fulness. It may also be true that in these days of improved methods of commercial intercourse, canals are relatively of minor importance, but so long as the present policy of the state, as shown by its laws, stands, the courts must carry out that policy. It is for the legislature, not for the Board of Public Works, nor for the courts to change it."

Upon the considerations above noted, I am of the opinion, by way of answer to the question presented in your communication, that the Ohio Postal Telegraph-Cable Company does not at this time as successor in interest of The Merchants Telegraph Company under the contract and agreement here in question, or otherwise, have any right to maintain this telegraph line on this section of Ohio Canal lands and unless some arrangement is made for the lease of these canal lands for the purpose for which they are now held, said company may be ousted from its occupancy of the lands, and that this may be done by an action in quo warranto in the Supreme Court or in any other court of competent jurisdiction. *State of Ohio, ex rel.,* vs. *Cincinnati Central Railway Company,* 53 O. S., 189; *State, ex rel.,* vs. *The Miami Conservancy District,* 125 O. S., 201.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

168.

CONTRACTS—COMPANY FOR CONSIDERATION OF SUM OF MONEY AGREES TO REPAIR MOTOR VEHICLES DAMAGED BY AN ACCIDENT—SUBSTANTIALLY AMOUNTS TO INSURANCE—SECTION 665 G. C.

SYLLABUS:

A company, which in the conduct of its business issues and sells a contract to owners of motor vehicles whereby in consideration of a certain sum of money it undertakes for a definite period of time to repair motor vehicles damaged as a result of an accident or agrees to furnish towing services to contract holders whose automobiles are disabled by

reason of an accident, is entering into a contract substantially amounting to insurance under the provisions of Section 665, *General Code.*

COLUMBUS, OHIO, February 25, 1937.

HON. ROBERT L. BOWEN, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR: I received your letter of recent date wherein you request the opinion of this office as to whether certain automobile service contracts enclosed in your letter are contracts of insurance or whether the companies issuing such contracts are entering into contracts substantially amounting to insurance.

The contracts as far as their terms and provisions are material and pertinent to your inquiry and the services to be furnished by the companies are as follows:

Contract No. 1

" DAMAGE TO ANOTHER'S MOTOR VEHICLE.

ITEM 1. Contract holders of the Company are entitled to the advantages and services of a garage which is under contract with the Company to repair without charge, regardless of the extent of the damage, any other motor vehicle damaged as the result of an accident caused by the sole negligence of the Contract Holder, provided, however, the motor vehicle so damaged is taken to the garage specified by the Company for such repairs.

DAMAGE TO CONTRACT HOLDER'S MOTOR VEHICLE.

ITEM II. In the event the Contract Holder's vehicle is damaged by collision caused by the negligence of the driver of any other moving vehicle, Contract Holders of the Company are entitled to the advantages and services of a garage which is under contract with the Company to repair all damage so caused to the within described motor vehicle, without charge for labor, regardless of the extent of damage, provided, however, the motor vehicle so damaged is taken to the garage specified by the Company for such repairs.

TOWING AND EMERGENCY ROAD SERVICE.

ITEM III. The Company agrees to provide towing and emergency road service anywhere in the United States or Canada whenever the Contract Holder's vehicle is disabled for any

cause whatsoever. In the event such service is required in Cuyahoga County, Ohio, the Contract Holder shall immediately notify the office of the Company and the Company will send a tow truck from its official garage to tow the Contract Holder's motor vehicle.

In the event the occasion for such services arises outside of Cuyahoga County or in the event the Contract Holder is unable to reach the office of the Company on the occasion of such emergency, the Contract Holder may apply to the nearest garage for such services and upon subsequent notification to the Company and proof that such services were rendered the Contract Holder shall be entitled to receive a credit endorsement on this contract or any renewal thereof, not to exceed $3.00.

* * * * * * * * * * * * *

The Contract Holder agrees to purchase all parts and materials incident to repairing the herein described motor vehicle through the official garage of the Company."

Contract No. 2.

"1. * * * The B. A. S. Company agrees to repair and keep in repair for a period of one year from date the following parts of the automobile * * *.

2. All fenders, running boards, steps, splash pans, side splashers, tire racks and tire carriers, metal tire covers, front bumpers and rear bumpers, bumperettes and to repaint all of the parts so repaired. When broken, the Company will sell to the owner for the above described car and install same. A windshield for $1.00, a headlight lens for $0.25, a tail light, stop light or cowl light lens for $..05, of the kind and quality now in the car.

If the second party wishes any of the parts herein above described to be replaced with new parts, the first party agrees to do all labor work to replace any or all parts.

3. It is further agreed and understood that all repairs as hereinbefore enumerated, shall be made by and at the garage specified by the Company.

4. For a period of one year from the date hereof the B. A. S. Co. covenants and agrees, to tow the car of the Owner, day or night, to any place designated by the owner of this contract, within a radius of ten miles from the maintenance garage of the Company in the event that said car shall become disabled as a result of an accident. * * *"

Contract No. 3.

"DAMAGE TO ANOTHER'S MOTOR VEHICLE.

ITEM I. Contract Holders of the Association are entitled to the advantages and services of a garage which is under contract with the Association to repair without charge, regardless of the extent of the damage, any other motor vehicle damaged as the result of an accident caused by the sole negligence of the Contract Holder, provided, however, the motor vehicle so damaged is taken to the garage specified by the Association for such repairs.

DAMAGE TO CONTRACT HOLDER'S MOTOR VEHICLE.

ITEM II. In the event the Contract Holder's vehicle is damaged by collision caused by the negligence of the driver of any other moving vehicle, Contract Holders of the Association are entitled to the advantages and services of a garage which is under contract with the Association to repair all damage so caused to the within described motor vehicle, without charge for labor, regardless of the extent of damage, provided, however, the motor vehicle so damaged is taken to the garage specified by the Association for such repairs.

FREE TOWING.

ITEM III. The Association will, through its official service station, tow member's automobile free of charge from a distance not to exceed ten miles and where an emergency exists and member is unable to move his car. Member is also allowed thirty minutes mechanical service in starting his car. This service also includes the changing of an inflated tire from rack to wheel. Member pays for all supplies and repairs on tires. Tires will be changed for women only.

NATIONAL TOWING.

In case of wrecks or mechanical breakdowns outside of the territory in which we operate, members may call the nearest garage available for such services and upon subsequent notification to the Association and proof that such services were rendered the Association will reimburse the said garage for the towing charge not to exceed three dollars ($3.00).

* * * * * * * * * * * * *

The Contract Holder agrees to purchase all parts and materials incident to repairing the herein described motor vehicle through the official garage of the Association."

Contract No. 4

"1. * * * A. S. C. agrees to repair and keep in repair for a period of one year from date the following parts of the automobile * * *;

2. All fenders, running boards, steps, splash pans, side splashers, tire racks and tire carriers, metal tire covers, front bumpers and rear bumpers, bumperettes and to repaint all of the parts so repaired.

If the parts to be repaired are beyond repair, the second party shall furnish new parts and the company will do all labor work to remove old parts and install new parts, without additional charge to second party.

3. It is further agreed and understood that all repairs as hereinbefore enumerated, shall be made by the Company at its garage.

4. For a period of one year from the date hereof A.S.C. covenants and agrees, to tow the car of the second party, described herein, day or night, to any place designated by the owner of this contract, within a radius of ten miles from the maintenance garage of the Company in the event that said car shall become disabled as a result of an accident. * * *"

Contract No. 5

"REPAIRS AND SERVICE.

It is understood and agreed that all repairs to a motor vehicle as per contract herein described shall be done at the Official Garage of the Company.

EMERGENCY ROAD SERVICE.

The Corporation agrees to provide emergency road and towing service when contract holder's vehicle is in need of such service. In the event the office or official garage is closed, the contract holder is authorized to have his automobile towed to the nearest garage and the Corporation will allow towing expenses not to exceed a five mile tow.

REPAIR SERVICE.

The Corporation agrees to repair the following described parts of contract holder's automobile as above described: All

fenders, running boards, frame, bumpers, bumperettes, tire racks, tire carriers, head lights, tail lights, cowl lights, stop lights, wheels, adjust brakes, steering column, front axle, radiator, windshield wipers, horn, body and in addition thereto repaint all parts repaired, exclusive of parts and replacements."

* * * * * * * * * * * * *

Contract No. 6.

"COLLISION REPAIR SERVICE.

The Club will repair free of charge the following described parts of member's automobile when said parts have been damaged as a result of an accident. All fenders, running boards, tire racks and carriers, front and rear bumpers and bumperettes, head lights, cowl lights, tail lights and stop lights and to repaint all of the parts so repaired.

The Club will repair free of charge the above described parts of an automobile belonging to another when said parts are damaged as a result of an accident caused solely by the member's car. An immediate written report must be made to the Club on printed forms furnished by the Club and certified by both parties."

Contract No. 7.

"COSTS OF LITIGATION — MANSLAUGHTER CASES.

In the event of a member's arrest on a charge of manslaughter the Club will allow the member up to $25.00 for costs of litigation for a preliminary hearing and not to exceed $100.00 if the case goes to a jury trial.

PROPERTY DAMAGE AND PERSONAL INJURY CASES.

In the event a member sustaining damage to himself, a member of his family or his automobile, caused by collision with another vehicle and due to the fault of another, if a settlement satisfactory to the member is not made and if the member proceeds to sue the other party in court, employing the services of a lawyer, the Club will allow the member $10.00 for costs of litigation in cases involving amounts up to $60.00; $15.00 in cases up to $100.00 and $25.00 in cases involving

larger amounts. These amounts to be paid whether the cases are won or lost.

In the event a member is sued in Court for damages alleged to have been caused by him and growing out of the use of his automobile, the Club will allow the member for costs of litigation the same amounts as those scheduled in the preceding paragraph.

It is understood that the member must employ his own lawyer. The Club recommends no one.

COLLISION REPAIR SERVICE.

The Club will repair free of charge the following described parts of members automobiles when said parts have been damaged as a result of an accident. All fenders, running boards, tire racks and carriers, front and rear bumpers and bumperettes, head lights, cowl lights, tail lights and stop lights and to repaint all of the parts so repaired.

EMERGENCY ROAD SERVICE.

The Club will, through its official service station, deliver gas, oil, tires, tubes, batteries, etc., within ten miles of the official service station, where an emergency exists and member is unable to move his car. Member is also allowed thirty minutes mechanical service in starting said car. This service also includes the changing of an inflated tire from rack to wheel. Member pays for all supplies and repairs on tires, batteries, etc. * *

NATIONAL TOWING

In case of wrecks or mechanical breakdowns outside of the territory in which we operate, members may call the nearest garage available and the Club will reimburse member up to three dollars ($3.00), upon presentation of RECEIPTED bill. Receipted bill must be on the printed bill head of the garage which does the towing. * * *"

Under the terms and provisions of the above contracts, the companies in consideration of a stipulated sum of money and for a definite period of time agree to furnish certain services to owners of motor vehicles damaged or disabled as a result of accidents. The contracts further provide that the contract holders pay for parts and materials incident to repairing the motor vehicles. The repair services to be performed by the companies are to be done in garages under contract with the companies or in official garages of the companies.

The questions presented by your letter are whether or not the companies, by reason of the above provisions of the contracts, are engaging in insurance business or entering into contracts substantially amounting to insurance, or guaranteeing against liability, loss or damage.

From a reading of the agreements, it will be observed that the word "insurance" is not included in the names of the companies nor is the term used anywhere in any of the contracts. Many of the agreements specifically state that they are automobile service contracts, and, in fact, Contract No. 4 sets out on its margin in red letters the following: "This is not an insurance policy." These elements in my opinion are not important for the purpose of determining whether the contracts in question are insurance. Whether or not a contract is one of insurance is to be determined by its purpose. contents and import and not by abstract declarations of its purpose. The name by which a corporation or assaciation, or its certificates or policies, are designated, is not determinative of the question whether the organization is an insurance company or its contracts are in the nature of insurance policies.

In the case of *State* vs. *Beardsley,* 88 Minn. 20, the court held as follows:

> "In determining whether a contract is one for insurance it is immaterial that on its face the contract does not expressly purport to be one of insurance, and that this word nowhere appears in it; the real character of the promise or of the act to be performed cannot be concealed or changed by the use or absence of words in the contract itself, but its nature is to be determined by an examination of its contents, and not by the terms used."

You will observe that several contracts provide that in the event of emergencies, contract holders may call the nearest garage for towing services and the companies agree to reimburse the contract holders either by payment in cash or by allowing a credit on the renewal of the contract. However, under the provisions of certain other of the contracts, no payments are made directly to contract holders for the damage or loss to their automobiles but the companies agree to repair the parts of the motor vehicles, damaged as a result of an accident, in garages under contract with the companies or in their official garages. The contract holders under such contracts are being paid in services for damage and loss to their property and in my opinion the rendition of services

by these companies is as much compensation for a loss as would be the payment of money.

In the case of *National Auto Service Corp.* vs. *State* (Tex. Civ. App.), 55 S. W. (2d) 209, the court held that for a contract to be insurance it is not essential that loss, damages or expenses indemnified against necessarily be paid to contractee, but a contract may constitute insurance if it be for the contractee's benefit, and the contract on which he, in case of breach thereof, may assert a cause of action.

It is apparent that under the provisions of all the contracts certain of the services the companies agree to perform become necessary by reason of damage, loss or disability of the motor vehicle as a result of an accident. All of the contracts with the exception of Contract No. 5 specifically limit certain of the services to be furnished by the companies to repairs of motor vehicles damaged as a result of an accident. Under the provisions of Contract No. 5, the repair services offered by the company are not available to contract holders if the motor vehicle is damaged when stolen or being operated without the Contract Holder's consent, being driven or operated in any race or speed contest, being driven by any person not lawfully authorized to operate a motor vehicle, being used to wilfully and/or knowingly violate any State, Federal or Municipal law or ordinance. It is reasonable to assume that this company becomes bound, at least by implication, to repair the automobile parts enumerated in the agreement, if such parts are damaged as a result of all accidents which do not occur when the motor vehicle is being operated under one of the conditions above mentioned. It would appear therefore that there is present in every contract at least one provision whereby the companies agree to render some services to contract holders when the motor vehicle is either damaged or disabled as a result of an accident. The companies in these instances agree to assume the risk of damage or loss and when such a risk is assumed the contract is one of insurance.

It was said by the court in the case of *First National Bank* vs. *National Security Co.*, 228 N. Y. 469, that the primary requisite essential to a contract of insurance is the presence of a risk of loss.

Again, in the case of *Dover Glass Works Co.* vs. *Insurance Co.*, 65 Am. St. Rep. 264, the court held:

> "An insurance in relation to property is a contract whereby the insurer becomes bound, for a definite consideration, to indemnify the insured against loss or damage, to a certain property named in the policy, by reason of certain perils to which it may be exposed."

There is no statutory definition of "insurance" in this state. No attempt will be made here to state all of the various definitions of the term "insurance" which have been given. However, several definitions given by the Supreme Court of Ohio will be stated.

In the case of *State* vs. *Ry. Co.*, 68 O. S. 9, at page 30, the Supreme Court defines the term "insurance" as follows:

> "What is insurance business? Various definitions have been given in brief of counsel, but we are content with the summary given in Bouvier's Law Dictionary (Rawle's Revision), 1068:
>
> 'A contract whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject by specified perils.'
>
> In another form, on the same page, it is said:
>
> 'In insurance in relation to property is a contract whereby the insurer becomes bound, for a definite consideration, to indemnify the insured against loss or damage to a certain property named in the policy, by reason of certain perils to which it may be exposed.' "

In the later case of *Ohio Farmers Insurance Co.* vs. *Cochran,* 104 O. S. 427, the Supreme Court of this state said:

> "An insurance policy is a contract between the insured and the insurer, whereby for an agreed premium one party undertakes to compensate the other for loss on a specified subject by specified perils."

The Supreme Court of Ohio in the case of *State, ex rel.* vs. *Laylin,* 73 O. S. 90, at page 97, said:

> "By indemnity is meant that the party insured is entitled to be compensated for such loss as is occasioned by the perils insured against, in precise accordance with the principles and terms of the contract of insurance."

It is to be observed that under the term "insurance" as defined by the Supreme Court of Ohio, the contracts under consideration are contracts of indemnity containing all the elements of an insurance contract.

The company issuing the policy is the insurer, the contract holder is the insured, the consideration paid by the contract holder for the services is the premium for the contract, the motor vehicle constitutes the subject matter, the contract holder has an insurable interest in the automobile, the accidental damage of the parts of the motor vehicle and the disability of the motor vehicle as the result of an accident constitute the risk, the duration of the risk is definitely set forth in the contract, and the agreement of the company to reimburse in some instances and to repair the damaged parts of the motor vehicle in other instances and to tow automobiles disabled as a result of an accident are the acts, as far as the contract holder is concerned, equivalent to the payment of money to him as the insured. See *National Auto Service Corp.* vs. *State, supra.*

In this state, the privilege of engaging in the insurance business is regulated by statute. Section 665, General Code, reads as follows:

> "No company, corporation, or association, whether organized in this state or elsewhere, shall engage either directly or indirectly in this state in the business of insurance, or enter into any contracts *substantially* amounting to insurance, or in any manner aid therein, or engage in the business of guaranteeing against liability, loss or damage, unless it is expressly authorized by the laws of this state, and the laws regulating it and applicable thereto, have been complied with.
>
> No person, firm, association, partnership, company and/or corporation shall publish or distribute, receive and print for publication or distribution any advertising matter wherein insurance business is solicited unless such advertiser has complied with the laws of this state regulating the business of insurance, and a certificate of such compliance is issued by the superintendent of insurance.
>
> Whoever violates the provisions of this section with reference to advertising, shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be fined not less than one hundred dollars nor more than five hundred dollars for each offense."

Under the terms of the provisions of this section, a company which is not licensed under the insurance laws of this state is prohibited from engaging either directly or indirectly in the business of insurance or entering into any contracts substantially amounting to insurance or in any manner engaging in the business of guaranteeing against liability loss or damage. It would seem from a reading of the provisions of the

above section that any company, corporation or association that engages in not only the writing of insurance contracts but any type of contract that is similar to contracts of insurance is required to comply with the insurance laws of this state. The provisions of Section 665, General Code, are not limited to contracts of strict insurance but apply to any contract which substantially amounts to insurance.

The Attorney General of Ohio, in Opinions of the Attorney General for 1928, Vol. I, page 424, held as follows in the syllabus:

> "Where a furniture company in Ohio sells furniture on the installment plan and, at the time of the sale, makes an agreement with the purchaser that, in the event the purchaser dies before the furniture is completely paid for, the company will cancel the debt for such furniture and give the purchaser's estate a receipt in full for the balance of the account remaining unpaid, the transaction is a contract 'substantially amounting to insurance' within the meaning of Section 665, General Code."

Again, in Opinions of the Attorney General for 1928, Vol. I, page 497, it was held:

> "Where a company in Ohio in consideration of a sum certain, contracts to maintain repairs in a workmanlike manner of certain exterior parts of an automobile from a certain date to a certain date, made necessary by collision or other similar accidental violence, the transaction is a contract substantially amounting to insurance under the terms of Section 665, General Code."

The contracts under consideration in this opinion are similar to the terms of the contracts considered in the opinion last above mentioned where it was held that the contract was substantially a contract of insurance. I concur in the reasoning and conclusions reached in the above opinion, for, by the express terms of Section 665, supra, in order to come within the provisions of this section, it is not necessary that the contract be one of strict insurance. The statute prohibits, unless the insurance laws of this state are complied with, a company from entering into a contract *"substantially amounting to incurance"*. This language is much broader and more inclusive than the phrase "contract of insurance" and I have no difficulty in arriving at the conclusion that all of the contracts submitted by you come within the provisions of this section of the General Code.

Although it is not necessary for the purpose of this opinion to determine whether Contract No. 7 is a contract of insurance or one substantially amounting to insurance, by reason of the fact that the company issuing the contract agrees to allow costs of litigation in the event the contract holder sustains damages and proceeds to sue the other party in court, employing the services of a lawyer, nevertheless in view of the case of *State, ex rel.* vs. *Laylin,* 73 O. S. 90, holding that a company is not engaged in the insurance business where it undertakes the defense of doctors in suits of malpractice, I deem it advisable to refer to this matter.

The case of *State, ex rel.* vs. *Laylin, supra,* held that a contract made between a company and its contract holders wherein the company undertook the defense of the contract holder in suits for malpractice, not agreeing to pay any judgment against the contractee, was not a contract of insurance. The court stated at page 99 that the contract was not one for indemnity, "for under it the liability of the company ceases, at the precise point and time, that the right to indemnify attaches or begins." The facts in that case, however, were entirely different from the facts here. There was no agreement there to indmnify the contract holder from loss but simply to defend him in any actions which might be brought against him for malpractice. Under the provisions of Contract No. 7 the company undertakes to indemnify, at least partially, the contract holder against loss by allowing him costs of litigation.

It was held in the case of *Physicians Defense Co.* vs. *O'Brien,* 100 Minn. 490, that an agreement to save harmless from a part of a loss is as much a contract of insurance as an agreeement to indemnify against an entire loss.

Specifically answering your question, it is my opinion that all of the companies issuing the contracts submitted by you are entering into contracts substantially amounting to insurance under the terms of Section 665, General Code.

Respectfully,

HERBERT S. DUFFY,

Attorney General.