and such payment would of course include remittances which might ultimately prove to be over-payments. Having reached the treasury, these payments are as much subject to the restrictive provision of Section 22 of Article II of the Constitution from which you quote as any of the revenues of the state.

In view of the uniformity with which this restriction upon payment from the treasury has been applied, it is unnecessary for me to quote to you from the many opinions of this department in which it has been held that there is no authority to pay money from the treasury in the absence of specific appropriation, although there may be both a legal and moral obligation upon the state. The case that you present constitutes no exception to this rule and I am therefore of the opinion that refunds can not be made of over-payments of state franchise taxes in the absence of specific appropriation therefor by the legislature. My conclusion is strengthened by the various special provisions of the Code creating rotary funds for similar purposes. A particular instance is the rotary fund established by Section 5537 of the General Code for the purpose of paying refunds of the tax upon gasoline. There being no similar provision with relation to the franchise tax, you are unauthorized to make payment out of the state treasury of refunds in the absence of specific appropriation therefor.

In so holding I am not unmindful of the line of cases which apparently lay down the rule that a public officer may be sued for recovery of funds paid into the public treasury but not lawfully there by reason of a mistake of fact or unconstitutionality of the statute by which the exaction was originally made. These cases are exemplified by *Osborne* vs. *Bank of U. S.*, 9 Wheaton, 738, and *Poindexter* vs. *Greenhow*, 114 U. S., p. 270; 29 L. Ed., p. 185. The rule announced is that, the court's action having determined the illegality of the exaction, the act of the officer in retaining the money is not and cannot be the act of the state, so that the state is not in any sense a party. Theoretically, at least, the moneys were never in the state treasury. You will observe that these cases are premised upon a decision of a court of competent jurisdiction as to the illegality of the payment into the treasury. Until such a judicial determination has been made, any administrative officer is unauthorized to make payment from the public treasury of funds, howsoever they may have been received, except in pursuance of a specific appropriation made by law.

Respectfully,
EDWARD C. TURNER,
Attorney General.

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APPROVAL, GAME REFUGE LEASE.

COLUMBUS, OHIO, September 7, 1927.

Department of Agriculture, Division of Fish and Game, Columbus, Ohio.

GENTLEMEN:—I have your letter of September 7, 1927, in which you enclose the following Game Refuge Lease, in duplicate, for my approval:

No. 1052, Elsie Winegardner, Thorn Twp., Perry County, 88 acres.

I have examined said lease, find it correct as to form, and I am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney General.