IV of the Constitution of Ohio, vested in the courts therein named, and in "such other courts inferior to the courts of appeals as

may from time to time be established by law." Prior to the adoption of the amendments to the Constitution of 1912, the aforesaid section of the Constitution, (Constitution of 1851), read "such other courts * * * as the General Assembly may from time to time establish," and such was likewise the substance of the language in the Constitution of 1802.

By virtue of the authority reposed in the General Assembly by the Constitution of 1851, to establish "such other courts," and by the amendment of 1912, to "establish by law courts inferior to the courts of appeals," mayor's courts in cities and villages were established by general laws, and a number of police courts and municipal courts have been established by special acts.

In the creation of each of these several courts, the Legislature has fixed the jurisdiction and power of the courts so created, and designated the distinct appellation by which the courts are to be known. The term "municipal court" has come to possess a definite meaning, and to apply only to those courts created by special legislative acts and designated by the terms of the act as a "municipal court."

If there were no other guide to the intention of the Legislature than the plain language of Section 6212-19, General Code, as amended, I would have no hesitancy in saying that its proper interpretation is that the words "any duly constituted municipal court" do not include the mayor's court of a city. There are, however, other cogent reasons which unqualifiedly support this conclusion.

The legislative history of amended Section 6212-19, General Code, discloses that the amendment was authorized by Senate Bill No. 158, which was originally introduced in the Senate on February 17, 1927. As provided by this bill it was proposed to amend said Section 6212-19, General Code, to provide as follows:

> Sec. 6212-19. "Money arising from fines and forfeited bonds shall be paid one-half into the state treasury credited to the general revenue fund; (one-half to the treasury of the township, municipality or county where the prosecution is held, according as to whether the officer hearing the case is a township, municipal, or county officer), one-half to the *county* when the officer hearing the case is a county officer; one-half to the municipal treasury when the officer hearing the case is a municipal officer; and when the officer hearing the case is a justice of the peace, one-half of said fine shall be paid into the treasury of the township in which the offense was committed, except when the offense is committed within a municipal corporation and tried by a justice of the peace, the one-half of said fine shall be paid to such municipal treasury." (Italics the writer's.)

The bill was later referred to a special committee authorized by House Joint Resolution No. 26, which resolution authorized the appointment of a joint committee to investigate the provisions of the General Code relative to courts of inferior jurisdiction receiving fees as compensation. On April 13, 1927, a minority report of said committee was submitted to the Senate, signed by two members thereof, which report is as follows:

> "We hereby recommend that the enactment into law of Senate Bills Nos. 72 and 158 will meet the situations that exist at this time in the State of Ohio."

Senate Bill No. 72 was known as the Marshall Bill, which amended Sections 1746 and 3347, General Code, respectively relating to the fees of justices of the peace and constables and enacted supplemental Section 1746-3, providing for the compensation of

justices of the peace, mayors, constables and marshals in state criminal cases in which justices of the peace and mayors had final jurisdiction, (112 O. L. 269).

Upon motion to substitute this minority report for the majority report of the committee, the motion carried. On April 20, 1927, several minor amendments to the bill were proposed and adopted in the Senate. It was also proposed to amend the bill by adding after the word "county" italicized in the above quotation, the following:

> "Treasury credited to the county general fund, out of which compensation approved by the judge (s) of the Common Pleas Court is authorized to be paid to a qualified attorney appointed or assigned by the prosecuting attorney to prosecute before the justice of the peace or mayor in State criminal cases in which such justice of the peace or mayor has final jurisdiction."

This last proposed amendment was adopted, and as so amended, the bill was passed by the Senate and sent to the House. The House proposed to amend the bill by striking out all of that portion of Section 6212-19, General Code, indicated by stars in the bill as finally enrolled and signed, and adding the provision with reference to municipal courts. With this amendment the Senate concurred, and the act was enrolled and signed on April 21, 1927, containing Section 6212-19, General Code, reading as it now does.

While said Senate Bill No. 158 was under consideration by the General Assembly of Ohio, to-wit on March 9, 1927, the Supreme Court of the United States decided the case of *Tumey* vs. *State of Ohio,* 273 U. S. 510, in which the court held, as stated in the sixth branch of the headnotes of said case:

> "A defendant tried for violation of the Ohio prohibition code—(General Code of Ohio, Section 6212-13 et seq.) before mayor of village, which under Section 6212-19, received a portion of fines collected from persons convicted, held to have been denied due process of law, in violation of Const. U. S. Amendment 14, by being tried before one who, by reason of General Code, Ohio Sections 4248, 4255, 4258, 4259, 4262, 4270, represented the village which was interested, and hence occupied inconsistent positions, one partisan, the other judicial, notwithstanding the right of the state to provide such a system of courts as it chooses, or to dispose of fines collected as it will, or in a manner to stimulate prosecution for crime."

In the course of the opinion in this case, which was written by Mr. Chief Justice Taft, the Chief Justice said:

> "The mayor is the chief executive of the village. He supervises all the other executive offices. He is charged with the business of looking after the finances of the village. It appears from the evidence in this case, and would be plain if the evidence did not show it, that the law is calculated to awaken the interest of all those in the village charged with the responsibility of raising public money and expending it, in the pecuniarily successful conduct of such a court. The mayor represents the village and cannot escape his representative capacity. On the other hand he is given the judicial duty first of determining whether the defendant is guilty at all, and second having found his guilt, to measure his punishment between $100 as a minimum, and $1,000 as a maximum for first offenses, and $300 as a minimum and $2,000 as a maximum for second offenses. With his interest as mayor in the financial condition of the village and his responsibility therefor, might not a defendant with reason say

that he fears he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine?"

It seems clear in the light of the decision of the Supreme Court in the Tumey case that had Senate Bill No. 158 been finally enacted in the form in which it was originally introduced, its effect would have been to deprive mayors of cities and villages of jurisdiction to try cases of the class to which it had reference. The same reasoning does not apply to judges of municipal courts, for the reason that these judges are not executive officers in the political subdivision in which the court where they preside is located, nor are they interested in an official way in the finances of that political subdivision; and therefore cannot be said to be prejudiced by the desire to augment the finances of the political subdivision by the imposition of fines.

If we may look to the legislative history of this act as outlined above, and the fact that after the introduction of the bill and before its final passage, the Tumey case was decided, it seems apparent that the intention of the Legislature in enacting it, as was finally done, was prompted by the desire to avoid the possibility of entirely depriving mayors of municipalities of jurisdiction in liquor cases arising under the Crabbe Act, and therefore carefully so worded the statute as to make it apply to municipal courts only, and not to mayor's courts.

There is no doubt but that resort may be had to the legislative history of an act, as well as to events of contemporary history, to determine the legislative intent in the enactment of laws. It is stated in Black on Interpretation of Laws, Section 91:

> "When a resort to extrinsic evidence becomes necessary in the construction of a statute, it is proper to consider the facts of contemporary history, the previous state of the law, the circumstances which led to the enactment, and especially the evil which it was designed to correct, and the remedy intended."

And again, in Section 96, the same author says:

> "In aid of the interpretation of an ambiguous statute, or one which is susceptible of several different constructions, it is proper for the courts to study the history of the bill in its progress through the Legislature, by examining the legislative journals."

In an early case in Ohio, *State of Ohio ex rel. Fosdick* vs. *Village of Perrysburg*, 14 O. S. 472, Judge Brinkerhoff in considering this subject, says:

> "In cases of doubt as to the proper interpretation of wills and contracts, it is a familiar rule that evidence is admissible to show the circumstances surrounding the party, or parties, at the time of the making of the instrument to be interpreted; and thus to place the court upon the standpoint of the party or parties whose intentions are to be ascertained; and to enable the court to see things in the light in which he or they saw them. And, on principle, I know of no good reason why on a question like this, we may not, in analogy to the rule referred to, look into the history and progress of the bill which finally ripened into this act, during its pendency in, and passage by the General Assembly, as shown by the journal of the two houses of that body."

An interpretation of the language of the proviso contained in this statute as applying only to cases prosecuted in courts designated by the Legislature as "municipal

courts" in the act creating them, leads to the inevitable result that municipalities in which there is not a duly constituted municipal court do not benefit by a share of the fines and forfeited bonds growing out of the prosecution of liquor cases under the Crabbe Act, while the municipalities wherein there is such a court do benefit thereby.

The wisdom of such legislation may well be questioned. It well illustrates what Judge Matthias in the case of *State ex rel.* vs. *Bushnell,* 95 O. S. 203, 214, calls "the scissors-and-paste method of legislation too frequently employed." It is brought about by an attempt on the part of certain interests to save for mayors of cities and villages criminal jurisdiction in cases wherein they are empowered to impose heavy fines without the intervention of a jury, regardless of consequences, which under the former provisions of the statute was held to be an abuse of the due process clause of the Federal Constitution, in the case of *Tumey* vs. *State, supra.*

The Legislature has an undoubted right to create courts inferior to the Court of Appeals, and fix their jurisdiction. *State ex rel.* vs. *Bloch,* 65 O. S. 370; *State ex rel* vs. *Yeatman, et al.,* 89 O. S. 44. The Legislature as well has the unqualified right to provide for the disposition of the proceeds of fines and forfeited bonds growing out of prosecutions in any court which it creates. This right is recognized and commented upon in the Tumey case, supra. Whether the result of fixing the powers of these courts and the disposition of fines and forfeited bonds growing out of prosecutions in said courts results in discrimination between political subdivisions is a matter peculiarly within the province of the Legislature itself, and cannot be obviated by a strained construction of statutes or by an unwarranted declaration of their unconstitutionality.

In an early Ohio case, *Ohio ex rel. Cincinnati,* 19 Ohio, 178 at page 195, the court said:

> "Before this court will declare any law to be unconstitutional that part of the Constitution of the state with which it conflicts must be pointed out and the discrepancy between the law and the Constitution clearly ascertained. So long as doubts remain, whether the law conflicts with the Constitution, the law should be enforced."

In the case of *The County of Miami* vs. *The City of Dayton,* 92 O. S., 215, the seventh paragraph of the syllabus reads:

> "Before a court is warranted in declaring a legislative act unconstitutional, it must clearly appear that the statute is obviously repugnant and irreconcilable with some specific provision or provisions of the Constitution. If there be a reasonable doubt as to such conflict the statute must be upheld."

I know of no specific provision or provisions of the Constitution of Ohio, or of the United States, with which this statute may be said to conflict, even though it results in apparent discrimination between municipalities. It has been suggested that it conflicts with Section 26 of Article II of the Constitution of Ohio which requires uniformity of legislation upon subjects of a general nature. With this contention I am unable to agree. The statute obviously applies to all municipal courts in the State of Ohio and is therefore uniform in its operation.

In specific answer to your questions, therefore, I am of the opinion:

First, that the words "duly constituted municipal courts" as used in the statute do not include mayor's courts of cities and villages.

Second, the statute is constitutional.

Respectfully,
EDWARD C. TURNER,
Attorney General.