1330.

MORAL OBLIGATION — MORAL CLAIMS — RECOGNITION AND ALLOWANCE BY POLITICAL SUBDIVISIONS — CHARTER CITIES—ARTICLE II, SECTION 29, CONSTITUTION OF OHIO HAS NO APPLICATION—LIMITATIONS ON RECOGNITION AND ALLOWANCE OF SUCH CLAIMS —ABSENCE FRAUD OR COLLUSION—JURISDICTION OF COURTS—OFFICER, ERRORS OF JUDGMENT—LAW AND FACT—CIVIL LIABILITY—BUREAU INSPECTION AND SUPERVISION OF PUBLIC OFFICES — FINDINGS AGAINST MEMBERS MUNICIPAL LEGISLATIVE BODY— OVERRULES OPINION 3517, JANUARY 6, 1939, OPINIONS ATTORNEY GENERAL, 1938, PAGE 2471.

*SYLLABUS:*

*1. In so far as the recognition and allowance by political subdivisions of the state, especially charter cities, of claims based upon a moral obligation as herein defined are concerned, Section 29, Article II of the Constitution of Ohio, has no application, such section being directed to the legislative department of the state and a limitation upon the legislative power of the General Assembly.*

*2. Subject to the limitations of law including those specifically named in Paragraph 3 of this syllabus, a claim against a political subdivision, whether sounding in tort or contract, even though it may not be enforceable in a court of law, may be assumed and paid from the public funds of the subdivision as a moral obligation if it be shown that the claim is the outgrowth of circumstances or transactions whereby the public received some benefit, or the claimant suffered some loss or injury, which benefit or injury or loss, as the case may be, would constitute the basis of a strictly legal and enforceable claim against the subdivision, were it not that because of technical rules of law no recovery may be had. (Opinion 3467, Opinions Attorney General, 1931, p. 1024, approved and followed.)*

*3. A claim based upon a moral obligation may not lawfully be allowed and paid by a political subdivision unless such claim has a legal basis on which to stand. Such a claim must be acted upon by the proper legislative authority with a full knowledge of the facts and there must be a complete absence of any fraud or collusion.*

*4. A claim based upon a moral obligation is reviewable by the courts, which are not bound by the finding of facts of the legislative body allowing the claim.*

*5. An officer who is required to exercise a discretion, including members of a municipal legislative body, cannot be held accountable civilly*

*for errors of judgment and immunity in this respect extends to errors in the determination both of law and of fact.*

COLUMBUS, OHIO, October 24, 1939.

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

GENTLEMEN: I have your letter inviting my attention to Opinion No. 3517, rendered to your Bureau under date of January 6, 1939, by my immediate predecessor in office, and asking if I "concur in the ruling therein set forth." Your communication reads:

> "We are in receipt of a letter from our Examiner in charge of the examination of the city of Cleveland accounts, in which it is requested that we direct your attention to Opinion No. 3517, rendered by the Attorney General under date of January 6, 1939, and inquire if you concur in the ruling therein set forth. We would call your attention particularly to the third branch of the syllabus of Opinion No. 3517, wherein it is held that this Bureau 'is warranted in making findings against each and all the members of the *governing body* who participate in the allowance of such claim as well as the recipient or recipients of the benefits thereof.'
>
> It has heretofore been consistently held that this Bureau was unauthorized to render findings against the members of council, for instance, who voted for the passage of an illegal ordinance, but findings could be made against the administrative officers who illegally disbursed public funds in accordance with the terms of such illegal, null and void ordinance.
>
> According to the terms of the Uniform Depository Law, section 2296-1 et seq. of the General Code, the 'governing body of a municipality is, or appears to be, the legislative body, such as council or the city commission.'
>
> May we request that you examine said Opinion No. 3517, dated January 6, 1939, and advise us in answer to the following questions:
>
> Question 1. Do you concur in the ruling to the effect that local subdivisions are without authority to recognize claims as moral obligations and provide for and pay them as such moral obligations?
>
> Question 2. Is the Bureau of Inspection and Supervision of Public Offices, through its State Examiners, required to render findings for recovery, jointly, against the members of the municipal legislative body and the recipients, for payments allowed and made as moral obligations?"

It is, of course, with reluctance that one Attorney General examines the opinions of one of his predecessors in office for the sole purpose of determining whether or not he concurs in such opinion. However, I appreciate the very grave importance of your inquiry and approach this task with the knowledge that the questions here involved are of major concern not only to those who may have claims against local subdivisions, but to the officers of local subdivisions, the taxpayers, and the people at large as well.

In his "The American Judiciary", Dean Simeon E. Baldwin says, at page 56, that "Chief Justice Bleckley of Georgia once remarked that courts of last resort lived by correcting the errors of others and adhering to their own." It is unnecessary to say that this office does not desire to survive by continuing in error, and most certainly the Attorney General of Ohio, as chief law officer of the state, implicitly follows the law as laid down by the courts ordained by the people. The duty of this office in this connection is well stated in Opinion No. 397, Opinions of the Attorney General for 1927, p. 689, where it was said:

> "I believe that state officers, boards and commissioners generally feel justified in acting upon the advice of the attorney general, especially where that advice is given with reference to the interpretation and application of legislative enactments, inasmuch as the attorney general is the chief law officer of the state, and at least should be qualified to pass on questions of that character. His interpretation of the meaning of the law should be justifiable direction to state officers in the performance of their administrative duties in the absence of any court orders with reference to the subject.
>
> After all, however, the law is not an exact science nor is its application a finished art. Because of the complexity of the law differences of opinion as to the meaning and practical application of legislative enactments continually arise and thus it becomes necessary that some final arbiter be authorized to definitely determine what construction shall be placed on the language of such enactments to the end that the scale of justice may be kept even and steady and rules of conduct made certain and stable.
>
> Courts are by the law made such final arbiters, and when the law is interpreted by a court the interpretation given to it by the court becomes the law within the jurisdiction of the court, and such interpretation as the court gives to the law should be followed and acted upon, at least within the territory over which such court has jurisdiction.
>
> It is therefore my opinion that the Bureau of Inspection and Supervision of Public Offices has no authority to question

the legality of the orders of a court but should act in accordance with such orders, even though such orders may not be in accord with the opinion of the attorney general, and even though, as in this case, the court's decision may be made in the discharge of an administrative duty rather than in his strictly judicial capacity."

Having carefully examined the opinion referred to in your letter, in the light of the law as I see it, I am constrained to say that I cannot concur in either the reasoning or the conclusions of Opinion No. 3517 for the reason that the courts of Ohio, including the Supreme Court, have held otherwise. In addition, former Attorneys General, including my immediate predecessor in office, have rendered opinions saying otherwise.

Obviously, in approaching the problems presented in your communication, the first duty is carefully to examine the opinion which you desire to be reviewed.

The first, third and fourth branches of the syllabus of Opinion No. 3517, supra, read as follows:

"Neither the state of Ohio nor any of its political subdivisions have authority or right to allow and pay a claim based solely and purely on moral obligation, except by a two-third vote of the members elected to each branch of the General Assembly as provided by Section 29, Article II of the Constitution.

* * * * * * * * *

3. When a claim based solely and purely on a moral obligation has been allowed and paid by the state or any of its political subdivisions in any other mode or manner than that provided by section 29, Article II of the Constitution of Ohio, the Bureau of Inspection and Supervision of Public Offices is warranted in making findings against each and all the members of the governing body who participate in the allowance of such claim as well as the recipient or recipients of the benefits thereof.

4. By reason of section 29, Article II of the Constitution of Ohio, the state has such an interest in such transaction that an action could be maintained on behalf of the state against those found to be responsible for the use of the subdivision involved."

The opinion proper reads in part as follows:

"Municipal corporations, with this atmosphere in their nostrils, with their constitutional delegation of powers of local self-government, insist with some degree of force that they are

'sovereignties within a sovereignty', and they have plenary power to give countenance to moral claims to the same extent as the state itself.

In my humble opinion these conceptions are misconceptions.

It became important to know just how and when moral obligations crept into the law. After much research I find the subject best treated in Williston on Contracts, Vol. I, sections 147 et seq. From this text with cases cited, it will be seen that it was about the middle of the 18th century that the term 'moral obligation' as a kind of past consideration giving validity to a subsequent promise to fulfill the obligation, gained currency.

It seems that Lord Mansfield was its sponsor. He was trained in the doctrines of the Civil Law and evidently disliked the Common Law doctrine of consideration. The theory of moral consideration was applied in various cases during Lord Mansfield's life and shortly after his death. * * *"

After quoting Williston on Contracts, Vol. 1, Section 147, to the effect that at "the present day there can be no doubt that the doctrine of moral consideration is wholly discredited in England, though in England as in the United States certain exceptional causes * * * still impose liability", the then Attorney General said that but one conclusion can be reached, "namely, that if a moral consideration is regarded in this as insufficient to support a contract, no obligation results when a moral consideration is the sole and only consideration therefor." What is referred to as "the tort phase of the question," is then mentioned, and it is declared:

"As a final deduction, it must be conceded that moral consideration and moral obligation have no part in the law of contracts or the law of tort in Ohio. The fact that there is no such law seems to make little difference as the state and its municipalities ever and anon take notice of moral obligations both in the law of contract and tort and satisfy claims based thereon.

If the General Assembly sees fit to allow and liquidate moral obligations, there are just two cures. The courts have the one, the people the other."

After a reference to the sovereign rights of the people and a quotation of Section 20, Article I of the Constitution of Ohio, it is pointed out in the opinion that our Constitution nowhere expressly authorizes "the General Assembly to recognize, allow and satisfy claims based purely

upon moral obligation" and that "if the General Assembly has such power, it must be necessarily implied from Section 29, Article II" of the Constitution. This section (quoted in the opinion) reads:

> "No extra compensation shall be made to any officer, public agent, or contractor, after the services shall have been rendered, or the contract entered into; nor, shall any money be paid on any claim, the subject matter of which shall not have been provided for by pre-existing law, unless such compensation, or claim, be allowed by two-thirds of the members elected to each branch of the General Assembly."

Concerning this section, that opinion further states that, while it might be insisted that the provisions thereof deal "purely with matters to which the state in its sovereign capacity is a party", the section is in fact not susceptible of such a restricted application, and the cases of State ex rel Gindelsperger v. Wright, Auditor, 24 O. C. C. (N. S.) 400 (1915), and Bates & Rogers Const. Co. v. Board of Commissioners, etc., 274 F. 659 (1920), and Opinion No. 1981, Opinions of the Attorney General 1933, Vol. III, p. 1891 (all hereinafter discussed), are cited as authority for the proposition that Section 29, Article II, supra, applies in toto and with all its vitality to all political subdivisions of the state as well as to charter cities.

The opinion continues:

> "It will probably be insisted that in this opinion I am stretching section 29, Article II of the Constitution to unwarranted limits.
>
> Permit me to say that this constitutional field was not entered surreptitiously. On the contrary, the question of applicability was given most careful and mature consideration, and I am frank in saying that such consideration was prompted by the reckless expenditure of the people's money by some of the subdivisions of state.",

and the Debates of the Constitutional Convention of 1850-1851, Vol. I, pp. 164, 284 and 285. and Vol. II, pp. 318, 569-574, 578, 597, 633, 664, 808, 852, 858 and 870, are referred to with the observation that "it is only necessary to read the record" to "understand what motivated the constitutional delegates to inject" Section 29 into our organic law.

The opinion concludes with the holding that, "in cases where claims based purely on moral obligations are allowed and paid, otherwise than as provided in Section 29, Article II", supra, a finding should be made by your Bureau against each member of the governing body that participated in the allowance of such claim, as well as the recipient or recipients

thereof" and that "the State of Ohio has such an interest in the transaction that an action could be maintained on behalf of the State against those found to be responsible, for the use of the subdivision involved."

From the above resume of Opinion No. 3517, it will be seen that my predecessor therein subscribed to the following propositions:

> I. Municipal corporations do not, under the "Home Rule" provisions of our Constitution or otherwise, have power to give countenance to and allow moral obligations;
>
> II. Since a "moral *consideration*" is insufficient in Ohio, as well as in most all jurisdictions, to support an *executory* contract, there can be no such thing as a moral obligation.
>
> III. Section 29, Article II of the Constitution of Ohio applies in its entirety and with full force to all political subdivisions of the state, including charter cities;
>
> IV. Where claims based purely on moral obligations are allowed and paid, otherwise than as provided in Section 29, Article II, supra, findings should be made "against each member of the *governing* body that participated in the allowance of such claim, as well as the recipient or recipients thereof"; and
>
> V. To enforce such a finding an action may be maintained in the name of the state against those found to be responsible, for the use of the subdivision involved.

With none of these conclusions do I agree; and I propose first to point out the reasons for my dissent, and second to discuss the law pertaining to the allowance of moral obligations and the limitations upon the allowance of such claims.

1. In so far as proposition I above stated is concerned, the powers of local self-government under the Home Rule Amendment of 1912 have been rather clearly defined and determined by our Supreme Court. In this connection it is sufficient to say that by the terms of Section 3, Article XVIII of the Constitution, municipalities are empowered "to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Section 7 of the same article authorizes any municipality to frame or adopt or to amend a charter for its government and, subject to the provisions of Section 3, supra, to "exercise thereunder all powers of local self-government."

In addition to the limitations contained in Section 3, Article XVIII, supra, Section 6 of Article XIII provides, inter alia, that the General Assembly shall restrict municipalities' "power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power," while by Section 13, Article XVIII, it is provided that:

"Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities."

It has been several times held that Section 6, Article XIII, supra, was not repealed by the adoption of any of the Home Rule provisions of Article XVIII. See State ex rel. Toledo v. Cooper, County Auditor, 97 O. S. 86 (1917); Berry et al. v. City of Columbus, 104 O. S. 607 (1922); State ex rel. v. Williams, Director of Finance, 111 O. S. 400 (1924); and Phillips on behalf of City of Lima v. Hume, Purchasing Agent, et al., 122 O. S. 11 (1930).

With reference to the nature, scope and extent of the powers of municipalities under our present constitution, the law is well stated in 28 O. Jur. 242, et seq., citing inter alia State ex rel. Toledo v. Lynch, Auditor, 88 O. S. 71, 102 N. E. 670, 48 L. R. A. (N. S.) 720 (1913); Fitzgerald et al., etc., v. City of Cleveland, 88 O. S. 338, 103 N. E. 512 (1913); State ex rel. Morgan v. Rush, etc., 37 Oh. App. 109, 174 N. E. 142 (1930); and City of Mansfield v. Endly, 38 Oh. App. 529, 176 N. E. 462 (1931; Aff'd 124 O. S. 652), in the following words:

"The powers of local self government 'are clearly such as involve the exercise of the functions of government, and they are local in the sense that they relate to the municipal affairs of the particular municipality.' * *

The powers of local self government conferred upon municipalities by article 8 (sic) of the Constitution are limited to such governmental powers as might be exercised by the state itself. On the other hand, such powers extend to and include all those which might be exercised by the state itself, through the legislature, within the proper domain of municipal government. * * *"

In the Morgan case, supra (37 Oh. App. 109), the first headnote reads:

"City of Cleveland has within its proper domain same powers that Legislature would have to pass private bills or do anything Legislature might do."

While it is rather difficult to justify this opinion in all respects and some of the statements therein contained, yet the court did say, and it seems to me to be the law (p. 111):

> "If we understand the nature of the charter of the City of Cleveland *it has within its proper domains the same power that the Ohio Legislature would have to pass private bills, or to do anything that the Legislature might do.* * * *" (Italics ours.)

A more helpful opinion is that of Judge Sherick, in the case of Mansfield v. Endly, supra, in which, at page 535 of 38 Ohio Appellate, it is said:

> "By the expression, 'to exercise all powers of local self-government,' we hold it to be understood that a municipal corporation may enact all such measures as pertain exclusively to it, in which the people of the state at large have no interest or concern, and which they have not expressly withheld by constitutional provision. * * *"

See also the opinion of Judge Stephenson, concurred in by the entire court, in Youngstown v. Craver, et al., etc., 127 O. S. 195 (1933), and the case of Cleveland et al. v. Ruple, 130 O. S. 465 (1936).

For the reasons and upon the authorities above cited, I feel compelled to disagree with the first proposition contained in Opinion No. 3517, as above stated.

II. Coming now to the second thesis of Opinion No. 3517, viz., that, since generally speaking a "moral consideration" is not sufficient to permit a recovery on an executory contract, there is in the law no such thing as a moral obligation, this is an obvious *non sequitur*.

While the term "moral obligation" may not be the most appropriate phrase to describe the kind of obligation or power or duty here under consideration, certainly there is no reason for confusing the legal concept expressed by the words "moral obligation" with any common law theory as to what is or is not a sufficient consideration to make an executory contract enforceable in the courts. The one has nothing whatever to do with the other. It may be conceded that a moral consideration is not sufficient to enable one to recover *ex contractu* or otherwise in the courts; yet, if because of a moral consideration a contract be fully executed, the person who surrenders a legal right because of such moral obligation, cannot recover or regain the legal right so surrendered. That is to say, a moral consideration will support a contract which has been completely executed excepting, of course, that class of contracts which the law-making body for reasons of public morals and public policy declares shall be entirely null and void, as for example gaming contracts.

Further, to delineate upon the obvious difference between the phrase "moral consideration", as used in the law of contracts, especially with reference to the enforceability of executory contracts on the one hand, and the term "moral obligation" as it has come to have a settled meaning in our law, would seem to be unnecessary.

III. The third proposition of Opinion No. 3517, is that political subdivisions, including charter cities, are controlled by the provisions of Section 29, Article II of the Constitution.

To sustain this position, the cases of State ex rel Gindelsperger v. Wright, Auditor, and Bates & Rogers Const. Company vs. Board of Commissioners, supra, and Opinion No. 1891, Opinions of the Attorney General for 1935, Vol. 3, p. 1891, are cited. In addition, reference is made to the Debates of the Constitutional Convention of 1850-1851. These authorities will be considered in order.

The Gindelsperger case holds and *only* holds as stated in the headnote:

> "Laws passed in the fulfillment of an obligation of the state or any of its agencies to an individual with respect to past transactions, are not laws of a general nature controlled by Section 26 of the Constitution of Ohio."

This case had to do with additional compensation allowed by the General Assembly for past services rendered by the deputy state supervisors of elections for Cuyahoga County, and was in nowise concerned with any political subdivision of the state.

In the Bates & Rogers Const. Company case, Judge Westenhaver, of the United States District Court, for the Northern District of Ohio, passed upon a demurrer to a petition filed by a contracting company against the county commissioners asking damages for failure to deliver a site, upon which the contracting company had agreed to build approaches to a bridge. The demurrer was overruled. At page 665 of the opinion, the constitutional provision here under consideration was dismissed with the single observation that:

> "* * * Section 29, art. 2, of the Constitution of Ohio, seems to me to be without pertinency. * * *"

The 1933 opinion of the Attorney General (Opinion No. 1981) does say at page 1895 that:

> "The argument might be presented that the foregoing constitutional section is an inhibition against the state legislature providing for extra compensation only, inasmuch as Article II of the Constitution is entitled 'Legislative.'
>
> However, the language of the Supreme Court in the Williams case, supra, does not appear to warrant such a narrow construction; and an opinion of a former Attorney General, reported in Opinions of the Attorney General for 1919, volume 1, page 66, held, as disclosed by the second paragraph of the syllabus:

'Such resolution (of the board of control of the city of Cleveland, adopted March 5, 1918, increasing compensation of certain employes, effective January 1, 1918) is ineffective in law to authorize payment for such previously rendered service, being within the inhibition of section 29, article II of said constitution.' "

The Williams case, referred to in the above quotation, is the case of State of Ohio, ex rel. v. Williams, 34 O. S. 218 (1877), which may be dismissed with the statement that the case was concerned with extra compensation for *state officers,* viz., assistant sergeants-at-arms of the Senate, and, therefore, has no application to political subdivisions.

And it is obvious that the opinion of the Attorney General of New York, cited as authority (p. 1895), has no application for two reasons: First, it had to do with the state itself and not with its subdivisions; and, Second, the people of New York have specifically included in the similar section of the New York constitution the words—the "legislature shall not, nor shall *the common council of any city,* nor *any board of supervisors.*"

Moreover, since the particular question involved in the 1933 opinion was whether or not a board of education might amend a contract with a private corporation for the purchase of coal so as to allow an increase in the contract price, a consideration of Section 29, Article II, was unnecessary.

Opinion No. 45, Opinions of the Attorney General, 1919, Vol. 1, p. 66, held that a resolution of the board of control of the city of Cleveland, increasing compensation of certain employes, was retroactive and ineffective to authorize payment for previously rendered services because of the inhibition of section 29, Article II, of said constitution."

It will be noticed, however, that in the body of this opinion (p. 67), as in the 1933 opinion, only the first phrase of Section 29 was in fact attempted to be applied, viz., that part reading, "No extra compensation shall be made to any officer, public agent, or contractor, after services shall have been rendered or the contract entered into;". And neither opinion gave any consideration whatsoever to the Debates of the Constitutional Convention of 1850-1851, referred to but not commented upon or considered in Opinion No. 3517, although it seems to me that the proceedings of the Convention and the debates are more than persuasive as to what was in the mind of the Convention when it adopted Section 29.

As originally presented in the report on "The Legislative Department," the first phrase of Section 29 (then numbered "Section 37") read:

"The General Assembly shall never authorize the payment of any extra compensation to any officer, public agent, or con-

> tractor, after the services shall have been rendered or the contract entered into, * * *." (Debates, Vol. I, 164, 284; Vol. II, 318.)

This phrase remained unchanged during all the debates of the Convention (Debates, Vol. I, 164, 284, 285; Vol. II, 319, 569-574, 578, 597, 633) until March 5, 1851, five days before adjournment, when "the standing committee on Revision, Arrangement and Enrollment" submitted its report "on the Legislative Department", in which the first phrase read as it now reads (Debates, Vol. II, 806, 808, 831).

In a consideration of the "Legislative Department" and the "Legislative Power" it was at various times moved "to strike out the whole section (present Section 29) as it stands"; to amend the section "by striking out all after the word 'into' "; to insert the words "the subject matter of"; and to add the words "unless such claim be passed by a majority of two-thirds, in each branch of the General Assembly" (Debates, Vol. I, 285; Vol. II, 569, 578, 597). As you shall have noted, the last two amendments were adopted. No attempt was at any time made to amend the first phrase above quoted; and since the change in the wording of this phrase was made by the "committee on Revision, Arrangement and Enrollment"; since the section in question was discussed and considered as a limitation on the legislative department of the state; and especially since in all the debates on this section only expenditures by and claims against the state were mentioned, the conclusion seems inescapable that Section 29 has no application to the political subdivisions of the state. Throughout the debates political subdivisions were not even named; and, of course, the powers of municipalities under the Home Rule provisions of our present Constitution were not given consideration, because we had no Home Rule provisions until the amendments of 1912.

In the Constitutional Convention of 1912, Section 29 does not seem to have been considered or debated either generally or in connection with the Home Rule provisions, for all of which reasons, I am constrained to disagree with proposition III of Opinion 3517, supra.

IV. As to the fourth proposition of Opinion 3517, to the effect that findings may be made against legislative officers who participate in the allowance of a claim based upon a moral obligation, the law in my opinion is otherwise.

In 22 O. Jur. 964, it is stated thus:

> "An officer who is entitled to exercise a discretion, that is, a judicial officer, cannot be held accountable civilly for errors of judgment, such as paying money to the wrong person. This immunity extends to errors in the determination both of law and of fact."

In support of this principle, the case of State of Ohio v. Bair, et al., 71 O. S. 410, 73 N. E. 514 (1904) (involving an exercise of discretion by county commissioners); Rish v. Witherill, et al., 4 Abs. 84 (1925) (involving an officer of a conservancy district); State of Ohio v. Coit, 8 O. D. (N. P.) 62, 35 Bull. 82 (1900) (involving a sheriff when acting in a quasi-judicial capacity), and Stewart, et al. v. Southard, 17 Ohio 402, 49 Am. Dec. 463 (1848) (involving the directors of a school district) are cited. From these cases it will be seen that the term "a judicial officer" as used in the excerpt above quoted is not used in its strict or narrow sense but has reference to officers who exercise a discretion and act in a judicial, quasi-judicial or legislative capacity as distinguished from those who perform purely ministerial acts.

In any event, the case of Village of Hicksville v. Blakeslee et al., 103 O. S. 508, 134 N. E. 445 (1921), would seem to be here dispositive. In that case the court held, as stated in the first three branches of the syllabus:

> "1. A resolution of a village council providing for the sale of the municipality's bonds is legislative in its nature, and an act of an individual member of council in voting for or against such resolution is the exercise of legislative discretion by such member.
>
> 2. The members of a municipal council, when acting in good faith, are exempt from individual liability for the exercise of their legislative discretion in voting, as such members of council, for or against any proposed legislation before them for consideration.
>
> 3. The fact that the proposed legislation is prohibited by law does not make it any the less legislative in its nature."

In this case an action was brought by the village of Hicksville against the members of the village council, who had illegally voted to authorize the payment of a commission to one who sold certain municipal bonds of the village. The court held as above set forth.

In the opinion, it was said by Judge Robinson, at page 517, et seq.:

> "* * * That legislative officers are not liable personally for their legislative acts is so elementary, so fundamentally sound, and has been so universally accepted, that but few cases can be found where the doctrine has been questioned and judicially declared.
>
> * * *
>
> The exercise of discretion by a village councilman in voting for a resolution or an ordinance void by reason of a statutory limitation upon the power of the council is no different from the exercise of discretion by a member of the general assembly in voting for a statute void by reason of a constitutional limitation upon the power of the general assembly, yet no one would claim

that a legislator would be liable either in his official or in his individual capacity for the exercise of his judgment and discretion in voting for such void statute. It is apparent that the action of council in providing by resolution a plan for the disposition of the bonds in question, which they had been unable to dispose of in the regular way, was legislative in its nature, it being an attempt to enact the necessary legislation to make lawful that which was theretofore unlawful; and the fact that it was ineffective in the accomplishment of its purpose does not make it any the less legislative in its nature, and this is the more apparent when the reason why it is ineffective is considered, to wit, because the general assembly had by legislation provided a plan for the sale of municipal bonds which the municipality was bound to follow, and with which the scheme adopted by the municipality was inconsistent. We see no reason for applying a different rule to a municipal legislator, who, in good faith, exercises his discretion in voting for a resolution void because of legislative limitations upon his power, than is applied to a state legislator exercising his discretion in voting for a statute void by reason of a constitutional limitation upon his power."

And it is here interesting to note that the first paragraph from Judge Robinson's opinion, supra, is quoted with approval in Section 567, Vol. 2, p. 393, of McQuillen Municipal Corporations, which contains an excellent discussion of the principles of law here involved.

Upon the above authorities, I dissent from proposition IV.

V. In so far as proposition V, supra, is concerned, the Legislature has, in Section 286, General Code, expressly and in detail prescribed how and in whose name actions shall be brought to recover findings for public money or public property made by your Bureau. This lengthy section reads in part as follows:

"* * * If the report sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public money due has not been collected, or that any public property has been converted or misappropriated, the officer receiving such certified copy of such report, other than the auditing department of the taxing district, may, within ninety days after the receipt of such certified copy of such report, institute or cause to be instituted, and each of said officers is hereby authorized and required so to do, civil actions in the proper court *in the name of the political subdivision or taxing district to which such public money is due or such public property belongs,* for the recovery of the same and shall prosecute, or cause to be prosecuted the same to final determination. * * *"

VI. Having discussed the points in Opinion No. 3517, with which I disagree, it remains to determine if in the law of Ohio there be such a thing as a moral obligation recognizable by a political subdivision or taxing district.

Touching the power of a municipal corporation to provide for the payment of a moral obligation, it is said in 28 O. Jur. 849, as follows:

> "The council of a municipality may provide for the payment of a claim which constitutes a moral, although not a legal, obligation of the municipality, except where such claim is for benefits received under a contract which has been entered into without compliance with mandatory provisions of law. But the exercise of the discretion of the municipal authorities in this respect is not unlimited, and the courts have power to enjoin the making of an allowance which is overgenerous in amount. It is said, in this connection, that public officials should consider themselves as trustees rather than philanthropists in the appropriation and disbursement of public funds."

At page 867 of the same authority it is said:

> "* * * An ordinance directing the payment of a claim which constitutes a moral, though not a legal, obligation of the municipality, is valid and binding upon the officers thereof."

There are many cases in Ohio involving the allowance and payment of claims based upon a moral obligation. Among others these may be cited: Fordyce v. Godman, Auditor of State, 20 O. S. 1 (1870); State ex rel. v. Williams, Auditor of State, 34 O. S. 218 (1877); State ex rel. v. Wright, Auditor, 24 O. C. C. (N. S.) 400 (C. C. Cuyahoga Co., 1904); and State ex rel. v. Tracy, State Auditor, et al., 47 O. A. 65, 69 O. L. R. 457, 190 N. E. 48 (C. of A. Franklin Co., 1934), all of which involved claims against the state. Cases involving claims against county commissioners are: Jones, Auditor, v. Commissioners of Lucas County, 57 O. S. 189 (1897); and State ex rel. v. Fronizer, et al., 77 O. S. 7 (1907). Board of Education v. State, 51 O. S. 531 (1894), involved a claim against a board of education. And Emmert v. City of Elyria, 74 O. S. 185 (1906); State ex rel. v. Brown, City Auditor, 8 O. C. C. 103, 4 O. C. D. 345 (C. C. Hamilton County, 1894); State ex rel. v. Rusk, Div. of Finance, 47 O. A. 109, 34 O. L. R. 54, 174 N. E. 142 (C. of A. Cuyahoga County, 1930); Peters, Div. of Finance, v. State, ex rel., 42 O. A. 307, 12 Abs. 290, 182 N. E. 139 (C. of A. Lucas Co., 1932); Arnold, a taxpayer, v. City of Akron, 54 O. A. 382, 8 O. O. 152, 23 Abs. 379, 7 N. E. (2nd) 660 (C. of A. Summit County, 1936); State, ex rel. v. Wall, as Director, 2 O. N. P. (N. S.) 517, 15 O. D. (N. S.) 349

(C. P. Franklin County, 1902), and Castner v. Village of Pleasant Ridge, et al., 7 O. N. P. (N. S.) 174, 18 O. D. (N. P.) 539 (C. P. Hamilton County, 1907).

Your questions do not require a consideration of the above cited cases involving claims based on moral obligations against the state; and the confines of this already lengthy opinion will not permit a review and analysis of the many cases above cited. Only a few of the opinions will be quoted from, therefore, and this for the purpose of showing that the courts of Ohio do recognize that moral obligations have a place in the law of Ohio and to point out some of the limitations on the allowance of such claims.

One of the leading cases in Ohio is the Fronizer case (77 O. S. 7). In this case, as stated at page 155 of the Hommel case, infra, "it was held that there could be no recovery back of money paid upon a county commissioners' bridge contract, fully executed, but rendered void because of the lack of the necessary statutory certificate by the county auditor, when there was no claim of unfairness, fraud or extortion, and no claim of effort to put the contractor in *statu quo* by return of the bridge, or otherwise."

In the case of Hommel & Co. v. Village of Woodsfield, 122 O. S. 148 (1930), it was said as follows at page 155, with reference to the Fronizer case:

> "* * * The court said that this rule (the rule above set forth in quotation marks) rested upon the principle of common honesty, and that the county should not be permitted to retain both the consideration and the bridge. However, the Fronizer case, *which is still the law in this state,* cannot be extended beyond the specific doctrine which it announces. It is not authority for the theory that there can be a money judgment or recovery for articles delivered to a municipality under a void contract." (Italics ours.)

At page 16 of the Fronizer case, Judge Spear, speaking for the court, said as follows:

> "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 the 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. Chapman v. County of Douglas, 107 U. S., 348; Lee v. Board of Commissioners, 52 O. C. A., 376; Bridge Co. v. Utica, 17 Fed. Rep., 316."

Board of Education v. State, supra (51 O. S. 531), held as stated in the first branch of the syllabus that:

"Where no obligation, legal *or moral,* rests upon a board of education, to pay a claim asserted against it by a private individual, an act of the general assembly, procured by the claimant, commanding such board to levy a tax for its payment, is unconstitutional and void." (Italics ours.)

In the opinion by Judge Bradbury, it was said at page 540:

"It may be conceded that the general assembly may authorize one of the political subdivisions of the state to levy a tax to pay a demand not legally enforceable, *but founded upon a moral consideration,* or may even command that the levy shall be made for that purpose, and yet deny to it the power to determine conclusively the existence of such obligation." (Italics ours.)

While the observations of Judge Bradbury were obiter, yet the fact remains that the court did recognize in the syllabus that there is in the law of this state such a legal concept as a moral obligation upon which a valid claim can be based and allowed.

In Emmert v. City of Elyria, supra (74 O. S. 185), the court said at page 194:

"But, because a municipality is not legally liable to pay for a public improvement, it does not follow that it is not under a moral obligation to do so or that a court because it will not enforce payment will enjoin it. The contract for paving this street is not *ultra vires.* If invalid it is so merely because the contract was made before the bonds to provide the money to pay for it were sold. Now that the work has been done in accordance with the contract and the bonds have been sold and the money to pay for it is in the treasury, it is right that it should be paid for and a court of equity ought not, unless its failure to do so would defeat the purpose of the law, prevent the municipality from doing what equity and fair dealing would exact from an individual."

State ex rel v. Brown, City Auditor, supra (8 O. C. C. 103) is more decisive. In this case it was squarely held as stated in the first headnote:

"Where equity and justice require the payment of a claim against a municipal corporation, though it may not be collectible at law, an ordinance of such city or village legally passed, directing and authorizing its payment, is legal and valid."

In the case of Arnold, a Taxpayer, v. City of Akron, supra, (54 O. A. 382) it was held:

"The council of a charter city, in which the people of the city, by its charter, had vested the exercise of the power of local self-government granted to the people by the Constitution of the state, authorized the execution of a certain contract relating to a matter of local self-government, which, under the Constitution and laws of Ohio and the charter, council had the power to authorize, but which contract was unenforceable because the officials of the city did not observe and comply with the law in the execution of the same: Held, that the council, acting with full knowledge of the facts and without fraud, had the power to recognize the defectively executed contract as creating a moral obligation, and to discharge such obligation."

At page 389 of the opinion it was said:

"An attempted ratification by a municipal corporation of a contract which it has no power to enter into, is ineffectual; but we have determined that the city had the power to enter into the first contract if it had observed the laws of the state in doing so; and a study of the cases leads us to the conclusion that, by the weight of authority, *it is competent for a municipality to ratify a contract which it had the power to make, but which was invalid because defectively or irregularly executed, if such ratification was made with full knowledge of the facts, and with intent to discharge a recognized moral obligation.*" (Italics ours.)

State, ex rel v. Wall, as Director, supra (2 O. N. P. (N. S.) 517), contains a well reasoned opinion by the late Judge Evans of the Franklin County Court of Common Pleas. The headnote in this case reads:

"Where the allegations of the petition demurred to show that the plaintiff's claim is equitable and just, and that the services sued for were necessary and beneficial to the defendant, a municipal corporation, and that the defendant by ordinance duly passed has allowed the claim as a valid claim against the defendant, and made an appropriation of funds for the payment thereof, and authorized and directed the same to be paid, the demurrer

should be overruled, although such claim without such ordinance could not have been collected at law or in equity."

At page 520, Judge Evans said as follows:

"'The Legislature,' says Judge Cooley, 'may recognize moral or equitable obligations, such as a just man would be likely to recognize in his own affairs, whether by law required to do so or not. And what the Legislature may do for the State, the municipalities, under proper legislation may do for themselves' (Cooley on Taxation (2d Ed.), p. 128). The Legislature has no constitutional power to authorize the payment of a void claim, and, of course, a municipality can have no such power; but the Legislature may authorize the payment of claims just in themselves, and for which an equivalent has been received, but which from some cause, can not be enforced at law (20 A. & Eng. Ency. of Law (2d. Ed.), 1222 and 1223). And this doctrine has been repeatedly sanctioned by the Supreme Court of this state (Board of Education v. McLandborough, 36 O. S., 227; Warder v. Commissioners, 38 O. S., 639, 643; Board of Education v. State, 51 O. S., 531 and 541). While the city council may make inquiry to ascertain, in the first instance, the truth of the facts necessary to authorize the allowance of the claim, yet the city council is without authority to *conclusively* find and recite such facts so as to estop the municipality from contesting them in a court of justice where the ordinance is sought to be enforced (Board of Education v. State, 51 O. S., 531, Syl. 2)."

So much for the courts of Ohio, whose decisions and opinions it is my duty to follow.

Of the many opinions of former Attorneys General holding that our law recognizes moral obligations and the allowance in proper cases of claims based thereon, the following may be cited: Opinions, Attorney General, 1927, Vol. III, p. 1747; 1928, Vol. I, p. 352; 1929, Vol. I, p. 329; 1929, Vol. II, p. 915; 1929, Vol. III, p. 1939; 1930, Vol. I, p. 157; 1930, Vol. II, p. 1524; 1931, Vol. II, pp. 945, 1024, 1027 and 1124; and 1937, Vol. I, p. 1015.

For opinions upholding the power of county commissioners to allow a claim based upon a moral obligation, see Opinions Attorney General, 1931, Vol. II, p. 1024. The syllabus of this opinion reads:

"A claim against a political subdivision, whether sounding in tort or contract, even though it may not be enforceable in a court of law, may be assumed and paid from the public funds

of the subdivision as a moral obligation if it be shown that the claim is the outgrowth of circumstances or transactions whereby the public received some benefit, or the claimant suffered some loss or injury, which benefit or injury or loss, as the case may be, would constitute the basis of a strictly legal and enforceable claim against the subdivision, were it not that because of technical rules of law no recovery may be had."

Opinions relating to the powers of boards of education with respect to moral obligations are: Opinions Attorney General, 1929, Vol. II, p. 915; 1929, Vol. III, p. 1939; and 1931, Vol. II, p. 1027. The syllabus of the 1929 opinion, reported at page 915, reads:

"1. Boards of education may lawfully, under proper circumstances, recognize moral obligations of the school district and pay claims as such from the public funds of the district.

2. A moral obligation of the State or a political subdivision thereof is a claim sounding either in tort or contract, whereby the State or political subdivision thereof, receive some benefit, or the claimant suffered some injury, which benefit or injury would be the basis for a legal claim against the State or political subdivision, were it not that because of the intervention of technical rules of law, no recovery may be had."

In Opinions of Attorney General, 1928, Vol. II, p. 352, and Opinions of Attorney General, 1937, Vol. I, p. 1015, it was held that the "legislative authority of a municipality may recognize, and authorize the payment of, moral obligations * * * unless by reason of charter provisions it is precluded from doing so."

The following quotations from the 1937 opinion, supra (pp. 1018 and 1019), are here pertinent:

"Columbus being a charter city has power and authority to recognize and liquidate moral obligations unless such action is in conflict with general laws, and I am frank to say that I am unable to find such conflict."

* * * * * * * * *

"I am of the opinion that the legislation involved in the instant case was in perfect harmony with Section 28, Article II *and did not violate Section 29, Article II of the Constitution.* I specifically affirm in every respect Opinion No. 2398, page 1524, Vol. 2, O. A. G. (1930). This is done in the hope that these questions involving the recognition and liquidation of moral obligations by municipalities may be definitely settled."

From the above citations of the opinions of my predecessors in office, it will be seen that, until the rendition of Opinion No. 3517, former Attorneys General, including my immediate predecessor, uniformly recognized the power and authority of political subdivisions to take cognizance of moral obligations and to allow and pay claims therefor. In these opinions, as shown by the citations therein, the former Attorneys General were guided by the opinions of the courts, especially the courts of Ohio, by whose decisions they were bound.

Upon precedent alone, therefore, I am compelled to dissent from the conclusions reached in Opinion No. 3517, and it also seems to me that the allowance of such claims, under proper limitations, is sustainable upon principle. The rationale of the payment of claims based upon a moral obligation is not difficult to understand. In so far as the law of contract is concerned, it is—that no one, not even the state or one of its political subdivisions, should unjustly enrich himself or itself at the expense of another. And, in so far as the law of tort is concerned, it is but an application or extension of the legal philosophy upon which the doctrine of *respondeat superior* rests. As said in Harbison v. Iliff, 8 O. N. P., 392 (C. P., Hamilton Co., 1901): "Servants are generally irresponsible and unable to respond in damages; so it is regarded as no more than just that he who has made it possible for him to injure another should, so far as an injury results from the exercise of the power conferred upon him, be responsible in his stead." So where an employe of the public does what would be a tortious act making the master responsible if he were a private individual, it seems entirely just that the person injured should be compensated for the wrong he was innocently made to suffer. Indeed, the doctrine of *respondeat superior* derives its name from a statute relating to public officers. See Larkin v. McNutt, 2 Pr. Edw. Isl. 300, 303 (1879), in which it was said:

> "* * * The maxim, *respondeat superior,* was first applied to public officers by the Statute of Westminster the Second, Cap. 2, from the words of which statute it is taken. * * *"

In passing, it should be pointed out that the lawfulness of recognizing and discharging moral obligation by public corporations has been upheld in other jurisdictions. See McQuillen Municipal Corporations, Vol. 5, p. 947, and cases cited. The text reads in part:

> "While payment of claims which are neither legal nor equitable is an expenditure for other than public purposes, the payment by municipal corporations of claims founded in justice and supported by a moral obligation only does not conflict with constitutional provisions forbidding the making of gifts. How-

ever, it has been held, that if a claim against a municipality is barred by limitations, payment of it amounts to a gift. * * *"

If no moral obligation exists to make the payment an ordinance appropriating money to pay the claim of a contractor for extra work is void. Thus where the contractor had been fully paid for all the work called for by the contract, and had done nothing additional, there was no moral obligation resting upon the city to pay him more. So there is no moral obligation resting upon the city to pay extra compensation to its officers, and usually statutes author.zing such payments are without legal force."

VII. It remains to consider the limitations upon the allowance by political subdivisions of claims of the kind here involved. Some of these limitations are apparent in the excerpts above quoted.

In the first place, the claim must have a legal basis on which to stand, that is, as stated in Jones, Auditor, v. Commissioners, supra (57 O. S. 189), a political subdivision "is wholly without authority to sanctify a demand illegal because of being upon a subject which can admit of no claim, and thus give away the people's money." See Board of Education v. State, supra (51 O. S. 531); Opinions, Attorney General, 1929, Vol. III, 1939; Vol. II, p. 1124, supra. Or, as put by Judge Lloyd, in the case of Peters, Director of Finance, v. State, ex rel., supra (42 O. A. 307, 308):

"* * * Public officials, it would seem, should consider themselves rather as trustees than philanthropists, in the appropriation and disbursement of public funds."

Secondly, when and if such claims be allowed, they must be acted upon with a full knowledge of the facts and there must be a complete absence of any fraud or collusion. See Arnold, a Taxpayer, etc., v. City of Akron, et al., supra (54 O. A. 382). Thirdly, any abuse of power in connection with the allowance of such a claim, is reviewable by the courts, which are not bound by the finding of facts of the legislative body allowing the claim. See opinions, Attorney General, 1928, Vol. I, p. 358, supra, where it is said at page 358:

"A moral obligation cannot be conclusively determined by the mere feat of a legislative authority. Its recognition and assumption is a legislative act, but the determination of the existence of the facts, which bring the claim within the realm of moral obligations, is a judicial determination *and may be made the subject of judicial inquiry by resort to the courts.*" (Italics ours.)

And lastly, see Opinions, Attorney General, 1931, Vol. II, p. 944, supra; and Hommel v. Village of Woodsfield, supra (122 O. S. 148), the syllabus of which reads:

> "1. Where the board of public affairs of a village has contracted for the delivery to such village of supplies or material, without authorization and direction by ordinance of council and without advertising for bids as required under Sections 4328 and 4361, General Code, such contract imposes no valid obligation upon the village. (Ludwig Hommel & Co. v. Incorporated Village of Woodsfield, 115 Ohio St., 675, 155 N. E., 386, approved and followed.)
>
> 2. In such case, an action for conversion of such supplies and material, praying for a money judgment, cannot be maintained against the village. (Frisbie Co. v. City of East Cleveland, 98 Ohio St., 266, 120 N. E., 309, approved and followed.)"

In view of the foregoing, and upon the precedents cited and for the reasons given, in specific answer to your questions you are advised that:

1. I do not concur in the holding of Opinion No. 3517, to the effect that local subdivisions are without authority to recognize claims as moral obligations and provide for and pay them as such moral obligations; and

2. The Bureau of Inspection and Supervision of Public Offices, through the State Examiners, is not required to render findings for recovery jointly, against members of the municipal legislative body and the recipients, for payments allowed and made as moral obligations.

Respectfully,
THOMAS J. HERBERT,
*Attorney General.*

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1331.

DEED—TO STATE BY JAMES N. WAITS AND STELLA M. WAITS, DESIGNATED LAND, BENTON TOWNSHIP, HOCKING COUNTY, TWO TRACTS, USE, DIVISION OF FORESTRY.

COLUMBUS, OHIO, October 24, 1939.

HON. CARL E. STEEB, *Secretary, Board of Control, Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR: You lately submitted to this office for examination and approval an abstract of title, warranty deed, contract encumbrance record