Judicial Notice – Excerpts Relating to the Morgan-Wignore Controversy

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[Author's Note. These two excerpts are from the author's preliminary draft of his proposed revision of the judicial notice chapter of Wigmore on Evidence. The excerpts are submitted for publication in this Edmund M. Morgan issue of the Vanderbilt Law Review for two reasons: First, because of the important role played by Professor Morgan in the recent development and articulation of the law of judicial notice and, second, because Professor Morgan and Dean Wigmore stand at opposite poles in the argument over judicial notice. At least they do with respect to one significant particular.

They do not differ with respect to the application of the doctrine to “law.” Nor do they reveal a difference with respect to so-called “jury notice.” Their difference relates to judicial notice of “facts.” Here Wigmore, following Thayer, insists that judicial notice is solely to save time where dispute is unlikely and that a matter judicially noticed is therefore only “prima facie,” or rebuttable, if the opponent elects to dispute it. It is express in Thayer and implicit in Wigmore that (perhaps because the matter is rebuttable) judicial notice may be applied not only to indisputable matters but also to matters of lesser certainty. Morgan on the other hand defines judicial notice more narrowly, and his consequences follow from his definition. He limits judicial notice of fact to matters patently indisputable. And his position is that matters judicially noticed are not rebuttable. He asserts that it is wasteful to permit patently indisputable matters to be litigated by way of formal proof and furthermore that it would be absurd to permit a party to woo a jury to an obviously erroneous finding contrary to the noticed fact. Also, he objects to the Wigmorean conception on the ground that it is really a “presumption” of sorts attempting to pass under a misleading name. It is, according to Morgan, a presumption with no recognized rules as to how the presumption works—what activates it and who has the burden of doing how much to rebut it.

The reader will notice that the following draft revision, while presenting Wigmore's position in textual insert or footnote, adopts Morgan's point of view. This change is made

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reluctantly. The reluctance stems in part from a suspicion that the best chance of progress in the tangle of presumptions, burdens of proof and judicial notice may lie in the misunderstanding of judicial notice. That is, Wigmore’s “judicial notice” could, if elaborated by a misunderstanding court, be applied to matters not indisputable enough to qualify for Morgan’s judicial notice and might be a significant contribution to the law of presumptions and burdens of proof. Whatever added publicity is given by this revision of the treatise to the fallaciousness of Wigmore’s position and to the impregnability of Morgan’s position will make it that much more difficult for courts to indulge in this creative mistake.

§ 2565. THEORY OF JUDICIAL NOTICE

Of the multifarious propositions essential to the resolution of a dispute before a legal tribunal, proof by formal evidence is dispensed

§ 2565. 1. 9 Wigmore, Evidence § 2565 (3d ed. 1940). (the following two paragraphs comprise the entire section): “Theory of Judicial Notice. Of the propositions involved in the pleadings, or relevant thereto, proof by evidence may be dispensed with in two situations: (1) where the opponent by a solemn or infra-judicial admission has waived dispute, and (2) where the Court is justified by general considerations in declaring the truth of the proposition without requiring evidence from the party. The former is considered under the head of Judicial Admissions (post, §§ 2588-2596). The latter is the process most commonly meant by the term Judicial Notice.

“There are various senses in which the term Judicial Notice is used. In the orthodox sense above noted, it signifies that there are certain ‘facta probanda’ (ante, § 2), or propositions in a party’s case, as to which he will not be required to offer evidence; these will be taken for true by the tribunal without the need of evidence. This general principle of Judicial Notice is simple and natural enough.” See the following authorities: 9 Holdsworth, A History of English Law 135-39 (1926); Maquire. Evidence—Common Sense and Common Law 167-75 (1947); Thayer, A Preliminary Treatise on Evidence at the Common Law 277-312 (1888); Davis, Official Notice, 62 Harv. L. Rev. 537 (1949); Davis, Judicial Notice, 55 Colum. L. Rev. 945 (1955); Keeffe, Landis & Shaad, Sense and Nonsense About Judicial Notice, 2 Stan. L. Rev. 864 (1950); McCormick, Judicial Notice, 5 Vand. L. Rev. 295 (1952); Morgan, Judicial Notice, 57 Harv. L. Rev. 269 (1944); Nokes, The Limits of Judicial Notice, 74 L.Q. Rev. 59 (1958) (surveying the English law of the subject); Strahorn, The Process of Judicial Notice, 14 Va. L. Rev. 544 (1928).

See also Uniform Rules of Evidence 9-12, quoted below. These rules are broader than Model Code of Evidence rules 801-06 (1942) in that (1) judicial notice must be taken without request, rather than on request, (a) of the common law and public statutes of other jurisdictions of the United States, and (b) of specific facts universally known to be true, and (2) judicial notice may, rather than may not, be taken of the laws of foreign countries. (3) Uniform Rule 11, according to the comment, “goes a little farther than Model Code Rule 805 in that it requires the judge to specify not only facts which he notices judicially but also his findings with respect to foreign laws, municipal ordinances and the like.” (4) Uniform Rule 10(4) has no counterpart in the Model Code and, if the other rules are read sympathetically, is superfluous:

“Rule 9. Facts Which Must or May Be Judicially Noticed. (1) Judicial notice shall be taken without request by a party, of the common law, con-
with in two situations. First, where the parties in some manner agree to the truth of the proposition, thus removing it entirely from controversy, and, second, where the court is justified by general considerations in ascertaining the truth of propositions by methods other than through the formal reception of evidence. The former—under institutions and public statutes in force in every state, territory and jurisdiction of the United States, and of such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute. (2) Judicial notice may be taken without request by a party, of (a) private acts and resolutions of the Congress of the United States and of the legislature of this state, and duly enacted ordinances and duly published regulations of governmental subdivisions or agencies of this state, and (b) the laws of foreign countries, and (c) such facts as are so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute, and (d) specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy. (3) Judicial notice shall be taken of each matter specified in paragraph (2) of this rule if a party requests it and (a) furnishes the judge sufficient information to enable him properly to comply with the request and (b) has given each adverse party such notice as the judge may require to enable the adverse party to prepare to meet the request.

"Rule 10. Determination as to Propriety of Judicial Notice and Tenor of Matter Noticed. (1) The judge shall afford each party reasonable opportunity to present to him information relevant to the propriety of taking judicial notice of a matter or to the tenor of the matter to be noticed. (2) In determining the propriety of taking judicial notice of a matter or the tenor thereof, (a) the judge may consult and use any source of pertinent information, whether or not furnished by a party, and (b) no exclusionary rule except a valid claim of privilege shall apply. (3) If the information possessed by or readily available to the judge, whether or not furnished by the parties, fails to convince him that a matter falls clearly within Rule 9, or if it is insufficient to enable him to notice the matter judicially, he shall decline to take judicial notice thereof. (4) In any event the determination either by judicial notice or from evidence of the applicability and the tenor of any matter of common law, constitutional law, or of any statute, private act, resolution, ordinance or regulation falling within Rule 9, shall be a matter for the judge and not for the jury.

"Rule 11. Instructing the Trier of Fact as to Matter Judicially Noticed. If a matter judicially noticed is other than the common law or constitution or public statutes of this state, the judge shall indicate for the record the matter which is judicially noticed and if the matter would otherwise have been for determination by a trier of fact other than the judge, he shall instruct the trier of the fact to accept as a fact the matter so noticed.

"Rule 12. Judicial Notice in Proceedings Subsequent to Trial. (1) The failure or refusal of the judge to take judicial notice of a matter, or to instruct the trier of fact with respect to the matter, shall not preclude the judge from taking judicial notice of the matter in subsequent proceedings in the action. (2) The rulings of the judge under Rules 9, 10 and 11 are subject to review. (3) The reviewing court in its discretion may take judicial notice of any matter specified in Rule 9 whether or not judicially noticed by the judge. (4) A judge or a reviewing court taking judicial notice under Paragraph (1) or (3) of this rule of matter not theretofore so noticed in the action shall afford the parties reasonable opportunity to present information relevant to the propriety of taking such judicial notice and to the tenor of the matter to be noticed.

2. Throughout this discussion of judicial notice, if confusion is to be minimized, it is essential that the word "evidence" be defined carefully and used consistently. It is essential to guard against using the word, as a layman would, to mean any kind of "information," without regard for the way in which it is received by the tribunal. "Evidence," as here used, means that
the head of judicial admissions—is considered infra §§ 2588-2596. The latter is here considered under the omnibus term judicial notice.

1. What is judicial notice?—The expression “judicial notice” is of obscure origin. Bentham discusses the subject in his works written between 1802 and 1812 but does not use the phrase "judicial notice."\(^3\) A variation of it appears, perhaps for the first time, in the sideheads of a treatise by Starkie in 1824:4 “Matters judicially noticed.” His running head reads, “Matters Noticed by the Court.” His text, however, contains no similar phrase. It seems obvious, as pointed out by Thayer, that the word “notice” in the present context connotes not casual observing or remarking or being aware of, as the word implies in popular usage today, but rather knowledge or the archaic legal term, carrying the same implication, conusance.\(^5\) It sometimes carries an imputation of chargeability with knowledge, a meaning still attributed to the word “notice” in the law.

Whatever may be the vintage of the name, it is clear that the principle of judicial notice is ancient. Bracton reported the maxim over information which is received by the trier of fact in its capacity as such, subject to the so-called formal rules of evidence—traditional rules as to burdens of proof, authentication, competency, oath, cross-examination, hearsay, opinion, best evidence and so on. The significance of this definition of “evidence,” as will be developed in text, is that “evidence” and “judicial notice” (though not strictly parallel terms) are complementary: That which is proved by evidence is not judicially noticed, and that which is judicially noticed is not proved by evidence.

3. Bentham, Rationale of Judicial Evidence (1827), in 6 The Works of Jeremy Bentham 276-76 (Bowring ed. 1843). Bentham suggested at 278, that in cases of matters notoriously true, the proponent be required to prove the fact only if the opponent not only demanded proof but declared that he disbelieved the fact (under “burthen of punishment, or ... satisfaction, or both”); he continued that “shake,—fear of disrepute, will in general be sufficient to prevent any such call from being made, in a case in which the declaration, if made, would be otherwise than sincere ...” Bentham’s proposal is not far from that involved in an unreasonable refusal to admit a fact requested under FED. R. Civ. P. 36, described in note 9 infra.

4. 1 Starkie, A Practical Treatise of the Law of Evidence 460 (1824). In a related (perhaps ancestral) context—distinguishing general acts of Parliament (where “the printed Statute Book is Evidence”) and private acts of Parliament (where “the printed Statute Book is not Evidence”—the word “notice” was used a century earlier. Gilbert, The Law of Evidence 10, 12 (1756). Gilbert (at 12-13) justified the different treatment accorded the two kinds of statutes on the ground that “no Man is understood to be possess’d of them [private statutes], as they are of those general Laws ... . Private Statutes are no Intimation to what is already known, but they are the Rules and Degrees that relate to the Private Fortune of this or that particular Man, which no one else is under any Obligation [13] to understand or take Notice of ... . [T]hey are not considered as already lodged in the Minds of the People.” (Emphasis added.) According to Professor Morgan, Gilbert’s work was written before 1726. Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 63 Harv. L. Rev. 177, 182 n.5 (1949).

seven centuries ago: *ea que manifesta sunt, non indigent probacione* ("that which is obvious need not be proved"). Application of the principle to a fact was reported in the Year Books over six centuries ago. Propriety of the principle in some sense cannot be doubted. Unfortunately, however, the term judicial notice is used in a number of senses. It is used to convey not one, but at least three conceptions or emphases.

(a) Ad hoc presumption.—In one of its uses, "judicial notice" embodies the notion that, where a matter essential to a party's case is probably true (or for any reason is unlikely to be disputed), the matter may be assumed, conditionally, to be true. That is, the judge has at his disposal a device for assigning a burden of proof (or of "challenge") to the other party. In essence, judicial notice, according to this view, has many characteristics of an ad hoc presumption.

Proponents of this view obviously dissent from the position taken in paragraph 2(b) infra that judicial notice is limited to matters indisputably true. And they accordingly dissent from the principle of § 2567 infra that judicial notice is "conclusive"; they would allow the party against whom judicial notice operates to demand formal proof of, or at least to disprove by formal evidence, the matter noticed.

This position reflects a justifiable impatience with the inflexibility of the exclusionary rules of evidence and of the rules as to burdens of proof (including presumptions). It is a cry, out of frustration, for liberation from the costly and time-consuming formality of proof under the rules of evidence in those instances where dispute is unlikely. Trial procedure might be less an object of derision if the law, before now, had fully elaborated a device of this kind. But the

6. 2 Bracton's N.B., case 194 (1222) (marginal notation).
7. Y.B. 30 & 31 Edw. I (R.S.) 256-59 (1302).
8. See the authorities cited infra § 2567, note 1.
9. Uniform Rule of Evidence 3 (following Model Code of Evidence rule 3 (1942)) contains an interesting and novel provision which may represent a concession to the need expressed in the text above. Rule 3 is not one of the judicial notice sections (all of which appear in note 1 supra). It applies not to matters patently indisputable but rather to disputable matters as to which "there is no bona fide dispute." The proposed rule provides: "If upon the hearing there is no bona fide dispute between the parties as to a material fact, such fact may be proved by any relevant evidence, and exclusionary rules shall not apply, subject, however, to Rule 45 [(discretionary exclusion of inordinately time-consuming, prejudicial, confusing and surprising evidence)] and any valid claim of privilege." The Comment to the Model Code rule states: "This Rule applies to matters of evidence the principle which the Federal Rules of Civil Procedure . . . make applicable to matters of substance in their provisions for pre-trial procedure and for summary judgment. To permit parties to insist upon a strict observance of the rules of evidence or procedure in the proof of formal matters and of evidentiary facts as to the truth of which there is no dispute is to impose unnecessary expense upon litigants and the public."

The reference in the Comment to "pre-trial procedure" is not to Fed. R. Civ. P. 16, which bears the title, "Pre-trial procedure; formulating issues." That
principle has not been elaborated. The necessary details are missing. While a strong and imaginative judge (especially if there is no jury) might be able to administer the unelaborated principle fairly and effectively, it is too sketchy for general application. Until parties can know just what kind of a showing requires or permits the judge to "notice" a fact and what sort of burden this shifts onto the adversary (to challenge, to produce some disputing evidence, to disprove), the conception is impracticable. It therefore must be rejected as anomalous.

(b) "Chargeability" of the judge.—The term judicial notice is also sometimes used to convey the thought that the court is "chargeable" with knowledge. That is, it imports that primary responsibility for obtaining (or having) certain information relevant to decision rests not with the parties but with the judge. Typically, "judicial notice" is used in this sense when the relevant information is domestic public law, but it is sometimes used in this sense when the information is facts notoriously and indisputably true. If a court is truly "charge-
able” with knowledge of a matter, it follows that the court must take judicial notice without request by the party.11 (Of course, even here the allocation of responsibility to the judge is not unqualified. The judge may solicit the aid of counsel in his effort to get correct information, and the principle of invited error may apply to penalize a party who knowingly or carelessly misleads or fails to assist the judge in his function.)

It should be discerned that the emphasis in this second use of the term is useful provided one does not draw from it the unwarranted negative inference that judicial notice may not be taken of matters of which the judge is not “chargeable” with knowledge. For judicial notice is frequently and properly taken of additional matters—for example, those which the judge may notice, and those which he must notice only upon request and upon being provided adequate information by the party (§ 2568 infra). A judge is frequently permitted on his own initiative to notice, for example, foreign law and facts indisputably true but which enjoy only local notoriety or which require resort to some reference book; and the judge is required to notice such matters, if at all, only if he is asked to do so and is provided with the necessary supporting informal information.2

(c) Informality of proof.—The name judicial notice creates an image of a third concept as well. The third, rather than emphasizing

11. See, e.g., UNIFORM RULE OF EVIDENCE 9(1), quoted in note 1 supra. For decisions involving judicial notice, in this sense, of applicable law, see Lilly v. Grand Trunk W. R.R., 317 U.S. 481, 488 (1943), and Hoyt v. Russell, 117 U.S. 401 (1886). In the Lilly case, the state court trying an FELA case, although not requested to do so, was required to notice an ICC rule, which was held to be an “integral part of the [federal Boiler Inspection] Act . . . .” In the Hoyt case, the Court stated that the trial court was “bound to know whether they [the laws of the territory] were in force in the township” in question. Cases in which the trial judge, though not requested to do so, was reversed for failure to notice a fact are rare. One such case, Mills v. Denver Tramway Corp., 155 P.2d 808 (10th Cir. 1945), so held and was criticized in 60 HARv. L. REV. 299 (1946).

Several state statutes require the court to notice certain facts as well as law. E.g., CAL. CODE CIV. PROC. § 1875 (Deering 1953); IDAHO CODE ANN. § 9-101 (1947); LA. REV. STAT. ANN. § 15-422 (1951); MONT. REV. CODES ANN. § 93-501-1 (1947); N.M.R. CIV. P. § 44(d); N.D. REV. CODE § 31-1002 (1943); ORE. REV. STAT. § 41.410 (1957); UTAH CODE ANN. § 78-25-1 (1953). These statutes, however, make no reference, one way or the other, to the necessity that notice be requested.

12. See, e.g., UNIFORM RULES OF EVIDENCE 9(2) and 9(3), quoted in note 1 supra. The following cases illustrate the kinds of matters here involved: Varcoe v. Lee, 180 Cal. 338, 181 Pac. 223 (1919); State v. Perkins, 342 Mo. 560, 116 S.W.2d 80 (1933); Pfleuger v. Pfleuger, 304 N.Y. 149, 106 N.E.2d 495 (1952). In the Varcoe case, the court sitting in San Francisco noticed that the intersection of Mission and 21st Streets in San Francisco was in the business district. In State v. Perkins, in determining whether chickens were stolen in the nighttime, the court took judicial notice “that the sun rose that morning at 4:31 a.m.” and that it was “broad daylight” at 5 a.m. And in the Pfleuger case, the New York court exercised the discretion accorded by N.Y. Civ. Prac. Act § 344-a to notice Pennsylvania law.
the “who” (which was the case with the second), emphasizes the “how.” It reflects the concept that the tribunal has the right, in appropriate instances, to inform itself as to a material matter by methods in addition to the reception of formal evidence, and it is implicit that the information may be obtained by resort to sources other than those adduced by the litigating parties.\footnote{13}

Indeed, this is the one distinguishing characteristic of judicial notice! It is the one generalization which applies in all cases, and only in cases, where it would be said that the expression “judicial notice” is properly used.

When the term is properly used, therefore, it may or may not mean that the judge has primary responsibility for injecting the information into the collective mind of the tribunal. But it always signifies that of all relevant information—information probative as to law or fact, as to liability or remedy, as to substance or procedure—the information in question is not acquired by the court through the presentation of formal evidence. Rather, the tribunal either already has the information or acquires it from a variety of sources and by a variety of relatively informal methods adapted to the situation.

This generalization about judicial notice should not be misconstrued. It does not necessarily mean that matters judicially noticed will be taken as true by the tribunal without investigation, without regard to information offered by the parties, without warning, and

\footnote{13. \textit{Uniform Rule of Evidence} 10(2), quoted in note 1 \textit{supra}, follows Model Code of Evidence rule 804(2) (1942), and states this point expressly. A number of statutes, providing for judicial notice of certain facts and practice, specify that: “In all these cases the court may resort for its aid to appropriate books or documents of reference.” \textit{Cal. Code Civ. Proc.} \textsection 1875 (Deering 1953); \textit{Idaho Code Ann.} \textsection 9-101 (1949); \textit{Mont. Rev. Codes Ann.} \textsection 93-501-1 (1947); \textit{Utah Code Ann.} \textsection 78-25-1 (1955). N.D. \textit{Rev. Code} \textsection 31-1001 (1943) provides: “No evidence of any fact of which the courts take judicial notice need be given in any civil or criminal action or proceeding pending in this state by the party alleging its existence, but any judge asked to take judicial notice thereof, if unacquainted with such fact, may refer to any person, document, or book of reference for his satisfaction in relation thereto, or may refuse to take judicial notice thereof unless and until the party making the request produces any such document or book of reference.” Referring specifically to judicial notice of foreign law, statutes in more than half of the states expressly authorize resort by the judge to informal sources. See, e.g., \textit{N.Y. Civ. Pract. Act} \textsection 344-a (par. C); \textit{Va. Code Ann.} \textsection 8-273 (1950); \textit{W. Va. Code Ann.} \textsection 5711 (1955); \textit{Uniform Judicial Notice of Foreign Law Act} \textsection 2 (adopted in 26 states). The Uniform Act provides that: “The court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information.” The New York statute states that: “Where a matter of law specified in this section is judicially noticed, the court may consider any testimony, documents, information or argument on the subject, whether the same is offered by counsel, as third party or discovered through its own research.” The Virginia statute, repeated with only minor changes in West Virginia, provides that the judge “may consult any book of recognized authority purporting to contain, state or explain the same [foreign law], and may consider any testimony, information or argument that is offered on the subject.”}
without chance for rebutting argument to the judge (although that may sometimes be the case). It means only that the truth will be ascertained by methods other than or in addition to the reception of formal evidence.

2. What matters are noticed?—The determination as to what information need not be adduced as formal evidence (i.e., what may be judicially noticed) reflects a judgment of appropriateness made by the courts on the basis of experience over the years. The determination depends sometimes on the nature of the information itself and sometimes on the nature of the proposition that the information is offered to prove. The situation is confused and exception-riddled. But it can be said that the vast majority of cases in which the principle of judicial notice is applied involve one or the other of the following judgments as to appropriateness:

(a) Law and legislative facts.—It is considered appropriate that a court not be limited to formal evidence in its determination of matters of law. That is, the “rules” applied by the court are judicially noticed. The judge is an expert in the law. The formal rules of evidence are not necessary or even helpful in screening the information on which the judge bases his ruling. And, since rulings on law should be the same in two similar cases and may be accorded stare decisis effect, they should not be based solely on the information which the parties to the instant controversy choose to adduce. There is agreement, therefore, that, while the court may hear the parties in its search for correct law, and may even solicit their aid, it is not required to limit itself to information supplied by the parties nor to permit the parties to address the trier of fact (judge or jury) by introducing formal evidence on the matter. This is so whether the court’s search is for the words of a public statute, at one extreme, or for particular facts (legislative facts) relevant to the meaning or constitutionality of a statute or common law rule, at the other. It is so whether the data are indisputable or disputable. And it is so whether the law in question pertains to liability, remedy or procedure and before, during or after trial. (Unfortunately, and perhaps because of an erroneous belief that judicial notice is limited to those matters of which the judge is “chargeable” with knowledge (paragraph 1(b) supra), the full freedom of judicial notice is usually not given to the judge when the law governing the case is foreign or lesser-known domestic law.)

(b) Indisputable adjudicative facts.—It is considered appropriate that a court not be limited to formal evidence in its determination even of some matters of fact—an area in which it is generally assumed that the tribunal should confine itself, first, to information offered by
the parties and, second, to information subject to rules of evidence guaranteeing its sufficiency and trustworthiness. It should be clear that the desirability of confining decision to evidence offered by the parties must give way when the fact is patently indisputable. This is because adherence to the general adversary principle risks an obviously erroneous finding arguably leading to injustice in the particular case and certainly making the court appear ridiculous. And insistence upon adherence to the formal rules of evidence, energy- and time-consuming as they are, is scarcely justifiable when the fact is patently indisputable.

There are two other, less often mentioned, areas in which the term judicial notice properly applies. Both deal with matters relevant to propositions of fact, and both overlap to some extent the kind of judicially noticed (indisputable) matters just mentioned:

(c) Facts relevant to judge-imposed criminal sentence.—It is considered appropriate (at least, it has been established by tradition) that the judge with responsibility for imposing criminal sentence not be limited to formal evidence or information offered by the parties when his objective is to resolve propositions of fact relevant only to the imposition of the sentence. Imposition of sentence almost

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14. See, e.g., Williams v. New York, 337 U.S. 241, 246-47, 250 (1949). In this case, the defendant was convicted by a jury of first degree murder. While committing a burglary, defendant had killed a 15-year-old girl by striking her with an iron bar. The jury recommended life imprisonment. The judge rejected the recommendation and imposed the death sentence. In doing so, he relied on a pre-sentence investigation report provided for by New York statute. Information expressly considered by the judge included defendant's alleged participation in thirty other burglaries (he had confessed to some, been identified as the perpetrator of others, but had been convicted of none) and his "morbid sexuality." The United States Supreme Court rejected the argument that the procedure employed by the judge violated the due process clause:

"[246] Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. . . . In addition to the historical basis for different evidentiary rules governing trial and sentencing procedures there are sound practical reasons for the distinction. In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused. Rules of evidence [247] have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time-consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory . . . limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence
always involves a broad exercise of discretion and, as in rulings on the law, a special responsibility to see that the action taken is in harmony with action taken in other, similar cases. The judge frequently could not fulfill his responsibility intelligently if his information were limited to that admissible in evidence, that tendered by the parties, or that which is indisputably true and therefore noticeable under paragraph (b) above.

(d) Background facts ("jury notice").—It is considered appropriate that a judge or juror be permitted to employ, inconspicuously and interstitially in his elementary processes of understanding and reasoning, his beliefs (though they are not in evidence) which he reasonably thinks he shares with other intelligent persons as to the general nature of things—the meanings of ordinary words, typical modes of human

is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial. . . .

[250] We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. . . . Such a procedure could endlessly delay criminal administration in a retrial of collateral issues."

A similar phenomenon—resort to extra-record, disputable information in fashioning a remedy—is common practice in administrative proceedings. See, e.g., NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1952). In that case, the Court approved the action of the NLRB in applying to the case before it the so-called "Woolworth formula" for computing back pay of a discriminatorily discharged employee. The Court, at 349, rejected the argument that the Board was limited, in its selection of remedy, to the record of the particular proceedings. Strong arguments exist for the extension of this liberal practice to judicial cases where the remedy amounts to much more than a settlement of a private dispute. A decree in a large anti-trust case, for example, may also be an enunciation of policy with far-reaching implications. There is language in United States v. Aluminum Co. of America, 148 F.2d 416, 446 (2d Cir. 1945), which might be misconstrued as allowing courts, in some instances, to notice even disputable matters relevant to fashioning decrees. In that case, the government alleged violations of the anti-trust laws by defendant. The trial judge, after a two-year trial beginning in 1938, dismissed the case. By the time the case reached the appellate court, enormous changes in the situation had been wrought by World War II. These changes were catalogued in the so-called "Truman Report." Speaking for the court, L. Hand, J., said, "we refuse to take 'notice' of facts relevant to the correctness of the findings; but we do take 'notice' of those relevant to remedies." The court therefore limited itself to the evidence before the trial judge in holding that the judge was wrong in dismissing the case, but took account of the later, informal information for purposes of refusing to formulate and enter a decree. The case was remanded for the trial judge to fashion the decree. See United States v. Aluminum Co. of America, 35 F. Supp. 820, 823-25 (S.D.N.Y. 1940); see Note, The Hearsay Rule in Civil Antitrust Suits, 60 Yale L.J. 363 (1951). But there is no indication in the opinion that judicial notice rather than formal evidence was relied on to establish disputable specific facts central to the remedy.
behavior, causal relations between commonplace events, and the like. In most instances these beliefs, assumptions, preconceptions, are true in the sense relevant to the controversy. In most of the remaining instances, either the error or the issue is relatively trivial. And the remainder of instances illustrates a largely unavoidable characteristic of a fact-finding system employing imperfect human beings. A trial, after all, is a human process, and the judge and jury must be accepted with their normal human characteristics. This assumes that any one of them will have beliefs which are at least partially wrong, that no two of them will share exactly the same beliefs, and that the reasoning processes of no two will operate in exactly the same way.

As indicated in paragraph (a) above, all matters relevant to law (at least to domestic public law) are judicially noticed, so no special category for "background facts" is necessary where proof of tenor of the law is the use made of the information. The category is important, however, where a determination of fact or an application of law to fact is involved. Since these typically are functions of the trier of fact—of the jury if there is one—this category of judicial notice is often referred to by the somewhat misleading name "jury notice."

Information falling within "jury notice," because of its elusive, elemental nature, is usually not expressed in any formal way at the trial (although often it is employed in argument by counsel). It is simply assumed to be playing its catalytic role in the jurors' minds. Thus, since the borderline between "background" facts and what might be called "foreground" facts is impossible to define, it should come as no surprise that a "jury noticed" fact is sometimes flushed to the surface by a party and is there subjected to the test of judicial notice in the traditional sense (paragraph (b) above) and, if it fails that test, to the requirement of proof by formal evidence.15

15. In addition to the cases cited infra §§ 2569 (judge's private knowledge) and 2570 (jury's own knowledge), see the following cases illustrative of the line between jury notice and judicial notice, and between jury notice and evidence.

On the question of admissibility of expert testimony as to matters which might be thought to be within the area of common knowledge, compare Nelson v. Brames, 241 F.2d 256 (10th Cir. 1957); United States v. Hiss, 88 F. Supp. 559 (S.D.N.Y. 1950); and Piechota v. Rapp, 148 Neb. 443, 27 N.W.2d 682 (1947), with Gibson v. United States, 200 F.2d 336 (3d Cir. 1952) (brief for appellant, appendix, pp. 22a-24a); State v. Chingren, 105 Iowa 169, 74 N.W. 946 (1898); and Commonwealth v. Marzynski, 149 Mass. 68, 21 N.E. 228 (1889). In the first three cases, expert evidence was admitted on the questions, respectively, of the manner in which chains on automobile tires affect skidding on ice, of the relation between a witness' demeanor on the stand and his credibility, and of the fact that alcohol has a retarding effect on the reflexes. In the latter three cases, expert evidence was excluded where offered to prove, respectively, that medical advice given by a physician was not proper, that there was a custom to mark up the price of land where it was traded for merchandise, and that cigars are drugs or medicines.
3. Summary.—What are the considerations dominant in the principle of judicial notice in its two main areas of application? In judicial notice of law, the dominant considerations are the expertness of the judge and the unique responsibility of the judge to determine law consistently with determinations in other, similar cases and with a view to the impact on later cases. The considerations dominant in the principle of judicial notice of indisputable adjudicative fact are the saving of time and prevention of flagrant mistake.

What does the theory of judicial notice leave to formal evidence? If facts relevant solely to criminal sentence (§ 2(c) above) and matters comprising the judge or jury’s elementary common general beliefs

On the question of what a judge may say to the jury by way of comment, necessarily involving general propositions of fact, compare Quercia v. United States, 289 U.S. 466, 468 (1933) (fully cited supra § 2551, note 7), where it was held error for the trial judge to remind the jury that the defendant “wiped his hands during his testimony” and that “that is almost always an indication of lying,” with Marshall v. State, 54 Fla. 65, 71, 44 So. 742, 743 (1907), where it was held proper for the judge to instruct the jury to “bring to bear upon the consideration of the evidence . . . all that common knowledge of men and affairs, which you, as reasonable men have and exercise in the everyday affairs of life.” See also cases cited supra §§ 2551, 2551a.

For a discussion of the limits of argument by counsel, see §§ 1806 and 1807 supra. See also Levin & Levy, Persuading the Jury with Facts Not in Evidence: The Fiction-Science Spectrum, 105 U. Pa. L. Rev. 139 (1956). And, with respect to reversal of judicial action because it is based in part on information not in evidence, compare United States v. Wilson, 284 F.2d 407 (4th Cir. 1960), with United States v. Hayashi, 282 F.2d 599, 602 (9th Cir. 1960), and Tennessee Gas Transmission Co. v. Hall, 277 S.W.2d 733 (Tex. Civ. App. 1955). In the Wilson case, the judge, for purposes of imposing a longer sentence, had noticed that 72 rifles stolen from the government, which were produced and observed in court, were worth more than $100. He was reversed. In the Hayashi case, the court, in an action for wrongful death, assumed arguendo that there was sufficient evidence of damages to one daughter and insufficient evidence of damages to another daughter, but sustained the jury award to both daughters on the ground that “the court would be entitled to take judicial notice of that fact that in the normal family the father has equal love and affection for all of his children and provides equal care, guidance, discipline and support.” In the Hall case, a verdict was general and although the jurors were motivated, in setting the value of an easement, by the possibility, raised by some jurors during deliberations, that a “chisel” plow might dig deep enough to penetrate the underground gas line, causing gas to escape. (Distinguish the parol-evidence-rule principle which may be employed to protect verdicts from attack even if the matter considered by the jury is neither in evidence nor properly a subject of jury notice.)

The fundamental, and yet elusive, character of “jury notice” is emphasized by the following two quotations: Thayer, A Preliminary Treatise on Evidence at the Common Law 279-80 (1898): “The subject of judicial notice, then, belongs to the general topic of legal or judicial reasoning. It is, indeed, woven into the very texture of the judicial function. In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved; and the capacity to do this, with competent judgment [280] and efficiency, is imputed to judges and juries as part of their necessary mental outfit.” And Bitterman, The Evaluation of Psychological Propositions, in Levin, Evidence and the Behavioral Sciences III-A-16 (mimeo. 1956): “Our everyday experience of the world comes in crude, unrepresentative chunks, with casual relations hopelessly obscured, and with prejudice, superstition, and self-interest inextricably intertwined in perception.”
used only interstitially in their understanding and reasoning pro-
cesses (2(d) above) can be treated separately, this can be said: What
in theory is left to formal evidence is information which is not patently
indisputable (2(b) above) and which is relevant to what is known
as factual inquiry (2(a) above). That is: What is left to formal
evidence is disputable adjudicative facts.

The following diagram illustrates the complementary roles played
by judicial notice and formal evidence in the process of informing
the court as to matters relevant to decision:

SCOPE OF JUDICIAL NOTICE

NOTE: The large cube purports to represent all information employed by
a court in arriving at a decision. The three dimensions are employed to
illustrate the significance of three distinctions relating to kinds of facts or
purposes for which they are employed. Not illustrated is the important but
elusive distinction which qualifies matter for so-called "jury notice."
§ 2566. ANOMALOUS MEANINGS OF THE TERM JUDICIAL NOTICE

[Author's Note. The proposed revision of this section involves so few changes from the third edition (1940) that the section is omitted here. The only significant addition to the "anomalous meanings of the term judicial notice" now contemplated is the "judicial notice presumption." That is the view of judicial notice preferred by Dean Wigmore himself but opposed by Professor Morgan and rejected in the revisions of §§ 2565 and 2567 here proposed.]

§ 2567. EFFECT OF JUDICIAL NOTICE—IS IT CONCLUSIVE?

There are two views as to the "conclusiveness" of judicial notice. On one side of the argument may be found Wigmore, following Thayer in the view that judicial notice is not conclusive; on the other side, asserting that judicial notice is conclusive, is Morgan:

Wigmore, 9 Evidence § 2567 (3d ed. 1940): (a) That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. This is because the Court assumes that the matter is so notorious that it will not be disputed. But the opponent is not prevented from disputing the matter by evidence, if he believes it disputable. It is true that occasionally a Court is found declaring a thing judicially noticed and at the same time refusing to listen to evidence to the contrary; but usually this is in truth laying down a new rule of substantive law by declaring certain facts immaterial; whenever a Court forbids the production of evidence, it removes the subject from the realm of the law of evidence properly so called.

(b) The process of taking judicial notice often may imply incidentally a ruling as to the respective functions of judge and jury. Does it signify that the settlement of the matter rests with the judge and not with the jury, that the jury are to accept the fact from the judge, and that so far as any further investigation is concerned, it is for the judge alone? Such is the view sometimes found, in decisions as well as statutes. Yet it seems rather that the jury are not concluded; that the process of notice is intended chiefly for expedition of proof; and that since the fact is disputable by the opponent (supra, par. a), it remains possible for the jury to negative it. In those classes of facts, however, in which the judge has the function of decision and not the jury (ante, §§ 2549-2559), it would be true, so far as any such facts were capable of notice, that the judge's determination is exclusive; but this would not be by virtue of the doctrine of judicial notice.

(c) That the appellate tribunal is not concluded by the ruling of the trial Court, would seem clear. The appellate tribunal may re-examine the question of judicial notice, not only by re-considering the information used by the trial Court, but also by considering additional information.

Morgan, 57 Harv. L. Rev. 269, 273–74, 279, 285 (1944): In an adversary system such as ours, where the court is bound to know the law and the
parties to make known the facts, it is particularly important that the court prevent a party from presenting a moot issue or inducing a false result by disputing what in the existing state of society is demonstrably indisputable among reasonable men. Just as the court cannot function unless the judge knows the law and unless the judge and jury have the fund of information common to all intelligent men in the community as well as the capacity to use the ordinary processes of reasoning, so it cannot adjust legal relations among members of society and thus fulfill the sole purpose of its creation if it permits the parties to take issue on, and thus secure results contrary to, what is so notoriously true as not to be the subject of reasonable dispute, or what is capable of immediate and accurate demonstration by resort to sources of indisputable accuracy easily accessible to men in the situation of members of the court. This, it is submitted, [274] is the rock of reason and policy upon which judicial notice of facts is built . . .

[279] If taking judicial notice of a matter means that it is indisputable, it must follow that no evidence to the contrary is admissible. If evidence to the contrary of what is judicially noticed is admissible, it must follow that the basis of judicial notice is not the prohibition against presenting moot issues and against maintaining a claim or defense on a false issue; its basis must be only convenience in trial, and the applicable considerations must be almost identical with those governing the allocation of the burden of proof. . . .

[285] The truth, then, is that there are at least some matters of fact in the realm of judicial notice which are not subject to contradiction by evidence, and that the decisions rejecting or disregarding the contrary evidence can be explained on no other theory. It is also true that in some cases a trial judge has been reversed for rejecting evidence as to matter which he ruled to be within the domain of judicial notice. There is not a single decision reversing, and it is believed not a single judicial expression disapproving, the action of a trial judge in rejecting evidence of a matter held by the appellate court to be a proper subject of judicial notice. The reversals are easily explained as holding that the matter in question was not within the field of judicial notice. The decisions affirming the rulings rejecting the contrary evidence, as well as others reversing rulings receiving or giving effect to such evidence, cannot be harmonized with Mr. Wigmore's theory. In his opinion there is no matter of fact that is not subject to dispute. . . .

Are these learned authors [Wigmore and Thayer] really making the field of judicial notice a segment of the field of presumptions? . . .

The difference of opinion is not complete. There is no difference of opinion as to matters of law. Where judicial notice of law is proper, it is agreed that a judge is not obliged to receive formal evidence to rebut his taking of judicial notice of any matter (legislative facts) helpful in determining the tenor of that law. Even with respect to matters of fact, the disagreement is not pervasive. There is no dissent from the proposition that judicial notice of the rarely mentioned matters of fact relating to judge-imposed sentences is not rebuttable by formal evidence. There may even be no disagreement as to the rebuttability of “jury notice” of the vague and almost indefinable
matters of belief used peripherally in the reasoning process, but this point has not been emphasized and is therefore unclear. The real difference between these authorities is limited to rebuttability of judicial notice where it is applied to other matters of fact. Disregarding for the moment "jury-notice" facts and "judge-sentencing" facts, it can be said that the dispute relates to the rebuttability of judicial notice of "adjudicative facts." The question is this: Assuming that it is proper to take judicial notice of information central to what is called the factual component of a determination of liability or remedy, may the prejudiced party rebut the judge’s determination by formal evidence tendered to the trier of fact?

Wigmore and Thayer say yes.1 Morgan says no.2 The cases and

§ 2567. 1. See the quotation in text supra from 9 Wigmore, Evidence § 2567 (3d ed. 1940). In accord are Thayer, A Preliminary Treatise on Evidence at the Common Law 308 (1898) ("Taking judicial notice does not import that the matter is indisputable. It is not necessarily anything more than a prima facie recognition, leaving the matter still open to controversy"); Tracy, Handbook of the Law of Evidence 48 (1852) ("a judge may take judicial notice of a fact whose existence is really doubtful. Objecting counsel is not bound by the ruling if he has evidence to offer to the contrary"); Davis, Judicial Notice, 55 Colum. L. Rev. 945, 979 (1955) ("requests for reconsideration of rulings on judicial or official notice must be entertained and the judge or officer must have the discretionary power, as now, to allow or to deny opportunity to support the request with argument or with evidence"). Bentham, as indicated supra § 2565, note 3, urged a device of this kind. Two great judges have announced dicta in support of this interpretation of the law: Cardozo, J., in Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292, 301 (1937), and L. Hand, J., in United States v. Aluminum Co. of America, 148 F.2d 416, 446 (2d Cir. 1945). For a full citation of these two cases and for other cases supporting the Wigmore view, see note 3 infra.

2. See the quotation in text supra from Morgan, 57 Harv. L. Rev. 269, 272-74, 279, 285 (1944). In agreement with the Morgan position are Maguire, Evidence—Common Sense and Common Law 174 (1947) ("the judge's decision to take judicial notice should be final"); Keeffe, Landis & Shaad, Sense and Nonsense About Judicial Notice, 2 Stan. L. Rev. 664, 668 (1950) ("The better view would seem to be that a fact, once judicially noticed, is not open to evidence disputing it"); McCormick, Judicial Notice, 5 Vandy. L. Rev. 236, 321-322 (1952) ("the weight [322] of reason and the prevailing authority support the view that a ruling that a fact will be judicially noticed precludes contradictory evidence and requires that the judge instruct the jury that they must accept the fact as true"); Nokes, The Limits of Judicial Notice, 74 L.Q. Rev. 59, 72-73 (1958) ("On principle there would seem to be no doubt that judicial notice is final. . . . However, there may occur circumstances in which judicial notice presents the appearance of operating as the equivalent of a rebuttable presumption, when its effect provides an apparent or actual parallel to prima facie evidence. Yet these circumstances occur only when judicial notice is inapplicable or partial or premature").

Uniform Rule of Evidence 11 (quoted supra § 2565, note 1) and Model Code of Evidence rule 804 (1942) accord with the Morgan view, set out in text supra. The comment to the Model Code rule states: "If a matter falls within the domain of judicial knowledge, it is beyond the realm of dispute; therefore, evidence is unnecessary. It is the judge's function to decide whether a matter is a subject of evidence or of judicial notice. . . . In a few cases it is said that the judge should have received evidence offered to show the opposite of what he declared to be a judicially noticed fact. What is meant is that the subject did not fall within the realm of judicial notice." See the cases in note 3 infra, some of which support the Morgan view.
3. The following cases are the ones commonly cited in support of or in opposition to the proposition that judicial notice is "conclusive." Most of the cases, for reasons apparent from reading the abstracts below, are distinguishable. Perhaps a dozen of them, properly interpreted, involve judicial notice not of fact but of law, where there is no disagreement that (if the law may be noticed at all) notice is "conclusive." See, e.g., Laubenheimer v. Factor (Fed.); Young v. Boy Scouts of America (Cal.); State v. Cromwell (N.J.). A few of the cases involve rejection of evidence offered not to rebut but to support the matter noticed. See, e.g., Stocker v. Boston & Maine R.R. (N.H.). At least two of the cases involve rejection of evidence offered to prove a matter held by the court not to be properly in issue. State ex rel. Landis v. Thompson (Fla.); Ex parte Kair (Nev.). One decision straddles the issue, making "judicial knowledge" conclusive but "judicial notice" rebuttable! State v. Lawrence (Utah). A number of the decisions purporting to support the Wigmore view involve situations in which, without regard to rebuttability, the matters were obviously inappropriate for judicial notice in the first place. See, e.g., In re Bowling Green Mill Co. (Fed.); Scheufler v. Continental Life Ins. Co. (Mo.); Llubera v. Mercado E Hijos (P.R.); State ex rel. Attorney General v. Norcross (Wis.). Or they involve situations in which the court is concerned not with rebuttability of a matter noticed but rather with opportunity to be heard on the question whether notice should be taken. See, e.g., Ohio Bell Tel. Co. v. Public Util. Comm'n. (Fed.) (dealing, in any event, with procedures before an administrative agency, distinguished infra in discussion of Federal Administrative Procedure Act § 7(d)); Panama Canal Co. v. Wagner (Fed.). And, in many of the cases, the point one way or the other is made almost gratuitously and is therefore barest dictum. See, e.g., United States v. Aluminum Co. of America (Fed.) (supporting rebuttability); Phelps Dodge Corp. v. Ford (Ariz.) (supporting conclusiveness); Board of Comm'rs. of Crawford County v. Radley (Kan.) (supporting rebuttability). Perhaps the strongest cases in support of the principle of "conclusiveness" are the Beardsley (Conn.), Larue (Kan.) and Marzynski (Mass.) cases, although the Nicketta (Ill.) and Taylor (Eng.) cases, dismissing complaints because it was judicially noticed that pleaded facts were untrue, are also strong by implication. The best cases arrayed against "conclusiveness" probably are the Ohio Bell and Aluminum Co. cases (both Fed.), where respect is commanded by the greatness of the opinion-writers rather than by the relevance of the dicta to the facts, and the Timson (Mo.) and Duranteau (N.H.) cases, where judgments were overturned ostensibly (although this is not clear) to permit the party against whom judicial notice was taken to introduce evidence in rebuttal.

United States: Federal: Lane v. Sargent, 217 Fed. 237, 238-39 (1st Cir. 1914) (action in federal court sitting, with jury, in New Hampshire, for injuries sustained in an accident in Massachusetts; on the theory that the "foreign law" of Massachusetts must be proved as a fact, defendant offered in evidence, to be read to the jury, three decisions of the Massachusetts Supreme Judicial Court, the evidence was rejected by the trial judge on the ground that "the question is a question of law for the court to pass upon, and the court is very glad to have any citation of Massachusetts law submitted to the court, and the court will instruct the jury upon what the Massachusetts law is"; held, judgment for plaintiff affirmed; the court "take[s] judicial notice of the Constitution and public laws of each state of the Union . . . those laws are known to the court . . . as laws alone, needing no averment or proof"); Seebach v. United States, 262 Fed. 885, 888 (8th Cir. 1919) (conviction for willful attempts to cause insubordination and refusal of duty in military forces during time of war; the trial court in its charge judicially noticed that the United States was at war when the acts were done; no contrary evidence had been offered and no objection was made; semble: "So far as judicial notice is concerned, see . . . [three Supreme Court decisions]. Judicial notice having been properly taken of a fact not embracing the entire issue made by the plea of not guilty, it was not necessary to submit it to the decision of the jury. In effect it became a matter of law for the court to instruct them"; the court then quoted, in support of its position, language
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Justifying a trial judge in instructing a jury “as to the principles applicable to the case” where all of the evidence on an issue is “clear and uncontradicted”; Ohio Bell Tel. Co. v. Public Util. Comm’n, 301 U.S. 292, 300–02 (1937) (commission, in determining that rates charged by the company between 1926 and 1933 were excessive, ascertained the value of company property during those years by modifying the value on June 30, 1925, in accordance with changes in price trends; reliance was placed on the tax value of land in relevant communities, on price indices in a recognized engineering magazine, and on a finding in a federal proceeding relating to price levels; the data were not in evidence and no warning, prior to the filing of the report in 1934, was given to the company that the extra-record data would be relied on; the commission refused to permit the company to submit evidence as to the value of its property during each year; opinion by Cardozo, J.; held, that “[300] The fundamentals of a trial were denied to the appellant where rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record”; reliance upon undisclosed “underlying proofs” is “not the fair hearing essential to due process”; a tribunal may take judicial notice of the fact that prices have gone down, but “[301] not of the extent of the depreciation at a given time and place”; “Moreover, notice, even when taken, has no other effect that to relieve one of the parties to the controversy of the burden of resorting to the usual forms of evidence. . . . [Citing Wigmore.] It does not [302] mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable”; decree reversed); Laubenheimer v. Factor, 61 F.2d 626, 630 (7th Cir. 1932) (habeas corpus; federal court, sitting in Illinois, in determining whether the crime for which England wanted petitioner extradited was also a crime in Illinois, the place of asylum, relied on testimony of experts as to Illinois law; held, trial court's order discharging petitioner on habeas corpus reversed; “federal courts take judicial notice of the public laws of all states, and of course the particular state wherein the court is sitting. . . . We are satisfied that the District Court erred in holding the question to be one of fact, and in according effect to the testimony of legal experts”); In re Bowling Green Mill Co., 132 F.2d 279, 283 (6th Cir. 1942) (to prove priority in bankruptcy proceeding, farmers holding so-called “white receipts” sought to show that the relationship between them and the bankrupt mill was bailor-bailee; the trial court took judicial notice of a custom in Kentucky that the relationship was one of sale; held, that the receipt-holders were bailors; a court may judicially notice a general custom, but there was no such custom in this case; first mention of the custom was in the district court's opinion; “Usage or custom cannot be availed of to dispense with evidence unless the fact shown is certain and indisputable.” [The quotation from page 301 of the Ohio Bell case, supra, taken from Wigmore, is then quoted.]); United States v. Aluminum Co. of America, 148 F.2d 416, 446 (2d Cir. 1945) (see facts of the case supra § 2565 note 14; L. Hand, J.: “facts which a court may judicially ‘notice’ do not for that reason become indisputable. Wigmore, § 2567a”); United States v. Grady, 225 F.2d 410, 416–17 (7th Cir. 1955) (prosecution for violation of Commodity Exchange Act; an issue was whether the Chicago Open Board of Trade was a “contract market”; it had been so designated by federal regulations promulgated pursuant to statute, and proper copies of the regulations were received in evidence over defendant's objections; the trial judge instructed the jury that he found “as a matter of law, that the Chicago Open Board of Trade is a contract market within the meaning of the Commodity Exchange Act and you are so instructed”; defendant contended that the issue was one of fact for the jury; held that the judge could have taken judicial notice of the fact, so it was “unnecessary to submit this facet of the case to the jury”; semble (at 417) that defendant could have offered evidence disputing the matter noticed, but that he did not do so, quoting Wigmore, § 2567 with approval); Panama Canal Co. v. Wagner, 294 F.2d 165, 169–70 (5th Cir. 1961) (injury from faulty stairway; on the issue of assumption of risk, the trial court on its own motion took judicial notice of the fact that tenants in the Zone are assigned to their quarters and have little choice of assignments; defendants were allowed a month in which to “advise the Court whether or not they desire to submit proof on the factual assumptions which the Court took judicial notice thereof” ; no proofs were offered; judgment for plaintiff affirmed; Rives, J., in concur-
ring opinion, approved of the use of judicial notice, but stated (at 170) that:

"The saving grace of the ruling, I think, is that the district court expressly
recognized the right of the appellant to dispute that matter judicially noticed
by evidence if it believed it disputable, thus differing from those courts
which refuse to hear evidence concerning matters of which they take judicial
notice"

Distinguish Administrative Procedure Act § 7(d), 60 Stat. 241, 242 (1946),
5 U.S.C. § 1006(d) (1958). It provides: "Where any agency decision rests on
official notice of a material fact not appearing in the evidence in the record,
any party shall on timely request be afforded an opportunity to show the
contrary." The procedures employed by administrative agencies in acquiring
information are for a number of reasons quite different from those used by
courts. See §§ 4(a)-(c) supra; GELLHORN & BYRE, ADMINISTRATIVE LAW 866-69
(4th ed. 1960). Significantly, in administrative proceedings there is no
jury and there is substantial relaxation of the rules of evidence. In such a
context, of course, it makes no sense to draw a distinction between opportunity to
be heard informally by the judge on the question whether notice should be
taken on the one hand, and opportunity to offer formal evidence to the jury
in rebuttal of a matter noticed by the judge on the other. In courts, where the
distinction does make sense, the parties are afforded "an opportunity to show
the contrary" only by way of the former of these two methods. See § 2568
infra; Uniform Rules of Evidence 10(1), 12(4) (quoted supra § 2563 n.1).

MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 9(4) (1946): "Agencies may
take notice of judicially cognizable facts and in addition may take notice of
general, technical, or scientific facts within their specialized knowledge.
Parties shall be notified either before or during hearing, or by reference in
preliminary reports or otherwise, of the material so noticed, and they shall
be afforded an opportunity to contest the facts so noticed. Agencies may
utilize their experience, technical competence, and specialized knowledge in
the evaluation of the evidence presented to them." (Emphasis added.) Either
this provision or one similar to it appears in the legislation of a number of
states. The irrelevance of administrative agency official-notice practice to the
question of rebuttability of judicial notice is explained supra in the discussion
of the Federal Administrative Procedure Act § 7(d).

the end of this footnote).

Arizona: Phelps Dodge Corp. v. Ford, 68 Ariz. 190, 196, 203 P.2d 633,638
(1949) (action under state occupational disease disability law; plaintiff al-
leged total disability caused by silicosis; industrial commission found for
plaintiff, judicially noticing that silicon dioxide dust in harmful quantities
existed; held, award set aside; dictum: "A fact of which a court may take
judicial notice must be indisputable. This being true it follows that evidence
may not be received to dispute it"; held also that the commission could not,
in making the finding, rely on findings it had made in earlier cases); Utah
"A fact to be judicially noticed must be certain and indisputable, requiring
no proof, and no evidence may be received to refute it"); Verner v. Redman,
77 Ariz. 310, 314, 271 P.2d 367,370 (1954) (suit to enjoin construction of
service station; trial judge granted the injunction, taking judicial notice that
the building would depreciate the value of residential property three blocks
away, thus dispensing with evidence of special damages to the petitioners;
held, distinguishing earlier cases where the affected property was in proximity,
that judicial notice here was improper and judgment reversed; "the fact of
damages [must be] so certain and indisputable that evidence will not be
received to refute it").

California: People v. Mayes, 113 Cal. 618, 627, 45 Pac. 860, 862 (1896) (prosecu-
tion for stealing a blue steer; witness for defendant testified that "betwixt
nine and ten" or "along about ten o'clock" on the night in question, while the
moon was up and shining, he saw one of the state's witnesses driving a dark
colored animal; although no evidence was introduced on the point, the judge
charged the jury that the moon on that night rose at 10:57 o'clock; defendant
was convicted; on his motion for a new trial, he filed the affidavit of a third
person to the effect that the moon rose at 10:35 p.m.; conviction affirmed;
judicial notice was proper and, per CAL. CODE CIV. PROC. § 2102 (Deering
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W 1953): "Whenever the knowledge of the court is by this Code made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it"; the affidavit is mere hearsay "insufficient to overcome the presumption of the correctness of the court's statement to the jury"; Young v. Boy Scouts of America, 9 Cal. App. 2d 760, 764, 51 P.2d 191, 193 (1935) (action against Boy Scouts of America for negligence in selection of scout master who allegedly instructed juvenile plaintiff to ride bicycle at night in such a way as to be injured by automobile; demurrers, based on immunity of charitable organizations, sustained; judicial notice taken of the act of Congress under which Boy Scouts was organized and of the constitution and by-laws filed with Congress pursuant to the act, showing it to be a charitable institution; "Any allegations of the complaint which conflict with facts of which we must take judicial notice must be disregarded"). The statute,

Connecticut: State v. Main, 69 Conn. 123, 136, 37 Atl. 80, 84 (1897) (information for violation of statute relating to destruction of trees diseased by "peach yellows"; judicial notice taken that the disease existed and was serious; held that statute was constitutional and that it was not the function of the jury to pass on constitutionality; "If, in regard to any subject of judicial notice, the court should permit documents to be referred to or testimony introduced, it would not be, in any proper sense, the admission of evidence, but simply a resort to a convenient means of refreshing the memory, or making the trier aware of that of which everybody ought to be aware. The defendant, therefore, had no right to have the jury pass upon the danger of contagion from trees affected by the yellows, as a means of determining the constitutionality of the statute"); Beardsley v. Irving, 81 Conn. 498, 491, 71 Atl. 580, 581 (1909) (breach of warranty as to soundness of a horse; verdict for plaintiff necessarily depended on a finding by the jury, based on conflicting testimony, that the contract was not entered into on a Sunday; new trial ordered; "The defendant was entitled to have the jury plainly and clearly instructed whether or not June 3, 1906, came upon a Sunday. ... The nature of the subject, the issue involved, and the apparent necessities of the case, require the court to notice judicially which of these days was Sunday").

Florida: State ex rel. Landis v. Thompson, 121 Fla. 561, 572, 164 So. 192, 197 (1935) (attempt to attack the validity of a legislative enactment in a motion for writ of ouster; court refused to test the correctness of the legislative record, indicating passage of the measure, in such a collateral proceeding; "so long as the questioned journals purport to stand as conclusive records of the Legislature, valid on their face, they must be judicially noticed as such by the courts in all proceedings not directly involving an adjudication as to the verity of such records. Judicial notice not only supplies the want of evidence to establish the fact judicially noticed, but necessarily precludes all attempts to proffer contradictory evidence to refute what the court holds that it must judicially know in the circumstances"); Schriver v. Tucker, 42 So. 2d 707, 709-10 (Fla. 1949) (habeas corpus; accused objected to sufficiency of papers attached to rendition warrant in extradition proceedings; the court, assuming arguendo that the parties stipulated that the papers did not include the required Requisition of the Governor of Illinois, denied habeas corpus; "even if it be considered that it was so stipulated, this court cannot consider itself bound by such stipulation in the instant case. ... This court will take judicial notice, as the court below could have done, of the records of extradition proceedings on file in the office of the Secretary of State. ... From such records, it affirmatively appears that there was submitted to the Governor of Florida by the Governor of Illinois an official Requisition ... [710] [Citing the Landis case, supra] 'Judicial notice ... necessarily precludes all attempts to proffer contradictory evidence'"; Makos v. Prince, 64 So. 2d 670, 673 (Fla. 1953) (liquor dealers sought to enjoin commissioners from enforcing an allegedly arbitrary resolution setting different hours-of-sale for different parts of the country; trial judge dismissed the bill, taking judicial notice that the areas were sufficiently different socially and economically to make the resolution reasonable; held, remedied with instructions that dealers be permitted to file an amended bill disputing the matters noticed; "as to matters of which the court may take judicial notice because they are matters of common knowledge, as distinguished from certain official records ... [citing the two cases abstracted supra], the rule is that the fact that a matter
is judicially noticed means merely that it is taken as true without the necessity of offering evidence by the party who should ordinarily have done so. This is because the court assumes that the matter is so notorious that the matter will not be disputed. But the rule does not prevent an opponent's disputing the matter by evidence if he believes it disputable. Wigmore on Evidence, 3d Ed., Section 2567 p.535).

Georgia: Mutual Life Ins. Co. v. Davis, 79 Ga. App. 336, 339, 53 S.E.2d 571, 574 (1949) (action for double indemnity under contract which precluded double indemnity for death resulting from military service in time of war; death was from explosion of ammunition dump in Germany on August 19, 1945; defendant, on ground that the court should judicially notice truth to the contrary, demurred to plaintiff's allegation that the war was over on August 15, 1945; overruling of the demurrer sustained; the court construed the term "war" in the contract to mean "shooting war" and judicially noticed that it did end on August 15, 1945; "The allegations of the petition which negative facts, the truth of which it is the duty of the court to take judicial cognizance, must be disregarded"). In this case, it should be noted, the court noticed the truth rather than the falsity of the pleading. The above-quoted dictum is therefore inappropriately phrased.

Illinois: Nicketta v. National Tea Co., 338 Ill. App. 159, 162, 168, 87 N.E.2d 30, 31, 34 (1949) (breach of warranty; trial judge dismissed complaint on ground that it is impossible to contract trichinosis as plaintiff alleged—from eating pork which has been properly cooked; affirmed; plaintiff "[31] alleged a factual impossibility"; "[31] In a few cases it is said that the judge should have received evidence offered to show the opposite of what he declared to be a judicially noticed fact. What is meant is that the subject did not fall within the realm of judicial notice").

Indiana: Taggart v. Keebler, 196 Ind. 633, 642, 154 N.E. 485, 488 (1926) (automobile-bicycle collision; "The court did not err in refusing to admit evidence of the provisions of said act of Congress [covering a pension paid to plaintiff and the relevancy of which is unclear]. Courts have judicial knowledge of the laws in force at the place where they are sitting, including acts of Congress that are in force there and what is judicially known need not be proved").

Iowa: State v. Chingren, 105 Iowa 169, 172, 74 N.W. 946, 947 (1899) (prosecution for fraud in a trade of land for merchandise; defendant's evidence that there was a custom to mark up the price of land when it is traded for goods was rejected; conviction affirmed; "It is a matter of common knowledge . . . This is generally known, and there was no occasion to prove that men sometimes ask more for a thing than it is worth"). Note that in this case the rejected evidence was offered to support, not to rebut, the noticed fact.

Kansas: LaRue v. Kansas Mut. Life Ins. Co., 68 Kan. 539, 543, 75 Pac. 494, 495, 496 (1904) (action for proceeds of life insurance, with amount payable depending on whether insured died in military service in time of war; the trial court rejected plaintiff's offer to prove that where insured was in the Philippines, there was armed resistance; judgment for defendant affirmed; judicial notice taken that, at time of insured's death in 1900 “[540] in the Island of Mindanao, by a blow from a weapon known as a bolo, in the hands of an insurrecto . . . , the inhabitants of Mindanao were in a state of insurrection . . . ," courts take judicial notice of it as a fact in history"); Board of Comm'r's v. Radley, 134 Kan. 704, 708, 7 P.2d 386, 388 (1932) (appellant contested the validity of county sale of land for delinquent taxes in 1928; the procedure followed, dispensing with public auction, had been proper prior to 1921 but was allegedly improper thereafter because of the absence of a new resolution by the county commissioners adopting the 1921 statute providing for dispensing with public auction; it had been said in a 1915 case, referring to the pre-1921 situation, that judicial notice would be taken of the adoption then by the county of the no-auction procedure; semble: “But judicial notice is not conclusive, . . . [quoting Wigmore]; sale held invalid").

Maryland: Macht v. Hecht Co., 191 Md. 98, 102, 59 A.2d 754, 756 (1948) (bill for declaratory decree permitting company, pursuant to a city ordinance, to connect two buildings over an alley, leaving a tunnel thirteen feet high; abutting landowners declined to consent, asserting that the ordinance was invalid; the landowners demurred to the company's allegation that the land-
owners would not suffer the special damages requisite to challenge the ordi-
nance, taking the position that the court should judicially notice the harm;
"But the opponent is not prevented from disputing the matter by evidence,
if he believes it disputable.' 9 Wigmore on Evidence, 3d Ed., § 2567.

Here the bill shows upon its face the existence of a dispute as to facts upon
which the appellants' rights to challenge the validity of the Ordinance must
depend." Demurrer held properly overruled).

Massachusetts: Commonwealth v. Marzynski, 140 Mass. 68, 72, 21 N.E. 228,
229 (1889) (prosecution for keeping shop open for purposes of doing business
on Sunday; the judge excluded expert testimony offered by defendant to the
effect that cigars are drugs or medicine, for the sale of which there was an
exception under the statute, and he charged the jury that if the shop was
kept open to sell cigars, defendant was guilty; conviction affirmed; "The court
has judicial knowledge of the meaning of common words, and may well rule
that guns and pistols are not drugs or medicines, and may exclude the opin-
ions of witnesses who offer to testify that they are. . . . [C]igars sold by a
tobacconist in the ordinary way are not drugs or medicines, within the mean-
ing of those words as used in the statute." The questions to the expert were
immature and incompetent).

Missouri: Timson v. Manufacturers Coal & Coke Co., 220 Mo. 560, 597-98,
119 S.W. 565, 569 (1909) (action by widow of miner killed by falling rock in
defendant's mine; the trial judge judicially noticed that all coal mines gener-
gate gas and rejected defendant's evidence that this mine did not; judgment
for plaintiff reversed; "If there is any question about the matter of taking
judicial notice of a fact, the doubt should be solved against the presumption
of such fact, and the parties put upon their proof. . . . Judicially noticing facts,
like many presumptions entertained by the courts, is but a rule of evidence;
and, if the question is a disputable one, or can be disputed, evidence so dis-
puting it is competent and should be admitted. [citing Wigmore with ap-
proval]"; Brock v. American Cent. Life Ins. Co., 44 S.W.2d 200, 201-02 (Mo.
App. 1931) (insurer defended action for double indemnity on ground that
death was by "poison," an excepted cause of death; "There was also evidence
that carbon monoxide gas is a poison, and that the death of insured was
caused thereby. The evidence being conflicting, it was proper to submit the
case to the jury. It is insisted the court should take judicial notice that
carbon monoxide gas is a poison. Judicial notice will be taken of scientific
facts generally known, but the fact judicially noticed may be disputed"");
Scheufler v. Continental Life Ins. Co., 350 Mo. 886, 895-96, 169 S.W.2d 359,
365 (1943) (action for attorney's fees under the insurance code; the trial
judge, not the one before whom the prior proceedings transpired, took judi-
cial notice of the prior proceedings in setting the attorney's fee; held, re-
mended; the trial judge did not consider all of the prior proceedings, and he
did not have sufficient information to know what a reasonable fee for all of
the proceedings should be; "In any event Mr. Aschemeyer would be entitled
to know upon [866] what basis the court was proceeding and be heard accord-
ingly. 'Taking judicial notice does not import that the matter is
indisputable. It is not necessarily anything more than a prima facie recog-
nition, leaving the matter still open to controversy. . . .' Thayer, Preliminary
Treatise on Evidence, p. 308")

Nevada: Ex parte Kair, 28 Nev. 127, 147, 80 Pac. 463, 466-67 (1905) (habeas
corpus; defendant had been convicted of working more than eight hours a
day in violation of statute; he attacked the constitutionality of the statute
asserting that his particular job was not dangerous nor injurious to health;
judicial notice taken that "prolonged labor in the employment restricted by
the statute is injurious to the health of the workmen as a class"; "we do not
deen it expedient to allow testimony in particular or exceptional cases to
defeat the constitutionality of the [467] act"). Note that the holding in this
case is not that judicial notice is conclusive, but rather that defendant was
trying to prove an immaterial point.

New Hampshire: Stocker v. Boston & M. R.R., 88 N.H. 401, 405, 143 Atl. 68,
71 (1924) (negligence in train-auto collision; plaintiff, over defendant rail-
road's objection, was permitted to prove defendant's knowledge of protective
device, such as automatic warning bells, by evidence that such devices existed
at other crossings on defendant's line; verdict for plaintiff; on ground that
the evidence, without limiting instruction, might have been misused by the jury, new trial ordered; dictum: "such evidence might be excluded, since judicial notice may well be taken of the fact that the railroad has knowledge of such protective methods.... It being a matter of common knowledge that the railroad knows about such things, evidence of its knowledge is unnecessary and cannot be rebutted"); State v. Durandea, 99 N.H. 30, 32, 104 A.2d 515, 521 (1954) (prosecution for driving under the influence of intoxicating liquor; defendant disputed that the street was a "public way" as required by the statute; determination of the city ordinance designating the street as a public way was provided to the appellate court, but not to the trial court; after expressly rejecting the Morgan view and approving the Wigmore view (both in text supra), the court continued: "We reaffirm the right of a municipal court to take judicial notice of its ordinances but since this right may have been exercised unfairly to the defendant we set aside the verdict of guilty in order that he may have an opportunity to dispute the matter judicially noticed"). The objectionable evidence in the Stocker case, supra, it should be noted, tended to support rather than disprove the matter of which judicial notice might be taken.

New Jersey: State v. Cromwell, 6 N.J. Misc. 221, 223, 140 Atl. 429, 430 (1928) (writ of error from conviction of bigamy; defendant claimed that... New York: People v. French Bottling Works, Inc., 259 N.Y. 4, 8, 180 N.E. 537, 538 (1932) (conviction for violation of Sanitation Code by failing to indicate on... New York: People v. French Bottling Works, Inc., 259 N.Y. 4, 8, 180 N.E. 537, 538 (1932) (conviction for violation of Sanitation Code by failing to indicate on bottle that beverage contained saccharin; the court, in affirming, referred to dictionaries for definitions and characteristics of "saccharin"); "While these definitions of the city are not conclusive on the fact, the people made out a prima facie case [that the regulation was reasonable] and the burden of going on passed to defendant to meet the evidence against it. As it offered no evidence, the conviction was proper."); Valentine v. Valentine, 109 N.Y.S.2d 466, 469 (Sup. Ct. 1951) (declaratory judgment to have it declared that defendant was not plaintiff's wife because of a divorce granted in Florida; the issue of fact raised by defendant's denial was whether defendant had made a general or special appearance in the Florida proceeding; plaintiff's motion for judgment on the pleadings denied; "proof of the proceedings before the court in another State and the interpretation to be given to the statutes and common law of that State are factual matters which must be established on a trial. . . Section 344-a of the Civil Practice Act permitting our courts to take judicial notice of the law of foreign jurisdictions does not change the situation where there is an issue as to the law of such foreign court").

North Carolina: Harper Furniture Co. v. Southern Express Co., 144 N.C. 633, 643, 644, 57 S.E. 458, 459, 460 (1907) (judicial notice taken that "14 days is too long a time for the transportation of freight by express between the two points—Lenoir, N.C., and Erie, Pa.—and that, prima facie, there has been actionable negligence in the performance of the contract of carriage"); the term prima facie imports "that on the facts indicated the plaintiff is entitled to have his cause submitted to the jury"); Commissioners of Hendersonville v. Prudden & Co., 180 N.C. 496, 499, 105 S.E. 7, 8-9 (1920) (action to recover purchase price of municipal bonds; defense that their sale had not been advertised in a "financial newspaper" as required by law; it was stipulated that the sale was advertised in an ordinary newspaper and that there was no "financial newspaper" in the state; held, that the bond issue was invalid; the court judicially noticed that several newspapers did exist in the state satisfying the statutory description; "the court is not concluded by the admission of parties to a controversy, as to conclusions or inferences of law, nor by admissions of fact when contrary to those of which the court is required to take judicial notice").
North Dakota: See N.D. Const. Ann. § 31-10-01 (1960) (“No evidence of any fact of which the courts take judicial notice need be given in any civil or criminal action or proceeding pending in this state by the party alleging its existence.”) Can any inference, as to rebuttibility by the opponent, be drawn from this language?

Oregon: State v. Kincaid, 133 Ore. 95, 103, 104, 285 Pac. 1105, 1108 (1930) (violation of a dance-hall license law applicable to a town not “having a population of 500 people or more”; the 1920 census showed a population in the town of 442; the defendant offered his own testimony that he, with the aid of various assistants, had enumerated the population and that on the date charged the town had more than 500 inhabitants; his testimony excluded as “but hearsay,” but held that “a qualified person who had ascertained the population” would be received; “Judicial notice would not preclude the court from establishing the truth”).

Pennsylvania: Snyder's Estate, 346 Pa. 615, 618, 31 A.2d 132, 134 (1943) (appeal from auditing judge's adjudication, confirming an account of a trustee for a weak-minded person; “The auditing judge properly refused to permit appellant to read into the record the World War Veterans' Act of 1924 and its amendments . . . . These laws are matters of which our courts will take judicial notice . . . . As to appellant's contention that he was thereby deprived of the right to raise a federal question concerning the violation of these statutes, it is sufficient to say that the record clearly indicates that the question was raised below in appellant's requests for conclusions of law and disposed of in the opinion of the court en banc”); Appeal of Albert, 372 Pa. 13, 20-21, 22, 92 A.2d 663, 666, 667 (1952) (discharge of teacher for advocating or participating in un-American or subversive doctrines upheld; judicial notice taken that the Communist Party—to which there was evidence that the teacher belonged—advocates violent overthrow, the tribunal refusing to allow the teacher to present contrary evidence; “it would seem almost an absurdity of legal procedure to continue to submit to various juries in individual cases a question so readily and authoritatively determinable from the mere perusal of the writings of the acknowledged founders and protagonists of the Communist movement . . . . It is true, perhaps, that the presumption created by the doctrine of judicial notice is not a conclusive one but is subject to rebuttal . . . . [quoting Wigmore] . . . . Be that as it may, appellant could have obtained a hearing de novo in the Court of Common Pleas had she requested it and could there have asserted her right to present [contrary] evidence . . . . Not having done so she is not now in the position to complain”).

Puerto Rico: Lluberas v. Hijos, 75 P.R.R. 7, 18-19 (1953) (action for benefits obtained by defendant from wrongful use of plaintiff's land; trial court took judicial notice of statistics in a government economic publication to determine the amount of sugar cane and other products raised on the relevant properties during the years in question; held, reversed; “The doctrine of judicial notice was adopted as a shortcut to avoid the necessity for the formal introduction of evidence in certain cases where there is no real need for the offering of such evidence . . . . Wigmore . . . . states that . . . . the opponent is not barred from contradicting the matter by evidence, if he believes it disputable . . . . [I]t was the duty of the lower court to base its judgment on the evidence submitted by both parties”).

South Dakota: Soyland v. Farmers Mut. Fire Ins. Co., 71 S.D. 522, 528, 26 N.W. 2d 696, 699 (1947) (plaintiffs sued and recovered fire insurance on a dwelling; defendant appealed on ground that the court should judicially notice that the policy was nullified because of an increase in the “moral hazard” in that the value of the house had been drastically reduced by sale of the land on which it stood; judicial notice refused; seems: “It is not permissible for the court to take judicial knowledge of a fact that may be disputed by competent evidence”).

Utah: State v. Rolio, 71 Utah 91, 97, 262 Pac. 987, 989 (1927) (action by state against owner of land adjacent to receding lake to quiet title to strip of land formerly underlying edge of the lake; the state alleged that the lake was navigable and that it held title to the land; defendant demurred; the
supreme court took judicial notice that title to lands underlying navigable waters is vested in the state subject only to Congress' power to control the waters for interstate and foreign commerce; “Such allegations of source of title, being rather a statement of a legal conclusion, would not be admitted by general demurrer, if the conclusion, as matter of law, were erroneous. But this court will judicially know what the law is in that respect. And what is judicially known may not be controverted by pleadings, or made issuable by them”); State v. Lawrence, 120 Utah 323, 328, 234 P.2d 600, 602 (1951) (prosecution for grand larceny; trial judge instructed jury that, though no evidence had been offered on the matter, it must take the value of the relatively new automobile, which defendant allegedly stole, to be worth more than the $50 minimum for grand larceny; reversed on appeal; the court distinguished the “judicial knowledge” of matters required by statute [now UTAH CODE ANN. § 78-25-1 (1953)], which are conclusive on the jury pursuant to statute [now UTAH CODE ANN. § 78-21-3 (1953)], and “judicial notice” of matters commonly known, which are not conclusive; “The taking of judicial notice of this latter class of commonly known evidentiary facts does not establish them so conclusively as to prevent the presentation of contrary evidence or the making of a finding to the contrary”; Wigmore quoted with approval). The statute last cited supra is discussed at the end of this footnote.

Washington: State ex rel. Huff v. Reeves, 5 Wash. 2d 637, 643, 106 P.2d 729, 732 (1940) (mandamus to compel secretary of state to certify Communist Party nominees for public offices; court refused to take judicial notice that the Communist Party advocates violent overthrow because counsel for relators denied it, and because there was a statutory procedure provided to determine the fact; “the issue should be presented, upon competent evidence, to a jury for determination”).

Wisconsin: State ex rel. Attorney Gen. v. Norcross, 132 Wis. 534, 544, 112 N.W. 40, 43 (1907) (quo warranto by attorney-general to declare void a franchise to build a mill on the Rock river; defendant demurred on ground that, although the complaint alleged that the river was not navigable, it was not navigable and that there was no interest for the attorney-general to protect and the complaint stated no cause of action; the trial judge judicially noticed that the river was not navigable and sustained the demurrer; held, reversed; “it cannot be held . . . that the question of the nonnavigability of Rock river for any public purpose, or any kind of navigation at all points on the river, and for all time, is such a matter of judicial knowledge that the state will not be heard to aver or offer evidence to the contrary [quoting Wigmore with approval]”).

ENGLAND: Taylor v. Barclay, 2 Sim. 213, 223, 57 Eng. Rep. 760, 772 (1828) (bill for discovery preparatory to an action to recover installments paid on obligations of the government of the Federal Republic of Central America; the bill alleged that defendant represented itself to be agent for the republic, which was “a Sovereign and Independent State, recognized and treated as such by His Majesty the King of these Realms”; after communicating with the foreign office and learning that the republic had not been recognized, discovery denied; “It appears to me that, without saying how far the Plaintiff might have had the discovery which he asks, provided he had represented his case otherwise, yet, if he makes this fact the foundation of his Case, that this is an Independent Government, recognized by the Government of this Country, when it is not so, I must judicially take notice of what is the truth of the fact, notwithstanding the Averment on the Record, because nothing is taken to be true except that which is properly pleaded: and I am of opinion that, when you plead that which is historically false, and which the Judges are bound to take notice of as being false, it cannot be said you have properly pleaded, merely because it is averred, in plain terms; and that I must take it just as if there was no such averment on the Record”); Davey v. Harrow Corp., [1957] 2 Weekly L.R. 941, 944, [1957] 2 All E.R. 305, 307 (action for damages caused to plaintiff's house by roots of defendant's trees; trial judge gave judgment for defendant, finding that the offending trees were on plaintiff's side of the property line; reversed; on re-examination of the evidence and on the basis of further information, held that the trees were on defendant's land; with reference to the “Ordnance Survey,” the court said that “the evidence of an official from the Ordnance Survey Office,
Proper resolution of the doctrinal dispute depends primarily on what role judicial notice (of adjudicative facts) is expected to play. All experts conceive of judicial notice as serving a time-saving function. But according to the Wigmore-Thayer view, that is its only function. The result of this philosophy is that judicial notice is conceived of as a useful tool for dealing not only with patently indisputable matters, but also with matters to some extent disputable. It is conceived of as a method of allocating some burden of challenge or proof (production or persuasion?) to the party which would not ordinarily have it. This would be done, presumably, whenever it appears to the judge (from formal evidence?) not that the matter is patently true, but only that the probabilities sufficiently support the proposition that it is expedient to assume the truth of the matter in the absence of declared resistance or of countervailing evidence. It is probable, therefore, that the Wigmore-Thayer view disagrees with the Morgan view on the conclusiveness of judicial notice only because it includes within its concept of judicial notice not only patently indisputable matters, to which Morgan would restrict the principle, but also matters somewhat disputable but unlikely to be disputed. If such a presumption-like device is to exist and if the term "judicial notice" is to be applied to it, then it follows that the opponent, in fairness, must given before us, but not in the court below, was that the line indicated the centre of the existing hedge. This is in accordance with the invariable practice of the survey as was proved in Fisher v. Winch (1) ([1939] 2 All E.R. 144), and in our opinion, after that case and this, courts in the future can take notice of this practice of the Ordnance Survey as at least prima facie evidence of what a line on the map indicates).

There are a few statutes which add to the confusion. In Alaska, California and Utah, for example, there are statutes which read as follows (California version): "Questions of law addressed to the court. All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it. Whenever the knowledge of the court is, by this code, made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it." ALASKA COMP. LAWS ANN. § 66-13-62 (1949); CAL. CODE CIV. PROC. § 2102 (Deering 1953); UTAH CODE ANN. § 78-21-3 (1953). All three of these states have adjacent sections providing as follows (California version): "All questions of fact, where the trial is by jury, other than those mentioned in the next section (above quoted), are to be decided by the jury, and all evidence thereon is to be addressed to them, except when otherwise provided by this code." ALASKA COMP. LAWS ANN. § 66-13-63 (1949); CAL. CODE CIV. PROC. § 2101 (Deering 1953); UTAH CODE ANN. § 78-21-2 (1953). These statutes, enacted in California, for example, in 1872, are quite obviously addressed to the broad question of who (judge or jury) decides a question rather than to the additional narrower question of how (by evidence or judicial notice) the information is obtained. Indeed, these pairs of statutes—but for the presence of other statutes specifically authorizing judicial notice—could be read to preclude entirely judicial notice of the typical indisputable adjudicative fact. In any event, as can be seen in People v. Mayes (Cal.), supra, and in State v. Lawrence (Utah), supra, the "bound to accept" statutes quoted above have been held or said to be applicable when judicial notice is taken of certain adjudicative facts.
be allowed to demand evidence or at least to introduce rebutting evi-
dence. Ergo, "judicial notice" is "rebuttable." The reasons for reject-
ing this Wigmore-Thayer view are expressed supra § 2565, paragraph
I(a).

If judicial notice of adjudicative facts is limited to matters patently
true, then it is clear that the result, albeit for different reasons, should
be the same for adjudicative facts as for legislative facts. The party
opposing judicial notice should not have the right to combat the
djudgment's determination by introducing formal evidence of the matter
to the trier of fact. That is, judicial notice should be "conclusive."

There should be no misunderstanding. To declare that "evidence"
will be rejected is not to say the "information" will not be received to
guide the judge in determining if judicial notice is or was proper.
(Indeed, it may be error for him to fail to receive it.) It is solely to
say that one of the reasons for judicial notice in the area of adjudi-
cative fact—viz., that it is inappropriate for a fact to be found patently
wrong—requires that a party not be permitted to dissuade the jury
from the indisputable truth and that a judge (if there is no jury) not
be bound by the formal evidence to find a fact contrary to what
informal investigation discloses is the indisputable truth.

4. Differences between the Wigmore-Thayer and Morgan views are not so
obvious where the fact is in any event to be decided by the judge rather than
the jury. This situation would exist either where there is a jury, but the
fact is one of those reserved to the judge (see §§ 2549-59 supra), or where
there is no jury and all facts are determined by the judge. As to such facts,
the efforts by the prejudiced party to dissuade the judge qua judge by infor-
mal information that judicial notice is inappropriate or that notice has been
wrongly taken (entirely permissible under the Morgan view) may be difficult
to distinguish from efforts by the party directed to the judge qua trier of fact
by formal evidence to rebut the noticed fact (as Wigmore and Thayer would
have it). Indeed, in administrative agencies, where an analogous no-jury
situation exists, no distinction is drawn (see discussion of Administrative
Procedure Act § 7(d) in note 3 supra at 796). In courts, however, the
distinction would seem to be necessary despite the absence of a jury. The
questions as to who has the burdens, as to the formality of proof, and as to
the freedom of the judge to resort to extra-record sources for illumination
could be (but are not as likely to be) as crucial in a non-jury as in a
jury trial.