594.

APPROVAL, BONDS OF CITY OF DOVER, TUSCARAWAS COUNTY—$13,600.00.

COLUMBUS, OHIO, July 3, 1929.

Industrial Commission of Ohio, Columbus, Ohio.

595.

MORAL OBLIGATIONS—DEFINED—BOARDS OF EDUCATION MAY RECOGNIZE SUCH CLAIMS.

SYLLABUS:

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 oblization of the State or a political subdivision thereof is a claim sounding either in tort or contract, whereby the State or political subdivision thereof, received 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.*

COLUMBUS, OHIO, July 5, 1929.

HON. HAROLD A. PREDMORE, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion with reference to the following:

> "Child seriously injured in the gymnasium in the Greenfield schools. It was necessary to call a local physician. It was also necessary that the child be confined in a hospital for some little time thereafter. The physician and hospital board have presented their bills for services rendered for said child to the board of education of Greenfield, Ohio.
>
> Can the board of education legally pay from school funds either or both of the aforesaid bills which have been presented?"

It is well settled that boards of education, in the carrying out of their functions, act in a governmental capacity and cannot be held to respond in damages for either misfeasance or malfeasance. *McHenry* vs. *Board of Education*, 106 O. S. 357. In accordance with this principle, there is no doubt but that the board of education of Greenfield school district could not be held responsible in tort for damages on account of an injury received by a pupil in the gymnasium of the school.

In Opinion No. 261, rendered by me under date of April 4, 1929, and addressed to the Prosecuting Attorney of Wayne County, it was held:

> "A board of education is not liable in its corporate capacity for damages

for an injury resulting from the use of machines or apparatus in the manual training department of a school."

It is equally well settled that boards of education, being creatures of statute, are vested only with such powers as are expressly conferred upon them by statute, together with such powers as are necessarily included within the express powers granted, for the purpose of carrying them into effect. *State ex rel. Clarke* vs. *Cook, Aud.,* 103 O. S. 465.

It is not within the powers of a board of education to make a binding contract with a physician or hospital to render services to a school pupil who has been injured in the course of his attendance at the school. So far as any legal liability for the payment for services rendered by the physician and hospital, under the circumstances related by you, is concerned, I am of the opinion that the board is not liable, either in tort to the child injured, or to his parents or guardian, or in contract to the physician who was called, or with the hospital where the child was confined.

Whether or not the board may, if it sees fit to do so, pay for this service as a moral obligation, presents a more difficult question.

That claims against the government or a political subdivision, which are not strictly legal, but which have arisen under circumstances creating what has been termed a moral obligation, may be so recognized and lawfully paid from public moneys, is well recognized. The difficulty arises in determining in each instance whether or not an alleged claim is a moral obligation, and who or what authority has the final determination of whether or not under the facts peculiar to each situation, a moral obligation exists, so as to justify and lawfully permit its payment as such.

In *U. S.* vs. *Realty Co.,* 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 1, 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."

In the course of the opinion rendered by Mr. Justice Peckham, it is said:

> "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.
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> * * *
>
> In regard to the question whether the facts 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."

In Ohio, however, the case of *Board of Education* vs. *State,* 51 O. S. 531, is authority for the statement that where the facts out of which an obligation, either moral or legal, 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. The syllabus of this aforesaid case reads as follows:

> "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 an opinion of this office, published in Opinions of the Attorney General for 1928, at page 352, it was held:

> "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."

There seems to be some difference of opinion as to the nature of the governmental function which is exercised in the recognition of moral obligations and the authorization of their payment. In the 1928 opinion, above referred to, it is said on page 358, in speaking of a moral obligation: "Its recognition and assumption is a legislative act." In harmony with the contention that the recognition and assumption of a moral obligation is a legislative act, it might be contended that such obligation could only be recognized and assumed by bodies possessing legislative powers, thus confinding the right to Congress, state legislatures and the legislative departments of municipal corporations, and denying the right to administrative boards not possessing legislative power. The courts and text writers, however, do not seem to have made this distinction, and have, without qualification, recognized the right of such administrative boards as boards of education to recognize and assume moral obligations.

In Ruling Case Law, Vol. 26, in Section 39 of the title "Schools," it is said:

> "A moral as distinguished from a legal claim, against a school district is sufficient to support a statute ordering a district to levy a tax for its payment. If, however, there is no claim, legal or moral, such a statute is unconstitutional. The legislature may make inquiry into the facts and recite them in the statute, but such recital cannot estop the district from disputing them in a court of law. Where 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. The district itself, it seems, may use school funds to pay a moral obligation and the right is not at all affected by or dependent on a legal decision as to the validity of the claim. A moral obligation in law is defined as one which cannot be enforced by action but which is binding on the party

who receives it in all conscience and according to natural justice." Citing *Bailey* vs. *Philadelphia,* 167 Pa. 569; 46 A. S. R. 691.

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 would not interfere with the payment of a moral obligation thus incurred by enjoining its satisfaction out of the public treasury.

In the case of *State ex rel.* vs. *Board of Education,* 11 O. C. C. 41, it was held:

> "An injunction will not be granted to prevent a board of education from applying money in its treasury, from taxes levied to build a schoolhouse, to the refunding of money by it borrowed in anticipation of such taxes and used for such purpose, and in the mode which it lawfully might have used the money arising from such taxes."

This case was affirmed by the Supreme Court in 53 O. S. 656.

In the case of *Bower, et al.* vs. *Board of Education,* 8 C. C. (N. S.) 306, it was held:

> "But even if failure to comply with the statutory requirements should render a note executed by a board of education unenforceable at law, the principle declared in 11 C. C. 41, requires recognition by the board of the obligation incurred, and would prevent an injunction lying against its collection."

This case was affirmed by the Supreme Court, without report, in 78 O. S. 443.

Many authorities recognize the right of a municipal corporation to pay moral obligations. *Kessler* vs. *Brown,* 4 O. C. D. 345; *State ex rel.* vs. *Wall,* 15 O. D. 349; McQuillin on Municipal Corporations, 2nd Ed. Sec. 2326.

In the Wall case, supra, the doctrine hereinbefore referred to with reference to the power of the municipal authorities to foreclose an inquiry into the facts by a proper proceeding in court, is stated thus:

> "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."

It is a well recognized principle of law that moneys raised by taxation and, in fact, all public moneys, may not be expended for private purposes, yet, as stated by Cooley in his work on Taxation, 4th Ed., Sec. 194:

> "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.

* * *

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.' It has also been defined as one 'which cannot be enforced by action but which is binding on the party who incurs it, in all conscience and according to natural justice. A 'moral obligation' means that some direct benefit was received by the state as a state or some direct injury has been suffered by the claimant under circumstances where in fairness the state might be asked to respond, and there must be something more than a mere gratuity involved."

In Am. & Eng. Ency. of Law, Vol. 20, page 872, the term "moral obligation" is defined as follows:

"Moral obligation means no more than a legal liability suspended or barred in some technical way short of a substantial satisfaction. An obligation which cannot be enforced by action, but which is binding on the party which receives it, in conscience and according to natural justice. It is that imperative duty which would be enforced by law were it not for some positive rule which, with a view to general benefit, exempts the party in that particular instance from legal liability."

Many other attempts have been made by courts and text writers to define a moral obligation and to designate the limits within which such an obligation may be recognized and paid.

No definition of a moral obligation, or general rule for determining when an alleged claim is a moral obligation, is entirely satisfactory. The rule for determining when a moral obligation exists, as stated in *Longstreth* vs. *City of Philadelphia,* 245 Pa. St. 233; 91 Atl. 667, to-wit: "A moral obligation is a duty which would be enforceable at law were it not for some positive rule of law which exempts the party in that particular instance from legal liability," may be followed with some considerable degree of definiteness. To say, however, as was said in another Pennsylvania case, *Bailey* vs. *City of Philadelphia,* 167 Pa. St. 569; 31 Atl. 925, that a moral obligation is one "which cannot be enforced by action but which is binding on the party who receives it in all conscience and according to natural justice," leaves unanswered what is conscionable or what is in accord with natural justice. So also the definition given in the case of *People* vs. *Weschester County Bank,* 231 N. Y. 465; 15 A. L. R. 1344, that "a moral obligation means that some direct benefit was received by the State as a State, or some direct injury has been suffered by the claimant under circumstances which in fairness the State might be asked to respond," leaves to be determined what constitutes "fairness."

Such terms as "moral," "conscience," "honorary," "fairness" and "natural justice" are not capable of a definite limitation. The purport of these terms depends on the viewpoint or angle of approach and is as variable as are the opinions, prejudices and inherent natures of the individuals or groups of individuals who apply them to a state of facts.

Courts are at considerable variance as to what constitute moral obligations. For instance, it is held in some jurisdictions that where persons have incurred loss in reliance on statutes afterwards held to be unconstitutional, taxation to reimburse them is not for a public purpose. *Michigan Sugar Co.* vs. *Dix,* 124 Mich. 674; *State ex rel.*

Garrett vs. *Froelich,* 118 Wis. 129. But the contrary is held in other jurisdictions. *Miller* vs. *Dunn,* 72 Cal. 463; *Cole* vs. *State,* 102 N. Y. 48. It is held in Michigan that a levy of a tax to reimburse a township treasurer for public money stolen from him, is not for a public purpose because there is no moral claim; and the same is true, it is held in Indiana, where he loses public money by the failure of a bank in which the money was deposited. In Ohio, however, it is held that where a public officer has lost public funds without any fault on his part he may be reimbursed. *Board of Education* vs. *McLandsborough,* 36 O. S. 227, and the same rule is stated in Arkansas. It would seem that it would be beyond controversy that a debt barred by limitations, is none the less a moral claim, and it has been so held in many jurisdictions. But in Mississippi it is held that paying a debt barred by limitation is simply giving away public money. *Trowbridge* vs. *Schmidt,* 82 Miss. 475.

The Supreme Court of Ohio has never stated what constitutes a moral obligation in this state. In the 1928 opinion above referred to, the rule, which in my opinion may safely be followed, is stated at page 358 of the Opinions, as follows:

> "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 rule to the facts stated in your inquiry, it becomes necessary to inquire:

First, did the calling of the physician and the engaging of the services of the hospital, or the acceptance of the services of either the physician or the hospital, create such a situation as to permit the board of education lawfully to recognize a claim for the reasonable value of these services to be a moral obligation of the school district and pay the same as such from the public funds of the district?

The manner of calling the physician and the engaging of the services of the hospital, whether by formal action of the board, or by individual action of the members of the board, or by a teacher or supervisor, does not appear. Neither does it appear whether or not the board by formal action assumed to ratify the calling of the physician and the engaging of the services of the hospital. In either, or any event, the action taken in engaging these services or accepting the same, or in assuming to ratify any action taken, would not be the basis of a legal claim against the board, because of its not being within the power of the board to incur such liabilities under those circumstances. Even so, however, if the school district as such— the public of the school district—had received the benefit of the services of the physician and hospital, the fact that it is not within the power of the board to incur a legal liability for those services, does not preclude the payment of the claims for those services as moral obligations.

In my opinion, the school district as such, did not receive the benefit of the services of the physician and hospital. This service and the benefit of it is purely private and accrues to the exclusive benefit of the child and its parents or guardian and not to the public. So far as these considerations are concerned, the board of education may not, in my opinion, recognize and pay the claim for the services of the physician and hospital as a moral obligation.

Second, were the circumstances under which the child suffered the injury such as would have created a legal liability for damages, except for the fact that technical rules of law prevent such a recovery?

If the manner by which the child suffered the injury was such that the board would be liable in damages for the said injury were it not for the fact that because the board, in the performance of its functions, acts in a governmental capacity and is therefore not liable for misfeasance or malfeasance in accordance with the doctrine of *McHenry* vs. *Board of Education,* supra, a claim for the services of the physician and the hospital in treating the child for the injury may lawfully be paid as a moral obligation in the nature of damages; otherwise not.

I am not informed as to just how the injury occurred. Clearly, a private institution, maintaining a gymnasium and not protected by the rule of non-liability applicable to governmental agencies, would owe certain duties to its patrons, the violation of which would cause it to be liable in damages for injuries suffered on account thereof. Among such duties would be the duty to provide a safe place to operate, and safe appliances and equipment for its patrons to use; and especially if children were among its patrons. If instruction and supervision were a part of the service afforded, such instruction and supervision must necessarily be competent and careful. An injury suffered by a patron as a direct and proximate result of a failure to perform these duties would clearly create a right of action in the injured person or his administrator, if death ensued therefrom, in which a recovery in damages might be had.

It would be beyond the scope of this opinion to discuss the question of negligence generally. Suffice it to say that a claim of the physician and hospital for services rendered to the injured child cannot lawfully be paid by the board of education of Greenfield schools as a moral obligation of the school district unless the circumstances surrounding the injury were such that the child would have had a legal claim for damages on account of said injury, save for the fact that no recovery may be had against a board of education in tort for injuries suffered by school children in the course of their attendance at school.

Respectfully,
GILBERT BETTMAN,
Attorney General.

596.

DISAPPROVAL, BONDS OF MONROE COUNTY—$4,500.00.

COLUMBUS, OHIO, July 5, 1929.

In re: Bonds of Monroe County, Ohio, $4,500.00.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

GENTLEMEN:—The transcript submitted relative to the above issue of bonds contains no evidence of any proceedings had prior to the passage of the resolution authorizing the bonds, as required under the provisions of sections of the General Code relating to necessary procedure to be taken by county commissioners, and particularly the Uniform Bond Act.

On November 21, 1928, this office returned the transcript for completion, but has received no word relative thereto. I accordingly advise you not to purchase the above bonds.

Respectfully,
GILBERT BETTMAN,
Attorney General.