Cities and Towns—Budget—Constitutionality.

City budget law provided by chapter 121, laws of 1931, becomes effective July 1, 1932.

Said act is constitutional and city officers have no power to question its constitutionality.

Mr. G. M. Robertson, August 1, 1932.
State Examiner,
Helena, Montana.

My dear Mr. Robertson:

You have submitted to me a copy of a resolution passed by the city council of the City of Livingston wherein the city clerk is directed not to install the city budget and accounting system required by chapter 121 of the laws of 1931, upon the ground that the city attorney of Livingston has advised the city council that the law did not become operative until 1933.

You also submitted an opinion of the city attorney wherein he advised the city council that the city budget law is unconstitutional for the reason that the legislature has delegated to the state examiner the

power to prepare forms and blanks to be used in connection with carrying out the provisions of the act. You inquire if either of these contentions are correct.

The contention that the act does not become effective until 1933 is based on section 14 which provides that the act shall be in full force and effect "from and after July 1, 1932." It is claimed that inasmuch as the clerk must notify each official in charge of an office, department, service or institution of the municipality "on or before the 1st day of July of each year" to submit itemized estimates of revenues and expenditures required by his office, department, service or institution for the current fiscal year it is impossible to give such notice on or before the 1st day of July of 1932 because the act, under and by virtue of section 14, does not take effect until after the first day of July, 1932, and therefore the first year that the notice could be given would be the year 1933. The words "from and after" are, unless the context of the statute in which they appear indicates to the contrary, generally held to exclude the date mentioned as the one from and after which the act is to take effect, but where the intention of the legislature is made manifest by the context of the act to include the date specified as the one "from and after" which the act is to take effect the courts will give the quoted words that effect so that instead of taking effect from the beginning of the first day after the date mentioned the act will take effect at the beginning of the date mentioned the same as if the statute had read "on and after" the date mentioned.

An analysis of the act will disclose that it was the intention of the legislature that it should go into effect on the first day of July, 1932, and that its provisions should be followed by municipal officers during the year 1932. The very provision of section 14 that the act should take effect from and after July 1, 1932, indicates that its provisions were not to be held in suspension so that they could become operative for the first time during the fiscal year 1933. Had the legislature intended such a long delay in the operation of the provisions of the act there would have been no reason for its fixing an effective date prior to 1933. The act provides that the fiscal year of every city commences on the first day of July and ends the last day of June, and I have no doubt it was the intention of the legislature to make the provisions of the act operative with the commencement of the fiscal year 1932, which is July 1st instead of the fiscal year commencing July 1, 1933.

The legislature had the option of choosing one of three alternatives in declaring when the act should become effective: first, it could have made the act effective from and after its passage and approval, or second, it could have said nothing about when it would take effect, thereby bringing into force section 90 R.C.M. 1921 which would make the act take effect on July 1, 1931, or, third, it could have specified any date after its passage and approval as the date when the act should take effect. It is reasonable to suppose that the legislature did not choose either of the first two of these alternatives for the reason that it deemed the time insufficient to permit of the installation of the budget system for operation during the fiscal year 1931. It did choose the third

alternative and it is reasonable to suppose that in doing so it deemed the period from the passage of the act to the beginning of the fiscal year 1932 as sufficient to make the preparation necessary to be made in order to install the system for use during the fiscal year 1932 and subsequent years. No plausible reason suggests itself why the legislature should choose the day after the last day on which notice is required to be given to the officers to submit estimates as the day when the act should take effect as by its provisions that day would be too late for giving the notice and although the act would be, theoretically, in effect on the second day of July, 1932, in its practical operation it would lie dormant and could not be enforced until the subsequent fiscal year. Under such a construction another legislative assembly would have convened and passed into history before any action had been taken under the act—a most unusual situation as regards legislation of this kind.

By construing section 14 as meaning that the act takes effect on the first day of July, 1932, the notices could be given on that day and the act put into operation during the fiscal year 1932, and it is my opinion that the courts would hold this to be the intention of the legislature.

As to the contention that the act is unconstitutional because of the claim that the legislature has delegated legislative powers to the state examiner, it is my opinion that this contention is not sound.

The provision requiring the estimates to be submitted on forms prescribed by the state examiner is not the main purpose of the legislation but it is only an incident to the main purpose which is to ascertain the amount of probable revenue and the probable expenditures and to limit the expenditures to the anticipated revenue. The provision for the state examiner supplying the forms is one that has for its purpose the production of uniformity throughout the state in the method of carrying out the main provisions of the act. The state examiner cannot change the provisions of the act by the preparation of his forms and whatever forms are prepared by him must be adaptable to carrying out what is commanded to be done by the provisions of the act. These forms cannot change the provisions of the act but their sole purpose is to aid the various municipal officers in carrying out what is commanded by the act. For reasons which will hereinafter appear I will not take the time to set forth the authorities which sustain the proposition that the legislature may delegate the preparation of forms to an executive officer for the purpose of aiding in the execution of the provisions of a statute. It is my opinion that there is no merit to the contention that this provision of the act renders it unconstitutional.

Furthermore, it does not lie within the power of the city officers to question the constitutionality of this act. Some of the authorities in other jurisdictions hold that a city being the creature of the legislative assembly its officers cannot question the validity of an act passed by their superior—the legislative assembly. In other jurisdictions the rule is somewhat modified and it is held that a public official may only question the constitutionality of a law where if he performed some act commanded by the law or refrains from performing some act which he is commanded to refrain from performing he would subject himself to liability because

of a constitutional provision at variance with the commands of the act but that where his duties are merely of a ministerial nature and are so subordinate in character that no injury or responsibility can possibly result to him by complying with the terms of a statute, the constitutionality of which is questionable, or whose duties are merely ministerial and incidental to the main purposes of the statute and no violation of duty can be imputed to him by reason of his obedience to the statute he will not be entitled to raise the question of the unconstitutionality of the statute. The authorities in the various jurisdictions are collated in the main opinion and dissenting opinions in the case of State ex rel Atlantic Coast Line R. Co. vs. State Board of Equalization, reported in 94 So. Rep. at page 681.

Our supreme court, in the case of State ex rel Lockwood vs. Tyler, 64 Mont. 124, 208 Pac. 1081, has said:

> "There is a conflict among the authorities as to the right of a ministerial officer to raise the constitutionality of an Act of the state legislature. It will do no good to review them. The better considered cases hold and the greater weight of authority is, that a ministerial officer to whom no injury can result and to whom no violation of duty can be imputed by reason of his complying with a statute will not be allowed to question its constitutionality. The rule is well and clearly stated in 12 Corpus Juris, section 183, page 765, as follows: 'There was much conflict of authority as to whether, in an action to enforce the performance of a statutory duty by a ministerial officer, he may question the constitutionality of the statute imposing a duty. In some cases this right is denied to ministerial officers, both on the ground that their rights are not affected by the statute and on that of public convenience, while in other cases ministerial officers are permitted to question the constitutionality of a statute imposing a duty on them, and this rule is defended both on the ground of public convenience and on the ground that the officer may incur personal liability by executing a void statute. The better doctrine, supported by an increasing weight of authority, is that a mere subordinate ministerial officer, to whom no injury can result and to whom no violation of duty can be imputed by reason of his complying with the statute, will not be allowed to question its constitutionality; but that the constitutionality of a statute may be questioned by an officer who will, if the statute is unconstitutional, violate his duty under his oath of office, or otherwise render himself liable, by acting under a void statute.' To the same effect is 6 Ruling Case Law, section 92, page 92."

The municipal officers of the cities of this state cannot incur any liability or violate any duty under their oath of office by complying with the statute in question. It merely commands the establishment of a budget system which modern experience has shown to be beneficial in both private and public business and the only liability that could be incurred by the officials would be for failure to comply with the statute.

No officer will be heard to say in the courts that the law is unconstitutional because if he fails to comply with it he will incur liabilities. He must base his attack on the constitutionality upon the ground that if he complies with the act he will violate his duty or incur a liability. By following this act no officer will violate his duty nor will he incur any liability; therefore, he is not in a position to contend in the courts that the act is unconstitutional nor can he justify his failure to comply with the act and install the budget system and operate it upon his mere contention that the act is unconstitutional.

For the reasons hereinabove stated, it is my opinion that the officers of the city of Livingston are required to comply with the city budget act above mentioned and that the resolution of the city council of the city of Livingston is null and void; that until the budget system is installed no expenditures can be made nor liabilities incurred by the city and no claim may be approved or warrant issued and if any claims are approved and warrants issued the officers so doing are liable to the city four-fold the amount of such claim or warrant, all as provided in section 7 of the act, and that any officers failing to file the estimates are liable to the penalty of $10.00 for each day of delay, not exceeding a total of $50.00 in any one year as provided in section 3 of the act.

Very truly yours,

L. A. FOOT,
Attorney General.