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BONDS, COUNTY REVENUE—ISSUED PURSUANT TO SECTION 2293-16a G. C.—IF SOLD BY COUNTY UNDER OPTIONAL PRIVATE SALE PROVISIONS OF SECTION THEY ARE NOT RESTRICTED TO MINIMUM PRICE FOR WHICH THEY MAY BE SOLD.

SYLLABUS:

County revenue bonds issued pursuant to Section 2293-16a, General Code, if sold by the county under the optional private sale provision of said section are not restricted as to the minimum price for which they may be sold.

Columbus, Ohio, December 12, 1949

Hon. Carson Hoy, Prosecuting Attorney
Hamilton County, Cincinnati, Ohio

Dear Sir:

This will acknowledge receipt of your request for my opinion which reads as follows:

> "We are in the process of making preliminary studies and investigations leading to the ultimate issuance of county revenue bonds pursuant to the provisions of H. B. 406 of the recent General Assembly, now incorporated in the General Code of Ohio as General Code Section 2293-16a. We understand that it is customary for prospective bond buyers to quote such bonds on an 'interest cost' basis whereby the only variable factor is the ultimate cost of financing and the actual price per bond, the number of bonds and the actual coupon interest can be adjusted either upward or downward to produce the 'interest cost' quoted.
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> This brings in question paragraph 2 of the above section of General Code relative to the option of the county to sell such bonds at private sale. This paragraph seems to provide that such

> bonds 'shall be signed and sealed as provided in the uniform bond act and may be sold as provided in that act, or at private sale at the option of the county'.
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> We are familiar with that provision of the uniform bond act which requires bonds at private sale to be sold at not less than par and accrued interest. The question arises as to whether or not revenue bonds which may be sold at the option of the county at private sale, are subject to that provision of the uniform bond act requiring sale at not less than par and accrued interest.
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> Investigation of this question with various investment bankers reveals the possibility of getting a better price and lower actual financing cost if the bonds can be so arranged as to number and interest coupon that they can be offered by the broker at somewhat less than par.
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> Inasmuch as the new legislation relating to revenue bonds and the sale thereof at private sale would seem to be the first instance in which counties have been authorized to engage in this practice and inasmuch as we are now engaged in definitive studies to determine the actual cost of those operations for which revenue bonds may now be issued, your opinion on the legality of arranging to sell revenue bonds at private sale for less than par will be appreciated."

Section 2293-16a, General Code, to which you refer in your letter, is a new section which was enacted by the 98th General Assembly as Amended House Bill No. 406. This section authorizes the issuance of revenue bonds by counties for the acquisition, construction or extension of sewers, sewage treatment or disposal works, or public water supply or waterworks systems, and for the acquisition, construction or operation of garbage or refuse collection or disposal systems. The second paragraph of said section reads as follows:

> "Such bonds shall bear interest at not to exceed six per cent per annum, payable semi-annually, shall mature in annual or semiannual installments within forty years commencing not later than five years, the amount of annual interest plus the amount of annually maturing principal to be substantially equal, shall be signed and sealed as provided in the uniform bond act and may be sold as provided in that act, or at private sale at the option of the county. Such bonds may be callable, and if so issued may be refunded."

Such bonds if sold in accordance with the Uniform Bond Act would be subject to the limitations contained in Section 2293-29, General Code, and related sections, which prohibit the sale of notes or bonds for less

than the face value thereof with accrued interest. The question which you raise pertains to the minimum price for which such bonds may be sold if the issuing authority elects to sell such bonds at private sale.

It will first be noted that no direct limitation on the selling price of such bonds is specifically provided in Section 2293-16a, General Code. It must then be determined whether the limitation as to the selling price of bonds contained in Section 2293-29 would apply to the optional private sale provision of Section 2293-16a. It is often urged that the Uniform Bond Act must be construed as an entirety and that each of the sections contained therein are inter-related and dependent. Amended House Bill No. 406 sets forth its purpose to be:

> "To supplement the uniform bond act of the General Code by authorizing counties to issue bonds payable only from special revenues."

In conformity with this purpose the enacted measure was assigned the above mentioned General Code number, which places it among the Uniform Bond Act provisions of the General Code. The first sentence of Section 2293-29, General Code, reads as follows:

> "No bonds or notes shall be sold for less than the face value thereof with accrued interest."

This statutory provision, therefore, provides a strong argument that bonds issued under the provisions of this new section of the Code and sold at private sale could not be sold for less than the face value and accrued interest.

Pertinent to any discussion of the disposition and sale of bonds and obligations of political subdivisions is the treatment of that question generally, as contained in 43 Am. Jur., at page 373, which contains the following statement:

> "The subdivision officials are vested with a discretion as to the method of sale or disposal, where the controlling statutes do not require the bonds to be sold in any particular manner, and the courts, in the absence of fraud or an abuse of the discretion vested in such officials, have no power to control their action. Thus, where the power is granted without restriction, the authorities of the municipality are left free to dispose of them at such prices as they can obtain. They have the implied power to agree upon the terms of sale. In some instances, however, although the statutes are silent as to specific method of sale, thus allowing exercise of

discretion in many respects, they nevertheless forbid sale below par, which mandate must be observed."

If, then, the above quoted sentence of Section 2293-29 may be construed as a mandatory provision applicable to all bonds issued by a subdivision, unless specific exception is made by the statute authorizing the issuance and sale of bonds for particular purposes, it would follow that no bonds issued by such subdivision, in the absence of a statutory exception, could be sold below their face value plus accrued interest.

It will be observed, however, that the remaining portion of the first paragraph of said Section 2293-29 relates to bonds sold by competitive bidding and provides for the disposition of bonds remaining unsold for want of bidders. Said remaining portion of the first paragraph of said section reads as follows:

> "The highest bid, or if bids are received based upon different rates of interest than specified in the advertisement (,) the highest bid based upon the lowest rate of interest, presented by a responsible bidder, shall be accepted by the taxing authority, or in the case of a municipal corporation by the fiscal officer thereof. But in case a bid is accepted based upon a rate of interest other than that provided for in the ordinance or resolution authorizing the issue of such bonds or notes such acceptance before taking effect must be approved by resolution of the taxing authority, which resolution shall be certified to the county auditor; in such case bonds or notes may be issued bearing the rate of interest provided for in such accepted bid without further amendment of the ordinance or resolution. When bonds or notes have been once advertised and offered at public sale, as provided by law and they or any part thereof remain unsold for want of bidders, those unsold may be sold at private sale at not less than their par value and accrued interest thereon bearing a rate of interest not greater than that provided in the resolution or ordinance authorizing the issue of such bonds or notes."

Unless one were to disregard entirely the ordinary rules of grammatical paragraph structure that a paragraph is a distinct part of a discourse or writing, any section or subdivision or writing or chapter relating to a particular point, whether consisting of one or many correlated sentences, he would be impelled to conclude that the limitation upon the selling price of bonds and notes contained in said section related only to those bonds which were sold by competitive bidding. This reasoning is fortified by the fact that the legislature in the context of the same paragraph saw fit to specifically provide that bonds sold at private sale, be-

cause of the lack of bidders at public sale, could not be sold for less than their par value and accrued interest. It will be noted further that Sections 2293-27, 2293-28 and 2293-29b, General Code, each provide for sales of notes and bonds of taxing authorities by other than public sales thereof, and in each instance the legislature has deemed it necessary to specifically provide that such sales may not be for less than par and accrued interest.

In view of the foregoing, I am compelled to the conclusion that the limitations upon the selling price of notes and bonds contained in the first sentence of Section 2293-29, General Code, relates solely to bonds issued and sold at public sale after advertising for bids pursuant to the provisions of the Uniform Bond Act, and does not apply to bonds sold at private sale under the optional provision of Section 2293-16a, General Code.

Many interesting and complicated problems arise involving the sale and disposal of public bonds at less than par or face value. Statutes permitting or forbidding the practice are more or less prevalent, presenting problems of construction, and in their absence questions of implication arise to be solved by the courts. We are confronted here with one of those problems in which there is an absence of statutory provision permitting or forbidding the private sale of such bonds at less than face value. It is generally conceded that, in the absence of statutory restrictions, a political subdivision invested with authority to issue bonds has the power to sell the bonds for less than par. (See 43 Am. Jur. at page 373, supra, 91 A. L. R. 9)

It is not unusual for statutes authorizing the issuance of such bonds to contain provisions, as in the statute under consideration here, relating to the interest which the proposed bonds shall bear. The courts in considering the question of whether or not such a provision in the statute imposes a restriction by implication upon the price at which the bonds may be sold have reached three distinct conclusions. A few have held that statutes fixing a maximum interest rate restrict the sale of the bonds for a price less than par, the theory in such cases being that the sale of bonds at a discount will have the effect of avoiding the limitation on the interest rate. These cases argue that if sale is made at a discount, the rate of interest actually paid by the issuing authority will necessarily be greater than the specified coupon rate and may be greater than the maximum allowed by the statute. A vast majority of the jurisdictions hold that such a provision will not prohibit sale for less than par. These jurisdictions are divided, however, in the effect of statutory provisions relating to

interest rates upon the power to sell municipal bonds for less than par. Under one view it is held that a political subdivision is without power to sell its bonds at such a discount that the rate of interest actually paid on the money received by it exceeds the maximum rate prescribed by the statute. Under the other view the rate of interest specified in the statute is held to have reference only to the nominal rate to be expressed in the bonds. (43 Am. Jur. 379, 91 A.L.R. 12) I am apprised of no decisions of the Ohio courts on this point. This is understandable in view of express provisions in the several statutes authorizing the issuance of bonds heretofore enacted, providing that the bonds so authorized shall not be sold below par except in certain instances under specified conditions and within prescribed limitations.

In Opinion No. 468 for the year 1949 I had occasion to consider a question of the sale of notes issued by township trustees for the purchase of firefighting equipment under authority of Section 3298-54, General Code, with respect to the meaning of the words "shall be offered for sale on the open market." The conclusions which I reached in that opinion are disclosed by the syllabus as follows:

> "Notes of a township issued by township trustees for the purchase of firefighting equipment under authority of Section 3298-54 of the General Code of Ohio are not required to be advertised or offered for public sale but may be offered for sale by the trustees by private negotiations through normal commercial channels customarily used in the sale and exchange of negotiable instruments and sold at such price as may be acceptable to them or at the prevailing price for similar instruments if higher than the lowest acceptable price."

Section 3298-54 contains a limitation as to the amount of interest such notes may bear. The manner of sale specified in that section of the Code appears to exclude all implications of a limitation upon the selling price, and since the question presented for determination did not involve a minimum selling price of the instruments of indebtedness, I did not deem it necessary to discuss the problem of implied limitation upon such price.

I am inclined to the view, however, that the line of authorities which support the theory that the rate of interest specified in a statute authorizing the issuance and sale of municipal bonds but which fails to prohibit the sale of such bonds for less than par or some other specified figure will not be implied as a limitation on the selling price of bonds issued thereunder but relates only to the nominal or coupon rate to be expressed in the bonds.

I am impressed with the statements of the Supreme Court of California, speaking through Chief Justice Waste, in the case of Golden Gate Bridge & Highway District v. Filmer, et al., 217 Cal., 754; 21 Pac. (2nd), 112; 91 A.L.R., 1, commencing on page 758 of the California Report, which reads as follows:

> "We deem it unnecessary to discuss at length or refer to the many decisions cited by the respondents on this phase of the question. They have been thoroughly discussed and distinguished by counsel on the respective sides. They are distinguishable in large measure by peculiar facts and the language of statutes under consideration. While some of them do support the respondents' position, we are of the view that the contention of the petitioner is fundamentally sound in theory, is supported by the general weight of authority, and has the approval of procedure and practice generally accepted in this state under statutes containing provisions similar to those of the Bridge Act. The practice has borne the test of practical construction which has been long given by the officers of the state charged with the supervision and control of the issuance of such bonds, and is approved by the action of the Legislature, which has left in many instances, the sale and disposition of them to the business judgment and good faith of local officers, to be controlled by financial conditions. The nature of municipal and district bonds and securities issued for definite purposes, the procedure under which they are issued, and the burdens placed upon the issuing communities are definitely understood. They are recognized as a commodity on the market, and pass from hand to hand on delivery, being commonly treated as a species of tangible property in themselves. Westinghouse Electric & Mfg. Co. v. County of Los Angeles, 188 Cal. 491, 494, 205 P. 1076.
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> Petitioner, in its brief, has set forth at considerable length the distinction between the rate of yield to a purchaser of bonds and the coupon rate, and has also quoted at length from decisions and from works bearing on various questions relating to the sale of bonds. This discussion involves mathematical calculations, and sets of examples of computations commonly made in ascertaining from a buyer, by resort to bond tables and other sources of information ordinarily used, the rate of yield that will be obtained upon the purchase of bonds at given prices and according to the coupon rate. It seems to be definitely settled in the financial world that the three essential characteristics of such bonds are principal amount, coupon rate, and maturity. The Supreme Court of the United States, in Old Colony R. Co. v. Commissioner of Internal Revenue, 284 U. S. 552, 52 S. Ct. 211, 76 L. Ed. 484, took the view, in regard to a contention as to the meaning of 'interest,' that it could not believe that Congress, in using the

word in the act, had in mind any concept other than the usual, ordinary, and everyday meaning of the term, or that it was acquainted with the accountants' phrase 'effective rate' of interest, but no doubt used it in the common understanding that interest means what is usually called interest by those who pay and who receive the amount so denominated in bond and coupon.

It seems to us that since the language in the Bridge Act and in the proposition submitted to the electors clearly refers to one of the essential characteristics of bonds, to wit, the coupon rate, there can be no justification for disregarding the natural meaning of the language used and its evident purpose, and that it must be held that the language of the act and of the proposition refers directly to the description and form of the bonds to be issued.

In addition to failing to provide that the board of directors may not sell the bonds at less than par, the Bridge Act (section 16 (St. 1923, p. 462) provides that, if the vote of the district is 'favorable to the incurring of such indebtedness, then the board of directors may by resolution at such time or times as it deems proper provide for the form and execution of such bonds, and for the issuance of any part thereof, and may sell or dispose of the bonds so issued at such times or in such manner either for cash in lawful money of the United States of America, or its equivalent as it may deem to be to the public interest . . .' We are of the view that the general rule, as established by the authorities, applies to this case, and is that so well stated by the Supreme Court of Kansas in Rowland v. Deck, 108 Kan. 440, 195 P. 868, 871. There, a taxpayer sought to enjoin the issuance of county bonds bearing coupons at the rate of 5 per cent. per annum (the maximum rate of interest permitted by the enabling act), which had been sold at a discount from par. The court discussed many decisions from its own and from other jurisdictions, some of which are relied on by the respondents here, and said: 'Where it is desired by the lawmaking body to restrict the amount for which bonds may be sold, the custom in this state and elsewhere is general to insert a clause in the statute to the effect that par or better must be obtained for them; this practice is so common that the omission of that or some other provision expressly covering the subject creates a strong presumption that the Legislature was content to rely upon the good faith and business judgment of the local officials to see that the bonds brought substantially the market price, which would necessarily be controlled by financial conditions.' As a conclusion, the court held that where a statute authorizes the issuance of bonds bearing not more than a stated rate of interest, and provides for their sale without making an express requirement as to the amount they shall bring, bonds issued thereunder, which bear the maximum interest named, may be sold at a discount, if the sale is made on

> the best terms obtainable. In exact accord with this view is the decision of the Court of Appeals of Maryland in Stanley v. Mayor of Baltimore, 146 Md. 277, 126 A. 151, 155, 130 A. 181. The court said: '. . . where a statute authorizes the issuance of bonds bearing not more than a stated rate of interest, and provides for their sale without making an express requirement as to the amount they shall bring, bonds issued thereunder which bear the maximum interest named may be sold at a discount if the sale is made on the best terms obtainable.' The Supreme Court of Oregon has said:
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> 'The weight of authority is to the effect that the sale of municipal bonds below par is not illegal, unless the act or ordinance authorizing the issue expressly directs that they shall not be sold for less than par.
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> " 'That the bonds of a municipal corporation may be sold by it for less than par must be regarded as the general understanding of lawmakers of the states, as well as the officers of the municipalities, because, when it is desired to prevent such sale, that fact is incorporated in the enabling act or in the ordinance or resolution providing for the issue of the bonds." Simonton on Munic. Bonds §146.' Kiernan v. Portland, 61 Or. 398, 122 P. 764, 765, Ann. Cas. 1914B, 255."

It has definitely been the custom of our legislature to insert restrictions in the statute authorizing the issuance of bonds by political subdivisions. Their failure to do so in this instance when the bonds are to be sold privately would appear to raise a greater implication that no limitation upon their selling price was intended than that the rate of interest specified in the statute would create an implied limitation upon the selling price.

In view of the foregoing, it is my opinion that bonds issued pursuant to the provisions of Section 2293-16a, General Code, when sold pursuant to the optional private sale provision of said section are not restricted as to the minimum price for which they may be sold.

Respectfully,

HERBERT S. DUFFY,
Attorney General.