The effect of the judicial expressions on the subject is that a person, if he believe a matter is being considered by the grand jury which pertains to or involves himself criminally, may ask the grand jury to accord him the privilege to voluntarily appear before it and give testimony under oath in reference to the charge, and also request the grand jury to subpoena witnesses to testify under oath in his behalf. However, the law does not require, nor is it the duty of, a grand jury so minutely to enter into extensive hearings of cases before it as to satisfy itself of the guilt or innocence of an accused. The duty of the grand jury is only to ascertain whether there is sufficient evidence against a person to warrant his being put on trial before a petit jury, the latter of which will declare his guilt or innocence.

By way of specific answer to your questions, I am of the opinion that it is discretionary with the grand jury as to whether or not it will permit an accused to voluntarily come before it and give evidence under oath, or subpoena witnesses in his behalf, in reference to a criminal charge against him which is then under consideration by the grand jury.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3101.

APPROVAL, BONDS OF CITY OF PIQUA, MIAMI COUNTY, OHIO—19,500.00.

COLUMBUS, OHIO, March 30, 1931.

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

3102.

BREAD LAW—EFFECT OF DECISION OF FEDERAL DISTRICT COURT HOLDING "MAXIMUM SURPLUS TOLERANCE" PROVISIONS OF ACT UNCONSTITUTIONAL—RESIDUE OF SUCH ACT UNAFFECTED.

SYLLABUS:

Effect of unconstitutionality of part of act, known as "An Act for the Regulation of Bakeries," upon the residue of the act, discussed.

COLUMBUS, OHIO, March 30, 1931.

HON. W. D. LEECH, *Chief of Division of Foods and Dairies, Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is hereby made of your letter presenting the following inquiry:

> "Regarding sections 1090-37 and 1090-38 of the General Code relating to loaves of bread.
>
> There is some discussion as to the effect of Judge Killits' decision in the Federal Court at Toledo regarding these two sections of the law.
>
> We would like to have your official opinion as to the elimination of any part or parts of these sections and as to the possibility of enforcing the balance. Some are of the opinion that Judge Killits' decision affected

only the maximum tolerance, leaving as a valid law the minimum weight and other features of the sections. It is in these matters that we are particularly interested."

Sections 1090-37 and 1090-38, General Code, which are a part of a law passed in 1921 (109 O. L., 604, G. C., Sections 1090-22 to 1090-43) entitled "An Act To fix the standard for loaf of bread," but more popularly known as "An Act for the Regulation of Bakeries," provide:

Sec. 1090-37. "Bread shall not be sold or offered or exposed for sale otherwise than by weight and shall be manufactured for sale and sold only in units of sixteen or twenty-four ounces, or multiples of one pound. When multiple loaves are baked each unit of the loaf shall conform to the weight required by this section. The weights herein specified shall be construed to mean net weights twelve hours after baking and to be determined by the average weight of at least twenty-five loaves. Such unit weights shall not apply to rolls and such bread as shall be defined as fancy bread by the secretary of agriculture.

Every loaf of bread manufactured for sale, sold, offered or exposed for sale shall have affixed thereon a plain statement in plain position of the weight of the loaf of bread, the business name of the maker, baker, or manufacturer. In the case of wrapped bread such information shall be stated on the wrapper of each loaf and in the case of unwrapped bread shall be stated by means of a pan impression or other mechanical means or shall be stated on a label using plain legible type. Such label affixed to an unwrapped loaf shall not be affixed in any manner or with any gums or pastes which are unsanitary and unwholesome, and there shall not be more than one label of a loaf or a unit."

Sec. 1090-38. "The secretary of agriculture shall prescribe such rules and regulations as may be necessary to enforce the preceding section, including reasonable tolerances or variations within which all weights shall be kept, provided, however, that such tolerances or variations shall not exceed one ounce per pound over or under the standard unit for single loaves, provided, however, that tolerance permitted in the weighing of twenty-five or more loaves shall not exceed one-half ounce per pound. The said secretary, and under his direction, the local sealers of weights and measures, shall cause the provisions of this section to be enforced. Before any prosecution is begun under this section the parties against whom complaint is made shall be notified and be given an opportunity to be heard by said secretary."

Section 1090-43, General Code, which is a part of the same act, reads:

"A violation of any provision of this act (G. C. §§ 1090-22 to 1090-43) or any rule or regulation adopted herein, shall, for the first offense, be fined not less than $25.00 nor more than $100.00, and for each subsequent offense not less than $100.00 nor more than $300.00."

Having the above provisions in mind, I come now to the decision of Judge Killits referred to in your letter. In an action entitled *Holsum Baking Company* v. *Green, et al,* said baking company, an Indiana corporation marketing products in Ohio, brought suit in the United States District Court for the Northern District of Ohio, Western Division, against Ohio officials charged with the duty of enforcing the act aforesaid. The exact nature of the gravamen in this suit and

the extent of the operative effect of the court's holding, may be ascertained best by a consideration of pertinent parts of Judge Killits' opinion and of the court's decree, rendered in October, 1930. The relevant portions of the opinion read:

> "The defendants are the officers of the State of Ohio, charged by law with the duty to enforce an Act of the General Assembly of Ohio known as 'An Act for the Regulation of Bakeries,' passed in 1921, the pertinent provisions of which, attacked in this action, are carried into the General Code of Ohio as Sections 1090-37, 1090-38, the texts of which respectively appear in the margin. While, indeed, the whole Act is attacked for unconstitutionality, we are invited to consider but the sections referred to, and, respecting them the objection is only against the limitation of tolerance above the specified weights, determined twelve hours after baking; i. e. one ounce to the pound in case of single loaves and an average of but one half ounce to the pound in blocks of at least twelve (twenty-five??) loaves. For brevity these statutory limitations we designate as maximum surplus tolerances." (Parentheses the writer's.)
>
> * * * * *
>
> The Act, as to the sections exemplified in the margin, is attacked as unconstitutional in the view that, respecting maximum surplus tolerances, it is unreasonable, arbitrary, oppressive to bakers and without merit respecting the rights of the general public—in short an invasion of rights guaranteed under the Fourteenth Amendment to the Federal Constitution. * * *
>
> Practically the question is here which was raised and decided by the Supreme Court of the United States in *Burns Baking Company* v. *Bryan,* 264 U. S., 504.
>
> It is valuable here to quote the following allegations of fact from the complaint, which, under the stipulations, are admitted to be true and which, along with those allegations noticed more generally, supra, bring the fact situation of this case in close parallel to that of *Burns Baking Company* vs. *Bryan,* supra, namely
>
> > 'That there are periods when evaporation, under ordiniary conditions of temperature and humidity prevailing in Ohio, exceeds the prescribed maximum tolerances and makes it impossible to comply with the provisions of said Act without employing artificial and expensive means to prevent or retard evaporation, and that these periods are of great frequency and duration.'
> >
> > * * * *
>
> Manifestly, considered as a proper exercise of the state's police powers, there is a distinction between a provision for a surplus tolerance and one for a deficiency. The latter is manifestly in the public interest as a safeguard against imposition, and, moreover, observance of it entails no substantial embarrassment to the baker, whereas the former, as observed in the Burns decision, serves the consuming public in no substantial manner, and it is readily seen to be a definitely hampering restriction in baking operations. * * * *
>
> An order, therefore, will enter enjoining the defendants and their agents from enforcing or attempting to enforce against Plaintiff, its agents and customers, those provisions of Sections 1090-37 and 1090-38, of the General Code of Ohio, and any regulations formulated by Defen-

dants pursuant to said Act, which provide for maximum surplus tolerance to loaves of bread sold in the markets of the state, and from enforcing or attempting to enforce the penalties provided in Section 1090-43, of said Act, for infractions of said provisions respecting such tolerances."

The court's decree reads in part:

"* * * the court, after considering the record made and arguments of counsel, finds that the Act of the Legislature of the State of Ohio, passed in 1921, and known as 'An Act for the Regulation of Bakeries' is contrary to and in violation of the Constitution of the United States, and particularly of the Fourteenth Amendment thereto in this that in the sections thereof now known as Sections 1090-37 and 1090-38, as carried into the General Code of Ohio, providing that no bread shall be marketed in the State of Ohio which, twelve hours after baking, shall weigh more than one ounce over sixteen ounces to the pound as to single loaves, or shall average more than one half ounce over sixteen ounces to the loaf when weighed in lots of twenty-five loaves, is arbitrary, unreasonable and oppressive and not a proper exercise of the police powers of the state, nor in the interest of the consuming public.

It Is Therefore Adjudged And Decreed that the defendants * * * be and they are hereby collectively and severally enjoined from enforcing or attempting to enforce the aforesaid provisions of said Act in any particular and from imposing or attempting to impose a penalty or penalties for alleged violations of said Act in the matters above specified, * * *"

From the portions of the opinion here given, not only is it evident—in fact so evident as to dispense with the necessity of my ferreting out more specific words and emphasizing them by repetition—that, of the act known as "An Act for the Regulation of Bakeries," Judge Killits purported to consider, to declare unconstitutional and to enjoin enforcement of, but Sections 1090-37 and 1090-38, General Code, but it is equally clear that, of these sections, he purported to consider, to declare unconstitutional and to enjoin enforcement of, only those provisions which relate to maximum surplus tolerances. As far as the court's *decree* is concerned, admittedly it states that "the court finds that *the Act* * * * is contrary to and in violation of the Constitution of the United States"; however, words follow which particularize this violation and characterize it as the maximum surplus tolerance feature. These express words of limitation in the decree, especially when interpreted in the light of what the court, in its opinion, said was under consideration, make it clear that the court actually held unconstitutional only the maximum surplus tolerance provision.

This situation furnishes occasion to inquire whether, when only a part of a statute is *expressly* declared unconstitutional, there remains, in the residue of such statute anything which is valid and enforceable. The principles of law which are determinative of this kind of problem, are well phrased in Cooley's "Constitutional Limitations" (8th Ed., 1927), Vol. 1. p. p. 359-363, as follows:

"It will sometimes be found that an act of the legislature is opposed in some of its provisions to the constitution, while others, standing by themselves, would be unobjectionable. So the forms observed in passing it may be sufficient for some of the purposes sought to be accomplished by it, but insufficient for others. In any such case the portion which

conflicts with the constitution, or in regard to which the necessary conditions have not been observed, must be treated as a nullity. Whether the other parts of the statute must also be adjudged void because of the association must depend upon a consideration of the object of the law, and in what manner and to what extent the unconstitutional portion affects the remainder. A statute, it has been said, is judicially held to be unconstitutional, because it is not within the scope of legislative authority; it may either propose to accomplish something prohibited by the constitution, or to accomplish some lawful, and even laudible object, by means repugnant to the Constitution of the United States or of the State. A statute may contain some such provisions, and yet the same act, having received the sanction of all branches of the legislature, and being in the form of law, may contain other useful and salutary provisions, not obnoxious to any just constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with or dependent on others which are unconstitutional. Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section; for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated within the meaning of this rule. If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail unless sufficient remains to effect the object without the aid of the invalid portion. And if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them."

Having these principles in mind, I am first of the opinion that Judge Killits' holding of said maximum surplus tolerances unconstitutional, does not, of itself, render invalid, the other sections (i. e. other than sections 1090-37 and 1090-38) of said act known as "An Act for the Regulation of Bakeries." An examination of the provisions in these other various sections of said act reveals as disclosed by representative titles to such sections, that they relate to such diverse matters as: "Bakery defined," "Specifications as to construction of bakeries," "Room for

changing apparel," "Sitting on tables, shelves, boxes, etc., prohibited," "Washing before handling ingredients or products," "Employment of person having contagious or infectious disease, prohibited," "Building, receptacles, etc., must be kept in sanitary condition," etc. Patently, these subject matters have reasons for existence which are entirely independent of the matters contained in sections 1090-37 and 1090-38, and, therefore, under the rule announced above, the invalidity of the maximum surplus tolerance item, does not render invalid the provisions in sections of said act, other than sections 1090-37 and 1090-38.

This brings me to the more difficult question of determining the effect, upon the remaining provisions of sections 1090-37 and 1090-38, of the invalidity of the maximum surplus tolerance enactment. As an aid in determining this problem, I should like to consider somewhat the history of bread legislation in the United States and a few of the leading judicial decisions pertaining thereto.

Some years ago, in order to prevent the fraud and short weights perpetrated upon the public by certain dishonest bread dealers, various cities saw fit to enact ordinances and various states, statutes, providing for the sale of bread in loaves of certain standard weights, and in no other way. A typical law of this nature was considered in 1912 by the United States Supreme Court in *Schmidinger* v. *Chicago,* 226 U. S., 578. The City of Chicago had passed an ordinance providing:

> "Section 2. Every loaf of bread made or procured for the purpose of sale, sold, offered or exposed for sale, in the city of Chicago, shall weigh a pound avoirdupois (except as hereinafter provided), and such loaf shall be considered to be the standard loaf of the city of Chicago. Bread may also be made or procured for the purpose of sale, sold, offered or exposed for sale, in half, three-quarter, double, triple, quadruple, quintuple, or sextuple loaves, and in no other way. Every loaf of bread made or procured for the purpose of sale, sold, offered or exposed for sale, in the city, shall have affixed thereon in a conspicuous place a label at least 1 inch square, or, if round, at least 1 inch in diameter, upon which label there shall be printed in plain type . . . the weight of the loaf in pound, pounds or fraction of a pound avoirdupois, whether the loaf be a standard loaf or not. The business name and address of the maker, baker, or manufacturer of the loaf shall also be printed plainly on each label.
>
> * * * *
>
> Section 4. If any person, firm or corporation shall make or procure for the purpose of sale, sell, offer or expose for sale, within the city of Chicago . . . any bread the loaf or loaves of which are not standard, half, three-quarter, double, triple, quadruple, quintuple, or sextuple loaves, as defined in § 2 of this ordinance, . . . or shall make or procure for the purpose of sale, sell, offer or expose for sale, within the city of Chicago, any standard loaf or loaves of bread which do not weigh 1 pound each, or any bread the loaf or loaves of which do not weigh as much as the weight marked thereon, or any bread the loaf or loaves of which do not have affixed thereon the label marked as hereinbefore provided, contrary to the provisions of this ordinance, such person, firm, or corporation shall be fined not less than $10 nor more than $100 for each offense."

The City of Chicago sued the defendant to recover penalties for a violation of said ordinance consisting of making and selling loaves of bread which differed in weight from the weights prescribed in said ordinance. The Supreme Court sustained judgment for the city, upholding the ordinance as a valid exercise of the police power, and ruling against the defendant's contentions that the ordi-

nance was an arbitrary and unreasonable exercise of the police power contravening the due process clause of the federal constitution and that it constituted an unlawful interference with the freedom of contract and violated the guaranty of equal protection of the laws secured by the fourteenth amendment. Similar cases are: *Chicago* v. *Schweinfurth,* 174 Ill. App. 64; *People* v. *Wagner,* 86 Mich. 594; *Guillotte* v. *New Orleans,* 12 La. Ann. 432; *State* v. *McCool,* 83 Kans. 428; *Commonwealth* v. *McArthur,* 152 Mass. 522; *Harwood* v. *Williamson,* 1 Sask. L. R. 66; *Armour & Company* v. *North Dakota,* 240 U. S. 510.

In *Allion* v. *Toledo,* 99 O. S., 416 (affirming 11 O. A. R. 1, and reversing 20 N. P. N. S., 353), the defendant was charged with selling a loaf of bread in violation of the weight stipulations of the following ordinance:

> "That every loaf of bread made or procured for the purpose of sale, sold, offered or exposed for sale within the City of Toledo shall weigh a pound avoirdupois (except as hereinafter provided) and such loaf shall be considered the standard loaf in the City of Toledo. Bread may also be made or exposed for sale in one pound, one and one-half pound, two pound, two and one-half pound, three pound, and three and one-half pound, four pound, four and one-half pound, five pound, five and one-half pound or six pound loaves and in no other way. * * * That if any person, firm or corporation shall make or procure for the purpose of sale, sell, offer or expose for sale within the City of Toledo any bread which contains a deleterious substance or material, any bread the loaf or loaves of which are not standard pound, pound and one-half, two pound, two and one-half pound, three pound, three and one-half pound, four pound, four and one-half pound, five pound, five and one-half pound or six pound loaf, as defined in Section 2 hereof, or any bread which is not made in a clean and sanitary place; or shall make or procure for the purpose of sale, sell, offer or expose for sale, within the City of Toledo, any standard loaf or loaves of bread which do not weigh one pound each, or any bread the loaf or loaves of which do not weigh as much as the weight mark on the label thereon, or any bread the loaf or loaves of which do not have affixed thereon the label marked, as provided in Section 2, such person, firm or corporation, shall be fined not less than $10.00 nor more than $100.00 for each offense."

It appeared that the defendant had sold loaves of bread each weighing from 11 to 11¾ ounces. The court, upholding defendant's conviction, said:

> "It is contended on behalf of the plaintiff in error that the city ordinance contravenes Section 1, Article 1 of the Ohio Constitution, and Section 1, Article XIV of the Federal Constitution. The fundamental guaranties of these two sections protect the right of private contract and the freedom of engagement in lawful business. However, there are various callings, though lawful and useful, which are subject to surveillance of and regulation by the state in the interest of the health, safety or welfare of the community. That bakeries may be so regulated and the state's police power invoked for that purpose is not open to question. This right of regulation is now generally conceded in both state and federal jurisdictions. Therefore the only question remaining, and the one here urged, is that the city council of Toledo, in the passage of this ordinance, clearly abused its power, and that its action was a

palpable and unwarranted interference with the business of plaintiff in error.

* * *

An ordinance similar to the Toledo ordinance was passed by the city council of Chicago, Illinois, permitting the manufacture of one-half pound loaves, as the minimum, and sextuple, or six pound loaves, as the maximum, weight that could be baked. This ordinance was sustained by the supreme court of Illinois in *Chicago* v. *Schmidinger,* 243 Ill., 167. This case eventually reached the supreme court of the United States, *Schmidinger* v. *Chicago,* 226 U. S., 578, where the judgment of the Illinois court was affirmed. While in the present case the ordinance prescribing the minimum standard loaf is attacked because the same is from four to five ounces heavier than her customer's trade demanded, in the Chicago case the attack was launched for the reason that the sextuple or six pound loaf was the maximum weight permitted to be made and sold in the city, although there was a considerable demand in some parts of the city for bread in weights different from those prescribed by the ordinance. As stated by Mr. Justice Day in that case: 'In some parts of the city bread weighing seven pounds is commonly sold.'.

Unless there is a clear and palpable abuse of power the court will not substitute its judgment for legislative discretion. The local authorities acquainted with local conditions are presumed to know what the needs of the community demand.

* * *

In prescribing the standard one pound loaf as the minimum which could be manufactured and sold by the baker, this court cannot say that the fixing of that standard, in the exercise of legislative discretion by the council, was so unreasonable and arbitrary as to require judicial interference. The ordinance is therefore constitutionally valid, and the judgment of the court of appeals is affirmed."

As time passed, it was felt by legislative bodies that laws merely providing for the sale of bread in certain standard weight loaves only, were inadequate to suppress fraud because of a tendency to increase a loaf of one standard size so much that it could readily be passed off and sold for a loaf of a larger standard size. In order to suppress this practice, bread laws were generally passed establishing maximum tolerances of deviation from the prescribed standard weight loaves. The leading decision pertaining to this new phase of bread regulation, handed down in 1924 by the United States Supreme Court (*Burns Baking Company* v. *Bryan,* 264 U. S., 504) and being the case upon which Judge Killits based his decision, involved the bread law of Nebraska which provided as follows:

"Section 2. Bread, standards of weight. Every loaf of bread made or procured for the purpose of sale, sold, exposed or offered for sale in the state of Nebraska shall be the following weights avoirdupois: ½ pound, 1 pound, 1½ pounds, and also in exact multiples of 1 pound and of no other weights. * * * Whenever twin or multiple loaves are baked, the weights herein specified shall apply to each unit of the twin or multiple loaf.

Section 3. Tolerance, how determined. A tolerance at the rate of 2 ounces per pound in excess of the standard weights herein fixed shall be allowed and no more, provided that the standard weights herein prescribed shall be determined by averaging the weight of not less than

twenty-five loaves of any one unit and such average shall not be less than the minimum nor more than the maximum prescribed by this act. All weights shall be determined on the premises where bread is manufactured or baked, and shall apply for a period of at least twenty-four hours after baking. Provided, that bread shipped into this state shall be weighed where sold or exposed for sale."

The plaintiffs sought to enjoin the governor and state officials from enforcing this law on the ground that it was repugnant to the due process clause in that the provision fixing the maximum weights was unnecessary, unreasonable and arbitrary. The decision of the state court upholding the validity of the statute was reversed by the United States Supreme Court which said:

"Undoubtedly, the police power of the state may be exerted to protect purchasers from imposition by sale of short weight loaves. *Schmidinger* v. *Chicago,* 226 U. S., 578, 588, * * * Many laws have been passed for that purpose. But a state may not, under the guise of protecting the public, arbitrarily interefere with private business, or prohibit lawful occupations, or impose unreasonable and unnecessary restrictions upon them. * * * Constitutional protection having been invoked, it is the duty of the court to determine whether the challenged provision has reasonable relation to the protection of purchasers of bread against fraud by short weights, and really tends to accomplish the purpose for which it was enacted. * * * (p. 513.)

* * *

* * the evidence clearly establishes that there are periods when evaporation under ordinary conditions of temperature and humidity prevailing in Nebraska exceed the prescribed tolerance, and make it impossible to comply with the law without wrapping the loaves or employing other artificial means to prevent or retard evaportion. And the evidence indicates that these periods are of such frequency and duration that the enforcement of the penalties prescribed for violations would be an intolerable burden upon bakers of bread for sale. * * * (p. 515.)

* * * Concretely, the sole purpose of fixing the maximum weights, as held by the supreme court, is to prevent the sale of a loaf weighing anything over 9 ounces for a 1 pound loaf, and the sale of a loaf weighing anything over 18 ounces for a pound and a half loaf, and so on. The permitted tolerance, as to the half-pound loaf, gives the baker the benefit of only 1 ounce out of the spread of 8 ounces, and, as to the pound loaf, the benefit of only 2 ounces out of a like spread. There is no evidence in support of the thought that purchasers have been or are likely to be induced to take a 9½ or a 10 ounce loaf for a pound (16 ounce) loaf, or an 18½ or a 19 ounce loaf for a pound-and-a-half (24 ounce) loaf; and it is contrary to common experience and unreasonable to assume that there could be any danger of such deception. Imposition through short weights readily could have been dealt with in a direct and effective way. For the reasons stated, we conclude that the provision that the average weights shall not exceed the maximums fixed is not necessary for the protection of purchasers against imposition and fraud by short weights, and is not calculated to effectuate that purpose, and that it subjects bakers and sellers of bread to restrictions which are essentially unreasonable and arbitrary, and is therefore repugnant to the 14th Amendment."

With this statutory and judicial history in mind, I return to the problem

of deciding what, if anything, remains as valid law of sections 1090-37 and 1090-38. The same principles which guided us in determining whether the other sections of the act were left intact, govern here, too. The Supreme Court of Ohio, in the syllabus of *State* v. *Ritchie,* 97 O. S. 41, states them succintly as follows:

> "An entire act of the general assembly of Ohio will not be held unconstitutional merely because a part of one of the sections of the act is in conflict with some provision of the constitution of the state, unless the unconstitutional part is of such importance and so inseparably connected with and related to the entire act as to raise a presumption that the constitutional part would not have been enacted without the unconstitutional provision."

In other words, where a court considers only a part of a statute and declares unconstitutional only that part, then the residue which was not considered or declared unconstitutional by the court, may or may not, depending on the circumstances, remain intact as valid law. On the one hand, such residue may be valid in spite of the fact that it was enacted along with the unconstitutional portion. Yet, on the other hand, when only part of an act is declared unconstitutional, the residue may automatically become invalid, not because it is unconstitutional (it may be entirely constitutional) but because reason leads one to presume that, when the legislature couldn't effect all of its intention, it had no desire to effect and make law just a part of it.

Applying these rules, I believe that the scheme for selling bread in only the standard weight loaves provided in Section 1090-37, General Code, drops out of the statute, and that, *as far as weight is concerned,* bakers may make loaves of any weight with the exception that no loaf shall weigh less than one pound. This is a logical consequence of the removal of the maximum surplus tolerance provision. Standards presuppose confines. When confines are broken down, standards vanish. It is apparent that, when the top is removed from these different weight standards, then the weight of one former standard expands upward and meets the next higher former standard, and thus along the whole line, these former standards fuse. For example, consider the 2, 3, and 4 pound standard weights. The statute originally permitted but a certain excess tolerance over those standard weights. These excess tolerances were declared unconstitutional and removed. As a result, there being no tolerance limitation left, there is nothing to prevent a baker from adding to the former three pound standard, any additional weight he desires. He could add 4 ounces or 7 ounces or 15 ounces. He could make a loaf of any weight in between 3 and 4 pounds. On the same reasoning, he could make any weight loaf in between the former 4 and 5 pound standards or 2 and 3 pound standards or between any former standards. Hence, as a matter of *actual weight* there are no standard sizes left. This illustration shows how fallacious it is to say that although the maximum surplus tolerance of weight is removed, the minimum weights still remain and that a baker can not therefore, produce a loaf which weighs less than any one of these standard weights—for if there is nothing to prevent a baker from adding any amount he wishes to a 2 pound loaf, he may choose to add 14 ounces and produce a loaf weighing 2 pounds, 14 ounces. Now it is preposterous to say that he couldn't bake a loaf that weighs 2 ounces less than 3 pounds, because he must observe the minimum weight of a 3 pound loaf. Obviously, as a matter of weight, a loaf weighing 2 pounds and 14 ounces and a loaf weighing 2 ounces less than 3 pounds are identical. It is thus clear that, at least as far as weight is concerned,

and as a practical matter, the removal of the maximum surplus tolerance destroys the scheme of selling loaves in only the certain standard weights provided in Section 1090-37, General Code.

Being of the opinion, therefore, that a baker may produce a loaf of any weight, (with exception that it must weigh not less than one pound), I come next to the question of designating the weight on the label. With respect to this, Section 1090-37, General Code, provided: "Every loaf of bread * * * shall have affixed thereon a plain statement in plain position of the weight of the loaf of bread." A literal construction of this provision may seem to require that a label bear the exact weight of the particular loaf, but as a practical matter this is impossible. As pointed out by the United States Supreme Court: "A number of things contribute to produce unavoidable variations in the weight of loaves at the time of and after baking." *Burns Baking Company* v. *Bryan,* 264 U. S., 504, 514-515. Certainly, it is unreasonable to suppose that it was intended that every loaf shoud be weighed at the moment it was sold and that a label then be placed on it accordingly. Bearing in mind the legislature's intent to protect the public against short weights, it seems that the essential thing intended, is that each loaf shall weigh at least as much as the weight indicated on the label, and hence that the law is not violated if the loaf actually weighs more than its label indicates. This interpretation was placed upon the Chicago ordinance. (*Schmidinger* v. *Chicago,* 243 Ill., 167; *Chicago* v. *Schweinforth,* 174 Ill. App., 64), and that ordinance, with the exception that it provided for no tolerances, was much the same as the Ohio statute.

Though the scheme of standard sizes falls, yet some few principles, I believe, do stand out, therefore, distinctively and independently enough in Section 1090-37 and 1090-38, to warrant the conclusion that they remain and are still valid and enforceable. Thus, from that which remains of the former section, the intent is clear that, with the exception of rolls and such bread as shall be defined by the secretary of agriculture to be fancy bread, no loaf of bread shall weigh less than 16 ounces net. (See *Allion* v. *Toledo,* 99 O. S., 416; *State* v. *Huber,* 27 Del., 259) 12 hours after baking; that loaves may be made of any weight over 16 ounces; that every loaf shall have affixed thereon a plain statement of its weight and the business name of the maker, baker or manufacturer; that no loaf shall weigh less, twelve hours after baking, than its label designates but that no violation results if a loaf weighs more than its label indicates; that in case of wrapped bread such information shall be stated on the wrapper of each loaf and in the case of unwrapped bread shall be stated by means of a pan impression or other mechanical means or shall be stated on the label using plain legible type; that such label affixed to an unwrapped loaf shall not be affixed in any manner, or with any gums or pastes which are unsanitary or unwholesome; that there shall not be more than one label of a loaf or unit. From the residue of Section 1090-38, General Code, it is equally clear that the secretary of agriculture shall prescribe such rules and regulations as may be necessary to enforce the valid remaining provisions of the preceding section; that said secretary, and under his direction, the local sealer of weights and measures, shall cause the valid provisions of this section to be enforced; and that before any prosecution is begun under this section, the parties against whom complaint is made shall be notified and be given an opportunity to be heard by said secretary.

Respectfully,

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