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Clyde F. Snyder
University of Illinois

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THE ORGANIZATION AND FUNCTIONS OF COUNTY BOARDS IN INDIANA

By CLYDE F. SNIDER*

COMPOSITION AND ORGANIZATION

County government in Indiana centers, so far as it may be said to have any center, in the board of county commissioners. Although the constitution recognizes county boards as instrumentalities for the performance of public business,¹ the board of commissioners is a statutory, and not a constitutional, agency.² The board consists of three members, one being elected from each of the three commissioner districts into which the county is divided, but all being elected by the voters of the county at large.³ Like other county officers, commissioners must, under the constitution, reside in the county during their incumbency of office. The courts have held this requirement to mean actual residence, and not merely residence in the general legal sense. Thus, a commissioner who removed with his family to Colorado and entered into business there, was held to have forfeited his office, notwithstanding his claim that his absence was of a temporary character and the fact that he actually returned to attend most of the regular meetings of the board. In such a case, the burden is upon the official of proving that his absence from the county is a mere temporary sojourn of a character which does not operate to vacate the office. But while commissioners must reside in the county, the mere removal of a commissioner from the district for which he was elected to another district within the same county does not operate to vacate his

*Member of Faculty University of Illinois, Department of Government.

¹In the provision (Art. VI, Sec. 10) that the General Assembly may confer powers of a local, administrative character upon "the boards doing county business in the several counties."

²State v. Goldthait, 172 Ind. 210, 216, 87 N. E. 133 (1909).

³Burns' Annotated Indiana Statutes, 1933, secs. 26-601, 26-602.

office. Although elected from a particular district, he does not forfeit his office by removing from that district, providing he continued to reside within the county.⁴

The term of office of county commissioners is three years, one member of the board retiring and his successor taking office on the first day of January of each year.⁵ The statutes provide that one commissioner shall be elected annually. In practice, however, two are elected at each biennial election, one being elected to take office on the first day of the succeeding January and the other to take office a year later.⁶ In the event that a vacancy occurs in the board's membership, appointment to fill the vacancy for the unexpired term is made by the remaining members, the auditor casting the deciding vote in case of a tie. Should a commissioner-elect die or resign before the beginning of the term for which he was elected, the commissioners in office fill the prospective vacancy by electing some person to serve for the entire term. Two members of the board constitute a quorum.⁷

Although the statutes contain no provision with respect to a presiding officer, the board, at the beginning of each year, chooses one of its members to serve as president for that year. The county auditor is *ex officio* clerk to the board and keeps a record of its proceedings.⁸

DUAL CHARACTER

The board of county commissioners in Indiana possesses a dual character, being, in the eyes of the law, both a corporation and a court.⁹ Each of these aspects of the board's nature will be considered in turn.

⁴Constitution of Indiana, Art. VI, Sec. 6, *Smith v. State*, 24 Ind. 101 (1865), *Relender v. State*, 149 Ind. 283, 49 N. E. 30 (1898).

⁵Burns, 1933, sec. 26-604, 49-207.

⁶*Ibid.*, sec. 26-603. Cf. Harold C. Feightner, *Indiana County Government* (Indianapolis, 1932), p. 317

⁷Burns, 1933, sec. 26-601.

⁸*Ibid.*, sec. 49-3004.

⁹*State v. Board of Commissioners*, 45 Ind. 501 (1874), *McCab v. Board of Commissioners*, 46 Ind. 380 (1874).

Character as a Corporation

The commissioners in each county of the state are constituted by law a body politic and corporate. In its corporate capacity, the board may sue and be sued; it also possesses the rights, powers, and duties incident to corporations generally, so far as such rights, powers, and duties are not inconsistent with the law creating the board or any other statute relating thereto.¹⁰

The board of commissioners personifies the county; indeed, in legal contemplation, the board *is* the county. "The county is known in law only by its board of commissioners, and acts, as a county, through its board."¹¹ Thus, during the period when counties were held liable for failure to keep bridges in repair,¹² it was held by the courts that, since for legal purposes the board is the county, action for damages in such cases would be against the board, notwithstanding that it was the county superintendent of roads, and not the county board, who was charged by statute with seeing that the bridges were properly repaired.¹³

Action by the board on behalf of the county must be taken when the board is legally in session and by the members acting concurrently, the courts having held that the members of the board cannot bind the county by acting successively and separately. The board, like other corporations, is a continuous body, which is not dissolved by one member going out of office and an other coming in.¹⁴

Character as a Court

The judicial character of the county board is reminiscent of those periods of territorial and state history when county

¹⁰Burns, 1933, sec. 26-606; *Sturgeon v. Board of Commissioners*, 65 Ind. 302 (1879).

¹¹*Board of Commissioners v. Wild*, 37 Ind. App. 32, 35, 76 N. E. 256 (1905). See also *State v. Clark*, 4 Ind. 315 (1853).

²See *supra*, ch. II, "Liability of County and Township".

¹³*Patton v. Board of Commissioners*, 96 Ind. 131 (1884).

¹⁴*Board of Commissioners v. Ross*, 46 Ind. 404 (1874); *Tombaugh v. Grogg*, 146 Ind. 99, 44 N. E. 994 (1896).

business was performed by the court of quarter sessions, the court of common pleas, and boards of justices.¹⁵ The county board was regarded as a court at the time of the adoption of the present constitution,¹⁶ and it was doubtless in view of that fact and the separation-of-powers theory that a provision was included in that document which expressly authorized the conferring of administrative powers upon "the boards doing county business."¹⁷ The board is not only a court but a court of record.¹⁸ It is authorized to punish contempts by fine or imprisonment, and to enforce obedience to its orders by attachment or other compulsory process.¹⁹ In counties having a population of 110,000 or over a "bailiff of the county commissioners' court" is appointed by the board.²⁰

Whether, in legal contemplation, the board of commissioners is to be regarded as primarily a court and only secondarily a corporate administrative agency, or vice versa, is not quite clear. In this connection, the recent case of *Hastings v. Board of Commissioners* is of interest. A majority of the members of the Supreme Court took the view, in that case, that the board of county commissioners is a court *belonging to the judicial department* of government, upon which certain administrative powers have been conferred under constitutional permission. More convincing, however, at least to the writer, seems the dissenting opinion, in which it is held that the board is not a court in the ordinary sense, having been constituted as such neither by the constitution, nor by the General Assembly under its power to establish "other courts." According to this view the board is not to be considered as "a court with certain administrative powers" but as "pri-

¹⁵See *supra*, ch. I.

¹⁶See *State v. Board of Commissioners*, 170 Ind. 595, 85 N. E. 513 (1908).

¹⁷Constitution of Indiana, Art. VI, Sec. 10.

¹⁸*State v. Conner*, 5 Blackf. 325 (1840), *Board of Commissioners v. Cutler*, 7 Ind. 6 (1855), *Paul v. Walkerton Woodlawn Cemetery Assn.*, 204 Ind. 693, 184 N. E. 537 (1933).

¹⁹Burns, 1933, sec. 26-619. The punishment for contempt may not exceed a fine of three dollars or imprisonment for twenty-four hours.

²⁰Burns, 1933, secs. 26-612, 26-613.

marily an administrative board with power to act judicially in special instances."²¹

SESSIONS

The statutes provide that the board shall hold regular monthly sessions, beginning on the first Monday of the month "and continuing only so long as the necessary business of such session absolutely requires."²² Under this provision, as interpreted by the courts, it is for the board itself to determine, in its discretion, when necessary business requires the continuation of a session. By adjourning from day to day or to a time certain the board may continue a regular session until the close of the month, or, indeed, into the next calendar month up to the first Monday thereof, at which time the next regular session begins. This rule will even permit the continuing of a December term into January of the succeeding calendar year. Thus, an order of a county board extending the December, 1930, term to January 5, 1931, has been upheld, action taken by the board during the first days of January being considered as action of the December term.²³ An adjourned meeting of any session operates as a continuation of the original meeting, and any business that might have been transacted at the original meeting may be transacted at the adjourned meeting.²⁴

In practice, the usual length of the regular session varies widely as between counties, the longer sessions being found, as a rule, in the more populous counties. In some counties, two days ordinarily suffice for the disposition of the month's business.²⁵ In Marion County, on the other hand, the board,

²¹Hastings v. Board of Commissioners, 205 Ind. 687, 188 N. E. 207 (1933).

²²Burns, 1933, sec. 26-550.

²³Kraus v. Lehman, 170 Ind. 408, 83 N. E. 714, petition for rehearing 84 N. E. 769 (1908), State v. Eckman, 205 Ind. 550, 187 N. E. 327 (1933).

²⁴Kraus v. Lehman, 170 Ind. 408, 83 N. E. 714, petition for rehearing, 84 N. E. 769 (1908); Laird v. State, 200 Ind. 319, 163 N. E. 263 (1928). See also, as to adjourned meetings, State v. Richey, 202 Ind. 116, 172 N. E. 119 (1930).

²⁵See, for example, Annual Report of the Auditor of Wabash County, Indiana, 1933.

by adjournment, meets regularly on Monday, Wednesday, and Friday of each week, and frequently on other days as well, thus extending the session throughout the month.²⁶ At least some county boards designate certain days of the regular session for the consideration of particular types of business. Thus, Monday, the first day of the session, is set aside in some counties for the consideration and allowance of claims and is sometimes referred to as "bill day." Tuesday is sometimes set aside as "road and ditch day" for the consideration of highway and drainage matters, and Wednesday for visiting the poor asylum and jail.²⁷ In actual practice, however, it seems that this order of business is followed only in a very general way. The allowance of claims often consumes more than a single day, and, on the other hand, constituents desiring to present other business to the board on "bill day" are likely to be accorded a hearing.

Special sessions of the board may be called, whenever the public interest so requires, by the auditor, by the clerk of the circuit court in case of the death or disqualification of the auditor, or by the recorder in case of the disqualification of both the auditor and the clerk; the determination of the auditor, or other officer calling the session, that the public interest requires special session, is final and conclusive.²⁸ Special sessions are limited to the transaction of business specified in the call therefor,²⁹ and the courts have deduced certain limitations upon the type of business which may, under any circumstances, be considered by the board when in special session. At one time the rule was followed that no business of a judicial character, where notice is required and there are conflicting claims or interests to be adjusted, might be transacted at a special session. Thus it was held, in 1880, that an

²⁶County Commissioners' Record, Marion County, Indiana.

²⁷See Annual Report of the County Auditor of Howard County, Indiana, 1915, Annual Report of the Auditor of Wabash County, Indiana, 1931.

²⁸Burns, 1933, sec. 26-607; *Wilson v. Board of Commissioners*, 68 Ind. 507 (1879), *Jussen v. Board of Commissioners*, 95 Ind. 567 (1884).

²⁹Burns, 1933, sec. 26-610. Literally, this limitation seems to apply only to special sessions called by the auditor.

order for the annexation of contiguous territory to an incorporated city could not be made by the board at a special session, on the ground that this was not ordinary county business but rather "a special statutory proceeding wherein notice is required, and where there may be adversary proceedings requiring judicial investigation and judgment."³⁰ Five years later the rule as to what business may, and what may not, be transacted at special sessions, was stated by the Supreme Court as follows:

"Where there are adversary proceedings of a judicial character, and notice is required, the judicial functions must be exercised at a regular session of the board of commissioners; but where the business is of an administrative or ministerial character, it may be lawfully transacted at a special session properly convened."³¹

In 1888, however, the rule of absolute prohibition was modified to permit the transaction of judicial business at a special session if the statutes expressly authorizes such transaction. Finally, in 1894, it was held that proceedings where notice is required may be considered at a special session if the context of the statute and the nature of the proceedings clearly indicate that it was the intent of the legislature that they should be so considered.³² It appears, therefore, that the present rule, dating from 1894, permits the transaction at special sessions of any business of an administrative character, provided that it is properly specified in the call for the session, but forbids the transaction at special sessions of business of a judicial nature unless its transaction is authorized by statute, either expressly or by reasonable implication.

It will be noted that the cases just discussed evince a consistent trend toward liberality in the court's decisions relative

³⁰*City of Vincennes v. Windman*, 72 Ind. 218, 219 (1880).

³¹*Platter v. Board of Commissioners*, 103 Ind. 360, 372, 2 N. E. 544 (1885). For a general discussion of the distinction made by the courts between the judicial and the administrative functions of the board of commissioners, see *infra*, "Administrative Acts and Judicial Acts".

³²*Prezinger v. Harness*, 114 Ind. 491, 16 N. E. 495 (1888), *Hufford v. Conover*, 139 Ind. 151, 38 N. E. 328 (1894).

to the kinds of business which may be transacted at special sessions. It should be pointed out, however, that all of those cases were decided during a period when regular sessions of the board occurred only quarterly and were strictly limited by statute as to their maximum length. Under the present system of regular monthly sessions which may be extended throughout the month by adjournment, the necessity for special sessions is greatly lessened and hence the significance of restrictions upon those sessions is correspondingly reduced. During the year of 1935, only four special sessions of the commissioners were held in Monroe County and only one was held in Fountain County.³³ In Marion County, due to the practice of continuing the regular session throughout the month by adjournment, there were no special sessions.³⁴

The procedure followed in board meetings is, in most instances, extremely informal, little attention being given to the fundamental principles—much less to the niceties—of parliamentary law. It is not uncommon, while the board is in session, to find various officials and citizens engaging different board members in conversation simultaneously. Indeed, due to the general confusion and hubbub, it is frequently impossible for a visitor entering the chamber of the “commissioners’ court” to determine whether the board is in formal session or in recess.

The sheriff is required to attend meetings of the county board, either personally or by deputy, and to execute the board’s orders. Board meetings are open to the public.³⁵

COMPENSATION OF MEMBERS

Members of the board of county commissioners receive an annual salary which is fixed by statute and depends, as do county salaries in general, upon the “population and neces-

³³One “adjourned meeting” was held in Monroe County and several such meetings were held in Fountain County. County Commissioners’ Record, Fountain County, Indiana, data for Monroe County supplied by Dr. Pressly S. Sikes, Department of Government, Indiana University.

³⁴County Commissioners’ Record, Marion County, Indiana.

³⁵Burns, 1933, secs. 26-611, 26-623.

sary services required" in the county.³⁶ The salary varies from \$100 in the least populous county of the state (Ohio County) to \$1,920 in the six most populous counties (Marion, Lake, St. Joseph, Allen, Vanderburgh, and Vigo). In addition to their salaries, commissioners are allowed mileage at the rate of six cents per mile for the distance necessarily traveled in the conduct of county business.³⁷

LIMITED NATURE OF POWERS

The board of commissioners is a creature of statute and possesses no powers other than those conferred upon it by statute, either expressly or by necessary implication. In applying this principle, the courts have held that the board could not, in the absence of statutory authority, maintain an action in the courts to vacate its order accepting a public improvement constructed by contract, even though it appeared that the order had been procured by fraud.³⁸ Likewise, it has been decided that, without a statute granting such authority, the board could not lease rooms in the courthouse to be used for private purposes.³⁹ Again, in the making of contracts the powers of the board are strictly limited; it enjoys no general power, because of its corporate character, of entering into contracts of all kinds, but possesses only such powers to contract as it derives from statute.⁴⁰ Acts done by the board in excess of its authority are void.⁴¹

³⁶Ibid., sec. 49-1003. This basis of classification for the purpose of fixing the compensation of officers is expressly authorized by constitutional provision. Constitution of Indiana, Art. IV, Sec. 22.

³⁷Burns, 1933, secs. 49-1004, 49-1013. No mileage is allowed, however, on trips between the commissioners' homes and the courthouse, and not more than one mileage is allowed for one conveyance although transporting more than one person.

³⁸Sullivan v. Board of Commissioners, 85 Ind. App. 287, 149 N. E. 94 (1925). See also Gavin v. Board of Commissioners, 104 Ind. 201, 3 N. E. 846 (1885).

³⁹State v. Hart, 144 Ind. 107, 43 N. E. 7 (1896). The authority here in question is now granted by statute. Burns, 1933, sec. 26-1805.

⁴⁰State v. Goldthait, 172 Ind. 210, 87 N. E. (1909). See *infra*, "Functions—Making of Contracts"

⁴¹Cincinnati, I. & W. R. Co. v. Board of Commissioners, 192 Ind. 1, 134 N. E. 782 (1922).

Not only is the board of commissioners confined, in its activities, to the exercise of the powers granted by statute, but the courts have insisted upon a strict interpretation of those powers. It has been held, for instance, that where it is the clear intent of a statute authorizing the incurring of indebtedness that interest should be paid annually, the board cannot issue bonds with interest payable semi-annually.⁴² Moreover, where the statutes prescribe the procedure to be followed in the performance of any activity, the board must adhere to that procedure or its action will be held invalid. Where, for instance, the statutes prescribe the procedure to be followed by the board in letting contracts for the construction of bridges, and where a company builds a bridge at the order of the board but without the statutory requirements being complied with, the company cannot recover from the county, notwithstanding the fact that the county may have received full value for the services performed and may actually be using the new bridge.⁴³

ADMINISTRATIVE ACTS AND JUDICIAL ACTS

In keeping with the dual status of the board as both a corporation and a judicial tribunal, the courts have distinguished between two types of function performed by that body—the one administrative in character and the other judicial.⁴⁴ As is usual in such matters, the courts have attempted no comprehensive classification of the various functions of the board on this basis, but, in deciding particular cases, have assigned certain functions to each of the respective categories. Among the functions of the board which have been classed as ad-

⁴²*English v. Smock*, 34 Ind. 115 (1870). For another instance of strict interpretation, see *Hamilton v. McMahel*, 80 Ind. App. 473, 141 N. E. 469 (1923).

⁴³*Rexford v. Board of Commissioners*, 85 Ind. App. 281, 151 N. E. 830 (1926). See also *Platter v. Board of Commissioners*, 103 Ind. 360, 2 N. E. 544 (1885).

⁴⁴The non-judicial functions are referred to occasionally as being of a "legislative" character and again as being of a "ministerial" nature. One looks in vain for a standard terminology in the judicial decisions relating to such matters.

ministrative are those of: examining and allowing claims against the county;⁴⁵ making contracts;⁴⁶ and acting upon petitions for the relocation of county seats.⁴⁷ On the other hand, the board acts judicially when it passes upon the public utility of proposed drainage or highway projects.⁴⁸

The distinction between the judicial and the administrative acts of the board is not always clear, nor is the basis upon which the distinction is made. The basis of distinction was recently considered in the case of *Hastings v. Board of Commissioners*, previously referred to,⁴⁹ which case concerned the removal from office of a county highway superintendent under a statute which provided that the superintendent should be appointed by the county board for a four-year term but should be removable by the board "after a hearing for incompetency, malfeasance or neglect of duties." The immediate question presented was that as to whether the board of commissioners, in removing the highway superintendent, was performing an act of a judicial character from which appeal would lie to the circuit court. In holding that the board acted judicially in the matter, a majority of the members of the Supreme Court declared that "If the final conclusion of a proceeding permits the board to exercise a discretion, it will be judicial, but when the final act or duty is imposed by law there is no discretion and the act or duty is ministerial." The principle seemingly enunciated here, viz., that every act of the board involving the exercise of discretion is judicial, was vigorously assailed in the dissenting opinion, the two dissenting judges taking the view that the board, in removing the superintendent, was performing a duty incidental to the management of the county's highway system, and that the

⁴⁵Board of Commissioners v. Heaston, 144 Ind. 583, 41 N. E. 457 (1895), Sudbury v. Board of Commissioners, 157 Ind. 446, 62 N. E. 45 (1901); Board of Commissioners v. Trautman, 204 Ind. 362, 184 N. E. 178 (1933).

⁴⁶Board of Commissioners v. Gillies, 138 Ind. 667, 38 N. E. 40 (1894), Kraus v. Board of Commissioners, 39 Ind. App. 624, 80 N. E. 544 (1907).

⁴⁷Hall v. Kincaid, 64 Ind. App. 103, 115 N. E. 361 (1917).

⁴⁸Bryan v. Moore, 81 Ind. 9 (1881); Meehan v. Wiles, 93 Ind. 52 (1884); Forrey v. Board of Commissioners, 189 Ind. 257, 126 N. E. 673 (1920).

⁴⁹Supra, "Rual Character—Character as a Court".

action was administrative rather than judicial in character. "When," the dissenting opinion declares, "an act is required of the county commissioners as an administrative board, such act is not judicial even though its performance may require the exercise of judgment and discretion." It was also pointed out by the dissenting members of the court that to hold that the board was acting judicially in discharging the superintendent would be to hold that the board was both party litigant and judge in the case—a situation quite inconsistent with American standards of justice.⁵⁰

As between the two opinions in this case, it seems to the writer that the dissent is the stronger from the dual standpoint of logic and precedent, notwithstanding the fact that the majority opinion cites authority to the effect that the act of removing public officers under statutes such as the one here in question is considered in certain other states as being judicial in its nature. It is quite generally recognized by students of public law and administration that administrative activities very often involve discretion. Moreover, in previous decisions, the courts of Indiana have held various functions of the county board which clearly involve discretion—e. g., those of allowing claims and letting contracts—to be administrative in character. It thus seems that final acceptance of the doctrine of the majority opinion would necessitate a reversal of numerous past decisions and a general reclassification of the functions performed by boards of commissioners. In this connection it is significant to note that, in the subsequent case of *Board of Commissioners v. Woodward*, which involved the same question as that in the Hastings case, the Appellate Court followed the majority opinion in the Hastings case only because a majority of the Appellate Court judges felt that they had no alternative but to follow the previous ruling of the Supreme Court. Although deciding the Woodward case on authority of the Hastings case, the majority members of the Appellate Court declared: "We

⁵⁰Hastings v. Board of Commissioners, 205 Ind. 687, 695, 699, 188 N. E. 207 (1933).

have read the dissenting opinion in that [Hastings] case, and considered it a well-reasoned opinion, but this court is bound by the majority opinion, regardless of the merits of the dissenting opinion."⁵¹ Moreover, one member of the Appellate Court was bold enough to dissent on the ground that the doctrine of the dissenting opinion in the Hastings case should be the law. Considering this feeling on the part of the Appellate Court judges, together with the logical dissent in the Hastings case, it seems not unlikely that the doctrine of the majority opinion in the latter case may ultimately be overruled.⁵²

Having considered the general nature of the distinction between administrative and judicial activities of the board and having noted some examples of each, there remains for consideration the practical significance of the distinction. In this connection, it is to be noted that there are several respects in which the two types of function are not on the same footing, different rules being applied by the courts to the respective types.

In the first place, when the board acts judicially its action, to be of any effect, must be shown by its record, whereas action of an administrative character may be shown in some other manner, even by parol.⁵³ The commissioners' court, as a court of record, can speak only by its record.⁵⁴ No such

⁵¹Board of Commissioners v. Woodward, 194 N. E. 735, 737 (Appellate Court of Indiana, 1935).

⁵²The fundamental question involved in the Hastings and Woodward cases, viz., that of the proper distinction between the judicial and the administrative functions of the board, continues to be of importance notwithstanding the fact that the particular office there involved—that of county highway superintendent—was abolished in 1933. Laws of Indiana, 1933, ch. 19. The incumbent of the present office of county highway supervisor, the establishment of which is optional with the respective counties, serves at the pleasure of the board of commissioners. Burns, 1933, sec. 36-1110.

⁵³Eder v. Kreiter, 40 Ind. App. 542, 82 N. E. 552 (1907); Paul v. Walkerton Woodlawn Cemetery Assn., 204 Ind. 693, 184 N. E. 537 (1933), McCabe v. Board of Commissioners, 46 Ind. 380 (1874).

⁵⁴State v. Conner, 5 Blackf. 325 (1840), Board of Commissioners v. Cutler, 7 Ind. 6 (1855); Paul v. Walkerton Woodlawn Cemetery Assn., 204 Ind. 693, 184 N. E. 537 (1933). The board has the power to correct or supply its records by *nunc pro tunc* entries, and a presumption will be indulged in

rule applies, however, to the board when its acts as an administrative agency, it having been held, for example, that a parol employment, at a legal session of the board, of an attorney to defend a suit against the county, was valid and binding upon the county.⁵⁵

In the second place, in the case of judicial action, appeal from the board's decision regularly lies to the courts, unless denied by statute; in the case of administrative action, however, appeal does not lie to the courts unless granted by statute.⁵⁶ In the third place, mandamus will lie to compel the board to perform a specific administrative duty required of that body by statute, but will not lie to control the action of the board when it is acting in a judicial capacity.⁵⁷ A fourth distinction lies in the fact, already noted in a previous section, that, while any business of an administrative nature may be transacted at a special session of the board if specified in the call for the session, judicial business may be considered in special session only by statutory authorization, express or implied.⁵⁸ These legal distinctions between the judicial activities of the board and its administrative activities are indicated in tabular form in Table I.

FUNCTIONS

Control of County Property

The board of commissioners is vested with the control of county property. The property most commonly belonging to counties consists of the courthouse with its appurtenant grounds, the poor asylum, and the jail. As will appear later,

favor of such entries. *Kraus v. Lehman*, 170 Ind. 408, 83 N. E. 714, petition for rehearing 84 N. E. 769 (1908), *Tombaugh v. Grogg*, 146 Ind. 99, 44 N. E. 994 (1896).

⁵⁵*McCabe v. Board of Commissioners*, 46 Ind. 380 (1874).

⁵⁶See *infra*, "Appeal from Decisions of Board".

⁵⁷*Hawkins v. Board of Commissioners*, 14 Ind. 521 (1860), *Board of Commissioners v. State*, 189 Ind. 540, 128 N. E. 596 (1920). Mandamus will not lie to control the board in the exercise of any discretionary power, whether judicial or administrative.

⁵⁸See *supra*, "Sessions."

however, some counties own other property of various kinds. The board may purchase or sell county property, subject to the requirement that the purchase or sale of real estate valued at one thousand dollars or more must have the approval of the county council. Except in certain extraordinary cases, however, the commissioners may sell county property only at public auction and after advertisement as prescribed by statute. The board is authorized to make, in conformity with

TABLE I.

DISTINCTIONS BETWEEN JUDICIAL AND ADMINISTRATIVE
BUSINESS OF BOARD OF COUNTY
COMMISSIONERS

	<i>Judicial Business</i>	<i>Administrative Business</i>
1. Keeping of record.	Essential to validity of action.	Not essential to validity of action.
2. Appeal to Courts from Decisions.	Lies unless denied by statute.	Lies only when granted by statute.
3. Control by mandamus.	Not subject to control.	May be compelled to perform ministerial duties.
4. Transactions at Special Session.	May be transacted only when transaction is authorized by statute and when specified in call.	May be transacted if specified in call.

the statutes, orders respecting the care of county property, and, subject to certain restrictions, to grant licenses, permits, or franchises with respect to the use of such property.⁵⁹

Auditing and Allowing of Claims Against County.

One of the chief duties of the board of commissioners is that of examining into the merits of all claims presented against the county, and of allowing such claims in whole or

⁵⁹ Burns, 1933, sec. 26-2008; Laws of Indiana, 1935, ch. 7. See *infra*, "The County Council—Authorizing Sale and Purchase of Real Estate."

in part, or rejecting them, as the commissioners in their discretion may deem just.⁶⁰ In its function of allowing claims, the board acts in much the same capacity as does the board of directors of a private corporation in auditing claims against the company.⁶¹ Due to the large number of claims presented, the commissioners usually find it impossible to examine personally the individual merits of all claims presented. Therefore, although the regular session of the board is normally devoted in large part to the work of auditing claims, the action of the board can be little more, in most instances, than a more or less perfunctory approval of the recommendations of the auditor, who has previously gone over the claims in preparing the business to come before the board. Claims must be filed with the auditor at least five days before the first day of the session at which they are to be allowed,⁶² the form for their statement being prescribed by the State Board of Accounts. The typical procedure in the auditing of claims is for the auditor, who has already examined the claims and noted his recommendations thereon, to pass the claims one by one to the president of the board, who passes them on to the second member and he, in turn, to the third. The decision of the board as to whether the claim is to be allowed, and, if so, in what amount, is noted thereon and the commissioners affix their signatures in places provided for that purpose.⁶³

Since the county board is a mere creature of statute, it has no power to allow any claim unless the expenditure involved is authorized by statute. In the event that the board allows a claim without such authorization, its action is unlawful and void and any payment made on a claim so allowed may be

⁶⁰ Burns, 1933, secs. 26-805, 26-807, Laws of Indiana, 1935, ch. 7. With respect to restrictions upon this power, see Burns, 1933, secs. 26-533, 26-538, 26-539, 26-806, 26-809.

⁶¹ See *Tucker v. State*, 163 Ind. 403, 416, 71 N. E. 140 (1904).

⁶² Burns, 1933, sec. 26-806. See also *ibid.*, sec. 26-538.

⁶³ Rubber stamps are sometimes used by board members to expedite the task of signing. Since the board acts by majority vote, the approval of two members, as evidenced by their signatures, is sufficient for the allowance of a claim.

recovered by the county.⁶⁴ Thus, it has been held that the action of the board, in allowing a claim for expenses incurred by the superintendent of the county asylum in attending meetings of state and national charity organizations, was illegal and void, even though the board had instructed the superintendent to attend such meetings and his attendance had been requested by the Board of State Charities, where no statute made it the superintendent's duty to attend the meetings or provided for the payment of his expenses.⁶⁵ The allowance of a claim by the board is not a judicial determination of its validity, the finding of the board being no more than *prima facie* evidence of the correctness of the claim.⁶⁶

It should be noted that the presentation of claims to the board of county commissioners for allowance or disallowance is a condition precedent to the bringing of suit upon such claims in the courts. Every claim must first be presented to the board, to the end that useless litigation may be avoided. When, however, a claim is disallowed, in its entirety or in part, by the board, the claimant has the option, under the statutes, of appealing to the courts from the board's decision or instituting an original action against the county.⁶⁷

Making of Contracts

The board of commissioners, as the general governing body of the county, is the agency entrusted with the making of contracts on the county's behalf. Like other powers of the board, its power of entering into contracts is strictly limited in its nature. The courts have held that the board "can not make contracts of all descriptions and for all purposes for

⁶⁴ Board of Commissioners v. Heaston, 144 Ind. 583, 41 N. E. 457 (1895), Eder v. Kreiter, 40 Ind. App. 542, 82 N. E. 552 (1907).

⁶⁵ Lake County v. Neuenfeldt, 78 Ind. App. 566, 136 N. E. 580 (1922).

⁶⁶ Sudbury v. Board of Commissioners, 157 Ind. 446, 62 N. E. 45 (1901), Gross v. Board of Commissioners, 158 Ind. 531, 64 N. E. 25 (1902).

⁶⁷ Sudbury v. Board of Commissioners, 157 Ind. 446, 62 N. E. 45 (1901), Mueller v. Board of Commissioners, 73 Ind. App. 196, 127 N. E. 15 (1920). See also Base Foundry and Machine Works v. Board of Commissioners, 115 Ind. 234, 17 N. E. 593 (1888).

which natural persons may. It will be confined in making contracts to the powers expressly granted to it by the act of its creation, and to the implied powers incidental and necessary to the execution of such expressed powers and the performance of the duties enjoined upon it."⁶⁸ The rule is well established that the board cannot bind the county by any contract which is beyond the scope of its powers.⁶⁹ Thus, it has been held that, their employment by the board being *ultra vires*, attorneys engaged to assist in the prosecution of persons charged with crime could not recover from the county for their services, this being true even where the charge against the defendant was the embezzlement of county funds.⁷⁰ While contracts made by the board are ordinarily in writing, the board may, in certain cases, bind the county by oral contracts.⁷¹

The board is charged with letting contracts for the purchase of materials and supplies for all county offices, and for the construction of county buildings and other public improvements.⁷² There is a tendency on the part of the General Assembly to require to an ever-increasing extent, that county contracts be let on the basis of open competitive bidding. As recently as 1935 this requirement was extended to the purchase of tools and materials to be used in the repair and maintenance of highways, total purchases up to \$350 per month in each county still being excepted, however, from the requirement.⁷³ Statutes requiring that contracts be let on the basis of competitive bidding usually prescribe with some exactness the procedure to be followed. Failure to comply with the procedural requirements renders a contract void, and injunc-

⁶⁸ *Hight v. Board of Commissioners*, 68 Ind. 575, 577 (1879).

⁶⁹ *Driftwood Valley Turnpike Co. v. Board of Commissioners*, 72 Ind. 226 (1880), *Board of Commissioners v. Bradford*, 72 Ind. 455, 37 Am. Rep. 174 (1880).

⁷⁰ *Board of Commissioners v. Ward*, 69 Ind. 441 (1880). See also *Hight v. Board of Commissioners*, 68 Ind. 575 (1879).

⁷¹ *McCabe v. Board of Commissioners*, 46 Ind. 380 (1874), *Board of Commissioners v. Ritter*, 90 Ind. 362 (1883).

⁷² Burns, 1933, secs. 26-536, 26-2001—26-2009, 53-104—53-106.

⁷³ Laws of Indiana, 1935, ch. 145.

tion will lie to prevent the board from carrying out its provisions.⁷⁴

Although the statutes prescribing the methods of letting contracts vary in detail, their general features are fairly uniform. The county board is usually required to prepare specifications of the commodities to be purchased or work to be performed, together with plans, drawings, or models, if necessary or desirable, and to place these on file in the auditor's office for public inspection. Notice is then given by publication in newspapers of general circulation that the specifications are on file for examination and that sealed bids will be received up to a certain date. The board, after examination of the bids submitted, is required to award the contract to "the lowest responsible bidder," or, in some instances, "the lowest and best responsible bidder."⁷⁵ The right is usually reserved to the board, however, to reject any or all bids, if they are unsatisfactory, and to readvertise for new bids. By the terms of the County Reform Law, the board of commissioners can make no valid contract unless money for the particular purpose involved has previously been appropriated by the county council.⁷⁶

Quite often the board of commissioners finds it necessary or desirable to make contracts the execution of which will extend beyond the time at which there is a change in the personnel of the board. As a general rule such contracts, if made in good faith, are valid. The courts, however, have made an interesting exception to this rule in holding invalid, as contrary to public policy, a contract for the employment

⁷⁴ Board of Commissioners v. Gillies, 138 Ind. 667, 38 N. E. 40 (1894).

⁷⁵ The courts have held that provisions of this nature vest some discretion in the board in determining the bidder to whom the contract shall be awarded. *Ness v. Board of Commissioners*, 178 Ind. 221, 98 N. E. 33, petition for rehearing 98 N. E. 1002 (1912); *Eigenmann v. Board of Commissioners*, 53 Ind. App. 1, 101 N. E. 38 (1913). For a case on this point involving township contracts, see *Lee v. Browning*, 96 Ind. App. 282, 182 N. E. 550 (1932), discussed *infra*, ch. VII, "The Advisory Board—Approving Contracts."

⁷⁶ Burns, 1933, sec. 26-525. See *Ness v. Board of Commissioners*, 178 Ind. 221, 98 N. E. 33, petition for rehearing 98 N. E. 1002 (1912); *State v. Board of Commissioners*, 204 Ind. 484, 184 N. E. 780 (1933), *Lund v. Board of Commissioners*, 47 Ind. App. 175, 93 N. E. 179 (1910).

of a county attorney for a term extending beyond the time when a change in the board's membership would occur.⁷⁷ It is to be noted, however, that this exception to the general rule is made upon the theory that, because of the intimate and confidential nature of the relationship between attorney and client, it is highly desirable that the board, as organized from year to year, have a free hand in selecting its legal adviser. This peculiar relationship not existing in the case of other county employees, their contracts of employment are binding upon the board regardless of subsequent changes in its personnel.⁷⁸

Establishment and Maintenance of Jail and Poor Asylum

The statutes provides that the board of commissioners of each county shall establish and maintain a county jail, and an asylum to which indigent persons who have become permanent public charges may be removed by township overseers of the poor.⁷⁹ As a matter of fact, however, two counties do not maintain jails at the present time but keep their prisoners in the jails of neighboring counties.⁸⁰ By an act of 1933, the county board is authorized, if the poor asylum contains a population of ten or less, to discontinue such asylum; to sell, lease, or otherwise dispose of the property relating thereto; and to contract with the board of commissioners of some other county for the care of the poor persons of the county discontinuing its asylum.⁸¹ However, no county has as yet discontinued its asylum under the provisions of this act. The county board is authorized to appoint a "board of visitors" to visit the county asylum and report thereon, and is itself required to visit and inspect the asylum at least once every three months.⁸²

Construction and Maintenance of Roads and Bridges

One of the most important functional activities of the county board is that with respect to roads and bridges. The

⁷⁷ *Jessup v. Hinchman*, 77 Ind. App. 460, 133 N. E. 853 (1922). See also *Board of Commissioners v. Taylor*, 123 Ind. 148, 23 N. E. 752 (1890).

⁷⁸ See *Board of Commissioners v. Shields*, 130 Ind. 6, 29 N. E. 385 (1891).

various laws providing for the construction of highways by the county are administered directly by the board, which receives petitions for the construction of particular projects, orders the improvements established after prescribed legal formalities have been complied with, and awards the contracts for construction. Maintenance and repairs of roads and bridges are under the supervision and control of the board, although in direct charge of either the county surveyor or a highway supervisor appointed by and responsible to the board.⁸³

Exercise of the Power of Eminent Domain

When the county, under the power of eminent domain conferred upon it by statute, seeks to acquire private property for some public use, condemnation proceedings are instituted in the circuit court by the board of county commissioners. Although occasionally authorized and employed for other purposes, the power of eminent domain is most frequently invoked by the county for the purpose of acquiring real estate for the erection of a courthouse, jail, poor asylum, or other county building, or for the opening, widening, or straightening of county highways.⁸⁴

Functions With Respect to Elections

The board of commissioners participates in various ways in the conduct of elections. The more important functions of the board in that connection are those of: establishing election precincts and changing their boundaries; providing rooms for polling places and equipping them with voting booths; and providing ballot boxes and/or voting machines for the several precincts.

⁷⁹ Burns, 1933, sec. 13-1001, Laws of Indiana, 1935, ch. 116, secs. 3, 8.

⁸⁰ See *infra*, ch. IX, "Correction—The County Jail."

⁸¹ Burns, 1933, sec. 52-215. As to the population of the poor asylums, see *infra*, ch. IX, "The County Asylum—Asylum Population."

⁸² Burns, 1933, secs. 52-206, 52-217.

⁸³ Burns, 1933, secs. 52-301—52-328.

⁸⁴ See Burns, 1933, secs. 26-2101—26-2106, 36-303, 59-401, Laws of Indiana 1935, ch. 94.

Appointment of Certain County Officers and Employees

Although the board of commissioners possesses no general power to appoint and remove county officers, it does appoint certain officers, boards, and commissions, some of which exist or are authorized in all counties and others in only a part of the counties of the state. Some of these are appointed for a definite term, while others serve at the pleasure of the board. The more important of these functionaries are the following: county health officer (appointed with approval of the State Board of Health); county physician; county attorney; superintendent of county asylum; county highway supervisor; county veterinarian; board of hospital trustees; board of managers of tuberculosis hospitals; superintendent of county insane asylum; superintendent of county workhouse; bailiff of the commissioners' court; purchasing agent; bridge commissioner; county inspector of weights and measures (appointed with approval of the State Commissioner of Weights and Measures); miners' examination board; three members of the county library board;⁸⁵ three memorial trustees; and four members of the county planning commission⁸⁶

It is also the prerogative of the board to appoint certain minor county employees, the number and nature of which vary from county to county. Examples of such employees are the custodian, matrons, and janitors of the courthouse and the custodian of the courthouse grounds.

Functions With Respect to Township Government

There are certain connecting links between county and township government, notwithstanding the fact that the governments of the two units are, in most respects, quite independent of each other. The more important functions of

⁸⁵ When the county contributes to the support of a city or town library, the board of county commissioners appoints two members of the governing board of such library. Burns, 1933, sec. 41-514.

⁸⁶ The board also designates one of its own members to serve on the planning commission.

the board of county commissioners which pertain to township government are those of: dividing the county into townships and, subject to certain restrictions, consolidating townships or altering their boundaries; hearing and deciding appeals by persons denied poor relief by township trustees; fixing, within statutory limitations, the number of justices of the peace to be elected in each township; and filling vacancies in township offices.⁸⁷

*Miscellaneous Functions*⁸⁸

Numerous other powers and duties are conferred by statute upon the board of county commissioners in some or all of the counties of the state. In some instances the statutes merely confer permissive powers while in others they impose mandatory duties. While most of the permissive statutes confer complete authority upon the board to act on its own initiative, a substantial number prescribe certain essential conditions precedent to action by the board, such as petition by the voters or freeholders, favorable vote at an election, or a combination of petition and election. In a few instances the board is free to act on its own initiative but is required to act upon proper petition and/or vote.

Subject, in some instances, to qualifications of the types just referred to, the board is authorized, in some or all counties of the state, to: (1) establish a county hospital; (2) establish a county tuberculosis hospital; (3) establish a county orphan asylum, either individually or jointly with contiguous county or counties; (4) provide a house for the accommodation of children who are under custody of the board of children's guardians or the juvenile court; (5) establish a county library; (6) execute bounty bonds, notes, or other evidences of indebtedness when the county borrows money; (7) ap-

⁸⁷ See Burns, 1933, secs. 5-101, 26-701—26-705, 49-405, 49-406, 65-106; Laws of Indiana, 1935, ch. 116, sec. 17.

⁸⁸ With respect to joint functions of the board of commissioners and county council, see *infra*, "The County Council—Functions Shared with County Board."

prove the number of deputies and assistants to be appointed by the various county officers, within limits fixed by law; (8) fix the dog tax within the county at an amount above the minimum prescribed by statute; (9) establish drainage projects, where the proposed work and the land affected thereby are entirely within one county; (10) receive petitions for the incorporation of towns and, upon approval of incorporation by the voters of the territory affected by such a petition, enter an order declaring that the town has been incorporated; (11) approve the official bonds of various county officers; (12) fill vacancies in county offices, except where otherwise provided by statute; and (13) serve ex officio as a county board of finance.⁸⁹

The list here presented might be extended almost indefinitely and is merely offered as being suggestive of the variety of powers and duties devolved upon the board by the General Assembly.

Appeal From Decisions of Board

The statutes provide that any person aggrieved by *any decision* of the board of county commissioners may appeal therefrom to the circuit court.⁹⁰ While the statutory language thus appears upon its face to be universal in its scope, the courts have held that this grant of a general right of appeal applies only to decisions of the board when that body is acting in a judicial capacity, and that appeal will lie from decisions of an administrative nature only if expressly granted by statute. This rule has been succinctly stated by the Supreme Court as follows:

"Where the duty of the commissioners involves judicial action, an appeal lies from its [*sic*] judgment, unless the right of appeal is denied

⁸⁹ Burns, 1933, secs. 16-303, 22-2601, 22-2805, 22-3215, 22-3216, 22-3301, 26-540, 27-104 ff, 41-510, 48-101—48-109, 49-123, 49-405, Laws of Indiana, 1935, chs. 70, 84.

⁹⁰ Burns, 1933, sec. 26-901. Italics are mine. Concurrent jurisdiction over such appeals has quite generally been conferred upon the superior courts in the counties where such courts have been established.

expressly or by necessary implication from the statute creating the duty. Where that duty does not involve judicial action, but consists in the performance of administrative, ministerial or discretionary powers, no appeal lies from such action, unless it is expressly authorized by statute."⁹¹

In practice, appeal is frequently granted by statute with respect to administrative matters—for example, from the action of the board in allowing claims.⁹² Appeal from a decision of the board must betaken within thirty days, by filing the proper appeal bond with the county auditor.⁹³ Even a person who was not a party to the proceeding before the board may appeal from the board's decision if he is aggrieved thereby. In such case, the appellant must file with the auditor, in addition to the appeal bond required of all appellants, an affidavit in which he sets forth the nature of his interest in the matter decided and his contention that he is aggrieved by the decision.⁹⁴

When an appeal is taken, the auditor makes a transcript of the proceedings before the board, which transcript he delivers, together with pertinent papers and documents and the appeal bond, to the clerk of the court to which the appeal is taken. The court tries the case *de novo*, the order of the board being suspended during pendency of the appeal. Upon conclusion of the trial, the court may make a final determination of the proceedings and cause its judgment to be executed, or may remand the case to the board with instructions as to further proceedings.⁹⁵

⁹¹ Board of Commissioners v. Davis, 136 Ind. 503, 505, 36 N. E. 141 (1894). See also Hanna v. Board of Commissioners, 29 Ind. 170 (1867); Platter v. Board of Commissioners, 103 Ind. 360, 2 N. E. 544 (1885), Hastings v. Board of Commissioners, 205 Ind. 687, 188 N. E. 207 (1933).

⁹² Burns, 1933, sec. 26-820.

⁹³ *Ibid.*, sec. 26-902.

⁹⁴ *Ibid.*, sec. 26-901. See Holman v. Robbins, 5 Ind. App. 436, 31 N. E. 863 (1892).

⁹⁵ Burns, 1933, secs. 26-903, 26-907; Barnes v. Wagener, 169 Ind. 511, 82 N. E. 1037 (1907). See also Souder v. Tyner, 189 Ind. 386, 127 N. E. 273 (1920).

II

THE COUNTY COUNCIL

Indiana is one of the few states in which the financial power of the county does not rest with the county administrative board but has been placed in the hands of some other authority.⁹⁶ Prior to 1899, this state followed the customary practice of vesting the board of county commissioners with both administrative powers and the control of finance. However, widespread extravagance and inefficiency during the latter half of the nineteenth century led to the enactment, in 1899, of the County Reform Law, an act which created the county council and vested in that body the exclusive power of levying county taxes, making appropriations, authorizing the borrowing of money, and approving the purchase or sale of real estate of the value of one thousand dollars or more. It is to be noted, however, that the act of 1899 provided for the making of certain kinds of payments out of the county treasury without appropriation by the council. Moreover, various statutes enacted since that date have conferred power upon the county board, with respect to certain specific matters, to make levies, spend money without council appropriation, borrow without council authorization, and buy and sell property without action by the council. Some of these exceptions, however, have been of only temporary duration, and those in existence at the present time are of relatively minor importance.

⁹⁶ County taxes are levied and county appropriations made in Massachusetts by the state legislature, and in New Hampshire and Connecticut by conventions composed of the members of the state legislature from the respective counties. John A. Fairlie and Charles M. Kneier, "County Government and Administration" (New York, 1930), p. 111. In South Carolina, county levies and appropriations are made by the state legislature under a system of reciprocal "courtesy" between the respective county legislative delegations which results in those delegations being the bodies which in fact control county finance. Columbus Andrews, "Administrative County Government in South Carolina" (Chapel Hill, N. C., 1933), *passim*.

The county council is frequently referred to as "the legislative body" of the Indiana county. It must be remembered in this connection, however, that the legislative or policy-determining powers of the county are very limited in their scope, the county, as a *quasi* corporation, serving primarily as a mere administrative unit for the carrying out of policies decreed by the General Assembly and only secondarily as a unit of local self-government. Moreover, subject to the fiscal control vested in the council, it is still the board of county commissioners which determines, so far as such determination devolves upon the county at all, what functions shall be undertaken by the county and how they shall be performed. That the council is not to be considered as the general legislative body of the county seems apparent from the fact, among others, that the General Assembly, when it enacted a county-planning law in 1935, conferred the power of adopting planning and zoning ordinances, not upon the council but upon the board of county commissioners.⁹⁷ It may be true, of course, that control of the purse is ultimately the determining factor in the formulation of policy, but, in view of the considerations just mentioned, it seems hardly proper to designate the council as *the* legislative body of the county.

COMPOSITION

The council consists of seven members, three being elected from the county at large and one from each of four councilmanic districts into which the county is divided by the board of county commissioners. Members are elected at the general November election in the even- non-Presidential year. Their term is four years, beginning on the tenth day after their election. Vacancies are filled by the council itself, the person elected to fill a vacancy serving for the unexpired term.⁹⁸

ORGANIZATION AND SESSION

A newly-elected council meets on the second Saturday after its election for the purpose of organization and the perform-

⁹⁷ Laws of Indiana, 1935, ch. 239.

⁹⁸ Burns, 1933, secs. 26-502, 26-505.

ance of such other business as may come before it. At this meeting the council chooses one of its members as presiding officer and another as presiding officer pro tem, these officers serving for the term of their offices as councilmen. The county auditor is clerk to the council.⁹⁹

The council holds a regular annual session on the first Tuesday after the first Monday in September for the purpose of fixing the county tax rate and making appropriations. Special sessions may be called by the county auditor or by a majority of the members of the council, the statutes prescribing the method by which notice of such sessions shall be given to council members and to the general public.¹⁰⁰

During the year of 1935, four special sessions of the council were held in Fountain County, six in Monroe County, and eight in Marion County.¹⁰¹ In most counties of the state, however, the number of special sessions probably does not normally exceed two or three in any year.

Council meetings are open to the public. A quorum consists of a majority of the members, but the passage of ordinances requires in every case at least a majority vote of all the members, and in certain cases an extraordinary majority.¹⁰²

COMPENSATION OF MEMBERS

Members of the council receive, as compensation for their services, ten, fifteen, or twenty dollars annually, depending

⁹⁹ *Ibid.*, secs. 26-507, 26-509.

¹⁰⁰ *Ibid.*, sec. 26-507.

¹⁰¹ *County Council Record*, Fountain County, Indiana, *ibid.*, Marion County, Indiana, data for Monroe County supplied by Dr. Pressly S. Sikes, Department of Government, Indiana University. The number of special sessions in Monroe County ordinarily does not exceed two in any year, the larger number in 1935 being occasioned by the construction of a new jail. Likewise, one of the special sessions in Fountain County was held for the purpose of authorizing the issuance of bonds for the construction of a new courthouse. The number of sessions in Marion seems to be about normal for that county, or perhaps slightly below the average.

¹⁰² Burns, 1933, secs. 26-508, 26-511. For examples of ordinances requiring an extraordinary vote, see *infra*, "Functions—Making Appropriations."

upon the population of the county, plus ten dollars per day while serving at special sessions.¹⁰³

FORMS OF ACTION

As in the case of city councils, action by the county council may take either of two forms, viz., the ordinance or the resolution. While the distinction between these two forms of action is not always clearly drawn it is well settled that the ordinance is the higher and more authoritative form. The courts have held that the word "ordinance", as used in the County Reform Law, means an instrument in writing—something more than a mere verbal motion subsequently reduced to writing by a secretary or clerk. Where the statutes provide for action by ordinance, as they do with respect to various matters such as the levying of taxes, the making of appropriations, and the authorization of borrowing, action can be taken *only* by ordinance; in such cases, a mere motion or resolution will not suffice.¹⁰⁴ If the statutes prescribe the procedure to be followed in the adoption of ordinances, the statutory requirements must be observed by the council or any action taken will be void. Thus, the courts have held the requirements that appropriation and taxing ordinances be read on two separate days, and that the ayes and nays be taken and recorded on every vote for the appropriation of money or the fixing of tax rate, to be mandatory. Unless these requirements are complied with, and unless the record shows such compliance, the ordinance is invalid. Moreover, if the record fails to show compliance, no presumption will be entertained that the requirements have been met.¹⁰⁵ Since the ordinance is a higher form of action than the resolution, an ordinance cannot be rescinded or repealed by resolution.¹⁰⁶

¹⁰³ Burns, 1933, sec. 26-503. The salary is ten dollars in counties of 35,000 population or less; fifteen in counties of more than 35,000 and not more than 75,000; and twenty in counties of over 75,000.

¹⁰⁴ State v. Board of Commissioners, 165 Ind. 262, 74 N. E. 1091 (1905).

¹⁰⁵ Van Der Veer v. State, 97 Ind. App. 1, 165 N. E. 265 (1929).

¹⁰⁶ Kraus v. Lehman, 170 Ind. 408, 33 N. E. 714, petition for rehearing 84 N. E. 769 (1908).

An examination of the *Council Record* in representative counties indicates that action is usually taken by ordinance whether that form of action is required by statute or not, action by resolution being relatively rare.

FUNCTION

Making Appropriations

The statutes authorize payment out of the county treasury, without appropriation by the county council, of: (1) money belonging to the state and commanded by law to be paid into the state treasury; (2) money belonging to any school fund; (3) money belonging to any township, town, or city, and commanded by law to be paid thereto; (4) money paid into the county treasury pursuant to public improvement assessments upon persons or property in territory less than that of the whole county; (5) "money due to any person, company or corporation, which has been paid into the treasury to redeem from any tax or other sale; or . . . money so due that has been paid in pursuant to authority of law as a tender or payment to the person, company or corporation"; (6) taxes erroneously paid; and (7) "money which any statute expressly provides shall be paid for a purpose therein stated out of the county treasury without being first appropriated for such purpose by the county council." In all other instances, before money can be paid from the treasury, there must exist an unexhausted appropriation therefor made by the council for the year in which the payment is made.¹⁰⁷

It must not be inferred, however, from the fact that the council is the appropriating body of the county that it may therefore appropriate county funds for any purpose and to any amount without restriction. On the contrary, the appropriating power of the council is strictly limited; appropriations may be made only as authorized by law, and any appropriation contrary to law is void.¹⁰⁸ Moreover, it is entirely

¹⁰⁷ Laws of Indiana, 1935, ch. 110. The act excepts from its provisions certain funds received from the state or the federal government for relief, public works, and similar purposes.

within the power of the General Assembly to require the council to make specific appropriations and, where this has been done and the council fails or refuses to act, mandamus will lie to compel the council to perform its statutory duty.¹⁰⁹

The annual county budget is adopted by the council at its regular September session, upon the basis of estimates submitted by the various county agencies and compiled by the auditor for presentation to the council. The statutes provide that if "an emergency should arise" for additional appropriations after the adjournment of the annual session of the council, such additional appropriations may be made at a special session, by two-thirds vote of all the council members, upon estimates prepared and presented in the same manner as that prescribed for regular appropriations.¹¹⁰ The courts have held that, under this provision, the council's determination that an emergency exists requiring additional appropriations is not conclusive, but is reviewable by the judicial branch of government.¹¹¹ By the terms of an enactment of 1935, all additional appropriations, made after the adoption of the regular annual budget, must have the approval of the State Board of Tax Commissioners.¹¹²

Levying Taxes

It is the duty of the council to levy annually, within the limits imposed by law, a tax sufficient to cover the current running expenses of the county, including payment of temporary loans and interest on county indebtedness, together

¹⁰⁸ See Burns, 1933, sec. 26-529; *Daily v. Board of Commissioners*, 165 Ind. 99, 74 N. E. 977 (1905). An appropriation by the council to pay a claim illegally allowed by the board of commissioners does not validate the claim. *Caldwell v. Board of Commissioners*, 41 Ind. App. 40, 83 N. E. 355 (1908).

¹⁰⁹ *State v. Meeker*, 182 Ind. 240, 105 N. E. 906 (1914); *State v. Steinwedel*, 203 Ind. 457, 180 N. E. 865 (1932). With respect to control of county and township officials by mandamus, see *infra*, ch. XIII, "Judicial Control—Special Writs."

¹¹⁰ Burns, 1933, sec. 26-521.

¹¹¹ *State v. Board of Commissioners*, 204 Ind. 484, 184 N. E. 780 (1933).

¹¹² Laws of Indiana, 1935, ch. 150.

with any current deficit which may have been incurred. If the county has bonded indebtedness, it is also the duty of the council to make a sinking fund levy for the ultimate liquidation of such indebtedness.¹¹³ At one time, statutes requiring local governmental units to impose levies of at least a certain minimum rate for specific purposes were quite common, but in 1931, as an economy measure, the General Assembly enacted a statute repealing all of these mandatory minimum levies.¹¹⁴ It must be remembered, however, that mandatory expenditures, such as county salaries fixed by statute, have the same practical effect as mandatory levies. Moreover, while the county council is free from the requirement that it imposes certain minimum levies, it is drastically limited as to the maximum levies it may impose by the provisions of the recently-enacted tax limitation law which specifies that the total tax rate for all taxing units shall not, except in case of an emergency declared by the county board of tax adjustment, exceed one dollar on each hundred dollars of assessed valuation outside incorporated cities and towns, or one dollar and fifty cents per hundred dollars of valuation within incorporated cities or towns.

Authorizing Incurring of Indebtedness

The state constitution limits the borrowing power of counties, as of other "political or municipal" corporations, to two per cent of the assessed valuation of taxable property, and the General Assembly has provided that county indebtedness may not exceed two per cent of the county's assessed valuation *less* mortgage exemptions.¹¹⁵ Within this limit, the coun-

¹¹³ Burns, 1933, sec. 26-532.

¹¹⁴ *Ibid.*, secs. 64-1334—64-1336. This act did not, however, affect those laws requiring school corporations to impose certain minimum levies in order to qualify for state aid. It is also to be noted that a few statutory provisions requiring the imposition of local levies upon petition therefor are still in effect. See "Mandatory Salaries, Tax Levies and Appropriations in Local Governments in Indiana" (Mimeographed Bulletin, Indiana Legislative Bureau, Mar., 1932).

¹¹⁵ "Constitution of Indiana," art. XIII, sec. 1, Burns, 1933, sec. 26-532. Owners of mortgaged real estate are entitled to deduct the amount of the

cil may authorize the issuance of bonds or other obligations of the county, negotiable or otherwise, bearing not to exceed six per cent interest, and running not to exceed twenty years. Bonds may be issued for any lawful corporate purpose except the payment of current expenses, and may, if the council sees fit, be made to mature serially. The ordinance authorizing the issuance of bonds must state the purpose for which the bonds are issued.¹¹⁶

It should be noted, in this connection, that the county council need not approve the issuance of bonds to pay for the construction of roads financed by special assessment, or for those constructed under the Three-Mile Gravel Road Law or the County-Unit Road Law. All such bonds, although issued by the board of county commissioners in the name of the county and commonly referred to as "county bonds", are technically obligations not of the county but of special taxing districts. Even county-unit road bonds, according to the courts, are not bonds of the county such as require the approval of the county council, but are obligations of a special taxing district coextensive with the county and payable by a tax levy upon such districts.¹¹⁷

The council is empowered to authorize temporary loans in anticipation of revenue for the purpose of meeting current expenses, but such loans may not exceed the revenue for the current year. An act of 1933 provides that temporary loans of this character shall take the form of tax-anticipation notes or warrants bearing interest at a rate not to exceed six per cent. The ordinance authorizing the issuance of such notes or warrants must appropriate and pledge to the punctual

mortgage indebtedness from the assessed valuation of the property for purposes of taxation, provided that the deduction is not greater than one-half the assessed valuation of the property and does not exceed in any case, the sum of one thousand dollars. Burns, 1933, sec. 64-209.

¹¹⁶ Burns, 1933, sec. 26-532. See, as to borrowing for poor relief purposes, Laws of Indiana, 1935, ch. 117. Bonds and other evidences of indebtedness issued by local governmental units must be approved by the State Board of Tax Commissioners if the rate of interest exceeds five per cent. Burns, 1933, sec. 64-1332.

¹¹⁷ Hull v. Board of Commissioners, 195 Ind. 150, 143 N. E. 589 (1924).

payment thereof, from the current revenues in anticipation of which they are issued, a sum sufficient to extinguish the indebtedness. Such notes or warrants, which are tax-exempt, are to be sold by the auditor to the highest bidder, after proper notice of the sale thereof has been published. In no case, however, may they be sold for less than par and accrued interest.¹¹⁸

Authorizing Sale and Purchase of Real Estate

The fourth function conferred upon the council by the County Reform Law is that of approving the purchase and sale of real estate. With certain minor exceptions which have been created by subsequent enactments, no purchase or sale of real estate may be made by the county, where the value is one thousand dollars or more, until the council has, by ordinance, authorized such sale or purchase and fixed the term and conditions thereof.¹¹⁹

Fixing Compensation of Deputy Officers

Under the recently-enacted county salary law, it is made the duty of the council to fix, within limits prescribed by the statute, the compensation of deputies and assistants appointed by the various county officers.¹²⁰

Functions Shared With the County Board

A few functions are conferred by statute upon the board of commissioners and council jointly. Thus, the two agencies, acting together: approve the acceptance of lands given or devised to the county for purposes of a public forest; hold hearings on petitions for the condemnation of school buildings as unfit for use, and decide for or against such condemnation,

¹¹⁸ Burns, 1933, secs. 26-532, 26-1022. For legislation of 1933 authorizing the re-funding of maturing obligations, see *ibid.*, secs. 26-1015—26-1021, 61-501—61-507.

¹¹⁹ *Ibid.*, sec. 26-534. For an exception, see *ibid.*, secs. 26-2201—26-2210.

¹²⁰ Laws of Indiana, 1935, ch. 84. This law, amended by the 1935 statute, was first enacted in 1933.

subject to appeal to the circuit or superior court; and determine, upon proper petition, the order in which county highway projects shall be established and constructed, in the event that two or more petitions for such projects are on file with the auditor at the same time.¹²¹

¹²¹ Burns, 1933, secs. 28-3001—28-3006, 32-105, 36-327—36-331.

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