No. 16544

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

WILLIAM H. McNICHOLS, as Auditor of the City and County of Denver, Plaintiff in Error, v. CITY AND COUNTY OF DENVER, a body politic and corporate, QUIGG NEWTON, as Mayor of the City and County of Denver, and T. P. CAMPBELL, as Manager of Improvements and Parks of the City and County of Denver, Defendants in Error.	**Error to the District Court of the City and County of Denver, Colo.** Honorable Joseph J. Walsh, Judge. Opinion by Mr. Justice Jackson, En Banc.

PETITION FOR REHEARING AND BRIEF OF COLORADO MUNICIPAL LEAGUE AND THE CITIES OF PUEBLO, COLORADO, AND COLORADO SPRINGS, COLORADO.

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INTRODUCTION

The League and the municipalities on this Brief are deeply concerned about certain points decided by the court in this case. We are particularly concerned about the holding that the pledging of property, to be used for a self-liquidating project and to be acquired by a municipality from the proceeds of revenue bonds, constitutes a "debt" as that word is used in the constitutional sense. Colorado cities and towns, in common with those throughout the country, are finding it increasingly necessary to

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construct for the safety, health, welfare and convenience of their citizens, innumerable public projects which cannot or will not be provided by private business. Typical projects are public utility systems to provide sewers, electricity, mass transportation, etc., air fields, parking facilities, field houses, swimming pools, and other public recreational facilities.

All such municipalities, by wise and farsighted enactment of paramount law, are restricted in the amount of public debt which may be assumed.

These constitutional, charter or statutory debt limitations apply to bonds for the payment of which the issuing municipality pledges its taxing power. Since these general obligation bonds are made liens against lands situate in the municipality, there is established a limit to the amount of such liens in proportion to the assessed value of such property. This matter is discussed in *Seaboard Airlines R. R. Co. v. Peters* (Fla. 1949), 43 So. (2d) 448, 455, a leading case involving the enlargement and improvement of the Miami International Airport.

Therefore, if many of these public improvements are to be made available to the urban citizen, they must be financed by self-liquidating plans which are not subject to municipal debt limitations. This problem was considered and decided by this Court in *Shields v. Loveland,* 74 Colo. 27, 218 Pac. 913, and *Searle v. Haxtun,* 84 Colo. 494, 217 Pac. 629, which we shall hereinafter discuss in greater detail.

In the instant case, a self-liquidating parking project to be paid off from revenues is the major promise and the security offered the bond purchasers as part of the inducement to advance the required funds, is a corollary. If this case turns upon the mortgage feature, involving no encumbrance of property presently owned by Denver, it seems clear to us that the tail is wagging the dog and that the end to be attained, the

legality and validity of which are not contested, is virtually precluded by eliminating the most obvious and feasible means thereto.

We are also disturbed by the decision that the redemption premium authorized by the Denver Council is so substantially objectionable, by reason of the electors' failure to pass upon it, as to vitiate the entire bond issue. This point is more important to us, as a practical matter, than it is to Denver. Many of the smaller towns and cities do not enjoy as favorable a market for their bonds as Denver does. We note that the bid accepted by the Denver Council on the bonds here in issue, called for an average interest rate slightly in excess of 3%. We seriously doubt that any of our smaller cities could obtain such favorable terms for their bonds even where the credit of the municipality is pledged, much less on this type of self-liquidating project, particularly in the inception. However, if the project operates successfully after completion, high interest costs may be diminished by calling or refunding bonds outstanding. The bond buyers are aware of this and ordinarily press for a redemption premium. We appreciate that the decision herein did not prohibit such premium, but in our small municipalities the cost and practical difficulties of setting up special election machinery and of foreseeing and satisfying the most minute and technical requirements, are substantial and we earnestly and respectfully urge that the discretionary powers and acts of municipal officers, when exercised in good faith and in the best interests of the people they represent, should be liberally construed. This entreaty likewise applies to the innuendo in the opinion as to the method of sale of municipal bonds.

We respectfully petition this Honorable Court to grant a rehearing herein, because of matters overlooked or misapprehended as more particularly hereinafter set out.

ARGUMENT

1. *Conveyance In Trust Of Proposed Parking Facilities.*

In holding that the revenue bonds are mortgage bonds which constitute a bonded indebtedness within the meaning of the Constitutional provision limiting the amount of the municipal indebtedness, it is submitted that the Court overlooked the critical and well established distinction between (1) the pledging or conveying of property presently owned by the City and (2) such transfer of property to be acquired with the proceeds of the bond sale.

This distinction was clearly explained by the Supreme Court of Alabama in response to an inquiry by the Governor of Alabama concerning the constitutionality of a statute providing for the issuance of municipal bonds without submitting the question to a vote of the municipal electors. The Court cited a number of cases from other jurisdictions and stated its opinion as follows:

> "Our view is that, if the proposal is to pledge the revenue from an existing system or the system itself to the payment of funds used in making extensions or improvements, there is a debt created in violation of section 225 of the Constitution, when the debt limit therein provided has been reached, and the result is not controlled by the inability to foreclose the mortgage. For, if the property once owned by the city may be thereby taken out of its control and operation, and put in the control of a receiver for the bondholders and the income from its operation may be taken away from the city, such authority has the effect of creating a debt, though no foreclosure is authorized. Thereby, the effects theretofore owned by the city became subject to be taken from it and devoted to the payment of

the claim. This creates a debt, though its payment is thus limited.

> "But, when the city purchases or constructs a system, no part of which has been owned theretofore by it, and no revenue theretofore created from it, the pledge of it and the income from it, with no other obligation of the city to pay the price in any respect does not divert funds or property of the city which could have been used for other purposes nor does it otherwise create a debt. Under such circumstances it would be affected by section 225 of the Constitution." (Opinion of the Justices, 148 So. 111, 114 (Ala. 1933).

In 1949 the Alabama Supreme Court affirmed its position on this question and further held that it was within the competence of the parties to stipulate in the bonds, mortgage or deed of trust that the liability incurred is not a general obligation of the municipality in the constitutional sense and to limit the payment of such obligations out of earnings and revenue of the project and the sale of the property constituting the finished project. (42 So. (2d) 348, (Ala. 1949). The Court stated:

> "This opinion is with the distinct understanding that the pledge for the payment of the bonds will not include any property which the city had already acquired or in which it has an equity nor the income from any such property." (Page 351).

Subsequently on June 15, 1950 the Alabama Supreme Court issued a validation decree validating the issuance of revenue water bonds by the Water Board of the City of Mobile. (*Hillard v. City of Mobile* (47 So. (2d) 162). As the Court had ruled upon the mortgage question in the two earlier cases, the trust deed feature of the Mobile bond issue was not even questioned.

The bonds were attacked on the ground that the City's firm commitment to pay for water over a period of years at a stipulated rate constituted a debt in excess of the constitutional limitations, and this contention was held to be without merit.

In *City of Joliet v. Alexander,* 194 Ill. 57, 62 N. E. 861, one of the cases cited in support of this Court's holding in the instant case, the distinction between the pledging of existing property and pledging of property to be acquired was clearly recognized. There the Court stated:

> "*What is* said relative to mortgaging property owned by the city, or pledging its existing income, is not intended to apply to a mortgage purely in the nature of a purchase-money mortgage, payable wholly out of the income of property purchased, or by resort to such property. This is not a case where there is no obligation of the city except the performance of a duty in the creation and management of a fund, and where the waterworks, upon paying for themselves, will become the property of the city. The reasoning in Winston v. City of Spokane (Wash.) 41 Pac. 888, cannot be applied to a case like this, *and could only apply to property or a fund which the city never had,* where the property is to be paid for by its own earnings without imposing any further liability on the city." (62 N. E. 861, 863).

This distinction was later recognized by the same Court in the subsequent case, *Schnell v. City of Rock Island,* 83 N. E. 462, 464 (Ill. 1907).

In *Hairgrove v. City of Jacksonville* (Ill. 1937), 8 N. E. (2d) 187, the Court held valid utility certificates issued by the city to pay for a municipal light plant, said certificates providing that the utility facilities were pledged as security for the payment of certificates. In

this case the Illinois Court distinguished its earlier decisions in *City of Joliet v. Alexander* and *Schnell v. City of Rock Island.* The distinction between the pledging of existing property and the pledging of property to be acquired with the proceeds of the proposed issue is clearly stated in the following language:

> "These cases (Joliet and Schnell) differ from the one before us in that there is here no pledge of any property or income, other than the system and its income to be acquired by sale of the certificates. Whether the city shall choose to later contribute to the payment of such certificates from income arising from the present owned facilities is not a matter material here. No such income is pledged and the question whether, had it been pledged, such pledge would establish a debt, is not here." (8 N. E. (2d) 187, 195).

The decision of the Court in the instant case conflicts in principle with *Searle v. Haxtun,* 84 Colo. 494, 271 Pac. 629, so that now it is impossible for a municipality to ascertain the law in this state, and to plan in conformity therewith the issuance of revenue bonds. In the *Haxtun* case the Court dismissed the plaintiff's contention that the pledge of pre-existing utility income created a debt, and held valid revenue bonds issued to pay for extensions and improvements of an existing electric light plant, said bonds being secured by pledge of revenues of both the existing plant and the proposed enlarged plant.

In the instant case the court says:

> "* * * the holder of the mortgage bond, however, can foreclose on the physical assets under the mortgage and *to that extent render the city that much the poorer,* by becoming possessed of its property that has been mortgaged. * * * But when the city consents to mort-

> gage its assets to secure the payment of its debt, the bonds become more than mere revenue bonds, * * *."

We cannot reconcile this language with the decision in the *Haxtun* case. In that case, the revenues of an existing plant were an asset of the town pledged in support of revenue bonds. The pledge or conveyance of any property, other than that to be purchased with the proceeds of the bond issue, would "render the city that much the poorer"; and hence, under the instant decision, any bonds so secured would not be revenue bonds, but so-called "mortgage" bonds subject to charter or statutory debt limitations. Such law is contrary to the great weight of authority and an earlier decision of this Court. It would impose most severe practical restrictions on the financing of necessary public projects by Colorado municipalities.

Furthermore, in the case of *Montgomery v. Denver* (1938), 102 Colo. 427, 440, the Court held valid the pledging of city funds to the payment of delinquent local improvement bonds, such a pledge being authorized by a provision of the Denver Charter. In an action for declaratory judgment the question was raised whether such a pledge constituted a debt of a municipality. In holding that the pledging of this additional security for local improvement bonds did not constitute a debt, this Court stated:

> "* * * 'The idea of a "debt" in the constitutional sense is that an obligation has arisen out of contract, express or implied, which entitles the creditor unconditionally to receive from the debtor a sum of money, which the debtor is under a legal, equitable, or moral duty to pay without regard to any future contingency.'
>
> "Under these circumstances we must conclude that section 48 in authorizing payment

by the city of deficiencies in bond payments does not create a debt within the meaning of that word as used in section 8, article XI of the Constitution, if this section at all applies to Denver; nor does it amount to the issuance of bonds or the creation of a loan within the meaning of section 1, article XX of the Constitution or section 206 of the charter, and hence is violative of none of these because of the fact that such payments have not been approved by the taxpaying electorate."

In the instant case the City is relinquishing nothing which it presently possesses; yet in the *Montgomery* case the city was pledging general funds. Admittedly the *Montgomery* decision turned upon the Denver charter provision by which the people had authorized the creation of a so-called surplus and deficiency fund to bulwark local improvement bonds. However, in the instant case, Charter Section 206, adopted by the people of Denver, which excluded revenue bonds issued for public utilities works and ways from the debt limitation, was apparently overlooked by the Court. The pertinent parts of Section 206 read as follows:

> "No loan shall be created nor bonds issued unless the question of creating the same and issuing the bonds therefor shall be submitted to the vote of such of the qualified electors of the city and county of Denver as shall, in the year next preceding such election, have paid a property tax therein and a majority of those voting upon the question by ballot shall vote in favor of creating such debt and issuing such bonds, and the interest on all such bonds shall be payable semi-annually.
>
> "The city and county of Denver shall not become indebted for any purpose or in any manner to any amount which, including existing in-

> debtedness, shall exceed three per cent. (3 per cent.) of the assessed valuation of the taxable property within the city and county of Denver as shown by the last preceding assessment of the city and county of Denver; provided, however, that in case section eight (8) of article eleven (11) of the constitution of the state of Colorado shall be amended at any time in respect to indebtedness of the municipality of the city and county of Denver, then and in such case the limitation of such indebtedness of the city and county, as above referred to, shall conform to any such an amendment so as to extend the provisions of said section 250 limiting the indebtedness of the city and county of Denver, as shall by such an amendment be provided for and authorized; *and provided, further, however, that in determining the limitation of the city and county's power to incur indebtedness, there shall not be included within the estimate bonds issued for the acquisition of water, light, or other public utilities, works or ways from which the city and county will derive a revenue.*" (Emphasis supplied)

This Charter provision, it seems manifest to us, excludes all bonds issued for public projects from which the City derives revenue, such as in the instant case.

The question whether a mortgage covering facilities to be acquired from revenue bond proceeds constitutes a "debt" of the municipality, was carefully considered by the courts in the following cases:

In *Warden v. City of Grafton* (W. Va. 193) 26 S. E. (2d) 1, the Court, in ruling upon the validity of municipal revenue bonds for the purpose of completing a municipal hospital, held valid a mortgage lien covering the entire hospital premises some of which was owned by the city prior to the contemplated betterments and

extensions to be financed by the bond issue. The Court stated:

> "* * * If the lien is to attach only to such part of the public works as shall have been constructed from the proceeds of the revenue bonds, then in case the bonds were issued for the enlargement or improvement of any such works, the lien would be only on an undetachable and probably unascertainable portion of the structure, and therefore would be utterly worthless. In the present case, for instance, the construction which shall now be made from the revenue bonds will necessarily be in the form of parts of the walls, floors, roofing, heating and lighting fixtures, plastering and general interior finish, and such a lien, of course, would be an absurdity. Even in the case of a building wholly constructed from revenue funds upon land otherwise acquired, the lien would be on the building but not on the land and, therefore, of little or no value. If it were proposed to buy the land and construct a complete, whole building from the proceeds of the revenue bonds and the bonds were to be secured by nothing except a lien on the building and ground, it would still be inadequate to make the bonds salable, *since no structure erected wholly from a bond issue would ever be considered adequate security for the bonds. In all cases to make the bonds commercially salable there must be some equity in the property on which there is a lien over and above the part produced by the bonds themselves.* We think we may take note of these practical facts, and therefore know that bonds secured in this limited way would not be salable and therefore defeat the whole purpose of the act. We decline to make a construction of this statute which would lead to this futility,

and this consideration alone would justify a construction of the statute which will tend to make the bonds in some degree salable, and which seems to be in accordance with the plain purpose of this act." (26 S. E. (2d) 1, 6). (Emphasis added.)

In *Interstate Power Company v. Town of McGregor* (Ia. 1941), 296 N. W. 770, the Court expressly upheld the right of the Town of McGregor to execute a mortgage covering electric utility property which was to be paid for with the proceeds of a revenue bond issue. The Court stated:

"There is no money, goods, or services due from the town of McGregor, on which it can be required to pay, deliver, or furnish to a holder of any of these bonds. None of its resources or property can be taken for, or subjected to, the payment of any bond. The legal title to the constructed improvement may be in the town, but such title, and the possession of the property, came to it subject to and burdened by the pledge of the property and its earnings to the payment of the bonds. The pledge preceded such title and possession. *Hogan v. City of Corning,* 217 Iowa 504, 250 N. W. 134, *Greaves v. City of Villisca,* 217 Iowa, 590, 595, 251 N. W. 766. The property was non-existent until it came into being because of the pledge, and if it be taken in payment of the obligation no property of the town or of its citizens or taxpayers is taken or depleted. The bond holders are at all time the real and equitable owners of the improvement and its earnings until the bonds are paid. *The pledges incur no debt on the part of the town but partake of the nature of a lien for the purchase price of the improvement and its revenue, or of purchase-money mortgages with no per-*

> *sonal liability on the part of the maker.* The creditor must look to the property alone, which his own capital has produced, for his recompense. The bonds do not constitute a debt, direct or contingent within the constitutional limitation. Compulsory exercise of the taxing power as a means of enforcing liability is expressly withheld, and the bond, itself, so notifies its holder. No property *presently owned* by the town could ever be called upon to pay for the new improvement. To constitute a debt against the town, there must be an obligation which it must meet with its funds or property." (296 N. W. 770, 777). (Emphasis added.)

In *Stone v. City of Hobbs* (N. Mex. 1950), 220 Pac. (2d) 704, 707, the Supreme Court of New Mexico, in holding valid the pledge of excise tax proceeds for the payment of local improvement bonds, stated:

> "Other constitutional questions are settled by State ex rel. Capitol Bldg. Commission v. Connelly, 39 N. M. 312, 46 P. (2d) 1097, 100 A.L.R. 878. There, Mr. Justice Sadler, speaking for the court, held that the term 'debt' within the constitutional provision limiting the debt contracting power of the state and municipalities, refers to an obligation by which the general faith and credit of the state or municipality is pledged, and which contemplates the levy of a general property tax for its retirement. Manifestly the obligation is not a debt within the meaning of the constitutional provision. * * *."

In its opinion in the instant case, this Court further held that the bonds were objectionable by reason of "a contradiction in terms" in that the bond states it is payable solely out of revenues of the facility and at the same time contains a provision that it is secured by a trust indenture. The above cases illustrate that such terms are compatible rather than contradictory

and that mortgages are frequently utilized to render revenue bonds more marketable. In fact, the Supreme Court of Ohio used both adjectives in describing a municipal bond issue in the case of *Vollmer v. Village of Amherst* (Ohio 1940) 29 N. E. (2d) 379, 384. There the Court stated:

> "However, we hold that these bonds, being mortgage revenue bonds, issued under Section 12 of Article XVIII of the Ohio Constitution, are not amenable to the provisions of the Uniform Bond Act, and that the failure to sell them at public sale, as required by that Act, does not invalidate said bonds."

The foregoing authorities show clearly that a conveyance of facilities in trust to secure revenue bonds does not transgress constitutional or charter limitations of municipal debt, even where such bonds are not expressly excluded from such constitutional or charter limitations, as are the bonds here questioned.

2. *Premium On Redemption.*

In deciding that the 2% redemption premium was invalid, it is respectfully submitted that the Court overlooked the above quoted provision of Section 206 of the Denver charter. Under said Charter provision such revenue bonds are not only excluded from the debt limitation but also excluded from the requirement that the issuance of bonds shall be approved by the taxpaying electors. Denver, perhaps, for reasons of public policy, of which we are not aware, preferred to obtain public approval and has not urged this point. However, it seems to us of utmost significance, in view of the *Montgomery* decision where the Court recognized the power of the citizens of Denver to adopt Charter provisions governing municipal and local matters. Because under the Denver Charter there was no requirement that the proposed revenue bonds be approved by the taxpaying electors, we are at a loss to understand how the

electors "had a right to assume that earlier redemption of the bonds would be at par." Actually, under the Charter provision which they themselves adopted they had expressly delegated to municipal officials the authority to work out such details as the redemption premium.

Furthermore, it is respectfully submitted that the Court misunderstood the nature and purpose of the authorized redemption premium. The allowance of a premium upon redemption increases the marketability of the bonds and tends to reduce the interest rate. This is a detail of business judgment, not prohibited by Charter, which cannot reasonably be held to constitute such an abuse of discretion as to vitiate the entire bond issue. A more accurate and realistic view is that the electors had a right to assume that the city officials would act in the best interests of the people and obtain the most favorable terms possible. After considerable study and exhaustive discussion with bond brokers and experienced investment men it was a considered judgment of the city officials that the redemption premium would increase the marketability and enhance the value of the bonds which would be reflected in lower interest rates.

In the *Montgomery* case the Court so viewed the matter and recognized the practical factors when it approved the pledge of general funds for the payment of defaulted local improvement bonds. There the Court stated:

> "Doubtless, we believe, with these conditions in mind, coupled with the definite conviction that a large amount of money must be expended for public improvements if their city was to progress as it has, the Denver electorate adopted the charter provision in question. It would seem that the arrangement so provided with respect to these matters is sensible and

proper and likely has proved highly beneficial to the people of Denver, including the general taxpayer, by making it unnecessary for the city to sell improvement district bonds at greatly depreciated prices."

The practice of paying a premium upon redemption of bonds is universally recognized. After lucubratory search, we have been unable to find any decision holding such a premium illegal except where it has been expressly prohibited by Charter or statute. Cases involving municipal bonds which provide for a redemption premium but in which no question was raised about the legality of such a premium are: *Manufacturer's Trust Company v. Roanoke Water Works Co.,* 1 S. E. (2d) 318 (Va. 1939); *Wheelis v. Phenix City,* 2 So. (2d) 776, (Ala. 1941); *Ollilo v. Clatskanie Peoples' Utility District,* 132 P. (2d) 416, (Oregon, 1942). In the case first mentioned, the Court said:

> "Under the terms of the bonds, the principal does not mature until July 1, 1950. Until that time the bonds bear interest at the rate of 5% per annum, payable semi-annually. While the Water Company has the right to redeem the bonds, this can be done only upon paying the bondholders the required call premium. It is a matter of common knowledge that such provisions materially add to the value and marketability of bonds." (1 S. E. (2d) 318, 324.)

The United States Circuit Court of Appeals recognized the purpose of a redemption premium in *Massachusetts Life Insurance Co. v. Securities & Exchange Commission,* 151 F. (2d) 424, 431, C.C.A. 8, (1945). In that case the Court denied the bondholders' alleged right to demand payment of the premium because redemption of the securities there involved was enjoined by an Act of Congress. However, the Court stated:

> "We agree that under proper circumstances a bondholder whose bonds are redeemed be-

fore their due date should be allowed compensation for the unanticipated expense incident to the reinvestment of his funds. The due date fixed in the contract in this case cannot be urged, however, as the basis for a claim for interest payments. When the retirement of bonds is compelled by an Act of Congress in the furtherance of a legitimate public policy, contract provisions standing in the way of the consummation of that policy must yield to the public good and are illegal. * * *."

In *United Public Utilities Corporation v. Securities Exchange Commission,* 52 F. Supp. 975, 978, a case arising out of the Commission's efforts to effectuate a simplification plan under the Public Utility Holding Company Act, the Court stated:

"* * * The empirical reason for redemption premiums is to compensate investors for involuntary termination of their investment and for the trouble of finding new investments. Investment management would be difficult indeed if investment obligations could be redemmed at will without any compensation to the owners of the obligations. The same empirical reason is recognized in current real estate mortgages which prohibit payment by mortgagor without consent of mortgagee, who also has the right to exact a penalty on payment before the specified time."

In *Cook v. City of Louisville* (Ky. 1935), 86 S. W. (2d) 157, it was contended that the Louisville Bridge Commission which had issued $5,500,000 of bonds bearing 4½% interest per annum and redeemable at premium was without power to issue refunding bonds, the proceeds of which would be used solely to pay the premium on previously issued and outstanding bonds. The Court, holding the contention to be without merit, stated:

"* * * The power to refund clearly includes such other powers as may be essential to make it effective. The only limitation on the amount of bonds that the commission can issue is that the proceeds shall be used 'solely for the payment of the cost of the bridge.' Although $5,-500,000 par value in bonds were originally issued by this very commission, no one seems even to have thought to question the validity of the bonds in excess of the amount actually necessary to pay for the construction of the bridge. The excess proceeds were used simply to redeem the excess bonds and, of course, at a premium. The issue now of $175,000 par value in bonds to cover the premium payable on redemption actually reduces the amount ultimately required to liquidate the debt and thus makes possible an earlier reduction in tolls. To decide that the issuance of bonds necessary to pay the premium for redemption was not devoting the proceeds 'solely for the payment of the cost of the bridge' would be to ignore the substance for the form. Furthermore, the Act (Section 9 (Ky. St. § 30371-9) expressly authorizes the payment of a premium for the redemption of the bonds before maturity. If the power to refund is to be implied, as it plainly is, under the King case, supra, there is clearly a like implication of authority to pay a premium." (86 S. W. (2d) 157, 158).

Generally, where express Charter or statutory limitations are not involved, the Courts have liberally viewed the discretionary powers of municipal authorities with respect to details of bond issues and have refused to invalidate such bond issues on questionable technicalities.

In *Town of Alamorgordo v. Beall,* 64 P. (2d) 384, 386 (N. M. 1937), the manner in which the town se-

lected certain outstanding bonds for redemption was questioned. The Court stated:

> "It is also urged upon us that a municipality cannot use its absolute arbitrary discretion in determining which bonds out of the whole issue shall be called for refunding. The right of the municipality to exercise its option to redeem the bonds is not questioned, and we are constrained to hold that the bondholder has no right to insist that his bond be called for payment before the due date or that it not be called. The discretion is vested in the municipality by our laws and there is no limitation as to the method by which the bonds redeemed are to be selected. Where the statute is silent the governing body of the municipality is vested with wide discretion in matters of policy. * * *."

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3. *Method of Selling Municipal Bonds.*

Although there was no ruling on the method of sale which Denver used, the opinion implies that the method employed was illegal and contrary to public policy. We have found, in the Denver Charter, no requirement of public sale of this type of bond, and, thus, it follows that the dicta of the Court casts a cloud on all bonds sold or to be sold at other than public sale, notwithstanding the absence of any charter or statutory requirement so to do.

The law with respect to the matter of sale of municipal bonds is well established. In the absence of charter or constitutional or statutory mandate, municipal authorities charged with the issuance and sale of bonds have wide discretion in offering such bonds for sale so long as the methods and means employed will, in their considered judgment, result in the most favorable terms to the city. This principle has been enunciated repeatedly.

> "In the absence of statute the manner of sale of bonds is within municipal discretion. Municipal bonds are generally sold in a block to some bond house and if there is no method of sale prescribed by law, a sale may be a private as distinguished from a public one." (McQuillin, Municipal Corporations, 3rd Ed., Sec. 43.65.)

> "What notice of sale shall be given, the time thereof, whether the sale shall be at public auction, and how the bids shall be received, are all matters depending upon the governing statute. In the absence of legislative directions as to any of such matters, the proceeding is wholly within the discretion of the municipal officers, circumscribed only by the demands of good faith and of official responsibility * * *." (Jones, Bonds and Bond Securities, 4th Ed., Sec. 363.)

In *Bayha v. Public Utility Dist. No. 1* (Wash. 1939), 97 P. (2d) 614, 627, it was contended by taxpayers contesting the validity of bonds issued by the Public Utility District that a contract entered into between the district and a fiscal agent was contrary to public policy because it tended to stifle competition and prevent competitive bidding by rival investment bankers. On this point the Court stated:

> "Had the statute required that the bonds of this district be sold at public sale, or had the commissioners decided to sell the bonds at public sale, it is possible that this option clause might have had some effect on prospective bidders, but that situation is not before us. The commissioners had the right to sell these bonds in any manner they should deem for the best interest of the district. After investigation, they decided it would be for the best interest of the

district to organize a syndicate, and sell the bonds at private sale. Our investigation of this record leads us to the conclusion that this plan was for the best interest of the district, and we are further of the opinion that the option clause did not tend to stifle competition, under the plan followed. Of course, it might be contended that any private sale tends to eliminate open competition, and still the statutes, in many instances, provide that property may be sold at private sale.

''For a general discussion of the authority of a municipality to sell bonds where no specific procedure is prescribed by statute, see Washington-Oregon Corporation v. Chehalis, 76 Wash. 442, 136 P. 681.

''The bonds in question are to be sold at par, and it does not appear that the interest rate of four and one-quarter per cent is not a fair rate of interest.

* * *

''From the entire record in this case, it appears that the commissioners acted in good faith; no abuse of discretion has been shown; a public sale of the bonds was not required by statute; and it follows that the trial court was right in holding that the sale should not be enjoined.''

In *Thomas v. McHugh* (N. D., 1934), 256 N. W. 763, 771, it was contended that a private sale of electric utility bonds by the city violated a statutory provision that certain bonds of the municipality cannot be sold without first advertising for bids. The Court ruled that the statute applied only to general obligation bonds.

''The chapter plainly indicates that it applies to general obligation bonds only. It does

> not pertain to those obligations payable by special assessments, nor could it apply to an indebtedness that is made payable out of a special fund, such as is involved in the instant case. The general power conferred by Chapter 172, Laws of 1929, allows broad discretion in the governing board, in carrying out the mandate of the people, with reference to ways and means in the procurement of the plant; and, in the absence of a statute providing otherwise, their discretion must govern the manner of placing or disposing of the bonds."

Similarly, in *Williams v. City of Rock Hill,* (S. C. 1935), 180 S. E. 799, 803, the Court stated on the question of private sale:

> "In the case at bar, the Legislature, as indicated, did not see fit to prescribe the manner in which the bonds in question should be sold, as undoubtedly it could have done; but it vested the city council, as it had authority to do, with power and discretion to dispose of them as to the council might seem best. The wisdom of such action on the part of the General Assembly being a legislative question, will not be inquired into by the court. See Brown v. Tharpe, 74 S. C. 207, 54 S. E. 363. The contention of the petitioner has no support in authority, and is without merit."

In *City of Fort Lauderdale,* 51 So. (2d) 263, 264, and *Vollmer v. Village of Amherst,* 29 N. E. (2d) 379, 384, the Supreme Courts of Florida and Ohio respectively ruled that private sales of bonds were valid and authorized, not being prohibited by statute.

Respectfully submitted,

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