County Commissioners—Authority to Contract to Pay Commission to One Acting as Fiscal Agent—Payment of Commission from General Fund of the County.

County Commissioners have no authority to make a contract to pay a commission or any amount directly or indirectly to the purchaser of its bonds for acting as fiscal agent in connection with the purchase of the bonds, required by law to be sold at not less than par.

The County Commissioners have no authority to make any collateral agreement whereby the net amount paid by the purchaser and received by the county would be less than the par value of the bonds and accrued interest.

Any such agreement made by the County Commissioners would be void as effecting indirectly a discount of the bonds.

C. C. Rowan, Esq.,
County Attorney,
Red Lodge, Montana.

My dear Mr. Rowan:

You have submitted for an opinion of this office the following question:

> "Can the County Commissioners of a county in issuing refunding bonds contract with a person or corporation to pay 4 per cent of the amount of the bonds for acting as fiscal agent and for purchasing said bonds, when the agreement is to purchase the bonds at par? The 4 per cent of the face of the bonds is to be paid from the General Fund of the county."

It is generally provided in connection with the authority to sell bonds that the same shall not be sold for less than par. This term as used in the commercial world means value for value and includes interest accrued at the time that the bonds are sold.

Sections 2907 and 2908 of the Revised Codes of 1907, as amended by Chapter 32 of the Laws of 1915, authorize the Board of County Commissioners to issue bonds for various purposes, and in Section 2907 the following language appears:

> "But no bonds must be sold for any price less than the par value thereof."

While there are some decisions allowing the payment of a brokerage fee in connection with the sale of bonds required to be sold for not less than par, they are commonly based upon the proposition that an emergency exists requiring, as stated in one case, "heroic action." Thus in Church v. Hadley, 145 S. W. 8, probably the leading case upholding the payment of a brokerage fee, the State Capitol of the State of Missouri had been destroyed by fire and an Act passed de-

claring an emergency to exist and authorizing the sale of $3,500,000 of bonds for the erection of a new capitol building. The court held that the emergency having been declared by the Legislature, it was sufficient to warrant the payment of a brokerage fee to effect the sale of the bonds when other means of finding a purchaser had failed.

The following cases also uphold the payment of brokerage fees:

Manitou v. First National Bank (Colo.) 86 Pac. 75;
State v. West Duluth Land Co., 75 Minn. 456;
39 L. R. A. (N.S.) 248, note, citing cases.

However, in Minnesota, the jurisdiction from which perhaps more decisions have come than any other upholding such brokerage fees, the case of Koochiching County v. Elder, 176 N. W. 195, is authority that no fee or commission may be paid to the purchaser of the bonds.

The dangers inherent in such a practice are obvious. If it be said that any indirect discount of bonds may be permitted, then the question of the amount of such discount is opened up. If a commission, of 4 per cent is permissible, why not a commission of 40 per cent, or any other amount? And if the existence of an emergency is to be determined by the County Commissioners, what limit of the amount of such discount, whether in the guise of a fiscal agency fee, or otherwise, would there be? Would not the same rule as to the determination of the existence of an emergency apply to the determination of the extent of the emergency, and consequently of the amount of the commission that should be allowed to meet such emergency? The greatness of the emergency would determine the greatness of the discount. And if merely a depressed bond market were permitted to be called such an emergency by the Commissioners, then the amount of such discount would correspond exactly to the degree of depression of the bond market in every case, and the provision of the statute that bonds must be sold at not less than their par value would become nugatory.

Section 245 of Abbott Public Securities, page 492, reads as follows:

"As already stated, it is customary for the statutory authority conferring the power to issue securities to require them to be sold at a price not less than the par value. This term is frequently used in the commercial world and means value for value. In connection with a sale of bonds, it conveys the idea that the corporation issuing the bonds shall receive in lawful currency a dollar in money for every dollar of obligation issued.

"The cases involving the legality of the sale or the validity of bonds consider in arriving at their decision the effect of the prohibitive character of such a statute or charter provision. The purpose of such prohibitive provisions is clear and the reasons sound.

"Contracts for the sale of securities at less than par when this is prohibited are usually held void. And the same principle necessarily follows where nominally the bonds are sold for par but where there has been a violation of the law through an agreement to pay a commission to the purchaser or otherwise evade its provision."

Village of Ft. Edward v. Fish, 33 N. Y. Supp. 784;
Edward C. Jones v. Board of Education, 51 N. Y. Supp. 950;
State of Illinois v. Dalefield, 8 Paige (N. Y.) 527;
Hunt v. Fawcett, 8 Wash. 396, 36 Pac. 318;
Lawrence County v. Northwestern Ry. Co., 32 Pa. St. 144.

In Whelan's Appeal, 108 Pa. St. 162, it was held by the Supreme Court of Pennsylvania that even where the statute provided that "the council may allow a reasonable compensation for the sale or negotiation of the said bonds," this did not authorize the allowance of a commission to the purchaser which would be virtually a sale at less than par.

In the recent decision by our Supreme Court in the case of Evans v. City of Helena, 60 Mont. 577, the question of the discounting of bonds required to be sold at not less than par, by any form of indirection, is practically foreclosed in this State. Incidentally the language of the court disposes of the argument that the condition of the bond market may be considered as constituting an emergency authorizing the County Commissioners to take any extraordinary measures to effect the sale of the bonds. In the opinion in that case the court used the following language:

"It requires no argument, however, to sustain the proposition that the fundamental idea in the mind of the legislature in enacting it was that the city council should not have power under any circumstances, directly or indirectly, to issue bonds or warrants of the district at a discount, but, on the contrary, that the price at which they should be issued and delivered for any work should be assured by the actual cost of it in cash. This is made clear by the expressions found in the proviso; i. e.: 'No warrants or bonds must be delivered to such contractor or contractors in excess of the amount of the work actually done at the time of delivery, nor shall the total amount issued be in excess of the total cost and expenses of the said improvements,' and 'no warrants or bonds shall be delivered or received in payment of a less sum than its face value.'

"If we keep in mind the fact that section 25, as amended (Laws of 1915, p. 340), expressly provides that the rate of interest upon the bonds or warrants of the district shall not exceed 6 per cent per annum, it becomes manifest that the legislature intended to prohibit the council from paying for any work in bonds or warrants which cannot, at the time of

the delivery, be sold upon the market for their face value. In thus limiting the rate of interest to six per cent, the legislature evidently entertained the idea that the condition of the market for bonds or warrants of the description under consideration would sometimes be such that there would be no sale for them, except at a discount, and therefore that while this condition should exist, cities should not be allowed to install improvements of any kind, the purpose being to prevent extravagance and waste. That this is the correct view is further emphasized by the provision in the latter part of section 26, supra, allowing the council the alternative of paying damages for property taken or damaged in making any improvement by delivering bonds or warrants of the district to the owner of the property or, in case he refuses to accept them, to sell them in the market for not less than par and pay him in cash.

"Counsel for city insists that inasmuch as the proposed contract will call for the payment of the price of the improvement in bonds or warrants at their face value, this amounts to a strict compliance with the requirement of the statute. In other words, he says that the statute contemplates that bonds or warrants of any improvement district will, at times, be worth less in the market than their face value, and therefore that, inasmuch as the contractor proposes to take the bonds or warrants at their face value for the work done, though in making out his bid he made an allowance for a discount of ten per cent, the statute will not, in fact, be violated. It is clear, however, that it will be as much a violation of the statute for the city council to contract to pay $100 in bonds or warrants for work which costs only $90, as it is for the council to pay $110 for work that costs only $100. Here the proposed price for paving the streets and doing the incidental work was fixed at $349,543.34. *This was arrived at by the contractor by adding to the actual cost ten per cent because the warrants he expected to receive would, in view of the condition of the market, sell for only ninety cents on the dollar.* The council intended to let the contract, fully understanding the basis upon which the contractor made his calculation. Any way the proposed contract may be viewed, the result will be an agreement by the council to issue and deliver the bonds or warrants of the district at a discount. It amounts to an agreement to do indirectly that which the council is expressly prohibited from doing directly. Therefore there will be a clear violation of the statute, and the second question, stated supra, must be answered in the negative."

The fact that the fiscal agency fee is to be paid out of the general fund of the county and not directly from the proceeds of the sale of the bonds in question is immaterial. The two contracts, one

for the purchase of the bonds at par and the other for the payment of a brokerage fee to the same persons or their representatives from a different fund, will be considered as part of the same transaction. Payment into one pocket on the condition that part of the amount so paid will be returned out of another pocket is the merest subterfuge. The same might be said of any other collateral agreement resulting in the actual payment of a net amount from the funds of the purchaser less than the par value of the bonds and accrued interest. It would be an agreement to do indirectly that which the County Commissioners are expressly prohibited from doing directly.

It is therefore my opinion that the County Commissioners have no authority to make a contract to pay a commission, or any amount, directly or indirectly, to the purchaser of its bonds for acting as fiscal agent in connection with the purchase of the bonds of the county required by law to be sold at not less than par, or make any collateral agreement whereby the net amount paid by the purchaser and received by the county would be less than the par value of the bonds and accrued interest, and that any such contract would be void as effecting indirectly a discount of the bonds.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.