bought from the personal funds of Mrs. Mittendorf, and added to as found necessary from the proceeds of said fund."

Whether the advancement made by the matron herself to procure the materials to make the articles which were afterwards sold was in the nature of a loan and the matron afterwards reimbursed herself, or whether she donated funds to start a rotary fund for the making of articles to be thus sold, does not appear, and makes no difference, as a donation or gift from the matron would be no different so far as the nature of this fund is concerned than if the gift were made by someone else.

The fund in my opinion has the same status as the fund under consideration in the opinion of 1921, above referred to. That is to say, it is in the nature of a trust fund for the benefit of all the inmates of the institution and should be held and administered as provided by Section 1840, supra, for the administration of funds arising from grants, gifts, devises or bequests of money or property made to or for the use or benefit of the said institution or of any inmate thereof.

It should be observed that the statute provides that the board may "in its discretion deposit in a proper trust company or savings bank any fund so left in trust." Your inquiry raises the question of whether or not under the provisions of this section the money constituting this fund may legally be invested in the stock of a building and loan company instead of depositing it in a proper trust company or savings bank.

In this connection, I direct your attention to a former opinion of this department rendered under date of December 3, 1915, and addressed to the Ohio Board of Administration, Opinions, Attorney General, 1915, Vol. III, page 2319, wherein it was held:

> "Trust funds held by the Ohio Board of Administration under Section 1840, General Code, cannot be deposited in a building and loan association."

Without discussing this question further, it is sufficient to say that I concur in the holding contained in the opinion of 1915 above referred to.

In specific answer to your question, therefore, it is my opinion that the moneys in the hands of the Matron of the Reformatory for Women at Marysville, which constitute the entertainment and amusement fund for the institution, should not be deposited in the state treasury, but that said fund is a trust fund and should be administered as such in accordance with the terms of Section 1840, General Code, and if deposited in a bank, such deposit should be made in a proper trust company or savings bank. There is no authority for the investment of these funds in the stock of a building and loan company or for the deposit of said funds with a building and loan company.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2440.

COUNCIL—CITY OF CLEVELAND—MAY DELEGATE AUTHORITY TO DIRECTOR OF LAW TO SETTLE CLAIMS FOR DAMAGES AGAINST CITY.

SYLLABUS:

1. *The Council of the City of Cleveland may legally delegate to the Director of Law authority to compromise and settle claims for damages against the city, and make a lump sum appropriation from which such claims may be paid*

2. *No opinion is expressed as to the power of the Commissioner of Accounts, under Section 70 of the Cleveland charter, to review the action of the Director of Law taken pursuant to such authority.*

COLUMBUS, OHIO, August 15, 1928.

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

GENTLEMEN:—This will acknowledge receipt of your recent communication as follows:

> "The Charter of the City of Cleveland does not provide that council may authorize the Director of Law to settle claims for damages.
>
> Said director's general duties are provided for in Section 45 of the Charter, which reads:
>
> 'When required so to do by resolution of the Council the Director of Law shall prosecute or defend for and in behalf of the City, all complaints, suits and controversies in which the city is a party and such other suits, matters and controversies as he shall, by resolution or ordinance, be directed to prosecute or defend.'
>
> Said council has by ordinance authorized the director of law to settle claims for damages without referring each said claim to council and has appropriated a lump sum for such purpose.
>
> The syllabus of Opinion No. 1622, Opinions of the Attorney General for 1918, at page 1551, reads:
>
> 'The city solicitor has no authority in his own right to compromise claims for damages against the city and to pay the same from an appropriation to his account for "court costs and damages".
>
> Council may not authorize the city solicitor by general or blanket resolution or ordinance to compromise any and all claims against the city. He may be authorized to negotiate settlements, but each settlement must be separately approved by council.'
>
> Question: May the council of the City of Cleveland legally delegate authority to the director of law to compromise and settle claims for damages?"

I am informed that damage claims which the Director of Law is authorized to settle and compromise are only those which are of a legal character. That is to say, the Director is not assuming in any way to recognize claims of a moral character only, and accordingly it is unnecessary in the consideration of your question to discuss any possible difference existing between the right to compromise legal claims and the right to recognize moral obligations.

In the course of the opinion from which you have quoted the syllabus, and with particular reference to the second branch thereof appears the following, on page 1552:

> "The question that now arises is as to whether or not this power may be delegated to the solicitor. Strictly speaking, it may not be so delegated. Each settlement which the solicitor makes must be specifically approved by council. Council may require and thus authorize the solicitor to defend any controversy, though not in suit, and this gives to the solicitor all the powers usually reposed in an attorney in the conduct of the controversy from the legal standpoint. The solicitor thus becomes the agent of the municipality as represented by the council with full authority to act as an attorney might act in a similar case. Such authority would not go so far, however,

as to permit the solicitor to bind the city finally and in his own right as such agent by the terms of any compromise upon which he might agree. He would be authorized to negotiate no doubt and to formulate terms; but before the settlement would be binding upon the city the action of council would be necessary. Such action should, in my opinion, be taken in each individual case. For the council to attempt to confer upon the solicitor blanket authority to compromise at his discretion damage claims of any given class asserted against the city would be for the council to delegate discretion which is reposed by the law in it to the solicitor. This can not lawfully be done."

The conclusion of my predecessor was accordingly predicated upon the proposition that the council could not delegate to the city solicitor the discretion which in the opinion of my predecessor was by law reposed in the council. This opinion would apparently be dispositive of your inquiry were it not for the fact that Cleveland is a charter city and it becomes necessary to determine whether any different rule is applicable by reason thereof.

Section 3 of the Charter of the City of Cleveland provides in part as follows:

"The legislative and executive powers of the city, except the legislative powers reserved to the people by this Charter, shall be vested in a Council and shall be exercised as hereinafter provided. * * *"

Commencing with Section 43 are the provisions of the Charter with relation to the Department of Law, the head of which is the Director of Law. The charter duties of the Director follow very closely those imposed by the statutes of Ohio upon city solicitors, but it is well to direct particular attention to Section 53, which is as follows:

"In addition to the duties imposed upon the Director of Law by this Charter or required of him by ordinance, he shall perform the duties which are imposed upon city solicitors by the general law of the state, beyond the competence of this Charter to alter or require."

Section 70 of the Charter is also pertinent to the present consideration, since it provides specifically with respect to the payment of claims. That section so far as pertinent, is as follows:

"No claim against the city shall be paid unless it be evidenced by a voucher approved by the head of the department or office for which the indebtedness was incurred; and each such director or officer and his surety shall be liable to the city for all loss or damage sustained by the city by reason of his negligent or corrupt approval of any such claim. The Commissioner of Accounts shall examine all payrolls, bills and other claims and demands against the city and shall issue no warrant for payment unless he finds that the claim is in proper form, correctly computed and duly approved; that it is justly and legally due and payable; that an appropriation has been made therefor which has not been exhausted, or that the payment has been otherwise legally authorized; and that there is money in the city treasury to make payment. He may investigate any claim and for that purpose may summon before him any officer, agent, or employe of any department, any claimant or other person, and examine him upon oath or affirmation relative thereto, which oath or affirmation he may administer. * * *"

At this point, it is advisable to revert to your communication and to restate that the council has, by general ordinance, authorized the director of law to settle damage

claims against the city, and, in furtherance of that authority, has appropriated a lump sum from which the amounts agreed upon may be paid. You inquire as to the legality of such a course.

You will observe from the quotation from the previous opinion of this office that my predecessor deemed the settlement of damage claims to be an exercise of discretion which could not be delegated; at least under the statutes of Ohio. It is significant, however, that nowhere in the statutes, nor in the Constitution, is there any specific reference to the subject of claims against municipal corporations nor any procedure outlined for the allowance thereof except that Section 4285 of the General Code gives to the auditor of a municipality power analogous to that conferred upon the Commissioner of Accounts by Section 70 of the Charter of the City of Cleveland, heretofore quoted. The pertinent part of Section 4285 is as follows:

> "* * * When any claim is presented to him, he may require evidence that such amount is due, and for this purpose may summon any agent, clerk or employee of the city, or any other person, and examine him upon oath or affirmation concerning such voucher or claim."

I am somewhat at a loss correctly to define the character of the action incident to the settlement of claims for damages. While, in one sense it may be stated to be quasi legislative, yet it also has certain administrative aspects and perhaps still more partakes of the nature of judicial action. It is a determination of the amount properly to be paid in compromise of an existing legal claim against the municipality which otherwise would necessarily receive ultimate determination by the courts. Hence, in my opinion the act of compromise is most accurately defined as of a quasi-judicial character.

Whether this function is one which resides solely within the authority of the Council of the City of Cleveland, because of the fact that it alone is vested with the legislative power of the city, is in my opinion questionable. Especially is this so because of the specific provisions of Section 70 of the Charter. Certainly the people by the adoption of the charter have delegated to the Commissioner of Accounts certain functions at least in connection with the allowance of claims which council would be powerless to disturb.

I believe, however, that the power delegated to the Commissioner of Accounts would not preclude council from itself allowing claims and accordingly the question still remains whether whatever authority council has may be delegated to the Director of Law.

Upon the general question as to the allowance of claims by municipalities, McQuillin in his work on Municipal Corporations (Second Edition), par. 2644 states:

> "In municipal corporations proper where the representative form of government prevails, and the corporators or inhabitants choose officers to represent and act for them in all matters which concern the interests of the corporation the power of compromise usually exists in the mayor and the governing legislative body, generally denominated the common council."

The author cites, however, in a note to the above quotation the provision of the charter of New York which authorizes the comptroller to settle and adjust claims in the adjustment of which he is to be governed so far as practicable by the rules of law and principles of equity which prevail in courts of justice. The courts of New York have held that this charter provision vests the sole authority in the comptroller and prevents council or the board of aldermen from making adjustments.

With respect to the same subject, the following is found in Corpus Juris, Vol. 44, at page 1449:

> "A municipality may, without express authority, compromise claims against it, such power being implied from the capacity to sue or to be sued; and although it may not make a gift under guise of a compromise of an entirely unfounded claim, the right to compromise and settle an existing and asserted claim does not depend on the ultimate decision for or against its validity. Power to compromise doubtful claims is inherent in the common council as the representative of the municipality—but a surety of claimant is not bound unless he also consents—and may be specially conferred by statute on other officers or boards, but statutes conferring authority on municipalities, boards, and commissions are to be strictly construed; and the power of a municipality in this behalf may be defined and limited by the statute and charter."

It thus appears that, so far as municipal corporations proper are concerned, there exists no definite precedent for the compromise of claims by law departments. The authorities do, however, clearly recognize the power of the people by charter or by statute, to confer this power upon other than the legislative body of the municipality. Where, as here, the legislative power is vested in council, the general trend of authority would seem to be that the compromise of damage claims is an incident of the legislative power which may not be delegated. It may be questioned, however, whether this may be stated as a definite and hard and fast rule.

In the present instance the people of the city of Cleveland have, in pursuance of the authority contained in the home rule provisions of the Constitution, adopted a charter for the government of the city. That charter, as to matters of local self-government, is the equivalent of a constitution, subject of course to certain restrictions of the state constitution which need not here be discussed. The charter in this instance, confers the legislative power upon council in language analogous to that of Section 1 of Article II of the Ohio Constitution conferring the legislative power of the State upon the Legislature. It accordingly may prove of some importance to compare the extent to which the Legislature has gone in the delegation of powers inherent in it. Manifestly, if the Legislature of Ohio has delegated certain functions to other officers and boards in a manner not subject to constitutional objections, there seems to be no reason for holding a similar delegation by the Council of the City of Cleveland either unconstitutional or violative of the city charter.

As I have heretofore stated, there is considerable difficulty in describing aptly the character of the power here sought to be conferred upon the Director of Law. This difficulty is well illustrated by reference to the case of *Miami County* vs. *Dayton*, 92 O. S., page 215, wherein was involved the constitutionality of the Conservancy Act. Without going into details with respect to the act, it is sufficient to say that it provided for the creation of a separate taxing district on proper application made to the Common Pleas Court, and gave to the district authority so created very broad powers with respect to the acquisition of property, determination of damages and the construction of the proposed improvement for the purpose of flood protection. Among other grounds the act was attacked on the ground that it was a delegation of legislative power. With respect to this objection the court speaking through Judge Wanamaker, says on page 234, as follows:

> "Again, it is claimed with much force that the conservancy statute undertakes to delegate legislative power. It is not specifically pointed out just what powers are strictly and wholly legislative, but it certainly cannot be seriously contended that the powers vested in the court of Common Pleas pertaining to the creation of the district are in any strict sense legislative powers.

A hearing is involved, a trial upon certain issues made by the petition and the objections thereto, and certain findings must be made by the Common Pleas in that behalf, all of which are essentially judicial in their nature. But it is claimed that the appointment of the directors and appraisers and their functions are legislative in character and amount to a delegation of legislative power.

It is difficult to see how this is any more a delegation of legislative power than the appointment of receivers and the various orders of court authorizing them to continue a going concern or to sell the same and distribute the proceeds, or to appoint appraisers in any given case, or any of the numerous boards that have heretofore been appointed by courts for the purpose of carrying out the substantial provisions of various statutory proceedings. But suppose that the powers so conferred are quasi-legislative, it must be conceded they are also quasi-administrative and quasi-judicial, and in such cases where the twilight zone of distinction prevails it has always been regarded as the right and duty of the Legislature to determine the nature of the function exercised and the body that should exercise it.

In this case they have conferred that power upon the court of Common Pleas. Whether that was wise or not is not important in this case. That should have been addressed to the legislative body that enacted the law.

We are satisfied that there is no constitutional prohibition against it.

Innumerable instances are available in our jurisprudence with reference to public improvements, such as turnpike roads, ditches and the like, where the Legislature has delegated to township trustees, county commissioners or other bodies, authority to lay out and organize districts for the construction of such improvement and for taxing or assessing the lands benefited thereby, and such enactments have been almost uniformly held valid; that is, that they were not a delegation of legislative power as prohibited by the constitution.

Manifestly the Legislature itself could not do the work contemplated by this statute. It would be impracticable. The only other alternative would be that the improvement must fail, that the general welfare must suffer because nobody but the Legislature could exercise the power."

You will observe that the court specifically refers to the appraisers, who among other things under the act were to determine the amount of damages caused to property by reason of the proposed improvement. Taking the act as a whole, the court concludes that the powers conferred are not only quasi-legislative but also quasi-administrative and quasi-judicial. It can scarcely be insisted that the powers delegated by the conservancy act are less broad than the power to compromise damage claims against the City of Cleveland.

Reference may also be made to the very great powers with respect to the improvement of roads which, under present law, are delegated to the Director of Highways. Lump sum appropriations are made to him, and he may exercise his discretion as to the roads to be improved, the character and cost of the improvement, the amounts to be paid to property owners for damages to property, and the amounts which will be paid for property actually necessary for such improvement. These may be paid out of the lump sum appropriation without any subsequent ratification or action on the part of the Legislature. Clearly, in my opinion, the delegation of this power is much broader than that attempted by the Council of the City of Cleveland

Again, attention might be called to the delegation to the Director of Agriculture of the power to condemn cattle infected with tuberculosis. Lump sum appropriations are also made in this instance and the Director may prescribe rules for the compensation for animals destroyed. These are, in every sense of the word, claims against the State, and the Director has the sole authority to determine the amount to be paid theron.

While I have been unable to discover any instance in which the constitutionality of the statutes with relation to the Director of Highways and the Director of Agriculture has been directly raised, yet I am confident that these laws would be sustained against an attack on the ground that they constituted an unconstitutional delegation of legislative power.

The power to compromise and settle claims against the State of various characters has been delegated in many other instances unnecessary to cite, and I believe that such delegation in the case of the State is not unlawful, in the absence of express constitutional provision vesting this power and authority in some specific officer or body. This conclusion is borne out to a large extent by the following from 36 Cyc., page 903:

> "The constitutions or statutes designate the officers or establish the boards by whom claims against the state are to be considered and passed upon. These are usually the state auditor, secretary of state, a board or court of claims, a board of examiners, or a board of auditors; and special committees or commissions are also sometimes appointed by statute to audit and settle particular claims. Where the constitution confers upon a certain officer or board the power to audit claims, the Legislature cannot deprive such officer or board of such power and confer it upon another; and so also where the Legislature has by statute made it the duty of a certain officer to audit claims that duty cannot be devolved upon another by joint resolution. In the absence of a constitutional prohibition, the Legislature may take upon itself the adjustment and settlement of claims; but in several states the constitutions provide that the Legislature shall not itself audit or allow any private claims against the state."

Here is clear recognition of the right of the Legislature, in the absence of constitutional prohibition, either to assume the function for itself or to delegate it to others. If this be true of a Legislature, I see no reason whatsoever for not applying the same reasoning in the instance here involved. While the legislative power of the City of Cleveland is placed in the hands of the council, I do not believe it improper, in the absence of a specific charter or constitutional prohibition, for the council to delegate a power of this character, which is at best quasi-legislative. Especially is this true in view of the heretofore quoted provision of Section 53 of the charter which at least impliedly authorizes council, by ordinance, to require the Director of Law to perform duties other than those specifically provided by charter. In pursuance of this authority council has by ordinance imposed the additional duty of settling damage claims upon the Director of Law. This is in my opinion no more of a delegation of legislative power than are the many instances heretofore cited in the case of the State.

I have heretofore quoted the pertinent part of Section 70 of the Charter, wherein certain powers and duties with respect to claims and demands against the city are given to the Commissioner of Accounts. An interesting question is presented as to whether the commissioner's duties and powers are such as to enable him to make independent inquiry into damage claims theretofore allowed and approved by the Director of Law. In other words, it is a question whether his powers are discretionary or whether they extend merely to the determination of whether or not the claims

are in proper form, correctly computed and duly approved. As this question is not before me, however, I give it no consideration.

In view of the foregoing, and in specific answer to your inquiry, I am of the opinion that the Council of the City of Cleveland may legally delegate to the Director of Law authority to compromise and settle claims for damages against the city, and make a lump sum appropriation from which such claims may be paid.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2441.

STATE AID—PENDING PROCEEDING—OPINION NO. 2110 APPROVED AND FOLLOWED.

SYLLABUS:

Where an application for state aid has been filed under the provisions of Section 1191, *General Code, prior to the effective date of House Bill No.* 67 (112 *O. L.* 430) *the filing of such application constitutes a proceeding which is pending within the meaning of Section* 26 *of the General Code of Ohio so that in all instances where it is necessary to acquire right of way for a road improvement it is the duty of the board of county commissioners to proceed under the provisions of former Section* 1201, *General Code, to acquire the requisite right of way. (Opinion No.* 2110, *dated May* 17, 1928, *approved and followed.)*

COLUMBUS, OHIO, August 15, 1928.

HON. JOHN H. HOUSTON, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—This will acknowledge your letter of August 10, 1928, as follows:

"Prior to January 1, 1928, the board of county commissioners of Brown County made an agreement with the state department of highways to procure a right of way through said county for the state highway department.

Certain owners of land abutting upon said highway refused to waive claims of compensation and damages to their lands and no agreement could be reached between them and county commissioners.

Thereupon the state department of highways advised that they would not construct said road unless right of way was procured by county according to original agreement. The state department of highways, through their legal advisor, advised the board of commissioners to proceed under Section 1201, G. C., as it stood prior to January 1, 1928, when the Norton-Edwards act went into effect.

This question has arisen under said proceeding in the probate court: Does Section 1201, G. C., as passed in the Norton-Edwards act, wherein former Section 1201, G. C., was specifically repealed, apply to this action or, inasmuch as the agreement between the state highway department and the board of county commissioners was made prior to January 1, 1928, does the former Section 1201, G. C., yet apply?

The former Section 1201, G. C., gives the commissioners alone right to start condemnation proceedings while latter Section 1201, G. C., repeals for-