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Samuel M. Soref

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THE DOCTRINE OF REASONABLENESS IN THE POLICE POWER

By Samuel M. Soref

I. Scope of the Police Power

The magnitude and importance of the police power may be inferred from the following language of the Wisconsin Supreme Court: "Without it the purpose of civil government could not be attained. It has more to do with the well being of society than any other power. Properly exercised it is a crowning beneficence. Improperly exercised it would make of sovereign will a destructive despot, superseding and rendering innocuous some of the most cherished principles of constitutional freedom."

The exercise of this important branch of our governmental machinery has become so varied and popular that it has been recognized as corresponding to the very right of self-preservation, and as forming the basis of our social system. But while the police power has become an indispensable attribute of sovereign power, and has been applied to the changing social and economic conditions of different ages, it has assumed to itself certain characteristics which are not altogether clear.

It is generally recognized that in the very indefiniteness of the scope of the police power lies a great deal of its usefulness. And it is

* Member of the Milwaukee Bar.

1 Mehlos v. Milwaukee, 156 Wis. 591; 146 N. W. 882
when certain boundaries are set out in the decisions to limit the operation of the police power that a great deal of confusion has resulted. It is for that reason, perhaps, of foreseeing the meaninglessness of limitations that might be placed on the police power that an early decision refrained from marking out its boundaries.²

Characterized by indefiniteness, and declared to be as broad as the general welfare, it is natural that the extent to which the law-making bodies may encroach upon the rights and property of the individual in the valid exercise of the police power should always have been a much controverted question. Private liberty and property rights have seldom been interfered with without some protest being offered, even though the large mass of the community actually profited from the legislation. A vast mass of litigation testifies to that fact.

For the proper development of this subject, some examples should be given in which the exercise of the police power has been held proper. It has been held to be a valid exercise of the police power to provide for the inspection of illuminating oils in railroad tank cars;³ to permit the flooding of lands in order to create a pond for fish culture;⁴ to prohibit smoking in crowded halls in order to preserve pure and fresh air therein;⁵ to forbid the carrying of concealed weapons;⁶ to forbid the beating of drums in the streets of a city without a permit from the mayor;⁷ to forbid the making of option contracts to buy or sell grain at a future time;⁸ to impose prohibitions upon the time and mode of catching and selling fish and game;⁹ to levy an assessment against persons keeping dogs in order to discourage the keeping of those animals;¹⁰ to prohibit a person who is not a member of a secret society from wearing a badge of such society;¹¹ to prescribe the weight and quality of loaves of bread offered for sale;¹² to limit the height of buildings in order to preserve the public safety;¹³ to create an employees' indemnity fund by assessments upon employers in hazardous callings;¹⁴ to require water to

² Commonwealth v. Alger, 7 Cush. (Mass) 53.
³ Willis v. Standard Oil Co., 50 Minn. 290.
¹⁰ Wilton v. Weston, 48 Conn. 325.
¹¹ Hammer v. State, 173 Ind. 199.
¹² Chicago v. Schmidinger, 243 Ill. 167.
¹⁴ State ex rel. Davis-Smith Co. v. Clausen, 66 Wash. 156.
be furnished on each floor of every tenement house; to prescribe that an assignment by a married man of wages to be earned by him in future shall be invalid unless consented to by his wife; to regulate the time and manner in which the right to fish, even on one's own land, shall be exercised, so as to subserve the common good. From this meagre enumeration, one might, perhaps, be led to believe that almost any kind of a statute could be passed under the guise of legislating in behalf of the general welfare. But there are various restrictions.

II. REASONABLENESS AS A LIMITATION ON THE POLICE POWER

An inherent limitation on the police power is "reasonableness." Property rights cannot be wantonly destroyed by wrongful enactment. There is a limit to the powers which may be exercised by the State. A reasonable relation must exist between the character of the legislation and the policy to be subserved. That relationship has been expressed in various forms. In *Ex Parte R. F. Quarg*, the court said, "The police power is broad in its scope, but it is subject to the just limitation that it extends only to such measures as are reasonable in their application and which tend in some appreciable degree to promote, protect, or preserve the public health, morals, or safety, or the general welfare." An examination of cases dealing with state regulation of polluted water systems discloses the doctrine that "interference with personal liberty is excusable when reasonably necessary for the protection of public health, provided the means used and the extent of the interference are reasonably necessary to accomplish that purpose." In *Welch v. Swasey*, the court similarly held that statutes passed in the exercise of the police power should be so tested by the courts as to see "whether they are reasonably directed to the accomplishment of the purpose on which the constitutional authority rests."

Another court has this to say of the police power: "Police regulations, in order to be valid, must tend to accomplish a legitimate public purpose; that is, such regulations must have a substantial relation to the public objects which government may legally accomplish; and, while it is for the legislative department of a municipality to determine the occasion for the exercise of its police power, it is clearly within the jurisdiction of the courts to determine the reasonableness of that

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15 *Health Dept. of N. Y. v. Trinity Church*, 145 N. Y. 32.
17 *State v. Theriault*, 70 Vt. 617.
18 149 Cal. 79.
19 23 L. R. A. (n.s.) 766.
20 193 Mass. 364.
The United States Supreme Court in *C. B. & Q. Ry. v. Drainage Comrs.* declared that if the means employed to promote the public welfare are "unreasonable," the action of the legislature will be regarded as illegal.

Evidently, the question of "reasonableness" is of considerable importance in testing the validity of police regulations. In fact, as the New York Court of Appeals said, "The difference between what is, and what is not reasonable frequently constitutes the dividing line between a valid and void enactment of the legislature in the exercise of its police power." That view is fortified by the words of the Wisconsin Supreme Court: "Too much significance cannot be given to the word "reasonable" in considering the scope of the police power in a constitutional sense * * * The final evidentiary test of the legitimacy of a police regulation is whether it is reasonable under all the circumstances * * * Every police regulation must answer for its legitimacy at the bar of reasonableness." Hence there can be no doubt but that every exercise of the police power is inseparably associated with the question of reasonableness. It appears further that the examination of the validity of a police regulation must necessarily involve a study of the reasonableness and appropriateness of the means employed to accomplish the public object. If treatment of this subject of reasonableness under the police power were to be judged solely by its intrinsic importance, such treatment would have to be quite extended and voluminous. There are indeed numberless decisions which have dealt with this subject, but to a large extent the courts have merely given expression to the term "reasonableness," in various ways without giving a definite interpretation of their understanding of this term. As a result, the language of many cases is highly misleading.

That the application of the doctrine of reasonableness to police regulations is a matter of no little difficulty may be illustrated by various conflicting holdings of the courts. In *State v. Justus*, the validity of a statute was involved which required journeymen plumbers to take an examination and to secure a certificate of competency from a certain board. The statute was to affect only those engaged in the plumbing business in cities or towns with a population of ten thousand or more which had a system of sewers or waterworks. The act was declared invalid because "there is no reasonable ground for distinction in the application of such a law to cities with or without sewer and water systems," and because "there is no reasonable ground for mak-
ing a distinction between what is termed a “master plumber” and “journeyman plumber.” In Illinois and Pennsylvania, however, similar statutes were held to be reasonable regulations and valid.

A conflict arises, too, as to the question of the constitutionality of statutes known as “Sales in Bulk Acts,” passed under the police power. In Young v. Lemieux, a statute, providing that a sale of a retail merchant of the whole or a large part of his stock in trade is voidable at the instance of creditors unless he has previously recorded a written notice of his intention to make the sale, was held to be valid exercise of the police power of the state. The court explained that “It may be that this act approaches the verge of legislative power, but we cannot say that its requirements as to the manner and time of giving notice of the sale are so clearly unreasonable or so unnecessarily burdensome as to compel us to hold that any constitutional rights have been infringed.” The New York Court of Appeals, however, in considering a similar case, thought such legislation “unreasonable” and therefore invalid.

In State v. Boone, a statute requiring physicians and midwives attending at births to investigate and to report as to facts not necessarily or naturally coming within the knowledge of the attending physician or midwife as to whether the birth is legitimate or illegitimate, the race, birthplace, age and occupation of the father, the race, birthplace, age, and occupation of the mother was held an invalid exercise of the police power because “unnecessary, unreasonable and arbitrary.” But in other states, similar statutes were not found to be “unreasonable,” and were upheld as valid police regulations.

In People v. Hulbert, a riparian owner was convicted of bathing in the waters of a lake from which a city took its water supply. A Statute made it a criminal offense to pollute such waters by bathing or swimming therein. On appeal, the conviction was reversed, the court holding that the use made of the water for the purpose of bathing was a reasonable one and that the conviction could not be sustained under the police power of the state. In State v. Morse, however, such an ordinance was held to be a valid exercise of the police power, and

27 79 Conn. 434.
29 84 Ohio 346.
31 Commonwealth v. McConnell, 116 Ky. 358
32 131 Mich. 156.
33 84 Vt. 387.
therefore, a reasonable use of the water of the pond was not denied to the riparian owner.

From the foregoing conflicting cases, it is evident that what one court regards as reasonable another may find to be unreasonable. It appears, too, that regarded solely as a question of fact, the matter of reasonableness may be supported either one way or the other. The determination of the validity of a police regulation is not, however, a matter of mere discretion or personal judgment; it must seek its solution in established principles of law and a sound construction of questions of fact. Just as personal conceptions of right and wrong conduct are in large part responsible for judicial determinations, so personal convictions as to what is reasonable and what is unreasonable lead the court to different interpretations of police regulations. It is impossible, however, to study these intangible, inarticulate forces which lead one court to one conclusion and another court to an opposite conclusion. The study must be confined to definite declarations of the court in its interpretation of the validity of police regulations. The problem is to discover what principles are and should be applied by the court in determining whether a police regulation is reasonable or unreasonable. Though there is a difference of opinion as to the scope of the police power, and a recognized difficulty in rendering a satisfactory definition of it, there seems to be no doubt that generally a police regulation is subject to the test of reasonableness. But what is meant by "reasonableness?"

III. UNREASONABLE AND UNCONSTITUTIONAL POLICE REGULATIONS

An examination of police regulations which have been held invalid by the courts is of material assistance in at least partly understanding the doctrine of reasonableness. A number of cases are referred to in order to justify some of the statements subsequently set forth.

In *People v. Hawkins*, it was held by a four to three decision that a statute forbidding the sale of goods made by convicts without being marked "Convict-Made" is not a valid exercise of the police power,—at least as to convict-made goods from other states. The court was of the opinion that there was not a "reasonable relation" between the means employed and the object of the legislators, which was to protect certain workmen in their wages against the competition of other workmen in penal institutions. Three of the dissenting judges, however, did not question the reasonableness of the regulation. It may be added that the majority opinion has been followed, not because the court was right in finding the regulation unreasonable, but because the

33 157 N. Y. 1.
statute was in conflict with the commerce clause of the Federal Constitution. 

_Tolliver v. Blizzard_\(^{34}\) held that the police power may not be extended to the prohibition of the sale of certain harmless drinks merely because certain persons, under the guise of selling such drinks, may sell intoxicating liquors. The court thought the ordinance unreasonable," and therefore void.

The court in _Marymont v. Nevada State Banking Board_\(^{35}\) held that a state cannot make it unlawful for any corporation, firm, or individual to engage in the banking business except through a corporation duly organized under and complying with certain state laws.

In _People v. Gillson_,\(^{36}\) a statute was involved which made it a misdemeanor for anyone to dispose of any article of food upon any representation that anything else than what is the subject of the sale or exchange is to be delivered as a gift, or reward to the purchaser. The court, in holding the statute an improper exercise of the police power, said that this regulation of trade was an "unreasonable and illegal interference with the liberty of the citizen in his pursuit of a livelihood by engaging in a perfectly valid business, conducted in a perfectly proper manner."

A municipal ordinance prohibiting the operation of any quarry within certain prescribed limits, regardless of whether it could be done without injury to other property of the public, was held to be an invalid exercise of the police power for it deprived the owner of his property without due process of law.\(^{37}\)

The court in _Frank L. Fisher Co. v. Woods_\(^{38}\) decided that a statute making an offer for sale of the real estate of another without written authority a misdemeanor is an invalid exercise of the police power. The court said: "To justify the state in interposing its authority in behalf of the public, it must appear that the interest in the public generally, as distinguished from those of a particular class, require such interference, and that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals."

In a Wisconsin case,\(^{39}\) it was held that a statute making it unlawful for an employer to discharge an employee because he is a member of a labor organization is an invalid exercise of the police power because it is violative of the constitutional guarantee of liberty.

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\(^{34}\) 143 Ky. 773.  
\(^{35}\) 33 Nev. 333.  
\(^{36}\) 109 N. Y. 389.  
\(^{37}\) Re Keise, 147 Cal. 609  
\(^{38}\) 187 N. Y. 990  
\(^{39}\) State v. Kreutzberg, 114 Wis. 530.
Bailey v. People\textsuperscript{40} held a statute restricting the number of persons that may occupy a room in a lodging house an unsustainable exercise of the police power because of the discrimination in applying the regulation to lodging house keepers.

Requiring fruit which is packed for shipment to have indicated on the outside of the container the place where the fruit was grown was declared an invalid exercise of the police power.\textsuperscript{41}

Weyther v. Thomas\textsuperscript{42} held that the police power does not extend to a statute requiring those engaging in the undertaking business to be licensed embalmers. The court said, "No argument has been addressed to us to show that the general embalming of dead bodies is necessary for the preservation of the public health, and we know of no facts that indicate such a necessity."

Another court held a law requiring horseshoers to have certain qualifications and to secure a license from a board of examiners after being examined, to be an improper exercise of the police power.\textsuperscript{43}

Restricting the right to engage in the insurance brokerage business to those who made it their principal business and to those who were in the real estate business was held to be an invalid exercise of the police power.\textsuperscript{44} "The legislation now in question," the court said, "must have been promoted in the interests of those engaged in the insurance brokerage business, alone, or in connection with a real estate brokerage business, rather than with any view of the public welfare."

Ruhstrat v. People\textsuperscript{45} held that the state police power does not include the power to prohibit the use of the national flag or emblem for advertising purposes. The "flag law," the court thought, was a harmless creature which tended in no way to safeguard the interests of society. It was also declared that the use of the flag for advertising purposes had "received the unqualified approval of the whole commercial world." Hence the complainant, who was engaged in the wholesale and retail cigar business, was permitted to use the likeness of the flag as a label or trademark.

In Dobbins v. Los Angeles,\textsuperscript{46} a municipal ordinance was adopted in August which made it unlawful to erect or maintain gas works in a certain district. In November, the complainant obtained permission from the board of fire commissioners to erect gas-works within a privileged area. Construction was begun. A second ordinance was then

\textsuperscript{40} 190 Ill. 28.
\textsuperscript{41} Ex Parte Hayden, 147 Cal. 649
\textsuperscript{42} 200 Mass. 474.
\textsuperscript{43} Matter v. Aubrey, 36 Wash. 308.
\textsuperscript{44} Hauser v. North British, Etc. Ins. Co. 206 N. Y. 455.
\textsuperscript{45} 185 Ill. 133.
\textsuperscript{46} 195 U. S. 223.
passed which amended the first ordinance, and included the complain-
ant’s premises within the prohibited district. There was no change of
conditions in the district. The ordinance was declared void as an arbi-
trary exercise of the police power.

An ordinance making it unlawful to sell fresh pork or sausage made
thereof between June 1st and and October 1st was held unreasonable
and void.47

_Chicago v. Netcher_48 held an ordinance prohibiting the sale of in-
toxicating liquor where dry goods, clothing, jewelry, and hardware are
kept for sale is an invalid exercise of the police power for there is no
“reasonable relation ot the subjects included in such power.”

Requiring employers to make weekly payment of wages, notwith-
standing private contracts which they may make with their employees
is not within the police power of the state. “Any law or policy that
disables the citizen from making a contract whereby he may find law-
ful, needed and satisfactory employment is unreasonable.”49

**IV. CONSTITUTIONALITY AS INVOLVED IN THE QUESTION OF
REASONABLENESS**

An examination of numerous cases dealing with the police power
discloses a few general principles running through a large percentage
of the cases. Where the test of reasonableness is applied, the test of
constitutonal limitations, too, is generally applied. The police power,
of course, depends on the law for its support, and is subject to consti-
tutional restrictions.50 This governmental power of legislating in behalf
of the public welfare has facetiously been referred to as the power to
pass unconstitutional laws. But an act which is clearly prohibited by
the constitution cannot be valid law, however proper and reasonable
it might be as a police regulation but for such prohibition.51 The fact
then that a law is reasonable is not in itself sufficient to admit it into
the class of valid laws. If it were the constitution would lose much
of its restraining force, and in many of its applications would be of
no use whatever.52 Where the matter of reasonableness must yield to
constitutional restrictions may be illustrated by the case of _Ex Parte
Quarg._53 There the court held that an act prohibiting any person from
selling tickets at an advance upon the original purchase price, or the
business of reselling such tickets at a profit, and making it a misde-

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47 _Helena v. Dwyer_, 64 Ark. 424.
48 183 Ill. 104.
49 _Republic Iron & Steel Co. v. State_, 160 Ind. 379.
50 _State ex rel. Adams v. Burge_, 95 Wis. 390.
51 _State ex rel. Jones v. Froehlich_, 115 Wis. 32.
52 _State v. Chittenden_, 127 Wis. 468.
53 149 Cal. 79.
meanor is not a valid exercise of the police power and is void as infringing on the rights of property guaranteed by the constitution and existing in the individual.

In testing the validity of a police regulation under the constitution, the statute or ordinance must be assumed to be for a reasonable purpose. Whether or not the regulation is reasonable is not to be tested by its possible application to extreme cases. It should be pondered whether the framers of the constitution intended that such a power be exercised in that particular manner, and whether “the spirit of the Constitution permits such legislation, although a strict construction of the letter prohibits.” In trying to ascertain the object of the enactment, if a result is reached which is so unreasonable as to suggest that such was not the purpose of the legislature, a reasonable meaning should be adopted if this can be found by a fair construction of the language used. An example of where a reasonable meaning was applied may be found in Wolf v. Smith, where the court held that requiring mine owners to keep at the mine bandages, oil, stretchers, and blankets for use of injured employees is within the police power, and does not infringe upon the constitutional rights of the owners.

The police power cannot be used as a cloak for the invasion of personal rights or private property, nor can it be used for the exclusive benefit of certain individuals or classes. As observed by the Wisconsin Supreme Court, “A police regulation, correctly speaking, is no more legitimate than a law in any other field if it in fact violates any principle entrenched in the Constitution.” As heretofore suggested, such violation must be clear and substantial, as was found in the case of Columbus Toney v. State. There the validity of a statute containing these words was in dispute: “That any person who has contracted in writing to labor for, or serve, another for any given time * * * and who before the expiration of such contract and without the consent of the other party, and without sufficient excuse, to be adjudged by the court, shall leave such other party * * * and who shall also make a second contract, either parol or written, of a similar nature or character * * * with a different person, without first giving notice to such person of the existence of the said contract, shall be guilty of a misdemeanor,” and on conviction be punished by fine and imprisonment.

Clearly, this was a violation of the “life, liberty, and property” guar-

54 Westport v. Mulholland, 159 Mo. 86.
56 Laurel Hill Cemetery v. San Francisco, 216 W. L. 358.
57 State ex rel. McGrael v. Phelps, 144 Wis. 1; 128 N. W. 1068.
58 149 Ala. 457.
59 State v. Redmon, 134 Wis. 89; 114 N. W. 137.
60 141 Ala. 120.
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antees of the federal constitution. So, there are many decisions holding that the use of trading stamps cannot be forbidden by the legislature because it clearly comes in conflict with the fourteenth amendment of the Constitution. Thus where a law is made invalid because of some constitutional provision, it is unnecessary to consider the question of its reasonableness.

According to the following language it would seem that the question of reasonableness necessarily includes a consideration of constitutional restrictions: "It were better to always say that the police power extends to and permits legislation regulating, reasonably, matters appertaining to the public welfare, since anything beyond that must necessarily fall at the threshold of some constitutional defense." But since a statute or ordinance may satisfy the criterion of reasonableness and still be invalidated because of some constitutional prohibition, it is best, wherever possible, to keep the matter of reasonableness separate and distinct from constitutional considerations. It is misleading to cite cases holding laws invalid as unreasonable extensions of the police power where the real basis for the decisions was that the law is in violation of some constitutional guarantee. The question of reasonableness need not be introduced where a law is clearly violative of some constitutional restriction. The danger of speaking of both the unreasonableness of the law and its infringement upon some constitutional limitation is that it is not clear whether the unreasonableness is found as a matter of fact or because it is violative of the Constitution. It is not certain, too, what weight is given to each reason, a matter which may be of considerable importance in subsequent cases in which that particular decision is referred to.

V. PRESUMPTION OF REASONABLENESS

There are other aspects of the doctrine of reasonableness as it is applied to the police power. It has been held that the good intentions of the legislature do not determine the validity of a statute. The reasonableness of a police regulation therefore is not wholly of legislative concern. Among the questions which then suggest themselves are: How far may courts go in determining whether a police regulation is reasonable or unreasonable? Do personal convictions on the part of the court that the statute is unreasonable justify it in holding the law

62 State v. Redmon, 134 Wis. 89; 114 N. W. 137.
63 Bonnett v. Vallier, 136 Wis. 193; 116 N. W. 885.
invalid? Does the mere fact that some property or personal right is affected warrant the court in invalidating the law?

This matter of construing the reasonableness of a statute where doubt exists is not free from difficulty and has received consideration in different ways. It is frequently stated that the mere fact that personal or property rights are affected will not prevent a law from being held valid. "The possession and enjoyment by the individual of all his rights, even that of liberty itself, are subject to such reasonable regulations and restraints as are essential to the preservation of the health, safety, and welfare of the community."64 The legislature has a reasonable discretion as to the necessity and manner of the application of the police power to particular conditions. Hence the court should be willing to give a liberal construction to statutes designed for the public welfare, which the court apparently failed to do in the case of People ex rel. Duryea v. Wilbur.65 There a law was in dispute which provided that "no public dancing academy shall be conducted nor shall dancing be taught or permitted in any public dancing academy unless it shall be licensed, pursuant to this act and the license be in force and not suspended." A violation of the act was made a misdemeanor. By a four to three decision, the law was held an improper exercise of the police power. This observation of the dissenting judges is significant: "The wisdom of such legislation is no concern of the courts. The concrete question is, may the legislature take proper precautions to see that public places, or places to which the public are invited, are safe, sanitary, and decent?"

In construing the element of reasonableness, the legislative discretion should not be interfered with merely because it appears that no actual harm by the object sought to be remedied has been shown.66 The enactment may be preventive, instead of remedial.67 In Durham v. Eno Cotton Mills,68 it was held that it was not an infringement of the rights of a riparian owner for the legislature to prevent the pollution of a river from which a public water supply is taken, although no actual injury to the public health or comfort is shown. Similarly, in State v. Schlenker,69 a statute was pronounced a proper exercise of the police power which prohibited the addition of water or any other substance to milk that is sold, even though the regulation extends to cases where the addition does no harm and defrauds no one.

How the court may take opposite views in construing a doubtful

64 State v. Morse, 84 Vt. 387.
65 198 N. Y. 1.
66 Dunham v. New Britain, 55 Conn. 378
68 141 N. C. 615
69 112 Iowa 642.
question of reasonableness may be illustrated by the following two cases. In *Wygant v. McLauchlan*, an ordinance prohibiting the internment of human bodies in a sparsely settled locality, although within the corporate limits was held invalid, the court being of the opinion that the burials were not calculated to impair the public health. A different position, however, is taken in *Bryan v. Birmingham*, which is more observant of the functions of the court and more in accord with the better views on this subject. There it was said that the presumption is that such an ordinance is reasonable and was enacted as a sanitary measure for the protection of the health of the city or certain parts thereof, and it is incumbent upon a person attacking its validity to show the contrary.

This subject may well be summarized by the observations of two different courts. "If there is a reasonable doubt as to the connection and adaptation, the advisability must be held by the court to have been with the lawmaking body. The court must be able to see clearly that the law was not so connected before holding it void for that reason." The court cannot set the law aside because it "may think itself more sagacious than the legislature, and can therefore see more clearly that the law will retard rather than promote progress and prosperity, and will be a detriment to the common good when actually applied to human affairs amid the conditions of the future."

And to use the language of the court in *Mugler v. Kansas*, which was referring to police regulations enacted by the legislature: "Every reasonable presumption is made in favor of their validity and every intendment is indulged to sustain them, and the burden is on him who asserts their illegality." Hence there is a presumption in favor of the reasonableness of the legislative action. In other words, the legislative act should clearly appear to be unreasonable before it is declared invalid.

VI. REASONABLENESS A QUESTION OF FACT

Another aspect of the doctrine of reasonableness is that what is a reasonable regulation is purely a question of fact. This is an additional reason why the matter of reasonableness should be considered independent of the question whether the regulation is barred by constitutional provisions, though whether the act is reasonable or not might be an indispensable aid in deciding its constitutional status. The ques-

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70 39 Ore. 429.
71 154 Ala. 447
72 *Holden v. Hardy*, 14 Utah 71
73 Ibid.
74 123 U. S. 623
75 *State v. Holcomb*, 68 Iowa 107
tion being essentially one of fact, it would seem that the jury would be the sole judge of the reasonableness of a statute or ordinance. Such, in fact, was the attitude of the court in an early Wisconsin case, involving an ordinance for the protection of a lake shore. The court said, "It is impossible for the court to determine whether or not the ordinance is reasonable and proper, in view of the object sought to be accomplished, without some evidence upon the subject; and we cannot see that it is a violation of any principle to submit these questions of fact to a jury as in other cases." That view, however, was not adopted in a later Wisconsin case, in which this language is used by the court: "Whether, in any case where the facts are undisputed, a city council has exceeded its power by the enactment of an unreasonable ordinance, is purely a judicial question, to be considered substantially the same as that of whether the legislature has exceeded its constitutional authority, reasonable doubts being resolved in favor of municipal powers." It is clear from the authorities that the settled law today is that the reasonableness of an ordinance is a question for the court.

The rule that reasonableness is a matter for judicial determination is not, however, extended to mean that the question must in all cases be determined without the help of the jury. Some authorities hold that where the reasonableness of the ordinance depends upon extrinsic facts which are in dispute, the aid of the jury must be sought. So then, in dealing with this question of reasonableness, the court is dealing with a question of fact. Illustrations of cases where the validity of statutes depended on questions of fact may be found in cases involving the efficacy of vaccination, the regulation of hours of employment, the fixing of minimum wages for women and children, the regulation of speed of trains and the fixing of standards of purity of milk and cream. Since the subjects with which the state may and does deal are almost infinite, the courts are confronted with the task of dealing with a countless number of different sets of facts. What is a reasonable regulation must therefore vary with the circum-

76 Clason v. Milwaukee, 30 Wis. 316.
77 Stafford v. Chippewa Valley E. R. Co. 110 Wis. 331
78 Lusk v. Dora, 224 Fed. 650;
Wice v. Chicago & N.W. Ry. Co. 193 Ill. 351;
79 State v. Boardman, 93 Me. 73;
Small v. Edenton, 146 N. C. 527;
People v. Detroit United R. Co. 134 Mich. 682
82 Adkins v. Children's Hosp. 261 U. S. 325.
84 City of St. Louis v. Liessing, 190 Mo. 464.
stances. It is very seldom, however, that the circumstances are exactly alike; so that it is extremely dangerous to rely upon the ruling of the court on the reasonableness of an act which on the face of it appears to be very similar to a statute before the court for consideration. The previously beaten paths of judicial opinion on the question of reasonableness contain few accurate guideposts to new fields sought to be explored by judicial review. Therefore, old cases and old laws dealing with police regulations are of little help except as they serve to guide the court, and insofar as they expound general principles applicable to special circumstances. In its final analysis, the determination of the question must depend on the particular conditions, as is also suggested in the case of State v. Feigold, "In drawing the line which separates the field of arbitrary interference with protected rights of property and freedom in personal action, from that of protective legislation in behalf of public safety, each case must fall on one or the other side in accordance with its particular circumstances."

Numerous cases have drawn attention to the fact that a business which is lawful to-day may in the future, because of changed conditions, become a menace to society. It is therefore safe to submit that it is unwise in many instances to cite old decisions on present day police regulations of a similar texture as those passed on by previous courts, because matters which may at that time have been regarded as harmless may to-day be regarded as inimical to the general welfare. It is even more true to-day than it was in the year 1897 that "the tendency of modern development is in the direction of greater, rather than more restricted, use of police power; and necessarily so, in order to meet the new dangers and increase the old dangers constantly occurring as natural incidents of advancing civilization." Precedent, therefore, is not a safe guide. As economic and social conditions change, judicial determinations founded on those conditions must change.

The reasoning of a court in this field of the law may serve as a poor guide to a proper determination of the validity of the statute. The underlying questions of fact which determine the status of the legislative enactment are matters upon which a legislative body may feel justified in possessing an opinion which it is unwilling to exchange for that of a judge, especially when the judge bases his finding,
not on evidence, but on general information which most likely is weaker than that which served as a foundation for legislative action. Thus, it is easy to understand how a lay public would question the determination of a court finding, without taking and considering evidence, that a law enacted by presumably intelligent persons limiting the hours that people may work in bakeshops has no substantial relation to the promotion of health (Lochner v. New York, 198 U.S. 45). It is submitted that the reasonableness or unreasonableness of a law passed under the police power may properly be separated from a consideration of judicial precedent. A more important consideration is whether the police regulation is fairly appropriate to its purpose under all of the existing circumstances and whether it is a bona fide exercise of the judgment of the legislative department of government.