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STUDENT NOTE

MORAL OBLIGATION—WHO SHALL BE THE KEEPER OF THE STATE'S CONSCIENCE?—The troublesome problem of moral obligation—*i.e.*, the policy that the state, notwithstanding its immunity from suit,[1] is morally bound under certain circumstances to compensate injured claimants—has recently become of increasing interest and importance in West Virginia. Specifically narrowed down, the interest revolves around the weight that the court should give a legislative enactment indicating that certain facts constitute moral obligation, thereby validating payment of public funds to satisfy the injured party. The West Virginia Supreme Court of Appeals has faced this delicate question several times of late upon the refusal of the state auditor to issue his warrant in compliance with a legislative enactment. In 1947, the court held for the first time[2] that a legislative determination that certain facts constitute a moral obligation was not conclusive.[3] In rapid succession, this holding was cited

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[1] W. VA. CONST. Art. VI, §35, "The state of West Virginia shall never be made defendant in any court of law or equity, except the state of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee."

[2] In a prior case, State *ex rel.* Cashman v. Sims, 130 W. Va. 430, 43 S. E.2d 805 (1947), the court refused to honor an award of the legislature, declaring that the finding of the existence of a moral obligation based upon facts which give rise to a juristic condition is subject to investigation and consideration by the court. But the language was not at all explicit.

[3] State *ex rel.* Adkins v. Sims, 130 W. Va. 646, 46 S. E.2d 81 (1947). Six youths were killed when their automobile crashed over a precipitous bank. There were no survivors and no witnesses to the accident. The administrators of each of these six decedents filed a claim with the state Court of Claims for $10,000 based on the state's alleged negligence in not having proper warning signs at the curve. The Court of Claims awarded the administrators of each $3,500, and admitted negligence on the part of the state. The legislature accepted this recommendation during the 1945 session, and appropriated the money to satisfy the award. The state auditor refused to honor the appropriation on the basis that it was the payment of public funds for a private purpose. When the administrators sought writs of mandamus, the court denied issuance because the legislature had failed to state with the appropriation that the reason for the award was moral obligation. The legislature in the 1947 session affirmed and approved the appropriation of the 1945 session, and further declared that, as a finding of fact, the circumstances resulting in the award constituted a moral obligation of the state. The state auditor still refused to honor the award on the same grounds. Again the administrators sought mandamus. Again the writ of mandamus was denied, the court squarely, decisively and *expressly* holding that the existence of moral obligation is a judicial question, and that a legislative declaration, while entitled to respect, is not binding on the court. The court reasoned that the state road commission could not mark every curve in the state, and that the proper exercise of this discretion did not constitute negligence.

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with approval, and followed both in upholding[4] and in avoiding[5] legislative appropriations. The court has carefully pointed out that these holdings should not be construed to mean that the judiciary has the power to recognize moral obligation, or that the court will substitute its ideas of good public policy for those of the legislature.[6] Rather, the legislature may recognize what it deems to be a moral obligation; but, once the legislature has decided moral obligation exists, then the judiciary has the power to review determinations of facts to see if the basis for moral obligation did, as a matter of law, exist.

Why the payment by the state of public funds for such purposes should be so closely guarded by the courts arises from the settled rule that public money shall not be paid for private purposes.[7] However, the West Virginia court follows the almost universal rule that the payment of public monies for a moral obligation, even if to a private individual, is a public expenditure, and therefore within the power of the legislature.[8] Since moral obligation is based on equitable and honorable obligations rather than positive rules of law, the courts have refused to question the legislature's determination of the facts resulting in the appropriation unless such determination was clearly erroneous.[9] That the courts have usually refused to question the legislative conclusion from the facts as well is due to a reluctance to invade the province

[4] State *ex rel.* Davis Trust Co. v. Sims, 130 W. Va. 623, 46 S. E.2d 90 (1947). Prison guard was negligent in permitting a known dangerous criminal to escape resulting in the immediate rape and murder of an elderly lady.

[5] State *ex rel.* Bennett v. Sims, 48 S. E.2d 13 (W. Va. 1948). Experienced state employee was unexplainably injured while handling dynamite; tested by rules which would have been applicable had the litigation been between private parties, the court could find no fault on the state's part.

[6] State *ex rel.* Davis Trust Co. v. Sims, 130 W. Va. 623, 637, 46 S. E.2d 90, 97 (1947).

[7] "The law is too well settled to require an extended argument to the effect that the Legislature can levy taxes and appropriate public revenues, only for public purposes." Woodall v. Darst, 71 W.Va. 350, 354, 77 S. E. 264, 265 (1912). "It is implied in all definitions of taxation that taxes can be levied for public purposes only and the rule that taxes can be levied only for public purposes is so well settled that a lengthy citation of decisions so holding is unnecessary." 1 COOLEY, TAXATION §174 (4th ed. 1924 Nichols).

[8] Woodall v. Darst, 71 W. Va. 350, 77 S. E. 264 (1912); United States v. Realty Co., 163 U. S. 427 (1896); Fairfield v. Huntington, 23 Ariz. 528, 205 Pac. 814 (1922); Munro v. State, 223 N. Y. 208, 119 N. E. 444 (1919); Wyoming *ex rel.* McPherren v. Carter, 30 Wyo. 22, 215 Pac. 477 (1923).

[9] *E.g.*, United States v. Realty Co., 163 U. S. 427 (1896); Payne v. Jones, 47 S. D. 488, 199 N. W. 472 (1924); Woodall v. Darst, 71 W. Va. 350, 77 S. E. 264 (1912); 42 AM. JUR., Public Funds §57 (1942).

of the legislature, and from the judicial inability to promulgate a concrete definition able to withstand an objective test. A moral obligation need not be such as would give rise to a cause of action against a private party; as usually expressed by the courts, the requirements are that an obligation must exist which would be recognized by a man with a keen sense of honor and with a real desire to act fairly and equitably without compulsion of law.[10]

These indicia, however, have been formulated as the courts were refusing to invade what they considered the all but exclusive province of the legislature. Our own decisions have never followed this classic concept. In 1912, when the doctrine of moral obligation was first expressly recognized in West Virginia,[11] the Supreme Court of Appeals observed by *obiter dictum* that whether a legislative appropriation was for a public or a private purpose was a question finally determinable by the court.[12] In 1934, the court stated (although not in considering the doctrine of moral obligation) that "a legislative declaration in respect of an existing condition as of fact but actually juristical, is not conclusive."[13] Even with these signposts, the results reached in recent moral obligation cases appear to be startling infringements on legislative powers in view of the traditionally accepted broad rules laid down in regard to the legislature's determination of facts prior to and as a basis for an enactment; indeed, our own court, in decisions concerning legislation, has chronologically stated that the judiciary cannot inquire into the motives and necessities which may have superinduced the passage of an act[14]—that a fact once determined by the legislature, and made the basis for an act, is not thereafter open to judicial investigation[15]—and that a legislative declaration of fact should be accepted by the courts unless there is strong reason for rejecting it.[16] Such statements, moreover, are consistent with

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[10] *E.g.*, Fairfield v. Huntington, 23 Ariz. 528, 205 Pac. 814 (1922); Hagler v. Small, 307 Ill. 460, 138 N. E. 849 (1923); People v. Westchester County National Bank, 231 N. Y. 465, 132 N. E. 241 (1921); Ausable Chasm Co. v. State, 266 N. Y. 326, 194 N. E. 843 (1935).

[11] *Semble* Slack v. Jacob, 8 W. Va. 612 (1875). This case had no discussion of the doctrine of moral obligation, although the facts would have warranted it.

[12] Woodall v. Darst, 71 W. Va. 350, 359, 77 S. E. 264, 267 (1912).

[13] *See* Berry v. Fox, 114 W. Va. 513, 523, 172 S. E. 896, 901 (1934).

[14] Slack v. Jacob, 8 W. Va. 612, 637 (1875).

[15] Woodall v. Darst, 71 W. Va. 350, 359, 77 S. E. 264, 267 (1912).

[16] Glover v. Sims, 121 W. Va. 407, 409, 3 S. E.2d, 612, 613 (1939).

those in other jurisdictions.[17] That the court should presume any legislative enactment valid, and that it should not declare legislative acts unconstitutional if under any set of facts they may be upheld, are axioms of constitutional law; an overwhelming number of decisions hold that, if certain facts would make an act constitutional, the court will not make a separate investigation of the facts, and will not attempt to decide whether the legislature has reached a correct conclusion with respect to them.[18] It is felt that to do so would be substituting the wisdom of the court for that of the legislature. Particularly would this reasoning seem to be applicable in moral obligation, which depends by its very nature not upon positive rules of law, but rather on the conscience of the arbiters.

In the decisions of the past three years, however, the holdings of the West Virginia court are apparently in disregard of such constitutional law principles. In *State* ex rel. *Davis Trust Co. v. Sims,*[19] the court upheld a legislative award to the administrators of decedent: she had died at the hands of a convict from the state security farm at Huttonsville, a convicted murderer and a known sexual pervert who was allowed by the guards to roam at will, when that convict "unaccompanied and unobserved, left the prison, went to the [decedent's] farm, . . . and there, after raping her, murdered her with a knife"; the decision was based on the guard's negligence, and the general rules of agency. In *State* ex rel. *Bennett v. Sims,*[20] the court reversed a legislative award based on the doctrine of

[17] Courts will generally acquiesce in the legislative determination of facts unless it is clearly erroneous, arbitrary, or wholly unwarranted. *E.g., Ex parte* Spencer, 146 Cal. 396, 86 Pac. 896 (1906); McSween v. State Live Stock Sanitary Board of Florida, 97 Fla. 750, 122 So. 239 (1929); Smith v. Command, 231 Mich. 409, 204 N. W. 140 (1925); State *ex rel.* Linde v. Packard, 35 N. D. 298, 160 N. W. 150 (1916); Stettler v. O'Hara, 69 Ore. 519, 139 Pac. 743 (1914); Poulnot v. Cantwell, 129 S. C. 171, 123 S. E. 651 (1924).

Determination of what constitutes public burden and what is for public good are questions for the legislature, with which the courts are loath to interfere. Stanley v. Jeffries, 86 Mont. 114, 133, 234 Pac. 135, 139 (1929).

Courts are said to have no power to conduct an investigation of facts which may enter into a question of public policy or expediency to sustain or frustrate legislation according to whether the courts happen to approve or disapprove the determination of such questions of fact by the legislature. *E.g.,* Consumers' League v. Colorado & S. Ry., 53 Colo. 54, 125 Pac. 577 (1912); Sanders v. Commonwealth 117 Ky. 1, 77 S. W. 358 (1903); *Ex parte* Kair, 28 Nev. 127, 80 Pac. 463 (1905).

[18] 16 C. J. S., Constitutional Law §151c (1939).

[19] 130 W. Va. 623, 46 S. E.2d 90 (1947).

[20] 48 S. E.2d 13 (W. Va. 1948).

res ipsa loquitur because "the relator has not established such negligence on the part of the Road Commission as would establish his to recover damages for his injuries, if, on the same state of facts, this were an action between private litigants." The result of *State* ex rel. *Adkins v. Sims*[21] obtained from similar reasoning. All three of these cases are based on the decision in *State* ex rel. *Cashman v. Sims*,[22] perhaps the most positive curtailment of legislative finality and authority, and certainly the initial blow. In this case, the relator was a doctor employed at a tuberculosis sanitarium which was an agency of the state. The low salaries offered by the state had resulted in a shortage of nurses, and the entire staff was overworked.[23] The relator had been examined for tuberculosis prior to starting his term of employment, and no evidence of this disease had been found. During his employment, he contracted tuberculosis, and was forced to discontinue his work and to receive treatments for the disease. The Court of Claims awarded him $2,000 because of the failure of the state to provide adequate conditions of employment. The state auditor refused to issue his warrant as directed by the legislature; a writ of mandamus was sought. The supreme court denied the writ on the basis that tuberculosis was not at that time considered an occupational disease, and that no definite proof was advanced showing that either employment or the admitted lack of facilities caused the illness, and that, since a private employer would not have been legally responsible, the payment by the state would have been an unconstitutional gift. Obviously, a fair and just man might consider himself responsible under such conditions, and under a moral obligation to repay the injured party. The court could quite easily have found sufficient facts present to uphold the legislative decision and the resulting appropriation.

Therefore, these cases must stand for the principle that moral

[21] State *ex rel.* Adkins v. Sims, 130 W. Va. 646, 46 S. E.2d 81 (1947).

[22] 130 W. Va. 430, 43 S. E.2d 805 (1947).

[23] To more fully understand the significance of the holding it is interesting to note statements of the Court of Claims' findings in the court's opinion. These findings were not disrupted, the court merely saying moral obligation did not exist. Testimony before the Court of Claims hearing showed that more nurses were needed; current medical standards required a larger staff of doctors and *not less* than 32 nurses to care for 80 patients. At Hopemont, the relator with the aid of only three nurses, was required to attend the 80 patients. A survey of experts showed that an annual minimum sum of $270,000 in salaries would have been necessary to care for the salaries of the institution if adequately staffed; sum available for that purpose was only $192,000.

obligation is a judicial question in nature, and that the legislature's determination is merely directive: should the legislature and judiciary disagree, the court's decision is, and should be, final.[24] To say that moral obligation is a judicial question deprives the legislature of its fundamental right to determine what is most desirable for the public. True, if the legislature had power to act only in certain contingencies, the court may look to see if such contingency exists.[25] Since the payment of public funds is prohibited for purely private purposes, the legislative action is valid only if moral obligation does exist. The traditional system of checks and balances demands that, if a legislative enactment is clearly a gift, the court must have the right to strike it down; otherwise, a benevolent or imprudent legislature could deplete the public funds by grants of charity and outright gifts. Such reasoning brings us face to face with the real question involved: to what degree must the legislative enactment be presumed valid in moral obligation cases? Should the court apply the usual test for legislation: that, unless clearly erroneous, enactments must be upheld? Should the test be different in moral obligation cases, for example, than the test applied in ordinary due process cases, so that the public treasury will be protected with greater diligence than the property and rights of the citizens? Must the legislature be presumed to be more apt to err in making payments of claims than it is in passing other public acts? That moral obligation is intangible and abstract, and frequently denotes different standards to different people, is not a valid reason to apply a stricter policy for it than for more tangible doctrines.

Our West Virginia court, however, seems to be applying this stricter policy in spite of the overwhelming weight of authority to the contrary.[26] Inasmuch as appropriations for moral obligations are within the inherent power of the legislature, it is felt that, when

[24] Such a ruling places West Virginia in a peculiar position: the judiciary can not originally recognize moral obligations; the legislature, which may, can not finally assert this power if the state auditor objects; and without a cautious auditor, the judiciary could never pass judgment at all. But, with the court's increasing inclination to exercise its discretion, more work results for an already overburdened court, since, with the legislature's determination not final, the state auditor will inevitably feel more inclined to deny payment of awards, with the result that claimants will have to seek mandamus to enforce the claim.

[25] Zimmerman v. Brooks, 118 Ky. 85, 80 S. W. 443 (1904). 28 Ky. L. J. 495 (1941).

[26] See note 9 *supra.*

the law making body exercises its discretion, its action should be held in the same high regard as other legislative acts. The United States Supreme Court, for example, recognizes that the legislature has the power to determine whether claims upon the public treasury are founded upon principles of right and justice, and that, once the legislature has decided the question in the affirmative, and has appropriated public money for payment of such claims, its decision can rarely if ever be the subject of review by the judicial branch of the government.[27] Even New York, which probably comes the closest to the West Virginia view,[28] permits court review only to see if the elements of moral obligation are present.[29] Our court continues to cite West Virginia holdings that legislative actions are entitled to the greatest respect and not to be overthrown by the judiciary unless clearly wrong;[30] but the decisions have not followed the spirit of the earlier opinions. Our court attempts to make a distinction between enactments based on moral obligation and other legislative acts on the basis that the existence of moral obligation is a juristic condition. But is not the factual situation behind any legislation equally as juristic a condition? The Supreme Court of Appeals has attempted to lay down a general rule to guide the legislature: a moral obligation does not exist unless (1) when, save for the constitutional immunity of the state from suit, there exists a contractual obligation, not created or

[27] United States v. Realty Co., 163 U. S. 427 (1896).

[28] State *ex rel.* Adkins v. Sims, 130 W. Va. 646, 46 S. E.2d 81 (1947) where the court expressly held that the existence of moral obligation is a judicial question, and that a legislative declaration, while entitled to respect, is not binding on the court.

[29] While there is a dearth of decisions on this precise point—legislative determination that moral obligation exists is not conclusive—West Virginia has some authority in their line of reasoning. *See* Williamsburg Savings Bank v. State, 243 N. Y. 231, 241, 153 N. E. 58, 61 (1926), in which it was stated, "the decision by the legislature that certain facts create a moral obligation, even if those facts exist, is not conclusive." (Legislative determination upheld). *See* Farrington v. State, 248 N. Y. 112, 115, 161 N. E. 438, 440 (1928), where the court said, "it must appear to the judicial mind and conscience that the particular claim belongs to a class concerning which the legislature might reasonably say is founded in equity and justice and invokes a moral obligation; otherwise such enactment is an unconstitutional exercise of the legislative power." (Legislative determination upheld). In Ausable Chasm Co. v. State, 266 N. Y. 326, 330, 194 N. E. 843, 845 (1935), the court stated that "to establish a claim founded upon a moral obligation the court must find that moral obligation actually exists." (Legislative award not upheld). In Hines v. State, 234 N. Y. Supp. 224, 225 (1929) the court declared that it was settled law in New York that the legislature might recognize moral obligation but such finding not conclusive and that the courts were not thereby precluded from deciding whether the judgment (sic) of the legislature was correct.

[30] State *ex rel.* Bennett v. Sims, 48 S. E.2d 13, 16 (W. Va. 1948).

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authorized by prior statute, of such a nature that in cases between private persons it would be recognized and considered as valid and binding, either at law or in equity, or (2) when a right to compensation is created in favor of a claimant by a previously enacted statute, and injury or damage results to him without fault on his part while he is engaged in the discharge of a lawfully imposed duty.[31] The court itself realized that such restrictions upon moral obligation were too strict; and, therefore, it went on to state that situations might arise, as exceptions to the general rule laid down, in which moral obligations might properly be found to exist which were predicated upon simple justice such as a fair and just man should assume in his own affairs, even though he was not compelled by law to do so.[32] While verbally recognizing the moral nature of some claims, however, the court has refused some extremely persuasive fact situations in basing their opinions in all cases solely on the theory that, if no liability would have existed between private parties, then the declaration by the legislature[33] that moral obligation existed was invalid.[34] The inescapable conclusion is that the appropriations of the legislature are reflections

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[31] State *ex rel.* Cashman v. Sims, 130 W. Va. 430, 442, 43 S. E.2d 805, 814 (1947).

[32] *Ibid.*

[33] As to the position that the Court of Claims assumes in aiding the legislative determination, it should be remembered that the Court of Claims has only the capacity of a legislative committee. In 1941, to assist the legislature to arrive correctly at the proper decision, and to provide an expeditious consideration of claims against the state, the State Court of Claims was created. W. VA. CODE c. 14, art. 2, §1 (Michie, 1943). The function of this three-judge court is to hear claims as a special instrumentality of the legislature; it is not invested with judicial power of the state. W. VA. CODE c. 14, art. 2, §4 (Michie, 1943). A determination of the Court of Claims is not subject to appeal or review by a court of law: the findings of the Court of Claims may be adopted or rejected by the legislature as its own determination of such facts without independent investigation, for the powers and duties of the Court of Claims are legislative in character. State *ex. rel.* Cashman v. Sims, 130 W. Va. 430, 436, 43 S. E.2d 805, 811 (1947). This court has no power to issue an award itself; it may only recommend action to the legislature; the legislature, in approving this recommendation is granting its own award. Having no power in itself, the Court of Claims is only a step in the procedure of making a claim against the state. It serves to "weed out" unworthy claims, and thereby saves the legislature valuable time, while assuring the claimants that their claims have received thorough examination. If the legislature makes an award on the basis of a Court of Claims recommendation, the judiciary role in West Virginia commences only if the state auditor contests the award.

[34] The supreme court has expressly applied legal liability test between private persons in: State *ex rel.* Cashman v. Sims, 130 W. Va. 430, 43 S. E.2d 805 (1947); State *ex rel.* Davis Trust Co. v. Sims, 130 W. Va. 623, 46 S. E.2d 90 (1947); State *ex rel.* Adkins v. Sims, 130 W. Va. 646, 46 S. E.2d 81 (1947); State *ex rel.* Bennett v. Sims, 48 S. E.2d 13 (W. Va. 1948).

of judicial rather than legislative discretion; for, whether the court intends to restrict moral obligations to claims that would entitle the relator to relief against a private party, or whether the exceptions to the general test must spring only from the court's conscience, the result is the some: in cases of moral obligation in West Virginia, the legislature (after originally instituting the action) stands on no higher a level than a lower court in an ordinary action or suit, or than an administrative agency in its hearings of proceedings.

P. J. F.

CASE COMMENTS

FEDERAL APPELLATE PROCEDURE—CERTIORARI—CONSIDERATION OF CONSTITUTIONAL OBJECTIONS NOT PRESERVED ON THE RECORD Petitioner was convicted of disorderly conduct for violating a Chicago ordinance concerning which the trial judge gave an instruction abridging the right of freedom of speech, to which petitioner did not except. The ground on which he based his appeal to the state appellate courts was that the ordinance as applied to his conduct violated his right of freedom of speech. Following affirmance in the appellate and supreme courts of Illinois, *Chicago v. Terminiello,* 332 Ill. App. 17, 74 N. E.2d 45 (1947); 400 Ill. 23, 79 N. E.2d 39 (1949), the case went on certiorari to the United States Supreme Court without specification of the erroneous instruction as ground for review in the application for the writ. *Held,* reversed. The ordinance as construed being unconstitutional, the fact that petitioner did not except to nor contest the instruction left it none the less ripe for review by the Supreme Court. *Terminiello v. Chicago,* 337 U. S. 1 (1949) (5-4 decision).

The majority opinion relies on *Stromberg v. California,* 283 U. S. 359 (1931). Although the *Stromberg* case substantially upholds the decision in the principal case, a distinction exists, however significant, which would have permitted an opposite result in the principal case under available authority. In the *Stromberg* case the trial court instructed, following the express terms of the statute, that appellant could be convicted if her conduct fell within any of the purposes set forth therein. There was a general verdict of guilty. Appellant did not except to the instruction but, on appeal to the state appellate court, contended that one of the proscriptions of the statute was invalid under the Fourteenth Amend-