

to pay the salaries of the bailiff and court reporter as fixed by the court, and since such salaries cannot be paid in the absence of an appropriation by such county council that the better procedure for the state tax board to follow would be to require that proper steps be taken in the local municipalities to compel a proper discharge of these duties. Your question is accordingly answered in the negative.

TAX COMMISSIONERS, STATE BOARD OF: Appropriation of motor vehicle highway funds allocated to counties—necessity of such appropriation; when same may be made.

November 18, 1937.

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

Dear Mr. Zoercher:

I have before me your letter in which you submit the question as to when the receipts from the motor vehicle highway account that are unexpended at the end of this year can be appropriated. You follow this question with the further question, namely:

“Could they be appropriated immediately during the first part of 1938, or would they have to wait until the next regular budget is prepared?”

I think that ordinarily this unexpended balance should have been considered as an estimated receipt and as such included in the annual 1937 budget and appropriated at the same time as other regular appropriations were made for the year 1938. Your second question, however, indicates that this was not done and the question, therefore, arises as to whether it may be done at a later time and prior to the formation of the next regular budget in 1938. I shall pass at once, therefore, to the consideration of your second question which, after all, is the only one of any particular importance at this time.

I think it may be of some importance to review briefly the development of the several acts providing for the establish-

ment of local budgets upon which tax levies and rates are based, beginning with the enactment of the Tax Act of 1919. The original provisions of that Act are not of any particular consequence in the consideration of the question before me except that they furnish the basis for subsequent amendments which are material. The budget principle developed through the several amendments of the 1919 Act, *supra*, assumed definite form with the amendment in 1920 of section 200 of the 1919 Act. The amended section provided, among other things, for the establishment of tax levies by the proper legal officers of any municipal corporation after the formation and publication by them of a budget and after a public hearing. The amended section provided for notice, both by publication and posting and also provided for an appeal to the county council by not less than twenty taxpayers affected by the levy. This appeal could be taken on either of two separate grounds. One of those grounds was that the levy is insufficient to yield the revenue necessary to meet the requirements of the municipality. The other ground was that more revenue will be raised by the levy than government economically administered requires.

Acts of 1920, p. 169.

The section was again amended in 1921, the material change being that the appeal referred to above instead of going to the county council should go to the state board of tax commissioners.

Acts of 1921, p. 641.

It is apparent from a consideration of the foregoing that thus far the budget referred to was a budget to be raised by a levy upon property.

In 1927 the section was again amended and strengthened but there is no indication in it that the budgets referred to had to do with any other budgets than those which were raised by a tax levy upon property. The section as amended in 1927, while making the final action of the state tax board in appeals to it final, at the same time gave a certain amount of latitude to meet emergencies by authorizing an additional appropriation by the giving of notice and upon a public hearing. Provision was also made for an appeal from an order for additional appropriations to the state tax board on sub-

stantially the same terms as an original appeal might be taken to said board. This section remained unchanged until 1935.

In the meantime, that is, between the years 1927 and 1935, certain changes were taking place with respect to the use of gasoline tax fund and the fund arising from motor vehicle registration. The first of these changes took place in 1932, when in connection with the transfer of township highways to the respective counties in which the townships are situated, it was provided that:

“Hereafter all expenses incurred in the maintenance, repair and preservation of county highways, including all township highways which are transferred to the counties and incorporated in the county highway system, as hereinbefore provided, shall be paid out of such funds as may be derived from the gasoline tax and the motor vehicle registration fees and which are paid to the several counties by the state, as provided by law, and no tax shall be levied hereafter by any county in this state for the repair, maintenance or preservation of county highways, except by unanimous vote of the county council in a case of extraordinary emergency or indispensable necessity.”

Acts of 1932, pp. 29-30.

At the same session an amendment was made to the Act for the registration of motor vehicles and the Act imposing a license fee on the use of gasoline, in which certain changes were made as to the distribution of said funds. In each of these Acts it was provided that the money so distributed to the several counties of the state should constitute a special road fund which might be used by the board of commissioners of any county in the construction, maintenance or repair of any county highways or bridges on such county highways within such county.

Acts of 1932, pp. 21-23.

In 1933 the Act of March 15, 1913 entitled “AN ACT concerning the maintenance and repair of free gravel or macadam roads” and all acts amendatory thereof and supplemental thereto, was repealed.

Acts of 1933, p. 87.

On February 18, 1933, a new Act entitled "AN ACT concerning the maintenance and repair of county highways and repealing conflicting laws and declaring an emergency" was passed. This Act provided, among other things, that the county surveyor should prepare an annual budget or itemized estimate of the cost of maintenance of his office and the cost of highways, bridges and culverts within the county which was to be filed in the office of the auditor for the use of the board of commissioners who might approve, or amend and approve, the estimates, it being provided that the estimates as finally approved should be the budget for the ensuing year and available to the board of county commissioners for the purposes provided in the Act without other or further appropriation. The commissioners were authorized to increase or decrease any item of the budget at any time upon the request of the surveyor.

Acts of 1933, p. 141.

No further legislation affecting this particular fund was enacted until 1935. Up to this time, however, it will be noted that the gasoline tax fund and the motor vehicle registration fund available to the counties were not required to be included in the county budget and except as provided in the 1933 Act, last above referred to, were not required to be budgeted at all. This is true, I think, notwithstanding the tax limitation acts passed in 1932 and 1933. Neither one of these acts had the effect of requiring the gasoline tax fund or the motor vehicle registration fund budget to be included in the county budget which might come before the tax board in these tax limitation statutes.

Acts of 1932, p. 17;

Acts of 1933, pp. 673 and 1085.

In 1935, however, section 200 of the Tax Act of 1918 providing for the budgeting of local expenses, was again amended and at the same time a new act was passed relating to budgets which affected the further use of the gasoline tax fund and the motor vehicle registration fund. The amendment to section 200, *supra*, is found in the Acts of 1935 on pages 532 to 536 and the new Act concerning the budgets of counties, cities, towns and school corporations is found on page 837 of the

1935 Acts. The amendment of section 200, *supra*, was approved on March 7, 1935, and the new special Budget Act was approved on March 9, 1935.

The first of the above acts contained no emergency clause and, of course, went into effect with the publication of the acts. The second act contained an emergency clause and was put into effect immediately upon its passage.

Section 200 as amended, *supra*, continued to apply simply to budgets to be raised by taxation, except as it was modified by the special act concerning budgets above referred to. The material provisions of this later act, so far as the present question is concerned, are as follows:

“That in the formulation of a budget by the proper legal officers of any county, city, town or school corporation, such officers shall prepare as accurate an estimate as can be obtained of the probable amount of revenue which such county, city, town or school corporation will receive from the state for and during the year for which such budget is being formulated and for which appropriations are to be made, and the amounts of revenue which will probably be received from the state shall be shown in such budget estimates and shall be taken into consideration in calculating the tax levy which is to be made for the ensuing year, and no money received from the state by any county, city, town or school corporation, whether from the gasoline fund, the motor vehicle fund, the common school revenue fund, or the general fund, for highway, street or school purposes, as the case may be, shall be expended unless and until such money so received or to be received shall have been included in the budget estimates and shall have been appropriated by the proper officers authorized by law to make appropriations, in the amounts and for the specific purposes for which any such fund is to be expended.” * * *

Acts of 1935, p. 837.

It was recognized, however, that emergency appropriations might be necessary and the amended section 200 yet provided for such appropriations which, however, were to have the approval of the tax board in all cases before they became effective.

Acts of 1935, pp. 532-534.

Two things are outstanding with respect to the gasoline tax fund and the motor vehicle registration fund upon the passage of the special Act of 1935 concerning budgets. First, this fund was required to be included as an item in the budget and it was required to be appropriated in the amounts and for the specific purposes for which it was to be expended. It will be noted, however, that neither Act provides as to when the appropriation should be made and upon any theory that might be pursued there would, at any rate, be left the possibility of an emergency appropriation.

In 1937 a new tax limitation law was passed. This Act is found on pages 646 to 656 of the Acts of 1937. This Act went into effect on the day of its passage, March 9, 1937, by virtue of the declaration of an emergency existing for its immediate taking effect. On the same day the legislature enacted an act governing the distribution of the gasoline tax fund and the motor vehicle registration fund and other fees and taxes connected with the operation of motor vehicles known as the Motor Vehicle Highway Account Act. This Act becomes effective on the 31st day of December, 1937.

These two Acts in their relation to prior legislation, already referred to, furnish the key to the solution of the question submitted.

It will be noted from an examination of the Act creating the motor vehicle highway account and providing for its distribution, referred to above, that "the funds allocated to the respective counties of the state from the motor vehicle highway account shall be annually budgeted, as provided by law, and, when distributed, shall be used for construction, reconstruction and maintenance of the highways of the respective counties * * *." It will be noted further that it is provided that "all funds allocated or distributed to the respective counties which are not used for maintenance shall be used for construction and reconstruction of the highways of the respective counties" and that "any surplus existing in the maintenance fund at the end of any year shall thereafter be used for construction and reconstruction of such highways by the respective counties."

Acts of 1935, p. 781.

This language clearly contemplates an annual budgeting of *all* of the funds allocated to the counties from the motor vehicle highway account and makes mandatory the use of those funds in the manner provided in the Act. Everything is taken care of to the extent of making specific provision for the use of any surplus at the end of any year, and while it is not stated as to when the budgeting is to be done, it is evident that it is contemplated that the budgeting shall be done at the regular budget making time to provide for other governmental expenses.

As to the appropriation, while it is probably contemplated that it should be made at the same time, yet as already stated, the statute fixes no time within which the appropriation must be made. All that is required is that it shall be made before the money is expended.

Returning now to the Tax Limitation Act of 1937, it will be noted that section 9 provides that:

“After the budget, levy and rate for each municipal corporation have been finally fixed and determined as herein provided, the appropriating body of each municipal corporation shall allocate the funds to be derived from said levy in such manner that the expenditures for the ensuing year shall remain within the limitations fixed in accordance with sections 5 and 8 of this Act.”

Acts of 1937, p. 655.

Referring to sections 5 and 8 of the Act, it is found that section 5 refers to budgets, levies and rates as finally fixed by the tax adjustment board, and section 8 refers to the same thing as fixed by the auditor or by the state board of tax commissioners. In either case, it is provided that if either of said boards shall revise, change or reduce any such budget, levy and rate as fixed by the proper officers of any municipal corporation, “the budget, levy and rate as so revised, changed or reduced” by said board shall be “the only budget, levy and rate *upon which taxes shall be levied, collected and applied during the ensuing year, except as herein otherwise provided.*” (Our italics.)

Acts of 1937, p. 650;

Acts of 1937, p. 654.

Taxes referred to in the above quotation evidently are taxes levied upon property, so that the specific limitation of sections

5 and 8 with respect to budgets as to which no change can thereafter take place, are budgets, levies and rates "upon which taxes shall be levied, collected and applied."

Section 9, *supra*, therefore, does not appear to be intended as furnishing an absolute limitation of budgets insofar as the same are not raised by taxation. In fact, the language is:

" * * * The appropriating body of each municipal corporation shall allocate the funds *to be derived from said levy* in such manner that the expenditures for the ensuing year shall remain within the limitations fixed in accordance with sections 5 and 8 of this Act." (Our italics.)

Acts of 1937, p. 655.

This thought harmonizes with the provisions of section 4 of the Motor Vehicle Highway Account Act which requires that all of the funds allocated to the respective counties from the motor vehicle highway account shall be annually budgeted as provided by law, and when distributed shall be used in a certain way set out in the Act. This is a mandatory provision which can not be complied with except by a budgeting of the entire fund thus received. Anything less than that is only a partial compliance with the statute.

The question remains as to whether upon a failure to fully comply with the statute by budgeting the entire fund and appropriating the entire fund at the regular budget making time, as to whether any remaining portion of the fund may later be appropriated. I think it can. While the duty of budgeting and appropriating is mandatory, the time when it may be done, in my opinion, is directory.

The general rule in such cases appears to be as stated in *School District No. 61, Payne County v. Consolidated District No. 2, Coyle, Logan County*, 237 Pac. 1110, quoting from the case of *People v. Cook*, 14 Barb. (N. Y.) 259, as follows:

" 'Statutes directing the mode of proceeding by public officers are directory, and a strict compliance with their provisions is not essential to the validity of the proceedings, unless it be so declared in the statute. Within this principle, where a statute directs a public officer to do a thing within a certain time, without any negative words restraining him from doing it after-

wards, the naming the time will be regarded as directory merely, and not as a limitation of his authority. This rule has been very steadfastly adhered to, by the courts, in all cases where certain acts are directed to be done, by public officers, within a stated time, and in a particular manner, when those acts are of a public character, and concern the public interests, or when the rights of third persons are concerned.' ”

School Dist., etc., v. Consolidated Dist., etc., 237 Pac. 1110 at p. 1111;

See also the case of People v. Earl, 94 Pac. 294;

Also the case of City of Uvalde v. Burney, 145 S. W. 311.

In my opinion there is nothing to prevent the appropriating during the first part of 1938, or thereafter, during said year of any unexpended balance in the motor vehicle highway account which was not included in the general appropriation made in September, 1937.

It should be borne in mind in this connection, however, that, in my opinion, no appropriation is valid unless it is based upon money actually in the treasury or for which provision has been made and which will become available during the fiscal year in which it is to be expended.

**ACCOUNTS, STATE BOARD OF: County and municipal funds
—validity of sale of county or municipal funds in bank in
process of liquidation.**

November 19, 1937.

Hon. William F. Cosgrove,
Examiner, State Board of Accounts,
State House,
Indianapolis, Indiana.

Dear Sir:

I have before me your request for an official opinion on the following question:

“Can a county or township, municipal corporations, and their officers sell their deposits in a bank now in liquidation?”