The secretary, examiners, inspectors, clerks and assistants shall, in addition to their salaries, receive such necessary traveling and other expenses as are incurred in the actual discharge of their official duties. The commission may also incur the necessary expenses for stationery, printing and other supplies incident to the business of the department. All salaries and expenses shall be approved and allowed by the commission and paid out of the treasury of the state on the warrant of the auditor, in the same manner as the salaries and expenses of other state officers are paid."

Without discussing at length the above quoted provisions of Section 486-5, General Code, it will be noted that, save as otherwise provided therein, the cost and expense of conducting examinations in the civil service of the several counties is to be paid by the state. The only exception to that rule is furnished by the proviso enacted as a part of said section in 1925, 111 O. L. 56. Under this proviso, in any county of the state in which are located municipalities having local civil service commissions, the state civil service commission is authorized to designate the civil service commission of the largest municipality within such county as the agent of the state civil service commission for the purpose of conducting examinations and otherwise carrying out the provisions of the civil service act within such county. In such case the civil service commissioners of the municipality thus designated to conduct examinations or to perform any other required service in the civil service of such county are entitled to receive for their services such reasonable compensation as the board of county commissioners may determine, to be paid out of monies appropriated by the board of county commissioners of such county and paid into the treasury of the municipality for the purpose, which sum so appropriated and paid into the city treasury is to be an amount sufficient to meet the county's portion of the cost of service so rendered, as determined by the number of employes in the classified service.

I know of no other statutory provision authorizing the expenditure of county funds to pay the cost and expense of examinations conducted in the county civil service and, consistent with the regular principle that county moneys can be expended for any purpose only when such expenditure is clearly authorized, I am of the opinion, in answer to your question, that moneys of the county can be expended for the purposes mentioned in your communication only under the conditions and in the manner provided by Section 486-5, General Code, above noted.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1701.

MUNICIPALITY—PAYMENT OF "MORAL OBLIGATIONS" DISCUSSED.

SYLLABUS:

1. *The legislative authority of a municipality may recognize, and authorize the payment of, moral obligations from appropriations made from public funds, unless by reason of charter provisions it is precluded from doing so.*

2. *Legislative authorities, in determining what are and what are not such moral obligations as will justify their recognition as such and the appropriation of public*

moneys for their satisfaction, may not conclusively find and recite facts upon which the alleged moral obligation is based so as to preclude a judicial inquiry with reference thereto.

COLUMBUS, OHIO, February 13, 1928.

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

GENTLEMEN:—This will acknowledge receipt of your communication, which reads as follows:

> "We are enclosing herewith copy of part of the report of examination of the City of Columbus for the period January 1st to December 31st, 1924.
>
> In view of the home rule provisions of the Constitution and the decision of the Supreme Court of Ohio in the case of Aldrich vs. City of Youngstown, 106 O. S. 342, is it the duty of this Bureau to make findings in such instances?"

The extract from the report of the examiner which you enclose reads as follows:

> "The audit of disbursements disclosed the following vouchers approved, payment being made from the general fund:
>
> 3/8/24—32451—B. F. Carter—Damage to automobile truck by fire department No. 7 pump truck, 12/15/1923 ..... $142.05
>
> Authorized by Ord. No. 34732—passed 1/7/1924.
>
> 4/4/24—33787—James B. Stowe—Damage to automobile truck by fire department No. 6 hook and ladder truck, 2/14/1924..... 33.60
>
> Authorized by Ord. No. 35014—passed 3/3/1924.
>
> 9/5/24—41382—The Jordan-Cols. Co.—Damage to automobile truck by fire department No. 8 hook and ladder truck 7/3/1924..... 10.95
>
> Authorized by Ord. No. 35487—passed 7/21/1924.
>
> 2/18/24—33366—W. W. Metcalf—Damage to automobile struck by police department car 2/7/1924..... 39.15
>
> Authorized by Ord. No. 34970—passed 2/18/24.
>
> 12/11/24—45718—Hunsinger Bros.—Damage for plate glass window shattered by bullet fired by police officer at fleeing automobile.. 71.50
>
> Authorized by Ord. No. 35667—passed 10/13/1924.
>
> Total ..... $297.25"

An examination of the ordinances of the City of Columbus which authorized and direct the payment of the several claims set out in the above report discloses that in each instance the ordinance, after setting forth the source of the claim, recites that the claim is recognized as a moral obligation of the City of Columbus. Each of these ordinances, after so recognizing the claim as a moral obligation of the city, appropriates sufficient monies to cover the amount of the claim and directs the auditor to draw his warrant in payment thereof.

The power of legislative authorities to recognize and pay moral obligations and to provide funds therefor by taxation has long been recognized. The difficulty arises in defining what constitutes a moral obligation and determining what limitations, if any, there are on such legislative authorities in fixing or declaring what constitutes a moral obligation.

In Cooley on Taxation, 4th Edition, Section 194, it is stated:

> "There are some cases in which taxation has been allowed for the benefit of private persons on considerations not of charity so much as of justice. Any exercise of the powers of government is liable to cause injury to particular individuals. When the injury is merely incidental these individuals have no legal claim to indemnification. Nevertheless, it seems eminently proper and just in some exceptional cases to recognize a moral obligation resting on the public to share with the persons injured the damage sustained; and this can only be done by means of taxation. All governments are accustomed to recognize and pay equitable claims of this nature under some circumstances; * * * In these cases the Legislature is not confined in making compensation within the strict limits of common law remedies, but it 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. Taxation to raise money to pay a claim based on a moral obligation, and not enforceable at law, is for a public purpose and is proper unless forbidden by some constitutional provisions. * * *"

Furthermore, the Legislature may compel municipalities to pay claims not binding in law, but just and equitable in character and involving a moral obligation. In Cooley on Taxation, Section 433, it is stated:

> "The power of the state to compel municipalities, counties and the like to pay their obligations is not confined to obligations of a strictly legal nature, but includes moral obligations since the difference between a legal and a moral obligation is frequently no more than that the one has a remedy providing for its enforcement and the other has not. * * * But the Legislature has no power to compel a municipality to pay a claim made against it and which it is under no obligation, moral or equitable, to pay; nor can the Legislature require a court to render judgment for such claim upon proof of the amount thereof. What is a sufficient moral obligation on the part of a municipal corporation to justify the Legislature in imposing upon the municipality a legal obligation to pay money raised by taxation is not always clear."

The term "moral obligation" has been defined as:

> "A duty which would be enforceable at law were it not for some positive rule which exempts the party in that particular instance from legal liability." Longstreth vs. Philadelphia, 245 Pa. St. 253; 91 Atl. 667, and cases cited.

In an earlier Pennsylvania case, *Bailey* vs. *City of Philadelphia,* 167 Pa. St. 569, 46 Am. St. Reports, 691, a moral obligation was defined as one,

> "which cannot be enforced by action but which is binding on the party who incurs it in conscience and according to natural justice."

In *People* vs. *Westchester County National Bank,* 231 N. Y. 465-476, the court, after stating the rule that statutes may be enacted authorizing the payment of equitable and moral obligations, says:

"What meaning then have the courts given to these terms? What is an equitable or moral obligation against the state? Instances where such payments have beeen authorized are many. In some, claims have been allowed where beneficial services have been performed for the state * * * In others where property was furnished it * * * or the state received money for land, the title to which proved defective * * * or work was done the expense of which in equity the state should bear. In another class of cases the Legislature has authorized payment when the claimant had been injured by the negligence of the servants of the state. These cases give some indication of what we mean when we speak of a moral obligation. In all some direct benefit was received by the state as a state, or some direct injury suffered by the claimant under circumstances where in fairness the state might be asked to respond—where something more than a mere gratuity was involved."

In American and English Encyclopaedia of law, 2nd edition, Volume 6, page 680, it is said that a moral obligation exists,

"where a duty arises from an antecedent legal obligation which has been suspended by some positive rule of law, or is found upon some legal right which the promisee has allowed to escape through mistake or by his dependence upon the promise, as for instance, debts barred by statute of limitations, debts discharged in bankruptcy, debts contracted by an infant. Where, however, the original contract is absolutely void, as for instance a debt contracted by a married woman, there is no such legal foundation for the moral obligations as will support her promise to pay the debt after her discoverture."

The text writer in the above quotation is, of course, speaking of the liability of married women at common law.

In attempting to apply the principles set out in the many definitions of moral obligations given by courts and text writers, considerable difficulty is experienced. Not one of the definitions is entirely satisfactory and courts have differed widely in the application of the principles involved. It is difficult to fix any definite line of demarcation between what are and what are not moral obligations; and no definite rule can be deduced from the authorities in the several states, due partly to the fact that the decided cases turn to some extent on the technical construction of constitutional provisions and statutory enactments. The rule can better be stated by illustration rather than by definition.

The power of Congress to recognize and provide for the payment of moral obligations has been recognized by the Supreme Court of the United States and the lower Federal Courts in an unbroken line of decisions. In the case of *United States* vs. *Realty Company,* 163 U. S. 427, it was held:

"The 'debts' of the United States which Congress has power to pay under the United States Constitution, Article I, Section 8, include those debts or claims which rest upon a merely equitable or honorary obligation, which would not be recoverable in a court of law if existing against an individual, but which would be binding upon his conscience or honor."

This case is cited with approval and followed in many later decisions of the Federal Courts. In the course of his opinion Judge Peckham, speaking for the court, at page 443, said as follows:

"The power to provide for claims upon the state founded in equity and justice has also been recognized as existing in the state government. * * * Of course the difference between the powers of the state legislatures and that of the Congress of the United States is not lost sight of, but it is believed that in relation to the power to recognize and pay obligations resting only upon moral considerations or upon the general principles of right and justice, the Federal Congress stands upon a level with the State Legislature."

As before stated, the greatest difficulty is encountered in determining the limitations on the relative powers of legislative authorities and the courts in declaring what is and what is not such a moral obligation as will justify the use of public funds to pay the same. In United States vs. Realty Company, supra, the Court said:

"In regard to the question whether the fact existing in any given case brings it within the description of that class of claims which Congress can and ought to recognize as founded upon equitable and moral considerations and grounded upon principles of right and justice, we think that generally such question must in its nature be one for Congress to decide for itself. Its decision recognizing such a claim and appropriating money for its payment can rarely, if ever, be the subject of review by the judicial branch of the government."

It is very generally recognized, however, that the Legislature cannot invade the field of judicial inquiry in this respect. That is to say, that where the facts out of which a moral obligation is claimed to arise are disputed, the contention falls within the province of the courts and cannot be foreclosed by a determination of the Legislature ordering its payment from public funds or a tax to be levied to pay such claim.

In the case of *Board of Education* vs. *State,* 51 O. S. 531, the Court held, as stated in the syllabus:

"1. 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.

2. In such case, if the board of education disputes the facts asserted by the claimant as the foundation of his claim, the general assembly, while it may make inquiry to ascertain, in the first instance, the truth of the facts so asserted, yet is without authority to conclusively find and recite in the act providing relief, the facts in dispute, so as to estop the board of education from contesting them in a court of justice where the act is sought to be enforced."

In this case the Legislature of Ohio had enacted a statute requiring the Board of Education of Marion Township, in Fayette County, to levy a tax for the purpose of refunding certain moneys to a former treasurer of the township of Marion, who claimed to have paid out certain moneys for the benefit of the school district and for which he had not been given proper credit. Action in mandamus was instituted against said Board of Education to compel it to levy this tax in accordance with the statute. It was contended in defense that the Legislature had been mistaken in assuming that the treasurer had really paid out this money for

the benefit of the township and had not been given proper credit therefor.

In the course of the opinion, Judge Bradbury, at page 540, said:

> "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.
>
> On the other hand it may be contended that if the power to levy a tax for a private purpose is denied to it, it follows as a corollary that it had no power to determine the character of a demand, for if it had the latter power it could defeat the limitation by falsely finding the claim to to founded, at least, on a moral consideration. We do not think the conclusion follows, for that would be to impute bad faith to a co-ordinate branch of the government which is not permissible.
>
> We think, however, that whenever a contention arises between an individual and some public body respecting the existence of a claim against the latter, the controversy falls within the province of the judiciary. * * *
>
> If, in the case under consideration, the relator has paid out money for the benefit of the respondent, for which, by some mistake, accident or error, he has never received credit, it is morally bound to make it good and this moral obligation is sufficient to support the statute in question. * * * Where, however, the facts, out of which a moral (or legal) obligation is claimed to arise, are disputed, the contention falls within the province of the courts, under the distribution of governmental powers prescribed by our constitution."

Claims which have been deemed such moral obligations for which the state or other political subdivision may appropriate money or levy taxes are of a varied character. As to some of these there seems to be little diversity of opinion. As for instance, it would seem beyond controversy that a debt barred by the statute of limitations is none the less a moral claim. See *Chapman* vs. *City of New York,* 168 N. Y. 80; *Board of Education* vs. *Blodgett,* 155 Ill. 441; and many other authorities. In Mississippi, however, it was held that payment of a debt barred by limitation is simply giving away public money, *Trowbridge* vs. *Schmidt,* 82 Miss. 475; 34 So. 84.

Claims founded upon a moral obligation and the power of municipal councils with respect thereto have been recognized by the lower courts of Ohio. In the case of *Kessler* vs. *Brown,* 4 O. C. D. 345, it was 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 *State ex rel.* vs. *Wall, Director,* 15 O. D. 349, the first and third branches of the headnotes read as follows:

> "1. A municipal corporation may recognize and pay claims against it of a moral and equitable nature, whether required by law to do so or not.
>
> 2. * * *

3. A municipal council may, in the first instance, inquire into the truth of facts necessary to authorize the allowance of claims of a moral nature against the municipality, but it is without authority to *conclusively* find and recite such facts so as to estop the municipality from contesting them in a court where the ordinance is sought to be enforced."

In this later case, Judge Evans of the Common Pleas Court of Franklin County in a well considered opinion followed the rule laid down in Cooley on Taxation and the decision of Judge Bradbury, above quoted in part, in Board of Education vs. State, 51 O. S. 531.

In the case of *Caldwell* vs. *Marvin,* 8 O. N. P. (N. S.) 387, 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 will not interfere with the payment of a moral obligation thus incurred by enjoining its satisfaction out of the public treasury.

A moral obligation cannot be conclusively determined by the mere fiat 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.

None of the Ohio cases above cited involve the recognition of a claim for damages to persons or property because of negligent act or omission (commonly called a tort) as a moral obligation and, so far as I know, this question has never been the subject of a judicial decision in this state.

From the trend of authority, as indicated in the Ohio cases noted above, it is my opinion that any claim may be recognized and assumed as a moral obligation, whether sounding in tort or contract, provided the claim is such that the state or municipality received some benefit, or the claimant suffered some injury, which injury would be the basis for a legal claim against the municipality, were it not that, because of the intervention of technical rules of law, no recovery may be had. Applying this principle to claims for damages to persons or property engendered by the negligence of the municipality or its agencies, the claim should contain those elements which would constitute actionable negligence against the municipality, were it not for the intervention of the rules of law that no recovery can be had against a municipality on account of the misfeasance, malfeasance or nonfeasance of its officers when in the exercise of a governmental duty as stated in *Aldrich* vs. *City of Youngstown,* 106 O. S. 342.

If, however, the injury were not occasioned by any negligence on the part of the municipality or its officers, or if the injury grew out of the combined negligence of the officers of the municipality and the claimant himself, or if for any reason the injury were brought about under such circumstances as would preclude a recovery if the injury had been inflicted by a private agency, the claim cannot be made the basis of a moral obligation.

As stated above, all the ordinances authorizing the payment of the claims set forth in your examiner's report recites, in a general way, the facts which form the basis of the claims. Whether or not these facts are true, and whether or not, if true, they are such as properly to make the claims the bases of moral obligations are proper subjects for judicial inquiry and these questions could only be determined in a proper proceeding brought for that purpose in a court of competent jurisdiction.

I could not assume to pass judgment on that question without more facts before me than are recited in the ordinances. Assuming, however, that each of these claims does possess the elements of a moral obligation, I am satisfied that it rests within the province of the municipal authorities of the City of Columbus to recognize them as such and appropriate funds to pay them.

I have stated this conclusion without any reference to the charter of the City of Columbus and upon the theory that the legislative authorities of the City of Columbus are not limited by any provisions other than those contained in the constitution and the statutes of the state. It is, of course, possible that a municipality in Ohio might adopt such charter provisions as would prohibit its legislative authority from recognizing and paying moral obligations. Upon examination of the charter of the City of Columbus, I find no such limitation.

Until a showing is made to the contrary, it should be assumed that the facts, as set forth by the city council in the several ordinances authorizing the payment of these claims, are true and that these facts do in fact constitute these claims such that they may be recognized as moral obligations, and you are therefore advised that you are not authorized in making findings for recovery on account of the payment of these claims.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1702.

PUBLIC UTILITY—LEASED TO OPERATING COMPANY—EXEMPT FROM FRANCHISE TAX IF EXCISE TAX PAID UPON GROSS RECEIPTS OR EARNINGS.

SYLLABUS:

An incorporated company, whether foreign or domestic, owning a public utility in this state, which it has leased to an operating company that pays an excise tax upon its gross receipts or gross earnings as provided by law, is exempt from the payment of a franchise tax.

COLUMBUS, OHIO, February 13, 1928.

The Tax Commission of Ohio, Wyandotte Building, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your communication, which reads:

> "The commission has directed me to ask you to advise it as to whether or not The Ohio River Edison Company and The Ohio River Transmission Company are subject to the franchise tax. A claim is being made that no such liability exists. This claim is advanced in a brief filed in this office by Mr. U. C. DeFord and which is herewith transmitted to you for your consideration.
>
> In supplement to the facts as stated by Mr. DeFord, it is our understanding that The Pennsylvania-Ohio Electric Company was in existence as an operating utility prior to the organization of both of the corporations mentioned above; that being desirous of erecting a power plant it caused The Ohio River Edison Company to be organized for the purpose of erecting