#34 9/20/63

Memorandum No. 63-49

Subject: Study 34(L) - Uniform Rules of Evidence
(Article II. Rules 9-12, Judicial Notice)

Attached is a copy of the research consultant's study on the Judicial Notice Article of the URE. Also refer to the New Jersey Supreme Court Committee on Evidence Report; it contains an excellent discussion of this article in the comments to the various sections. Reference will also be made to the Commission's 1957 Recommendation and Study relating to Judicial Notice of the Law of Foreign Countries.

Attached as Exhibit I (pink sheets) is the text of Article II.

BACKGROUND

General Scheme of Judicial Notice Article. This article provides, first, that certain matters of law and certain matters of fact must be noticed without request. Rule 9 (1). Next, it provides that certain other matters of law and fact may be noticed without request (Rule 9 (2)), but upon request and certain other conditions these matters must be noticed (Rule 9 (3)). Finally certain procedural provisions are included (Rules 10 and 11) and certain provisions concerning post-trial judicial notice (Rule 12) are also included. Study, pages 1-5.

Existing statute. The text of the existing statute--Code of Civil Procedure Section 1875--is set out on pages 6-7 of the study. Matters not listed in the statute may be judicially noticed. Study, page 5-7.

POLICY QUESTIONS

The following policy questions are presented:

GENERAL SCHEME.

As noted above, some matters must be judicially noticed whether or not a request is made. Others need only be noticed if a request is made, but may be noticed even though no request is made. Is this general scheme satisfactory? The existing California law is unclear as to the extent to which judicial notice is mandatory. Professor Chadbourn suggests that where the doctrine of invited error is applicable on the appellate level, the fact that the trial judge failed to take notice of a matter which the rules make compulsory without request would not be reversible error. Study, pages 8-9.

RULE 9--SUBDIVISION (1).

Domestic law. This subdivision provides for compulsory notice without request of the common law, constitution and public statutes in force in this State. Taking this together with the doctrine of invited error, this subdivision states existing California law. Study, pages 9-10. Is this satisfactory?

Federal law. This subdivision provides for compulsory notice without request of the common law, constitution and public statutes of the United States. Taking this together with the doctrine of invited error, this subdivision apparently states existing California law. Study, pages 9-10. Is this satisfactory?

Law of sister states and territories and jurisdictions of the United States. This subdivision provides for compulsory notice

without request of the common law, constitution and public statutes of sister states and territories and jurisdictions of the United States. California law is not clear whether a request for notice is required in this case; there is considerable doubt that notice is compulsory. See Law Revision Commission Report on Judical Notice of the Law of Foreign Countries, pp. I-14-15. See Study, pages 10-11.

Note that New Jersey placed this category of law in the permissive-unless-a-request-is-made category--Rule 9(2).

In the case of federal law and California law, not only are both bodies of law applicable, but both are, or should be, familiar to the judge, or easily discoverable by him through sources and materials that are readily available. Moreover, he is familiar with the general body of this law and with interpretations if it, even if he is not familiar with a particular rule or statute applicable or relevant to the case at hand. It is clear that this law should be automatically applied, whether counsel requests it or not.

In the case of the law of a sister state or territory or jurisdiction of the United States, the foreign law may be applicable to the case, but it may not be specifically known to the judge and he may not be familiar with it and it may not be easily discoverable by him because the sources of the law may not be readily available. In such case, placing this category of law under Rule 9, subdivision (2), would not require the judge to take judicial notice of the law unless counsel has

adequately accepted his responsibility for informing the judge. On the other hand, it may be that the problems of judicial notice of the law of sister states and territories and jurisdictions of the United States are simple enough to justify adopting the URE mandatory notice approach.

The existing California statute has been held inapplicable to the territories of the United States. But the pertinent case did not consider that the definition of "state" in the Code of Civil Procedure includes territories, and the new Judicial Notice of Foreign Law Statute (which requires notice by the party) probably would cover the case if the definition of "state" is not applicable

The question presented is: Should the URE provision providing for mandatory notice of the law of sister states and territories and jurisdictions of the United States be approved or should this category of law be placed in the subdivision (2) class--permissive unless request is made?

Rules of court. New Jersey requires mandatory notice of the rules of court of New Jersey. Should a similar provision be added in subdivision (1)? (Not discussed in Study.) What about the rules of court of the United States courts should they be added to subdivision (1) or (2)? And the rules of court of other states and territories and jurisdictions of the United States--should they be added to subdivision (2)?

Revision of language. New Jersey substituted the phrase "the decisional, constitutional and public statutory law" for the phrase the "common law, constitution and public statutes

in force in. . .". The New Jersey language appears to be an improvement of the URE language. Should this revision be incorporated in our revision of the URE rule?

Indisputable facts and propositions universally known. Subdivision (1) applies to this category and the compulsory notice rule applies. A dictum in a California case indicates that notice probably is not compulsory now. The consultant recommends approval of this provision, and the New Jersey report also approved it. It appears that this is a category where the judge should be forbidden (as the rule forbids him) to squander time, money and energy by requiring formal proof of a fact which is universally known. Should this portion of Rule 9 (1) be approved? Study, pages 11-13.

Indisputable facts locally known. Rule 9 (2) makes the permissive-unless-request-is-made rule applicable to indisputable facts locally known. Probably under existing law this is the rule that now applies in California to these facts, since the dictum mentioned above indicated that the permissive-unless-request-is-made rule now applies to "indisputable facts universally known." The consultant recommends, however, that this category be placed in subdivision (1) and that judicial notice be compulsory without a request. See his discussion on page 22 of the research study.

Note that New Jersey retained this category in subdivision (2) and revised the language to read:

> such facts as are so generally known or of such common notoriety within the [~~territorial-jurisdiction-of~~] county in which the court is sitting

that they cannot reasonably be the subject of dispute.

Two policy questions are presented:

(1) Should indisputable facts locally known be included under subdivision (1)--compulsory without request; or should they be included under subdivision (2)--permissive unless request is made.

(2) Should the New Jersey revision of the language be adopted?

RULE 9--SUBDIVISIONS (2) AND (3).

General scheme of subdivisions (2) and (3). Subdivision (2) contains a number of types of laws and facts to which a permissive-unless-request-is-made rule of judicial notice applies. Subdivision (3) prescribes the type of request for notice that is required in order to make judicial notice compulsory. It is suggested that subdivision (3) be considered first. See research study, pages 23-24.

Is subdivision (3) satisfactory? Note that New Jersey revised this subdivision to read:

> 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.]~~ notice thereof by appropriate pleadings; or at or before the pretrial conference; or at least 10 days before the trial when there is no pretrial conference; but the judge may permit such notice to be given at any time in the interest of justice.

See discussion of subdivision (3) on pages 13-16 of the research study. In connection with this subdivision, it is noted that Continuing Education of the Bar, California Civil Procedure During

Trial (1960) at page 254 states:

> Usually as a practical matter, counsel initiates the request that judicial notice be taken of a matter and furnishes the judge sufficient information to enable him to comply with the request.

It cannot be stated by way of general proposition that the current California law is or is not in accord with the scheme of subdivisions (2) and (3) of Rule 9. The subsequent discussion will indicate what the existing law is with respect to some of the specific matters stated in subdivision (2).

Note that the conditions stated in subdivision (3) affect the right of the party to demand notice, but do not affect the power of the court to act on its own motion without a request. The judge must comply with the provisions of subdivision (1) of Rule 10, however, if the conditions stated in Rule 9 (3) are not met. Rule 10 (1) is considered later.

Private acts and ordinances. Given compliance with subdivision (3), subdivision (2) requires notice of "private acts and resolutions of the Congress of the United States and of the legislature of this state, and duly enacted ordinances." There are uncertainties and confusion in our existing law respecting notice of private statutes and ordinances. See research study pages 17-18.

Note that New Jersey revised this provision to read:

> (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 of every other state, territory and jurisdiction of the United States, and duly enacted ordinances . . . of governmental subdivisions or agencies of the United States, of this state, and of every other state, territory and jurisdiction of the United States;

Under the New Jersey Report, judicial notice is compulsory if Rule 9 (3) is complied with. Note that the scope of the revised New Jersey rule is somewhat broader than the Uniform Rule. It includes not only private acts, resolutions and ordinances of the United States or this state, but also includes such acts, resolutions and ordinances of sister states and territories and jurisdictions of the United States.

The policy question presented is: Should the original URE version be approved or should the broader New Jersey revision be approved?

Regulations and "determinations." Given compliance with subdivision (3), subdivison (2) requires notice of "duly published regulations of governmental subdivisions or agencies of this state." (emphasis added.)

Note that agencies of the United States are not here included. Professor Chadbourn suggests that they should be. Study, page 18. New Jersey goes further, covering "duly published regulations and determinations of governmental subdivisions or agencies of the United States, of this state, and of every other state, territory and jurisdiction of the United States."

Note that this extends to sister states regulations and ordinances as well as to California and United States regulations and ordinances.

The addition of the phrase "and determinations" or a similar phrase appears highly desirable. (The research study does not discuss this.) There is nothing in Rule 9 which specifically

covers the "public and private official acts of the . . . executive and judicial departments of this State and of the United States" which are covered by the existing statute--Section 1875 of the Code of Civil Procedure. Under this provision, courts judicially note a wide variety of administrative and executive acts in addition to published regulations. For example: Livermore v. Beal, 18 Cal. App.2d 535, 541 (1934) (acts of U.S. Dept. of Interior and General Land Office: regulations, withdrawal orders, surveys and other records and communications); Arnold v. Universal Land Co., 45 Cal. App.2d 522, 529 (1941) (similar records of General Land Office); Stanislaus Lumber Co. v. Pike, 51 Cal. App.2d 54, 56 (1942) (Governor's proclamation of legal holiday); People v. Mason, 72 Cal. App.2d 699, 706 (1946) (Congressional declarations and presidential and executive proclamations made in connection with prosecution of World War II); Mendez v. Pac. G. & E. Co., 115 Cal. App.2d 192, 195 (1953) (contract between defendant and United States for distribution of electricity); Watson v. Los Altos School Dist., 149 Cal. App.2d 768, 772 (1957) (records of State Board of Education and county planning commission); Wilson v. Loew's, 142 Cal. App.2d 183, 188 (1956) (proceedings and reports of House Committee on Un-American Activities); Los Angeles v. State Dept. Pub. Health, 158 Cal. App.2d 425, 431 (1958) (administrative construction of statute and attorney general's ruling approving it); Pearson v. State Social Welfare Board, 54 Cal. 2d 184, 210 (1960) (records of California Dept. of Social Welfare and California Board of Social

Welfare); Dept. of Mental Hygiene v. Rosse, 187 Cal. App.2d 283, 287 (1960) (records of Department of Mental Hygiene showing cost of support of insane person at state hospital); Chambers v. Ashley, 33 Cal. App.2d 390, 391 (1939) (city records of election); People v. Cahan, 141 Cal. App.2d 891, 899 (1956) (Judicial Council); Southern Pacific Co. V. Lipman, 148 Cal. 480, 491 (1906) (letter of land office commissioner); Parker v. James Granger, Inc., 4 Cal. 2d 668, 677 (1935) (Department of Commerce); McPheeters v. Board of Medical Examiners, 74 Cal. App.2d 46, 47 (1946) (Board of Medical Examiners).

In the Rosse case, supra, the court states:

> The furnishing of the certified copies of the official record was the proper method of transmitting to the court the information on the matter of which the court was entitled to take judicial notice. 187 Cal. App.2d at 288.

The New Jersey revision apparently uses the word "determinations" to permit judicial notice of much of the material included in the above list. The existing California statute uses the word "acts" and applies only to the "acts" of the executive and judicial departments of this state and the United States. Thus, the existing language does not cover "acts" of sister states. It is not clear to what extent "determinations" will pick up content of official records. Perhaps, where an official record is not of a "determination," the proponent of the evidence should be required to introduce a certified copy of the record into evidence rather than relying upon judicial notice.

The policy question presented is: Should the original URE language be approved (regulations of this state), or should

Professor Chadbourn's language be approved (regulations of this state and the United States) or should the broad language of the New Jersey revision (quoted above) (revised to include "acts" instead of "determinations") be approved?

Another policy question is whether Government Code Section 11384 should be made subject to subdivision (3) of Rule 9. Section 11384 provides:

> 11384. The courts shall take judicial notice of the contents of each regulation or notice of the repeal of a regulation printed in the California Administrative Code or California Administrative Register.

Note that the notice is mandatory and is not subject to any such conditions as those stated in subdivision (3). Professor Chadbourn suggests (or implies) that Section 11384 should be retained but be made subject to subdivision (3). Study pp. 18-19.

Court proceedings or records. The URE contains no provision on whether a court may judicially notice court proceedings or records. New Jersey added the following provision to subdivision (2):

> (2) Judicial notice may be taken without request by a party of . . . (b) records of the court in which the action is pending and of any other court of this state or federal court sitting in or for this state;

Professor Chadbourn does not discuss this matter in the research study, but the following discussion may prove helpful to the Commission. It is clear that a court may judicially notice its own records and proceedings in the same case.

However, despite the broad language of CCP 1875 (3) ("acts" of the "judicial departments of this State and of the United States"), the general rule has been--at least until 1960--that normally a court will not in one case take judicial notice of the records or judgment in another case. This is so even though the action is pending in or was determined by the same court and was between the same parties. The foregoing rule has been criticized. See McCormick, p. 702; 2 Stanford L. Rev. 666, note 7. And the rule has not been inflexible; in unusual circumstances, to avoid unreasonable hardship, judicial notice may be taken of the proceedings in a different case. However, in Popcorn Equipment Co. v. Page, 92 Cal. App.2d 448, 453 (1949), the opinion points out that, even where the hardship exception applies and judicial notice is taken, the party must bring the matter to the court's attention in some appropriate manner (as by reference to the judgment in briefs or in argument).

A recent decision indicates that the so-called "exceptions" may soon become the general rule, and that a former judgment will be judicially noticed except when it would be unfair to a party to do so. A bold step in this direction was taken by Stafford v. Ware, 187 Cal. App.2d 227 (1960) (petition for hearing by Supreme Court denied January 31, 1961). In a prior action, between the same parties, it was determined that S's rights under an oil lease were wholly terminated. In this present action by S asserting rights thereunder, defendants' motion for summary judgment was granted on the ground of res judicata. The affidavit in support of the motion alone was insufficient, but if judicial notice could be taken of the prior judgment the bar would be established. Held, summary judgment affirmed.

The court pointed out that the flat declarations against judicial notice in such cases do not appear in the opinions today, and that hardship or convenience give rise to exceptions. These exceptions are difficult to apply, for it can seldom be determined whether the other judgment will affect the outcome unless it is examined (i.e., noticed in fact if not judicially). Accordingly, a policy of liberal notice was suggested:

> We have reached three conclusions. First, the case law on the subject is in hopeless conflict. Second, the Legislature should do, with respect, at least to the plea of res judicata, what it has done in Section 433. . . with respect to "another action pending": Authorize the court to take judicial notice of it, provided an affidavit invokes such notice. Third, as the trial court's attention was called to the prior action and judgment by the defendants and its existence was commented on by the plaintiff it was the common-sense thing for the trial court to take judicial notice of it, and we presume that it did so. So we shall proceed to do the same. Id. at 236.

A strong case is made for inclusion of a provision like the one that New Jersey added to the Uniform Rule.

The policy question presented is: Should an addition like the one made in New Jersey be added to permit judicial notice of the records of the court in which the action is pending and of any other court in this state or federal court sitting in or for this state? This would, of course, be subject to subdivision (3).

Foreign law. Under subdivision (2)(b), judicial notice of the "laws of foreign countries" is made permissive unless a request is made. See research study, pages 19-21. Note that New Jersey revised this to read "law of foreign countries", making the word "laws" read "law." Also, if we are to retain present law, we should add "and political subdivisions of foreign countries" to (2)(b).

This provision must be considered in connection with subdivisions(3) and (4) of Rule 10. As the consultant points out, subdivision (3) of Rule 10 may not be necessary but does no harm. He recommends its approval. See research study pages 26-27. We will consider approval of this subdivision later. He recommends that a portion of our present law--enacted upon recommendation of the Law Revision Commission--be substituted for subdivision (4). The proposed subdivision of Rule 10 would read in substance:

> If a court is unable to determine what the law of a foreign country or a political subdivision of a foreign country is, the court may, as the ends of justice require, either apply the law of this State if it can do so consistently with the Constitution of this State and of the United States or dismiss the action without prejudice.

The consultant recommends approval of this proposed subdivision of Rule 10 and of the portion of Rule 9(2) relating to the laws of foreign countries. He notes that the principle difference between existing law and the pertinent URE provisions is the problem that arises when the court is unable to determine foreign law. What does the court do? The Uniform Rules are unclear, the proposed subdivision of Rule 10 would make it clear by inserting our existing law. New Jersey made a provision like the one quoted above applicable to the "law of any jurisdiction other than this state and the United States" (Rule 9(4). We do not propose to dispose of subdivision (4) of Rule 10 at this time, but the Commission at this time should consider whether the language quoted above should be adopted in principle. If so, should it be limited to foreign law or also include law of sister states, etc.?

Indisputable facts locally known. This was previously considered in connection with Rule 9(1).

Verifiable facts. This category of facts and propositions--Rule 9(2)(d)--contemplates consultation of source books and covers a variety of matters which are recognized under existing law (even though not listed in Code of Civil Procedure Section 1875, since the courts have not considered that section as defining the extent of their powers). See research study, page 23. The facts need not be actually known if they are readily ascertainable and undisputed. The facts would include: Knowledge of the bench and bar (whether a person is lawyer; that the Legislature has the assistance of efficient legislative counsel and was therefore aware of rule in certain case; that it would be difficult to find in California any lawyers more experienced or qualified in defending criminal cases than the Public Defender of Los Angeles County and his staff, etc.) General knowledge (economic increase in cost of living; war conditions, etc.) Medical and scientific facts, etc.

New Jersey proposed to revise the pertinent portion of Rule 9(2) to read:

> specific facts, and propositions of generalized knowledge which are capable of immediate ~~[and accurate]~~ determination by resort to ~~[easily accessible]~~ sources of reasonably indisputable accuracy.

By way of comment, New Jersey states:

> Included in Rule 9(2) are indisputable facts immediately ascertainable by reference to sources of reasonably indisputable accuracy, by which is meant treatises, encyclopedias, almanacs and the like. This would not mean, of course, that such reference works would be received in evidence or sent to the jury room. Their use would be limited to consultation by

the judge and the parties for the purposes of determining whether or not to take judicial notice. Also included in Rule 9(2) would be facts which are accepted as established by experts and specialists in the natural, physical and social sciences, provided that these facts are of such wide acceptance that to submit them to a jury would be to risk irrational findings. These are included in Rule 9(2) because it seems reasonable to put the burden on the the parties to put them before the judge if judicial notice is to be mandatory.

The policy question presented is: Should the Uniform Rule provision be approved as drafted or as revised by New Jersey or in some other form? In this connection note the language of the last clause of Rule 9(1)-- "so universally known that they cannot reasonably be the subject of dispute."

Additional matters. Is there anything listed in Section 1875 that is not included in the matters listed in Rule 9?

JUDICIAL NOTICE OF "LEGISLATIVE FACTS."

Professor Chadbourn discusses this matter on pages 31-34 of the research study. He concludes: "In view of the difficulty of stating in statutory form the process of notice of legislative facts, we think coverage of such notice is wisely omitted in the Uniform Rules. It would seem to be important, however, to disavow any intent to disapprove of or to limit the principle of notice of legislstive facts. This could be satisfactorily accomplished by including a statement to this effect by way of commentary upon Rule 9."

New Jersey, on the other hand, determined to include a statement of this concept in the revised rules. They proposed to add the following new subdivision to Rule 9:

(3) Judicial notice may be taken of any matter which would be of aid in deciding what the law should be.

The following comment is contained in the New Jersey with reference to this proposed subdivision:

> Subsection (3) has been added to Rule 9. It provides that a judge or reviewing court (Rule 12(3), (4)) may take judicial notice of any matter which would be of aid in deciding what the law should be. It is well known that this is a common practice generally exercised under the rubric of "judicial notice." Hence its inclusion here. When an inquiry is directed to a rule of law, either common law or constitutional law, both trial judges and reviewing courts regularly "take judicial notice" of facts which are disputable and which are to be found in books, treatises, magazine articles, and the like. See, e.g., Weintraub, Judicial Legislation, 81 N.J.L.J. 545 (October 30, 1958), and Currie, Appellate Courts Use of Facts Outside of the Record by Resort to Judicial Notice and Independent Invertigation, 1960 WIS. L. REV. 39. Professor Kenneth Davis has coined the term "legislative facts" to describe these because they relate to the legislative" or rule-making function of the courts in contract to "adjudicative facts" which are of significance only to the parties to the immediate action or adjudication. See Davis, Judicial Notice, 55 COLUM. L. REV. 945 (1955).
>
> In the light of this, it may be asked why the drafters of the Model Code of Evidence and the Uniform Rules did not provide for this form of judicial notice, if it be such.
>
> It has been suggested that the judicial notice rules are inapplicable to this form of inquiry because "such judicial notice really involves a matter of judicial reasoning." See Laughlin, Judicial Notice, 40 MINN. L. REV. 365, 386 (1956). This comment acknowledges that the process is "judicial notice," but that it is a different kind of judicial notice. Perhaps it doesn't belong in this system of Rules. It may be that the time has come to create a new characterization for the process of using facts not in evidence for the purpose of deciding what the law should be.
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> Professor Davis, an authority on administrative law, insists that the process is judicial notice, and argues that the Uniform Rule drafters were simply remiss in not providing for it. It is his view that a literal reading of Uniform Rules 9 and 12 would prohibit this widely accepted practice. On the other hand, at least one member of the Committee feels that Rule 9(3) as proposed is "so broad and says so many things by implication that are of a deep philosophical nature as to be dangereous as well as inappropriate." Others think that it is

unnecessary to include this provision among the judicial notice rules and that it might create confusion to do so.

> Your Reporter has decided to treat the practice, for the time being, as judicial notice. Since a newly drafted Rule should attempt to state explicitly what may or may not be done, and not leave such matters to "general understanding," Rule 12(3) provides that a judge or reviewing court may "take judicial notice" of disputable matters for the purpose of deciding a rule of law. This section is not subject to Section 4; hence the judge or reviewing court may not be compelled to take judicial notice of the subject matter of this part.

The policy question presented is: Should the New Jersey subdivision be included in the revised rules; should some other provision be included to cover this matter; or should nothing be included in the rules and a statement be included in the comment as suggested by the consultant?

RULE 10.

Subdivision (1). Professor Chadbourn "presumes" that this is existing law and recommends approval. Research study, page 24. The New Jersey analysis of the subdivision casts some doubt about whether this is existing law.

New Jersey adds the following clause at the beginning of the subdivision: "To the extent practicable,". In justification of this change, the New Jersey comment states:

> Rule 10(1) provides that, to the extent practicable, the judge must afford the parties reasonable opportunity to contest the taking of judicial notice. The notion of practicability and reasonableness should cover not only the nature of the hearing as relating to the importance of the matter to the case, but also whether it is reasonable for the judge to grant a hearing at all. Judicial notice, as Thayer has observed, is a protean concept; judges take judicial notice of many things in the very process of legal reasoning. To require a hearing on each occasion that a judge takes judicial notice would unnecessarily encumber him. The judge should grant a hearing when it is reasonable to do so and should provide a hearing

that is reasonable as to the matter in question. A hearing would not be necessary on such questions as whether liquor is intoxicating or the like. But as to such complex questions as the tenor of the law of a foreign country applicable to the case, the granting of a hearing under Rule 10(1) would, in effect, be mandatory. The New Jersey courts have so construed their judicial notice statute, saying that an opportunity for a litigant to know what the deciding tribunal is considering and to be heard with respect to it is guaranteed by due process of law. It has been suggested by a member of the Committee, however, that Rule 10(1) is unnecessary since a failure to grant a reasonable hearing would be an obvious denial of due process.

The policy question presented is: Should Rule 10(1) be approved as drafted, be revised as in New Jersey, be revised in some other manner, or be omitted?

Subdivision (2). This subdivision provides in substance that the judge may consult and use any source of pertinent information, subject to the rules of privilege. See research study, pages 24-26. Professor Chadbourn recommends approval as drafted, noting that this will repeal the language added to existing law by a 1957 amendment which he considers undesirable. The 1957 amendment provides that, in making inquiries concerning law of foreign countries, the court may resort to the advice of persons learned in the subject matter, which advice, if not received in open court, shall be in writing and made a part of the record in the action or proceeding. See his discussion pages 25-26. An examination of the 1957 report of the Commission discloses that the recommendation gave no reason for this requirement and it was not recommended by the consultant, Professor Edward A. Hogan, Jr. (deceased). See 1957 Report pages I-20--I-22. See, however, note 40 of the research study for a defense of the California requirement.

Note the New Jersey revision of subdivision (2) which seems to be an improvement of the language. Delete "the judge may consult and use" and insert after "information" the words "may be consulted or used,".

The policy questions presented are: Should the URE subdivision be approved as drafted or as revised by New Jersey? Should the language of the 1957 amendment be rejected?

Subdivision (3). Professor Chadbourn states that this is an obvious proposition and that its inclusion does no harm. Study, pages 26-27. Note that New Jersey deleted the word "clearly." This seems to be a desirable deletion.

The policy question presented is: Should the URE subdivision be approved as drafted or as revised by New Jersey?

Subdivision (4). The consultant recommends the deletion of this subdivision and the substitution of a statement of existing law. See this memorandum pages

It is suggested that it is desirable to retain the substance of subdivision (4), revised in the form set out in the New Jersey Report:

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

The New Jersey comment suggests the desirability of the inclusion of revised subdivision (4):

> Rule 10 (4) makes it clear that a determination as to the applicability of law, rule or court, or any other matter under Rule 9 is for the judge and not for the jury in any circumstance. This is the present practice and is one of the important functions of a judicial notice rule. Professor McNaughton has pointed out that if the other rules are read sympathetically, Rule 10 (4) becomes superfluous.

The addition of the new subdivision (5) to Rule 10 (substance of rule on foreign law) would not make subdivision (4) of Rule 10 unnecessary since the

new subdivision (5) is not as broad in its coverage as is subdivision (4) (although the problem apparently arises primarily in judicial notice of [illegible]

The policy question presented is: Should subdivision (4) be approved as drafted or as revised by New Jersey or disapproved?

RULE 11.

Mandatory or only on request? This section as proposed by the URE is mandatory; New Jersey has revised the section to provide that it is mandatory only upon request. It is proposed below to examine the various implications of the section and to present with respect to several matters the question of whether the section should be mandatory or only be mandatory upon request.

Making record of matters noticed. The URE section requires that the judge indicate for the record the matter which is judicially noticed. The rationale for this requirement is set out in the study as follows:

> Frequently the judge fails to put in the record matters which he judicially notices, and thereby lays the foundation for needless dispute. For this reason [the requirement of making a record] is inserted.

The New Jersey comment justifies their approach as follows:

> Finally, the Rule requires that, if requested, the judge shall indicate for the record what he has taken judicial notice of, as well as the source of his information, both of which would serve specifically to identify for a reviewing court what the trial judge has done.

Although not so stated, probably the New Jersey view is based on the belief that it will avoid time consuming and unnecessary preparation of a record of something judicially noticed with respect to which there is no controversy.

Should a matter which the judge judicially notices be required to be made a matter of record even where he has instructed the jury on the matter?

In other words, should this requirement be restricted to nonjury cases if the requirement is to be mandatory? Continuing Education of the Bar, California Civil Procedure During Trial (1960) at page 255 states:

> If a matter is judicially noted, the normal procedure is for the court to instruct the jury to find the judicially noted fact or, in a nonjury case, to include in the record a statement that the fact was judicially noticed. C.C.P. § 2102.

The policy question presented with respect to making a record of matters noticed is: Should the URE mandatory approach be taken, should the New Jersey approach be taken, or is some other alternative available?

Conclusiveness of notice. Under existing law, there is no right to introduce evidence disputing a fact as noticed by the court. See research study, pages 28-29. The jury is bound to accept the judge's determination. New Jersey is in agreement; but there the rule will, of course, apply only if an instruction is given. The New Jersey comment states:

> On request by a party the judge must instruct the jury to accept as established a fact or law of which he has taken judicial notice. The Rule implements the Morgan approach to the effect that once a judge has taken judicial notice of a matter, the controversy is over; no further proof will be taken as to it and the matter is not for the jury to find. In light of the thoroughness with which a judge should consider the taking of judicial notice in the first place, it would be a waste of time to receive evidence on the matter again; moreover, to submit an indisputable fact or matter of law to a jury would permit the possibility of irrational results which the judicial notice rules are designed to prevent.

Without deciding at this point whether instruction of the jury should be mandatory or only upon request, it seems clear that this principle of existing law must be retained. See New Jersey comment on pages 38-39 of the New Jersey Report.

Instruction of jury. The URE rule requires that the jury be instructed as to all matters judicially noticed other than the common law, constitution or public statutes of this state. New Jersey provides for mandatory instruction only upon request (but would permit the judge to give such an instruction on his own motion). New Jersey justifies its view as follows:

> Rule 11 further provides that the judge need not instruct the jury unless requested. This is intended to avoid time consuming and unnecessary instructions.

There is merit to the New Jersey view, but should it not apply to all matters judicially noticed--including those noticed under Rule 9(1). Probably, it should apply to Rule 9(3) (New Jersey version) if this is included in our revised rules, since the judge will be instructing the jury under that subdivision as to what the law is. This is a matter for discussion, however, for why should an instruction be required on matters noticed under subdivision (3) (New Jersey version) when none is required on matters noticed under Subdivision (1)? Note that New Jersey applies the instruction provision to subdivision (3) of their rules. Should it also apply to subdivision (4) of Rule 9 (New Jersey version)? New Jersey applies it to that subdivision.

With respect to judicially noticed common law, constitutional provisions and statutes, should not the judge be required on request to instruct the jury concerning these matters judicially noticed. Neither New Jersey nor the URE so require.

When the policy on this matter is determined, an appropriate rule will be drafted to effectuate the policy.

RULE 12.

Subdivisions (1) and (3). Subdivision (1) provides that the failure or even the refusal of a judge to take judicial notice of a matter at the trial

of an action does not bar that trial judge, or another trial judge, from taking judicial notice of that matter in a subsequent proceeding, such as a motion for a new trial or the like.

Subdivision (3) provides that a reviewing court may in its discretion take jud icial notice of matters specified in Rule 9.

Professor Chadbourn states that such post-trial notice is presently recognized in California. Study, page 29.

See New Jersey Report, pages 42-43, for summary of arguments that reviewing court should be required to take judicial notice of matters listed in Rule 9 (1). See Research Study, page 30, for statement of Professor Currie's objections to Rule 12 (1) and (3).

It is suggested that subdivision (3) be revised to read somewhat like the New Jersey revision. It should read:

> (3) The reviewing court in its discretion may take judicial notice, in the manner provided for by Rule 10 (2), of any matter specified in Rule 9 whether or not judicially noticed by the judge.

This revision is probably the reason that Rule 10 (2) was revised by New Jersey.

The policy question presented is: Should Rule 12 (1) and (3) be approved as drafted, or approved as revised above, or should these subdivisions be approved as revised in some other manner?

Subdivision (2). This subdivision states existing law. It was approved by New Jersey without change.

Subdivision (4). It is not clear whether this subdivision is or is not California law. New Jersey approved the subdivision without change. In justification of the subdivision, New Jersey Report states:

> Rule 12 (4) provides that in taking judicial notice the reviewing court should provide a reasonable opportunity

to the parties to provide information and argue as to the noticeability of a matter. Such a requirement provides a desirable protection for the parties. If a court considers a question of sufficient importance, its members should not engage in ex parte exploration of the issue without giving the parties some opportunity either to present information to the court or to argue the point. In appellate practice the normal time for this would be the oral argument. If an issue of sufficient importance arises thereafter, supplemental briefs or an additional argument may be in order.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I.

II. Judicial Notice

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 to the tenor of the matter to be noticed.

(2) In determining the propriety of taking judicial notice of a matter or the tenor thereof, (a) the judge may consult and use any source of pertinent information, whether or not furnished by a party, and (b) no ex usionary 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, constitut law, or of any statute, private act, resolution, ordinance or regulation falling within Rule 9, shall be a matter for the judge and not for the jury.

RULE 11. INSTRUCTING THE TRIER OF FACT AS TO MATTER JUDICIALLY NOTICED.

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

RULE 12. JUDICIAL NOTICE IN PROCEEDINGS SUBSEQUENT TO TRIAL.

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

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

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

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