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Judicial Notice

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JUDICIAL NOTICE*

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1. The Need for and the Effect of Judicial Notice[1]

The traditional Anglo-American system of proof demands rigorous guaranties of accuracy, with its requirement of witnesses having first-hand knowledge, its mistrust of hearsay, however reliable, except for narrow exceptions, and its insistence upon original documents and their authentication by witnesses. These requirements have their roots in the contentious or adversary system, where the party and not the judge is responsible for gathering and presenting facts, and in the method of jury trial. But this strict though scientific insistence upon proving everything at first hand is, like jury-trial itself, enormously costly in time, energy and money.

The principal effect of the use of the doctrine of judicial notice is to excuse the party having the burden of establishing a fact from the necessity of producing formal proof of the fact[2] by sworn witnesses and authenticated documents or objective evidence. Besides this important effect of dispensing at least provisionally with formal proof, which all courts and writers concede to be the primary effect of judicial notice, there are other possible consequences, sometimes disputed, which will be discussed later.[3]

The requirement of formal proof by witnesses and documents under the restrictions of the preferential and exclusionary rules has been assumed to be justified generally for the ascertainment of facts at judicial trials. But in some situations this cumbrous process of formal proof is plainly not needed at all. In other situations compliance with the process might conceivably give some enhanced accuracy, but the added assurance would be marginal and clearly not worth what it would cost.

What are these situations? First, where the fact in question is known at once with certainty by all the reasonably intelligent people in the community

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1. General references: Thayer, Preliminary Treatise on Evidence c.7 (1898); Wigmore, Evidence §§ 2565-83 (3d ed. 1940); Maguire, Common Sense and Common Law 166-75 (1947); Davis, *Official Notice,* 62 Harv. L. Rev. 537 (1949); Keeffe, Landis and Shadd, *Sense and Nonsense about Judicial Notice,* 2 Stan. L. Rev. 664 (1950); Morgan, *Judicial Notice,* 57 Harv. L. Rev. 269 (1944); Strahorn, *The Process of Judicial Notice,* 14 Va. L. Rev. 544 (1928); York, *Unjudicial Notes on Judicial Notice,* 13 Rocky Mt. L. Rev. 374 (1941); Dec. Dig., *Evidence* ## 1-52, *Crim. Law* # 304; 31 C.J.S., *Evidence* §§ 6-102 (1942); 20 Am. Jur., *Evidence* §§ 16-130 (1939). For good general statements of the doctrine, see Porter v. Sunshine Packing Corp., 81 F. Supp. 566, 575 (W.D. Pa. 1948); Williams v. Comm., 190 Va. 280, 56 S.E.2d 537, 542, syl. 2 (1949).

2. Varcoe v. Lee, 180 Cal. 338, 181 Pac. 223, 226 (1919).

3. See pp. 318 *et seq. infra.*

without the need of resorting to any evidential data at all. Second, where reasonably intelligent people might not have in mind the information in question, but where they would agree that the facts are verifiable with certainty by looking at authoritative books of reference. This principle of verifiability with certainty should prove to be the growth-principle in the evolution of judicial notice. Third, where the ascertainment of the matter falls within the special responsibility of the judge as a judge, such as the rules of law applicable to a case before him, and matters pertaining to the personnel, records, organization and jurisdictional boundaries of the court-system to which his court belongs. Fourth, where questions arise as to other governmental facts, which the judge as an officer of government is considered to have special facilities and responsibility for learning and verifying. Fifth, where a judge is faced with the task of creating law, by deciding upon the constitutional validity of a statute, or its interpretation, or the extension or restriction of a decisional rule, upon grounds of policy, and such policy is thought to hinge upon social, economic, political or scientific facts. Though the conclusions from these facts, or the facts themselves, may be debatable, the situation is close to class three, the law-finding process, so that jury-trial is inappropriate, and the restrictions of formal proof almost equally so.

These situations are, of course, not mutually exclusive. For instance, the characteristic of the second situation, certain verifiability, obtains also in respect to situations three and four.

Certain other circumstances, less specifically definable in effect, may also be suggested as apparently influencing the courts' willingness to apply the doctrine of judicial notice. A court is more willing to notice a general than a specific fact, as for example, the approximate time of the normal period of human gestation,[4] but not the precise maximum and minimum limits.[5] Again, it is obvious in reading the cases that the courts make a wider use of judicial notice in formulating arguments in supporting conclusions of law than in deciding particular facts in issue. Moreover, it seems that the easy accessibility of reliable sources of information, and the experience and skill that the judge possesses in the particular field or science will influence him in his decision whether to take judicial notice. Another factor which seemingly should, and probably does have an influence, is the feeling that judicial notice may work beneficially in certain cases by withdrawing from jury consideration fact-questions of science and technology which a jury, because of its

4. Equitable Trust Co. v. McComb, 19 Del. Ch. 387, 168 Atl. 203, syl. 6 (1933).

5. Commonwealth v. Kitchen, 299 Mass. 7, 11 N.E.2d 482, syl. 6 (1937). But it may so far take cognizance of the general limits as to find a particular birth to be probably within or beyond them. See Estate of McNamara, 181 Cal. 82, 183 Pac. 552, syl. 4, 7 A.L.R. 313 (1919); *cf.* Cronin v. Cronin, 234 Ky. 207, 27 S.W.2d 950, syl. 2 (1930); Harward v. Harward, 173 Md. 339, 196 Atl. 318, syl. 1, 2 (1938).

limitations and prejudices, is ill-adapted to handle.[6] Finally, the decisions of the upper courts manifest a willingness to extend the bounds of judicial notice for the purpose of sustaining a just judgment in the lower court,[7] and a corresponding tendency to restrict its application where the result would be to overturn a satisfactory disposition.

Judges have been prone to emphasize the need for caution in applying the doctrine of judicial notice.[8] The great writers on Evidence, on the other hand, having perhaps a wider view of the needs of judicial administration, advocate a more extensive use of the doctrine. Thus Thayer suggests: "Courts may judicially notice much that they cannot be required to notice. That is well worth emphasizing, for it points to a great possible usefulness in this doctrine, in helping to shorten and simplify trials. . . . [T]he failure to exercise it tends daily to smother trials with technicality, and monstrously lengthens them out."[9] And Wigmore says, "The principle is an instrument of usefulness hitherto unimagined by judges."[10]

2. MATTERS OF COMMON KNOWLEDGE

The oldest and plainest ground for judicial notice is that the fact is so commonly known in the community as to make it unprofitable to require proof, and so certainly known as to make it indisputable among reasonable men.[11] Though this basis for notice is sometimes loosely described as universal knowledge, manifestly this could not be taken literally[12] and the modern opinions, more reasonably, speak in terms of the knowledge of "most men,"[13] or of "what well-informed persons generally know,"[14] or "the knowledge that every intelligent person has."[15] These phrases progressively widen the

6. See Jordan v. Mace, 69 A.2d 670 (Me. 1949), where the court (without alluding to judicial notice) set aside a verdict establishing paternity in a bastardy case on the ground of the scientific reliability of blood-tests showing nonpaternity. See also Note, 163 A.L.R. 949 (1946), collecting conflicting decisions on the courts' power to take judicial knowledge of the scientific validity or conclusiveness of such tests.

7. See Note, 45 HARV. L. REV. 190 (1931).

8. See, *e.g.*, Varcoe v. Lee, 180 Cal. 338, 345, 181 Pac. 223, 226 (1919); State v. Clousing, 205 Minn. 296, 285 N.W. 711, 123 A.L.R. 465, 470 (1939).

9. THAYER, PRELIMINARY TREATISE ON EVIDENCE 309 (1898).

10. 9 WIGMORE, EVIDENCE 585 (3d ed. 1940).

11. Varcoe v. Lee, 180 Cal. 338, 181 Pac. 223, 227, syl. 11 (1919); Gulf C. & S.F. Ry. Co. v. State, 72 Tex. 404, 10 S.W. 81, 82 (1888); Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 272-73 (1944).

12. In Topeka v. Stevenson, 79 Kan. 394, 99 Pac. 588 (1909), the court in taking judicial notice of the meaning of the initials R.M.L.D. (retail malt liquor dealer) said, "It is not necessary for courts to wait, before taking judicial notice of a thing, until everybody knows and understands it. The meaning of a term has become a part of our common knowledge when it is generally understood by persons familiar with the subject."

13. Porter v. Waring, 69 N.Y. 250, 253 (1877).

14. Brandon v. Lozier-Broderick & Gordon, 160 Kan. 506, 163 P.2d 384, 387, syl. 6 (1945).

15. Strain v. Isaacs, 135 Ohio St. 495, 18 N.E.2d 816, 825 (1938).

circle of facts within "common knowledge." Moreover, though usually facts of "common knowledge" will be generally known throughout the country, it is sufficient as a basis for judicial notice that they be known in the local community where the trial court sits.[16] By analogy may the common knowledge concept be extended to knowledge common to those in a particular trade? There are some affirmative intimations,[17] but it seems the law has not yet gone so far,[18] and that most of the need for judicial knowledge of facts generally known in a trade or profession can be satisfied by resort to the formula developed in the next section of facts ascertainable with certainty.

A famous colloquy in the Year Books shows that a clear difference has long been taken between what judges may notice judicially and the facts that the particular judge happens personally to know.[19] It is not a distinction easy for a judge to follow in application, but the doctrine is accepted that actual private knowledge by the judge is no sufficient ground for taking judicial notice of a fact as a basis for a finding or a final judgment,[20] though it may still be a ground, it is believed, for exercising certain discretionary powers, such as awarding probation in a criminal case, or granting a motion for new trial to avoid an injustice.

Jury-knowledge.—The jury has the power, analogous to the power of the judge, to consider as if proven, facts within the common knowledge of the community. Accordingly, the court may instruct them to take in account

16. Varcoe v. Lee, 180 Cal. 338, 181 Pac. 223, syl. 13 (1919) (that a certain portion of Mission Street is in a business district is well known to citizens of San Francisco); Randall v. Commonwealth, 183 Va. 182, 31 S.E.2d 571, syl. 4 (1944) (in robbery prosecution trial judge, in taking judicial notice that "half-way house," the place of the robbery, was located in county where venue laid, will be assumed to have done so on basis of community knowledge). But "night club gossip and stories appearing in newspapers" are not equivalent to community knowledge. Berry v. Chaplin, 74 Cal. App.2d 669, 169 P.2d 453, syl. 11-14 (1946) (Los Angeles trial court in filiation case could not take judicial notice of extent of wealth of Charles Chaplin). There are intimations that local customs may not be noticed. See, *e.g.*, First National Bank v. Commercial Bank & Trust Co., 137 Wash. 335, 242 Pac. 356, syl. 6, 7 (1926). But, under the present principle, if generally and certainly known in the community, they should be.

17. See, *e.g.*, United States v. Rappy, 157 F.2d 964, syl. 4 (2d Cir. 1946); United Carbon Co. v. Monroe, 92 F. Supp. 460, 465, syl. 6 (W.D. La. 1950); Ritholz v. Johnson, 244 Wis. 494, 12 N.W.2d 738, 741, syl. 3, 4 (1944).

18. Kennedy v. General Geophysical Co., 213 S.W.2d 707, syl. 1 (Tex. Civ. App. 1948). And the courts say that they will not notice, as such, customs in a particular trade [Eluzis' Case, 292 Mass. 351, 198 N.E. 262, syl. 2 (1935); Usher v. Eckhardt, 176 Minn. 210, 222 N.W. 924, syl. 1 (1929)], though there is no reason why, in a given case, such custom might not be a matter commonly known or certainly ascertainable.

19. Anon., Y.B. 7 Hen. IV, f.41, pl. 5 (1406), from which the following is an excerpt: "Tirwhit: Sir, let us put the case that a man kills another in your presence and sight, and another who is not guilty is indicted before you and is found guilty of the same death, you ought to respite the judgment against him, for you know the contrary, and report the matter to the King to pardon him. No more ought you to give judgment in this case. . . . Gascoigne, C.J. One time the King himself asked me about this very case which you have put, and asked me what was the law, and I told him just as you say, and he was well pleased that the law was so."

20. Gibson v. Von Glahn Hotel Co., 185 N.Y. Supp. 154, syl. 1 (Sup. Ct. 1920); Darnell v. Barker, 179 Va. 86, 18 S.E.2d 271, syl. 3-5 (1942); Note, 113 A.L.R. 258 (1938).

their knowledge and experience, common to the community generally, in weighing the evidence;[21] counsel may, without evidence, argue the truth of such facts;[22] and the courts in passing upon the sufficiency of the evidence to support the verdict, will give weight to this factor.[23] The other grounds, however, for judicial notice, discussed in succeeding sections, are not the basis for jury-knowledge but are available only for administration by the judge.

3. FACTS CAPABLE OF CERTAIN VERIFICATION

The earlier and still the most familiar basis for judicial notice is "common knowledge." Not only has this conception widened with the progress of the law, but a second and distinct principle has now come to be recognized. Matters of common knowledge would nearly always be matters that the judge would know off-hand without occasion for any investigation. But when asked to notice a fact not generally known, but which obviously could easily be ascertained by consulting materials in common use, such as the day of the week on which January 1 fell ten years ago, the judges resorted to the fiction that in consulting the calendar and taking judicial notice they were merely "refreshing memory" as to a matter of common knowledge.[24] More realistically, we have here an important extension of judicial notice to the new field of facts "capable of accurate and ready demonstration,"[25] "capable of such instant and unquestionable demonstration, if desired, that no party would think of imposing a falsity on the tribunal in the face of an intelligent adversary,"[26] or "capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy,"[27] as variously

21. Marshall v. State, 54 Fla. 66, 44 So. 742, syl. 5 (1900); Notes, 16 TEXAS L. REV. 403 (1938), 144 A.L.R. 932 (1943). In principle, of course, the knowledge of a juror about the facts of the particular case should not be considered. He should testify. Perhaps, in strictness, expertness of particular jurors about values, skills or occupational knowledge should not be considered, not being common to the jurors and shared by the community. Some courts have held that instructions on jury-knowledge which fail to make this clear are ground for reversal. Downing v. Farmers' Mutual Fire Ins. Co., 158 Iowa 1, 138 N.W. 917, syl. 2 (1912). But there is much force to the contrary view that this restriction sacrifices one of the chief values of jury trial, and is a restriction which jurors cannot and will not obey. Solberg v. Robbins Lumber Co., 147 Wis. 259, 133 N.W. 28, syl. 3 (1911) (instruction permitting jurors to pool their individual knowledge, approved).

22. State v. Marsh, 70 Vt. 288, 40 Atl. 837, syl. 12 (1898); Kuehl v. Hamilton, 136 Ore. 240, 297 Pac. 1043, syl. 6, 7 (1931).

23. Leary v. Fitchburg Ry., 173 Mass. 373, 53 N.E. 817 (1899) (common experience as to way of alighting from cars); Carlton v. Sley System Garages, 143 Pa. Super. 127, 17 A.2d 748, 749 (1941) (jurors' community knowledge about streets and traffic in Philadelphia); Shikany v. Salt Creek Transp. Co., 48 Wyo. 190, 45 P.2d 645, syl. 13 (1935) (common knowledge about value of rugs).

24. See, *e.g.*, Friend v. Burnham & Morrill Co., 55 F.2d 150, 151 (1st Cir. 1932) (court "warranted . . . in taking judicial notice of any common or general knowledge relating to canning cooked foods, and to refresh his recollection by reference to standard publications").

25. Note, 47 COL. L. REV. 151 (1947).

26. 9 WIGMORE, EVIDENCE 548 (3d ed. 1940).

27. MODEL CODE OF EVIDENCE, Rule 802(c) (1942).

stated.[28] In this realm fall most of the facts, theories, and conclusions which have come to be established and accepted by the specialists in the areas of natural science,[29] natural phenomena,[30] chronology,[31] technology,[32] history,[33] geography,[34] statistical facts[35] and other fields of professional and scientific knowledge.

The judge is free to consult on his own motion any sources that he considers reliable,[36] but under our tradition of party-presentation, the extent

28. See also *In re* Malcom, 129 F.2d 529, 533 (C.C.P.A. 1942); Nichols v. Nichols, 126 Conn. 614, 13 A.2d 591, 595 (1940); State v. Schriber, 185 Ore. 615, 205 P.2d 149, syl. 6 (1949).

29. See, *e.g.*, Electric Storage Battery Co. v. Shimadzu, 123 F.2d 890, syl. 3 (3d Cir. 1941) (that heated oxygen will combine with lead to form lead oxide); Russo v. Swift & Co., 136 Neb. 406, 286 N.W. 291, syl. 2 (1939) (nature and origin of disease of echinococcosis); State v. Schriber, 185 Ore. 615, 205 P.2d 149, syl. 8 (1949) (that Bang's disease is an infectious and contagious disease of cattle). See Note, *Judicial Notice of Medical Facts*, 36 MICH. L. REV. 610 (1938). See also Buhrkuhl v. F. T. O'Dell Const. Co., 232 Mo. App. 967, 95 S.W.2d 843, syl. 4-8 (1936), where the court takes judicial notice that a barn taller than other buildings on an isolated farm was a place of special danger from lightning.

Disagreements as to whether particular scientific questions are within the field of judicial knowledge are, naturally, not uncommon. See, *e.g.*, Universal Granite Quarries Co. v. Industrial Commission, 224 Wis. 680, 272 N.W. 863, syl. 1 (1937), and Smith v. Harbison-Walker Refractories Co., 340 Mo. 389, 100 S.W.2d 909, syl. 16 (1936) (that some dust causes lung trouble); *In re* Swahn's Will, 158 Misc. 17, 285 N.Y. Supp. 234 (Surr. Ct. 1936), and Commonwealth v. English, 123 Pa. Super. 161, 186 Atl. 298, syl. 7 (1936) (that blood-grouping tests are relevant on question of paternity); Cowan v. Georgia Railroad & Banking Co., 52 Ga. App. 667, 184 S.E. 635 (1936), and Wm. A. Smith Const. Co. v. Brumley, 88 F.2d 803, syl. 3 (10th Cir. 1937) (whether rays of locomotive headlight crossing rays of automobile light would cut off latter light). The courts not infrequently will use the doctrine of judicial notice as a basis for determining that expert opinion testimony contrary to accepted knowledge is not to be believed. See, *e.g.*, Parton v. Phillips Petroleum Co., 231 Mo. App. 585, 107 S.W.2d 176 syl. 7 (1937) (testimony that it is not dangerous to pour kerosene on a fire). Manifestly, a court may judicially notice general principles and limits where it cannot be certain of the particular application. See Muse v. Page, 125 Conn. 219, 4 A.2d 329, syl. 6-8 (1939) (distance within which a truck can be stopped).

30. McAffee v. United States, 111 F.2d 199, syl. 1 (D.C. Cir. 1940) (maximum and minimum temperatures in District of Columbia on certain date); State v. Perkins, 342 Mo. 560, 116 S.W.2d 80, syl. 5 (1938) (time of sunrise on particular morning).

31. State v. Van Ness, 109 Vt. 392, 199 Atl. 754, syl. 10, 117 A.L.R. 415 (1938) (days of week on which certain dates fell).

32. Werk v. Parker, 249 U.S. 130, 132, syl. 1, 39 Sup. Ct. 197, 63 L. Ed. 514 (1919) (court by reference to encyclopedia and other authorities could take notice that long before present patent was issued the use of horse-hair mats in presses for the extraction of oil was well known in the art).

33. Unity Oil Co. v. Gulf Oil Corp., 141 Me. 148, 40 A.2d 4, 156 A.L.R. 297 (1944) (dates of declaration of World War II and of beginning of rationing); Miller v. Fowler, 200 Miss. 776, 28 So.2d 837, syl. 3-7 (1947) (that acts of warfare between Japan and the United States had not entirely ceased on Aug. 14, 1945).

34. See, *e.g.*, Swarzwald v. Cooley, 39 Cal. App.2d 306, 103 P.2d 580, syl. 6 (1940) (meaning of phrase, "ordinary high tide," in the vicinity of Laguna Beach).

35. Groves v. Board of Comm'rs, 209 Ind. 371, 199 N.E. 137, syl. 2 (1936) (population of cities and towns of state shown by federal census); Cox v. Polson Logging Co., 18 Wash. 2d 49, 138 P.2d 169, syl. 6 (1943) (trial judge may inform jury of life expectancy from mortality tables without proof); DEC. DIG., *Evidence* # 12.

36. Brown v. Piper, 91 U.S. 37, 42, 23 L. Ed. 200 (1875) ("any means . . . which he may deem safe and proper"); Dwinell-Wright Co. v. National Fruit Product Co., 140 F.2d 618, 624, syl. 12 (1st Cir. 1944) (essays, magazine articles and brochures); People v. Mayes, 113 Cal. 618, 45 Pac. 860, 862, syl. 1 (1896) ("any source of informa-

of the judge's willingness to take the initiative in looking up the authoritative sources will usually be limited,[37] and it is the task of counsel to find and to present in argument and briefs such references, excerpts and explanations as will convince the judge that the fact is certain and demonstrable.[38] If on investigation he finds that the fact, theory or conclusion which he is asked to notice is one which the authorities in the field reveal as debatable, he will leave the question for resolution by expert testimony.

An able Minnesota judge has said that judicial notice of scientific facts can be taken only when such facts are "generally recognized" and not when such facts "are known, if at all, only by a specially informed class of persons."[39] It is suggested, however, that this limitation is a throw-back to the earlier view that common knowledge was a universal requirement, and is inconsistent with the later recognition that ready and indisputable verifiability is a distinct and sufficient basis for judicial notice. Such a restriction would stand as a bar to judicial notice in most of the areas of science, technology, and statistics where it can be most usefully employed. It is true that a judge when asked to notice scientific facts will on examination of the data often conclude that the scientists do not agree, or do agree that the supposed fact is doubtful or debatable, or he may conclude that he, the judge, is unable from his reading of the data to be sure that the fact *is* scientifically accepted. All these would be clear grounds for refusing notice. But to say that he can never notice a scientific fact if not commonly known assumes that judges having in view their general level of intelligence and training are not able, in a useful proportion of cases, to examine technical scientific materials and determine safely whether a given fact, theory or conclusion is accepted. Surely this is too modest an estimate of the capacity of our judges. Certainly the supposed limitation is not the measure of what they actually do.[40]

In the progress of science facts and theories are constantly changing from the unknown or debatable to the realm of the accepted and established.

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tion which he may deem authentic either by inquiry of others, or by the examination of books, or by receiving the testimony of witnesses"); 9 WIGMORE, EVIDENCE § 2568a (3d ed. 1940); 31 C.J.S., *Evidence* § 12 (1942). Compare, however, the holding that the trial court should not rely on medical treatises on an issue on which evidence has been received, in Anderson v. Jersey Creamery Co., 278 Mich. 396, 270 N.W. 725, syl. 1 (1936), critically noted, 36 MICH. L. REV. 610, 615 (1938). A favorite source, as might be expected, is the encyclopedia. See, *e.g.*, Chiulla de Luca v. Board, 94 Conn. 7, 107 Atl. 611, 612 (1919) (propensities of lightning); Timson v. Manufacturers' Gas & Coal Co., 220 Mo. 580, 119 S.W. 565, 568 (1909) (that all coal mines generate gas, notice refused); Note, *Notice of Scientific Facts from Encyclopedias and Dictionaries*, 9 KAN. CITY L. REV. 38 (1940).

37. *Cf.* Russell v. Liberman, 71 R.I. 448, 46 A.2d 858, 860 (1946).

38. Shapleigh v. Mier, 299 U.S. 468, 475, 57 Sup. Ct. 17, syl. 5, 81 L. Ed. 386 (1937) (question of validity of an expropriation under Mexican law; held, party having burden to prove invalidity fails, when the court is left without knowledge of invalidating rule, after exploring, in its function of judicial notice, every channel of information).

39. Lickfett v. Jorgenson, 179 Minn. 321, 229 N.W. 138, 139, syl. 3 (1930).

40. See the holdings described in notes 29-35, *supra*, and see Note, 36 MICH. L. REV. 610, 611 (1938).

Thus, the theories underlying the identification of the handwriting of a document by expert analysis, or of a person by his fingerprints, or of firearms by "ballistics-tests" were all once debatable but are now accepted. The capacity of "lie-detector" tests, by measurements of blood-pressure interpreted by technicians, to reveal conscious lying is now considered debatable[41] but tomorrow may be viewed by the courts as scientifically established.[42] And even now, we probably are in transition from judicial scepticism to judicial acceptance of the certainty of conclusions to be drawn from biological tests showing nonpaternity.[43] On the other hand innumerable scientific "certainties" of the past such as the fact of the flatness of the earth, or the efficacy of blood-letting as a remedy for disease, which could once have been judicially noticed under this principle, would today have to be noticed in reverse.

In the increasingly important practice of judicial notice of scientific and technological facts, some of the possibilities of error are, first, that the courts may fail to employ the doctrine of judicial notice in this field to the full measure of its usefulness,[44] second, that they may mistakenly accept as authoritative scientific theories that are outmoded or are not yet received by the specialists as completely verified, and third, that in taking judicial notice of accepted scientific facts, the courts, in particular cases may misconceive the conclusions or applications which are supposed to flow from them. Of these, it seems that the first has thus far been the most frequent shortcoming.

4. The Judge's Task as Law-Finder—Judicial Notice of Law

One of the principal functions of the judge, for which he is specially qualified by professional equipment, is to find and interpret the law applicable to the issues in a trial, and in a jury case, to announce his findings of law to the jury for their guidance. The heavy-footed common law system of proof by witnesses and authenticated documents is too slow and cumbrous for the judge's task of finding what the applicable law is. Usually this law is familiar lore and if not he relies on the respective counsel to bring before

41. See People v. Forte, 279 N.Y. 204, 18 N.E.2d 31, syl. 2, 119 A.L.R. 1198 (1938) (court could not take judicial notice that the lie-detector is or is not effective for the discovery of truth). To like effect is State v. Cole, 354 Mo. 181, 188 S.W.2d 43, syl. 12, 13 (1945).

42. See Smallwood, *Lie-detectors: Discussions and Proposals*, 29 Cornell L.Q. 535 (1944). And see Streeter and Belli, *The "Fourth Degree": The Lie Detector, infra*, p. 549.

43. *Compare* Berry v. Chaplin, 74 Cal. App.2d 652, 169 P.2d 442, syl. 22-28 (1946) (jury may rely on mother's testimony and reject result of test), *with* Jordan v. Mace, 69 A.2d 670, syl. 1-3 (Me. 1949) (verdict contrary to result of tests, authorized by statute, cannot stand).

44. The holding in Loth v. Loth, 227 Minn. 387, 35 N.W.2d 542, syl. 16, 6 A.L.R.2d 176 (1949), declining to notice the value of stocks presumably quoted on the market, seems to be an instance.

him the statutes, reports and source-books, and these every-day companions of judge and counsel are read from informally in discussion or cited and quoted in trial and appellate briefs. Occasionally the judge will go beyond the cited authorities to make his own investigation. In the ordinary process of finding the applicable law, the normal method, then, is by informal investigation of any sources satisfactory to the judge, that is, by judicial notice. Where this norm was departed from, it was in cases where the source-material was not easily accessible to the judge, as in case of "foreign" law, or "private" laws or city ordinances. As these materials become more accessible, the tendency is toward permitting the judges to do, what perhaps they should have done from the beginning, that is, to rely on the diligence of counsel to provide the necessary materials, and accordingly to take judicial notice of *all* law. This seems to be the goal toward which the practice is marching.

Domestic Law.—As to domestic law generally, the judge is not merely permitted to take judicial notice but required to do so,[45] at least if so requested, although in a particular case a party may be precluded on appeal from complaining of the judge's failure to notice a statute where his counsel has failed to call it to the judge's attention.[46] This general rule that judicial notice will be taken of domestic law means that state trial courts will notice federal law,[47] which is controlling in every state, and has been held to mean that in a federal trial court the laws of all the states, not merely of the state where it is sitting, are domestic and will be noticed.[48] Similarly all state-wide, or nation-wide, executive orders and proclamations,[49] which are legally effec-

45. Strain v. Isaacs, 135 Ohio St. 495, 18 N.E.2d 816, 825 (Ohio App. 1938) (dictum); Randall v. Comm., 183 Va. 182, 31 S.E.2d 571, 572, syl. 1 (1944) (dictum); 20 AM. JUR., *Evidence* § 23 (1939); MODEL CODE OF EVIDENCE, Rule 801 (1942).

46. Great American Ins. Co. v. Glenwood Irr. Co., 265 Fed. 594, syl. 3-5 (10th Cir. 1920). See, however, an illuminating Note, *Overlooking Statutes,* 30 YALE L.J. 855 (1921), which surveys the cases and concludes that, generally, errors arising from ignorance of a statute should be corrected on appeal.

47. State v. Superior Court, 205 Ind. 355, 186 N.E. 310, syl. 12 (1933) (constitution and statutes); Mangum v. Atlantic Coast Line Ry. Co., 188 N.C. 689, 125 S.E. 549, syl. 1 (1924) (Federal Employers' Liability Act); DEC. DIG., *Evidence* # 34.

48. Lamar v. Micou, 114 U.S. 218, 223, 5 Sup. Ct. 857, 29 L. Ed. 94 (1885) (on appeal from federal court in New York, proper for trial and appellate courts to notice Georgia law); Lane v. Sargent, 217 F. 237, syl. 1 (1st Cir. 1914). Since judicial notice is regarded as a matter of procedure rather than substantive law, it seems that the controlling force of state substantive law, under Erie R.R. v. Tompkins, 304 U.S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938), is inapplicable. Wm. J. Lemp Brewing Co. v. Ems Brewing Co., 164 F.2d 290, syl. 4 (7th Cir. 1947) (semble). But see Keeffe *et al., Judicial Notice,* 2 STAN. L. REV. 664, 686 (1950). *Cf.* Eliscu v. Fiber, 157 F.2d 136, syl. 1 (3d Cir. 1946), which purports to rely on the New Jersey Uniform Act as a ground for noticing New York law. On appeal, however, from a state court, the Federal Supreme Court will not notice the law of another state unless the state court below could have done so. Hanley v. Donoghue, 116 U.S. 1, 6, 6 Sup. Ct. 242, 29 L. Ed. 535 (1885).

49. U.S. *ex rel.* Crow v. Mitchell, 89 F.2d 805, syl. 1 (D.C. Cir. 1937) (presidential orders relating to civil service); Hamilton v. James, 231 Ala. 668, 166 So. 425, syl. 4 (1936) (president's and governors' proclamations declaring moratorium); Heyward v. Long, 178 S.C. 351, 183 S.E. 145, syl. 8, 114 A.L.R. 1130 (1936) (governor's

tive, and all state or national administrative regulations,[50] having the force of law, will also be noticed. When such documents are included in the Federal Register it is provided that their contents shall be judicially noticed.[51] Under this principle the laws of antecedent governments will be noticed.[52] Exceptions to the principle, however, are recognized for private laws[53] and municipal ordinances.[54] In terms of practical expediency under modern conditions these last mentioned limitations seem indefensible.[55]

The Law of Sister States.—It is easy to see how difference of language and inaccessibility of source-books should have led the English courts to develop the common law rule that the laws of foreign nations would not be noticed but must be pleaded and proved as facts.[56] The assumption in the earlier cases in this country[57] that the courts of one state must treat the

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proclamation declaring highway department in state of insurrection); Parker v. Anderson, 112 Vt. 371, 25 A.2d 41, syl. 7 (1942) (president's order requiring Navy to use force to protect lives and property endangered by hostile power); DEC. DIG., *Evidence* # 46.

50. Tucker v. Texas, 326 U.S. 517, 66 Sup. Ct. 274, 90 L. Ed. 274 (1946) (regulations of Federal Public Housing Authority); United States v. Bradford, 160 F.2d 729, syl. 4 (2d Cir. 1947) (regulations of federal administrative agencies); Milwaukee Mechanics' Ins. Co. v. Oliver, 139 F.2d 405, syl. 4 (5th Cir. 1943) (regulations of state fire insurance board); Powell v. Anderson, 147 Neb. 872, 25 N.W.2d 401, syl. 4 (1946) (federal regulations); 9 WIGMORE, EVIDENCE § 2572, n.6 (3d ed. 1940); DEC. DIG., *Evidence* # 47. For a comprehensive discussion, see Note, 59 HARV. L. REV. 1137 (1946).

51. 49 STAT. 502, 44 U.S.C.A. § 307 (Supp. 1951).

52. Ponce v. Roman Catholic Church, 210 U.S. 296, 309, 28 Sup. Ct. 737, 52 L. Ed. 1068 (1908) (Spanish laws in Puerto Rico); Martinez v. Gutierrez, 66 S.W.2d 678, syl. 8 (Tex. Comm. App. 1933).

53. Courts do not notice private acts. Bolick v. City of Charlotte, 191 N.C. 677, 132 S.E. 660, syl. 1 (1926); Chambers v. Atchison, T. & S.F. Ry. Co., 32 Ariz. 102, 255 Pac. 1092, syl. 1 (1927) (private acts of Congress). The same has been held as to local laws. Caldwell v. Crosser, 20 S.W.2d 822, syl. 2 (Tex. Civ. App. 1928). And special acts. Brodsky v. Fine, 263 Mass. 51, 160 N.E. 335, syl. 3 (1928). But all such acts are readily accessible nowadays, and the rule refusing notice is archaic. Half the states have abrogated it by statute. 9 WIGMORE, EVIDENCE § 2572, n.14 (3d ed. 1940).

54. Gardner v. Capital Transit Co., 152 F.2d 288, syl. 5 (D.C. Cir. 1945); Page v. Weiland, 137 Ohio St. 198, 38 N.E.2d 583, syl. 2 (1940); DEC. DIG., *Evidence* # 32. This needlessly burdensome practice has been reformed by statute in a few states only. 9 WIGMORE, EVIDENCE § 2572, n.15 (3d ed. 1940). In New Hampshire, by decision the enlightened result has been reached that the court may in its discretion notice ordinances. Walsh v. Public Service Co., 92 N.H. 331, 30 A.2d 494, syl. 3, 4 (1943). However, a municipal court will notice the ordinances of the city, and by what seems the better view, on appeal the reviewing court will do the same. Orose v. Hodge Drive-It-Yourself Co., 132 Ohio St. 607, 9 N.E.2d 671, syl. 1, 2, 111 A.L.R. 954 (1937), Notes, 11 U. OF CIN. L. REV. 535 (1937), 4 OHIO ST. L.J. 131 (1937), 111 A.L.R. 954 (1937). A city charter, granted by public law, will of course be noticed. Grant v. Aldermen, 316 Mass. 432, 55 N.E.2d 705, syl. 4 (1944).

55. They are discarded in the provisions of the MODEL CODE OF EVIDENCE, Rules 802(a), 803 (1942) (judge may, and if furnished by the party with sufficient information, must notice private acts, and ordinances and regulations of governmental divisions).

56. See, *e.g.*, Fremoult v. Dedire, 1 P. Wms. 431, 24 Eng. Rep. 458 (Ch. 1718), Mostyn v. Fabrigas, 1 Cowp. 161, 174, 98 Eng. Rep. 1021 (C.P. 1774); Collet v. Lord Keith, 2 East 260, 272, 273, 102 Eng. Rep. 368. (K.B. 1802). This view had wide support in continental law also. Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1019, n.2 (1941).

57. See, *e.g.*, Brackett v. Norton, 4 Conn. 517, 520 (1823).

laws of another state as foreign for this purpose is less understandable and to the after-view seems a deplorable instance of mechanical jurisprudence. Yet it remains today, in nearly every state which has not yet adopted a reformatory statute, the common law rule that notice will not be given to the laws of sister states.[58] This is probably the most inconvenient of all the limitations upon the practice of judicial notice. Notice here could certainly be justified on the principle of certainty and verifiability,[59] and the burden on the judge could be minimized by casting the responsibility upon counsel either to agree upon a stipulation as to the law or to produce on each side for the benefit of the court all materials necessary for ascertaining the law in question.

Under the present practice when pleading and proof of the foreign law has been overlooked, or has been unsuccessfully attempted, the resulting danger of injustice is somewhat mitigated by the presumption that the law of the sister state is the same as that of the forum,[60] or more simply the practice of applying local law if the law of the other state is not invoked and proven.[61] But this presumption-tool is too rough for the job in hand,[62]

58. See, *e.g.*, United Merc. Agencies v. Bissonnette, 155 Fla. 22, 19 So.2d 466, syl. 4, 5, 155 A.L.R. 916 (1944); Mason v. Pelkes, 57 Idaho 10, 59 P.2d 1087, syl. 8 (1936); Hillmer v. Grondahl, 109 Vt. 388, 199 Atl. 255, syl. 5 (1938). In New Hampshire, however, the court found that this rule was so wanting in "logical support" and "practical merits" that the court's continuing responsibility for developing a reasonable procedure justified it in abandoning the outmoded practice and in taking judicial notice of the law of sister states. Saloshin v. Houle, 85 N.H. 126, 155 Atl. 47, syl. 11, 14, 15 (1931). If such a common-sense attitude toward the rules of proof were more widespread the law of evidence would soon be freed from many of its archaic rigidities.

The burden of the requirement of technical proof is somewhat mitigated by statutes and judicial holdings admitting as evidence printed copies of statutes and decisions when they profess to be official copies. 5 WIGMORE, EVIDENCE § 1684 (3d ed. 1940). Or privately printed reports of cases when proved to be commonly used in the courts of the state where the cases were decided. 6 *id.* § 1703. Or even legal treatises of recognized credit. 6 *id.* § 1697. This practice has been codified in the Uniform Proof of Statutes Act, now in effect in twenty-three states and territories. 9 U.L.A. 609 (1942); *id.* 286 (Supp. 1951).

59. See Section 3 above.

60. Where the question is one which would be governed at the forum by a rule of common law, it is presumed that the same common law rule prevails in the sister state. Vartan Garapedian Inc. v. Anderson, 92 N.H. 390, 31 A.2d 371, syl. 1 (1943). But it has been held that this presumption does not obtain as to the law of Louisiana, which was not regarded as a common law state. Kennard v. Illinois Central Ry. Co., 177 Tenn. 311, 148 S.W.2d 1017, syl. 5, 134 A.L.R. 770 (1941). Where the matter is governed by statute in the forum state, the majority of courts will presume that a similar statute exists in the sister state. Hall v. Proctor, 242 Ala. 636, 7 So.2d 764, syl. 12 (1942); Buhler v. Madison, 105 Utah 39, 140 P.2d 933, syl. 14 (1943). A minority will in these circumstances presume that the common law of the forum before it was modified by statute prevails in the sister state. Stern v. Lieberman, 307 Mass. 77, 29 N.E.2d 839, syl. 1 (1940); Zwirn v. Galento, 288 N.Y. 428, 43 N.E.2d 474, syl. 2 (1942). See 9 WIGMORE, EVIDENCE § 2536 (3d ed. 1940); STUMBERG, CONFLICT OF LAWS 176 *et seq.* (2d ed. 1951); Note, 12 TEXAS L. REV. 333 (1934); DEC. DIG., *Evidence* # 80; 31 C.J.S., *Evidence* § 133 (1942); RESTATEMENT, CONFLICT OF LAWS §§ 622, 623 (1934).

61. Bollinger v. Gallegher, 144 Pa. 205, 22 Atl. 815, syl. 3 (1891); Blethen v. Bonner, 93 Tex. 141, 53 S.W. 1016, syl. 1 (1899).

62. See, *e.g.*, Dixie Ohio Exp. Co. v. Butler, 179 Tenn. 358, 166 S.W.2d 614, syl. 1-3 (1942), 17 TENN. L. REV. 877, where the plaintiff sued in Tennessee for a death injury which occurred in Kentucky. The Kentucky Death Act was neither pleaded nor

particularly when the materials for ascertaining the laws of sister states are today almost as readily accessible as those for local law, and in any event counsel as officers of the court are available to find and present those materials to the judge in just the same informal and convenient fashion as if they were arguing a question of local law. In 1936 the Conference of Commissioners on Uniform Laws accepted this view and drafted the Uniform Judicial Notice of Foreign Law Act[63] which has now in substance been adopted by more than half the states.[64] It has been suggested with much persuasiveness that Congress could and should, under the powers conferred by the Full Faith and Credit clause of the Constitution prescribe this practice for the courts of all the states.[65]

The Law of Foreign Countries.[66]—Statutes in four of our states[67] provide that the court must take judicial notice of the law of foreign countries, and two states, New York[68] and Michigan,[69] permit the court to do so in its discretion. Maryland requires its courts to notice the laws of foreign jurisdiction "having a system of law based on the common law of England."[70] The Uniform Act, however, contains no provision for notice of the law of other

proved, but a verdict and judgment for damages was rendered for plaintiff. The Supreme Court, though in previous decisions it had presumed that statutory law in other states was the same as in Tennessee, declined, "in view of the well known differences between statutes of this kind [Death Acts] in the different states" to presume the identity of the Kentucky statute with that of the forum, but recognizing that the failure to plead and prove the Kentucky statute was a mere oversight, it did not dismiss the suit but remanded it with leave to the plaintiff to amend her declaration. It called attention, however, to the Uniform Judicial Notice of Foreign Law Act, and doubtless as a result of this intimation, the legislature adopted the Act in 1943. TENN. CODE ANN. § 9773.7-.11 (Williams Supp. 1951).

63. NATIONAL CONF. OF COMM'RS OF UNIFORM STATE LAWS, 1936 HANDBOOK 355-59; *id.*, 1945 HANDBOOK 124; 9 U.L.A. 271 (1942); *id.* 176 (Supp. 1951); Notes, 26 CORNELL L.Q. 502 (1941); 46 HARV. L. REV. 1019 (1933); 32 MASS. L.Q. 20. As to the requirement of pleading or notice, see Note, 134 A.L.R. 576 (1941). It has been said that where contrary statutes or decisions of the sister state have not been called to the court's attention, the presumption of identity will prevail. Strout v. Burgess, 68 A.2d 241, syl. 20, 21, 12 A.L.R.2d 939 (Maine 1949); Knych v. Trustees, 320 Mass. 339, 69 N.E.2d 575, syl. 1 (1946). *But cf.* Heater v. Mittendorf, 72 Ohio App. 4, 50 N.E.2d 559, syl. 4 (1943) (court required to inform itself of statutes of sister state). In ascertaining the sister state's law, it is proper for the court to consider an affidavit of an attorney of that state setting out statutes and passages from court-opinions claimed to be pertinent. Franzen v. Equitable Life Assur. Soc., 130 N.J.L. 457, 33 A.2d 599, syl. 7 (1943).

64. See statutes and court rules compiled in 9 WIGMORE, EVIDENCE § 2573 (3d ed. 1940), and statutes referred to in 9 U.L.A. 170 (Supp. 1951).

65. Hartwig, *Congressional Enactment of Uniform Judicial Notice Act,* 40 MICH. L. REV. 174 (1941). See also Field, *Judicial Notice of Public Acts,* 12 MINN. L. REV. 439 (1928); Note, 14 WASH. L. REV. 222 (1939).

66. For valuable discussions, see Nussbaum, *The Problem of Proving Foreign Law,* 50 YALE L.J. 1018 (1941); Keeffe, Landis and Shadd, *Sense and Nonsense about Judicial Notice,* 2 STAN. L. REV. 664, 673 (1950); Wachtell, *Proof of Foreign Laws in American Courts,* 69 U.S.L. REV. 526, 580 (1935).

67. MASS. ANN. LAWS c.233, § 70 (1933); MISS. CODE ANN. § 2168 (1942); N.C. GEN. STAT. ANN. § 8-4 (1943); W. VA. CODE ANN. § 5711 (1949).

68. N.Y. CIV. PRAC. ACT § 344a.

69. MICH. STAT. ANN. §§ 27.874, 27.876 (1938).

70. MD. ANN. CODE GEN. LAWS art. 35, § 56 (1939).

nations. Accordingly in the federal courts and in all the states, except the seven mentioned above, the common law practice of refusing judicial notice to the law of foreign countries prevails.[71] Accordingly in these jurisdictions the burden of strict proof must be undertaken. When the foreign law is in the form of a statute or decree, it is generally held at least in the earlier cases in this country that an authenticated copy must be produced.[72] This would require, in strictness, a sworn or officially certified copy,[73] but (as in respect to the laws of sister states)[74] this has been ameliorated by statutes or decisions permitting the use of a copy in a book purporting to be printed by authority of the foreign state or proved to be commonly recognized in its courts.[75] Ordinarily the written text must be interpreted in the light of the applicable decisions, treatises and commentaries, and this under common-law proof must be accomplished by taking the testimony in person or by deposition of an expert in the foreign law.[76] The adversary of course is free to take the testimony of other experts if he can find such on his side, and the cross-examination of conflicting experts is likely to accentuate the disagreement.[77] This method of proof seems to maximize expense and delay and hardly seems best calculated to ensure a correct decision by our judges on questions of foreign law. It could be vastly improved by pretrial conferences[78] in which agreements as to undisputed aspects of the foreign law could be secured, and by the appointment by the court of one or more experts on foreign law as referees[79] or as court-chosen experts[80] to report their findings to the court.

71. See, *e.g.*, United States *ex rel.* Jelic v. District Director of Immigration, 106 F.2d 14, syl. 11 (2d Cir. 1939); Rowan v. Commissioner, 120 F.2d 515, syl. 3 (5th Cir. 1941); Groome v. Freyn Eng. Co., 374 Ill. 113, 28 N.E.2d 274, syl. 4 (1940); Greer v. Paust, 202 Minn. 633, 279 N.W. 568, syl. 2 (1938); DEC. DIG., *Evidence* # 37.

72. See, *e.g.*, Pierce v. Indseth, 106 U.S. 546, 551, 1 Sup. Ct. 418, 27 L. Ed. 254 (1882). Cases pro and con are cited in 4 WIGMORE, EVIDENCE § 1271 n.4 (3d ed. 1940). In England an expert was permitted to testify to the effect of the foreign statute, and indeed the statute's terms were not sufficient to prove the foreign law without the expert's opinion. Baron de Bode's case, 8 Q.B. 208, 115 Eng. Rep. 854 (1845); 7 WIGMORE, EVIDENCE § 2090a (3d ed. 1940).

73. Emery v. Berry, 28 N.H. 473, 485 (1854); see 4 WIGMORE, EVIDENCE § 1273 (3d ed. 1940).

74. See note 58 *supra*.

75. See Uniform Proof of Statutes Act, 9 U.L.A. 609 (1942); *id.* 286 (Supp. 1951); and statutes and decisions collected in 5 WIGMORE, EVIDENCE § 1684 (3d ed. 1940); 6 *id.* § 1703.

76. A case illustrating this practice is *In re* Neilson's Estate, 118 Mont. 304, 165 P.2d 792 (1946) (deposition of legal counselor of Danish Legation discussing legal treatises and giving opinion as to inheritance rights of aliens under Danish law).

77. "It is the writer's impression that under the present practice of the courts, skillful advocates may succeed in developing confusing divergencies between experts on purely verbal matters in situations where coherent and well-substantiated written opinions would eliminate all difficulties." Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018, 1029 (1941).

78. As provided, for example, by Rule 12, Federal Rules of Civil Procedure.

79. As to extent of court's common law powers in this direction, see *Ex parte* Peterson, 253 U.S. 300, 40 Sup. Ct. 253, 64 L. Ed. 919 (1920).

80. See 2 WIGMORE, EVIDENCE § 563 (3d ed. 1940); Beuscher, *Use of Experts by the Courts*, 54 HARV. L. REV. 1105 (1941); MODEL CODE OF EVIDENCE, Rules 403-10 (1942).

In any event the adoption by the federal courts and by the states which have not yet adopted it, of the flexible procedure of judicial notice, whereby the court is free to get its information from any convenient source, seems the path of justice and common sense. The courts could then accept, as they should, the opinions of experts submitted by letters instead of being limited to cross-examined testimony.

The unwillingness of the courts to notice the laws of other countries creates difficulties where the party whose case or defense depends, under conflicts rules, upon foreign law and he fails to prove that law as a fact. There are several solutions. First, the court may decide the issue against him for failure of proof.[81] This is often a harsh and arbitrary result. Second, the court may simply apply the law of the forum on the ground that no other law is before it,[82] especially if the parties have tried the case as if local law were applicable.[83] Third, the court may presume that the law of the other country is the same as that of the forum,[84] thus reaching the same result as under the second theory but raising intellectual difficulties because the presumption is so frequently contrary to fact. When the doctrine involved is one of common law, but the other nation is not a common law country, some courts will decline to apply the presumption.[85] On the other hand, when the common law rule invoked is a part of the common fund of all civilized systems, such as the binding force of ordinary commercial agreements, the presumption is applied though the foreign country is not a common law country.[86] Moreover, by what is probably the prevailing and more convenient view, if the

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See also Usatorre v. The Victoria, 172 F.2d 434, 443 (2d Cir. 1949), where in reversing a lower court decision for the judge's failure to make a finding as to Argentine law, the court said, "Perhaps [such a finding] can be made without further testimony on the subject. It may be that, if he considers it desirable, some arrangement will be agreed upon which will enable the judge to summon an expert of his own choosing."

81. *Cf.* Cuba R.R. v. Crosby, 222 U.S. 473, 32 Sup. Ct. 132, 56 L. Ed. 274 (1912).

82. See, *e.g.*, Burgess v. Western Union Telegraph Co., 92 Tex. 125, 46 S.W. 794, syl. 1 (1899).

83. Watford v. Alabama & Florida Lumber Co., 152 Ala. 178, 44 So. 567, syl. 4 (1907).

84. See, generally, the illuminating discussion in Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018, 1035 *et seq.* (1941). See also STUMBERG, CONFLICT OF LAWS 177 (2d ed. 1951). Cases are collected in DEC. DIG., *Evidence* # 81.

85. Cuba R.R. v. Crosby, 222 U.S. 473, 479, 32 Sup. Ct. 132, 56 L. Ed. 274 (1912) (law of Cuba as to responsibility of employer for injury to employee); Commissioner v. Hyde, 82 F.2d 174, syl. 9 (2d Cir. 1936) (court cannot presume that French civil law same as local common law in respect to validity of contract made in France for creation of trust by husband for wife); *In re* Everett's Estate, 112 Vt. 252, 23 A.2d 202, syl. 6, 7 (1942) (Italy not presumed to have common law rule requiring seal on power of attorney to execute a bond).

86. Cuba RR. v. Crosby, 222 U.S. 473, 478, 32 Sup. Ct. 132, 23 L. Ed. 190 (1912) (dictum); Parrot v. Mexican Cent. Railroad Co., 207 Mass. 184, 93 N.E. 590, syl. 7 (1911) (presumption that defendant would be liable in Mexico on agreement made there by its general passenger agent, under "universally recognized fundamental principles of right and wrong").

question would be governed locally by a statute, a like statute in the foreign country may be presumed.[87]

International and Maritime Law.—The rules, principles and traditions of "international law," or "the law of nations," or the maritime law common to western nations generally, will be noticed in the federal[88] and state courts.[89] Sometimes this is a mere noticing of the international sources of the court's local law, sometimes it may constitute the noticing of the law regulating transactions in a foreign country. But as to the latter there are limitations which narrow the inviting possibilities in the international field of the process of informal proof and free investigation, which we call judicial notice. If the maritime rules[90] or the prize rules[91] of the foreign country have been published here by governmental authority as the authentic foreign law they will be noticed. Or if the foreign maritime rules are embodied in a widely-adopted international convention, they may be considered as having passed into general maritime law, and noticed as such.[92] But even in this last case, it was held that the court could not notice the subsurface effect and interpretation of such rules, but would leave this to formal proof.[93] Specific rules of maritime law obtaining in the foreign state, not claimed to be part of the common fund of international rules will not be noticed.[94] Even the presumption of identity of the foreign law with the local law, which would seem to be unusually convenient and realistic in the maritime field, has been narrowly restricted.[95]

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87. Wickersham v. Johnston, 104 Cal. 407, 38 Pac. 89, syl. 1 (1894) (sale of note by English executors, powers of executors presumed to be limited as under California statute); Murphy v. Murphy, 145 Cal. 482, 78 Pac. 1053, syl. 3 (1904) (California statutory rate of interest presumed to prevail as to amount due on English judgment). *Contra:* Parrot v. Mexican Cent. Railroad Co., 207 Mass. 184, 90 N.E. 590, syl. 5 (1911) (dictum).

88. The Paquete Habana, 175 U.S. 677, 20 Sup. Ct. 290, 299, syl. 6, 44 L. Ed. 320 (1899).

89. McFeena's Adm'r v. Paris Home Telephone Co., 190 Ky. 299, 227 S.W. 450, syl. 3 (1921) (dictum).

90. The New York, 175 U.S. 187, 20 Sup. Ct. 67, 70, 44 L. Ed. 126 (1899); The Scotia, 14 Wall. 170, 20 L. Ed. 822 (1872) (British orders in council as to the "rules of the road" at sea, later adopted by Congress).

91. Talbot v. Seeman, 1 Cranch 1, 38, 2 L. Ed. 15, 27 (1801) (French decree law as to condemnation of prizes).

92. Black Diamond S.S. Corp. v. Robert Stewart and Sons, Ltd., 336 U.S. 386, 396, 397, 69 Sup. Ct. 622, syl. 7, 8, 93 L. Ed. 754 (1949).

93. Such holding rests on a supposition that conflicting partisan expert testimony will reveal more accurately the right foreign interpretation than will the submission of informal opinions and briefs—a most debatable assumption.

94. Black Diamond S.S. Corp. v. Robert Stewart & Sons, Ltd., 336 U.S. 386, 396, 397, 69 Sup. Ct. 622, 628, 93 L. Ed. 754 (1949); Yang-Tsze Ins. Ass'n v. Furness Withy & Co., Ltd., 215 Fed. 859, syl. 4 (2d Cir. 1914); Usatorre v. The Victoria, 172 F.2d 434, syl. 4 (2d Cir. 1949).

95. See Ozanic v. United States, 165 F.2d 738, syl. 17, 18 (2d Cir. 1948); Sonnesen v. Panama Transport Co., 298 N.Y. 262, 82 N.E.2d 569, syl. 4 (1948).

5. Facts Relating to the Personnel, Operation and Records of the Court[96]

There is an area of facts relating to the court of which he is the principal officer that the judge has an official duty to know or to ascertain, and the judge obviously has special facilities for learning these facts. Moreover, many of the facts about the court, such as its jurisdiction, are regulated by domestic law, and many of them if not of general professional knowledge are readily and certainly verifiable. These bases for judicial notice apply to the trial judge who is asked to notice facts about his own court, and to the appellate judges as grounds for noticing facts relating to their own court and those pertaining to the courts over which they have appellate supervision. Thus, the judges take notice of the identity of the officers of their courts, such as the other judges,[97] the sheriffs,[98] clerks,[99] and attorneys; [100] of the duration of the terms and sessions,[101] and of the rules of court.[102] It would seem obvious that the judge of a court would take notice of all the records of the institution over which he presides, but the courts have been slow here to give the principles of judicial notice their full reach of logic and expediency. It is settled of course that the courts, trial and appellate, take notice of their own respective records in the present litigation, both as to matters occurring in the immediate trial,[103] and in previous trials or hearings.[104] The principle

96. See 9 Wigmore, Evidence §§ 2578-79; 31 C.J.S., *Evidence* §§ 44-50 (1942); Dec. Dig., *Evidence* # 40-43.

97. Payne v. Williams, 47 Ariz. 396, 56 P.2d 186, syl. 4 (1936) (supreme court notices names of superior court judges, their counties and terms); State *ex rel.* Nickerson v. Rose, 351 Mo. 1198, 175 S.W.2d 768, syl. 9 (1944) (similar). See also Commonwealth v. Keenan, 347 Pa. 574, 33 A.2d 244, syl. 5, 6 (1943), where, in mandamus proceeding to compel judges of a common pleas court to decide certain cases long pending, the supreme court took judicial notice that "illness" pleaded by the president judge as excuse for his neglect of duty was of such self-inflicted nature as to afford no excuse for his failure to perform his duties.

98. Sowers-Taylor Co. v. Collins, 14 S.W.2d 692 (Mo. App. 1929) (names of officers authorized to serve process).

99. Favre v. Louisville & N.R. Co., 180 Miss. 843, 178 So. 327, syl. 2 (1938).

100. Squire v. Bates, 132 Ohio St. 161, 5 N.E.2d 690, syl. 4 (1937) (persons who have been admitted and dates of their admission).

101. Vance v. Harkey, 186 Ark. 730, 55 S.W.2d 785, syl. 1 (1933) (supreme court knows that term at which decree entered has elapsed); Roberts v. Turk, 225 Ky. 100, 7 S.W.2d 849, syl. 5 (1928) (court of appeals knows its own terms).

102. A trial court, of course, knows its own rules without formal proof. Wallace v. Martin, 166 So. 874, syl. 1 (La. App. 1936). And on general principles an appellate court knows judicially what the trial court judicially knew. Nevertheless, many appellate courts have refused to notice trial court rules, unless embodied in the bill of exceptions. See, *e.g.*, Scovill v. Cassidy, 275 Ill. 462, 114 N.E. 181, syl. 17 (1916) (where municipal court rules not in bill of exceptions, appellate court erred in ordering the rules certified to them and considering them when certified); and cases cited 31 C.J.S., *Evidence* § 49, n.86 (1942). This inconvenient formalism has been repudiated by statute in Illinois, see Boettcher v. Howard Engraving Co., 389 Ill. 75, 58 N.E.2d 866, syl. 2 (1945), and elsewhere by decision, see, *e.g.*, Hudson v. Hoster, 47 N.E.2d 637, syl. 3, 4 (Ohio App. 1942).

103. Nichols v. Nichols, 126 Conn. 614, 13 A.2d 591, syl. 8, 12 (1940) (superseded pleading claimed to constitute admission, will be noticed but must be called to trial court's attention); Branch v. Branch, 194 Ga. 575, 22 S.E.2d 124, syl. 2 (1942).

104. Collins v. Leahy, 347 Mo. 133, 146 S.W.2d 609, syl. 5 (1941) (where city map was part of record of prior appeal to supreme court, court would take notice of

seemingly is equally applicable to matters of record in the proceedings in other cases in the same court, and some decisions have recognized this,[105] but the majority thus far have adhered to the needless requirement of formal proof, rather than informal presentation, of recorded proceedings in other suits in the same court.[106] Matters of record in other courts are usually denied notice but one decision blazes the trail for such notice on the ground that they are public documents.[107]

6. OTHER GOVERNMENTAL FACTS

Not only is the judge a judicial officer with the special functions of knowing or informing himself about the law and about the operations of his branch of the court-system, but he is an officer as well of the general state or federal government and has duties and facilities of knowledge about the powers and operations of such general government.[108] Not only does this principle serve to justify the practice of noticing governmental facts, but other principles we have discussed often offer additional bases for judicial notice in respect to particular governmental facts. Thus, the location of a state capital is a matter of common knowledge and will usually also be designated as such in some domestic law, and furthermore, such location would be a matter verifiable as certain and indisputable. Accordingly, in considering a question of notice of governmental facts, not only the present principle but the foregoing alternative possibilities should be canvassed.

International Affairs.—The courts, state and federal, take judicial notice of treaties entered into by the United States with foreign nations, as part of the national law.[109] Similarly, as a governmental fact, the courts notice the recognition by the executive department of a particular foreign govern-

it on subsequent appeal though not introduced in evidence at later trial). *But cf. In re* Aughenbaugh, 125 F.2d 887, syl. 1, 2, 5, 6 (3d Cir. 1941) (reference in hearing on contested claim not entitled to consider, without notice to parties, facts shown by papers previously filed in the same bankruptcy proceedings).

105. Willson v. Security-First Nat. Bank, 21 Cal.2d 705, 134 P.2d 800, syl. 3 (1943) (dictum: exceptionally, court will notice proceedings in another case in interest of justice); Fox v. Schaeffer, 131 Conn. 439, 41 A.2d 46, syl. 16, 157 A.L.R. 132 (1944) (right to notice judgment in another case does not mean that court can give weight to conclusions embodied in judgment); Johnson v. Marsh, 146 Neb. 257, 19 N.W.2d 366, syl. 3 (1945) (may notice where other case interwoven with present).

106. Gray v. Bradford, 194 Ga. 492, 22 S.E.2d 43, syl. 10 (1942); People v. McKinlay, 367 Ill. 504, 11 N.E.2d 933, syl. 6 (1938); Naffah v. City Deposit Bank, 339 Pa. 157, 13 A.2d 63, syl. 3 (1940); DEC. DIG., *Evidence* # 43(3).

107. Zahn v. Transamerica Corp., 162 F.2d 36, 48, n.20 (3d Cir. 1947).

108. See, *e.g.*, State v. Sims, 54 S.E.2d 729, 741 (W. Va. 1949).

109. Allen v. Markham, 156 F.2d 653, syl. 9 (9th Cir. 1946); Munich Reinsurance Co. v. First Reinsurance Co., 6 F.2d 742, syl. 4 (2d Cir. 1925); Seaboard Trust Co. v. Topken, 130 N.J. Eq. 46, 20 A.2d 709, syl. 4 (Ch. 1941); DEC. DIG., *Evidence* # 39.

ment.[110] The making of pacts and treaties between foreign governments would not, seemingly, be noticed under this last theory, but important facts of international relations, such as the Munich pact of 1938,[111] may be noticed as a matter of common knowledge or as a matter of readily verifiable current history. Our declaration of war with a foreign power would be noticed as a governmental fact,[112] as would the making of an armistice or formal termination of hostilities, but a court has also noticed as a matter of current history the fact of continued fighting in remote areas after the Japanese surrender in September, 1945.[113] In like manner, the existence of a state of war between foreign countries may be noticed as a notorious fact.[114]

Facts as to the Territory of the Government.[115]—Under the present principle the state courts take judicial notice of the boundaries of the nation,[116] of the location of the states and territories,[117] and the location and boundaries of the state in which the court is sitting[118] and of the counties,[119] districts[120] and townships[121] thereof, as well as the location of the capital of the state and the location and identity of the county seats.[122] Similarly, the location and boundary of any incorporated city, as a subdivision of the state should be noticed.[123] The location of governmental buildings[124] and institutions[125] is likewise noticed.

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110. Oetjen v. Central Leather Co., 246 U.S. 297, 38 Sup. Ct. 309, syl. 1, 62 L. Ed. 726 (1918) (recognition of Carranza government in Mexico first as *de facto* and later as *de jure* government); United States v. Belmont, 301 U.S. 324, 330, 57 Sup. Ct. 758, 81 L. Ed. 1134 (1937) (recognition of Soviet government); 9 WIGMORE, EVIDENCE §§ 2566, 2574 (3d ed. 1940).

111. United States *ex rel.* Reichel v. Carusi, 157 F.2d 732, syl. 1 (3d Cir. 1946) (treaty between Germany and Czechoslovakia and its terms); Fox River Paper Corp. v. United States, 65 F. Supp. 605, syl. 4 (E.D. Wis. 1946) (making of Munich treaty in September 1938 and its effect on world anticipation of peace).

112. See Johnson v. Biddle, 12 F.2d 366, syl. 3 (8th Cir. 1926); DEC. DIG., *Evidence* # 11f. *Cf.* Gara v. United States, 178 F.2d 38, syl. 9 (6th Cir. 1949) (noticing existence of "cold war" necessitating enactment of Selective Service Act of 1948).

113. Miller v. Fowler, 200 Miss. 776, 28 So.2d 837, syl. 3-7 (1947).

114. The Austvard, 34 F. Supp. 431, syl. 9, 10 (D. Md. 1940).

115. 9 WIGMORE, EVIDENCE § 2575 (3d ed. 1940); DEC. DIG., *Evidence* # 25; 31 C.J.S., *Evidence* § 33b (1942).

116. Reese v. Cobb, 135 S.W. 220, syl. 2 (Tex. Civ. App. 1911) (boundary line between United States and Mexico, as recognized by their governments).

117. Curtis v. Sexton, 252 Mo. 221, 159 S.W. 512, syl. 11 (1913) (sister states); Swofford v. State, 3 Tex. App. 76, 84 (1877) (Indian Territory).

118. Watson v. Western Union Co., 178 N.C. 471, 101 S.E. 81, syl. 4 (1919).

119. State v. Armstrong, 315 Mo. 298, 286 S.W. 705, syl. 1 (1926) (location of city and county of St. Louis); Elmore County v. Tallapoosa County, 221 Ala. 182, 128 So. 158, syl. 1 (1930) (area and boundaries).

120. Board of Education v. State, 222 Ala. 70, 131 So. 239, syl. 2 (1930) (school district).

121. Nelson v. Thomas, 103 Cal. App. 108, 283 Pac. 982, syl. 2 (1930).

122. Bunten v. Rock Springs Grazing Ass'n, 29 Wyo. 461, 215 Pac. 244, syl. 26 (1923).

123. Rosenau v. Lansing, 113 Ore. 638, 234 Pac. 270, syl. 2 (1925).

124. Times-Mirror Co. v. Superior Court, 3 Cal.2d 309, 44 P.2d 547, syl. 7 (1935).

125. Murphy v. Daly, 206 Ind. 179, 188 N.E. 769, syl. 6 (1934) (state prison).

Identity of Officials and Other Facts about Them.[126]—All courts would presumably notice the identity of the principal officers of the national government.[127] Courts, whether state or federal, sitting in a state would notice the identity of incumbents of principal state offices.[128] Similarly trial courts are entitled to notice the incumbency of particular persons as officers of the county or district in which the court is sitting.[129] Similarly, the dates of the beginning and end of their periods of service[130] and the amount of their salaries[131] will be noticed as to officers of these classes. But as to officers not within these descriptions, and generally as to officers in inconspicuous or subordinate posts the courts, though judicial knowledge could often be justified on grounds of verifiability, are inclined to refuse to notice their identity.[132]

Official Documents.—Within limits similar to those prescribed in the preceding paragraph, the courts have judicially noticed the existence and contents of documents issued by the classes of officers indicated above as their public, written acts.[133] This doctrine dispenses with formal authenticating proof of the genuineness of the documents, but this does not mean that if the

126. See 9 WIGMORE, EVIDENCE § 2576 (3d ed. 1940); DEC. DIG., *Evidence* # 44; 31 C.J.S., *Evidence* § 37 (1942).

127. United States v. Phelps, 40 F.2d 500, syl. 1 (2d Cir. 1930) (assistants to the Secretary of Labor); Lyman Flood Prevention Ass'n v. Topeka, 152 Kan. 484, 106 P.2d 117, syl. 1 (1940) (time of retirement of Woodring as Secretary of War); *In re* Son-se-grah's Will, 78 Okla. 213, 189 Pac. 865, syl. 3 (1920) ("heads of departments of the federal government and their chief subordinates").

128. See, *e.g.*, Picking v. Pennsylvania R. Co., 151 F.2d 240, syl. 3 (3d Cir. 1945) (that named defendants were officials of Pennsylvania and New York); Patten v. Miller, 190 Ga. 123, 8 S.E.2d 757, syl. 2 (1940) (chairman, State Highway Board).

129. See, *e.g.*, Prudential Insurance Co. v. Calvin, 227 Ala. 146, 148 So. 837, syl. 4 (1933) (that certain person was health officer and death certificate issued by him as registrar); Rockford v. Mower, 259 Ill. 604, 102 N.E. 1032, syl. 4 (1913) (persons holding office as city clerk in the various cities in the county in which court is sitting).

130. People v. Neary, 113 Colo. 12, 154 P.2d 48, syl. 1 (1945) (end of term of state district attorney); Lyman Flood Prevention Ass'n v. Topeka, 152 Kan. 484, 106 P.2d 117, syl. 1 (1940) (time of retirement of Secretary of War).

131. Pink v. State, 105 S.W.2d 265, syl. 4 (Tex. Civ. App. 1937), *aff'd*, 133 Tex. 82, 124 S.W.2d 981 (1939) (in passing upon receiver's fee court could notice salaries of state offices held by him).

132. See, *e.g.*, Crawford v. State, 155 Ind. 692, 57 N.E. 931, syl. 2 (1900) (deputy attorney general); Ward v. Henry, 19 Wis. 76, 81 (1865) (deputy marshal). A classic instance of illiberality in denying notice is People v. Schmitz, 153 Cal. xviii, 94 Pac. 419, syl. 5 (1908) (indictment for extortion defective in failing to allege that defendants Schmidt and Ruef were mayor and political boss of San Francisco though both of those facts were notorious), criticised in 9 WIGMORE, EVIDENCE § 2583 (3d ed. 1940).

133. See, *e.g.*, Fletcher v. Jones, 105 F.2d 58, syl. 5 (D.C. Cir. 1939) (records and reports of Home Owners' Loan Corporation); General Hosp. Soc. v. New Haven County, 127 Conn. 53, 14 A.2d 746, syl. 3 (1940) (returns of county commissioners as printed by comptroller); State v. Couch, 139 Fla. 353, 190 So. 723, syl. 2 (1939) (bill filed in office of secretary of state); Stankus v. New York Life Ins. Co., 312 Mass. 366, 44 N.E.2d 687, syl. 5 (1942) (President's reports to Congress under Lease-Lend Act); and cases cited DEC. DIG., *Evidence* # 48. But the practice is limited to public transactions of general interest. Carson Cadillac Corp. v. Birmingham, 232 Ala. 512, 167 So. 794, syl. 3 (1936); 20 AM. JUR., *Evidence* § 44 (1939). All public transactions which are embodied in the Federal Register, "shall be judicially noticed." The Federal Register Act, 44 U.S.C.A. § 307 (Supp. 1951).

document is a statement of facts, such facts are themselves judicially noticed.[134] A similar result of dispensing with formal authentication may be attained by doctrines to the effect that signatures of such officers may be "noticed" as genuine, or that their seals will be "noticed."[135] Wigmore has suggested that a more supportable theory is that the purported signatures and seals are themselves accepted as sufficient evidence of the genuineness of the document.[136]

7. Social and Economic Data Used in Judicial Law-Making: "Legislative" Facts[137]

Under modern views, the judge has not only the task of finding what the law is, but between the gaps of existing doctrines to create new law.[138] In doing this, he will be guided as a legislator would be[139] by considerations of expediency and public policy. In doing so he must act either upon knowledge already possessed or upon assumptions, or upon investigation of the pertinent general facts, social, economic, political, or scientific. Under the older tradition the custom was to rationalize the result solely in terms of analogy to old doctrines leaving the considerations of expediency unstated. In recent decades the trend is toward a wider use by the judges in their opinions of explicit statements of their policy-judgments and of the factual grounds therefor. These latter have been helpfully classed as "legislative facts," as contrasted with "adjudicative facts" which are the facts about the particular parties to the controversy and their specific interests and transactions.[140] How are these legislative facts to be presented to the court?

134. See the illuminating opinion of Magruder, J., in Stasiukevich v. Nichols, 168 F.2d 474, 479, syl. 7-12 (1st Cir. 1948). And United States v. Aluminum Co. of America, 148 F.2d 416, 445, 446 (2d Cir. 1945); Morgan, *The Law of Evidence, 1941-1945,* 59 Harv. L. Rev. 481, 485-86 (1946).

135. See, *e.g.,* Atlantic Industrial Bank v. Centonze, 130 Conn. 18, 31 A.2d 392, syl. 1 (1943) (seals and signatures of heads of department of state government); Kuhnhausen v. Stadelman, 174 Ore. 290, 148 P.2d 239, 149 P.2d 239 (1944) (statute requiring notice of succession in office and signatures and seals of "principal" officers not limited to most exalted); Dec. Dig., *Evidence* # 49, 31 C.J.S., *Evidence* § 38 (1942).

136. 7 Wigmore, Evidence § 2161 (3d ed. 1940). For the scope and limits of the rule as applied to official documents, see 7 *id.* §§ 2161-67.

137. See Davis, *Official Notice,* 62 Harv. L. Rev. 537, esp. 549-60 (1949) (unusually original and enlightening discussion); Davis, *Evidence in the Administrative Process,* 55 Harv. L. Rev. 364, 404 (1942); Morgan, *Judicial Notice,* 57 Harv. L. Rev. 269, 287-91; Morris, *Law and Fact,* 55 Harv. L. Rev. 1303, 1318-25 (1942); 1 Wigmore, Evidence § 41 (3d ed. 1940); 9 *id.* § 2555(d); Bikle, *Judicial Determination of Questions of Fact Affecting Constitutional Validity,* 38 Harv. L. Rev. 6 (1924); *cf.* Fuchs and Freedman, *Wagner Act Decisions and Factual Technique in Public Law Cases,* 22 Wash. U.L.Q. 510 (1937); Manoff and Sarcia, *Pleading and Proof of Constitutional Facts,* 15 Conn. B.J. 227 (1941). See also Notes, *The Consideration of Facts in Due Process Cases,* 30 Col. L. Rev. 360 (1930), *Social and Economic Facts—Appraisal of Suggested Techniques for Presenting Them to the Courts,* 61 Harv. L. Rev. 692 (1948), *The Presentation of Facts Underlying the Constitutionality of Statutes,* 49 Harv. L. Rev. 631 (1936), *Consideration of Facts in Due Process Cases,* 23 Ind. L.J. 176 (1948), *Consideration of Extrinsic Evidence on Constitutionality of Statutes,* 82 L. Ed. 1244 (1938).

138. Cardozo, The Nature of the Judicial Process 113, 114 (1921).

139. *Id.* at 120.

140. Davis, *Official Notice,* 62 Harv. L. Rev. 537, 549 *et seq.* (1949).

"Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, *Borden's Farm Products Co. v. Baldwin,* 293 U.S. 194, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist. *Chastleton Corporation v. Sinclair,* 264 U.S. 543."[141]

The usual resort, however, for ascertainment of legislative facts is not through formal proof by sworn witnesses and authenticated documents but by the process of judicial notice. Is judicial notice here trammeled by the usual requirement that the facts noticed must be certain and indisputable? Such a requirement seems inappropriate here where the facts are often generalized and statistical and where their use is more nearly argumentative, or as a help to value-judgments, than conclusive or demonstrative.

In cases where the validity of a statute is attacked for want of due process the nature of the issue narrows sharply the need for certainty. The court is asking not whether the social facts support the statute, but only whether the legislature had reasonable grounds for believing that they do.[142] On this issue, the court considers such data as reports of legislative committees,[143] investigating commissions,[144] and administrative bureaus,[145] compilations of legislation in the various states and countries,[146] encyclopedias,[147] dic-

141. United States v. Carolene Products Co., 304 U.S. 144, 153, 58 Sup. Ct. 778, 82 L. Ed. 1234 (1938). And this practice obtains in a majority of state courts. Ritholz v. Johnson, 244 Wis. 494, 12 N.W.2d 738, syl. 7 (1944); Note, 82 L. Ed. 1246. A minority hold that the court is limited in its consideration of "legislative" facts to those of which it can take judicial notice. Note, 82 L. Ed. 1244, 1250 (1938). Upon such "judicial inquiry" by formal proof, the decision since it concerns the ascertaining of law is for the judge, not the jury. 9 WIGMORE, EVIDENCE § 2555(d) (3d ed. 1940).

142. Thus in repelling an attack on the Filled Milk Act as wanting in due process, the court said, "When Congress exercises a delegated power such as that over interstate commerce, the methods which it employs to carry out its purposes are beyond attack without a clear and convincing showing that there is no rational basis for the legislation; that it is an arbitrary fiat." Carolene Products Co. v. United States, 323 U.S. 18, 31, 65 Sup. Ct. 1, 89 L. E. 15 (1944).

143. Carolene Products Co. v. United States, 323 U.S. 18, 28, 65 Sup. Ct. 1, 89 L. Ed. 15 (1944); Everard's Breweries v. Day, 265 U.S. 545, 561, 44 Sup. Ct. 628, 68 L. Ed. 1174 (1924).

144. Levy Leasing Co. v. Siegel, 258 U.S. 242, 245, 42 Sup. Ct. 289, 66 L. Ed. 595 (1922) (reports of governor's and mayor's committees on housing emergency); McLean v. Arkansas, 211 U.S. 539, 549, 29 Sup. Ct. 206, 53 L. Ed. 315 (report of industrial commission authorized by Congress to show need for state miners' wage regulation).

145. Parker v. Brown, 317 U.S. 341, 363, 63 Sup. Ct. 307, 87 L. Ed. 315 (1942) (reports of U. S. Tariff Commission and publications of U. S. Department of Agriculture, notice as supporting economic need for raising proration program under state act).

146. Hutchinson Ice Cream Co. v. Iowa, 242 U.S. 153, 157, 158, 37 Sup. Ct. 28, 61 L. Ed. 217 (1916) (butterfat requirements for ice-cream); Muller v. Oregon, 208 U.S. 412, 419, 28 Sup. Ct. 324, 52 L. Ed. 551 (1908) (compilation in the famous "Brandeis brief" of laws regulating working hours of women); State v. Main, 69 Conn. 123, 135, 37 Atl. 80 (1897) ("peach yellows").

147. Jacobson v. Massachusetts, 197 U.S. 11, 31, 25 Sup. Ct. 358, 49 L. Ed. 643 (1905) (showing experience of other countries with compulsory vaccination).

tionaries,[148] and scientific books and articles.[149] In this context, when the courts state that they take judicial notice of such writings, they mean merely that they take notice that such sources are authentic and sufficiently reliable for the legislature reasonably to give weight to their statements[150]—not that they take notice of the truth of the statements.[151] A similarly restrictive use may be made when such fact-reports are noticed for the purpose of aiding in the interpretation of a statute. Committee reports and other sources reciting social facts may often be used not to show what the facts were, but what was reported to the legislature,[152] or what was so widely or authoritatively believed that it was probably considered by them.[153]

Situations remain, however, where these discriminations are inapplicable and where the judge as law-maker must search for the social facts as they are in truth, and not merely for what the legislature could reasonably have supposed them to be. Shall the court in a state where the question is new, accept or reject, in the light of the social and economic consequences, the traditional doctrine that in letting a dwelling-place the landlord has no duty to repair defects that are dangerous to the life of the occupant?[154] In fixing common law liability for injury to a pedestrian shall an automobile be classed as a "dangerous machine"?[155] At a time when the tests were relatively new should the court admit evidence of the results of a blood-test for paternity?

148. State v. Main, 69 Conn. 123, 135, 37 Atl. 80 (1897) ("peach yellows").

149. Jacobson v. Massachusetts, 197 U.S. 11, 33, 25 Sup. Ct. 358, 49 L. Ed. 643 (1905) (text on vaccination); Parker v. Brown, 317 U.S. 341, 363-68, 63 Sup. Ct. 307, 87 L. Ed. 315 (1943) (reports, bulletins, articles and books on the economics of the grape industry).

150. See Muller v. Oregon, 208 U.S. 412, 420, 28 Sup. Ct. 324, 52 L. Ed. 551 (1908) ("The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil"); Carolene Products Co. v. United States, 323 U.S. 18, 31, 65 Sup. Ct. 1, 89 L. Ed. 15 (1944).

151. See Stasiukevich v. Nichols, 168 F.2d 474, 479 (1st Cir. 1948).

152. And hence the probable purpose and scope of the statute. See Note, *Legislative Materials to Aid Statutory Interpretation,* 50 HARV. L. REV. 822, 826 (1937).

153. See H. J. Heinz Co. v. N.L.R.B., 311 U.S. 514, 523-26, 61 Sup. Ct. 320, 85 L. Ed. 309 (1941), where the court in determining whether refusal to sign a written agreement was an unfair labor practice under the Act, referred to materials outside the record including textbooks on the history of labor-relations, articles, official and unofficial bulletins and other materials.

154. See Morris, *Law and Fact,* 55 HARV. L. REV. 1303, 1318 (1942).

155. See Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629, 16 A.L.R. 255 (1920), where the court, on the basis of statistics of deaths and injuries due to automobiles taken from Census Bureau reports and of opinions expressed in publications of the National Safety Council concludes that they are "dangerous machines." See also Davis v. Co-operative Equity Co., 262 U.S. 312, 316, 43 Sup. Ct. 556, 67 L. Ed. 996 (1923), where the court struck down as a "burden on interstate commerce" a Minnesota statute permitting a summons to foreign railroad corporations to be served on a soliciting agent in the state; in reaching that conclusion it relied on statistics as to the numbers of suits against such railroads in Minnesota courts, as recited in a proclamation of the governor.

The courts today are coming more and more to bring into the open such policy questions as the basis for making law by a choice of doctrines. On some such questions, particularly those of scientific cast as in the paternity-test example, the court might be willing to hear formal expert testimony, but its normal reliance is judicial notice. Under this process the social, economic and scientific data can be conveniently and cheaply presented in the briefs, or can be found by the research of the judge or his assistants. And here again, it is believed, the usual requirements for judicial notice of certainty and indisputability should not be insisted on. The reports, statistics and professional opinions which the judge relies on will be those which he thinks most trustworthy, but they will not usually be indisputable.[156] Nor should the ultimate fact-conclusions of the judge on which his policy-judgment is based be required to be certain. In the realm of basic "legislative" facts, as in respect to policy-valuations themselves, certainly "is not the destiny of man."

Judicial notice in the field of "legislative" facts is an important avenue for a more informed consideration by our courts in policy-making of the contributions of the social, economic and physical sciences. No rigid requirement of certainty should curb it, but appropriate safeguards should be developed. Among these are the giving of notice to the parties (perhaps in some cases accompanied with proposed findings),[157] affording them opportunity to furnish materials, or supplementary materials, when such notification is needed,[158] and in exceptional cases the resort to expert referees or masters to ascertain the facts.[159]

8. PROCEDURAL INCIDENTS

Some of the practical requirements and effects of judicial notice should be briefly discussed.

First, the distinction should again be mentioned between taking judicial notice of sources, documents and materials,[160] without formal proof of

156. See Davis, *Official Notice,* 61 HARV. L. REV. 537, 549-56 (1949); Davis, *Evidence in the Administrative Process,* 55 HARV. L. REV. 364, 403-07 (1942).

157. This suggestion is made in Note, 61 HARV. L. REV. 692, 698 (1948). *Cf.* the "proposed report" of administrative agencies as described in Davis, *Official Notice,* 62 HARV. L. REV. 537, 559-63 (1949).

158. Note, 61 HARV. L. REV. 692, 697 (1948).

159. For discussion of these and similar aids to the court see Note, 61 HARV. L. REV. 692, 700 (1948); Beuscher, *The Use of Experts by the Courts,* 54 HARV. L. REV. 1105, 1107, 1118 (1941) (quoting from the English Rules of the Supreme Court).

160. Examples: People v. Stralla, 14 Cal.2d 617, 96 P.2d 941, syl. 1 (1939) (for determining whether gambling ship was operated in a "bay," may examine historical data and maps); Schultz v. Winston & Newell Co., 68 N.D. 674, 283 N.W. 69, syl. 5 (1938) (mortality tables); McClain v. Comm., 189 Va. 847, 55 S.E.2d 49, syl. 4 (1949) (official map).

authenticity, and taking notice of facts recited in such materials.[161] The court in noticing the materials may intend to notice the facts also, but the court's statement that it takes notice of the particular source must be shown to have had the wider intent before it can be persuasively cited as a precedent for that effect.

Fairness will ordinarily require that the court before making a final ruling that judicial notice will be taken of a given fact should notify the parties of his intention to do so and afford them an opportunity to present information which might bear upon the propriety of noticing the fact, or upon the truth of the matter to be noticed.[162]

In some instances it will be apparent to the court that the matter is one which the parties are expecting him to notice. The tenor of domestic law, common and statutory, and facts of universal knowledge are examples.[163] In a wide range of other matters, however, such expectation would not be obvious.[164] As to facts of this kind, and as to materials, records and sources of information sought to be noticed the party seeking notice must ordinarily request such notice and present such materials at the trial, if he is to complain later of the court's failure to notice such facts or materials.[165]

Assuming that the requirement of a request is satisfied or that a case is presented where request is unnecessary, is the court bound to take

161. The distinction is taken in Stasiukevich v. Nichols, 168 F.2d 474, 479, syl. 9 (1st Cir. 1948); and in Morgan, *The Law of Evidence, 1941-1945,* 59 HARV. L. REV. 481, 485-86 (1946). See also Fox v. Schaeffer, 131 Conn. 439, 41 A.2d 46, syl. 16, 157 A.L.R. 132 (1944) (right of the court to notice a judgment appearing in a file in another case in same court does not mean that it will give it conclusive effect as to facts found).

162. MODEL CODE OF EVIDENCE, Rule 804(1) (1942) so provides. The ruling in *In re* Aughenbaugh, 125 F.2d 887 (3d Cir. 1942), see note 105, *supra,* seems explainable on this principle. See also UNIFORM JUDICIAL NOTICE OF FOREIGN LAW ACT § 4.

163. As to these, MODEL CODE OF EVIDENCE, Rule 801 (1942) provides that the judge "shall of his own motion take judicial notice." See Mills v. Denver Tramway Corp., 155 F.2d 808, syl. 6 (10th Cir. 1946), 60 HARV. L. REV. 299, where the trial court, though not requested to do, was reversed for failure to take notice, in the absence of evidence to the contrary, that the street-car involved in the accident was equipped with a warning bell. See also Lilly v. Grand Trunk Western R.R., 317 U.S. 481, 488, 63 Sup. Ct. 347, syl. 10, 87 L. Ed. 411 (1943) (appellate court reversed for failure to notice a rule of the ICC having the force of law, though the rule was not called to the attention of the trial court whose holding was consistent with it).

164. See Ellison, P.J., in Christy v. Wabash Ry. Co., 195 Mo. App. 232, 191 S.W. 241, 245 (1917).

165. Shapleigh v. Mier, 299 U.S. 468, 57 Sup. Ct. 261, 264, 81 L. Ed. 355, 113 A.L.R. 253 (1937) (particular Mexican Constitutional provisions, laws, etc.); Goodhall v. Cox, 129 Conn. 79, 26 A.2d 551, syl. 3 (1942) (public documents); Knych v. Trustees, 320 Mass. 339, 69 N.E.2d 575, syl. 1 (1946) (laws of New York); Line v. Line, 119 Md. 403, 86 Atl. 1032, syl. 5 (1913) (that certain date fell on Sunday); Christy v. Wabash Ry. Co., 195 Mo. App. 232, 191 S.W. 241, syl. 14 (1917) (ICC rule, but *cf.* Lilly case, *supra* note 163); Russell v. Kniffin, 118 Misc. 808, 194 N.Y. Supp. 792, syl. 2 (Sup. Ct. 1922) (that date was Sunday); Amundson v. Wilson, 11 N.D. 193, 91 N.W. 37, syl. 4 (1902) (previous judgment); Mogul Transportation Co. v. Larison, 181 Ore. 252, 181 P.2d 139, syl. 3 (1947) (OPA regulations); 9 WIGMORE, EVIDENCE § 2568 (3d ed. 1940); Note, 113 A.L.R. 258, 259 (1938); 31 C.J.S., *Evidence* § 13c (1942). See extensive Note, *Judicial Notice by Appellate Courts of Facts and Foreign Laws not Brought to the Attention of the Trial Court,* 42 MICH. L. REV. 509 (1943).

judicial notice wherever the fact is proper for it? It seems to be agreed that in some cases it is mandatory, as for example in respect to domestic law and facts universally known.[166] In another range of cases it is discretionary whether the court will take judicial notice or will leave the matter to formal proof.[167] It has been said with much generality that the exercise of discretion "depends on the nature of the subject, the issue involved, and the apparent justice of the case."[168]

If the trial judge takes judicial notice of a fact, how far is this fact thereafter open to dispute? Certain situations should be distinguished. First, it is clear that fairness often requires that the judge before he notices a fact apprise the parties of the possibility and give them an opportunity to bring forward, not formal proof, but informal data (books of authority, calendars, scientific articles, government bulletins, etc.) to convince him that the matter is not clear and hence not proper for notice, or that the fact he proposes to find is not true.[169] That is part of the investigative process which is judicial notice. Second, as we have seen, the courts often take judicial notice of the authenticity and general trustworthiness of particular sources of information, such as legislative committee reports, or government bulletins, but not of the facts asserted therein.[170] When this is so, even though the authenticity of the source may not be attacked by formal proof, the facts as-

166. MODEL CODE OF EVIDENCE, Rule 801 (1942); Power v. Bowdle, 3 N.D. 107, 54 N.W. 404, syl. 6 (1893) (trial court reversed for failure to notice that under general usage of state, abbreviated symbols on tax rolls were insufficient descriptions of the land taxed). See 20 AM. JUR., *Evidence* § 23 (1939).

167. THAYER, PRELIMINARY TREATISE ON EVIDENCE 309 (1898) ("Courts may judicially notice much which they cannot be required to notice"); Burkuhl v. F. T. O'Dell Const. Co., 232 Mo. App. 967, 95 S.W.2d 843, syl. 6 (1936) (that barn higher than other buildings more likely to be struck by lightning, discretionary, notice taken); Walsh v. Public Service Co., 92 N.H. 331, 30 A.2d 494, syl. 3-5 (1943) (municipal ordinance, discretionary, notice not taken, but party did not tender "proof" of its terms); Kraus v. Kraus, 183 Misc. 667, 51 N.Y.S.2d 886, syl. 1 (Sup. Ct. 1944) (notice of foreign law, discretionary, under statute); Randall v. Commonwealth, 183 Va. 182, 31 S.E.2d 571, 572 (1944) (trial court properly in its discretion noticed that certain well known house was in the county). Of course, the wording of particular statutes regulating judicial notice in terms of "may" or "shall" will often control. See, *e.g.*, Kraus v. Kraus, *supra*. The *Model Code of Evidence* provides for compulsory notice without request—domestic common law and public statutes and indisputable "propositions of generalized knowledge" (Rule 801); discretionary notice without request—private acts, ordinances and regulations, specific notorious facts, specific and generalized facts capable of certain verification, law of sister states (Rule 802); and compulsory notice on request—matters mentioned in Rule 802 must be noticed if the party requests notice and furnishes adequate information, and has notified the adversary (Rule 803).

168. Hunter v. New York, O. & W. Ry. Co., 116 N.Y. 615, 23 N.E. 9, 10 (1889).

169. See, *e.g.*, Ohio Bell Telephone Co. v. Public Utilities Comm'r, 301 U.S. 292, 300-3, 57 Sup. Ct. 724, syl. 4-6, 81 L. Ed. 1093 (1937) (where commission, after rate-hearing, considered additional sources of information without notifying the utility nor embodying the sources in the record, and state reviewing court considered only the record and took "the word of the Commission as to the outcome of a secret investigation," due process denied). MODEL CODE OF EVIDENCE, Rule 804(1) (1942) provides: "The judge shall inform the parties of the tenor of any matter to be judicially noticed by him and afford each of them reasonable opportunity to present to him information relevant to the propriety of taking such judicial notice or to the tenor of the matter to be noticed."

170. See note 161 *supra*.

serted can be freely disputed by evidence.[171] Again, the court may take judicial notice of a fact, not as constituting part of the issue, but merely as circumstantial evidence, raising an inference of some other ultimate fact in issue. At the same time the court may rule that the fact noticed does of itself give rise to a permissible inference, or an *ad hoc* presumption, of the ultimate fact. In such event, even though the fact noticed could not be contradicted by evidence, of course evidence would be allowable to rebut the inference.[172]

This brings us to the crucial question, if the judge after due investigation with opportunity for the parties to assist therein, makes his deliberate ruling that he takes judicial notice of a given material fact, may the opposing party dispute by formal evidence the truth of the fact noticed, and in a jury-tried case, ask that the question of fact be submitted to them? Thayer suggests qualifiedly an affirmative answer[173] and Wigmore more sweepingly follows in his train.[174] However, it seems that even these great writers and judges equally great,[175] in advocating this view lose sight of the reasons for judicial notice and its purpose and function. As we have seen the conditions of judicial notice are that the fact to be noticed must either be (a) *in the special competence of the judge,* such as a conclusion about the content of a legal rule or of "legislative" fact, or (b) *indisputable,* because it is universally known to be true or because it can be readily and certainly verified upon reference to unimpeachable sources. As to the first it is apparent that the judge is specially equipped to go to reliable sources, that testimony would be a waste of time, and that the jury has no function to play. As to the second, the obvious policy is that parties shall not be permitted to dispute by proof what the judge has found to be a moot or sham issue, not susceptible of reasonable dispute. Thus judicial notice of indisputable facts rests on the same policy as the practice of summary judgments. Accordingly the weight

171. United States v. Aluminum Co. of America, 148 F.2d 416, 446, syl. 42 (2d Cir. 1945), explained in Morgan, *The Law of Evidence, 1941-1945,* 59 HARV. L. REV. 480, 482-86 (1946).

172. In Harper Furniture Co. v. Southern Express Co., 144 N.C. 639, 57 S.E. 458, 459, syl. 1 (1907), an action for delay in dispatching a broken crank shaft from Erie, Pa., to plaintiff at Lenoir, N.C., the court held that it would take judicial notice of the existence of railroad lines between the two cities and of the nature of the express business and said, "The court taking judicial notice of these facts, it must follow, as a fair and reasonable inference, 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."

173. THAYER, PRELIMINARY TREATISE ON EVIDENCE 308-09, ¶ (3) (1898).

174. 9 WIGMORE, EVIDENCE § 2567 (3d ed. 1940).

175. See the expressions of Cardozo, J., and Learned Hand, J., respectively, in Ohio Bell Tel. Co. v. Public Utilities Comm'r, 301 U.S. 292, 300-03, 57 Sup. Ct. 724, syl. 4-6, 81 L. Ed. 1093 (1937); and United States v. Aluminum Co. of America, 148 F.2d 416, 446, syl. 42 (2d Cir. 1945).

of reason[176] and the prevailing authority[177] 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.

The action of the trial judge taking notice of a fact or directing the jury to find it, or refusing to take judicial notice, should be embodied in the record for appellate review, with references to its sources when appropriate.[178] If the fact was one proper for judicial notice by the trial court, as for example a matter notorious in the local community, the upper court will likewise notice it,[179] and similarly if not within the power of the lower court, the upper court will hold itself within the same limit.[180] As we have seen above, the failure of the party to request judicial notice of a fact at the trial is significant in determining the fairness of his complaint on appeal of the judge's failure to notice. In the absence of such request below will the upper

176. Most convincingly expounded in Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, esp. 273-87 (1944), and by the same author in *The Law of Evidence, 1941-1945*, 59 HARV. L. REV. 481, 482-87 (1946).

177. See, *e.g.*, Lane v. Sargent, 217 Fed. 237 syl. 1 (1st Cir. 1914) (federal court in New Hampshire will notice Massachusetts law and properly excluded evidence of Massachusetts decisions); State v. Main, 69 Conn. 123, 37 Atl. 80, syl. 3 (1897) (in passing on validity of statute providing for destruction of infected trees court should take judicial notice of prevalence of belief in danger of "peach yellows" and not submit reasonableness of the law to jury); Beardsley v. Irving, 81 Conn. 489, 71 Atl. 580, syl. 2 (1909) (party entitled to have the court take notice whether date fell on Sunday and instruct jury accordingly rather than leave question to them); State *ex rel.* Landis v. Thompson, 121 Fla. 561, 164 So. 192, syl. 6 (1935) (judicial notice of legislative journals precludes contradictory evidence); Nicketta v. National Tea Co., 338 Ill. App. 159, 87 N.E.2d 30, syl. 1 (1949) (trial court properly took notice on pleadings that trichinosis cannot be contracted from eating properly cooked pork, and dismissed complaint; evidence thereon unnecessary); Commonwealth v. Marzynski, 149 Mass. 68, 21 N.E. 228, syl. 2 (1889) (court will take notice that tobacco and cigars are not medicine and exclude testimony to contrary); Stocker v. Boston & M.R. Co., 83 N.H. 401, 143 Atl. 68, syl. 11 (1928) (railroad's knowledge of protective devices at crossings judicially noticed; evidence thereof unnecessary and fact cannot be contracted). See CAL. CODE CIV. PROC. ANN. § 2102 (1949) § 2102 ("the court is to declare such knowledge to jury who are bound to accept it") and other western codes cited 9 WIGMORE, EVIDENCE § 2567, n.4 (3d ed. 1940); MODEL CODE OF EVIDENCE, Rule 805(b) (1942) ("the judge . . . shall direct the trier to find the fact as so noticed").

Contra: In re Bowling Green Milling Co., 132 F.2d 279, syl. 10 (6th Cir. 1942) (dictum); Macht v. Hecht Co., 191 Md. 98, 59 A.2d 754, syl. 5 (1948) (refusal to take judicial notice on pleadings of a fact open to dispute; dictum that if notice taken, can dispute by evidence); Scheufler v. Continental Life Ins. Co., 350 Mo. 886, 169 S.W.2d 359, syl. 13 (1943) (in application for allowance of fee, judicial notice of prior proceedings does not cut off applicant's right to be heard on reasonableness of allowance); State *ex rel.* Attorney-General v. Norcross, 132 Wis. 534, 112 N.W. 40, syl. 1 (1907) (in proceeding to abate dam as nuisance court could not, on demurrer to complaint, take notice that stream was not navigable and thereby cut off contrary evidence); and see cases cited in notes 169 and 171 *supra*.

Cases pro and con are cited in Wickes, Book Review, 16 TEXAS L. REV. 204, 207, 208 (1938), and 31 C.J.S., *Evidence* § 13, nn.61, 62 (1942).

178. See Nichols v. Nichols, 126 Conn. 614, 13 A.2d 591, syl. 13 (1940); MODEL CODE OF EVIDENCE, Rule 805 (1942).

179. Varcoe v. Lee, 180 Cal. 338, 343, 181 Pac. 223, syl. 7 (1919).

180. Thus the Supreme Court of the United States in reviewing lower federal courts takes judicial notice as the lower courts may of the laws of all the states, but in reviewing state courts it takes notice of other states' laws, only when the particular state court under review has that power. Hanley v. Donoghue, 116 U.S. 1, 6, 6 Sup. Ct. 242, 245, 29 L. Ed. 535 (1885).

court notice the matter? If the effect will be to sustain a satisfactory judgment, the court is much more likely to do so, than when the result is reversal of a judgment apparently just.[181] The matter is probably not reducible to rule.[182] The trial court's findings in the realm of judicial notice are not conclusive upon the upper court, which may make its own investigation and reach its finding independently.[183]

9. Trends in the Development of Judicial Notice

All writers on the subject have been impressed by the importance and the latent possibilities for usefulness of the process of judicial notice. What trends in its past growth can we discern which may be projected into the future? In the first place, the emphasis is shifting from the ancient and now comparatively less important basis of "common knowledge" to the more pregnant basis of verifiable certainty. This latter is a channel which easily brings to the court the abundant fruits of new scientific findings and discoveries as soon as they become professionally accepted and enables the court to translate these findings to the jury not tentatively but with authority. In the second place, this shift of emphasis, from what needs no proof to what can be verified with certainty by investigation, reveals that judicial notice is not merely a substitute for formal proof by witnesses but is itself another method of proof of certain kinds of facts, namely, the method of research into the professionally authoritative books and reports in the particular field. Viewed thus as a new system of proof of facts within a particular range it is apparent that judicial notice is still in a formative stage. To attain full usefulness, certain directions of growth may be looked for. Among these are the clearer acceptance of safeguards for the parties in the form of notice and opportunity to present materials on matters proposed to be noticed, the wider consciousness of the responsibility of counsel for the production of reliable sources for investigation, the realization by the judges of their primary responsibility for the adequacy of the research and the trustworthiness of the sources relied on, and finally the provision for the judges of expert and impartial assistants who can evaluate the data from the viewpoint of the particular science in cases when such evaluation is beyond the competence of the judges.

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181. See Note, 42 Mich. L. Rev. 509, 513, (1943).

182. See discussion of Clark, J., in American Legion Post v. First Nat. Bank, 113 F.2d 868, 872, syl. 4, 5 (2d Cir. 1940).

183. 9 Wigmore, Evidence § 2567(c) (3d ed. 1940). And the failure or refusal of the trial court to take notice of a fact does not preclude the upper court from noticing it. Rogers v. Cody; 8 Cal. 324, 38 Pac. 81, syl. 1 (1894) (that land foreclosed was outside county).