DEPARTMENT OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES: Payment of allowances made by Judge of Circuit Court of expenses necessarily incurred in conducting the business of the court, in the absence of an appropriation therefor.

December 20, 1943.

Hon. Otto K. Jensen,
State Examiner,
Department of Inspection and Supervision of Public Offices,
State House,
Indianapolis, Indiana.

Dear Mr. Jensen:

This will acknowledge receipt of your recent letter which reads as follows:

"The question has been presented to this department as to whether the county auditor, in the absence of an appropriation therefor, made by the county council, is authorized and required, under the law, to issue his warrant in payment of allowances made by the judge of the circuit court of expenses necessarily incurred in the proper conduct of the business of the court, or in payment of the salary of the probation officer appointed under the provisions of Section 20 of Chapter 233, Acts of 1941.

"I am sending two letters, in which these questions are presented, for your further information.

"I would like to have your opinion upon these questions."

The two letters referred to in your letter, and a copy of each of which was enclosed, are in part as follows:

(1) The auditor of Tipton County states that during the April term of the Tipton Circuit Court a murder case was tried in which a special answer had been filed by the defendant alleging that he was insane at the time of the trial; that pursuant to the statute the court appointed three doctors to make an examination and testify at the trial as to the mental condition of the defendant, and the court allowed each doctor a
sum of $25.00 as fees for their services; that in connection with the examination a bill was contracted at a hospital laboratory, which bill was also allowed by the court; that the defendant was a pauper and unable to employ counsel and upon the defendant's request the court appointed counsel for the defendant to represent him throughout the trial and allowed such counsel a fee of $150.00 for his services.

This letter further states that there is no specific appropriation covering any of these expenditures and states that the trial court is of the opinion that the allowances made by the court may be paid out of any unexpended balance in the general fund of the county, without a special appropriation therefor, as required by the county reform law.

(2) The other letter is from the auditor of Jay County, Indiana, and states that on August 16, 1943, the judge of the Jay Circuit Court appointed a probation officer pursuant to the provisions of Burns' R. S. 1942 Replacement Volume 4, Section 9-2848, at which time there was no appropriation for the payment of the salary of said appointee for the balance of the calendar year of 1943. The auditor further submits the following specific questions, to-wit:

a. Should the language found in paragraph 1 of Section 20, Chapter 233, Acts 1941, which is Section 9-2848, supra, to-wit:

"Such salaries and expenses to be paid by the county subject to the approval of the county council"

be interpreted to mean that the county council must approve payment of and make appropriation for payment of probation officers appointed by the court and does the county council have the right to refuse to make such appropriation.

b. Where the court directs the payment of a probation officer duly appointed by the court, can the State Board of Accounts question the payment so made as salaries when ordered so paid as a part of court expenses and can this be paid from the general fund
and after the auditor pays the same from the general fund does any liability accrue upon his bond.

c. That Jay County has a population of 22,000 and is it absolutely necessary that probation officers who are to receive salaries be appointed from eligible lists secured from competitive examination.

An answer to these questions involves an examination of the sections of the statute hereafter referred to as construed by the Supreme Court of Indiana in connection with the inherent power and duty of the court in incurring and allowing necessary expenses to insure the adequate and efficient administration of justice as required by the Constitution of Indiana, and the right of the Legislature to limit, restrict and prevent the court from so functioning and performing its constitutional duty.

Burns' R. S. 1933, Section 26-522, which is Section 22 of Chapter 154, Acts of 1899, reads in part as follows:

"Funds due the state or any township, town or city of the county from the county treasury may be paid in the manner and upon the authority prescribed by law other than this act, but, except as to such funds, no money shall be paid from the county treasury otherwise than upon a warrant drawn by the county auditor. Except as to salaries of county councilmen, this act shall not be construed as authorizing the auditor to draw any warrant that is not authorized by existing or other laws than this act. * * * In all the above enumerated instances, payment may be made out of the county treasury upon the authority and in the manner prescribed by law without appropriations by the county council. In all other instances, no warrant shall be drawn upon, or money paid out of, the county treasury, unless an appropriation by the county council therefor has been made for the calendar year in which the payment is made, and which appropriation remains unexhausted." (Our emphasis.)

Burns' R. S. 1933, Section 26-523, provides that the county auditor shall keep separate accounts for each specific item of appropriation made by the council and that he shall not
suffer any item of appropriation to be overdrawn, or the appropriation of one item to be drawn upon for any other purpose, or for the purpose of any other county office, court or division thereof, other than that for which the item of appropriation was specifically made. This section further provides that the county auditor shall be guilty of a misdemeanor and subject to a fine to which may be added imprisonment in the county jail for a violation of this section of the statute.

Burns' R. S. 1933, Section 26-526, provides that every county officer, and every member of a board of county commissioners, who shall issue any warrant for the payment of money, which shall purport to be an obligation of the county, and be beyond the unexpended balance of any appropriation made for such purpose, or who shall attempt to bind such county by any contract, agreement, or in any other way to an extent beyond the amount of money at the time already appropriated by ordinance for such purpose, and remaining at the time unexpended, shall be liable on his official bond and shall also be subject to a fine and imprisonment in the county jail.

Burns' R. S. 1933, Section 26-527, reads as follows:

"No court, or division thereof, of any county, shall have power to bind such county by any contract, agreement, or in any other way, except by judgment rendered in a cause where such court has jurisdiction of the parties and subject-matter of the action, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of such court, and for the purpose for which such obligation is attempted to be incurred, and all contracts and agreements, express or implied, and all obligations of any and every sort attempted beyond such existing appropriations shall be absolutely void."

Burns' R. S. 1933, Section 26-529, reads in part as follows:

"Except as to payment of the salary of councilmen herein specifically provided for, this act shall not be construed as authorizing the appropriation of any money to be paid out of the county treasury, or the drawing of any warrant therefor, or payment of any
money out of such treasury, for any purpose what-
ever for which such payment out of the county treas-
ury is not authorized by law other than this act. The
intent of this act is to place limits and checks upon
payments out of such treasury, and not to extend or
increase them."

Section 13 of Article 1 of the Indiana Constitution, reads
as follows:

“In all criminal prosecutions, the accused shall have
the right to a public trial, by an impartial jury, in the
county in which the offense shall have been committed;
to be heard by himself and counsel; to demand the
nature and cause of the accusation against him, and to
have a copy thereof; to meet the witnesses face to
face, and to have compulsory process for obtaining
witnesses in his favor.”

Section 1, Article 7, of the Indiana Constitution provides
that the judicial power of the state shall be vested in the
Supreme Court, Circuit Court, and such other courts as the
General Assembly may establish.

In the case of Knox County Council v. State ex rel. McCor-
mick, 217 Ind. 493, the Supreme Court of Indiana considers
the power and authority of the Knox Circuit Court to make an
allowance as attorney fees for services rendered by counsel
for a pauper defendant in a criminal case, who was tried in
the Knox County Circuit Court upon a change of venue from
the Pike County Circuit Court and for which, at the time of
the allowance, there was no specific appropriation as required
by the provisions of the statute heretofore set forth. Judge
Fansler, speaking for the Supreme Court of Indiana, says
in part as follows:

“These questions require an investigation of our
decisions involving the power of the courts to appoint
counsel to defend poor persons who are charged with
crime, and the right of counsel so appointed to receive
compensation from the county for their services.

“Recently the Supreme Court of the United States
reaffirmed its conclusion that the Federal Constitution
requires that, where a defendant in a criminal case
desires counsel, and counsel is not provided, the trial court has no jurisdiction to proceed with the prosecution. * * * The Constitution of Indiana requires that a defendant in a criminal case shall be provided with counsel, and failure of the courts to provide competent counsel will prevent a valid conviction. * * * It follows therefore that where one who is without means is charged with crime, the question of whether he shall have counsel appointed for him has not been left to the discretion of the court or the Legislature. It has been determined by the people in their Constitutions, national and state, that he shall have counsel, and that there can be no legal prosecution of the charge against him unless and until counsel is provided for him. The Constitution of this state vests the judicial power in the courts. The judiciary is an independent and equal coordinate branch of the government. Courts were established for the purpose of administering justice judicially, and it has been said that their powers are coequal with their duties. In other words, they have inherent power to do everything that is necessary to carry out the purpose of their creation. The Constitution contemplates indictment and trial in the courts for crime. It is the duty of the court to see that justice is administered speedily, without delay, and legally, and in conformity to the constitutional mandates. One of these constitutional mandates is that a defendant in a criminal case shall have counsel to represent him. It is the duty of the courts therefore to see to it that he shall have counsel. * * *

"* * *

"As pointed out in the beginning, the United States Supreme Court has held that, under the Federal Constitution, there can be no valid trial of a criminal case unless the defendant is adequately defended by counsel, and that a judgment rendered under such circumstances is void. This court has consistently held that, under the Constitution of Indiana, there can be no valid judgment against a defendant in a criminal case unless he has been offered, and, if so desired, provided with, adequate counsel. It has been held from the
earliest times, and is conceded in all of the cases, that members of the bar may not be compelled to defend or assist in prosecution without compensation. If the courts cannot compel such services without being able to insure compensation, courts may find themselves unable to procure counsel for pauper defendants, and hence unable to function as a court and conduct the trials of those charged with crime. * * * Thus the power of the court to function, as contemplated by the Constitution, and to try one accused of a serious crime, would depend upon the determination of a majority of the members of the county council, not because the Constitution so contemplates, but because the Legislature had so decided. (*) Such a conclusion is contrary to the consistent view of this court, that courts have inherent power to do all things that are reasonably necessary for the administration of justice within their jurisdiction." (*) (Our emphasis.)

"It seems to be the universal rule that 'a court has the inherent power and authority to incur and order paid all such expenses as are necessary for the holding of court and the administration of its duties.'" * * *
(Our emphasis.)

"* * * The conclusion seems unavoidable that it is the duty of courts to see that criminal cases are tried; that these cases cannot be legally tried unless the defendant, if he is a pauper, is provided with counsel; that attorneys cannot be compelled to serve without compensation; and therefore that, in order to conduct a legal trial, the court must have power to appoint counsel, and order that such counsel shall be compensated if necessary; and that the right to provide compensation cannot be made to depend upon the will of the Legislature or of the county council." (Our emphasis.)

"* * * The Legislature has recognized the necessity for, and the right of the court to appoint, counsel for poor persons, and has provided by Sec. 9:13:14, Burns' 1933, Sec. 2235, Baldwin's 1934, supra, that: 'Whenever in any criminal prosecution, a change of venue shall have
been taken from the county in which such prosecution originated, the trial court shall have authority to appoint counsel on behalf of such original county to prosecute such action or to defend any poor person defendant therein. Counsel so appointed shall be entitled to reasonable compensation for services in such case, but the amount thereof shall be settled and allowed by the judge of the court from which the change of venue was first granted.

"No impediment is seen to the exercise of legislative discretion as to the tribunal in which the compensation shall be fixed and allowed. But if Sec. 26-527, Burns' 1933, Sec. 5391, Baldwin's 1934, supra, which denies to courts the right to make allowances unless there is a pre-existing appropriation, was intended to strike down the jurisdiction of courts to make such allowances as are necessary to the carrying out of their constitutional functions, it is to that extent unconstitutional." (Our emphasis.)

Again in the case of Finerty, Auditor v. State ex rel. Greenwald, 215 Ind. 346, the Supreme Court had under consideration an action in mandamus by the State on the relation of Charles E. Greenwald, Judge of the Superior Court of Lake County, to compel Joseph E. Finerty, as auditor of Lake County, and another as treasurer of Lake County, to draw and pay a warrant for additional salary for relator as superior judge. The various sections of the statute heretofore set forth were construed by the Supreme Court and in deciding the case Judge Swaim uses the following language:

"* * * Appellee, however, contends that the 1927 act makes unnecessary an appropriation for any salaries payable under said act. It is unnecessary to decide this question under the facts established by appellee herein.

"The 1927 act does not purport to give the auditor any authority to draw a warrant for such salary against any fund or account which has been appropriated for some other purpose. It is admitted by appellee that there is no appropriation balance against which a warrant for his claim could be drawn. This
being true, the auditor could only legally draw a warrant, covering said claim, against an unappropriated balance. The complaint does not allege, nor did the evidence show, that there was any such unappropriated balance available. In the absence of any showing to the contrary, we must assume that the county council of Lake County each year has done its duty; that in computing the necessary tax rate, it has utilized all available balances both actual and anticipated and has taken into consideration all anticipated receipts from sources other than taxation. An auditor should not be mandated to draw a warrant, which can only legally be drawn against an unappropriated balance, without a clear showing that there is such a balance available. * * *.” (Our emphasis.)

It will thus be seen from the italicized language, supra, that the court’s decision was based upon the proposition that the complaint did not allege and the evidence did not establish that there was any unappropriated balance in the general fund of the county against which a warrant could be drawn. Therefore, in view of the law as established by the Supreme Court of Indiana in the cases cited, supra, it is my opinion that the question contained in the letter from the auditor of Tipton County should be answered in the affirmative, provided there are sufficient funds in the general fund of Tipton County which are unappropriated for any other specific purpose against which warrants covering the allowances made by the Tipton Circuit Court may be drawn and paid.

Referring to the questions contained in the letter written by the auditor of Jay County, Indiana, I call your attention to the language found in the following sections of the statute. Burns’ 1942 Replacement: Volume 4, Section 9-2832, being Section 4 of Chapter 233 of the Acts of 1941, creating juvenile courts, reads in part as follows:

“* * * In all other counties the circuit court and the judge thereof shall have and possess all the powers and duties conferred on the juvenile court and the judge thereof, by this act (Sections 9-2829—9-2861), and shall have exclusive jurisdiction in all matters relating to children, as provided in this act: * * *.”
Section 9-2848, being Section 20 of Chapter 233, Acts 1941, reads in part as follows:

"* * * Probation officers and other employees shall receive such salaries and expenses as the judge shall determine, such salary and expenses to be paid by the county subject to the approval of the county council. * * *

"In each and every county of this state having a population of less than one hundred thousand (100,000) the judge of the court having juvenile jurisdiction shall appoint one (1) probation officer and may appoint one additional assistant probation officer for every fifty thousand (50,000) population. The probation officer shall receive as compensation for his or her services an annual salary not to exceed twenty-four hundred dollars ($2,400) and each assistant probation officer shall receive an annual salary of not to exceed two thousand dollars ($2,000)." (Our emphasis.)

It is apparent that the Legislature recognized the fact that a probation officer was, and is, a necessary adjunct of the Juvenile Court in the efficient handling and administration of juvenile delinquency, and for this reason vested in the judge of the Juvenile Court created by Chapter 233, Acts 1941, the exclusive right and authority to appoint such probation officer and fix the amount of his salary subject only to the maximum amount thereof designated by the Legislature itself in Section 20 of the Act. After vesting the judge with such authority it is inconceivable to assume that the Legislature also intended to vest in the county council a veto power and discretion over such salary which, if exercised by such county council, would enable and permit it to frustrate and defeat the purpose, object and intention of the Legislature in enacting Chapter 233, Acts 1941, aforesaid. The Act must be construed so as to give full force and effect to the intention of the Legislature in enacting the law.

City of Indianapolis v. Evans, 216 Ind. 555; Steiert v. Coulter, 54 Ind. App. 643.
This end is accomplished by holding that the words "subject to the approval of the county council" mean that such county council must take notice of the amount of salary and expenses allowed by the Judge of the Juvenile Court for such court and provide for the necessary funds therefor in preparing and adopting the annual budget for the court.

State ex rel. v. Steinwedel, 203 Ind. 457 on 473.

Applying this rule of construction to the provisions of Section 20, Chapter 233, Acts 1941, Burns' 1942 Replacement Vol. 4, Section 9-2848, it is my opinion that the county council has no discretion in the matter, but that it is their mandatory duty to make the necessary appropriation to cover the salary of the probation officer, and other necessary expenses of the Juvenile Court, as determined and allowed by the judge thereof, pursuant to the authority vested in him by the provisions of said Chapter 233, aforesaid.

This duty upon the part of the county council may be enforced by mandamus, or other appropriate process, under the statutory power of the court (see Section 3-903, et seq), and if there is an unappropriated balance in the general fund of the county, it is my opinion that the same answer heretofore given to the questions propounded by the auditor of Tipton County, Indiana, is applicable to the questions propounded by the auditor of Jay County, Indiana.

Finally, it is well settled by the decisions of the Supreme Court that where the Legislature has definitely fixed and determined the amount of salary to be allowed an official, or has specifically authorized a certain officer, board or body, to fix and determine such salary, and such officer, board or body acts in pursuance of the authority so vested in them by statute, their action in so doing under such statute is equivalent to a specific appropriation for such purpose, and it is the imperative duty of the proper officials to provide the funds required to meet such allowances.

State ex rel. v. Steinwedel, 203 Ind. 457-473;
State ex rel. v. Meeker, 182 Ind. 240-247 to 249.

Answering the third question submitted by the auditor of Jay County, it is my opinion that the probation officer appointed by a judge of a circuit court, acting as a juvenile
court, should be selected and appointed from eligible lists secured from competitive examination, as provided by Burns' Replacement Sec. 9-2904.

SECURITIES COMMISSIONER: Banks organized under Federal law doing business in Indiana and acting as agent in buying and selling securities need not register under the Indiana Securities Law.

December 20, 1943.

Hon. Warren Day, Securities Commissioner,
State House,
Indianapolis, Indiana.

Dear Mr. Day:

I have your letter of November 10, 1943, in which you ask the following question:

"Is a bank, organized under the laws of the United States, and which is under the supervision of the Comptroller of the Currency, Washington, D. C., required to register as a dealer under the provisions of the Indiana Securities Law, when such bank, doing business within the State of Indiana, acts as agent for its customers in buying and selling both listed and unlisted securities within the State of Indiana?"

The Indiana Securities Law, being Section 11 of Chapter 120 of the Acts of 1937 as amended by Section 10 of Chapter 30 of the Acts of 1941 (25-839 Burns' 1933 Supplement), provides that no dealer shall engage in business in this state as such dealer or sell any securities unless the dealer has registered in the office of the Securities Commission. Such registration requires the filing of certain information and the payment of a seventy-five dollar ($75.00) registration fee.

"Dealer," in the Securities Law, is defined by subsection (d) of Section 3 of the above mentioned act, as follows: (25-831 Burns' 1933 Supplement.)

"The term 'dealer' shall mean any person other than an agent as defined in this act who in this state engages