4121.

APPROVAL, BONDS OF WAYNE RURAL SCHOOL DISTRICT, MONROE COUNTY, OHIO, $911.93.

COLUMBUS, OHIO, APRIL 5, 1935.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

4122.

MOTION PICTURE FILMS—AMENDED S. B. NO. 88 OF 91st G. A. HELD UNCONSTITUTIONAL IF ENACTED.

SYLLABUS:

The provisions of Amended Senate Bill No. 88 of the 91st General Assembly, purporting to regulate the selling, renting, leasing and bartering of motion picture films would, if enacted into law, unduly interfere with the rights of property of copyright owners of motion picture films under laws of the United States enacted in pursuance of the Constitution of the United States and would be an unwarranted interference with the rights of private contract of the owners of motion picture films, whether copyrighted or not, and for that reason would be in violation of the provisions of Section 1, Article I of the Constitution of Ohio and of Article XIV of Amendments to the Constitution of the United States.

COLUMBUS, OHIO, APRIL 5, 1935.

HON. MARTIN L. DAVEY, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—I am in receipt of your request for my opinion with respect to whether or not a law as contained in Amended Senate Bill No. 88 of the 91st General Assembly, which bill has been passed by the Legislature of Ohio and has been presented to you for your approval or veto as in your judgment may be advisable, would be constitutional if finally enacted in accordance with law. This act purports by its title to be "AN ACT To regulate the selling, renting, leasing and bartering of motion picture films." The act contains five sections, and reads as follows:

> "SECTION 1. As used in this act, the word 'person' shall include any natural person, partnership, co-partnership, firm, unincorporated association or corporation doing business within this state.
>
> 'Public exhibition' shall mean any exhibition, performance or display which the public may see, view or attend for an admission price, fee or other valuable consideration.
>
> SECTION 2. It shall be unlawful for any person to enter into a contract, directly or indirectly, to sell, rent, lease, license, lend, distribute or barter a motion picture film for public exhibition within this state upon the condition imposed by the seller, vendor, renter, lessor, licensor or distributor of such mo-

tion picture film, that such public exhibition thereof shall begin, occur or take place on a certain or specified day or days of the week.

SECTION 3. Any person who violates any provision of this act shall, upon conviction thereof, be fined not less than twenty-five dollars nor more than three hundred dollars for the first offense, and shall be fined not less than three hundred dollars nor more than five hundred dollars for each separate subsequent offense.

SECTION 4. When, upon complaint or otherwise, the attorney general or prosecuting attorney has good reason to believe that any provision of this act has been violated, he shall commence an action in the supreme court or in the court of appeals of the county in which the defendant resides or does business, or in the court of appeals of Franklin county. The attorney general or a prosecuting attorney may commence such an action upon his own relation, or upon the relation of another person.

SECTION 5. A domestic, or foreign corporation or foreign association exercising any of the powers, franchises or functions of a corporation in this state, violating any provision of this act, shall not have the right of, and shall be prohibited from, doing any business in this state. The attorney general or a prosecuting attorney shall enforce this provision by quo warranto proceedings in the supreme court, or the court of appeals of the county in which the defendant resides or does business, or in the court of appeals of Franklin county, or by injunction or otherwise. The secretary of state shall revoke the certificate of such corporation or association theretofore authorized by him to do business in this state."

It will be observed from Section 2 of the said act that the inhibition provided for by the act is not directed against the exhibition of films or pictures at any particular time or any particular place, but against the making of a contract directly or indirectly, "to sell, rent, lease, license, lend, distribute or barter a motion picture film for public exhibition within this state upon the condition imposed by the seller, vendor, renter, lessor, licensor or distributor of such motion picture film, that such public exhibition thereof shall begin, occur or take place on a certain or specified day or days of the week." The making of such a contract becomes a penal offense for the seller, vendor, renter, lessor, licensor or distributor of a motion picture film for which forfeiture of the right to do business follows as well as the imposition of a fine if the contract is entered into upon the condition stated in the act.

It is common knowledge that distribution of motion picture films in the United States by distributors of such films, is made in all cases pursuant to a contract. The nature of that contract is not so commonly understood. A comprehensive description of the distribution of motion picture films throughout the United States is contained in a study issued by the United States Department of Commerce, Bureau of the Census (1932) under the title "Census of Distribution—Motion Picture Films." The following quotation is from page six of that official document:

"The distribution problem is further complicated by the fact that motion pictures, unlike other commodities, are seldom sold, although the term 'rental' is used. What actually happens is that the distributor or producer who holds a copyright to a picture grants an exhibitor a license which gives him the right to show the picture and supplies him with the positive print in order that the right may be exercised by the licensee. Such right is normally confined to a certain location and to a certain specified time."

In the case of *Vitagraph* vs. *Park,* 144 N. E., 85 (Mass. 1924) in which was involved an action based upon such a contract the court said that, "strictly the contract is neither for a sale nor for a lease; it contemplates a license and a bailment." In the course of the court's opinion in that case it was said:

> "The contract in the present case is different from a sale. There, if the transaction is consummated the seller parts with all his interest in the property. It is not like a lease of land, for in that case the lessor will eventually get back all he parts with. Here the distributor does not part with all for it has a right to the film upon termination of the contract in accordance with the terms and also the right to dispose of the subsequent exhibitions. But if the contract is consummated the distributor loses the possibility of making first run contracts, which in the nature of things cannot twice be carried out in the same district."

In the case of *Coca-Cola* vs. *State,* 225 S. W., 791 (Texas) it is stated:

> "The owner of a copyright having the exclusive right to manufacture and sell the article protected thereby and being under no legal obligation to grant such right to another may impress upon an assignee such restrictions as he may see proper and to which his assignee will agree."

There are cited in support of this statement the cases of *Bennet* vs. *Harrow Company,* 186 U. S., 91; *Bennet* vs. *Coca-Cola Company,* 238 Fed. 513; *Bauer* vs. *O'Donnell,* 229 U. S., 1; *Victor Talking Machine Company* vs. *Strauss,* 222 Fed., 524. In the case of *Federal Trade Commission* vs. *Paramount Famous Laskey,* 57 Fed., 2nd, 152, it was held:

> "A distributor of films by lease or sale has the right to select his own customers and to sell such quantities at given prices or refuse to sell at all to any particular persons for reasons of his own."

Many authorities might be cited wherein the principle is recognized that the owner of a copyright or patent may sell or lease the same to whomever he pleases or refuse to sell at all, or he may attach any lawful conditions he sees fit to any right growing out of such copyright or patent which he vends, sells or leases. See *Fox* vs. *Duvall,* 286 U. S. 123; *General Electric Company* vs. *U. S.,* 272 U. S., 476.

The right of a copyright owner or his assignee who may be the distributor of motion picture films, to specify as a condition of the grant of a license under a copyright that a performance licensed by the copyright begin or occur on a specified day and the right of any such copyright owner or his assignee to resort to the ordinary remedies open to such owners for infringement in case films are exhibited or shown on dates not authorized by the license contract, has been recognized in two comparatively recent cases. *Tiffany* vs. *Dewing,* 50 Fed., 2nd, 911; *Metro-Goldwyn-Mayer* vs. *Bijou,* 59 Fed., 2nd, 70.

It has been recognized that a state may not pass a law nullifying acts of Congress granting rights to owners of copyrights or abridging those rights except such regulations as may have for their purpose the protection of its citizens against fraud. See *Allen* vs. *Riley,* 203 U. S., 347.

Since the act in question seeks to prohibit entirely the making of certain contracts, it is necessary that it be examined in the light of the well known guaranty of the right of private contract as contained in Section 1 of Article I of the Constitution of Ohio, and Article XIV of the Amendments to the Constitution of the United States.

The general right to make a contract in relation to his own business is part of the

liberty of an individual protected by the Fourteenth Amendment to the Constitution. *Lochner* vs. *New York,* 198 U. S., 45. See also Corpus Juris, Vol. 12, page 1200, where it is said:

> "The right to make contracts is both a liberty and a property right, and is within the protection of the guaranties against the taking of liberty or property without due process of law. Neither the state nor federal governments, therefore, may impose any arbitrary or unreasonable restraint on the freedom of contract. This freedom, however, is not an absolute, but a qualified, right, and is, therefore, subject to reasonable restraint in the interest of the public welfare."

An equally positive guarantee of the inviolability of the right of private contract is contained in Section 1 of Article I of the Constitution of Ohio:

> "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."

Cleveland vs. *Construction Company,* 67 O. S., 197; *State* vs. *Brookman,* 70 O. S. 428.

To be sure, this right to contract as one pleases with respect to his own business is not absolute. *P. C. C. & St. L. Ry.* vs. *Kinney,* 95 O. S., 64; C. J. Vol. 12, page 1200.

I am unable to see, however, how the interference with the freedom of contract as between a distributor of motion picture films and an exhibitor as is sought by the act of the legislature here in question, can be justified under the police power. Certainly, the making of such contracts can have no reasonable or direct relation to the public health, safety or morals. If such a contract calls for the exhibition of a picture that had not passed censorship the contract, of course, would be illegal and unenforcible and the same would be true if it called for the showing of a picture on Sunday in a municipality where such exhibitions were prohibited by valid ordinances, or, if there were a state law prohibiting the showing of films on certain days or certain hours of certain days a contract between a distributor and an exhibitor would be invalid in so far as it sought to require exhibitions or showings of pictures at prohibited times.

Each film before it may be shown in this state, must first pass muster with the Board of Censors of Motion Picture Films. A film which is approved by the Board of Censors is presumably fit to be exhibited on any day of the week. Exhibitions of motion picture films are, of course, subject to regulation in the interests of the public welfare, providing such regulation is not arbitrary and does have some relation to the public health, safety and morals, but this act does not seek to regulate exhibitions but arbitrarily prohibits the making of a contract within this state whereby the seller, lessor or vendor makes such contract upon condition that the films must be exhibited or shown at certain times.

A somewhat similar bill, which sought to regulate the making of contracts between the owners of motion picture films and exhibitors, was before the Legislature in 1927 (House Bill No. 367 of the 87th General Asembly). The then Attorney General upon being requested for an opinion as to the constitutionality of its provisions if it should be enacted into law, held:

> "The motion picture business is not so affected with the public interest as

to justify legislation as proposed in House Bill No. 367 regulating the making of contracts between producers or distributors and exhibitors."

See Opinions of the Attorney General for 1927, page 546.

The act in question purports only to regulate contracts made by the owners of motion picture films whether copyrighted or not with attendant fines and forfeitures, without any proper basis justifying the prohibition.

There is no criterion expressed or implied in the act referring to restraint of trade in any of its connotations or to any coercive action or unfair practice or to any combination or concerted action or immoral or illegal exhibitions or showings of motion picture films.

To my mind, it does not seem that the prohibition contained in the act has a rational basis so as to bring it within such regulation of the right of contract bearing a proper relation to the public health, safety or morals, as to justify its enactment under the police power.

I am therefore of the opinion that the provisions of House Bill No. 88 of the 91st General Assembly are such as would unduly interfere with the rights of property of copyright owners of motion picture films under laws of the United States enacted in pursuance of the Constitution of the United States and that it unduly interferes with the right of private contract of the owners of motion picture films whether copyrighted or not, and for that reason is a violation of the provisions of the Fourteenth Amendment of the Constitution of the United States and of Section 1 of Article I of the Constitution of Ohio.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4123.

APPROVAL, TEN LEASES FOR THE USE OF THE SALES TAX DIVISION OF THE TAX COMMISSION OF OHIO FOR OFFICE ROOMS IN DAYTON, ASHTABULA, STEUBENVILLE, NORWALK, CINCINNATI, ZANESVILLE, LANCASTER, TOLEDO, MANSFIELD AND PORTSMOUTH.

COLUMBUS, OHIO, APRIL 6, 1935.

HON. T. S. BRINDLE, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR: You have submitted for my approval ten leases, as hereinafter set forth, granting to you, as Superintendent of Public Works, for the use of the Sales Tax Division of the Tax Commission of Ohio, certain office rooms in several cities, as follows:

Lease from the Dayton Arcade Company of Dayton, Ohio, for Rooms Nos. 1001—and 1002 of the Commercial Building, Dayton, Ohio. This lease is for a term of one year and ten months, beginning on the first day of March, 1935, and ending on the 31st day of December, 1936, by the terms of which the State will be required to pay fifty-two dollars and fifty cents ($52.50) per month on the first day of each and every month, in advance.

Lease from C. F. Schaffner of Ashtabula, Ohio, for Rooms Nos. 213 and 215 of the Schaffner Building, Ashtabula, Ohio. This lease is for a term of one year and ten months, beginning on the first day of March, 1935, and ending on the 31st day of De-