indicated in levying the tax that the 40% allotted to the counties would be required to be expended in each year. In any event, the Legislature having full power to make such appropriations within the limits of the purpose for which the tax was levied, may attach such conditions to the use of such fund as seem to it wise.

Section 1 of the General Appropriation Bill of the 88th General Assembly, House Bill No. 510, contains, among other things, the following:

> "The sums herein named in the column designated '1929' shall not be expended to pay liabilities or deficiencies existing prior to January 1, 1929, nor to pay liabilities incurred subsequent to December 31, 1930; those named in the column designated '1930' shall not be expended to pay liabilities or deficiencies existing prior to January 1, 1930, or incurred subsequent to December 31, 1930."

An examination of the language of the section above quoted discloses that the Legislature has stated in clear and unambiguous language that the sums in said bill named in the column designated "1930" shall not be expended to pay liabilities existing prior to January 1, 1930, as hereinbefore indicated. As the second year's appropriation is carried under the column designated "1930," it follows that if an attempt were made to expend such funds as will be distributed to the counties for the year 1930, during the year 1929, such act would constitute a violation of the express provision of the Appropriation Bill, for the reason that it requires only a mathematical computation to determine the amount to which each county is entitled, which is included within the appropriation for such year. In other words, it is believed that the situation in so far as your question is concerned, is no different than if the Legislature had indicated a definite amount for each county in each year in making the appropriation.

It may be mentioned that in a number of instances the Legislature in its enactment of the Appropriation Bill, has seen fit to make appropriations in which there is no designation for the year 1930. However we have no such situation before us.

Based upon the foregoing, you are specifically advised that the 40% of the 80% of the Highway Construction Fund allotted to the counties under the provisions of Section 5541-8 of the General Code of Ohio, and appropriated by the General Assembly under the column designated "1930" may not be legally expended to cover obligations arising prior to January 1, 1910.

It is believed a more specific answer to your inquiry is unnecessary.

Respectfully,
GILBERT BETTMAN,
Attorney General.

757.

TAX COLLECTOR—ILLEGALLY EMPLOYED TO RECOVER DELINQUENT PERSONAL TAXES—RIGHT TO FEES DISCUSSED—JOINT LIABILITY WITH COUNTY TREASURER FOR COLLECTED TAXES NOT TURNED INTO TREASURY.

SYLLABUS:

1. *An employment of a collector to collect delinquent taxes without complying with the provisions of Section* 5696, *General Code, relative to the public reading of the list of persons delinquent, is illegal and void, whether such collector was employed by*

the county commissioners or by the county treasurer, but fees that have already been paid to a collector under color of such employment may not be recovered by the county in the absence of a showing of fraud or collusion.

2. *In the event fees have been earned by a collector under such employment but not paid, an action does not lie against the county to compel their payment.*

3. *When such collector has been employed by the county treasurer, and has not paid taxes collected into the county treasury, both the collector and the county treasurer are responsible and liable therefor.*

4. *When such collector has been employed by the county commissioners, and has not paid taxes collected into the county treasury, the county treasurer, as well as the collector, is responsible therefor, providing the treasurer has ratified such employment.*

COLUMBUS, OHIO, August 17, 1929.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your letter of recent date is as follows:

"We respectfully request you to render this department your written opinion upon the following:

In a certain county in this state the following appears upon the Journal of the board of county commissioners in relation to the employment of a delinquent tax collector under the provisions of Section 5696 of the General Code:

November 10, 1924—Journal 18, Page 551.

'It was moved by Smith, seconded by Hawkins, that in accordance with Section 5696, G. C., the county treasurer be authorized to employ John C. Grim to collect delinquent personal taxes for the year 1922 on a percentage basis of 15% of the total amount collected.'

April 14, 1926—Journal 20, Page 450.

'It was moved by Pfarr, seconded by Hagelbarger, that this board employ John C. Grim to collect the 1924 delinquent personal taxes for the year 1924 at a fee of 15% of the amount collected.'

November 8, 1926—Journal 21, Page 222.

'It was moved by Pfarr, seconded by Hagelbarger, that this board employ John C. Grim to collect the 1925 delinquent personal taxes at a fee of 15% of the amount collected in accordance with the recommendation of G. Lloyd Weil, Treasurer.'

The delinquent list was not read prior to either of these employments, and it will be noted that the last two entries indicate a direct employment of the delinquent tax collector by the county commissioners and not an authorization of the treasurer to employ such collector. The collector so employed collected taxes under each of said employments.

Question 1: The delinquent list not having been publicly read as required by Section 5696, General Code, would the collector be entitled to retain any fees that have been paid to him or may such fees be recovered upon a finding made by this department?

Question 2: Would such collector be entitled to any fees that have been paid to him, under his employment by the county commissioners, or may such fees be recovered upon a finding made by this department?

Question 3: May such collector be legally paid fees which have accrued under any of such employments, but which have not yet been paid?

Question 4: When taxes collected by such collector under his first employment have not been paid into the county treasury, who is responsible for the taxes which have not been so accounted for?

Question 5: May the county treasurer be held jointly liable with such collector for taxes collected by the collector under his first employment and not paid into the county treasury?

Question 6: When taxes collected by such collector under his second or third employment have not been paid into the county treasury, who is responsible for the taxes which have not been so accounted for?

Question 7: May the county treasurer be held jointly liable with such collector for taxes collected by the collector under his second or third employment, and not paid into the county treasury?"

The first three questions submitted relate to the matter of fees paid and to be paid to a collector of delinquent personal property taxes appointed as set forth in your letter. Upon the facts submitted, it becomes first necessary to determine the legality of the appointments. Section 5696, General Code, under which such appointments purport to have been made, provides as follows:

"The county commissioners, at each September session, shall cause the list of persons delinquent in the payment on personal property to be publicly read. If they deem it necessary, they may authorize the treasurer to employ collectors to collect such taxes or part thereof, prescribing the compensation of such collectors which shall be paid out of the county treasury. All such allowances shall be apportioned ratably by the county auditor among all the funds entitled to share in the distribution of such taxes."

The list not having been publicly read prior to any of the appointments in question, the first consideration must be as to whether or not such failure renders these appointments absolutely void. This question has been adjudicated by the Ohio Supreme Court in the case of *Commissioners of Hamilton County* vs. *Arnold*, 65 O. S. 479. The language of the court at page 484 is dispositive of the question, wherein it is said:

" * * * Until the delinquent list is caused to be read, the commissioners can take no step toward authorizing the appointment of a collector, and any step taken by them before the reading of such list is absolutely void."

In view of the fact that each appointment here under consideration is absolutely void on account of the delinquent list not having been read, it is unnecessary to consider any additional ground of invalidity occasioned by two of the appointments having been made by the county commissioners instead of by the county treasurer as provided in Section 5696, supra.

These appointments being absolutely void, may recovery be had by the county for moneys paid pursuant thereto? This office has repeatedly held that in the absence of a showing of fraud or collusion, when payment has been made upon a void contract for services performed, there can be no recovery of such payment without putting the party paid in statu quo. The authorities in support of this principle have been cited and discussed to such an extent as to render unnecessary their repetition here. See Opinions of the Attorney General, 1917, Vol. III, p. 1747; 1928, Vol. III, p. 2004; 1928, Vol. IV, p. 3080.

Considering your third question, a more difficult problem arises. In an opinion of my predecessor, Opinions of the Attorney General, 1928, Vol. IV, p. 2800, it was held, as disclosed by the syllabus, as follows:

"1. The driver of a school wagon or motor van who does not give a satisfactory and sufficient bond and who has not received a certificate of good

moral character as provided by Section 7731-3, General Code, cannot recover for his services as such driver.

* * * * * * * * * * * * * * "

This opinion followed and cited the principle contained in Labat on Master and Servant, Vol. II, Section 570, wherein it is said:

"The general principle that 'No court will lend its aid to a man who founds his action upon an immoral or illegal act precludes a servant from suing on a quantum meruit for the value of services, the performance of which involved a violation of an express statutory provision by both parties. Under such circumstances the master and servant are deemed to be in pari delicto."

I am inclined to concur in these views as applicable to the question submitted.

As herein discussed, the appointments in question are absolutely void. Bouvier defines "void" as follows:

"The term 'void' can only accurately be applied to those contracts that have no effect whatsoever and which are mere nullities such as those which are against law, illegal, criminal, or in contravention of law and incapable of confirmation or ratification; * * * ."

The principle governing the right to recover upon a void contract where one party has retained a benefit, as in the situation here, is set forth in 13 Corpus Juris, p. 506-507, wherein it is said:

"While there are cases to the effect that as long as a party retains the benefit of an agreement he will not be allowed to avail himself of its illegality, they are contra to the weight of authority and opposed to the general rule already stated, it being ordinarily held that, where the contract is void because of illegality, its repudiation by one party does not give the other the right to have restored to him what he parted with under it."

Coming now to the question of liability and responsibility of the county treasurer and the collector, under the circumstances set forth in your letter, it has been held in the case of *Brady* vs. *French, Treasurer,* 9 O. D. 195, which case involved the employment of a collector to collect delinquent personal taxes, as disclosed in the second paragraph of the headnotes:

"The employment of a collector is an employment by the treasurer (and officially, not individually) and not by the county commissioners. The legal character of the person so employed is that of deputy treasurer, * * * ."

Your last four questions concern the matter of who is liable in the event the collector, illegally appointed, has not paid into the county treasury taxes collected under color of such appointment. I am of the opinion that there is no question as to the liability of the collector in each instance, as it has been held that an officer must account for public money which has been placed in his hands because of his appointment, notwithstanding such appointment is illegal. *U. S.* vs. *Maurice,* 26 F. Cas. No. 15747, 2 Brock, 96. Under the well established principle of agency, wherein a principal is liable for the acts of an agent within the scope of the agent's authority,

there can be no question as to the liability of the county treasurer in a case where the collector is appointed by the treasurer. In the cases where the collector was appointed by the county commissioners, the same situation would exist provided the treasurer ratified such employment by furnishing the collector the information and means for effecting such collection. I assume that such ratification existed here, as the collector would probably not have made any collections without the cooperation of the county treasurer, at least to the extent of being supplied with necessary lists, etc.

Specifically answering your various questions, I am of the opinion that:

1. An employment of a collector to collect delinquent taxes without complying with the provisions of Section 5696, General Code, relative to the public reading of the list of persons delinquent, is illegal and void, whether such collector was employed by the county commissioners or by the county treasurer, but fees that have already been paid to a collector under color of such employment may not be recovered by the county in the absence of a showing of fraud or collusion.

2. In the event fees have been earned by a collector under such employment but not paid, an action does not lie against the county to compel their payment.

3. When such collector has been employed by the county treasurer, and has not paid taxes collected into the county treasury, both the collector and the county treasurer are responsible and liable therefor.

4. When such collector has been employed by the county commissioners, and has not paid taxes collected into the county treasury, the county treasurer, as well as the collector, is responsible therefor, providing the treasurer has ratified such employment.

Respectfully,
GILBERT BETTMAN,
Attorney General.

758.

DISAPPROVAL, ABSTRACT OF TITLE TO LAND OF PHILIP N. MOORE AND FRANCES L. BISHOP IN THE VILLAGE OF OXFORD, BUTLER COUNTY, OHIO.

COLUMBUS, OHIO, August 17, 1929.

HON. W. P. ROUDEBUSH, *Secretary, Board of Trustees, Miami University, Oxford, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication submitting for my examination and approval an abstract of title and warranty deed, relating to three certain inlots or tracts of land known and designated on the plat of the village of Oxford, Butler County, Ohio, as Inlots Nos. 285, 286 and 287, and subject to the payment of an annual ground rent of $6.00 each due and payable to the treasurer of Miami University, to-wit: On Inlots 285 and 286 on January 4th, every year, and on Inlot 287 on May 20th every year.

Upon examination of the abstract of title submitted, I find that Philip N. Moore and Frances L. Bishop have a good and indefeasible fee simple title to the above described property free and clear of all claims and encumbrances except the "dower" interest of Eva Perry Moore, wife of Philip N. Moore, the undetermined taxes on said property for the year 1929 and a balance of $124.82 on assessment levied