

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?”

Municipal corporations such as enumerated above can only exercise these powers granted them by the legislature in express words, those necessarily implied in or incident to powers expressly granted, or those essential to the declared objects and purposes of the corporation. Therefore, the answer to your question depends upon whether such express or implied power has been granted such municipal subdivisions of our government. In each of the subdivisions enumerated above there are express statutory grants of power to the unit of government to dispose of real or personal property which the unit owns. I call your attention to section 26-2008, Burns Annotated Statutes, 1933, concerning the disposition of county property by the county commissioner which reads as follows:

“The board of county commissioners shall not be authorized to sell any *county property, either personal or real*, except at public auction, after advertising such property for sale sixty (60) days in at least one (1) newspaper of general circulation in the county where said property is for sale, and by posting up notice of said sale at the county court house, in a conspicuous place, giving the terms, time and place of sale, and a description of the property to be sold.”

Similar provision is made for the sale of township property by the township trustee, by section 65-125 Burns Annotated Statutes, 1933, which reads as follows:

“No township trustee *shall sell any real or personal property of such township* except at public auction, after notice for thirty (30) days prior to the day of sale, by posting notices (thereof) at six (6) public places in said township of the time, terms and places of said sale, giving a description of the property to be sold: Provided, That any gravel or other road material belonging to such township may be sold by the trustee of such township, with the approval of the advisory board, without giving notice and without offering such gravel or other road material for sale at public auction. All money derived from the sale of such gravel or other road material shall be carried into the township treasury and shall constitute a part of the township road

fund and shall be disbursed as the other moneys belonging to such fund are disbursed." (Acts 1897, Ch. 141 § 1, p. 218; 1915, Ch. 39, § 1, p. 91.)

Like provisions are also made by statute concerning the disposition of a city of its property. I refer you to sections 48-1407, clause 50, which reads as follows:

"To authorize the alienation and conveyance of any property, *real or personal*, belonging to such city, whether used for public and governmental or for private purposes: Provided, That no such property shall be sold until the same has been appraised by three (3) disinterested freeholders of such city appointed by the judge of the circuit court in the county in which such city is located; and no sale or conveyance of any such property shall be made for a less sum than such appraisement, and, in the case of real estate, only by a two-thirds vote of the common council; such conveyance shall be by the mayor, in the name of the city, attested by the city clerk and with the seal of the city: And provided, further, That where it is shown to the common council that any personal property does not exceed in value the sum of one hundred dollars (\$100), the council may authorize the sale thereof without an appraisement." (Acts 1905, Ch. 129, § 53, p. 219.)

By a reading of the foregoing it is clear to me that the legislature in each case did not seek to deny the governmental units the power to alienate their real and personal property, but recognizing such inherent power to so dispose of property, did regulate the mode of sale and transfer. The judicial decisions of this state, while not passing precisely upon any of the foregoing enactments have upheld the power of the subsidiary governmental units to sell their property not held in a governmental capacity.

Terre Haute v. Terre Haute Waterworks Co., 94 Ind. 305;

Shannon v. O'Boyle, et al., 51 Ind. 565;

O'Boyle v. Shannon, 80 Ind. 159.

I quote the following language from the Shannon case wherein the Indiana Supreme Court passed upon the legality of the sale of corporate stock held by Vigo County:

“Municipal corporations possess the *incidental or implied right to dispose* of the real or personal property of the corporation, of a private nature, unless restrained by statute. Dillon on Mun. Corp., Sec. 445.” (Our italics.)

The validity of this same sale was again before the Indiana Supreme Court in the O’Boyle case in affirming the proposition stated:

“When this case was here before it was held that the commissioners of Vigo County had power to sell stock in controversy, and that the exercise of that power was a matter which rested in their discretion; that their power to make such a sale was *implied from the nature of their organization* and from general powers conferred upon them by statute.” (Our italics.)

From the language of the two foregoing cases, decided before the enactment of the above quoted statutes, it is clear that the legislature recognized this power in the units of local government to sell their personal property and in the passage of such acts expressly affirmed the existence of the power. These sections, therefore, serve as an express grant of power to counties, townships and cities to sell their personal property subject to the restrictions contained therein. It is to be noted that in each of the three instances the units of local government are subjected to practically identical limitations upon the exercise of this power.

In view of the foregoing I am of the opinion that a county, township or city has the power to sell its personal property and the question narrows down to whether a deposit in a closed bank comes under the classification of “personal property” as used in the statute. The words “personal property” are a generic term, and are so used in the three sections above. As italicized, the property subject to sale is either “personal or real” and there are no sections of definitions in such acts defining the term. What the legislature precisely intended to be

included under the term is best decided by looking to other statutes defining personal property and judicial decisions on the matter. The legislature has defined the term as concerns statutes relating to civil procedure as follows:

“The phrase ‘personal property’ includes goods, chattels, evidence of debt and things in action.” (Burns Ann. Statutes, 1933, Sec. 2-4701.)

In a judicial determination of the question of what was included within the words “personal property” as used in a statute it was said:

“The word ‘property’ includes both real and personal, and the words ‘personal property’ includes money, chattels, goods, evidences of debt, and things in action.” (Nurdyke v. Charlton, 108 Iowa 414.)

In view of the foregoing it is my opinion that the legislature intended the words “personal property” as used in the three sections quoted above to include those things usually included within the term as defined by other legislative enactments and by judicial decree. This being true, the right of a county, township, or city to sell its personal property includes the right to sell deposits in a bank in the process of liquidation if such frozen assets are included within any of the enumerated types of assets which are included within the term “personal property,” i. e. money, chattels, evidences of debt, or things in action. It is beyond question that the deposit of county funds in a bank establishes a debtor creditor relation between the parties and thereby arises a chose or thing in action in favor of the depositor. “Things in action” being included within the objects and rights that make up personal property, it follows that a county deposit in a bank in liquidation is an article of property belonging to such county.

Bullowa v. Gladding, 40 R. I. 147, 100 H. 249.

Therefore, it is my opinion that the legislature intended by the use of the words “personal property,” in the statutes relating to power of a municipal corporation to sell such, to include all objects and rights usually contained therein. And further, that such being the case the counties, townships, or cities possessing the right to sell their personal property have the right to sell their deposits in closed banks if the statutory procedure for such sales, as set out by statute, are complied with.