

TAX COMMISSIONERS, STATE BOARD OF: Courts' powers to include in budget item for increase in salaries of court officers made two years previous.

November 7, 1939.

Hon. Philip Zoercher, Chairman,
State Board of Tax Commissioners,
State House,
Indianapolis, Indiana.

Dear Mr. Zoercher:

I have your letter of November 2, 1939, in which you enclose some correspondence between you, as Chairman of the State Tax Board, and Mr. John F. O'Brien, County Attorney for Vigo County. In your letter you present the following questions:

"1. Can a court include in the 1940 budget an item for an increase in salaries for the court bailiff, page and janitor for services performed in 1937?

"2. Can those salaries be paid now, or can the judge render a judgment at this time for services performed in the year 1937 for which no provision was made in the budget and no order by the court made to mandate a restoration of the amounts before the budget was finally fixed or before the services were performed?"

It appears from the correspondence submitted with your letter that the Judge of the Vigo Circuit Court in 1937 duly made and entered an order fixing the salaries of his page and bailiff and caused to be duly filed and presented a request therefor at the regular annual session of the Vigo County Council; that the same was rejected and was again regularly presented in 1938 and rejected; that in 1939 the request was again duly presented to the county council and was granted but the same was denied by the State Tax Board. Your letter and correspondence attached thereto is not very clear as to whether the county council appropriated any money at all for the page and bailiff or a less sum than requested. I think, however, from the data submitted, appropriations were made for a less amount than requested. For the purpose of this opinion, however, the situation makes no difference.

The question presented in your letter is: "Can those salaries be paid now, or can the judge render a judgment at this time

for services performed in the year 1937, for which no provision was made in the budget and no order by the court made to mandate a restoration of the amounts before the budget was finally fixed or before the services were performed?" The question resolves itself into this: Can there be a valid judgment rendered under the circumstances as outlined in your letter and the correspondence attached thereto?

It must be conceded that the judge of the circuit court may employ a bailiff and page in order to carry on the work of the court if in his judgment he considers it reasonably necessary for the administration of justice within the scope of its jurisdiction. As said in the case of *Dunn v. State, ex rel., Corydon*, 204 Ind. 390:

"We quite agree with appellant that the legislature has no power or authority to curtail and hamper the courts in the exercise of their lawful duties, and that the court has the inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction and to employ the relatrix as a page in said court if it was reasonably necessary for the practical and efficient operation of its lawful and designated duties. This power in the court necessarily implies the power and authority to order paid the reasonable and necessary expense of such assistance."

Citing *State, ex rel., Flynn, et al.*, 161 Ind. 554; *Board v. Stout*, 136 Ind. 53.

In the case of *Board v. Stout*, 136 Ind. 53, the court said:

"Courts are an integral part of the government, and entirely independent; deriving their powers directly from the constitution, in so far as such powers are not inherent in the very nature of the judiciary. A court of general jurisdiction, whether named in the constitution or established in pursuance of the provisions of the constitution, can not be directed, controlled, or impeded in its functions by any of the other departments of the government. The security of human rights and safety of free institutions require the absolute integrity and freedom of action of courts. (Citing cases.) While the power of a court is essentially jurisdictional, being the

power to hear and adjudge causes, yet it has also such incidental powers as are necessary to the full and free exercise of its purely judicial functions. The court may, therefore, make such rules and regulations as are necessary to secure its own freedom of action, and to carry on its business with dignity, decorum, order, due dispatch, and convenience."

It was also said in the case of *The State, ex rel., Hovey v. Noble*, 118 Ind. 350, that:

"The domain of the judiciary are not so extensive as that of the other departments, but no other power can enter that domain without a violation of the constitution, for within it the power of the judiciary is dominant and exclusive. The element of governmental power given to the judiciary is the most unfettered of all the enumerated departments of government—and ours is from the foundation upward, a government of enumerated and distributed departments—the judicial is the least trammled by constitutional limitations. Less extensive than others, it is freer from restraint. Fewer limitations circumscribe its power and fewer restrictions trammel its functions."

The judicial department of the State of Indiana is an independent department of government and so provided in the Indiana State Constitution. Section 10 of Article 3, provides: "The powers of the government are divided into three separate departments; the legislative, the executive, including the administrative, and the judicial, and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this constitution provided."

In the case of *Parker, et al. v. State*, 135 Ind. 534, the court said:

"It is true that the General Assembly may create courts, under the constitutions, but it can not confer on them judicial power for it possesses none to confer. When created, such power is conferred by the constitution, and not by the Act creating the court. (Citing cases.) The Supreme Court in this State is a court created by the constitution and as such it possesses

the inherent power to do all acts necessary to enable it to effectually exercise the jurisdiction conferred upon it.”

Likewise, the circuit court being created by the constitution, also has the inherent power to do all acts necessary to enable it to effectually exercise the jurisdiction conferred upon it and to do all things necessary and proper for the efficient administration of justice. And if the court finds that it is necessary in the proper administration of justice to appoint a bailiff and page, it has the inherent power to do so and to fix a reasonable salary or wage for the service rendered.

It is my understanding that the State Tax Board does not contend that any of the foregoing general statements of the law are not correct but the board insists that the county budget law prevents such a proposed recovery. The “Reform Act” or budget law was passed in 1899. It has been amended in a few particulars since its enactment.

It must be conceded that the legislature can not take away the inherent power of a court. Neither can a county council prevent a court from fixing a reasonable salary for a page or bailiff. If it can, then it is taking from the court an inherent right, which rightfully belongs to the court, and thus makes the court subject to the interference of another department of government.

Section 14 of the Acts of 1899, 26-515 Burns 1933, provides that the power of fixing rates shall be vested in the county council and that no money shall be drawn from the treasury but in pursuance of appropriations so made. Section 16, Burns 26-516, provides for the estimates to be made before the Thursday following the first Monday in August each year for each county officer including the courts, and section 18, Burns 26-518, applies also to court expenditures and the third item provides for the estimated amount required for bailiff hire. Section 20, Burns 26-520, provides among other things:

“At the regular annual meeting of the council on the first Tuesday after the first Monday in September, the auditor shall present all of said estimates thereto, and may make such recommendations to the council with reference to the estimate as may to him seem proper and it shall be his duty before such meeting of the council to prepare an ordinance in proper form, to be adopted by

the council, fixing the rate of taxation for the taxes to be collected in the ensuing calendar year, and also an ordinance making an appropriation by items for such calendar year for the various purposes for which all of the above estimates are made. The county council at said meeting shall act upon said ordinance, and, by adopting the same or amended or substituted ordinance, fix the tax rate within the limits prescribed by law."

Section 22, Burns 26-322, among other things provides:

"In all other instances, no warrants 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."

Section 25, Burns 26-525, provides:

"All obligations of any and every sort beyond such existing appropriation are declared to be absolutely void."

Section 27, Burns 26-527, provides:

"No court, or division thereof, of any county, shall have power to bind such county by any contract, agreement, or in other way, except by judgment rendered in a cause where said court has jurisdiction of the parties and the 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
* * *"

If any of the foregoing provisions of the budget law were enacted for the purpose of curtailing the power of the courts whereby their usefulness in the administration of justice would be limited or lessened in any way, then said provision would be void and unconstitutional under the authorities heretofore cited, but I do not think, by a careful reading of the Act, that it was the purpose of the Act to ham-string the courts.

I do not think the Act must be construed as granting the county council the power to place an unreasonable limitation on court expenditures. It must be assumed that the legislature, when enacting the budget law, had in mind the inherent power of courts and did not intend by the enactment to curtail

or in any manner lessen this power. If it is within the power of the county council to have full power and authority to say what appropriations and the amount thereof may be made for the courts, then it is within the council's power to absolutely control the usefulness and power of the courts. This of course was not intended, but, if so, such power given is void and of no effect.

Special attention should be given to section 27, *supra*. This section provides that no court has power to bind the county by any contract beyond the amount of money already appropriated for the purpose of such court, except by judgment rendered in a cause where such court has jurisdiction of the subject matter of the action and parties.

The first part of this section can not be construed to mean that a court is powerless to contract for services reasonably needed in the conduct of the court unless there is a present appropriation and the exception expressly grants a court power to render judgment in a case where such court has jurisdiction of the subject matter and of the parties. As I understand the facts in controversy, as stated in your letter, the judge of the circuit court fixed the salary of the page and bailiff at a certain sum but the council fixed the salary at a less amount and they have never received the amount fixed by the court and are contemplating suing for the balance. This claim was not created in violation of the budget law. It arose out of and is based upon an order of court exercising its inherent power. The want of an appropriation is not a defense. See *Board v. Pike Civil Township*, 168 Ind. 535. Neither does the fact that a mandamus proceeding was not resorted to prevent a valid judgment being rendered.

The fact that the page or bailiff accepted less than the court fixed for services does not prevent a recovery for the balance.

“An officer who accepts and receipts for less than the amount of his salary provided by law may recover the remainder not so received.”

Board v. Chapman, 22 Ind. App. 60.

One who accepts less than the amount fixed for his salary or wages may at any time until barred by the statute of limitations, recover the remainder thereof. (*City of Rushville v. Thomas*, 88 Ind. App. 665.)

In the case of *People v. City of Chicago*, 292 Ill. App. 589; 12 N. W. (2d) 13, it was said:

“It may be conceded that a public officer whose compensation has been lawfully fixed is not estopped from claiming full compensation by the fact, alone, that he accepted an amount less than that lawfully fixed for his services.”

The State Tax Board seems to put great stress upon the cases of *Board v. Mowbray*, 160 Ind. 10; *Board v. McGregor*, 171 Ind. 634, and *Turner v. Board*, 158 Ind. 166. It is sufficient to say that these cases and others are not based upon the inherent right of courts to discharge duties and obligations in the administration of justice. They are all based upon powers given directly or indirectly by the legislature and subject to the regulation and control of that department of the government. The distinction is made clear in the case of *Board of Commissioners v. McGregor*, 171 Ind. 634, wherein it is said:

“The expression ‘inherent power,’ made with respect to an action of the court *ex necessitate* in a matter where the authority could be reasonably implied from that expressly given, has suggested in later days grave constitutional questions. An examination of the authorities will show that the appointment by courts of attorneys to defend indigent persons accused of crime who are without counsel and without the means of employing legal assistance, is not properly speaking, the exercise of a fundamental right or power inherent in the court, but such authority is implied from the jurisdiction and powers expressly conferred, and functions and duties imposed, and the general statutes and policy of the State providing for the necessities of the poor, which reasonably include a fair opportunity to protect their rights as litigants in courts of justice. (Citing cases.) The power to make such appointment emanating directly or indirectly from the legislature, it follows that its exercise is subject to the regulation and control of the department.”

The above case reaffirmed the case of *Turner v. Board*, *supra*, and held that they did not deprive the court of any inherent power, the inference being if such powers had been deprived, a different rule would apply.

It is the duty of the judge of the circuit court to appoint a court bailiff and fix his per diem. The legislature of 1935 passed an Act to amend section 1 of an Act approved March 9, 1921, giving the court the specific power and duty to do this. The amended Act being chapter 151, Acts of 1935, and reads as follows:

“That the judge of the circuit, superior, criminal, probate and juvenile courts in each county in the State of Indiana having a population of thirty-five thousand or more, according to the last preceding United States census, shall appoint a bailiff and may appoint a riding bailiff for his court, whose per diem shall be fixed by the court to be paid out of the county treasury. In counties having a population of less than thirty-five thousand according to the last preceding United States census, the judge of the circuit court may appoint a bailiff, but if no bailiff be appointed the sheriff of the county shall perform the duties of the bailiff.”

Vigo County having a population of more than 35,000, the court shall appoint a bailiff and fix his per diem. When so fixed it has the same effect and force as if the legislature had fixed it. Of course, it is to be presumed that the court would fix a reasonable per diem. I find no express provision of the law providing for a page but if the court deems it necessary for the reasonable conduct of the court to have one, then in my judgment he would unquestionably have the inherent power to appoint one and fix his salary per diem.

Answering your specific questions, it is my judgment that a valid judgment could be rendered in favor of the bailiff based upon a good complaint and sustained by sufficient and proper evidence, and, likewise, one in favor of the page if it is shown that his services were reasonably necessary for the court in discharging its duties.