elapse a full week between the date of the last publication and the date of the event advertised. Since the statutory requirements have not been complied with, I am compelled to advise you not to accept these bonds.

Respectfully,
EDWARD C. TURNER,
Attorney General.

197.

SENATE BILL NO. 30—IF ENACTED INTO LAW WOULD NOT INFRINGE ON RIGHTS OF EMPLOYERS OR EMPLOYEES—FOURTEENTH AMENDMENT TO FEDERAL CONSTITUTION.

SYLLABUS:

Senate Bill No. 30, if enacted into law, would not infringe upon any rights guaranteed employers or employees under the Fourteenth Amendment to the Federal Constitution or under any other constitutional provision.

COLUMBUS, OHIO, March 17, 1927.

HON. CHESTER C. BOLTON, *Chairman, Rules Committee, Ohio Senate, Columbus, Ohio.*

MY DEAR SENATOR:—I acknowledge receipt of your communication of March 10th, requesting my opinion in respect of Senate Bill No. 30, Mr. Rebman, your letter reading as follows:

> "Enclosed please find copy of Senate Bill No. 30, Mr. Rebman, declaring provisions in contract of employment whereby either party undertakes not to join, become or remain a member of a labor union or of any organization of employers or undertakes in such event to withdraw from the contract of employment, to be against public policy and void.
>
> This proposed legislation has been referred to the Rules Committee of the Senate for consideration. The Committee are questioning whether the bill as drawn infringes either upon the rights guaranteed employers or employes or the rights of contract guaranteed under the constitution and would therefore appreciate an opinion from you as to the constitutionality of the proposed act."

The title and text of Senate Bill No. 30, are as follows:

> "A BILL
>
> Declaring provisions in contracts of employment whereby either party undertakes not to join, become or remain a member of a labor union or of any organization of employers or undertakes in such event to withdraw from the contract of employment, to be against public policy and void.
>
> Be it enacted by the General Assembly of the State of Ohio:
>
> Section 1. Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting, or contained in, any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby (a) either party to such contract or agreement undertakes or promises not to join, become, or remain, a member of any labor organization

or of any organization of employers, or (b) either party to such contract or agreement undertakes or promises that he will withdraw from the employment relation in the event that he joins, becomes, remains, a member of any labor organization or of any organization of employers, is hereby declared to be contrary to public policy and wholly void."

The effect of this proposed legislation, if adopted, would be to limit the rights of employers and employees to contract. Whether such limitation be legal depends upon the purpose sought to be accomplished by the bill.

As I read it, the bill is designed to preserve in this state on behalf of both labor and employers the right to collective bargaining. In my opinion this object is within the police power of the state and therefore is proper subject of legislative action.

The reasons for my opinion that such a law would be constitutional are as follows:

(1) The right of declaring the public policy of a state is vested in its legislature but subject to review by the courts when alleged to be contrary to some constitutional provision.

(2) While the right of contract is a part of the individual freedom protected by the Fourteenth Amendment to the Federal Constitution, nothing is better settled by the repeated decisions of the Supreme Court of the United States than that the right of contract is not absolute and unyielding but is subject to limits and restraints in the interests of public health, safety and welfare and such limitation may be declared in the legislation of the state.

(3) The welfare of the working man is a part of the public welfare of the state.

(4) The welfare of the employers is a part of the welfare of the state.

(5) A measure calculated to insure industrial tranquillity between employers and labor would come within "public welfare."

(6) A measure calculated to insure or increase efficiency in the relation between employers and labor would come within "public welfare."

(7) The lessening of the labor turnover in industry is a matter of grave public concern.

(8) The continuity of production in industry and the avoidance of strikes and lockouts is a matter of grave public concern.

(9) Collective bargaining may tend to accomplish lawfully what has long been sought by the public, a voice in disputes between employers and labor. Collective bargaining means a contract between labor on one side and the employers on the other side. While no man can be compelled to work for another against his will, nor can an employer be compelled to retain an undesirable employee, yet collective bargaining will almost inevitably lead to term contracts and confer rights upon both sides which may be protected in the courts.

It seems to me that the present bill presents a striking illustration of what Mr. Justice McKenna referred to when he said in the course of the opinion of the Supreme Court of the United States in German Alliance Assurance Co. v. Lewis, 233 U. S., at page 409:

> "Against that conservatism of mind, which puts to question every new act of regulating legislation and regards the legislation invalid or dangerous until it has become familiar, government—state and national—has pressed on in the general welfare; and our reports are full of cases where in instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the Constitution of the United States. The dread of the moment having passed, no one is now heard to say that rights were restrained or their constitutional guarantee impaired."

The term "collective bargaining" is used to denote the negotiation of terms and conditions of employment between an organization acting on behalf of the employees and an employer or association of employers in contradistinction to bargaining between an employer and an individual employee. (Okes Organized Labor and Industrial Conflicts, No. 201.)

Collective bargaining is thought of primarily in connection with wage agreements but this is not its only function. Borrowing from the language of William M. Leiserson, Impartial Chairman, Rochester Clothing Market, in his article "Collective Bargaining and its Effects on Production," to be found in the September, 1920 issue of "The Annals of the American Academy of Political and Social Science:"

(page 42)

"Modern industry, therefore, if it is to get production, is face to face with the problem of adjusting its management methods to provide for collective bargaining. Collective bargaining implies a questioning of the absolute authority of the management in governing the productive efforts of the employees. It says there must be no rules or orders affecting the interests and welfare of the wage earners without the consent of those who must obey them. It is further based on the principle that an individual employee can not effectively question the authority of the management; therefore the aim is to join all employees in a union which together with representatives of the employer will form a legislative body for the purpose of giving to those who have to obey the laws of industry a voice in determining those laws. * * * Trade unions, with their method of collective bargaining, can not survive if this method does not bring greater production and greater economic welfare. * * *

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Collective bargaining has brought about a similar change in the attitude of the workers toward the introduction of machinery and improved methods of production. Here again the individual workman's feeling, acquired under individual bargaining, is falsely ascribed to organized labor. * * *

The introduction of pressing machines has been quite a problem in the clothing industry, but the unions have taken a stand with the employers in approving the use of these machines and with the aid of the unions the introduction of the pressing machines has been made much more easy, even though some men have to operate two or three machines. * * *

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A highly important gain to production from collective bargaining, which is commonly overlooked, is the lessening of interruptions to industries caused by strikes, lockouts, stoppages and also by high rates of labor turnover. Trade union agreements with employers usually run for a year or other stated period and during these periods strikes, stoppages or lockouts are prohibited and arbitration of disputes provided. * * *

(page 48)

No one who has studied the history of trade agreements in the coal mining industry, stove molding, printing trades, on the railroad and in the clothing and building trades, can have any doubt that such agencies (administrative agencies) are developed where the collective bargaining relations are maintained for a sufficient length of time to permit it. In the first place, the

unions in their own local units, district councils, conventions and executive boards establish that control and discipline of individual members which is essential in industry and which, because it is democratic, is more effective than the employers' efforts at control. Secondly, when the agreements are made there are always joint meetings of representatives of the employers and the workers who have a mutual veto on each other's acts and who together legislate for the industry. Thus, the point of view of both labor and capital are considered in all legislation and each gets a thorough understanding of the problems and purposes of the other.

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With this developed to complete the administrative machinery of collective bargaining, we have a complete system of constitutional government in industry modelled on the basis of experience, and capable of handling efficiently and constructively all the problems of modern production. It is bound to grow and survive as the prevailing type of labor management, because industrial monarchy with its insistence on individual bargaining has already broken down in its inability to get production from the wage earner."

In the code proposed by Honorable William S. Kenyon of Iowa, as chairman of the committee investigating the West Virginia situation, paragraphs four and five read as follows:

"4. The right of operators and miners to organize is recognized and affirmed. This right shall not be denied, abridged, or interfered with in any manner whatsoever nor shall coercive measures of any kind be used by employers or employees or by their agents or representatives to compel or to induce employers or employees to exercise or to refrain from exercising this right.

5. The right of operators and of miners to bargain collectively through representatives of their own choosing is recognized and affirmed." (The Annals of the American Academy of Political and Social Science, issue January, 1924, page 311.)

The national War Labor Board consisted of representatives selected by the American Federation of Labor and the National Conference Board with two joint chairmen, one now Mr. Chief Justice Taft, the other Honorable Frank P. Walsh. This board set up a code of fundamental principles, some of which may be summarized:

(1) The right of workers to organize in trade unions and to bargain collectively through chosen representatives.

(2) The right of employers to organize in associations or groups and to bargain collectively through chosen representatives.

(3) Prohibiting employers from discharging workers for membership in trade unions or for legitimate trade union activities. (Id. 307)

The necessity of collective bargaining on behalf of both employers and employees is recognized in the article of Joseph H. Willits, Professor of Industry, Wharton School, University of Pennsylvania, formerly on the staff of the U. S. Coal Commission, published in the January, 1924 volume of "The Annals of the American Academy of Political and Social Science."

In an article by Julius Henry Cohen of the firm of Cohen, Gutman & Richter, entitled "Collective Bargaining and the Law as a Basis for Industrial Reorganization," published in the July, 1920 volume of "The Annals of the American Academy of Political and Social Science," page 47, said:

"The title 'collective bargaining' is given to many things of essentially different character. As a term it is apt to be misleading. Primarily it is the dealing between an organized group of employees and one or more employers, and refers to the process of *bargaining* on the part of *groups* of employees as distinguished from the process of individual contracting. The term, however, has come to include the making of industrial agreements between large groups of employers, large groups of employees and representatives of the public. Such industrial agreements during the war became quite common through the efforts of the war labor board and the labor departments of various branches of government. * * *

Such agreements as these are in reality new phases of industrial organization. In fact they mean the government of industry by those supplying the capital and those supplying the labor, through organization on both sides continuously functioning through agencies of their own selection. This kind of government is a new kind of government. It is the effort of democracy to assert its power of self-government in industry. This philosophy is developed in an article in the Columbia Law Review for April, 1920 by Robert L. Hale, entitled 'Lawmaking by Unofficial Minorities.' The war has brought us to the realization that the productivity of a people depends upon the interest of the workers in their work. During the war we appealed to them on patriotic grounds and the response indicated that the incentive to effort is not to be found in the old 'pleasure and pain' economic philosophy. But along with the incentive to production is the necessity for systematic organization and orderly administration in industry. * * *

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Applying these lessons of political experience to industry, we find government in industry as indispensable as municipal government. Peace, orderliness, organization, willingness to postpone differences in order that the machinery may go on—all these are present. In addition, there is the vital fact that industry can not go on without the active cooperation of the worker. It is possible in government to run the government in spite of the indifference of the citizen. But we can not run industry with indifferent workmen. We must search then for a method in industry which will provide for self-government and we must make this self-government effective. My experience and my study lead me to the conclusion that 'constitutional government in industry can best be brought about' through agreements by the organized employers and organized employees freely arrived at through representatives of their own choosing but when arrived at supported by the law of the land. In brief, just as commerce has been built up upon the legality of individual contract, I think industry is likely to be built upon the basis of collective agreements.

* * * It is because of this epoch making experience that I believe collective bargaining should be recognized legally and as a matter of public policy encouraged as a process of industrial legislation and government in industry. I believe in that kind of collective bargaining."

Quotations could be multiplied but I believe that I have demonstrated that collective bargaining is a live question and one that comes within the public welfare.

On January 25, 1915, the Supreme Court of the United States, by a divided court, in the case of Coppage v. State of Kansas, 236 U. S. 1 (59 L. Ed. 441) held:

The rights of personal liberty and property are infringed without due

process of law contrary to the United States Constitution, Fourteenth Amendment, by Kansas Law 1903, Chapter 222, under which, as construed and applied by the highest state court, an employer or his agent may be criminally punished for having prescribed as a condition upon which one may secure employment under, or remain in the service of, such employer (the employment being terminable at will) that the employee shall enter into an agreement not to become or remain a member of any abor organization while so employed; the employee being subject to no incapacity or disability, but on the contrary free to exercise a voluntary choice."

While I believe that the correct interpretation is set forth in the dissenting opinion of Mr. Justice Holmes and in the dissenting opinion of Mr. Justice Day, concurred in by Mr. Justice Hughes, yet if Senate Bill No. 30 presented the identical question decided in that case, I would feel bound to follow the law therein laid down, just as was done by the Supreme Court of Ohio in the case of Jackson v. Berger, 92 O. S. 130, wherein the court, in following the case of Coppage v. State of Kansas, supra, said:

"The construction placed on provisions of the Federal Constitution by our highest tribunal and its decisions on purely federal questions are binding upon the state courts. Conflict of authority between the state and nation, on federal questions, would result in antagonism and governmental collision between the nation and the several states."

While I maintain that the legislature has the right to limit the freedom of contract, as was done by the Ohio legislature in General Code Section 12943, and in a similar statute by the Kansas legislature, yet the law of the land as declared by the Supreme Court of the United States and to which I must bow, holds otherwise. However, in the language of Judge Johnson in the case of Jackson v. Berger:
"I wish to express my full agreement with the views of Justices Day, Hughes and Holmes, as set forth in the dissenting opinions in the Coppage case," and to say that with the experience in industry had during and since the war, I would not hesitate to present the affirmative side of the constitutionality of Section 12943 of the General Code if occasion arose.

As said by Mr. Justice Holmes in his dissenting opinion in the case of Adkins v. Childrens' Hospital, 261 U. S. 568:

"The earlier decisions upon the same words in the Fourteenth Amendment began within our memory, and went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma, Liberty of Contract. Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do embodied in the word 'liberty.' But pretty much all law consists in forbidding men to do some things that they want to do and contract is no more exempt from law than other acts."

In the same case (261 U. S.) at page 562, Mr. Chief Justice Taft said:

"The boundary of the police power, beyond which its exercise becomes an invasion of the guarantee of liberty under the Fifth and Fourteenth Amendments to the Constitution is not easy to mark. Our court has been laboriously engaged in picking out a line of successive cases. We must be careful, it seems to me, to follow that line as well as we can, and not to depart from it by suggesting a distinction that is formal rather than real."

In one of those earlier cases decided by the Supreme Court of the United States without dissent, it was held in the case of Erie Railroad Co. v. Williams, as Commissioner of Labor of the State of New York, 233 U. S. 685 (headnotes):

> "While it is a fundamental principle that personal liberty includes the power to make contracts, the liberty of making contracts is subject to conditions in the interest of the public welfare, and whether that principle or those conditions shall prevail can not be defined by any precise or universal formula. Each case must be determined by itself.
>
> Each act of legislation has the presumption that it has been enacted in the public welfare and the burden is on him who attacks it.
>
> The burden of the party attacking a police regulation as unconstitutional under the due process clause is not sustained by the mere principle of liberty of contract; it can only be sustained by showing that the statute conflicts with some constitutional restraint or does not subserve the public welfare.
>
> The legislature is the judge in the first instance of whether a police regulation is necessary; judicial review is limited, and even an earnest conflict of public opinion does not bring the question of necessity within the range of judicial cognizance."

Under the statute passed on in the case of Coppage v. State of Kansas, the employee was subject to no incapacity or disability, but on the contrary was left free to exercise a voluntary choice. That statute attempted to criminally punish the employer for discharging an employee under an employment which was terminable at will.

We are confronted with no such situation in Senate Bill No. 30. Both employer and employee are bound alike. There is no punishment of an employer attempted for his discharge of an employee for joining, becoming or remaining a member of any labor organization. The employer remains free to discharge for any cause he pleases or without cause and the employee remains free to quit for any cause he pleases or without cause. However, if Senate Bill No. 30 becomes a law, in cases of contract for a definite term, an employer may not discharge an employee solely because of his membership in a union nor may an employee quit solely because of the membership of his employer in an employers' association without responding to the other in damages for breach of contract. This bill does seek to limit the right of contract to the extent that neither the employer nor the employee may validly stipulate against the other becoming or remaining a member of an association.

Specifically answering your question, I am of the opinion that Senate Bill No. 30, if enacted into law, would not infringe either upon the rights guaranteed employers or employees or the rights of contract guaranteed under the constitution.

Respectfully,
EDWARD C. TURNER,
Attorney General.