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Judicial Notice

Charles V. Laughlin

JUDICIAL NOTICE

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The principle of judicial notice goes to the very essence of the judicial process. Without a backlog of general knowledge, or the power to make many summary determinations, any tribunal would find the process of adjudication approaching impossibility. For a principle so important, judicial notice opens the door to little in the way of crucial or controversial issues.

Judicial notice is covered by Uniform Rules 9 through 12.[1] The

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1. Such portions of the Uniform Rules of Evidence (proposed by the commissioners on Uniform State Laws and the American Law Institute) as deal with judicial notice are as follows:

"RULE 9. *Facts Which Must or May be Judicially Noticed.*

"(1) Judicial notice shall be taken without request by a party, of the common law, constitutions and public statutes in force in every state, territory and jurisdiction of the United States, and of such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute.

"(2) Judicial notice may be taken without request by a party, of (a) private acts and resolutions of the Congress of the United States and of the legislature of this state, and duly enacted ordinances and duly published regulations of governmental subdivisions or agencies of this state, and (b) the laws of foreign countries, and (c) such facts as are so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute, and (d) specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy.

"(3) Judicial notice shall be taken of each matter specified in paragraph (2) of this rule if a party requests it and (a) furnishes the judge sufficient information to enable him properly to comply with the request and (b) has given each adverse party such notice as the judge may require to enable the adverse party to prepare to meet the request.

"RULE 10. *Determination as to Propriety of Judicial Notice and Tenor of Matter Noticed.*

"(1) The judge shall afford each party reasonable opportunity to present to him information relevant to the propriety of taking judicial notice of a matter or the tenor of the matter to be noticed.

"(2) In determining the propriety of taking judicial notice of a matter or the tenor thereof, (a) the judge may consult and use any source of pertinent information, whether or not furnished by a party, and (b) no exclusionary rule except a valid claim of privilege shall apply.

"(3) If the information possessed by or readily available to the judge, whether or not furnished by the parties, fails to convince him that a matter falls clearly within Rule 9, or if it is insufficient to enable him to notice the matter judicially, he shall decline to take judicial notice thereof.

"(4) In any event the determination either by judicial notice or from evidence of the applicability and the tenor of any matter of common law, constitutional law, or of any statute, private act, resolution, ordinance or regulation falling within Rule 9, shall be a matter for the judge and not for the jury.

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

Minnesota statutory law upon that subject is not extensive. Chapter 599[2] is entitled "Judicial Notice and Proof." Sections 599.01-599.03 and 599.11-599.25 deal with the subject of varying kinds of judicial proof (some of which may have some indirect relationship to the subject of judicial notice), only sections 599.04-599.10 of that chapter deal with judicial notice. Those sections correspond to the Uniform Judicial Notice of Foreign Law Act. In addition to the seven mentioned sections of chapter 599, Minnesota has a constitutional provision[3] requiring judicial notice of the provisions of Municipal Home Rule Charters, and statutory provisions requiring the judicial notice of properly published rules and regulations of administrative agencies,[4] municipal ordinances and local statutes,[5] private statutes,[6] the seal of any executive department of the United States or of any corporation the stock of which is beneficially owned by the United States,[7] and the seal and signature of the chairman and secretary of the Industrial Commission.[8]

There are many Minnesota cases listed in the digest under the heading of "Judicial Notice." In many, but not in all, the actual words "judicial notice" were used by the courts. Most of these cases do no more than state that such and such a matter will be judicially noticed. Very few deal with judicial notice as a substitute for proof, as contemplated by Uniform Rules 10(1), 10(2), 10(3), 11, 12(1), 12(2) and 12(4) [9] That is the situation in which a party, not de-

judge, he shall instruct the trier of fact to accept as a fact the matter so noticed.

"RULE 12. *Judicial Notice in Proceedings Subsequent to Trial.*

"(1) The failure or refusal of the judge to take judicial notice of a matter, or to instruct the trier of fact with respect to the matter, shall not preclude the judge from taking judicial notice of the matter in subsequent proceedings in the action.

"(2) The rulings of the judge under Rules 9, 10 and 11 are subject to review.

"(3) The reviewing court in its descretion may take judicial notice of any matter specified in Rule 9 whether or not judicially noticed by the judge.

"(4) A judge or a reviewing court taking judicial notice under Paragraph (1) or (3) of this rule of matter not theretofore so noticed in the action shall afford the parties reasonable opportunity to present information relevant to the propriety of taking such judicial notice and to the tenor of the matter to be noticed."

2. Minn. Stat. (1953).
3. Minn. Const. Art. 4, § 36.
4. Minn. Stat. § 15.049 (1953).
5. Minn. Stat. § 544.20 (1953).
6. Minn. Stat. § 628.21 (1953).
7 Minn. Stat. § 600.17 (1953).
8. Minn. Stat. § 175.11 (1953). In addition § 192.81 requires all military courts of the Minnesota National Guard to judicially notice the signature of all commissioned officers of the National Guard.
9. See note 1, *supra.*

siring to introduce evidence in support of some factual contention, will request the trial court to judicially notice the fact for which he is contending. If judicially noticed, the matter will be covered by an instruction, or may be the basis for a directed verdict, and will be subject to review. Instead, almost all the decided Minnesota cases involve the situation contemplated by Uniform Rule 12(3). They are nearly all cases in which some matter was judicially noticed initially by the Supreme Court of Minnesota. Possibly, in some of the cases in which the Supreme Court affirmed the trial court, and, in doing so invoked the principle of judicial notice, the fact involved had already been judicially noticed below. If so, that did not appear from the published opinions. Thayer has pointed out[10] that to regard judicial notice as merely a phase of the law of evidence obscures its real nature; that instead, it belongs to the subject of judicial reasoning and belongs to all phases of the law in which reasoning is important. The Uniform Rules seem to be based largely, although not entirely, upon the concept of judicial notice as a phase of the law of evidence, whereas the bulk of the Minnesota decisions seem to be based upon the broader Thayerian concept of judicial notice as a phase of legal reasoning. Specific aspects of the Uniform Rules will now be considered.

I

Distinction between Judicial Notice Being Mandatory and Being Only Permissive Unless a Request and Showing be Made.

Uniform Rule 9 provides in part:

"*Facts which must or may be judicially noticed.*

"(1) Judicial notice shall be taken without request by a party, of. . . .

"(2) Judicial notice may be taken without request by party, of. . . .

"(3) Judicial notice shall be taken of each matter specified in paragraph (2) of this rule if a party requests it and (a) furnishes the judge sufficient information to enable him properly to comply with this request and (b) has given each adverse party such notice as the judge may require to enable the adverse party to prepare to meet the request."

Whether judicial notice is mandatory or permissive (unless requested by a party who produces data to support his request) is a question noted by the writers.[11] It is, however, a problem generally ignored by Minnesota decisions. Absent the Uniform Rules, the

10. Preliminary Treatise on Evidence 278 (1898).

11. 9 Wigmore, Evidence § 2563 (3d ed. 1940), Morgan, *Judicial Notice*, 57 Harv. L. Rev. 269, 271, 276, 277 (1944), McCormick, *Judicial Notice*, 5 Vand. L. Rev. 296, 319, 320 (1952).

one instance of mandatory judicial notice, generally recognized, relates to the statutory and common law of a court's own jurisdiction.[12] That such judicial notice is compulsory is true in the sense that a court will be reversed if wrong as to the law even though the proper authorities have not been called to its attention by counsel.[13] Undoubtedly, that is the law of Minnesota. Minnesota does expressly recognize the distinction between compulsory and permissive judicial notice in connection with the law of other states and various inferior types of law, such as municipal ordinances.[14] So far as other types of judicial notice are concerned, there are plenty of Minnesota decisions in which the Supreme Court uses judicial notice in connection with its action of reversing the trial court. This writer, however, has found no case in which the Supreme Court reversed the trial court because it had failed to take judicial notice.

II

Subject Matter of Judicial Notice: Judicial Notice of Law

Categories of judicial notice are well outlined by Professor McCormick as follows:[15]

(1) Matters of common knowledge,
(2) Matters capable of definite or specific ascertainment,
(3) Matters which the judge, as such, has a special responsibility for ascertaining,
(4) Matters known to other government departments, especially accessible to the judge,
(5) Social and political facts, particularly relevant to the judge's participation in the law-making process.

Although not listed first the most striking instance of judicial notice is in regard to what is normally called "law." Judicial notice is a part of the judicial process, and what we call "law" is the most striking product of that process. This would fall third on McCormick's list. Wigmore[16] describes this type as follows

> "Matters which the judicial function supposes the judge to be acquainted with, in theory at least."

Provisions of the Uniform Rules regarding judicial notice of law are as follows

12. *Ibid.*
13. Assuming, of course, that error has not been invited by affirmatively misleading the court.
14. See notes 21, 22, 30, and 31 *infra*. It is not intended to state the rules, at this point, regarding judicial notice of various types of law. It is only intended to point out that the distinction between mandatory and permissive judicial notice is recognized where the matter of judicial notice of certain types of law is concerned.
15. McCormick, *Judicial Notice*, 5 Vand. L. Rev. 296-297 (1952) Compare 9 Wigmore, Evidence § 2571 (3d ed. 1940).
16. 9 Wigmore, Evidence § 2571(2) (3d ed. 1940).

"Rule 9....
"(1) Judicial notice shall be taken without request by a party, of the common law, constitutions and public statutes in force in every state, territory and jurisdiction of the United States,....
"(2) Judicial notice may be taken without request by a party, of (a) private acts and resolutions of the Congress of the United States and of the legislature of this state, and duly enacted ordinances and duly published regulations of governmental subdivisions or agencies of this state, and (b) the laws of foreign countries...."

It will be seen that some types of law fall into the category of mandatory judicial notice,[17] whereas judicial notice of other types of law is permissive.[18] It must be borne in mind that any matter subject to permissive judicial notice becomes subject to mandatory judicial notice if the requirements of Rule 9(3) are compiled with. Whenever used, the term "permissive" judicial notice implies this limitation.

It is evident that Rule 9(1) makes mandatory judicial notice of the constitutions, general statutes and doctrinal law of the United States and the State of Minnesota. Such is entirely in accord with present Minnesota practice.[19] The Uniform Rules make mandatory judicial notice of the constitutions, general statutes and doctrinal law of all other American states. Since the enactment of the Uniform Judicial Notice of Foreign Law Act[20] in 1939, judicial notice of such laws by Minnesota courts has been permissive,[21] but not

17 Those covered by Rule 9(1).
18. Those covered by Rule 9(2).
19. In McDonald v. Railway Transfer Co., 121 Minn. 273, 141 N. W 177, 178 (1913) an act of Congress was judicially noticed. The following cases involve judicial notice of Minnesota law: Midwest Wine Co. v. Ericson, 227 Minn, 24, 34 N. W. 2d 738 (1948), Peterson v. Village of Cokato, 84 Minn. 205, 87 N. W. 615 (1901); Burfenning v. Chicago, St. P., M. & O. Ry., 46 Minn. 20, 48 N. W. 444 (1891). Likewise, the provisions of municipal charters (as distinguished from municipal ordinances) are judicially noticed by Minnesota doctrine. Oehler v. City of St. Paul, 174 Minn. 410, 219 N. W 760 (1928); A. A. White Townsite Co. v. City of Moorhead, 120 Minn. 1, 138 N. W. 939 (1912). Home rule charters, by being drafted by the people of the municipality, can hardly be considered as general state statutes; however, they are judicially noticed by the terms of the Minnesota constitution, art. 4, § 36.
20. Minn. Stat. §§ 599.04-.10 (1953).
21. Patterson v. Consumers Roofing Co., 209 Minn. 50, 295 N. W. 401 (1940), 25 Minn. L. Rev. 646 (1941). Formerly, Minnesota Courts did not judicially notice the law of other American states; Patterson v. Consumers Roofing Co., *supra*. There were ways by which the Minnesota courts could mitigate the inconvenience of their refusal to judicially notice. By statute, methods of proof were made more expeditious (Minn. Stat. §§ 599.01, 599.02, 599.03). Those statutes are still carried as active, although they might be regarded as largely obsolete now. Also, certain presumptions were helpful. For example, it was presumed that the law of another state was the same as the common law of Minnesota. Beard v. Chicago, M. & St. P Ry., 134 Minn. 162, 158 N. W. 815, 816 (1916); Farmers State Bank v.

mandatory [22] In contrast, Uniform Rule 9(2)(b) makes judicial notice of the law of foreign countries only permissive. However, under present law judicial notice of the law of foreign countries is not even permissive. The decisions[23] denying such judicial notice were prior to the enactment of the Uniform Judicial Notice of Foreign Law Act but appear not to have been changed by that act.[24] Uniform Rule 9(2)(a) and the present law of Minnesota are in accord in permitting judicial notice of private legislative enactments, municipal ordinances and duly published administrative regulations. Judicial notice of municipal ordinances goes back to 1885[25] and is currently established by statute[26] and recognized by decisions.[27] The same statement may be made concerning private statutes[28] and duly published administrative regulations.[29] That the judicial notice of municipal ordinances and private statutes is per-

Walch, 133 Minn. 230, 158 N. W 253, 254 (1916), Twin City Box Factory v. Adirondack Fire Ins. Co., 114 Minn. 475, 131 N. W 497 (1911), Myers v. Chicago, St. P., M. & O. Ry., 69 Minn. 476, 72 N. W 694, 695 (1897), Cooper v. Reaney, 4 Minn. (Gil. 413) 528 (1850), Desnoyer v. McDonald, 4 Minn. (Gil. 402) 515 (1860).

22. Minn. Stat. § 599.04 (1945), *In re* Daniel's Estate, 208 Minn. 420, 294 N. W 465, 472 (1940). The question is not squarely settled by the statute, standing alone. Section 599.04 uses the mandatory language "shall," but § 599.07 authorizes a party to request judicial notice provided "reasonable notice shall be given to the adverse parties either in the pleadings or otherwise." That section has been construed by 25 Minn. L. Rev. 646 to remove judicial notice of the law of other states from the mandatory category. *In re* Daniel's Estate, *supra,* holds that *a party* is not held to know the law of another state. In reaching that conclusion the court states that, even under the Uniform Act, *it* does not judicially notice the law of another state unless requested to do so and the pertinent sources are called to the court's attention.

23. Greear v. Paust, 202 Minn. 633, 279 N. W 568, 570 (1938), Traders Trust Co. v. Davidson, 146 Minn. 224, 178 N. W 735, 737 (1920), O. W Kerr Co. v. Nygren, 114 Minn. 268, 130 N. W 1112, 1113 (1911), Lando v. Lando, 112 Minn. 257, 127 N. W 1125, 1127 (1910).

24. The basic section (§ 1 of the Act, 599.04 of Minn. Stat.) specifies only United States jurisdictions, thereby, by implication, excluding foreign countries. Section 599.08 (§ 5 of the Uniform Act) specifies that the law of every other jurisdiction shall be determined by the court, but shall not be subject to judicial notice. *See also,* McCormick, *Judicial Notice,* 5 Vand. L. Rev. 296, 307 (1952).

25. See Village of Minneota v. Martin, 124 Minn. 498, 145 N. W 383 (1914).

26. Minn. Stat. § 544.20 (1953).

27 Jedneak v. Minneapolis General Electric Co., 212 Minn. 226, 4 N. W 2d 326, 330 (1942), Buhner v. Reusse, 144 Minn. 450, 175 N. W 1005, 1006 (1920), Village of Minneota v. Martin, 124 Minn. 498, 145 N. W 383 (1914), State v. Overby, 116 Minn. 304, 133 N. W 792 (1911).

28. Permissive judicial notice was established by Minn. Stat. § 628.21 (1945) and recognized by Stabs v. City of Tower, 229 Minn. 552, 40 N. W 2d 362, 365 (1949), Burlington Mfg. Co. v. Board of Courthouse and City Hall Comm'rs., 67 Minn. 327, 69 N. W 1091 (1897), Webb v. Bidwell, 15 Minn. (Gil. 394, 398) 479 (1870).

29. Judicial notice established by Minn. Stat. § 15.049 (1945) (incorporating by reference sections 15.045-15.048), and recognized in Bunten v. Eastern Minnesota Power Co., 178 Minn. 604, 228 N. W 332 (1929).

missive and not mandatory is shown by the statutory requirement that ordinances and private statutes shall be pleaded and "thereupon the court shall take judicial notice thereof."[30] This pleading requirement fulfills the same function as the request and notice in Uniform Rule 9(3), and therefore changes permissive into mandatory judicial notice. There is no comparable pleading requirement in the statute[31] dealing with judicial notice of administrative regulations. On the contrary, the statute uses the mandatory language, "Judicial notice . . shall be taken." However, this statute deals with the same type of subject matter as those covering municipal ordinances and private statutes, and it is here believed that the judicial notice provided for is permissive.

III

Matters of Common Knowledge[32]

Uniform Rule 9 provides in part:

"(1) Judicial notice shall be taken without request by a party, . . . of such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute.

"(2) Judicial notice may be taken without request by a party of, . . . (c) such facts as are so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute. . . "

It will be observed that three categories are referred to:

(1) "Specific facts . . universally known."

(2) "Propositions of generalized knowledge."

(3) "Facts . . . generally known . . . within the territorial jurisdiction of the court."

The differentiation between universal knowledge and general knowledge within the territorial jurisdiction of the court is quite clear.[33]

30. Minn. Stat. §§ 544.20, 628.21 (1953).

31. Minn. Stat. § 15.049 (1953).

32. Because common knowledge is one of the most generally asserted bases for judicial notice, there is sometimes a temptation to impart notice or knowledge to the public generally of all things that will be judicially noticed by a court. The Supreme Court of Minnesota fell into the error of regarding the passage of a statute as notice to the public of an existing fact, simply because the court would judicially notice the statute, in Minnesota v. Messenger, 27 Minn. 119, 6 N. W. 457 (1880). The same idea was followed in Bauman v. Granite Sav. Bank & Trust Co., 66 Minn. 227, 68 N. W. 1074 (1896) in which the court implied that since it will judicially notice that Duluth is in St. Louis County, the public are charged with notice of that fact. Fortunately, in Electric Short Line Term. Co. v. Minneapolis, 64 N. W. 2d 149, 154 (Minn. 1954) the court expressly overruled the *Messenger* case. The fallacy of the *Messenger* case was in concluding that because common knowledge implies judicial notice, judicial notice implies common knowledge.

33. This distinction is not expressed by the Minnesota Supreme Court in so many words. However, there are cases in which the court finds the existence of a common knowledge, which could not possibly exist otherwise than

Not so obvious is the distinction between facts and propositions.

In innumerable cases the Supreme Court of Minnesota has taken judicial notice of propositions of generalized knowledge, this writer has found no case, however, in which a specific fact has been recognized as being universally known.[34] In other words, common knowledge has not been used as a substitute for proof, rather, the Minnesota decisions basing judicial notice thereon use it as a phase of judicial reasoning or judicial legislation. The term "judicial reasoning" is used to indicate that part of the judicial process whereby the applicability of established rules of law to specific facts is determined. The term "judicial legislation" is used to indicate the activities of a court when confronted with a novel situation, or with a need to modify rules of law to meet changing social conditions. The difference between judicial reasoning and judicial legislation is one of degree only, but in classifying the case material, the distinction is a convenient one. Professor McCormick states:[35]

> " [C]ourts make a wider use of judicial notice in formulating arguments in supporting conclusions of law than in deciding particular facts of issue. "

This sets forth in different words the thought previously expressed. It is submitted that the analysis here presented strikes the key as to the difference between "specific facts" and "propositions of generalized knowledge." "Specific facts" would seem to correspond to Professor McCormick's "particular facts in issue." On the other hand, judicial notice of "propositions of generalized knowledge" seems to correspond to what has been called, herein, judicial notice as a matter of judicial reasoning or what Professor McCormick calls "judicial notice in formulating arguments in supporting conclusions of law." This argument is supported by the fact that Rule

within the territorial jurisdiction of that court. In Petersen v. Holm, 66 N. W 2d 15, 16 (Minn. 1954) the court found that it was common knowledge, *especially among people of Scandinavian background,* that Petersen and Peterson are the same name. That would certainly not be common knowledge except in a jurisdiction with many people of Norwegian or Swedish ancestry. Likewise, in Erickson v. County of Stearns, 190 Minn. 433, 252 N. W 219 (1934) the court took judicial notice that certain Minnesota lakes were navigable, and in *In re* Baldwin, 218 Minn. 11, 15 N. W 2d 184, 187 (1944), the court eloquently acknowledged the scenic beauties of Lake Minntonka. It is respectfully submitted that only a person familiar with Minnesota would be aware of these things. If the first two cases cited above were pending outside of Minnesota the court could inform itself by obtaining specific information. Thus, this particular basis for judicial notice merges into the one to be next considered, matters capable of a definite ascertainment.

34. Exceptions must be made of the cases referred to in note 33 *supra.* In those cases the court judicially noticed facts known within the court's territorial jurisdiction. If the Uniform Rules had been in effect in Minnesota when those cases were decided judicial notice would have been under Rule 9(2) rather than Rule 9(1).

35. McCormick, *Judicial Notice,* 5 Vand. L. Rev. 296, 297 (1952)

801 of the American Law Institute's Model Code of Evidence refers to "propositions of generalized knowledge" but not to "specific facts," which are covered in Rule 802. Rule 801 of the Model Code corresponds with Uniform Rule 9(1), whereas Rule 802 corresponds with Uniform Rule 9(2). It is evident, both from the fact that Rule 801 combines "propositions of generalized knowledge" with "common law and public statutes" and from the comment on that rule,[36] that such propositions are considered as a part of the law-making or law-applying process. Judicial notice of "specific facts" would almost always be made or denied by a trial court and its action affirmed or reversed by a reviewing court. On the other hand, since trial courts do not usually write opinions formally rationalizing their decisions, judicial notice of "propositions of generalized knowledge" will almost always be made initially by reviewing courts.

Sometimes propositions of generalized knowledge are used by the Supreme Court in affirming the action of the trial court in sustaining demurrers to pleadings.[37] Other decisions uphold the actions of the trial courts in submitting cases to juries[38] or withdrawing them from juries.[39] Judicial notice has proven useful in up-

36. A. L. I., Model Code of Evidence, 319 (1942). Consider particularly, the following comment:

"... In determining whether a verdict is supported by the evidence, both trial and appellate judges universally apply those propositions of generalized knowledge which are so generally known and accepted as not to be the subject of dispute by intelligent men. No evidence of such propositions is required, and, indeed, it would ordinarily be rejected if offered."

37. In Marudas v. Odegard, 215 Minn. 357, 10 N. W. 2d 223, 234 (1943), the court judicially noticed that at the outset of World War II great changes occurred in the auto business, and that, therefore, allegations that defendant published that plaintiff had discontinued his automobile business do not allege a cause of action for libel because going out of business, under such circumstances, does not imply insolvency. See also Wiseman v. Northern Pac. Ry., 214 Minn. 101, 7 N. W. 2d 672, 674 (1943); Laine v. Consolidated Vermillion & Extension Co., 123 Minn. 254, 143 N. W. 783 (1913).

38. Baxter v. Great Northern Ry., 73 Minn. 189, 75 N. W. 1114 (1898). This was a suit for damages caused by a fire spreading from the defendant railroad's right of way. One of the grounds upon which a directed verdict was requested was that the section men were not acting in the course of their employment in starting the fire. In upholding the action of the trial court in denying a directed verdict the court judicially noticed the usual functions of sectionmen.

39. These are the cases in which directed verdicts have been given, or cases have been otherwise withdrawn, as by judgments notwithstanding the verdict. Examples of such cases are: Syverson v. Nelson, 70 N. W 2d 880, 883 (Minn. 1955); Person v. Okes, 224 Minn. 541, 29 N. W. 2d 360, 362 (1947); Plotke v. Metropolitan Life Ins. Co., 210 Minn. 541, 299 N. W. 216 (1941); Betcher v. Capital Fire Ins. Co., 78 Minn. 240, 80 N. W. 971, 972 (1899). In Person v. Okes, *supra*, plaintiff, a domestic servant, was injured when a small step ladder she was using collapsed. She sought to establish notice of the defect on the part of the defendant by reason of fact that he had

holding instructions given by trial courts.[40] In one case[41] the trial court was upheld in rejecting evidence of a fact judicially noticed. In holding damages not to be excessive the court may also use judicial notice.[42] In two cases the Supreme Court used judicial notice in upholding the actions of the Industrial Commission.[43] The cases in which the Supreme Court used judicial notice as a part of its reasoning in reversing the trial court are fewer in number than those in which that principle has been used to accomplish an affirmance. In the decisions here noted, trial courts submitted cases to the juries, and the court resorted to judicial notice in holding that the issues should have been withdrawn, either by use of the directed verdict or the judgment notwithstanding the verdict.[44] In these cases is presented judicial reasoning in a more extreme form. It is easier to uphold a trial court than to grant a reversal, as witness the fact that far more of the cases here cited are affirmances than reversals. It is also easier to reverse the action of the trial court in directing a verdict and remand for jury trial, as was done in *Himmel v. Orliski*.[45] Therefore, more acute and fundamental reasoning is required in reversing judgment on a verdict. An example may be found in *Berry v. Northern States Power Co.*,[46] which was a death case. Plaintiff's decedent was electrocuted when he tried to tie a

discarded the ladder. In rejecting that argument and upholding a judgment on a directed verdict for defendant, this court judicially noticed that there are many reasons, other than knowledge of defects, why ladders are discarded.

40. Chicago, M. & St. P Ry. v. Anderson, 168 Fed. 901 (8th Cir. 1909), State v. Bentley, 231 Minn. 531, 45 N. W 2d 185, 193 (1950).

41. Hallada v. Great Northern Ry., 69 N. W 2d 673, 684 (Minn. 1955)

42. Holz v. Pearson, 229 Minn. 395, 39 N. W 2d 867, 874 (1949), Kauppi v. Northern Pacific Ry., 235 Minn. 104, 49 N. W 2d 670 (1951), Swanson v. J. L. Shiely Co., 234 Minn. 548, 48 N. W 2d 848, 855 (1951), Eichten v. Central Minnesota Cooperative Power Ass'n, 224 Minn. 180, 28 N. W 2d 862 (1947). In the last three cases cited the court judicially noticed the greatly reduced purchasing power of money in holding that verdicts much larger than previously granted in similar types of cases were not excessive.

43. In upholding an award of compensation the court recognized that the public generally did not suffer from bursitis. Hunter v. Zenith Dredge Co., 220 Minn. 318, 19 N. W 2d 795 (1945). In Corcoran v. Fitzgerald Bros., 239 Minn. 38, 58 N. W 2d 744 (1953), the court, in affirming a denial of compensation, judicially noticed that when an employer puts up a ten foot fence, he has not created an avenue of ingress and egress.

44. St. Paul Hotel Co. v. Lohm, 196 F 2d 233, 235 (8th Cir. 1952), Beery v. Northern States Power Co., 239 Minn. 48, 57 N. W 2d 838, 841 (1953), Otto v. Sellnow, 233 Minn. 215, 46 N. W 2d 641 (1951).

45. 221 Minn. 192, 21 N. W 2d 605, 607 (1946). Plaintiff was a pedestrian and a child of seven and was struck by defendant's vehicle at an intersection. The evidence was that defendant entered the intersection on a green light, and that, therefore, the light plaintiff approached was red at the time of the impact. It was conceded, however, that if plaintiff's light was green when he entered, there was at least a case for the jury. In reversing the judgment entered upon a directed verdict for defendant the court judicially noticed that traffic lights stay yellow a very short time.

46. 239 Minn. 48, 57 N. W 2d 838, 841 (1953).

rope to a live wire. In reversing judgment for plaintiff and holding that the trial court should have granted defendant's motion for judgment *n.o.v.*, on the ground of contributory negligence as a matter of law, the court judicially noticed the great danger from electricity.

Before moving to the subject of judicial notice as judicial legislation it should be observed that the cases cited present only a sample of instances in which judicial notice is an aspect of judicial reasoning. Only those cases were considered in which the court expressly used the words "judicial notice" or some comparable expressions such as "it is common knowledge" or "everybody knows." Actually, whenever a judge makes an assertion in an opinion, other than a reference to facts apparent from the record being reviewed, he is committing an act of judicial notice. It is in that way that judicial notice is as broad as the judicial process.

Differing only in degree from judicial notice as judicial reasoning is judicial notice as judicial legislation. That judges do legislate is accepted today.[47] This phase of judicial notice is Professor McCormick's fifth category.[48] At another point[49] he expresses the same thought by the wording of his heading No. 7: "Social and economic data used in judicial law-making: 'Legislative' facts." Professor Davis differentiates between "official notice" and "judicial notice"[50] and makes it clear that official notice is not merely an administrative version of judicial notice. Official notice is said to relate to the legislative activities of administrative agencies. Actually, judicial notice, in the sense now being discussed comes pretty close to what Professor Davis regards as official notice. To say that the courts may legislate should not be regarded as implying that they legislate in the same way as legislatures do. Legislative acts may be, and usually are in form, entirely arbitrary On the other hand a court is expected to reason out every decision. Thus, judicial legislation may well be regarded as a phase of judicial reasoning. The premises with which a court starts its reasoning process may be legislative enactments, or authoritative principles,[51] or the facts of social life. Judicial notice is the process by which social conditions (usually changing), requiring rationalized legislation, come to the court's attention.[52] It may be questioned whether judicial notice as judicial legislation is properly discussed under the heading of common knowledge. The reason for doing so are twofold: (1) the Minne-

47. Cardozo, The Nature of the Judicial Process 98 (1921).
48. McCormick, *Judicial Notice,* 5 Vand. L. Rev. 296, 297 (1952).
49. *Id.* at 315.
50. Davis, *Official Notice,* 62 Harv. L. Rev. 537, 549-560 (1949).
51. Pound, My Philosophy of Law, 249, 257 (1941).
52. Morgan, *Judicial Notice,* 57 Harv. L. Rev. 269, 289 (1944).

sota cases which can be properly brought into this discussion use the language of common knowledge and (2) the Uniform Rules recognize no separate category corresponding to this type of judicial notice but, it is believed, include it under the phrase "propositions of generalized knowledge."

Judicial notice is frequently used by courts in the decision of constitutional questions. Two classical examples, both decided by the Supreme Court of the United States in cases appealed from the Supreme Court of Minnesota, may be cited. Well known is Mr Justice Brandeis' famous opinion in *Davis v. Farmers Co-operative Equity Co.*[53] In holding that to permit jurisdiction over a railroad which had its principle operation far from Minnesota would constitute an unconstitutional burden upon interstate commerce, the court judicially recognized many facts. The same technique was used to uphold the constitutionality of the compulsory arbitration provisions of the Minnesota standard fire insurance policy in *Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co.*[54] In reaching its conclusion the court said "we know" and then enumerated many facts which it believed to be true and which would tend to support its conclusions regarding the legislation attacked. In holding unconstitutional a statute separating the wine from the liquor business at the wholesale level but not at the retail level, the court in *George Benz Sons, Inc. v. Ericson*[55] judicially noticed that there are far more retailers of liquor than wholesalers, and that they come more intimately into contact with the public. The court judicially noticed that one of the functions of a bartender is to keep order, and upheld, in *Anderson v. City of St. Paul,*[56] an ordinance permitting only men to be bartenders as against the attack that it involved a discrimination based on sex. In *Eldred v. Division of Employment and Security*[57] the constitutionality of the unemployment compensation law was upheld. One attack was that it was discriminatory because it only applied to employees in municipalities over 10,000 population. In upholding its constitutionality the court judicially noticed that most unemployment is in municipalities of that size.[58]

53. 262 U. S. 312, 315 (1923), *reversing* 150 Minn. 534, 186 N. W 130 (1921).
54. 284 U. S. 151, 159 (1931), *affirming* 181 Minn. 518, 233 N. W 310 (1930).
55. 227 Minn. 1, 34 N. W 2d 725, 733 (1948).
56. 226 Minn. 186, 32 N. W 2d 538 (1948).
57 209 Minn. 58, 295 N. W 412, 415 (1940).
58. Other cases using the principle of judicial notice in passing upon the constitutionality of statutes are: Oscar P Gustafson Co. v. Minneapolis, 231 Minn. 271, 42 N. W 2d 809, 812 (1950), Village of St. Louis Park v. Casey, 218 Minn. 394, 16 N. W 2d 459 (1944), Erickson v. King, 218 Minn. 98, 15 N. W 2d 201, 203 (1944). In upholding the constitutionality of the mortgage

The question should be discussed as to whether Uniform Rule 9(1) making mandatory judicial notice of specific facts and propositions of generalized knowledge would change the law of Minnesota. In very few instances has the distinction between mandatory and permissive judicial notice been expressed in Minnesota. It is believed that judicial notice of specific facts is now permissive. Since judicial notice of propositions of generalized knowledge is a phase of judicial reasoning, it is assimilated to judicial notice of domestic law, and thus is mandatory. This is true in the sense that if a trial court is wrong it will be reversed, even though its error resulted from a failure to judicially notice some proposition which was not called to the court's attention.

IV

Matters Capable of Immediate and Accurate Determination

Uniform Rule 9(2)(d) provides:

> "Judicial notice may be taken without request by a party, of . . . (d) specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy."

This rule refers to one of the standard categories of judicial notice and is of increasing importance.[59] The Minnesota decisions, however, are far from clear as to this basis for judicial notice. The language of Minnesota decisions refers extensively to common knowledge, but makes no reference to immediate and accurate ascertainment as a basis for judicial notice. Furthermore, the cases are far from being in accord in their results and there are certainly cases which have refused to judicially notice facts capable of specific ascertainment. Courts have refused to judicially notice the action taken by specific counties under local option statutes,[60] or the contents of legislative journals to see if a required two-thirds vote was obtained,[61] or records in the registrar's office.[62] General scientific propositions have fared little better than the specific facts dealt with in the preceding cases. In *Lickfett v. Jorgenson*[63] the court refused

moratorium law the court judicially noticed the existence of a state of emergency. Home Bldg. & L. Assn. v. Blaisdell, 290 U. S. 398, 444 (1934), *affirming* 189 Minn. 422, 249 N. W. 334 (1933) and 189 Minn. 448, 249 N. W 893 (1933).

59. McCormick, *Judicial Notice,* 5 Vand. L. Rev. 296, 297, 300, 323 (1952).

60. Olson v. Pederson, 206 Minn. 415, 288 N. W. 856 (1939); State v. Kusick, 148 Minn. 1, 180 N. W. 1021 (1921).

61. Burt v. Winona & St. P. R. R., 31 Minn. 472, 18 N. W. 285, 288 (1884). But see note 77 *infra,* for a case apparently in conflict.

62. Williams v. Langevin, 40 Minn. 180, 41 N. W. 936 (1889).

63. 179 Minn. 321, 229 N. W. 138 (1930).

to judicially notice the increased danger of being struck by lightning while on the highway,[64] and in *Christensen v. Northern States Power Co.*,[65] the court refused to judicially notice the effect upon marine life of blasting and electricity shorted into water. The court seemed to limit judicial notice to matters of common knowledge. So far as the cases here cited are concerned the uniform rules would seem to present a drastic addition to Minnesota's common law

Although the Minnesota cases do not announce capacity for summary and certain determination as a ground for judicial notice, many decisions cannot be explained upon any other basis. Sometimes the court may indulge in the fiction of calling something common knowledge which really isn't. In judicially noticing the number of votes cast at an election in *State v. Stearns*[66] the court said that "every intelligent man knows" that information. It is submitted that such a statement is in error, although it is a matter which every intelligent man can quickly and certainly ascertain.[67] Without particularly stating the reason, the court has judicially noticed the following facts hour of sunset on a specific date;[68] the number of votes cast at a certain election;[69] that only one piece of land in Minnesota can be described as "NW ¼ of Sec. 1, township 49, range 15";[70] that Saturday fell upon a certain day of the month;[71] and that October 13, 1861, did fall on Sunday [72] All of these matters would seem to be demonstrable propositions but not general knowledge.

64. The following expression of the court shows the tenor of its thinking: " We do not take judicial notice of things which are not of common and general understanding. [W]e cannot take judicial notice of such facts as are known, if at all, only by a specially informed class of persons. " *Id.* at 139. Cases throughout the United States usually decide such issues as this the other way. For a leading authority contrary to the Minnesota case see Missouri *ex rel* F T. O'Dell Constr. Co. v. Hostetter, 340 Mo. 1155, 104 S. W 2d 671 (1937).

65. 222 Minn. 474, 25 N. W 2d 659 (1946).

66. 72 Minn. 200, 75 N. W 210, 215 (1898) *reversed on other grounds*, 179 U. S. 223 (1900).

67 See also Eldred v. Division of Employment and Security, 209 Minn. 58, 295 N. W 412, 415 (1940) in which the court consulted statistical tables in judicially noticing that most unemployment is in localities over 10,000. The court considered its action to be based upon common knowledge, but the fact that tables were consulted would indicate that, instead, it was based upon determination. Minnesota is not alone in this tendency to indulge in the fiction that propositions which can be demonstrated to be true are commonly known. *See* McCormick, *Judicial Notice*, 5 Vand. L. Rev. 296, 300 (1952).

68. Cohen v. Silverman, 153 Minn. 391, 190 N. W 795, 796 (1922).

69. Minnesota v. Tosney, 26 Minn. 262, 3 N. W 345 (1879) In State v. Stearns, note 66, *supra*, such information was regarded as common knowledge.

70. Quinn v. Champagne, 38 Minn. 322, 37 N. W 451, 452 (1888)

71. Starbuck v. Dunklee, 10 Minn. (Gil. 136, 140) 168 (1865).

72. Finney v. Callendar, 8 Minn. (Gil. 23, 26) 41 (1863). In this case the court consulted an almanac and judicially noticed the fact therein stated rather than simply judicially noticing the reliability of the source of informa-

Judicial notice may also be based upon the special capacity of the judge to make certain types of determinations.[73] This is usually considered to be a separate basis.[74] However, the drafters of the Uniform Rules do not so treat it, and it can well be brought under the category of matters capable of being immediately and accurately demonstrated. Thus, the court will judicially notice its own records,[75] the authenticity of signatures and seals of various public officials,[76] entries in legislative journals[77] and records of the county treasurer's office.[78]

In conclusion, it may be said that the Uniform Rules would clarify and render certain what might now be considered to be subject to some doubt and uncertainty under existing Minnesota law.

tion. It has been pointed out that sometimes a court will judicially notice the reliability of a particular source of information, and will admit that source for the jury's consideration, without judicially noticing the facts therein stated. Thayer, Preliminary Treatise on Evidence 306 (1898); 9 Wigmore, Evidence § 2566 (3d ed. 1940); McCormick, *Judicial Notice*, 5 Vand. L. Rev. 296, 318 (1952). It seems as if that situation can be analyzed as a matter of evidence law. Evidence is generally rejected for one of three reasons: (1) Irrelevancy, (2) unreliability, and (3) policy considerations. Evidence of a general category may be rejected because it is regarded as unreliable. The hearsay rule is the best example of this. Some particular species of that type of evidence may, however, be considered reliable, and therefore admissible. Here we have an exception to the hearsay rule, based upon a proposition of judicial notice.

73. It is well known that judicial notice cannot be based upon the personal knowledge of a judge. 9 Wigmore, Evidence § 2569 (3d ed. 1940). Compare Masterson v. Le Claire, 4 Minn. (Gil. 108) 163 (1860), holding that the court will take judicial notice of the signature of an attorney, when executed in his capacity as such, but will not judicially notice the signature of the very same lawyer, when signed in a personal matter.

74. *See* 9 Wigmore, Evidence § 2571(2) and §§ 2574-2579 (3d ed. 1940); McCormick, *Judicial Notice*, 5 Vand. L. Rev. 296, 297 (third and fourth categories) and 311-315. McCormick assimilates this category to matters of law rather than to matters capable of immediate and accurate determination, as is done here.

75. Examples are: Court's own decision in prior related cases, Bowe-Burke Mining Co. v. Willcuts, 45 F. 2d 394 (D. Minn. 1930); Brokl v. Brokl, 133 Minn. 334, 158 N. W. 436 (1916), steps taken by party necessary to establish jurisdiction, Bond v. Pennsylvania R. R., 124 Minn. 195, 144 N. W. 942 (1914); S. E. Olson Co. v. Brady, 76 Minn. 8, 78 N. W. 864 (1899); prior proceedings in the same case, *In re* Kepp Electric & Manufacturing Co., 98 F. Supp. 51, 65 (D. Minn. 1951) appeal dismissed 191 F. 2d 735; *In re* Rees, 39 Minn. 401, 40 N. W. 370 (1888). *Testimony* in a prior stage of the case is entirely different. That is not a matter of record and thus not the subject of judicial notice. Taylor v. Northern States Power Co., 196 Minn. 22, 264 N. W 139 (1935); MacIntyre v. Albers, 175 Minn. 411, 221 N. W. 526 (1928). If admissible at all, as an exception to the hearsay rule, evidence must be offered.

76. State *ex rel.* Becker v. Brotherhood of American Yoeman, 111 Minn. 39, 126 N. W. 404, 405 (1910); Minnesota v. Barrett, 40 Minn. 65, 41 N. W. 459 (1889); Sherrerd v. Frazer, 6 Minn. (Gil. 406) 572 (1861), Minn. Stat. §§ 175.11, 600.17 (1953).

77. Miesen v. Canfield, 64 Minn. 513, 67 N. W 632 (1896). This is difficult to reconcile with Burt v. Winona & St. P R. R., note 61, *supra*.

78. State *ex rel.* Neff v. District Court, 140 Minn. 375, 168 N. W. 184 (1918); Williams v. Langevin, 40 Minn. 180, 41 N. W. 936 (1889).

V

Rule 10: "Determination as to Propriety of Judicial Notice and Tenor of Matter Noticed"[79]

The first three sections of this rule are in accord with the general practice throughout the country and do not change any Minnesota precedents.[80] Rule 10(1) gives each party an opportunity to present information to the court concerning the propriety of taking judicial notice. This practice is well known to all members of the bar so far as judicial notice of domestic law is concerned. There, the information presented to the court is in the form of statutes, decisions, and various secondary sources. It is strikingly true that if judicial notice be based upon determination, opportunity to present information is indispensable. Even where judicial notice is based upon common knowledge, such opportunity should be afforded. The writer has found no contrary Minnesota case, and the recent case of *In re Land O' Lakes Creameries, Inc.*,[81] is in accord, at least inferentially In that case the Supreme Court rejected an administrative determination, based upon judicial notice by the administrative agency, that turkey raising is non-seasonal. The case was remanded for evidence. The case shows that a decision taking judicial notice can be upset when a contrary showing is made.

Rule 10(2) permits the judge to consult any source of pertinent information, and eliminates exclusionary rules, except for valid claims of privilege. No Minnesota cases dealing with the subject of exclusionary rules have been found. The rest of the rule accords with present Minnesota practice and with general practice.[82] Reference has already been made to various types of determinations which would be impossible without the broad latitude here permitted.[83] The court has explicitly considered statistical tables in taking judicial notice as to the locality of unemployment.[84] In *Hanson v. Hayes*[85] the court inspected the decisions of the Industrial Commission to determine how that body had construed the Compensation Act. So far as judicial notice of the law of another state is concerned, section 2 of the Uniform Judicial Notice of Foreign

79. For a full text of this rule see note 1 *supra*.

80. So far as the writer has been able to discover.

81. 68 N. W 2d 256, 261 (Minn. 1955).

82. 9 Wigmore, Evidence § 2568a (3d ed. 1940).

83. Such as number of votes cast, dates of the month, certain days of the week.

84. Eldred v. Division of Employment and Security, 209 Minn. 58, 295 N. W 412, 415 (1940).

85. 225 Minn. 48, 29 N. W 2d 473 (1947).

Law Act[86] has the same provisions as Uniform Rule 10(2)(a).[87] The elimination of exclusionary rules by Uniform Rule 10(2)(b) is in line with the distinction between "evidence" and "informational data."[88] It seems as though "informational data" is something offered to persuade a court (such as law books) in connection with its decision on the subject of judicial notice, whereas "evidence" is something offered to persuade a trier of fact.[89]

Uniform Rule 10(3), providing that there be no judicial notice unless the judge is convinced, is clearly in accord with Minnesota law.[90] This is understandable when it is considered that failure to judicially notice merely requires a party to offer his proof.

Uniform Rule 10(4) is a bit puzzling. It provides:

> "In any event the determination either by judicial notice or from evidence of the applicability and the tenor of any matter of common law, constitutional law, or of any statute, private act, resolution, ordinance or regulation falling within Rule 9, shall be a matter for the judge and not for the jury."

Here it looks as though the drafters of the Uniform Rules do not have faith in their own handiwork. If they mean what they say under Rule 9, all the matters mentioned in Rule 10(4) are judicially noticed. That necessarily implies that determination is made by the court and not the jury. Is it then a redundancy to specifically so provide? The commissioners, themselves, offer the following explanatory comment:

> "... Clause (4) of Rule 10 is suggested by the Uniform Judicial Notice of Foreign Law Act so as to make it clear that determinations of applicable law are not properly questions of fact for the jury but are for the judge to determine. This is true whether evidence is offered on the issue of what the law is or whether the rule of judicial notice is strictly invoked. In this respect the old

86. Minn. Stat. § 599.05 (1953).

87. Minn. Stat. §§ 599.01, 599.02 and 599.03 (1953) seem to be superseded, so far as the law of other American States is concerned, by § 599.05, and would be superseded as to foreign law, as well, by Uniform Rule 10(2)(a). Sections 599.01-599.03 deal with methods of proof rather than with judicial notice. Even under judicial notice, it is necessary that there be a method of establishment. However the "any pertinent source of information" basis of Rule 10(2)(a) is more inclusive than the particular methods of the sections.

88. *See* Nix v. Hedden, 149 U. S. 304, 307 (1893); McCormick, *Judicial Notice*, 5 Vand. L. Rev. 296, 320 (1952).

89. Compare, however, Minn. Stat. § 599.07 (1953), in which attorneys are permitted to offer "evidence of such laws" in connection with the action of the court in judicially noticing the law of other American States.

90. State *ex rel.* Remick v. Clousing, 205 Minn. 296, 285 N. W. 711, 714 (1939) in which the court states:

> "... Judicial notice is to be taken with caution, and every reasonable doubt as to the propriety of its exercise ... should be resolved against it. ..."

common law rule is changed. The issue of what the foreign law is, was commonly one of fact for the jury"

The reference to the Judicial Notice of Foreign Law Act is undoubtedly to sections 3 and 5 of that act.[91] That act provides for judicial notice only of the law of other states of the United States. Therefore it is quite logical to provide in section 5 that issues as to the law of foreign countries, and as to municipal ordinances, regulations, etc., of other states shall be decided by the court and not the jury. Section 3 of the Judicial Notice of Foreign Law Act[92] is substantially the same as Uniform Rule 10(4). The commissioner's note thereto is as follows:[93]

"This correction of the old common law rule, by making the foreign law determinable by the judge, not the jury, is a necessary corollary of assimilating sister-State law to forum law"

Strictly speaking, it seems to be a redundancy rather than a corollary, however, it may be justified out of an abundance of caution. It puts the courts on notice that, unlike other matters subject to judicial notice, law shall never be decided by the jury, even though sufficient informational data to justify a court decision is not available. In any event, it is evident that Uniform Rule 10(4) is entirely in accord with existing Minnesota law.

VI

Theory of Judicial Notice

(Herein, Uniform Rule 11)

Decisions regarding judicial notice as a part of evidence law are made in the first instance by the trial court.[94] If the trial judge refuses to judicially notice a fact the only recourse is by review. The party requesting judicial notice, which has been refused, is free to offer evidence, but it is obvious that the jury would not be re-

91. Minn. Stat. §§ 599.07 and 599.08 (1953). The latter section (section 5 of the Uniform Act) provides

"The law of a jurisdiction other than those referred to in section 599.04 [every state, territory, and other jurisdiction of the United States] shall be an issue for the court, but shall not be subject to the provisions of sections 599.04 to 599.07 concerning judicial notice."

The annotation to that section cites the following cases. Greear v. Paust, 202 Minn. 633, 279 N. W. 568, 570 (1938), Traders Trust Co. v. Davidson, 146 Minn. 224, 178 N. W. 735, 737 (1920), Kerr v. Nygren, 114 Minn. 268, 130 N. W. 1112, 1113 (1911), Lando v. Lando, 112 Minn. 257, 127 N. W. 1125, 1127 (1910). Those cases merely hold that the court will not judicially notice the law of foreign countries. They say nothing about who decides what that law is.

92. Minn. Stat. § 599.06 (1953). It provides

"The determination of such laws [those judicially noticed under § 599.04] shall be made by the court and not by the jury, and shall be reviewable."

93. 9 Uniform Laws Ann. 404 (1951).

94. This is not to be confused with judicial notice of propositions of generalized knowledge by a reviewing court as a part of its reasoning process.

viewing the court's decision but would be passing upon the matter in issue. What happens if the trial court takes judicial notice of some fact? Two such outstanding authorities as Professor Thayer and Dean Wigmore seem to have taken the position that any issue of fact is still open for determination by the trier of fact.[95] According to Professor Morgan the jury is bound to accept the court's decision upon a matter judicially noticed.[96] Others have taken the same view.[97] Of course, no one contends that a judge is irrevocably bound not to change his own decision judicially noticing some matter. Production of informational data by a party adversely affected by the court's action, may well induce the judge to change his mind and leave to the trier of fact a matter previously noticed. The right of the party to attempt to induce the judge to change his mind is clearly recognized by Uniform Rule 10(1).

A reference to the basic rationale of judicial notice is necessary in order to decide which of the two views is correct. We must start with the underlying principle that there is a division of function between court and trier of fact. Some questions are decided by judges, others by triers of fact. jurors, masters in chancery, or judges. Little value is found in a rigid analytical dichotomy between questions of law and questions of fact. The legislative and doctrinal rules accepted as major premises in any particular case may be called the "law" of that case. However, even in a trial with a jury, the judge decides many other things. Why? In some instances, he acts merely as a matter of expedition and to avoid confusing the jury with collateral issues. If it is Dean Wigmore's understanding that this is the reason for judicial notice, the Thayer-Wigmore theory would seem to be sound. But can it be said that expedition is the reason for judicial notice? If a matter is of such common knowledge that no informational data is required there is no reason why the jury cannot use such information without an instruction from the court. In fact, it seems, the jury can.[98] Even if

95. Thayer, Preliminary Treatise on Evidence 308 (1898); 9 Wigmore, Evidence § 2567 (3d ed. 1940). This is the interpretation Professor Morgan places upon the position of those two commentators. Unfortunately, their language is not entirely free from doubt. When Wigmore says, "But the *opponent is not prevented from* disputing the matter by evidence, if he believes it disputable, . . ." he may be using the term "evidence" in the sense of informational data aimed at persuading the court to change its decision.

96. Morgan, *Judicial Notice* 57 Harv. L. Rev. 269, 280 (1944).

97. McCormick, *Judicial Notice* 5 Vand. L. Rev. 296, 321 (1952); Keefe, Landis and Shaad, *Sense and Nonsense about Judicial Notice* 2 Stan. L. Rev. 664 (1950). For a statement of the conflicting points of view see Baldwin and Dodge, *A Code of Evidence for Wisconsin?* 1945 Wis. L. Rev. 192, 204.

98. Thayer, Preliminary Treatise on Evidence 296 (1898); 9 Wigmore, Evidence § 2570 (3d ed. 1940); Morgan, *Judicial Notice* 57 Harv. L. Rev. 269, 272 (1944); McCormick, *Judicial Notice* 5 Vand. L. Rev. 296, 299

informational data is necessary, as in the case of judicial notice based upon determination, said data can be presented to the jury as evidence as expeditiously as it can be presented to the court.[99] Even statutory and doctrinal law is no exception, as witness the fact that at certain times in the past such matters have been determined by juries.[100] Rather than being a matter of expediting the trial, it would seem as if the basis for judicial notice is to be found in the public policy which demands a degree of uniformity in the administration of justice. This point is well put by Professor Morgan as follows:[101]

> "In any system designed to adjust relations between members of a society, the applicable law ought not to be allowed to vary with the diligence and skill of counsel, and a decision contrary to what is accepted as indisputable fact in that society cannot be justified."

The function of judicial notice, as a device for obtaining uniformity of decision, would be frustrated if the jury could re-examine a matter determined by the court.

The writer has found no present Minnesota authority upon the question of whether or not the jury may redetermine a matter judicially noticed. Uniform Rule 11 provides

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

(1952). It is proper to instruct the jury that in evaluating the evidence they may consider their general knowledge. In some jurisdictions the court may even comment upon the evidence, which is really a matter of *suggesting* to the jury matters of general knowledge to be considered. Whitaker v. Chicago, St. P., M. & O. Ry., 115 Minn. 140, 131 N. W 1061, 1063 (1911) should be understood as a matter of comment rather than a matter of judicial notice. In that case suit was brought by a consignee against a carrier for damages suffered when a shipment of strawberries spoiled *en route*. In affirming judgment upon a verdict for the defendant, the court states as follows

> "Nor was there any error in stating to the jury in the charge that strawberries have an inherent tendency to become heated and moldy. This is a tendency of all ripe fruit, and a fact commonly known, and of which the court will take notice."

The trial court, in the instruction upheld, was not deciding an issue of fact, but reminding the jury of something they might consider in connection with their decision.

99. This is subject, of course, to the hurdle of exclusionary rules. Under Uniform Rule 10(2)(b) a judge is not so frustrated when considering informational data for the purpose of determining whether or not to take judicial notice. However, in any situation in which a court would be persuaded by a particular item of informational data, the judge can judicially notice the reliability of the source and so admit the data into evidence, exclusionary rules to the contrary notwithstanding. *See* note 72 *supra*.

100. This is true today in Justice of the Peace courts in many jurisdictions just as it was true in criminal cases in some states during the past century.

101. Morgan, *Judicial Notice* 57 Harv. L. Rev. 269, 273 (1944)

trier of fact other than the judge, he shall instruct the trier of fact to accept as a fact the matter so noticed."

This clearly seems to follow the Morgan view. To "instruct the trier of fact to accept" implies that evidence contrary to the court's determination will be accepted. Thus, Rule 11 definitely, and properly, clarifies Minnesota law.

VII

Rule 12: Judicial Notice in Proceedings Subsequent to Trial

The writer has found no Minnesota authority either supporting or in conflict with Uniform Rule 12(1) dealing with judicial notice by the trial court in proceedings subsequent to trial. So sound a rule must certainly be in accord with Minnesota law. However, the Uniform Rules do have a clarifying effect in that regard. Uniform Rule 12(2) providing for review of trial court decisions on the subject of judicial notice is sound and in accord with Minnesota law.[102] Rule 12(3) providing for initial judicial notice in the reviewing court presents the situation actually found in the overwhelming majority of cases decided by the Supreme Court of Minnesota.

Uniform Rule 12(4) presents something of a real problem. It provides:

> "A judge or a reviewing court taking judicial notice under Paragraph (1) or (3) of this rule of matter not theretofore so noticed in the action shall afford the parties reasonable opportunity to present information relevant to the propriety of taking such judicial notice and to the tenor of the matter to be noticed."

There appears to be nothing on this subject in the present statutory or doctrinal law in Minnesota. Perhaps the presentation of informational data as part of a petition for rehearing might constitute a compliance with this rule, but that seems to go beyond what is normally thought of as the purpose of such a procedure. In so far as Rule 12(4) relates to judicial notice taken initially by the reviewing court under Rule 12(3) the problem is pointed because most cases involving judicial notice are cases of initial action by the Supreme Court. In a case such as *Cohen v. Silverman*,[103] in which the court, in reversing judgment entered upon a directed verdict for defendant, judicially noticed the hour of sunset, the court would be bound to provide opportunity to present informational data under

102. Casper v. Frederick, 146 Minn. 112, 177 N. W 936 (1920). *See* State v. Overby, 116 Minn. 304, 133 N. W. 792 (1911) in which the Supreme Court of Minnesota avoids deciding whether it will review the trial court's action in the absence of the pertinent informational data appearing in the record.

103. 153 Minn. 391, 190 N. W. 795, 796 (1922).

Uniform Rule 12(4) It is not clear that such a judicial obligation does exist under present Minnesota law. *Cohen v. Silverman* clearly fits the situation contemplated by Rule 12(4) because a specific fact was there determined and noticed. Cases in which the reviewing court bases its original judicial notice upon common knowledge, are not so clear. It has been pointed out that such judicial notice really involves a matter of judicial reasoning. This seems to be foreign to what is contemplated by Rule 12(4), certainly in cases in which the trial court is affirmed. In those cases the Supreme Court agrees with the trial court and presents its reasons for agreeing. It is fair to assume that the reasons are not far different from those already advanced by the lower court or by appellee in his brief. But when the reviewing court uses judicial notice for the purpose of reversing the trial court, the party against whom the decision runs has had no opportunity to refute the court's action. Therefore, it might well be argued that Rule 12(4) would require that opportunity be provided to present relevant information. However, since a court always uses reasoning in its opinions, an opportunity to present data against matters stated in the opinion would reduce it to a status of a mere intermediate report. It is believed that, even in cases of reversal, Rule 12(4) entitles the losing party to no more of an opportunity to present data against statements made in the opinion than would be present in the usual petition for rehearing.

Conclusions

By way of conclusion, a reclassification of the matters already covered will be attempted under the following headings

1. Respects in which the Uniform Rules are in accord with present Minnesota law.
2. Respects in which the Uniform Rules change the present Minnesota law
3. Minnesota statutory law which should be repealed if the Uniform Rules are adopted.
4. Respects in which adoption of the Uniform Rules would clarify Minnesota law
5. Respects in which the Uniform Rules and Minnesota law are indifferent to each other.

1. *Accord.* The Uniform Rules agree with present Minnesota practice in making judicial notice of the United States and Minnesota constitutions, general statutes, and decisions mandatory [104] Under both, judicial notice of private statutes, administrative regulations and municipal ordinances is permissive.[105] Also permissive is

104. See note 19 *supra.*
105. See notes 25 to 31 *supra.*

judicial notice of facts generally known within the territorial jurisdiction of the court.[106] Under the Uniform Rule 10(1) both parties must be afforded an opportunity to present information data; it is believed that same is true under present Minnesota law.[107] In addition, the court may consider any pertinent source of information.[108] Neither under Uniform Rule 10(3) nor under Minnesota law may the court take judicial notice unless it is convinced.[109] All matters of law must be determined by the court and not the jury.[110] The Supreme Court has the power to review the trial court's determinations as to judicial notice and to take judicial notice initially under present Minnesota law,[111] as well as under Uniform Rules 12(2) and 12(3).

2. *Change.* Under Uniform Rule 9(1) judicial notice of the constitutions, statutes and decisions of other states of the United States is mandatory, whereas Minnesota has adopted the Uniform Judicial Notice of Foreign Law Act which makes judicial notice of such matters permissive.[112] Also mandatory under Rule 9(1) is judicial notice of specific facts universally known. Although there seem to be no cases squarely in point, it is believed that at present such judicial notice is permissive. Judicial notice of the law of other countries is permissive under Uniform Rule 9(1); no such judicial notice is now recognized in Minnesota.[113] Uniform Rule 12(4) requires that, if the reviewing court takes judicial notice of a matter not previously so noticed, reasonable opportunity to present information shall be provided. Quaere, what types of judicial notice are covered by this? However Rule 12(4) is construed, it will change Minnesota law to some extent. Beyond what can be done in a petition for rehearing, there is no present provision for submitting information to be a reviewing court pertinent to matters it has judicially noticed.

3. *Repeal.* If the Uniform Rules should be adopted in Minnesota, sections 599.01 through 599.10 of the Minnesota statutes should be repealed. All of these sections are either in conflict with the Uniform Rules or are superseded thereby. Sections 599.01

106. See note 33 *supra.*
107. See note 81 *supra.*
108. See Uniform Rule 10(2)(a) and notes 83 to 87 *supra.*
109. See note 90 *supra.*
110. Uniform Rule 10(4) is in accord with Minn. Stat. §§ 599.06 and 599.08 (1953). See notes 91-93 *supra.*
111. See note 102 *supra.*
112. Notes 21 and 22 *supra.* It must be borne in mind that permissive judicial notice becomes mandatory if a request therefore be made, notice given, and informational data is furnished the court.
113. Notes 23 and 24 *supra.*

through 599.03 deal with methods of proving foreign law. Of course, even though foreign law be judicially noticed, it must be established by the use of informational data. Rule 10(2)(a) permits the court to use "any source of pertinent information." That clearly supersedes the more detailed provisions of sections 599.01-599.03. Sections 599.04-599.10 are the Uniform Judicial Notice of Foreign Law Act. The Uniform Rules, either explicitly or implicitly, cover everything in that act and much more. Repeals by implication are not favored, furthermore, it is confusing that statutes contain overlapping and redundant material. The same argument would seem to require repeal of Minnesota statutes sections 544.20 (Judicial Notice of Municipal Ordinances), 628.21 (private statutes), and 15.049 (administrative regulations) Such is not here suggested. Those statutes do not conflict with the Uniform Rules. They do overlap to some extent, but they also supplement the Uniform Rules by spelling out in detail matters suggested in the rules.[114] Those statutes are not found in chapters dealing with evidence or judicial notice as such. They are incidental to other subjects, and, it is believed, no confusion will result by their retention. It would be a futile task for legislation to specify decisions rendered obsolete by the Uniform Rules. Such matters must await determination in each particular case.

4. *Clarification.* No clear and explicit distinction exists in the Minnesota statutory or doctrinal law between mandatory and permissive judicial notice, such a distinction is clearly recognized by Uniform Rule 9. Minnesota decisions do not recognize, in those terms, the distinction between specific facts and propositions of generalized information which is made by Uniform Rule 9(1). Such a distinction would seem to be implicit in Minnesota law Judicial notice of propositions of generalized knowledge is probably mandatory in the sense that a court would be reversed, if in error, however, that such is true is made clear by Rule 9(1) Uniform Rule 9(2)(d) puts an end to any doubt regarding judicial notice of matters capable of immediate and accurate determination. Many cases would indicate that such is the Minnesota law, but that is not absolutely clear. The writer has found no Minnesota authority, either way, comparable to Rule 10(2)(b) restricting exclusionary rules in connection with the sources of information to be considered. Fundamental is the question whether evidence can be introduced in

114. For example, Uniform Rule 9(2)(a) refers to judicial notice of "duly published regulations." Section 15.049 (Minn. Stat. 1953) incorporates sections 15.045 to 15.049 which specify the method of publication in greater detail.

refutation of a matter judicially noticed. The Minnesota authorities leave this question unanswered. Rule 11 settles it by establishing the conclusive effect of judicial notice. Rule 12(1), dealing with judicial notice in subsequent proceedings, probably states the Minnesota law, although it is not explicit.

5. The final conclusion is that the uniform rules have little effect upon the large body of Minnesota precedent. The Uniform Rules deal primarily with judicial notice as a matter of evidence law, whereas the majority of decisions deal with generalized knowledge as a phase of judicial reasoning.