3199.

MORAL OBLIGATION — CLAIM AGAINST COUNTY — COUNTY COMMISSIONERS DETERMINE ALLOWANCE OF SUCH CLAIM—DIRECTION OF PAYMENT SUBJECT TO LEGAL ADVICE OF PROPER OFFICERS AND RULES OF LAW ENUNCIATED BY COURT — ALLOWANCE OF CLAIMS REVIEWABLE BY COURTS, NOT BOUND BY FINDINGS OF COMMISSIONERS — THERE MUST BE SUFFICIENT FUNDS IN COUNTY TREASURY, APPROPRIATE TO PAYMENT OF SUCH CLAIM, NOT OTHERWISE ENCUMBERED—UNDER UNIFORM TAX LEVY LAW, SECTION 5625-1 ET SEQ., G. C., COUNTY AUDITOR WHO PAYS CLAIM CONTRARY TO LAW, LIABLE FOR ALL DAMAGES AND LOSS SUSTAINED BY COUNTY—WHERE CLAIM MEETS LEGAL REQUIREMENTS AND IS LAWFULLY ALLOWED, AUDITOR NOT LIABLE — SEE OPINIONS ATTORNEY GENERAL, 1939, VOLUME III, PAGE 1966.

SYLLABUS:

1. *Whether or not the facts upon which an application for the allowance of a claim against a county as a moral obligation are sufficient to justify the allowance of such claim and the direction of its payment as such is a matter to be determined in the first instance by the county commissioners, subject to such rules of law as have been enunciated by the court relating to moral obligations and the legal advice of the proper officers. The allowance of such a claim is reviewable by the courts, which are not bound by the finding of facts made by the commissioners.*

2. *Such a claim may not be allowed and ordered paid as a moral obligation unless there be sufficient funds in the county treasury appropriate to the payment of such claim and not otherwise encumbered.*

3. *A county auditor who pays a claim contrary to law is, under the provisions of the Uniform Tax Levy Law (Section* 5625-1, *et seq. G. C.), liable for all damages and loss sustained by the county to the extent of such payment. He would not be liable, however, for issuing a warrant in payment of a claim ordered paid as a moral obligation if such claim be lawfully allowed and meets the requirements of law pertaining to claims of this kind.*

(Opinion No. 1330, Opinions Attorney General, 1939, Vol. III, p. 1966, followed.)

Columbus, Ohio, January 4, 1941.

Honorable Kenneth Kreider, Prosecuting Attorney,
Newark, Ohio.

Dear Sir:

I have your recent request which reads as follows:

"I invite your attention to Attorney General's Opinion No. 1330, dated October 24, 1939, and before making request relative to same review the facts of the transaction which has come on for my consideration. The facts are as follows:

On or about the thirteenth day of October, 1936, the County Commissioners of Licking County by their unanimous consent and vote approved the purchase of limestone for the repair and improvement of several roads within said county, and in pursuance thereof and in accordance with subsequent shipping instructions, the stone company, from which the purchase of said stone was contemplated, furnished better than six thousand tons of stone. The price asked for said stone was fair and equitable in the light of the price asked for similar stone in the competitive and open market, and was satisfactory and acceptable to the County Commissioners, and the bid and offer of the company furnishing said stone was, in the opinion of the Board of said Commissioners, the lowest and best bid obtainable.

However, the record of the County Commissioners is silent relative to the purchase of said stone, but at the time the purchase of same was unanimously approved by the County Commissioners an amount sufficient to meet the expenditure of said purchase was in fact in the County Treasury free from any obligation or certification then outstanding, but inadvertently no record of resolution of purchase was made nor certificate issued showing the amount sufficient to meet said expenditure in the County Treasury free from any obligation or certification.

However, the quantity of stone hereinbefore mentioned was in fact delivered to the county of Licking with freight prepaid, and all of said stone was used for the repair and improvement of several roads within said county, and the public has received the full benefit from the improvements and repairs thus made by the use of said stone. It is without question that the circumstances surrounding the transactions had by the Commissioners with the company furnishing said stone were without any fraud or collusion whatsoever.

In connection with the purchase of said stone, it does not appear that the then County Surveyor of Licking County furnished

an estimate. While there is not sufficient money in the County's Road and Bridge Fund at present free from obligation or certification to pay for the stone so furnished, I have been asked if the claim of the company furnishing said stone can legally be paid in view of the Attorney General's opinion to which I have already invited your attention, and if so, could the present County Commissioners by their majority vote pass a resolution authorizing the payment of said claim out of the County's Road and Bridge Fund with the understanding that the Auditor of said County issue a warrant for the payment of said claim in pursuance of said resolution as soon as the County's Road and Bridge Fund has a balance free from obligation or certification sufficient to meet the payment of said claim.

Before requesting your opinion relative to the legality of the above claim, and relative to the legality of the contemplated procedure, may I call your attention to Section 5625-33 of the General Code which sets up certain requirements that must be met before the County Auditor can legally pay a bill, and ask you whether or not said procedure would comply with the above statute and release the Auditor from any liability on his part?"

As I understand your request, you ask three questions which may be succinctly stated as follows:

I. Are or are not the facts set forth in your letter sufficient to justify the county commissioners of your county in adopting a resolution recognizing as a moral obligation and ordering paid the purchase price of the material received and used by them for the county's benefit?

II. May such claim be so allowed and ordered paid at this time when the county road and bridge fund does not have sufficient moneys therein to pay such claim, to the end that the county auditor may issue a warrant when, as and if there should be sufficient moneys in said fund? and,

III. If the county commissioners should so recognize and order such claim to be paid, and if and when there should be sufficient moneys in the county road and bridge fund the county auditor should issue a warrant to pay the claim in question, would the county auditor, in view of the provisions of Section 5625-33, General Code, be released "from any liability on his part?"

I. In so far as your first question is concerned, this office is of the opinion that it cannot properly pass thereon. The Attorney General is in nowise a fact finding officer and is not empowered either by the Constitution or by statute to adjudicate or decide any question of fact, the determination of which is by law vested in other public officers, boards or commis-

sions. He is, by law, made "the chief law officer for the state and all its departments" and is required, when so requested, "to give legal advice" to state officers, boards and commissions "in all matters relating to their official duties" and when requested by them to advise "the prosecuting attorneys of the several counties respecting their duties in all complaints, suits and controversies *in which the state is, or may be a party.*" (Sections 333, 341 and 343, G. C.) That is to say, in matters of the instant kind, it would be an usurpation of power and authority for the Attorney General's office to attempt to determine and advise the county commissioners, either directly or through you, as to whether or not the claim about which you inquire should be allowed and paid as a moral obligation. The resolution of this question is a matter to be determined in the first instance by the county commissioners, under such legal advice as you, with the assistance of this office, may give, the action of the county commissioners in allowing such a claim being reviewable in the courts, which are not bound by the finding of facts made by the commissioners.

Moreover, any action taken by the county commissioners is subject to examination and audit by the state bureau of inspection and supervision of public offices, which, in the discharge of the duties imposed upon it, is empowered by law to make inquiry into the facts, and to this end to subpoena and compel the attendance of witnesses. And it is needless to say that this office would not attempt to predetermine what if any action the bureau might take; in anywise to foreclose or hinder the bureau in the proper performance of the duties vested in it by law; or to prejudge its action in carrying into effect the matters and things for which it was created.

In so far as the law is concerned, it is of course manifest that the claim about which you inquire may not be enforced in the courts as a legal obligation for several reasons.

While by the express terms of Section 7214, General Code, county commissioners are expressly authorized "to contract for and purchase such material as is necessary for the purpose of constructing, improving, maintaining or repairing any highways, bridges or culverts within the county," the Legislature has prescribed the mode and method of entering into such contracts. For example, Section 7187, General Code, provides in part that:

> "The county surveyor shall report to the county commissioners on or about the first day of April in each year the condition of the county roads, bridges and culverts in the county, and

> estimate the probable amount of funds required to maintain and repair the county roads, bridges and culverts, or to construct any new county roads, bridges or culverts required within the county.
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> * * *
>
> The county surveyor shall approve all estimates which are paid from county funds for the construction, improvement, maintenance and repair of roads and bridges by the county. * * * "

Section 2414, General Code, reads:

> "No proposition involving an expenditure of one thousand dollars or more shall be agreed to by the board, unless twenty days have elapsed since the introduction of the proposition, unless by the unanimous consent of all the members present of the board, which consent shall be taken by yeas and nays, and entered on the record."

while Section 5625-33, General Code, provides inter alia that no subdivision or taxing unit shall make any expenditure of money unless appropriated in accordance with the provisions of the Uniform Tax Levy Law (Section 5625-1, et seq., G. C.), or make "any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same * * * has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances." See Section 5625-33, General Code.

It thus appears that while the county commissioners were expressly authorized to purchase road material of the kind here involved, the attempted purchase was, as shown by the facts stated in your request, defective and contrary to law, in that: (1) there was no estimate or any approval of an estimate by the county surveyor; (2) there was no unanimous consent of all the commissioners present *"taken by yeas and nays, and entered on the record;"* (3) there was no appropriation in accordance with the provisions of the Uniform Tax Levy Law or lawful appropriation of funds free from any previous encumbrances of appropriate funds in the treasury; and (4) there was no certificate of the fiscal officer as required by Section 5625-33, General Code. The facts, therefore, show that the claimant has no legal cause of action enforcible in the courts. And, in support of this conclusion, your attention is invited to the memorandum opinion filed on June 23, 1938, in Cause No. 1876, in the Court of Appeals of Licking County, Ohio, styled The State of Ohio, ex rel., Central Oil Emulsion Corp., etc., v.

William F. Wulfhoop, as County Auditor of Licking County, Ohio, in which almost identical facts were involved.

Coming now to the law in so far as the character of the instant claim may form the basis of a moral obligation is concerned, it seems to me that your question is exhaustively answered in Opinion No. 1330, Opinions, Attorney General, Vol. III, p. 1966, referred to in your letter. It is deemed unnecessary to quote at length from the above opinion. However, your attention is invited to page 1981, where the cases of State ex rel. Fronizer, et al., 77 O. S. 7 (1907), and Hommel & Co. v. Village of Woodsfield, 122 O. S. 148 (1930), are referred to and quoted from.

With reference to the Fronizer case, it is said, inter alia, as follows:

> "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.' "

See also page 1984, which refers to an opinion of the Attorney General, in the following language:

> "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.' "

Your attention is further invited to page 1987, where an excerpt from Opinion No. 1701, Opinions of the Attorney General, 1928, Vol. I, page 352, 358, is quoted as follows:

> "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."* (Italics ours.)

As above suggested, it seems to me that Opinion No. 1330 sufficiently sets forth the law in so far as the allowance of the claim involved in your communication as a moral obligation is concerned.

II. In so far as your second question is concerned, as above pointed out it is specifically provided in Section 5625-33, supra, that no subdivision or taxing unit shall expend any money unless appropriated as provided in the Uniform Tax Levy Law, or make any contract involving the expenditure of money unless a certificate of the fiscal officer of the subdivision be attached to such contract showing that funds to meet the same have been lawfully appropriated from an appropriate fund and are in the treasury or in the process of collection, free from previous encumbrances. Certainly if a contract involving the expenditure of public money may not legally be entered into without such a certificate, *a fortiori,* a moral obligation may not be recognized and ordered paid without there being sufficient funds in the treasury to pay the same.

Although your inquiry is limtied to funds in the road and bridge fund, your attention in this connection is invited to the provisions of Sections 5625-13 et seq., General Code, with reference to the transfer of funds and the procedure necessary to accomplish such a transfer.

III. Coming now to your third question, your attention is invited to Opinion No. 2016, Opinions, Attorney General, 1928, Vol. II, p. 1005, the fourth branch of the syllabus of which reads as follows:

> "Public officers who expend or authorize the expenditure of public funds on void contracts, agreements, obligations or orders contrary to the provisions of Section 5625-33, General Code, are liable to the taxing district whose funds have been so expended *for all damages or loss sustained by such taxing subdivision* in an amount equal to the full amount of such funds paid on or on account of any such void contract, agreement, obligation or order." (Italics ours.)

This opinion was followed and quoted with approval in Opinion No. 918, Opinions, Attorney General, 1939, Vol. II, p. 1257.

It will be noted that in the question posed by you, the county auditor would only be liable *"for all damages or loss"* sustained by the county if the payment be illegal; and if the claim in question measures up to the require-

ments of law relating to moral obligations and the allowance thereof, one being that the county shall have received *quid pro quo,* there could be no damages or loss sustained by the county. This of course assumes that the claim shall have been allowed as a moral obligation in a lawful manner from funds presently in the county treasury appropriated to pay such claims.

In view of the foregoing and in specific answer to your questions, it is my opinion that:

1. Whether or not the facts upon which an application for the allowance of a claim against a county as a moral obligation are sufficient to justify the allowance of such claim and the direction of its payment as such is a matter to be determined in the first instance by the county commissioners, subject to such rules of law as have been enunciated by the court relating to moral obligations and the legal advice of the proper law officers. The allowance of such a claim is reviewable by the courts, which are not bound by the finding of facts made by the commissioners.

2. Such a claim may not be allowed and ordered paid as a moral obligation unless there be sufficient funds in the county treasury appropriate to the payment of such claim and not otherwise encumbered.

3. A county auditor who pays a claim contrary to law is, under the provisions of the Uniform Tax Levy Law (Section 5625-1, et seq., G. C.), liable for all damages and loss sustained by the county to the extent of such payment. He would not be liable, however, for issuing a warrant in payment of a claim ordered paid as a moral obligation if such claim be lawfully allowed and meets the requirements of law pertaining to claims of this kind. (Opinion No. 1330, Opinions, Attorney General, 1939, Vol. III, p. 1966, followed).

Respectfully,

THOMAS J. HERBERT,
Attorney General.