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Admission of Extrinsic Evidence in Cases Involving the Validity of Statutes and Ordinances in Indiana

ADMISSION OF EXTRINSIC EVIDENCE IN CASES INVOLVING THE VALIDITY OF STATUTES AND ORDINANCES IN INDIANA

Attacks on the validity of statutes and ordinances typically take the form of a showing of conflicting legal language between the state or federal constitution on one hand, and the legislative or municipal enactment on the other. Frequently, however, the question is also made to turn upon the existence of factual circumstances not discernible from the enacting language but with reference to which the statute or ordinance will be applied. These factual circumstances will be referred to as "extrinsic evidence." With respect to the problem of admissibility, extrinsic evidence is of two types: judicially noticeable and non-judicially noticeable. If the court allows the introduction of extrinsic evidence at all, a question arises whether only the former or both types of extrinsic evidence should be admitted.[1] An additional problem involves the scope of the issue upon which such evidence is admitted. Extrinsic evidence may be introduced which tends to prove that only as applied to the particular situation of the party claiming invalidity is the enactment invalid, or that there exists no factual constitutional basis at all to uphold the validity of the statute or ordinance. As will be seen, failure to distinguish these two issues may result in faulty analysis and unfortunate results. The purpose of this writing is to examine the Indiana cases which have dealt with the question of admission of extrinsic evidence, to ascertain the existing rule concerning admissibility, and to scrutinize the rationale and legal effect of the existing and alternative rules.

With respect to the admission of extrinsic evidence in determining the constitutionality of statutes, the present status of the Indiana rule is unsettled. Until recently the court, with one excepion, had adhered to the

1. General references: Barnett, *External Evidence of the Constitutionality of Statutes,* 3 ORE. L. REV. 195 (1924); Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action,* 38 HARV. L. REV. 6 (1924); *Consideration of Extrinsic Evidence on Question of Constitutionality or Unconstitutionality of Statute,* 82 L. ED. 1244 (1937); Denman, *Comment on Trial of Facts in Constitutional Cases,* 21 A.B.A.J. 805 (1935); Manoff and Sarcia, *Pleading and Proof of Constitutional Facts Underlying State Statutes,* 15 CONN. B.J. 227 (1941); Morris, *Law and Fact,* 55 HARV. L. REV. 1303, 1318-25 (1942); Wilson, *Consideration of Facts in Constitutional Cases,* 17 So. CAL. L. REV. 335 (1944); Note, *The Consideration of Facts in "Due Process" Cases,* 30 COLUM. L. REV. 360 (1930); Note, *The Presentation of Facts Underlying the Constitutionality of Statutes,* 49 HARV. L. REV. 631 (1936); Note, *Social and Economic Facts—Appraisal of Suggested Techniques for Presenting Them to the Courts,* 61 HARV. L. REV. 692 (1948); Note, *Consideration of Facts in Due Process Cases,* 23 IND. L.J. 176 (1948).

exclusionary rule first expressed in *Pittsburgh, C., C. & S.L.R.R. v. State.*[2] In considering whether a statute prescribing specifications of railroad cars was reasonably related to the public welfare, the court stated:

> If it cannot be made to appear that a law is in conflict with the constitution, by argument deduced from the language of the law itself, or from matters of which a court can take judicial notice, then the act must stand. The testimony of expert, or other witnesses, is not admissible to show that in carrying out a law enacted by the legislature some provisions of the Constitution may possibly be violated.[3]

Although the exclusionary rule was broadly stated, the court's language may have been directed only to evidence tending to prove that as applied to the party asserting invalidity the statute was unreasonable, and not to evidence showing that the statute was without any reasonable basis.[4]

Eighteen years later in *Weisenberger v. State,*[5] an equally broad but opposite rule was postulated when the supreme court held that in determining the reasonableness of a statute, unconstitutionality could be shown not only by facts subject to judicial notice, but also by facts established by other evidentiary techniques. It should be noted that only facts applicable to the particular case of the party asserting unconstitutionality were examined. Within another eighteen years the court expressly overruled this case, reverting to the rule that only facts susceptible of judicial notice may be considered by the court:[6]

> Whether or not extrinsic evidence can be considered on the question of the constitutionality of a statute is a question upon which the authorities are in hopeless disagreement. Aside from the case of *Weisenberger v. State* . . . which was not exhaus-

2. 180 Ind. 245, 102 N.E. 25 (1913). *But see* Board of Commissioners of Newton County v. State *ex rel.* Bringham, 161 Ind. 616, 618, 69 N.E. 442, 443 (1903), where the court "went beyond the limit of judicial knowledge" in considering extrinsic evidence on the issue of constitutionality.

3. 180 Ind. 245, 253, 102 N.E. 25, 28 (1913). Compare the following language in Railroad Comm'n of Ind. v. Grand Trunk Western R.R., 179 Ind. 255, 266, 100 N.E. 852, 856 (1912): "If a statute is doubtful or uncertain, the circumstances under which it is enacted, other statutes, if there are any upon the same subject, whether passed before or after the act in question . . . the history of the country, the conditions of affairs, the mischief sought to be remedied, and the object sought to be obtained, will all be looked to in ascertaining the legislative intent."

4. The admissions and evidence discussed by the court concerned only the cost to the complainant of complying with the statute and evidence that, as to complainant's railroad cars and trainmen, compliance would not produce any beneficial results. Pittsburgh, C., C. & S.L.R.R. v. State, 180 Ind. 245, 253, 102 N.E. 25, 27 (1913).

5. 202 Ind. 424, 175 N.E. 238 (1931).

6. Department of Ins. v. Schoonover, 225 Ind. 187, 72 N.E.2d 747 (1947).

> tively reasoned on this point, this court has steadfastly held to the general rule that in determining the constiutionality of a statute involving the exercise of police power the question is one of law, and extrinsic evidence will not be received on the constitutionality of such statute. The only extrinsic facts which will be considered are those of which the court will take judicial notice.[7]

On petition for rehearing the court took care to point out that parties were not precluded from bringing facts to the attention of the trial court to establish those matters of which the court could take judicial notice.[8] Whether the principal opinion was referring to extrinsic facts relating only to the complainant's particular situation or facts tending to show non-existence of any reasonable basis was left unresolved by the cryptic language of the court.[9] In 1948[10] and 1952,[11] the supreme court reiterated its holding in this case.

Thus the matter stood until the recent decision of *Tinder v. Clark Auto Co.*[12] in which the court upheld as a reasonable classification a statute proscribing Sunday business operations of automobile dealers. While both the appellant's and appellee's briefs contain a discussion of the exclusionary rule and the admission of extrinsic evidence,[13] no mention of these issues appears in the opinion. With regard to other issues, however, the court quoted language from two cases approving a less stringent rule applying to the admission of extrinsic evidence. Discussing the matter of reasonable classifications, the court reiterated the following

7. *Id.* at 190, 72 N.E.2d at 748. Compare the statement in State v. Griffin, 226 Ind. 279, 287, 79 N.E.2d 537, 541-42 (1948): "In the matter of the classification of objects for the purpose of legislation, the rules have been well stated thus: '[I]f the classification is reasonable, not artificial or arbitrary, and rests upon some substantial difference of situation or circumstances indicating the necessity or propriety of legislation restricted to the class created, it will be upheld. . . . It is not necessary that the reason for the classification should appear on the face of the legislation. In determining the propriety of the classification the court may resort to facts that are within its judicial knowledge, contemporaneous conditions and situations of peoples, existing state policies, and matters of common knowledge.' 59 C.J., Statutes, § 319 pp. 732, 723."

8. Department of Ins. v. Schoonover, 225 Ind. 187, 195, 72 N.E.2d 747, 750 (1947).

9. After citing language from an earlier case holding that non-judicially noticeable evidence was not admissible in testing the validity of an ordinance the court stated: "We approve of the above quotations in regard to a question of fact being raised as a means of arresting a legislative act. All that means is the application of a statute to a particular situation. In such a case the statute might be found unconstitutional as applied to the particular situation though otherwise left in full force and effect: we have no such situation in the case before us." *Id.* at 191, 72 N.E.2d at 749.

10. Kirtley v. State, 227 Ind. 175, 84 N.E.2d 972 (1948).

11. Department of Financial Institutions v. Holt, 231 Ind. 293, 108 N.E.2d 629 (1952).

12. 149 N.E.2d 808 (Ind. 1958).

13. Brief for Appellee, pp. 8, 27, Reply Brief for Appellant, pp. 2, 4-7, 46-47.

dicta from an earlier Indiana case:[14]

> In determining the propriety of the classification the court may resort to facts that are within its judicial knowledge, contemporaneous conditions and situations of peoples, existing state policies, and matters of common knowledge. 59 C.J. Statutes § 319, pages 732, 733.[15]

Later the court asserted that the burden of demonstrating invalidity was upon the one challenging the statute, and quoted the following statement of the United States Supreme Court:[16]

> When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and *one who assails the classification must carry the burden of showing* by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, *that the action is arbitrary.*[17]

Although the above quoted language is significant, in view of the issues which the court was discussing it cannot be interpreted as an express relaxation of the exclusionary rule. More meaningful is the court's lengthy consideration of non-judicially noticeable extrinsic evidence. Other Indiana cases in which the court has considered such evidence without discussion of admissibility are explicable in that the facts discussed may have been subject to judicial notice.[18] In *Tinder,* however, such an explanation is untenable. Among the factors considered by the court in upholding the constitutionality of the statute were the following: automobile dealers offer gifts and refreshments to attract customers on Sundays; dealers extensively utilize advertising media to publicize the fact that they are open on Sunday; many persons are attracted from outside the locality where the dealers are engaged in business, thus increasing traffic congestion and hazards at such localities; many dealers of such businesses operate not less than twelve hours per day during the week and not less than eight or ten hours on Sunday.

The present status of the admissibility of evidence incapable of judi-

14. State v. Griffin, 226 Ind. 279, 287, 79 N.E.2d 537, 542 (1948).
15. Tinder v. Clarke Auto Co., 149 N.E.2d 808, 810 (Ind. 1958).
16. Borden's Farm Products Co. v. Baldwin, 243 U.S. 194, 209 (1934).
17. Tinder v. Clarke Auto Co., 149 N.E.2d 808, 812 n. 6 (Ind. 1958) (Emphasis added by the Indiana court).
18. *E.g.,* Crawford v. Calumet Paving Co., 233 Ind. 127, 131, 117 N.E.2d 368, 370 (1953); Pittsburgh, C.C. & S.L. Ry. v. Indiana, 178 Ind. 498, 502, 99 N.E. 801, 803 (1912).

cial notice in cases involving the constitutionality of statutes is left in doubt. While *Tinder* may indicate a relaxation of the earlier rule, the absence of discussion of the issue leaves that case of dubious value as precendent, especially in view of the fate of *Weisenberger* which was overruled despite an express holding on the question of admissibility.

Less confused are cases in which the claim of invalidity is directed at a municipal ordinance. An ordinance is subject to an attack upon its validity on two grounds, viz., that it is unreasonable[19] or that it violates some specific provision of the federal or state constitution.[20] Although there may be a great deal of overlapping between the questions of reasonableness and constitutionality of ordinances, the two concepts are distinctly separable and have been so treated by the courts.[21] With respect to the question of reasonableness, if a statute confers upon a municipal corporation the power to pass ordinances of a specific character, an ordinance enacted in the express terms of the statute cannot be questioned as unreasonable. Only the granting statute is open to attack. On the other hand, if the legislative grant is a general one, or the statute confers a specific power upon the municipality but the method of its exercise is not prescribed, the manner in which the ordinance employs such a grant of power can be attacked as unreasonable.[22] The Indiana Supreme Court has at times been confused by the distinction between the two methods of attacking the validity of ordinances *i.e.*, unreasonableness and violation of a specific constitutional provision.[23] However, the court has consistently

19. 5 McQUILLIN, MUNICIPAL CORPORATIONS § 18.01 (3rd ed. 1949).

20. *Id.* at § 19.01.

21. "The doctrine of reasonableness has in cases involving municipal ordinances a wider scope than in cases [involving the constitutionality of statutes]; municipal ordinances being tested, not only by the Constitution, but also by the stautes of the state, and by the common law." Motlow v. State, 125 Tenn. 547, 591-92, 145 S.W. 177, 189 (1912); 11 AM. JUR. *Constitutional Law* § 307 (1938). See also, Kneier, *Judicial Review of the Motives of City Councils,* 19 GEO. L.J. 148 (1930).

22. Stuck v. Town of Beech Grove, 201 Ind. 66, 163 N.E. 483 (1929); Park Hill Development Co. v. City of Evansville, 190 Ind. 432, 130 N.E. 645 (1920); Chicago, I. & L. Ry. v. Town of Salem, 170 Ind. 153, 82 N.E. 913 (1907); City of Indianapolis v. Miller, 168 Ind. 285, 80 N.E. 626 (1906); Southern Ind. R.R. v. City of Bedford, 165 Ind. 272, 75 N.E. 268 (1905); Beiling v. City of Evansville, 144 Ind. 644, 42 N.E. 621 (1895); Champers v. City of Greencastle, 138 Ind. 339, 35 N.E. 14 (1894); 5 McQUILLIN, MUNICIPAL CORPORATIONS § 18.02 (3rd ed. 1949).

23. Pittsburgh, C., C. & S.L.R.R. v. City of Hartford City, 170 Ind. 674, 82 N.E. 787, *petition for rehearing denied,* 170 Ind. 683, 85 N.E. 362 (1908). The court was concerned with the validity of an ordinance requiring the railroad to erect and maintain an electric light at a certain crossing. The railroad contended that it had the right to form issues of fact regarding the necessity and fairness of the ordinance. The court first stated that a city ordinance "stands on the same general footing as an act of the legislature," *id.* at 683, 85 N.E. at 363, and then held that there was no error in excluding non-judicially noticeable evidence on the question of validity. *Id.* at 686, 85 N.E. at 363-64. This equation of ordinances with statutes precluded the railroad from attacking the ordinance as unreasonable.

admitted extrinsic evidence bearing on the subject of reasonableness whether or not the facts in question were judicially noticeable.[24] Moreover, in two recent cases involving the conflict of municipal ordinances with specific constitutional provisions, the court has considered at length extrinsic evidence incapable of judicial notice in holding the ordinances unconstitutional.[25]

From the foregoing, it appears that whatever function the exclusionary rule was meant to serve in guarding legislative enactments, the courts have not seen fit to carry over this safeguard when the subject of inquiry is a municipal ordinance. Doubtless the restrictive effect of the exclusionary rule has precluded the introduction of extrinsic evidence in a number of cases where the validity of a statute was at issue. The method by which the court must consider this issue then becomes a pertinent subject of inquiry.

A multitude of cases exist in which the Indiana court has considered the validity of statutes and ordinances without apparent resort to non-judicially noticeable facts.[26] Determination of the issues must then take

24. Stuck v. Town of Beech Grove, 201 Ind. 66, 163 N.E. 483 (1929); Denny v. City of Muncie, 197 Ind. 28, 149 N.E. 639 (1925); Park Hill Development Co. v. City of Evansville, 190 Ind. 432, 130 N.E. 649 (1920); Southern Ind. R.R. v. City of Bedford, 165 Ind. 272, 75 N.E. 260 (1905); Cleveland, C.C. & S.L. Ry. v. City of Connersville, 147 Ind. 277, 46 N.E. 579 (1896). Compare Steffy v. The Town of Monroe City, 135 Ind. 466, 35 N.E. 121 (1893) with Champer v. City of Greencastle, 138 Ind. 339, 35 N.E. 14 (1894).

"The admissibility, competency and relevancy of evidence of unreasonableness of an ordinance is governed, of course, by rules governing admissibility of evidence generally. A question of admissibility, arising frequently in connection with the matter of the reasonableness of an ordinance, is whether the evidence of unreasonableness is restricted to the ordinance itself and what appears on its face or extends to other proof. Naturally, the unreasonableness of an ordinance may in some instances be apparent on its face. But as to whether or not, where the unreasonableness of an ordinance is not apparent on its face, evidence extrinsic to it can be introduced to establish its unreasonableness, there is some difference of view, although the correct rule appars to be that the admissibility of such evidence depends upon whether the ordinance has been enacted under valid express and specific power, in which event extrinsic evidence is not admissible, or under general, implied or incidental power, in which event extrinsic evidence is admissible, to show its unreasonableness." 5 McQUILLIN, MUNICIPAL CORPORATIONS § 18.24 (3rd ed. 1949). If extrinsic evidence is admitted, the question of reasonableness is for the court and is not a question of fact for the jury. *Id.* at § 18.21.

25. Board of Zoning Appeals v. LaDow, 153 N.E.2d 599 (Ind. 1958); Board of Zoning Appeals of Decatur v. Jehovah's Witnesses, 233 Ind. 83, 117 N.E.2d 115 (1953). *Accord,* General Outdoor Advertising Co. v. City of Indianapolis, 202 Ind. 85, 172 N.E. 309 (1930). There is a paucity of early Indiana cases dealing with the attack of an ordinance as violative of a specific constitutional provision.

26. *E.g.,* Alanet Corp. v. Indianapolis Redevelopment Comm'n. 154 N.E.2d 515 (Ind. 1958); Crawford v. Calumet Paving Co., 233 Ind. 127, 117 N.E.2d 368 (1953); Tinder v. Music Operating, Inc., 237 Ind. 33, 142 N.E.2d 610 (1957); Caesar v. DeVault, Township Trustee, 236 Ind. 487, 141 N.E.2d 338 (1956); Evansville & O. Ry. v. Southern Ind. Rural Electric Corp., 231 Ind. 648, 109 N.E.2d 901 (1952); Hayes v. Taxpayer's Research Ass'n, 225 Ind. 242, 72 N.E.2d 658 (1947); Perry Township of Marion County, Ind., v. Indianapolis Power & Light Co., 224 Ind. 59, 64 N.E.2d 296 (1945); Schmidt v.

the form of a "reasoning process," *i.e.*, the court relates its knowledge of the meaning of words to rules of logic and common experience in determining that a certain effect is or is not accomplished.[27] In addition, the court may take judicial notice of relevant facts. If there exist no relevant extrinsic facts which would aid the court in reaching a conclusion, utilization of the reasoning process is the only practical means of determining the issue of validity. Likewise, if the only relevant extrinsic facts existing are susceptible of judicial notice, utilization of the reasoning process and judicial notice provides as fair a determination as possible. However, the exclusion of non-judicially noticeable extrinsic evidence which would be outcome determinative if admitted, necessarily results in erroneous conclusions and a denial of constitutional guarantees. Justification of the exclusion of such evidence must therefore rest upon a cogent rationale.

Any contention that judicial notice[28] will provide the court with sufficient facts upon which to base a decision is untenable. The primary function of judicial notice is to preclude parties from securing results contrary to what is beyond reasonable dispute or capable of immediate demonstration by resort to easily accessible sources of indisputable accuracy.[29] Thus, the courts in taking judicial notice of extrinsic facts may utilize not only indisputable facts of common notoriety but also indisputable matter contained in available sources of recognized accuracy.[30] From these propositions it is easily demonstrable that with respect to the introduction of extrinsic evidence, judicial notice will scarcely serve as a sub-

F. W. Cook Brewing Co., 187 Ind. 623, 120 N.E. 19 (1918); State v. Wiggam, 187 Ind. 159, 118 N.E. 684 (1917); Ayres v. State, 178 Ind. 453, 99 N.E. 730 (1912); Chandler Coal Co. v. Sams, 170 Ind. 623, 85 N.E. 341 (1908); Street v. Varney Electrical Supply Co., 160 Ind. 338, 66 N.E. 895 (1902).

27. "The wisdom we seek in judges and in administrative officers is made up of multifarious ingredients that often defy identification and usually defy separation from other ingredients—Knowledge of specific facts, understanding of general facts, prior experience in trying to solve similar problems, mental processes such as logic or reasoning and mental processes such as appraising or estimating or guessing, formulation and application of notions of policy, imagination, inventiveness and intuition, emotional reactions and emotional control." Davis, *Judicial Notice,* 55 COLUM. L. REV. 945, 949 (1955).

28. General references: Davis, *Judicial Notice,* 55 COLUM. L. REV. 945 (1955); Keefe, Landis and Shoad, *Sense and Nonsense About Judicial Notice,* 2 STAN. L. REV. 664 (1950); McCormick, *Judicial Notice,* 5 VAND. L. REV. 296 (1952); Morgan, *Judicial Notice,* 57 HARV. L. REV. 269 (1944).

29. Morgan, *Judicial Notice,* 57 HARV. L. REV. 269, 273 (1944).

30. *Id.* at 290. The practical utilization of judicial notice by the courts may go far beyond the realm of indisputability. Davis, *Judicial Notice,* 55 COLUM. L. REV. 945 (1955). However, without the element of indisputability the rationale of excluding extrinsic evidence incapable of judicial notice fails completely. For if the court may consider disputable extrinsic evidence under the guise of judicial notice there is no reason why they should not be able to consider similar evidence presented by conventional evidentiary devices.

stitute for other evidentiary techniques. The indisputability of a proposition may itself be the subject of reasonable dispute.[31] Extrinsic factors which effect a denial of due process or produce grossly unreasonable results may be ascertainable only by intense investigation and analysis. There is also a danger of misuse and abuse of judicial notice.

> A judge may ignorantly consider a generalization drawn from the segment of human experience known to him to be so notoriously true as to admit of no reasonable question. He may erroneously regard a source of information as of indisputable accuracy. He may treat a half-truth as if it were the whole truth. . . . In reading data garnered from text books and encyclopedias, and statistics taken from specified sources, set out in an opinion of a court of last resort, one often has a feeling that they might have been contradicted or explained by diligent counsel aware that the courts intended to use them.[32]

Specific examples of the misuse of judicial notice may be mentioned. The Indiana Supreme Court has judicially noticed that "milk and its by-products is a food absolutely essential to thousands of our citizens in order to sustain life, and if the supply was cut off for only a few days no one could foretell the dire calamity that would follow."[33] In considering a statute granting free hunting and fishing licenses to veterans the court stated that it judicially knew that a high percentage of hunters were veterans and to exempt them from paying fees would have a tendency to deplete the funds available for the protection and propagation of fish and game, thereby retarding conservation objectives.[34] The court has even gone to the extent of characterizing the motives from which men act as being matters of common knowledge.[35] Few would contend that these statements concerned matters of common notoriety beyond reasonable dispute. From the foregoing, it must be concluded that judicial notice will not comprehend all facts pertinent to the issue and is subject

31. Morgan, *supra* note 29, at 277-79.
32. *Id.* at 292-93.
33. Albert v. Milk Control Board of Ind., 210 Ind. 283, 291, 200 N.E. 688, 691 (1936).
34. Hanley v. State of Ind., Ind. Dept. of Conservation, 234 Ind. 326, 123 N.E.2d 452 (1954).
35. Bolivar Township Bd. of Fin. of Benton County v. Hawkins, 207 Ind. 171, 191 N.E. 158 (1934). "As a matter of common knowledge, we know that surety companies were refusing to go upon bonds required by the Public Depository Act, that these individuals who were already on bonds were, in a sense, in order to protect themselves, required to renew the bonds they were obligated upon, and other individuals because obligated from a sense of duty in order to prevent their local government from breaking down." *Id.* at 188, 191 N.E. at 165.

to misuse. The exclusion of extrinsic evidence not judicially noticeable must, therefore, find its rationale in matters of policy.

Two reasons are frequently advanced in support of the exclusion of extrinsic facts not susceptible of judicial notice: First, since the determination would be a factual one the question of validity would have to be submitted to the jury in jury-tried cases;[36] second, instability of the law would result since the question of invalidity would depend upon the particular case presented to the court.[37] The implied rationale of the first reason mentioned is that uniform results would be impossible since different juries would render different results. However, the Supreme Court of the United States—the lead court in permitting the admission of extrinsic evidence—has held that the presence of a factual basis for legislation is a judicial question and not one that may be submitted to the jury.[38] It is arguable that a different rule may obtain in Indiana in criminal cases since the Indiana Constitution provides that "In all criminal cases whatever, the jury shall have the right to determine the law and the facts."[39] The Supreme Court of Maryland—a state which enjoys a like constitutional provision—has held that even in criminal cases the constitutionality of a statute cannot be argued to the jury.[40]

The second reason advanced in support of the exclusionary rule is the result of a misconception. The admission of extrinsic evidence is not directed to a showing that the statute's application to a particular party is invalid, but to a showing of existence or non-existence of a constitutional basis with respect to all persons and property which are part of the

36. Pittsburgh, C.C. & S.L. Ry. v. State, 180 Ind. 245, 252-53, 102 N.E. 25, 28 (1913); Pittsburgh, C.C. & S.L. Ry. v. City of Hartford City, 170 Ind. 674, 684, 82 N.E. 787, 85 N.E. 362, 363 (1908).

37. Pittsburgh, C.C. & S.L. Ry. v. State, 180 Ind. 245, 252-53, 102 N.E. 25, 28 (1913).

38. Dennis v. United States, 341 U.S. 494, 512, affirming an opinion by Learned Hand in United States v. Dennis, 183 F.2d 201 (2d Cir. 1950): "Were it not so, there would be no chance for review, for the verdict would be final; moreover, different juries might give different verdicts, and any approach to uniformity, short as that can be in any event in this field, would be impossible." *Id.* at 216. Compare United States v. Hashmall, 97 F. Supp. 43 (D.D.C. 1951).

Wigmore's treatise contains the following statement, but he cites no authority: "Where a *legislative act* is argued to be unconstitutional, and this is to depend upon the unreasonableness, or lack of possible reasonableness, of the law in its purpose or operation, and thus the external facts furnishing the possible legislative motive or the possible actual effect must be considered, this incidental question of fact is not for the jury, but for the Court. Hence, no testimony, of experts or others, would be admitted for the jury." 9 WIGMORE, EVIDENCE § 2555 (d) (3rd ed. 1940).

39. IND. CONST. art. 1, § 19. For a clarification of this provision see Beavers v. State, 236 Ind. 549, 141 N.E.2d 118 (1957).

40. Hitchcock v. State, 213 Md. 273, 131 A.2d 714 (1957).

society affected by the statute.[41] As mentioned earlier, the language in some of the Indiana cases announcing the exclusionary rule may be explicable as directed at evidence of the complainant's particular situation.[42] Moreover, the court's determination of the question of constitutionality need not depend solely on the abilities or diligence of counsel. The presumption of constitutionality, if utilized as something more than a meaningless phrase, affords a means of safeguarding the legislative judgment.[43] In addition, if the court feels that an insufficient presentation of facts was made in support of the validity of the statute, it could remand the case to the trial court for additional findings of fact[44] or appoint a master to make an independent investigation.[45] Finally, there is little reason to believe that the adversary system of deciding cases will function less efficiently with respect to the presentation of evidence in constitutional cases than in other instances.

Just as judicial notice is subject to misuse, the exclusion of non-judicially noticeable extrinsic evidence which results in sole reliance upon the reasoning process may also produce undesirable results. Conventional evidentiary theory precludes a judge's use of facts which he knows only as an individual observer outside of court.[46] If such matters were not excluded, the parties affected would have no fair chance to test and perhaps dispute that supposed knowledge. In principle, the line is plain between facts which are judicially noticeable, facts which a judge knows only as an individual observer outside of court, and "facts" which a judge utilizes in the reasoning process which are gleaned from his common experiences. The practical delimitation of these concepts is, however, a problem of great difficulty. In addition, sole reliance on the reasoning process may result in an inadvertent use of facts within the judge's personal knowledge.

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41. "Appellee has also urged us to consider certain facts with regard to the conduct of his own particular business. The legislature was not required to enact a statute which would take into account, nor are we permitted to consider, the particular method of operation by a single dealer." Tinder v. Clarke Auto Co., 149 N.E.2d 808, 819 (Ind. 1958).

42. See text accompanying notes 4-9 *supra.*

43. See Note, *The Presumption of Constitutionality Reconsidered,* 36 COLUM. L. REV. 283 (1936).

44. See Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924), remanding to the district court a case in which evidence of constitutional facts was required. For an Indiana case holding an ordinance unconstitutional because of failure of the city to put in evidence showing the ordinance to be a valid exercise of the police power, see Board of Zoning Appeals v. LaDow, 153 N.E.2d 599 (Ind. 1958).

45. See Borden's Farm Products Co. v. Baldwin, 293 U.S. 194 (1934), *order to appoint a master carried out, sub nom.* Borden's Farm Products Co. v. Ten Eyck, 11 F. Supp. 599 (S.D.N.Y. 1935), *aff'd,* 297 U.S. 251 (1936).

46. 9 WIGMORE, EVIDENCE § 2569 (3rd ed. 1940).

In *Long v. State*,[47] a statute proscribing the seining of fish in Indiana waters was attacked as an arbitrary classification in violation of the constitutional prohibition of local or special laws.[48] The statute excepted from its provisions certain boundary waters but forbade seining even in these waters within 100 yards of the mouth of any streams emptying into the excepted waters from the Indiana side. With respect to this provision the court stated that it "was clearly designed to prevent interruption or disturbance of the natural migration of fish from those rivers up the streams of this state."[49] There was no indication that the court was attempting to take judicial notice of this fact and under the exclusionary rule it could not have been put into evidence. The court's reference to the habits of migrating fish was explicable only as a use of personal knowledge. It is doubtful if such an abuse would have occurred had the appellate court been able to consider a record which contained a full exposition of extrinsic matters relating to the issue of constitutionality.

There seems little reason to differentiate between statutes and ordinances with respect to the character of evidence admissible on the issue of constitutionality. As noted earlier,[50] the Indiana court has not been reluctant to admit all relevant extrinsic evidence when an ordinance is the subject of consideration. There is as great, or greater, potential for abusive use of statutes than ordinances. Nor need more deference be shown the judgment of the legislature than that of a city council. The growing complexities of modern society militate against further exclusion of evidence incapable of judicial notice in reviewing the constitutionality of legislative enactments. Despite its absence of an express ruling on the matter, *Tinder v. Clarke Auto Co.* should be looked to as a welcome departure from the outmoded and undesirable exclusionary rule.

47. 175 Ind. 17, 92 N.E. 653 (1910).
48. IND. CONST. art. 4, § 22.
49. 175 Ind. 17, 20, 92 N.E. 653, 654.
50. See text accompanying note 17 *supra*.