

Section 665, General Code, provides 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."

It is apparent upon examination of the certificate of membership that the said association is transacting, among other things, an insurance business.

It was said by the court in the case of *First National Bank vs. National Surety Company*, 228 N. Y. 469, reversing 182 App. Div. 262, 169 N. Y. S. 774, that:

"The primary requisite essential to a contract of insurance is the presence of a risk of loss."

Also in *Dover Glass Works Co. vs. Ins. Co.*, 1 Marv. (Del.) 32, 29 Atl. 1039; 65 Am. St. Rep. 264:

"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."

The contract contained in the certificate of membership in the instant case is clearly one of indemnity.

Specifically answering your question, therefore, it is my opinion that this association, among other things, is transacting a business substantially amounting to insurance.

Respectfully,

EDWARD C. TURNER,
Attorney General.

2878.

GRADE CROSSING—RELOCATION OF STATE HIGHWAY—WHEN AUTHORITY OF COURT IS REQUIRED.

SYLLABUS:

Where, in the relocation or realignment of a state highway, it is proposed to change the location of a crossing at grade between such highway and the tracks of a railroad, it is necessary to secure the authority of the Court of Common Pleas by virtue of the provisions of Sections 8897, et seq., General Code.

COLUMBUS, OHIO, November 14, 1928.

HON. HARRY J. KIRK, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your letter of November 5, 1928, as follows:

“Submitted herewith in triplicate is an agreement prepared by the Baltimore & Ohio Southwestern Railroad Company, as to the form of which your approval is requested.

The proposed agreement between the Baltimore & Ohio Southwestern Railroad Company and the Director of Highways has to deal with the building of a new crossing and the elimination of the existing crossing on State Route No. 56, in Athens County, situated near Carbondale, Ohio.

Your attention is directed to Section 5 of the proposed agreement, wherein certain conditions are laid down by the railroad company relative to the closing of this crossing. These conditions did not appear to be desirable to the State without agreement by the County Commissioners to vacate the old crossing when such procedure was required by the State. Attached herewith is a letter from the Clerk of the Commissioners of Athens County in which it is agreed to take such necessary steps.

The agreement accompanying your letter comprehends an exchange of the new right of way across the railroad tracks for the present right of way; that is to say, the conveyance of the easement for the new crossing is conditioned upon a vacation of the old crossing. The State is agreeing to procure the vacation of the old roadway across the tracks. I am not clear from the blue print accompanying the agreement just what the present situation is, and it is not shown just how far the new crossing is from the old.

It is clear, however, that this agreement contemplates an entirely new crossing at grade of the highway and the railway. This being so, it appears to me that it is necessary, before the agreement is entered into, to secure the consent of the Court of Common Pleas by reason of the provisions of Sections 8897, et seq., General Code. Sections 8897 and 8898 are as follows:

Section 8897. “Every municipality or other authority hereafter building a highway across an existing railroad, shall construct it above or below the grade thereof, unless in the manner hereinafter provided allowed to build at grade. The cost of such work shall be paid, thirty-five per cent by such municipality or other authority, and sixty-five per cent by the company owning the railroad. The word ‘railroad’ shall include interurban railroads and the words ‘railroad company’ shall include interurban railroad companies engaged in the operation of cars by electricity or other lawful motive power which said companies may adopt or use. The method or procedure for the construction of such highway and the manner of construction thereof shall be governed by the statutes regulating the abolition of grade crossings.”

Section 8898. “When it is desired by a railroad company constructing a new railroad, or in changing or in altering the location of one heretofore constructed, or by any municipality or authority constructing a new highway that the railroad or highway should be so constructed that the railroad and highway will cross each other at the same grade, or if it is desired to divert, change or alter an existing public highway, a petition shall be presented by the party desiring such construction or diversion, to a Common Pleas Court of the county within which the crossing or diversion is situated, and if it is a highway asking for the right to cross a railroad, the railroad company shall be the defendant. If it is a railroad company asking for the right to cross a highway, or divert, change or alter any existing public highway in a municipality, such municipality shall be the defendant. If outside the municipality, and a road or highway other than a road or highway on the state highway system, the trustees of the township and the board of commissioners of the county shall be the defendants. If it is a road or highway on the state highway system,

the director of highways shall be the defendant. Summons shall be served and the rule days and the rights of the defendants to plead shall be the same as in civil actions in such court."

The succeeding sections prescribe the details incident to the procedure. While the language of Section 8898 is not entirely clear on the point, in my opinion, it necessitates securing the authority of the Common Pleas Court where a change is made in the location of a state road which necessitates the making of a new crossing at grade with the railroad. The Legislature has established a general policy that all crossings constructed in the future shall be at other than grade and that no more grade crossings shall be permitted except where the Common Pleas Court is convinced that the public safety will not be prejudiced thereby. Since I am informed that the approval of the Common Pleas Court has not been secured in this instance, I do not feel that I should approve the agreement at this time. When such approval is secured I shall be glad to pass upon the agreement if you again present it.

With respect to the agreement itself, I will point out that it is not clear to me what the exact situation is, and I am therefore unable to determine what authority or authorities would have jurisdiction to vacate the old right of way across the railroad. Under Section 1202 of the General Code the Director of Highways apparently has sole jurisdiction to vacate portions of the state road which may properly be abandoned by reason of relocation or realignment. I observe, however, that there are apparently two county roads which join with the state road at the crossing and I will therefore appreciate it if, in resubmitting the agreement, you give me more in detail the status of the various roads affected by the crossing.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2879.

GASOLINE TAX—PART PAYMENT BY CORPORATION—WHEN STATE
TREASURER MAY ACCEPT.

SYLLABUS:

Where payment of a portion of the tax due for gasoline sold is offered without prejudice to the right of the State to collect the balance, the Treasurer of State is authorized to accept the same.

COLUMBUS, OHIO, November 14, 1928.

HON. BERT B. BUCKLEY, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your recent communication as follows:

"Attached herewith is a carbon copy of a letter received from C., M. & F., Attorneys, Guardian Building, Cleveland, Ohio, in the matter of the gasoline tax of the A. Oil Company of Wooster, Ohio.

The Treasurer has received from these attorneys the check of the A. Oil Company, payable to the order of the Treasurer of State, in the amount of \$4,801.99, the company of its own accord having made a deduction of \$3,204.32 by reason of the tax improperly paid on non-taxable benzol at two cents a gallon.