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Judicial Notice and Rebutting Evidence

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JUDICIAL NOTICE AND REBUTTING EVIDENCE

Judicial notice is defined as, "the doctrine that the law will take cognizance of certain facts without proof, either because of their universal notoriety, or the fact is common knowledge within the jurisdiction of the court, or is closely related to the official character of the court."

The doctrine of judicial notice does not belong to the law of evidence alone. It is a part and process of judicial reasoning. As one judge aptly put it, "the court may not shut its eyes to what all others can see and understand."[1] The object of this rule is to save time, labor and expense in securing and introducing evidence on matters which are not ordinarily capable of dispute. Applying the doctrine of judicial notice gives rise to two important and fundamental problems: (1) of what facts will the court take judicial notice and, (2) may evidence be introduced to rebut facts judicially noticed by the courts?

In answering the first question, the courst have agreed that, generally speaking, matters of judicial notice have three material requisites: (1) the matter must be a matter of common knowledge; (2) it must be well and authoritatively settled and not doubtful and uncertain; (3) and it must be known to be within the limits of the jurisdiction of the court. The matter of which a court will take judicial notice must be a subject of common and general knowledge. A fact is said to be generally recognized or known when its existence or operation is accepted by the public without qualification or contention or capable of immediate accurate demonstration; for example, the existence and location of highways and bridges.[2] The test is whether sufficient notoriety attaches to the fact involved as to make it proper to assume its existence without proof. The fact that a belief is not universal, however, is not controlling for there is hardly any belief that is accepted by everyone. Those matters familiarly known to the majority of mankind, or to those persons familiar with the particular matters in question, or knowledge in the particular jurisdiction which everyone of average intelligence and knowledge of things about him can be presumed to know, are properly within the concept of judicial notice. Matters of which the court will take notice are to a great extent uniform or fixed and cannot depend in any way upon uncertain testimony, for as soon as a matter becomes disputable it ceases to fall under the heading of common knowledge, and so will not be judicially recognized.[3]

Frequently the doctrine of judicial notice is stated as a rule dispensing with proof of certain facts, averment of them, or both. There are some matters that are regarded as so fixed, certain and unchangeable that the courts will take judicial notice of them as a matter of course, and a refusal to do so may be reversible error.

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1 McGovern v. New York, 234 N.Y. 377.
2 Schmidt v. Allegheny Co., 303 Pa. 560.
3 Carns v. Matthews, 106 Pa. Super. 582.

For instance, there are the laws of the forum, the coincidence of the days of the week and the days of the month,[4] and the hours of sunrise and sunset.[5]

On the other hand, there are many matters not so fixed and unchangeable, and in regard to these the courts are permitted a discretion, either to assume that these are true until found false, or to require evidence in the first instance. The courts are not bound to take judicial notice of certain facts, even though such facts may be well-established matters of common knowledge; however, they may require supplemental proof.[6] Whether a court will take judicial notice of well-established matters of fact is discretionary with the trial court, the rulings of which usually depend upon the nature of the subject, the issue involved, the apparent justice and the circumstances of the particular case. Language found in many cases to the effect that the court is bound to take judicial notice of this or that fact means no more than that the court may do so if in its discretion, the sense of justice requires it. This is proved by the fact that decisions are rarely reversed, because the trial court refuses to take judicial notice of matters of fact without proof. As far as precedent on particular points is concerned prior decisions are of little value because time, place and surrounding circumstances must be taken into consideration when a court is faced with the problem of deciding whether or not it will take judicial notice of a certain factual situation.

It is not essential that matters of judicial notice be actually known to the judge.[7] If the facts are proper subjects of judicial notice, the judge may inform himself in any way he sees fit. Judges may refresh their memories upon matters properly subjected to judicial notice from encyclopedias, dictionaries or other publications, although it is clear that the mere appearance of facts in the latter does not entitle them to be judicially noticed, unless they are such as to be part of the common knowledge. In accord with the above reasoning, it is proper to receive evidence as to facts that will be judicially noticed when such proof is received merely as an aid to the memory of the court.[8] The effect of a fact which has been judicially noticed not only relieves the parties from the necessity of setting forth in their pleadings many essential parts of their case, but also relieves them of the burden of proving such facts.

This brings us to the second question—may evidence be introduced to rebut facts judicially noticed?

Here the cases seem to be in conflict and confusion. Some cases hold that a fact judicially noticed is indisputable and therefore no evidence can be introduced to rebut such facts.[9] Other cases hold that a matter judicially noticed means merely

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4 Wilson v. Van Leer, 127 Pa. 371.
5 Kovalchik v. Demo, 94 Pa. Super. 167.
6 Brush v. Lehigh Val. Coal Co., 290 Pa. 322.
7 Seemens' Estate, 346 Pa. 610.
8 Seemens' Estate, 346 Pa. 610.
9 Utah Construction Co. v. Berg, et al, 68 Ariz. 285.

that it is taken as true until the opponent offers competent evidence to the contrary. How can we reconcile the two views? Reading the cases carefully, we find the courts of the first group have divided the facts which are to be judicially noticed into two distinct classes, the first of which has facts which are contained in official documents and these documents themselves are sources of indisputable accuracy[10] When a case such as this arises and the court rules that the fact is judicially noticed and that no evidence to the contrary will be admitted, the party against whom the fact operates has not been prejudiced. In the second class, these same courts hold that, in cases where the facts are not unchangeable, they must first determine whether the fact is within the domain of judicial notice. In reaching this decision the court may require the parties to submit information to refresh the memory of the court. Each party is permitted to submit its side of the argument as to whether the fact should be considered within the domain of judicial notice. The court, after hearing this information and refreshing its memory, makes a ruling that it will or will not take judicial notice of a certain fact. Thus the courts adhere to the one view that, "you cannot rebut an indisputable fact." They reach this decision by the rationalization that they are not receiving contrary evidence, but are merely refreshing their memory as to whether or not the fact is within the domain of judicial notice. Cases such as these are often cited as holding "a fact judicially noticed takes the place of proof and is of equal force and cannot be rebutted." Looking at the holding alone seems to place at an extreme disadvantage the party against whom the judicially noticed fact operates. In actual practice, however, he has had an opportunity to offer his contrary evidence and suffers no disadvantage.[11]

Cases cited as contrary to this view hold that a party may introduce evidence to rebut a fact which has been judicially noticed. The difference between the two holdings, however, seems to be more apparent than actual, because they both reach similar results. The only real difference seems to be in the time when the contrary evidence will be received. In group number one, contrary views are thrashed out and then the court rules that it will or will not take judicial notice. In group number two, the court takes judicial notice in the first instance based on its own discretion and then allows the party affected to offer competent evidence to the contrary. This latter view is reflected in a recent case, *Nicketta, et al* v. *National Tea Co.,* 338 Ill. App. 159, where the court took judicial notice that a human being could not contract the disease, trichinosis, from eating pork which had been properly cooked. Then it went on to say in the opinion that this fact judicially noticed was conclusive as against the plaintiff, because the plaintiff offered no scientist, doctor, book, article, test, or other authority which would establish or tend to establish that a human being can acquire trichinosis from eating pork which had been properly cooked. Considering only the results, it is of little importance which group of

10 Snyder Estate, 346 Pa. 615.
11 Snyder Estate, 346 Pa. 615.

cases we follow as long as we give the adverse party, at some time in the proceeding, a right to challenge facts which are to be used against him.

The authorities on the law of evidence seem to follow the rationale of the cases or vice-versa. In Wigmore's "Code of the Rules of Evidence," § 3076, we find the rule stated in the following words:

> "The judicial notice of a fact is only a provisional ruling, which becomes conclusive if not 'bona fide' disputed; the party disfavored by the fact may therefore introduce evidence to the contrary."

This statement of the rule seems consistent with the underlying reasons for the doctrine of judicial notice. The list of things covered by judicial notice is constantly expanding and no exact limit can be placed upon it. That which will be matter of common knowledge in one country or locality, and be judicially noticed in another, may be entirely beyond the knowledge or experience of the court or the people.[12] Facts of which the court will not take judicial notice today may be recognized tomorrow as out of the realm of proof, and facts which are recognized today as indisputable may be proved false and unfounded by new discoveries and advances in science. Of necessity, judicial knowledge is continually extended to keep pace with the advance of art, science and general knowledge. To hold otherwise would be to deny progress and such a position would be untenable. Thus, the courts, in applying the doctrine of judicial notice, merely reflect the state of the times and progress. If we accept the above reasoning as sound, then we must also accept the proposition that when there is a *bona fide* dispute as to whether the matter falls within the domain of judicial notice, the party disfavored by the fact must be allowed to introduce evidence to the contrary.

The power of the court to take judicial notice should be exercised with caution, and if there is any doubt whatever either of the fact itself or that it is a matter of common knowledge, evidence should be required. The American Law Institute's Code of Evidence sets up many rules with the view of protecting the rights of both parties to a proceeding, when the problem of judicial notice arises. These safeguards are worthy of adoption by any jurisdiction. These rules are as follows: (1) requiring the party requesting judicial notice to furnish the judge with sufficient information to enable him to comply with the request and to give each adverse party such notice, if any, as the judge deems necessary to enable the adverse party fairly to prepare to meet the request;[13] (2) the judge shall inform the parties 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, and the judge should not take judicial notice unless the matter is clearly indisputable;[14] (3) require the judge to include in the record of the trial

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12 State v. Main, 69 Conn. 123; State v. Damm, 64 S.D. 309.
13 Rule 803.
14 Rule 804.

a statement of the matter as so noticed and if tried by jury, shall direct the jury to find the matter as so noticed;[15] (4) by allowing both the trial judge in proceedings after trial and the reviewing court to take judicial notice, but requiring in either event that the parties be afforded reasonable opportunity to present information relevant to the propriety of taking such judicial notice and to the tenor of the matter to be noticed.[16]

The views taken by the cases and those of the authorities all recognize that even though the court has validly taken judicial notice of a fact situation, a party is not prevented from showing that the facts cannot be applied in the particular case. Such was the case in *Mazmanian* v. *Kuken,* 189 N.E. 815, where the court took judicial notice that a depression existed in the United States during the early 1930's, which condition was within the domain of judicial notice, the plaintiff could not rebut the propriety of noticing the depression, but he could show that he was in fact employed during those years and would have had continued employment had not the injury occurred.[17]

Many of these rules are generally recognized in practice, and if adopted *in toto* would be entirely consistent with the objectives of judicial notice—saving time, labor and expense in getting at the true issues of the case and rendering justice to all parties concerned.

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[15] Rule 805.
[16] Rule 806.
[17] Accord, Commonwealth v. Marzynski, 149 Mass. 68.