conformity with the other statutory provisions relating to the execution of leases of this kind.

Said lease is accordingly hereby approved by me as to legality and form, and my approval is endorsed on said lease and upon the duplicate and triplicate copies thereof, all of which are herewith returned.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3383.

CHARTER MUNICIPALITY—RIGHT TO PAY PREMIUMS TO INSURANCE COMPANY FOR PENSIONS AND LIFE INSURANCE FOR ITS EMPLOYES—CONDITION NOTED.

SYLLABUS:

1. *A municipal corporation, which, by force of its charter adopted by authority of Section 7 of Article XVIII of the Constitution of Ohio, possesses all powers of local self-government granted to it by the Constitution of Ohio, may provide group life or indemnity insurance for its officers or employes and pay the premium for such insurance, either in whole or in part, from the public funds of the municipality, unless it is prohibited from so doing by the provisions of its charter.*

2. *A municipal corporation, having adopted a charter in which it expressed a purpose to assume all powers of local self-government granted to municipalities by the Constitution of Ohio, may, in the absence of charter provisions prohibiting or limiting such action, through its legislative authority, enter into an agreement with an insurance company whereby the insurance company agrees to pay pensions to employes of the municipality after such employes have reached a certain age, or have become incapacitated, in such amounts and upon such terms as may be determined by the said legislative authority.*

COLUMBUS, OHIO, June 30, 1931.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion in answer to the following questions:

> "Question 1. May a municipality through its council enter into an agreement with an insurance company, whereby the insurance company agrees to pay pensions to employes of the municipality, after the employe has reached a certain age, or has become incapacitated, in such amounts and under such terms as council may determine? (Members of the Police and Fire Departments excepted.)
>
> Question 2. May funds of a municipality be expended in making payments to the insurance company of part of the cost of such agreement, the remainder of the cost being contributed by the employe, on a basis of rates determined by council?
>
> Question 3. May the funds of a charter municipality be expended in making such payments, when the charter contains provisions as follows:
>
> > 'It (the city) shall have all powers that now are, or hereafter may be, granted to municipalities by the constitution or laws

of Ohio; and all such powers, whether expressed or implied, shall be exercised and enforced in the manner prescribed by this charter, or when not prescribed herein, in such manner as shall be provided by ordinance or resolution of the council.

All general laws of the state applicable to municipal corporations, now or hereafter enacted, and which are not in conflict with the provisions of this charter, or with ordinances or resolutions hereafter enacted by the city council, shall be applicable to this city, provided, however, that nothing contained in this charter shall be construed as limiting the power of the city council to enact any ordinance or resolution not in conflict with the constitution of the state or with the express provisions of this charter.'

Question 4. If such an agreement as stated in Question No. 1 is valid, may it contain an insurance feature, whereby the employes estate would receive a fixed amount at his or her death?"

Your inquiry involves the question of the lawfulness of a municipality expending the public funds of the municipality to procure life or disability insurance for its officers and employes. To provide for the payment of a pension, or an annuity, for employes who have reached a certain age, or become incapacitated in the service of a municipality, or served a certain term as a municipal employe is in effect providing insurance for those employes. The payment of such pensions, or the providing for the payment of annuities under such circumstances, is generally recognized as being comprehended within the term "insurance" and is in practice a branch of insurance.

To determine whether or not public corporations may lawfully provide from public funds for life or indemnity insurance for its officers and employes requires consideration of two questions: First, has the public authority the power to effect such insurance and, second, if the power exists, is the purpose a public purpose for which taxes may be levied?

There is no statutory authority which either expressly or by necessary implication grants to a municipality in Ohio the power to effect insurance of the kind here under consideration for its officers and employes, other than those provisions authorizing the creation of police and firemen's pension and indemnity funds. Because of this lack of statutory authority, I would have no hesitancy in saying that a municipality could not lawfully enter into an agreement such as you inquire about were it not for the fact that municipalities have by direct grant of the state constitution authority to exercise all powers of local self-government, and that the city in question has by the terms of its charter, as quoted in your letter, expressed a purpose to assume all authority so granted, if in fact such assumption of power by charter provision is necessary.

By giving effect to the home rule provisions for municipalities, as granted by the Constitution of Ohio, it was held by my predecessor in an opinion reported in Opinions of the Attorney General for 1927, at page 48, as follows:

"Unless forbidden by its charter, the legislative authority of a municipal corporation may, as a part of the compensation of its employes, legally authorize group insurance on behalf of any or all of the employes of such municipality."

In a later opinion found in the Opinions of the Attorney General for 1928, at page 1099, it is held:

"The legislative authority of a village may, as a part of the compensation of its employes, legally authorize group indemnity insurance and pay the premium therefor from public funds."

In neither of the opinions referred to above was any consideration given to the question of whether or not the providing of such insurance was in furtherance of a public purpose.

Inasmuch as similar uses of public revenues, as for instance, the use of such revenues for school teachers' retirement fund purposes and for police and firemen's pension funds, have been upheld, the Attorney General probably did not feel it to be necessary to discuss the question.

It is a familiar principle of law that moneys raised by taxation may not be expended for other than a public purpose. Courts are not in accord as to just what constitutes a public purpose. It is said by Cooley in his work on taxation, section 188, that there is no such thing as drawing a clear and definite line of distinction between purposes of a public and private nature.

As stated above, it has been held by the Supreme Court in the case of *State, ex rel* v. *Kurtz,* 110 O. S. 332, with reference to the use of public moneys for the creation of a state teachers' retirement fund which in effect is a provision for the payment of teachers' pensions and death benefits, a type of life and indemnity insurance, as follows:

"Contribution to a state teachers' retirement fund is a proper expenditure of money for a school purpose. Such a retirement system increases the morale and tends to raise the standard of the teaching force."

Likewise, for many years there has been in effect provision for the creation, in part or entirely, of police and firemen's pension funds which is also a type of insurance similar to that about which you inquire. In Cooley on taxation, section 183, it is said:

"The assertion of power for a long time on the part of the state in adopting a certain kind of legislation, while not controlling is entitled to great weight on the question of public purpose. However, custom should not be controlling, since it shuts out from consideration new conditions and new necessities. Public purposes are not restricted to those for which precedents may be found."

On the whole, I am of the opinion that the courts of Ohio would uphold the payment of the premium on group life or indemnity insurance for public officers and employes, providing it appeared that the public authority providing the insurance possessed the power to do so.

In an opinion rendered by me which opinion may be found in the report of Opinions of the Attorney General for 1929, at page 1716, it was held:

"Boards of education are not authorized to pay from school funds part of the premium on a group life insurance policy for the protection of the teachers in its employ."

In this opinion the question of whether or not the providing of such insurance was in fulfillment of a public purpose was not discussed. The opinion is based

entirely on the lack of authority under the Ohio statutes for a board of education to provide for group insurance for the protection of the teachers in its employ.

Cases involving the right of public authorities to provide group insurance for public employes are not numerous. In the case of *Nohl* v. *Board of Education of City of Albuquerque,* 199 Pac. 373, wherein the question of the right of a board of education to use the school funds for the purpose of carrying group insurance for school teachers and employes was involved, the decision is based on a statute giving the county board of education the authority, among other things, "to defray all expenses in connection with the proper conduct of the public schools in their respective districts". It was held that the board of education possessed the power by virtue of said statute to use the school funds for the purpose mentioned and that the group insurance was conducive to the proper conduct of the school by enabling the county board of education to procure and retain a better class of teachers. In another case, *State of Tennessee, ex rel Frank M. Thompson, Attorney General* v. *City of Memphis,* 251 Southwestern, page 46; 27 A. L. R., page 1257, it was held, as stated in the syllabus:

> "A city having power to increase the wages of its employes may take out group insurance for their benefit, if it will receive better service by so doing, without violating the constitutional provisions forbidding the appropriation of public funds for private purposes."

In an annotation to this case in A. L. R. it is said:

> "The recent cases uphold the right of municipal corporations to use public funds to carry insurance for their officers and employes."

In a somewhat earlier case in New York it was held that municipalities were not empowered to take out group insurance for the benefit of their employes, in effect, holding that such insurance was not for a public purpose. *People ex rel Terbush and Powell v. Dibble,* 189 N. Y. S. 29. The decision referred to was by the Supreme Court of Schenectady County, New York. The case was affirmed by the New York Court of Appeals, 231 N. Y. 593, but the court of Appeals did not pass upon the fundamental question as to the right of the city in question to insure its officers and employes. The Court of Appeals in affirming the decision of the lower court stated:

> "The inadequacy of the record in this and other respects precludes us from affirming the question as to the power of the city to take out group life insurance for the benefit of its employes who may thereafter die or become disabled while in the service of the city."

The decision in this case cannot be considered as a determination by the highest court of New York on the merits of the question.

It has long been recognized that it is within the power of a state legislature to authorize by proper legislation the establishment of police and firemen's pension funds in municipalities and of teachers' pension funds in school districts. As stated above, each of these pensions is a type of insurance and there is no doubt but that the legislature could as well authorize municipalities to provide for the kind of insurance spoken of in your inquiry. It has not so done, and inasmuch as it has not invaded this field, there is no doubt in my mind but that a municipality, under its home rule powers, after having adopted a charter with a

provision therein such as is set out in the third branch of your inquiry, may lawfully provide for the payment of pensions to the employes of the municipality, other than those in the police and fire departments, by arranging with an insurance company for the payment of these pensions, and the payment from public funds of a proper premium therefor.

I am therefore of the opinion that each of the questions submitted by you should be answered in the affirmative.

Respectfully,

GILBERT BETTMAN,

Attorney General.

3384.

APPROVAL, ABSTRACT OF TITLE TO LAND OF THE NEW YORK CENTRAL RAILROAD COMPANY, IN PORTAGE TOWNSHIP, OTTAWA COUNTY, OHIO.

COLUMBUS, OHIO, June 30, 1931.

HON. SCOTT GRAVES, *Prosecuting Attorney, Port Clinton, Ohio.*

DEAR SIR:—There was legally received at this office from Graves and Duff, attorneys at law at Port Clinton, Ohio, a corrected abstract of title of a part of Section 31, Township 7, Range 17, in Portage Township, Ottawa County, Ohio, which is owned of record by The New York Central Railroad Company, and was formerly used by it for railroad right of way purposes. The property here in question, which is to be purchased by the board of county commissioners of Ottawa County, Ohio, for the purpose of being used by the state highway department in the re-location of State Highway No. 2 in and through Port Clinton, is more particularly described as to metes and bounds with respect to the particular parcels thereof in a deed form of the deed to be executed by and on behalf of The New York Central Railroad Company conveying this property to the board of county commissioners; which deed form, as I am advised, has heretofore been submitted to you as well as to this office.

Upon examination of the original abstract of title submitted, I was of the opinion that The New York Central Railroad Company had a good merchantable record title to most of the property here in question. As to a part of said property, however, there was some question as to whether the railroad company had any title to the same otherwise than by prescriptive right for railroad purposes; and for this reason I did not feel like approving the purchase of said property, and declined to do so unless the railroad company would execute to the board of county commissioners a deed with full covenants of warranty. This the railroad company did not seem willing to do; and for this reason, the purchase of this property was not closed upon the original abstract submitted.

The corrected abstract of title submitted sets out quite fully certain proceedings in the Court of Common Pleas of Ottawa County, Ohio, filed therein by The New York Central Railroad Company, the object of which was to quiet the title of said railroad company in and to the property here in question (as well as other property) against the claims of all persons who, as shown by the abstract, might by any possibility have any claim against this property. By a judgment