with proceedings to sell the property of an inmate of an infirmary under the provisions of Section 2548, General Code.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2398.

MORAL OBLIGATION—COMPENSATION OF ATTORNEY ASSISTING CITY SOLICITOR WHO CANNOT LEGALLY COLLECT—NOT NECESSARY FOR COUNCIL TO SPECIFIALLY NAME WHERE SUCH MORAL OBLIGATION RECOGNIZED.

SYLLABUS:

In providing for the payment of a moral obligation by the council or other legislative authority of a municipality it is not necessary that the claim for which payment is being allowed be referred to, in the legislation providing for the said payment, as a "moral obligation" in specific terms.

COLUMBUS, OHIO, September 30, 1930.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion, which reads as follows:

> "In the report of an examination of the City of Bucyrus, filed in this office on August 27, 1930, the examiner states that $500.00 was illegally paid to Mr. S., attorney. The pertinent part of the report reads:
>
> 'On page 21 of our last report of examination of this city we discussed the proper procedure in employing special counsel.
>
> On October 4, 1928, council by motion only, employed Attorney C. S. as an assistant to the solicitor in representing the city in the sewage disposal case before the State Board of Health, but failed to fix his compensation.
>
> Opinion No. 1278, rendered by the Atorney General in 1916, provides that council is without authority to employ special counsel to assist the city solicitor in litigation unless a request is made therefor by the solicitor and upon such request the exclusive power of selection or apportionment rests with the solicitor.
>
> This same opinion holds that council may fix the compensation of such special counsel on a per diem, percentage, monthly or lump sum basis.
>
> On January 31, 1929, the city solicitor aproved the payment of a voucher in favor of Mr. S. for the sum of $500.00 for services rendered by Mr. S. as Special Counsel.
>
> On February 4, 1929, we submitted to the Bureau the question of the legality of this claim and were informed that in view of the above noted Opinion of the Attorney General, that the attorney employed as special counsel by motion of council did not have an enforcible claim against the city and that the city auditor could not legally draw his warrant in favor of such attorney for the amount appropriated by council, which was $500.00, or the amount of the approved voucher, but that a moral obligation did exist, however, and it was suggested that the matter be referred to council

which could determine by ordinance or resolution the amount due such attorney and authorize payment of the amount as a moral obligation.

On April 2, 1929, council by Resolution No. 1371 fixed such compensation at $500.00 which amount they deemed reasonable, and ordered and directed the payment of said amount to Mr. S. However, council failed to declare the claim a moral obligation and the above resolution must be classed as retroactive legislation, which is not in accordance with the provisions of Sections 28 and 29 of Article 2 of the Constitution of the State of Ohio.

FINDING: By reason of the above, a finding as an illegal payment is made against C. F. S. in the sum of $500.00.

Mr. S. contends that the finding as a conclusion of law is not sustained by the facts, and requests the correction of the report, and elimination of the finding.

A copy of Mr. S.'s letter, excerpts from council's minutes and a copy of the resolution referred to in the report, are enclosed herewith.

In view of the facts, and the provisions of Section 4226 G. C., is it the duty of the Bureau to correct the report and eliminate this finding?"

For the purpose of this opinion, it is not necessary to discuss the question of whether or not the employment of Mr. _____ to assist the Solicitor of Bucyrus, was regular in the first instance, and thus a legal obligation to pay for the services rendered arose. The fact is that the services were performed to everyone's satisfaction and paid for apparently upon the belief, in the first instance, that a legal obligation to make such payment existed. After council's attention had been directed to the fact that the statutory procedure for the employment of a person to assist the city solicitor had perhaps not been strictly followed in making the employment and that the payment was objected to on that ground the council undertook, by its action of April 2, 1929, to correct whatever irregularities may have existed in its former action and to authorize the payment of the claim, apparently as a moral obligation although nowhere in the ordinance of April 2, 1929, authorizing the payment, is the term "moral obligation" to be found.

It is well settled that moral obligations may be recognized and paid by the council or other legislative authority of a municipal corporation. See Opinions of the Attorney General for 1929, pages 915 and 1939; Opinions of the Attorney General for 1928, page 352 and authorities therein cited. Considerable difficulty arises in any case, as to whether or not circumstances existing with reference to a given situation are such as to be a proper basis upon which to predicate a moral obligation.

Your examiner makes no question as to the payment here under consideration on the grounds that the facts were not such as to merit a recognition of the claim as a moral obligation in law. Everyone apparently recognizes, and I believe properly so, that under the circumstances, council might have very properly recognized and paid this claim as a moral obligation, if, in fact, a legal obligation for its payment did not exist.

The facts are quite analogous to those under consideration in the case of *Caldwell* vs. *Marvin,* 8 O. N. P., N. S., 387. In that case the payment of attorney fees for services rendered to a board of education, under such circumstances that the claim could not have been enforced because technically illegal, had been authorized by the board. The court said that the mere invalidity of the employment of the attorney was so far overcome by equity inuring to the benefit of the public that a court of equity would not interfere with the payment of a moral obligation thus incurred by enjoining its satisfaction out of the public treasury.

Your examiner's objection to the payment of this claim by authority of the ordinance of April 2, 1929, as stated in his finding, is as follows:

> "However, council failed to declare the claim a moral obligation and the above resolution must be classed as retroactive legislation, which is not in accordance with the provisions of Sections 28 and 29 of Article 2 of the Constitution of the State of Ohio."

The substantial legal question involved here, is whether or not, when a payment is to be made as and for a moral obligation, it is necessary in the legislation providing for such payment that it be stated in specific terms that the payment is made in recognition of a "moral obligation."

It has always seemed to me that the better practice would be to note, in legislation providing for the payment of a moral obligation that the claim for which payment is then being authorized is based on a "moral obligation", but I do not find any court decision sustaining that contention. In fact, after examining a large number of cases involving questions relating to the payment of moral obligations, I do not find any case in which the question of whether or not it is necessary to recite, in the resolution ordinance or statute providing for the payment of such a claim, the fact that the payment is being authorized in recognition of a moral obligation is considered at all. The question does not seem to have been of enough importance to be the subject of discussion in any of these cases. No one seems to have raised the question.

I also find that it has not been the practice for the State Legislature, in recognizing such claims, to state in the legislation authorizing payment that the payment is being made in recognition of a moral obligation. Thus in a late instance where the Legislature authorized the board of county commissioners of Cuyahoga County to pay $15,000 in settlement for all damages incurred by Joseph A. Spitzig, for injuries sustained by him owing to the falling of a passenger elevator in the court house of Cuyahoga County, Ohio, in which elevator he was a passenger while attending court in said court house as a juror, no mention is made of the fact that a moral obligation is being recognized in the act of the Legislature authorizing the payment. See 112 O. L., 102. Many other instances of like import might be cited.

The second objection of your examiner, to the effect that the ordinance in question is retroactive legislation and therefore violative of the Constitution, is not in my opinion tenable. If the ordinance is to be viewed in any other light than a piece of original legislation authorizing the payment of a claim as a moral obligation, it must necessarily be considered as curative legislation.

Our Supreme Court, in the case of *Burgett et al.* vs. *Norris, Treasurer,* 25 O. S., 309 held:

> "The power of the Legislature to pass curative statutes retrospective in their nature, which do not impair contracts, nor disturb vested rights is not inhibited by Section 28, Article 2, of the Constitution."

I am therefore of the opinion that the finding of your examiner in this case is not justified, and in fairness to Mr. S., against whom the finding is made, it should be corrected.

Respectfully,
GILBERT BETTMAN,
Attorney General.