MERCER v. NORTH LITTLE ROCK SPECIAL SCHOOL DISTRICT.

Opinion delivered May 7, 1928.

1. SCHOOLS AND SCHOOL DISTRICTS—UNCONDITIONAL SALE OF BONDS.—Where a school district advertised that it would sell certain bonds unconditionally, a bid which contained a provision that the check attached was not to be cashed until the bonds were delivered with the approving opinion of a certain attorney, and that the bonds were to be certified and trusteed, was a conditional bid, and was properly rejected, as being conditional.
2. SCHOOLS AND SCHOOL DISTRICTS—FRAUD IN SALE OF BONDS.—The fact that a sale of school bonds was made in a twice-a-week newspaper of *bona fide* circulation, instead of a daily paper of larger circulation, was insufficient to show fraud or collusion where all the parties interested were given an opportunity to bid.

Appeal from Pulaski Chancery Court; *Frank H. Dodge,* Chancellor; affirmed.

STATEMENT OF FACTS.

Appellant brought this suit in equity to enjoin appellees from delivering certain school district bonds, or in any way disposing of them. Appellees defended the suit on the ground that the bonds were legally issued and that the school district had a right to dispose of them for the purpose for which they were issued. Pending a hearing of the case, the proceeds derived from the sale of the bonds amounting to $504,356.83 were impounded, and appellees were enjoined from paying out any of said funds until the further orders of the court.

It appears from the record that the North Little Rock Special School District duly advertised as required by statute in the Arkansas Gazette, published twice a week in the city of Little Rock, Arkansas, that it would receive sealed bids for bonds to mature from 1928 to 1958 inclusive, on the first day of February, 1928. The bonds were to be in the sum of $500,000, bearing interest not to exceed six per cent. The sale of the bonds was to be unconditional; and, on the day designated, they were sold to E. M. Ream & Company for $504,356.83. The money derived from the sale of said bonds was placed in the hands of the treasurer of the North Little Rock

Special School District to be by him deposited in the banks which were the depositories of the school district. The notice of the proposed sale of bonds gave the amount of bonds to be sold, the rate of interest they were to bear, and also the following: "Said bonds to be offered unconditionally."

The deposition of James B. McDonough, an attorney at law of Fort Smith, Arkansas, was taken and read as evidence in the case. According to his testimony, sometime between January 1 and March 1, 1928, there were submitted to him by the Bankers' Trust Company of Little Rock, Arkansas, the records of the North Little Rock Special School District relative to the issuance and sale of $500,000 worth of school bonds. The Bankers' Trust Company was acting for E. M. Ream & Company, which was his client, and which before that time had sought the opinion of the witness on the legality of certain other bond issues. The witness rendered an opinion stating that said bond issue would be legal if the bonds were issued and sold in accordance with the record proceedings submitted to him. The opinion was dated February 18, 1928, and was addressed to E. M. Ream & Company, Gazette Building, Little Rock, Arkansas. The opinion was to be released and used only after the bonds were sold on February 21, 1928. The approval was on condition that the mortgage to secure the bonds should be re-acknowledged on February 21, the date of sale, and that the mortgage should be immediately thereafter recorded. The opinion was forwarded prior to the day of the sale for the sole purpose of avoiding a delay in the delivery of the bonds to the purchaser. The witness had often given opinions to be used and released prior to the date of the delivery of the bonds to reliable purchasers and responsible clients, as he knew E. M. Ream & Company to be. It has been the rule of the witness not to give an opinion as to the legality of an issue of bonds or a copy of such opinion to any proposed purchaser other than the one under whose employment he acted. In other words, the witness, when employed by one bond buyer

to prepare an opinion relating to a bond issue, does not feel at liberty, without the consent of his employer, to give his opinion to another buyer. The witness was in Little Rock on other business on February 20, 1928, and had a conference with E. M. Ream. He advised him that he had re-examined all the proceedings, and that in the event Ream became the purchaser of the bonds on February 21, he was at liberty to then use such approving opinion.

The American Southern Trust Company made a bid for said bonds which was $8,617.60 greater than the bid of E. M. Ream & Company. We copy from the bid of the American Southern Trust Company the following:

"We understand the school board has had printed $529,000 5 per cent. bonds, said bonds maturing according to the original schedule of $500,000 6 per cent. bonds, with an additional $1,000 maturing on October 1 of each of the years 1930 to 1958, both years inclusive. If the board desires to dispose of the entire $529,000, we will pay you the sum of $508,334.80, together with accrued interest, which said price is equal to a 5 3/8.5 basis plus 20/100 of 1 per cent. Adding accrued interest through February 21, the total amount due you on $529,000 5 per cent. bonds is $509,877.73. We understand the school board will furnish the legal approving opinion of J. B. McDonough, of Fort Smith, Arkansas, whose fee we agree to pay. It is understood and agreed that the checks attached are not to be cashed until the bonds are delivered to us with said opinion and other papers described."

Gus Walton represented Brown-Crummer Company and M. W. Elkins Company jointly in making a bid for said bonds. The bid was in the name of Brown-Crummer Company, and the body of it reads as follows:

"For your bond issue of $529,000, maturing 1929 to 1958 inclusive, bearing 5 per cent. interest, interest payable semi-annually at the Bankers' Trust Company, Little Rock, Arkansas, you to furnish us with approving opinion of Mr. James B. McDonough or Rose, Hemingway,

Cantrell & Loughborough, and have the bonds certified and trusteed, we agree to pay you 101.83 cents on the dollar, or the sum of $538,680.70, plus accrued interest of $1,542.93 from February 1 to February 22, 1928, making a total sum of $540,223.63 that we will pay you for the bonds. You are to deduct $500 for attorney fee from this price. We hand you herewith check for $540,-223.63 in full payment for the above bonds. This check is to be held uncashed pending delivery of the actual bonds to us, with attorney's opinion. If we are allowed to name the depository for these funds, we agree to pay you the additional sum of $6,000. You are to receive no interest on daily balance. This is not to be considered a condition of our bid on the above bonds.''

Walton put in his bid with a certified check and asked the secretary of the school board for an approving opinion relative to the issuance of the bonds, and the secretary did not show him the approving opinion which had been prepared by J. B. McDonough, who was a skilled attorney in matters of that sort. The name of Elkins was not put in because he had had trouble with this same school district.

W. E. Phipps, secretary of said school district, was also a witness in the case. According to his testimony, the school district at first made a contract with E. M. Ream & Company, whereby the latter agreed to have the bonds printed and have their legality approved by a nationally known bond attorney and to pay the trustee fee, provided Ream & Company became the bond buyers. In the contract Ream & Company guaranteed that the bonds should be sold for not less than 106 cents on the dollar and accrued interest on the face of the bonds. The school board was to pay Ream & Company $1,200 in case it did not get the bonds. The agreement provided for a public sale of the bonds to the highest bidder. Later on, E. M. Ream & Company appeared before the school board and read letters from various law firms to the effect that considerable delay in the sale of bonds might occur if Ream & Company should be held to its

agreement to furnish the approving opinion of a nationally known bond attorney. The board therefore released E. M. Ream & Company from its agreement and decided to advertise and sell the bonds unconditionally. This was done, and the notice required by statute and the terms and place of sale were duly advertised as required by law in the twice-a-week Gazette published in Little Rock, Arkansas, with a circulation of 16,000 or 17,000 approximately. The twice-a-week Gazette is a *bona fide* newspaper published in Pulaski County, Arkansas, and is 109 years old.

W. K. Mercer, appellant, who brought the suit in the chancery court, is a property owner in said North Little Rock Special School District.

The chancellor found the issues in favor of the appellees, who were the defendants in the chancery court; and it was decreed that the complaint of the appellant should be dismissed for want of equity. It was further decreed that the order impounding the funds be set aside. The case is here on appeal.

L. P. Biggs, for appellant.

J. F. Wills, Tom F. Digby and *Carmichael & Hendricks,* for appellee.

HART, C. J., (after stating the facts). It appears from the statement of facts, which need not be repeated here, that the school district advertised and sold the bonds with the following: "said bonds to be offered unconditionally." The bonds were sold unconditionally, and E. M. Ream & Company became the purchaser thereof. The record shows that the bid of the American Southern Trust Company for the bonds was $8,617.60 higher than the bid of E. M. Ream & Company, and that the bid of Brown-Crummer Company was $39,304.70 higher than the bid of E. M. Ream & Company. Hence, it is insisted that one of these bids should have been accepted by the school district. The American Southern Trust Company disclaimed any right in the premises. This leaves Brown-Crummer Company as the contesting bidder. The school district sold the bonds to E. M. Ream & Company because

it made an unconditional bid, and this was in accord with the resolution of the school board relating to the sale of the bonds and with the advertisement pursuant to the resolution.

The bid of the American Southern Trust Company contained a provision that the check attached to the bid was not to be cashed until the bonds were delivered with the approving opinion of J. B. McDonough of Fort Smith, Arkansas, whose fee the bidder agreed to pay. The bid of the Brown-Crummer Company also contained a provision that the school district was to furnish it with the approving opinion of Mr. J. B. McDonough or of Rose, Hemingway, Cantrell & Loughborough, and was also to have the bonds certified and trusteed. Thus it will be seen that both of these bids were conditional. According to Bouvier's Law Dictionary, bidding, in its comprehensive sense, is making an offer; but, in its ordinary sense, it is signifying the making of an offer at an auction. The language referred to in both bids plainly shows that the offer made by each bidder was conditional. The bid of Ream & Company, who became the purchaser of the bonds, was an unconditional bid in accordance with the proposition and advertisement of the school board. The board properly accepted the proposition made in accordance with the terms of the resolution and advertisement of the sale of the bonds, provided it acted in good faith in the premises.

In *Trowbridge* v. *City of New York,* 53 N. Y. Supp. 616, it was held that a bid for municipal bonds, containing the clause, "Our bid is to be subject to the approval of the legality of the issues by our counsel," is a conditional bid.

This view is in accordance with our own holding on the question. In *Bank of Eastern Arkansas* v. *Bank of Forrest City,* 94 Ark. 311, 126 S. W. 837, the court held that a county depository act which directs that the county court shall advertise for sealed bids and shall select as depository of the county funds the bidder offering the highest rate of interest on such funds, con-

templates an unconditional offer, and that a bid whereby the bidder offered to pay a certain percentage more on the funds than the highest and best bid that should be made by any other bidder should not be received.

Again, in *Casey* v. *Independence County,* 109 Ark. 11, 159 S. W. 24, it was held in a similar case that an offer from a bank whereby it agreed to pay a certain per cent. more on county funds than any other bid received was not such a bid as the statute contemplated.

In *Grant County Bank* v. *McClellan,* 112 Ark. 550, 166 S. W. 550, the court said there can be no real competition unless all bidders are required to bid upon the same basis and that no proposition can be considered to be a bid unless it is complete in itself as declared by the courts. Hence, it was again held that where a bank seeking to become the depository of county funds proposed to pay a certain per cent. more than any other bid offered, this did not constitute a bid, for the reason that it could not be acted upon alone without reference to anything outside of itself.

In the present case, E. M. Ream & Company was a client of J. B. McDonough, a well-known bond lawyer, and had secured his approving opinion based upon an examination of the records of the school district. While Ream & Company exhibited this approving opinion to the school board, the latter had no control over the opinion and had no right to deliver it to other bidders to be used by them in making their bids. McDonough expressly testified that the opinion had been sent to be used by E. M. Ream & Company, and that no other person had a right to use it. Hence, the other bidders not only made conditional bids, but attached to their bids a condition which could not be honorably complied with by the officers of the school board. They could have, under the circumstances, no right whatever to use McDonough's opinion for the benefit of other bidders than E. M. Ream & Company, for which the opinion was made and which alone had the right to make use of it.

This brings us to a consideration of whether there was any fraud practiced by the school board in selling the bonds to E. M. Ream & Company. The record shows that it was first agreed that the bonds should be sold at auction, and that the approving opinion of a nationally known bond attorney should be procured by E. M. Ream & Company for the benefit of all who might bid at the public sale of the bonds. Later, E. M. Ream & Company reported to the school board that such an approving opinion could not be secured without causing much delay in the sale of the bonds. The school board then decided to rescind its original contract with E. M. Ream & Company and to make an unconditional sale of the bonds. This it had a right to do if it acted in good faith in the matter, and if there was no fraud or collusion between the school board and E. M. Ream & Company in the premises. There is nothing in the record to indicate fraud or collusion of the school board with E. M. Ream & Company, unless two circumstances, which we shall now proceed to discuss, amount to fraud or collusion.

In the first place the advertisement for the sale of the bonds was made in the twice-a-week Gazette instead of the daily Gazette or some other daily paper. The record shows that the twice-a-week Gazette has a *bona fide* circulation in Pulaski County, where the bonds were to be sold. It is suggested that the daily Gazette or some other daily paper might have a greater circulation. This is not sufficient to show fraud or collusion. The record shows that all the parties who wished to bid knew about the sale and were given an opportunity to bid. The record does not show why the advertisement was made in the twice-a-week Gazette, but perhaps it was done because it was cheaper, and the school district knew as a matter of fact that all persons who wished to bid had actual knowledge of the time, place and terms of the sale. Indeed, the proceedings of the school board were public records, and, as such, were accessible at all reasonable times to any interested person.

Again, it is submitted that there was fraud or collusion between the officers of the school board and Ream & Company because the bid of Brown-Crummer Company amounted to $39,304.70 more than the bid of Ream & Company. As we have already seen, the bid of Brown-Crummer Company was made upon the express condition that the school board should furnish it with the approving opinion of Mr. James B. McDonough or of Rose, Hemingway, Cantrell & Loughborough, and also upon the condition that the bonds be certified and trusteed. If this contention should be sustained, the practical effect would be that a bidder could change the method of sale from an unconditional to a conditional one. This might not be to the advantage of the district. The officers of the school district were public officers, and, as such, are accountable for any breach of trust. The bidder at the sale is accountable to no one. He might make a conditional or an unconditional bid, just as he liked. In the present case the bidder must have known that the sale was to be unconditional, and yet made a conditional bid. The bidder knew that the sale was unconditional. He might have secured the opinion of any lawyer he liked. The school district was not interested in what lawyer approved the bonds for the bidders. It cannot be said that the making of a conditional bid, when an unconditional sale was advertised, showed fraud because the unsuccessful bidder bid $39,304.70 more than the successful bidder.

We are of the opinion that there is not sufficient evidence in the record to justify us in finding that the officers of the school district acted in bad faith or acted fraudulently or collusively with E. M. Ream & Company, the successful bidder, in making the sale of the bonds.

Therefore, the decree will be affirmed.

Justices WOOD, KIRBY and MEHAFFY dissent.