3507.

CONTRACT—LEGAL DUTY OF HIGHWAY DEPARTMENT TO RETURN CERTIFIED CHECK TO BIDDER WHEN.

SYLLABUS:

Where a bid was submitted to the Department of Highways for a sewer project, accompanied by the proper certified check as security, and after such department had awarded the contract to such bidder, the bidder called attention to a mistake made in the amount of its bid, due largely to a failure to discover that concrete base required to be cut by the specifications for such project was heavien than anticipated by such specifications, and asked to be relieved from entering into a contract with the department, and some time thereafter the Department of Highways readvertised such project, setting forth more numerous classifications of labor with resultant higher estimate of cost for the project than was set forth by the original specifications, and awarded the contract to another bidder than the original bidder, the said Department of Highways has a legal duty to return to the original bidder the certified check deposited by it.

COLUMBUS, OHIO, November 26, 1934.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—Your recent inquiry reads as follows:

> "On November 24, 1933, bids were taken for Federal Municipal Project No. 399-D and shortly thereafter a contract was awarded to The Franklin Asphalt Paving Company of Columbus, Ohio.
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> The Franklin Asphalt Paving Company submitted a letter claiming certain mistakes in their bid due to indefiniteness of the plans and refused to enter into a contract. The project was later readvertised but during the intervening time wage rates had been revised and the estimate and the bids were in excess of those submitted in the former letting.
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> We have since that time held the certified check which was submitted with the bid of The Franklin Asphalt Paving Company although they have applied for its return on numerous occasions.
>
> We have received a letter from C. H. Duncan, Secretary of The Ohio Contractors Association, which I am enclosing, which explains the situation very thoroughly. I wish to call your attention to the paragraph on page three which is an excerpt from a letter from this Department dated December 28, 1933. We were willing at that time to cancel the award and return the certified check but the Bureau of Public Roads was not willing to concur in this arrangement.
>
> I respectfully request your opinion as to whether we have the right to return the certified check of The Franklin Asphalt Paving Company."

Without undertaking to quote the letter of the Secretary of the Ohio Contractors Association which you enclose with your communication, it is sufficient to state, in order to set forth the facts necessary for the rendition of an opinion on your question, that after the award was made to the Franklin Asphalt Paving Company on its bid for the construction of the sewer project, but before a formal contract had been entered into, it was discovered by such company that it would

be impossible to contract for said project at its bid price due to the necessity of cutting through a concrete base under car tracks, which base was a great deal heavier than the "base contemplated by the plans for the project."

It appears from the facts disclosed in such company's letter to your department that the fact that the base of the concrete was heavier than was anticipated could not have been reasonably foreseen at the time of the submission of its bid, and if the bidder were compelled to go through with his bid it would result in great financial loss to it.

It has been recognized in Ohio that where a bidder on a public contract presents a bid which is based on a mistake in calculation which would involve him in serious financial loss were he compelled to complete the contract, he may not be compelled to execute the contract by the political subdivision which is awarding the project.

In Opinions of the Attorney General for 1927, Vol. II, Page 1138, it was held as disclosed by the first paragraph of the syllabus:

> "Where a bona fide bidder for a contract for the construction of a building for the use of the state or an institution supported in whole or in part by the state in good faith submits a bid which is based on a mistake in calculation which would involve him in serious financial loss were he compelled to perform the work for the amount of the bid he cannot be compelled to execute the proposed contract."

The foregoing opinion was based largely on the Ohio case of *Ferro Concrete Construction Co.* vs. *The Board of Education of Cincinnati,* 11 N. P. (N. S.) 86; 21 O. D. 463, decided by the Common Pleas Court of Hamilton County on February 11, 1907. The syllabus of this case reads:

> "Where a bona fide bidder for public work in good faith submits a bid which is based on a mistake in measurements which would involve him in serious financial loss were he to do the work for the amount named, the minds of the parties have not met, and he can not be compelled to execute the proposed contract, notwithstanding the terms upon which the bid was submitted provided that it should not be withdrawn; and injunction will lie on the petition of the bidder to restrain the board having charge of the contract from accepting the bid and insisting that he execute the contract or subject himself to an action for damages."

While it is true that the opinion in the foregoing case was based on facts disclosing that the bid had not been accepted at the time the City Board of Education was informed by the bidder of the mistake, and in the instant case your department had awarded the contract to the bidder before receiving word from the bidder of the mistake in its bid, nevertheless, the court in its opinion expressly cites with approval the case of *Bromagin & Co.* vs. *City of Bloomington,* 234 Ill. 114; 84 N. E. 700, in which case the facts disclosed an award had been made to the bidder before the bidder called attention to the mistake in his bid, and it was held that the bidder was entitled to be relieved from his bid. In the cases of *Braman* vs. *City of Elyria,* 5 C. C. (N. S.) 387, affirmed without report in 73 O. S. 346; *State* vs. *Board,* 81 O. S. 218, and *Pfaff Construction Co.* vs. *Leonard,* 40 App., 246; 11 Abs., 102, it was laid down that a public board is not prevented after an award has been made from reconsidering its action, at least, before the contract is formally entered into.

In the Ferro Construction Company case, supra, after reviewing various cases of the Supreme Court of the United States and of other states, the court states in the concluding portion of its opinion at page 90 as follows:

> "In this case the city can lose nothing. The plaintiffs are willing and should be required to pay the expense of the advertising for bids and also to guarantee the city against loss by having to accept as the lowest bid any bid higher than the bid next above plaintiff's at the former bidding.
>
> Compliance with these conditions will prevent any loss to the defendant and at the same time permit justice to be done to the plaintiff.
>
> I will grant the relief prayed for upon the conditions named."

The foregoing case involved a bid for the erection of a school building for the above board of education for the city of Cincinnati. At the time of the proceedings for the submission of the bids for the building involved in the case, section 7623, General Code, paragraph 4, applicable to the letting of contracts for city school district buildings, read:

> "4. Each bid must contain the name of every person interested therein, and shall be accompanied by a sufficient guarantee of some disinterested person, that if the bid is accepted, a contract will be entered into, and the performance of it properly secured. * * *"

While the court did not discuss extensively the question of whether the check or other guarantee, which the bidder must have put up at the time of submitting its bid, as the foregoing statutory provision was then in force and the opinion of the case does not show any non-compliance of the bidder with such provision, should be returned to the bidder on granting it the relief of cancellation of its bid because of its mistake in the submission thereof, yet the portion of the opinion quoted would tend to indicate that the bidder was not entitled to a return of his guarantee; at least, it was held that the board of education should retain sufficient money to cover any loss resulting from having to accept as the lowest bid upon readvertisement of the project any bid higher than the bid next above the plaintiff's at the original bidding, and the cost of readvertising.

It seems fair to assume that the court in speaking of the possible expense chargeable against the plaintiff had in mind that the readvertisement for bids would be based on the same specifications, plans and conditions as were called for at the original bidding. As will hereinafter be pointed out, the general rule appears to be that where a bidder submits a bid that is not accepted by the awarding authority by reason of a bona fide mistake of the bidder, the deposit made by the bidder should be returned to him. See an annotation on this question appearing in 80 A. L. R. Annot., 586, et seq.

At least, it seems to be the general rule that where, after a mistake occurs in a bidder's bid, the awarding authorities readvertise on other conditions than those set forth at the original letting, the bidder is entitled to recover all of his deposit. From cases decided by the courts of other states, which cases were based on facts somewhat similar to facts now before us, it would appear that a bidder may receive back his deposit if the political subdivision calling for bids does not readvertise for bids based on identical plans, specifications and conditions as those set up at the time of receiving original bids. See 44 Corpus Juris, 336, 337,

"Municipal Corporations," sections 2504 and 2505, entitled, respectively, "Deposit or other security on making bids," and "Return or forfeiture."

For instance, in the case of *Cotter* vs. *Casteel* (Tex. Civ. App.), 37 S. W. 791, it was held as disclosed by the first paragraph of the syllabus:

> "An advertisement for bids for street paving required each bid to be accompanied by a deposit of $2,000, to be forfeited if the bidder failed to qualify after award of the contract, and of the successful bidder a bond for performance of the work, and guaranty of the same. The specifications provided that the city would pay monthly the entire cost of the work as it should be completed and accepted. The contract submitted to the successful bidders by the city bound the city to pay only a portion of the cost of the work, and required the bidders to wait for the balance until collected by the city of assessments to be made after the work was done and accepted, and contained other onerous conditions not required by the advertisements and specifications. The bond recited such contract, and obligated the contractors to faithfully perform all the stipulations therein contained. *Held,* that on the refusal of the successful bidders to execute such contract and bond, and their offering to execute a contract and bond in compliance with the advertisement, specifications, and their bid, the city had no right to the $2,000 deposited."

As disclosed above, it appeared from the facts of the case that more burdensome provisions were attempted to be incorporated into plaintiff's contract than were called for by the specifications on which the bid was based, and when he refused to execute the contract with these additional provisions, the council of the city readvertised and let the contract to another person at an increase of $13,000 over the original bid of plaintiff on the basis of the provisions of the contract attempted to be enforced against the original bidder. The court in decreeing the right of the original bidder to have his check returned, obvious'y concluded that the political subdivision could not retain the check unless the contract was let on the same specifications and conditions as were presented to the original bidder.

In another case, that of *Tunny* vs. *City of Hastings,* 121 Minn., 212, it was held as disclosed by the syllabus:

> "1. Chapter 312, Laws 1903, provides for public bidding for certain city work and provides that no bid shall be considered unless accompanied by a cash deposit or certified check for at least 15 per cent of the amount bid. The city advertised for bids for such work and in the advertisement stated that no bid would be considered unless accompanied by a cash deposit or certified check for at least $500. Plaintiff submitted a bid with this deposit. This amount was much less than 15 per cent of the bid. The bid was accepted. The bidder cannot avoid his bid on the ground that too small a deposit was required of him.
>
> 2. It was competent, however, for the parties to abandon the contract made by the bid and the acceptance of it. In this case plaintiff advised the officers of the city that he had made a mistake in his bid. The parties then proceeded to negotiate on a different basis. The city claimed a new contract and attempted to hold plaintiff to it. At no time did the city evince any disposition to hold plaintiff to his bid. *Held,* there was a

mutual consent to abandon the obligation of the bid and plaintiff was accordingly entitled to recover his deposit."

In the foregoing case a bidder submitted a bid for construction of a city sewer system and after the city authorities had accepted the bid they were informed by the bidder that he had made a mistake in his bid in that he had figured on earth excavation, whereas in fact a substantial part of the excavation was through solid rock, and if compelled to go through with his bid great loss would be suffered. The city authorities attempted to negotiate a new contract by agreeing to pay the bidder an increased price over his original bid. The court stated at page 216 relative to this matter:

"This latter negotiation is only material as indicating an unmistakable purpose on the part of the city not to stand on the original bid. Plaintiff was released from his obligation incurred by this bid and he is accordingly entitled to recover the amount of the deposit which accompanied the same."

From the language of the court, supra, it would appear that the awarding authority must stand on its original specifications and plans in re-letting a project in order to entitle it to retain a check deposited with it by an original bidder.

Section 1206, General Code, relating to state highway projects, reads as follows:

"* * *

Each bidder shall be required to file with his bid a certified check for an amount equal to five per cent of the estimated cost, but in no event more than ten thousand dollars, payable to the director (of highways), which check shall be forthwith returned to him in case the contract is awarded to another bidder, or in case of a successful bidder when he has entered into a contract and furnished bond as required by law. * * *"

In the case of *Donaldson* vs. *Abraham*, 68 Wash. 208; 122 Pac. 1003, wherein a somewhat similar statutory provision was under discussion, it was held, as disclosed by the syllabus:

"1. In an action against the board of county commissioners to recover a deposit given with a bid for the construction of a road, evidence held sufficient to support a finding that the bid was made through mistake.

2. A court of equity has the same power to relieve from forfeitures provided for by statute as it has to relieve from those provided for by contract.

3. One bidding for the construction of a county road filed a bid, which was less than he intended, owing to his mistake in failing to properly add various items of work, and before the bids were let he asked permission of the board of supervisors to withdraw his bid, or to correct it. *Held* that, the bid having been made through mistake, a court of equity would relieve the bidder from the forfeiture provided for by Rem. & Bal. Code, §5385, which requires bidders to deposit certified

checks in amounts equal to 5 per cent. of their bids, which shall be forfeited in case the successful bidder refuses to enter into a contract for performance of the work, for the mistake in this case was not detrimental to the county; the loss of the forfeiture not being ground for denying the relief." (122 Pac. 1103.)

It was stated in the opinion at page 1004:

"The remaining question is: Was the mistake such as to entitle the appellants to relief from their obligation to enter into a contract for the performance of the work? We think it was. It is not forgotten, of course, that the requirement is statutory that a bidder for county work, such as that in contemplation here, shall deposit with his bid a certified check in an amount equal to 5 per centum thereof, which shall be forfeited if the bidder refused to enter into a contract for the performance of the work, in case the contract be awarded him (Rem. & Bal. Code, §5585); but this does not call for a rule different from the ordinary rule. Equity has the same power to relieve from forfeitures provided for by statute as it has to relieve from forfeitures provided for by ordinary contract. Where mistake is relied upon to relieve, the essential requirement, in both instances, is that the mistake be not the result of willful neglect; that it be of such a character as to cause serious pecuniary or other detrimental loss to the person disadvantageously affected by it, if it be not relieved from; and that to relieve from it will not operate to the injury of another.

The appellants in the case before us fall within the rule. By mistake and inadvertence, they put in a bid for a piece of work for a sum much less than they intended to bid for it, and for a sum much less than that for which the work could be performed without loss. The mistake was not due to their willful neglect; nor will the granting relief from the mistake cause the other persons interested any serious loss, other than they will be deprived of the gain to be derived from a forfeiture of the check. But this latter is not a loss or injury, within the meaning of the rule, and is not a ground for denying relief."

The case of *United States of America* vs. *Rudolph Axman,* 234 U. S. 36, cited in the letter of the Secretary of the Ohio Contractors Association, is also in point, although the facts are not precisely the same as those before us in this opinion. The syllabus of such case reads:

"A change in the place of dumping the spoil, made when reletting the contract for the completion of the dredging work in San Pablo bay, prevents the United States from recovering under the provisions of the original contract by which it might annul the same for the contractor's default, and recover whatever sums might be expended in completing the contract in excess of the contract price, where, by the original contract, the place of dumping the spoil was made an essential and specific requirement, which could only be modified by written agreement, and the engineer in charge had refused permission to dump the spoil elsewhere."

From the foregoing, it would seem that a court of equity having the facts of

the case at bar before it, could, if it found from the evidence that a mistake in the bid was not a result of willful neglect by the bidder, and that the mistake was of such character as to cause serious loss to the bidder if not relieved from the bid, order a return of the check to the bidder.

From the letter enclosed with your communication, it seems that your department has exercised its discretion and determined that the bid of the Franklin Asphalt Company was based on a bona fide mistake that was not the result of willful neglect of the bidder, and that the mistake was material. It also appears that your department let the contract after readvertisement to another bidder, based on specifications establishing five classes of labor, instead of the two classes under the original specifications, with resultant increase of estimate of cost for the project due to the higher wage scale.

Therefore, in specific answer to your question, I am of the opinion that your department has the right to, and should, return the certified check to the Franklin Asphalt Paving Company.

Respectfully,
JOHN W. BRICKER,
Attorney General.

3508.

APPROVAL, ABSTRACT OF TITLE TO LAND IN ANDOVER TOWNSHIP, ASHTABULA COUNTY, OHIO, OWNED BY THE PYMATUNING LAND COMPANY, FOR PUBLIC PARK, HUNTING AND FISHING GROUNDS.

COLUMBUS, OHIO, November 26, 1934.

HON. WILLIAM H. REINHART, *Conservation Commissioner, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and approval an abstract of title to a certain tract of land in Andover Township, Ashtabula County, Ohio, which tract together with other tracts of land in Williamsfield, Andover and Richmond Townships in said county, the state of Ohio is acquiring from the Pymatuning Land Company. These lands are being acquired for the purpose and to the end that such lands and the waters innundating and submerging the same as a result of the construction and maintenance by the Water and Power Resources Board of the commonwealth of Pennsylvania of the dam at and across the outlet of the Pymatuning Swamp into the Shenango River in Crawford County, Pennsylvania, may be used as a public park and as public hunting and fishing grounds or territory.

The tract of land above referred to is the southwest part of Lot No. 44, according to the original survey of said township, and is bounded and described as follows:

> Bounded on the South by the North line of Lot No. 45 in said Township; on the East by lands formerly owned by Joseph Stinson; on the North by lands formerly owned by said Joseph Stinson and extending far enough West to contain 26 Acres of land, and being the East part of lands Deeded by Ida Jones to J. H. Johnson, by Deed dated April