

"This court is of opinion that such recovery is not authorized. The principle applicable to the situation is the equitable one that where one has acquired possession of the property of another through an unauthorized and void contract, and has paid for the same, there can be no recovery back of the money paid without putting, or showing readiness to put, the other party in statu quo, and that rule controls this case unless such recovery is plainly authorized by the statute. The rule rests upon that principle of common honesty that imposes an obligation to do justice upon all persons, natural as well as artificial, and is recognized in many cases. \* \* \*

The county should not be permitted to retain both the consideration and the bridges. \* \* \* the court leaves the county of Sandusky where it finds it."

Applying the principle of the Fronizer case, and assuming that a board of education entered into a contract with a person to drive a school wagon or motor van otherwise than in conformity with the statute and received the benefit of the services of such driver and paid him, the district should not now be permitted to recover the moneys so paid in the absence of a showing of fraud or collusion in the transaction.

I am therefore of the opinion, in specific answer to your question, that a driver of a school wagon or motor van who does not give satisfactory and sufficient bond and who has not procured a certificate of good moral character, as provided by Section 7731-3, General Code, cannot recover for services rendered on a contract of employment for the driving of said school wagon or motor van. If, however, he is so employed, and renders services in pursuance of such a contract, and is paid therefor, no recovery can be had on behalf of the school district of the moneys so paid, in the absence of a showing of fraud or collusion in the transaction.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

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2997.

#### DELINQUENT TAXES—LAND NOT FOUND—REQUIREMENTS FOR CANCELLATION BY COUNTY AUDITOR DISCUSSED.

##### SYLLABUS:

*Where delinquent taxes are charged against land and it is made to appear to the county auditor by affidavit or otherwise, that said land is not and has not been in existence during the time said delinquency has occurred, the county auditor may legally cancel the charge for delinquent taxes upon his tax list and certify the cancellation so made by him to the county treasurer who should correct the tax duplicate in accordance therewith.*

COLUMBUS, OHIO, December 10, 1928.

HON. LEROY W. HUNT, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication which reads:

"The Auditor of State has directed us to institute foreclosure proceedings upon the following described lot:

Lot 10-10-2-1 Original Sand Beach, Jerusalem Taxing District, Lucas County, Ohio.

We immediately wrote the party who held record title and they advised that they had made search for this land but could not find it; the Auditor's record shows a tax valuation as follows: Land \$20; Building \$200.

I took this matter up with the Appraisement Department of the County Auditor's office and they have made a careful survey of the lot; they say that this property was originally located on a sand ridge but the shore line has been given no protection and the lake has washed back over a good many feet of land. The Appraisement Department says that they have knowledge and are able to make affidavit that there has been no building on this land and that the land itself has been under water since 1924.

The party holding record title says that in view of the fact that this property is under water that he will not pay the delinquencies; that means that this office will be forced to institute foreclosure proceedings which will entail an expense of between fifty and sixty dollars at least, and there is a question whether we could sell it, and if any one would purchase it, sight unseen, and then found it was located out in the lake, they would not pay the taxes and four years from now we would again have it for sale.

The Appraisement Department would like to know if these taxes could be abated inasmuch as it is all under water and there is nothing to sell."

It appears that whatever may have been the value of said land and of the building thereon, neither is now in existence, the building having been either destroyed or removed, and the land a portion of a sand ridge, now being covered by the water of the lake to a depth of several feet. This condition has existed since 1924, according to the statement of your Appraisement Department. You state that in view of the foregoing the owner of title refuses to pay the delinquent tax and you hesitate to institute foreclosure proceedings which will create an expense; you doubt if it would sell without the buyer having knowledge of its existence and that said buyer would not pay the taxes.

Section 2591 of the General Code, reads as follows:

"Whenever, after the second Monday of April, and before the first day of October, in any year, it is made to appear to the county auditor, by the oath of the owner, or one of the owners, of a building or structure, land, orchard, timber, ornamental trees or groves, or tangible personal property, or by the affidavit of two disinterested persons, residents of the township, city or village in which the same is or was situated, that such building, structure, land, orchard, timber, ornamental trees or groves, or tangible personal property is listed for taxation for the current year, and has been destroyed or injured by fire, flood, tornado, or otherwise, after the first Monday of April of the current year, he shall investigate the matter, and deduct from the valuation of the property of the owner of such destroyed property, on the tax list for the current year, an amount which, in his judgment, fairly represents the extent of the injury or destruction: provided, however, that no such deduction shall be made in the case of an injury to, or destruction of a building, structure, land, orchard, timber, ornamental trees or groves, resulting in damage of less than one hundred dollars, nor shall any deduction be made for or on account of any damage or loss which is covered by insurance, nor

on account of any sheep killed by dogs. The county auditor shall certify the deductions made by him under the provisions of this section to the county treasurer, who shall correct the tax list and duplicate in accordance therewith."

This section authorizes the county auditor to deduct the value of the building or land that has been destroyed by flood or otherwise and certify said deductions to the county treasurer who shall correct the tax list and duplicate in accordance with said certificate, when it is made to appear between the second Monday of April and the first Monday in October in any year that such land or buildings have been destroyed, but this action is taken upon the application of the owner of the buildings or land so destroyed, and it does not appear that the owner herein has made application for any deductions.

It appears that said land and building were not in existence at the time the land was certified to the Auditor of State as delinquent.

Section 2588 of the General Code reads as follows :

"From time to time the county auditor shall correct all errors which he discovers in the tax list and duplicate, either in the name of the person charged with taxes or assessments, the description of lands or other property or when property exempt from taxation has been charged with tax, or in the amount of such taxes or assessment. If the correction is made after the duplicate is delivered to the treasurer, it shall be made on the margin of such list and duplicate without changing any name, description or figure in the duplicate as delivered, or in the original tax list, which shall always correspond exactly with each other."

This section relates to correction of errors on the tax list and duplicate either in the name of the owner, the description of the lands, or of the amount of such taxes or assessments. This section is construed to apply to errors of bookkeeping only.

Section 2588-1, General Code, reads as follows :

"The county auditor from time to time shall correct any clerical errors which he discovers in the tax list, in the name of the person charged with taxes, the valuation, description or quantity of any tract, lot or parcel of land or improvements thereon, or minerals or mineral rights therein, or in the valuation of any personal property, or when property exempt from taxation has been listed therein, and enter such corrections upon the tax list and duplicate."

It is noted that this section authorizes the county auditor to correct any clerical errors which he discovers in the tax list either in the name of the persons charged with the taxes, the valuation, description or quantity of any tract, lot or parcel of land or improvements thereon.

In the case of *The State of Ohio vs. The Cleveland & Pittsburgh Railroad Company, et al.*, 94 O. S. 61, a part of the syllabus reads as follows :

"1. Under the constitutional grant of authority to regulate interstate and foreign commerce, the United States government has paramount control of navigable waters and power to establish therein harbor lines and regulations.

2. The title and rights of littoral and riparian proprietors in the subaqueous soil of navigable waters, within the limits of a state, are governed by the laws of the state, subject to the superior authority of the federal government.

3. The title of the land under the waters of Lake Erie within the limits of the state of Ohio, is in the state as trustee for the benefit of the people, for the public uses to which it may be adapted."

Without going into the reasoning indulged in by the court or considering the authorities therein cited, I am of the opinion that, under the facts you present, all title to the property ceased upon subsidence or erosion of the land, since no private property right in the lands under Lake Erie exists except such as is incident to the ownership of abutting property.

The institution of foreclosure proceedings with respect to something concerning which no private property right can exist, would, of course, be an absurdity and the law does not require a vain thing. It is therefore believed that if a member of your said appraisal department has knowledge and is qualified to make affidavit that there has been no building on this land and that the land itself has been submerged under the water of the lake since 1924, the auditor may legally cancel said charge against the land on his tax list; and that the county auditor should certify said cancellation so made by him to the county treasurer, who should correct the duplicate in accordance therewith, under authority of Section 2589 of the Code, which is as follows:

"After having delivered the duplicate to the county treasurer for collection, if the auditor is satisfied that any tax or assessment thereon or any part thereof has been erroneously charged, he may give the person so charged a certificate to that effect to be presented to the treasurer, who shall deduct the amount from such tax or assessment. If at any time the auditor discovers that erroneous taxes or assessments have been charged and collected in previous years, he shall call the attention of the county commissioners thereto at a regular or special session of the board. If the commissioners find that taxes or assessments have been so erroneously charged and collected, they shall order the auditor to draw his warrant on the county treasurer in favor of the person paying them for the full amount of the taxes or assessments so erroneously charged and collected. The county treasurer shall pay such warrant from any surplus or unexpended funds in the county treasury."

It is therefore my opinion that where delinquent taxes are charged against land and it is made to appear to the county auditor by affidavit, or otherwise, that said land is not and has not been in existence during the time said delinquency has occurred, the county auditor may legally cancel the charge for delinquent taxes upon his tax list and certify the cancellation so made by him to the county treasurer, who should correct the tax duplicate in accordance therewith.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*