Note from the Attorney General's Office:

1938 Op. Att'y Gen. No. 38-3517 was overruled in part by 1981 Op. Att'y Gen. No. 81-011.

For the reasons above stated, it is my opinion that a corporation organized for the purpose of servicing second mortgages on homes which a contractor had constructed, the corporation holding in its own name the second mortgage and remitting to the contractor for the amounts collected, less a service charge, the corporation being limited to such an arrangement, would not be compelled to qualify as a trust company under Sections 710-150, et seq., of the General Code, because of not being affected with a public nature.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

3517.

MORAL OBLIGATION—NO AUTHORITY OR RIGHT VESTED IN STATE OR ANY POLITICAL SUBDIVISION TO PAY—EXCEPTION, TWO-THIRDS VOTE OF MEMBERS OF GENERAL ASSEMBLY—POWER OF BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES TO INSPECT ACCOUNTS, ETC., TO MAKE FINDINGS AGAINST MEMBERS OF GOVERNING BODY AND RECIPIENT OF BENEFITS—CITATIONS—AUTHORITY TO MAINTAIN ACTION.

SYLLABUS:

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

2. *The Bureau of Inspection and Supervision of Public Offices of the State of Ohio has plenary power under Section* 13, *Article XVIII of the Constitution of Ohio and Sections* 274 *et seq., General Code, to inspect the accounts, reports and vouchers of all departments of State and each and every taxing district thereof and make such findings as the facts warrant.*

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.*

COLUMBUS, OHIO, January 6, 1939.

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

DEAR SIR: I am in receipt of your various communications relative to the right and authority of the governing bodies of the political subdivisions of the State of Ohio, and particularly municipalities to recognize, allow and satisfy claims based purely and solely on a moral consideration, which consideration, it is claimed results in moral obligation.

I note your further inquiry as to the right and authority of your Bureau to make findings relative to such allowances, against whom your findings should be made and as a finality, by whom can recovery be had and what is the procedure.

Suffice it to say that under the constitutional grant contained in Section 13, Article XVIII of the Constitution of Ohio, the General Assembly by force of Sections 274 et seq., General Code, has invested your Bureau with plenary power to "inspect and supervise the accounts and reports of all state offices, including every state educational, benevolent, penal and reformatory institution, public institution and the offices of each taxing district or public institution in the State of Ohio" and make such findings as the facts warrant.

I take it that the General Assembly intended when it created your Bureau that in whatever nook or cranny public money lurks, you have the full right of exploration. Moral obligations constitute one universal headache. The impression seems to have gone forward that the State in its sovereign capacity has the power to ignore all law, take the people's money, liquidate so-called moral claims, and no one can raise a hand to curb these recently made in-roads into the public exchequer.

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 becomes 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, Volume 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.

About the beginning of the 19th century, a disposition became evident to restrict the doctrine of moral consideration, and in 1840, the Queen's Bench expressed its dissent from the doctrine and adopted as an accurate statement of the law the summary made in the reporter's note to an earlier decision. (*Littlefield* vs. *Shee,* 2 B. and Ad. 811), as follows:

> "An express promise * * * can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law: but can give no original right of action if the obligation on which it is founded never could have been enforced at law though not barred by any legal maxim or statute provision."

In the latter part of Section 147, supra, the author uses the following language:

> "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."

I quote Williston on Contracts, Volume 1, Section 149:

> "Though the doctrine of moral obligation is generally discredited, it still survives in a few states. In Georgia the Code provides that a 'strong moral obligation' is sufficient consideration to support a promise and the Louisiana Code states that a 'natural obligation' shall be sufficient consideration. In Illinois, Maryland, Michigan and especially in Pennsylvania, the doctrine still persists to a limited extent."

An examination of the notes and citations can leave no doubt in the mind that Dr. Williston gave careful consideration to the law of Ohio in the preparation of the text hereinbefore referred to and classified Ohio as one of the states wherein a moral consideration was regarded as insufficient.

But one conclusion can be reached when this phase of the law is carefully considered, namely, that if a moral consideration is regarded

in Ohio as insufficient to support a contract, no obligation results where a moral consideration is the sole and only consideration therefor.

In my opinion the above statement is a correct statement of the law of Ohio relative to contracts sought to be supported by a moral consideration.

I next arrive at the tort phase of the question. Unless one person violates or invades the legal rights of another, there is no tort liability. A tort is a liability which the law recognizes independent of contract.

If A violates or invades the legal rights of B to his damage, he has committed a legal wrong and should respond in damages—but if A injures B or his property,—while A is acting within his legal rights,—A has committed no legal wrong, there is no legal liability and A is under no moral obligation to reimburse B. See Williston on Contracts, Volume I, Section 148.

As a final deduction, it must be conceded that moral consideration and moral obligation have no place 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.

In England "The King can do no wrong", hence you cannot sue the crown. We have not gone so far as to say "The state can do no wrong" but we do say "The state cannot be sued without its consent"—and it seldom consents.

Because the State, engaged in many activities as it is, injures some one in person or property or both, claims based purely on moral obligations are presented each year and paid.

It seems to be the prevalent impression amongst our legislators, that all powers not delegated by the Constitution remain with the General Assembly. That is one more misconception. I quote Section 20, Article I of the Constitution of Ohio, this section being the last section of our Bill of Rights:

> "This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated *remain with the people.*" (Italics the writer's).

Nowhere does our Constitution expressly authorize the General Assembly to recognize, allow and satisfy claims based purely upon moral obligation. If the General Assembly has such power, it must be necessarily implied from Section 29, Article II, which I quote:

> "No extra compensation shall be made to any officer, public agent, or contractor, after the service 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."

It might be insisted that the above quoted section of the Constitution deals purely with matters to which the State in its sovereign capacity is a party. The section is not susceptible of such construction. There is no language in the section limiting its application to matters of State. State and Federal Courts have considered this section and have not given it such a restricted application.

> *State ex. rel. Gindelspurger* vs. *Wright, Auditor,* 24 C. C. (N. S.) 402;
>
> *Bates & Rogers Const. Co.* vs. *County Coms. etc.,* 274 Fed. 659.

Likewise, this office has applied the section to boards of education. See Opinion No. 1981, (1933).

Construing Section 29, Article II of the Constitution conversely, we get the following—Extra compensation may be made to any officer, public agent or contractor after the service shall have been rendered or the contract entered into and money may be paid on a claim, the subject matter of which has not been provided for by pre-existing law, if such compensation or claim be allowed by two-thirds of the members elected to each branch of the General Assembly. The only possible claim that could be made by an officer, public agent or contractor for extra compensation after the service had been performed or contract entered into would have to be based on a moral consideration of sufficient moment to create a moral obligation. In each instance the legal consideration has admittedly been exhausted and the only possible recourse, if it amounts to recourse, is a moral consideration.

If a claim is made that has not been provided for by existing law, there can be no legal liability. It has been unequivocally held, not only in Ohio, but in practically every jurisdiction of the United States that recovery cannot be had against the State or any of its subdivisions on quantum meruit. If a claim has no pre-existing law to support it, the claimant must necessarily fall back on moral consideration resulting in moral obligation. If a claimant has a claim against the State or any of its subdivisions, and when I say subdivisions, I include all municipalities, charter as well as non-charter, that has no support under the laws of the State

of Ohio, he has no more nor less than a moral claim which he must carry to the General Assembly through the instrumentality provided by law, namely the Board of Sundry Claims.

If, upon presentation, the General Assembly sees fit to allow such claim by a two-thirds vote of the members elected to each branch thereof, well and good, but if the General Assembly does not allow the claim by the required vote, the moral claimant is at his strings-end.

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.

Section 29 of Article II was not contained in our first Constitution. It came with the Constitution of 1851, was carried into the Constitution of 1912 and not one word was changed.

In order to understand what motivated the constitutional delegates to inject this section into our organic law, it is only necessary to read the record, viz.:

1. Debates I, Constitutional Convention of 1851, pp. 164, 284 and 285.
2. Debates II, Constitutional Convention of 1851, pp. 318, 569-574, 578, 597, 633, 664, 808, 832, 858 and 870.

Those delegates were not blind to the situation that existed even at that time. A claimant with a "pull" could extract money from the State and its subdivisions, providing, of course, his claim had a moral aspect, notwithstanding there might not have been a scintilla of law to support it.

Taxes, in those days, were not regarded by the taxpayers with any greater degree of affection than they are today.

The constitution-makers of 1851 came largely "from the soil." While taxes were low, dollars were high and in the main, they had to be extracted from the earth. These forbears of ours may have been hard-headed but they were not empty-headed.

They realized that the people of the State were obliged to furnish the grease to lubricate the wheels of government through the medium of taxation, and they felt that they, inasmuch as they furnished the money, had the right to say who should expend it, how and for what their money should be expended. They were not permitted to interpose a moral obligation as against the tax-gatherer. If their defense against the collection of taxes was not warranted by the laws of the State, they either paid the taxes or their property was sold by the Sheriff at the south door of the

Court House—or some other door. A door would be found and used. They reasoned very properly that "What is sauce for the goose is sauce for the gander."

They did not object to paying their money for purposes of government but they wanted it expended for the purposes of government under the law and not for "moral purposes" that had no support in law—and they were right.

As civilization progresses it seems to turn from the substantial to the aesthetic and Section 29 of Article II is a barrier to aesthetic indulgence.

Your next concern is relative to the scope of your finding in cases where claims based purely on moral obligations are allowed and paid, otherwise than provided in Section 29, Article II of the Constitution. In my opinion your finding 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.

Your next question would naturally be, how can collection be enforced?

Having reached the conclusion and specifically held that the General Assembly must allow all claims based only on a moral consideration or moral obligation, as you please, then I am of the further opinion 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.

I have carefully examined the cases referred to in your communication but found them of little or no assistance, as none of them dealt with the constitutional phase of moral obligation upon which this opinion is based.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

3518.

APPROVAL, BONDS, VILLAGE OF JEFFERSONVILLE, FAYETTE COUNTY, OHIO, $20,000.00, DATED JULY 1, 1938.

COLUMBUS, OHIO, January 6, 1939.

Public Employes Retirement Board, Columbus, Ohio.
GENTLEMEN:

RE: Bonds of Village of Jeffersonville, Fayette County, Ohio, $20,000.00.