

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION AND A STUDY

*relating to*

The Uniform Rules of Evidence

Article II. Judicial Notice

April 1964

CALIFORNIA LAW REVISION COMMISSION  
School of Law  
Stanford University  
Stanford, California

### **NOTE**

This pamphlet begins on page 801. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes.

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION AND A STUDY

*relating to*

The Uniform Rules of Evidence

Article II. Judicial Notice

April 1964

CALIFORNIA LAW REVISION COMMISSION  
School of Law  
Stanford University  
Stanford, California



## CALIFORNIA LAW REVISION COMMISSION

ROOM 30, CROTHERS HALL  
STANFORD UNIVERSITY  
STANFORD, CALIFORNIA 94305



## COMMISSION MEMBERS

JOHN R. McDONOUGH, Jr.  
*Chairman*  
RICHARD H. KEATINGE  
*Vice Chairman*  
SENATOR JAMES A. COBEY  
ASSEMBLYMAN ALFRED H. SONG  
JOSEPH A. BALL  
JAMES R. EDWARDS  
SHO SATO  
HERMAN F. SELVIN  
THOMAS E. STANTON, Jr.  
ANGUS C. MORRISON  
*Ex Officio*

## COMMISSION STAFF

JOHN H. DeMOULLY  
*Executive Secretary*  
JOSEPH S. HARVEY  
*Assistant Executive Secretary*  
JON D. SMOCK  
*Associate Counsel*  
ANNE SCHMIDT-WEYLAND  
*Administrative Assistant*

February 1964

To HIS EXCELLENCY, EDMUND G. BROWN  
*Governor of California*  
and to the Legislature of California

The California Law Revision Commission was directed by Resolution Chapter 42 of the Statutes of 1956 to make a study "to determine whether the law of evidence should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference."

The Commission herewith submits a preliminary report containing its tentative recommendation concerning Article II (Judicial Notice) of the Uniform Rules of Evidence and the research study relating thereto prepared by its research consultant, Professor James H. Chadbourne of the Harvard Law School. Only the tentative recommendation (as distinguished from the research study) expresses the views of the Commission.

This report is one in a series of reports being prepared by the Commission on the Uniform Rules of Evidence, each report covering a different article of the Uniform Rules.

In preparing this report, the Commission considered the views of a Special Committee of the State Bar appointed to study the Uniform Rules of Evidence. The REPORT OF THE NEW JERSEY SUPREME COURT COMMITTEE ON EVIDENCE (March 1963) also was of great assistance to the Commission. Portions of some of the comments in this report are based on similar comments in the report of the New Jersey Committee.

This preliminary report is submitted at this time so that interested persons will have an opportunity to study the tentative recommendation and give the Commission the benefit of their comments and criticisms. These comments and criticisms will be considered by the Commission in formulating its final recommendation. Communications should be addressed to the California Law Revision Commission, School of Law, Stanford University, Stanford, California.

Respectfully submitted,

JOHN R. McDONOUGH, JR.  
Chairman



## TABLE OF CONTENTS

	Page
<b>TENTATIVE RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION</b> -----	807
<b>BACKGROUND</b> -----	807
<b>REVISION OF URE ARTICLE II</b> -----	808
Rule 9. Matters Which Must or May Be Judicially Noticed	808
Rule 9.5. Matters Conditionally Required to Be Judicially Noticed -----	816
Rule 10. Determination as to Propriety of Taking Judicial Notice and Tenor of Matter Noticed-----	819
Rule 10.5. Procedure When Judge Unable to Determine What Foreign Law Is -----	820
Rule 11. Noting for Record Matter Judicially Noticed; In- structing Jury -----	821
Rule 12. Judicial Notice in Proceedings Subsequent to Trial	822
<b>AMENDMENTS AND REPEALS OF EXISTING STATUTES</b> -----	824
Civil Code Section 53 -----	824
Code of Civil Procedure-----	825
Section 433 -----	825
Section 1875 -----	825
Section 2102 -----	826
Corporations Code Section 6602-----	827
Government Code Section 34330-----	827
Penal Code -----	827
Section 961 -----	827
Section 963 -----	827
<b>A STUDY RELATING TO THE JUDICIAL NOTICE ARTI- CLE OF THE UNIFORM RULES OF EVIDENCE</b> -----	829
(A detailed Table of Contents for the study begins on page 829.)	





# TENTATIVE RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

*relating to*

## THE UNIFORM RULES OF EVIDENCE

### Article II. Judicial Notice

#### BACKGROUND

The Uniform Rules of Evidence (hereinafter sometimes designated as the "URE") were promulgated by the National Conference of Commissioners on Uniform State Laws in 1953.<sup>1</sup> In 1956 the Legislature directed the Law Revision Commission to make a study to determine whether the Uniform Rules of Evidence should be enacted in this State.<sup>2</sup>

The tentative recommendation of the Commission on Article II of the Uniform Rules of Evidence is set forth herein. This article, consisting of Rules 9 through 12, relates to judicial notice.

Judicial notice is a substitute for formal proof of matters of law and of those facts which everyone knows, or should know, are true. Thus, the process of judicial notice shortens trial time and saves money, for it eliminates the necessity of complying with technical requirements of proof, such as those relating to authentication, expert testimony, best evidence, and the like. In addition, judicial notice promotes rational factfinding; it prevents jurors from erroneously finding as untrue facts which cannot reasonably be disputed.

URE Article II provides a comprehensive scheme for judicial notice. Judicial notice of some matters is mandatory. Other matters may be noticed without a request and must be noticed if requested by a party who gives notice of the request to each adverse party and furnishes sufficient information to the judge. The Uniform Rules provide parties with a reasonable opportunity to present information to the judge as to the propriety of taking judicial notice of a matter and as to the tenor of the matter to be noticed.

Most of California's existing statutory law in regard to judicial notice is found in Section 1875 of the Code of Civil Procedure. This section lists the matters of which "courts take" judicial notice. But the California courts have not considered the section as limiting the extent of their power to take judicial notice and, although Section 1875 does not so provide, the courts take judicial notice of matters of com-

<sup>1</sup> A pamphlet containing the Uniform Rules of Evidence may be obtained from the National Conference of Commissioners on Uniform State Laws, 1155 East Sixtieth Street, Chicago 37, Illinois. The price of the pamphlet is 30 cents. The Law Revision Commission does not have copies of this pamphlet available for distribution.

<sup>2</sup> Cal. Stats. 1956, Res. Ch. 42, p. 263.

mon knowledge which are certain and indisputable. As a result, much of the California law on judicial notice can be found only in judicial decisions.

By way of contrast with the URE scheme, the existing California law is unclear (*e.g.*, it is not clear which matters *must* be noticed and which matters *may* but are not required to be noticed) and inconsistent (*e.g.*, a pleaded ordinance must be judicially noticed in a criminal case under Penal Code Section 963, but ordinarily the same ordinance may not be judicially noticed in a civil case by a superior or appellate court). Moreover, unlike the URE, the existing law does not provide the parties with adequate procedural protections. Except as to the law of foreign countries, there does not appear to be any requirement that the adverse party be notified of a request to take judicial notice. Nor is there any statutory requirement that the parties be given a reasonable opportunity to present information to the judge as to the propriety of taking judicial notice of a matter or as to the tenor of the matter to be noticed.

The Commission tentatively recommends that URE Article II, revised as hereinafter indicated, be enacted as law in California.<sup>3</sup> The revised article slightly broadens the list of matters of which judicial notice may be taken under existing law and *requires* that judicial notice be taken of some matters. This should result in greater use of judicial notice with a corresponding reduction in trial time. Any fear of expanded judicial notice should be offset by the procedural protections that are provided the parties under the revised article.

## REVISION OF URE ARTICLE II

In the material that follows, the text of each rule proposed by the Commissioners on Uniform State Laws is set forth, and the amendments tentatively recommended by the Commission are shown in *strikeout* and *italics*. New rules tentatively recommended by the Commission but not included in the URE are shown in *italics*. Each rule is followed by a Comment setting forth the major considerations that influenced the Commission in recommending important substantive changes in the URE rule or in the corresponding California law. For a detailed analysis of the various rules and the California law relating to judicial notice, see the research study beginning on page 829.

### Rule 9. Matters Which Must or May Be Judicially Noticed

RULE 9. (1) Judicial notice shall be taken ~~without request by a party~~, of :

(a) The ~~common law, constitutions and public statutes~~ *decisional, constitutional, and public statutory law in force in of the United States and of every state, territory, and jurisdiction* possession of the United States. ; ~~and of such specific~~

<sup>3</sup>The final recommendation of the Commission will indicate the appropriate code section numbers to be assigned to the rules as revised by the Commission.

(b) *Any matter made a subject of judicial notice by Section 11383, 11384, or 18576 of the Government Code or by Section 307 of Title 44 of the United States Code.*

(c) *Rules of court of this State and of the United States.*

(d) *Facts and propositions of generalized knowledge as that 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 the following matters to the extent that they are not embraced within subdivision (1):*

(a) *Resolutions and private acts and resolutions of the Congress of the United States and of the legislature of this any state, territory, or possession of the United States. and duly enacted*

(b) *Ordinances and duly published regulations Legislative enactments and regulations of governmental subdivisions or agencies of this (i) the United States and (ii) any state, territory, or possession of the United States. and*

(c) *Official acts of the legislative, executive, and judicial departments of this State and of the United States.*

(d) *Records of any court of this State or of the United States.*

(e) ~~(b)~~ *The laws law of foreign countries; and governmental subdivisions of foreign countries.*

~~(e)~~ (f) *such facts as are so generally known or of such common notoriety Specific facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.; and ~~(d)~~*

(g) *Specific facts and propositions of generalized knowledge that are not reasonably subject to dispute which and are capable of immediate and accurate determination by resort to easily accessible sources of reasonably 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.*

*(3) Judicial notice may not be taken of any matter unless authorized or required by statute.*

### Comment

#### Revised Rule 9 Generally

The judge is required to take judicial notice of the matters listed in subdivision (1). He may take judicial notice of the matters listed in subdivision (2) even when not requested to do so; he is required to notice them if a party requests it and satisfies the requirements of Proposed Rule 9.5.

There is some overlap between the matters listed in the mandatory notice provisions of subdivision (1) and the matters listed in the permissive-unless-a-request-is-made provisions of subdivision (2). Thus, when a matter falls within subdivision (1), notice is mandatory even though the matter would also fall within subdivision (2). The revision to the introductory clause in subdivision (2) makes this clear. For example, public statutory law is required to be noticed under subdivision (1)(a) even though it would also be included under official acts of the legislative department under subdivision (2)(c). And certain regulations are required to be noticed under subdivision (1)(b) even though they might also be included under subdivision (2)(b) and (c). Indisputable matters of universal knowledge are required to be noticed under subdivision (1)(d) even though such matters might be included under subdivision (2)(f) and (g).

There is also some overlap between the various categories listed in subdivision (2). However, this overlap will cause no difficulty because all of the matters listed in subdivision (2) are treated alike.

### **Subdivision (1)**

Judicial notice of the matters specified in subdivision (1) is *mandatory*, whether or not the judge is requested to notice them. Although the judge errs if he fails to take judicial notice of the matters specified in subdivision (1), such error is not necessarily reversible error. Depending upon the circumstances, the appellate court may hold that the error was "invited" (and, hence, is not reversible error) or that points not urged in the trial court may not be advanced on appeal. These and similar principles are not abrogated by subdivision (1).

Subdivision (1) includes both matters of law and fact. The matters specified in paragraphs (a), (b), and (c) of subdivision (1) are all matters that, broadly speaking, can be considered as a part of the "law" applicable to the particular case. The judge can reasonably be expected to discover and apply this law, even if the parties fail to provide him with references to the pertinent cases, statutes, and regulations. Other matters that also might properly be considered as a part of the law applicable to the case (such as the law of foreign countries and certain regulations and ordinances) are included under subdivision (2), rather than under subdivision (1), primarily because of the difficulty of ascertaining such matters. Paragraph (d) of subdivision (1) covers "universally known" facts.

Listed below are the matters that are included under subdivision (1).

**California and federal law.** The decisional, constitutional, and public statutory law of California and of the United States must be judicially noticed under subdivision (1)(a). This requirement states existing law as found in subdivision 3 of Section 1875 of the Code of Civil Procedure.

**Law of sister states.** The decisional, constitutional, and public statutory law in force in sister states must be judicially noticed under subdivision (1)(a). Courts now take judicial notice of the law of sister states under subdivision 3 of Section 1875 of the Code of Civil Procedure. However, the revised rule requires notice of relevant decisions of *all* sister-state courts, whereas Section 1875 seems to preclude notice

of sister-state law as interpreted by the intermediate-appellate and trial courts of sister states. The existing law is not clear as to whether a request for judicial notice of sister-state law is required and whether judicial notice is mandatory. On necessity for request for judicial notice, see Comment, 24 CAL. L. REV. 311, 316 (1936). On whether judicial notice is mandatory, see *In re Bartges*, 44 Cal.2d 241, 282 P.2d 47 (1955), and the opinion of the Supreme Court in denying a hearing in *Estate of Moore*, 7 Cal. App.2d 722, 726, 48 P.2d 28, 29 (1935).

**Law of territories and possessions of the United States.** The decisional, constitutional, and public statutory law in force in the territories and possessions of the United States must be judicially noticed under subdivision (1)(a). It is not clear under existing California law whether this law is treated as sister-state law or foreign law. See WITKIN, CALIFORNIA EVIDENCE § 45 (1958).

**Regulations of California and federal agencies.** Judicial notice must be taken under subdivision (1)(b) of the rules, regulations, orders, and standards of general application adopted by California state agencies and filed with the Secretary of State or printed in the California Administrative Code or the California Administrative Register. This is existing California law as found in Government Code Sections 11383 and 11384. Under subdivision (1)(b), judicial notice must also be taken of the rules and amendments of the State Personnel Board. This, too, is existing California law under Government Code Section 18576.

Subdivision (1)(b) also requires California courts to judicially notice documents published in the Federal Register (such as (1) presidential proclamations and executive orders having general applicability and legal effect and (2) orders, regulations, rules, certificates, codes of fair competition, licenses, notices, and similar instruments, having general applicability and legal effect, that are issued, prescribed, or promulgated by federal agencies). There is no clear holding that this is existing California law. Although Section 307 of Title 44 of the United States Code provides that the "contents of the Federal Register shall be judicially noticed," it is not clear that this *requires* notice by state courts. See *Broadway Fed. etc. Loan Ass'n v. Howard*, 133 Cal. App.2d 382, 386, 285 P.2d 61, 64 (1955) (referring to 44 U.S.C.A. §§ 301-314). Compare Note, 59 HARV. L. REV. 1137, 1141 (1946) (doubt expressed that notice is required) with Knowlton, *Judicial Notice*, 10 RUTGERS L. REV. 501, 504 (1956) ("it would seem that this provision is binding upon the state courts"). *Livermore v. Beal*, 18 Cal. App.2d 535, 542-543, 64 P.2d 987, 992 (1937), suggests that California courts are required to judicially notice pertinent federal official action, and California courts have judicially noticed the contents of various proclamations, orders, and regulations of federal agencies. *E.g.*, *Pacific Solvents Co. v. Superior Court*, 88 Cal. App.2d 953, 955, 199 P.2d 740, 741 (1948) (orders and regulations); *People v. Mason*, 72 Cal. App.2d 699, 706-707, 165 P.2d 481, 485 (1946) (presidential and executive proclamations) (disapproved on other grounds in *People v. Friend*, 50 Cal.2d 570, 578, 327 P.2d 97, 102 (1958)); *Downer v. Grizzly Livestock &*

*Land Co.*, 6 Cal. App.2d 39, 42, 43 P.2d 843, 845 (1935) (regulation). The revised rule will make the California law clear.

**Rules of court.** Judicial notice of the court rules of the courts of this State and of the United States is required under subdivision (1) (c). This may change existing California law, for a number of older cases indicate that our appellate courts do not take judicial notice of the rules of the lower courts. *E.g.*, *Cutter v. Caruthers*, 48 Cal. 178 (1874); *Warden v. Mendocino County*, 32 Cal. 655 (1867); *Gammon v. Ealey & Thompson*, 97 Cal. App. 452, 275 Pac. 1005 (1929). However, these cases are inconsistent with the modern philosophy of judicial notice as indicated by the holding in *Flores v. Arroyo*, 56 Cal.2d 492, 496-497, 15 Cal. Rptr. 87, 89-90, 364 P.2d 263, 265-266 (1961) (stating that judicial notice would be taken of records and proceedings of courts of this State and overruling cases to the contrary). Moreover, the rules of the California and federal courts are, or should be, familiar to the court or easily discoverable from materials readily available to the court. Since this cannot be said of the court rules of the courts of sister states and of other jurisdictions, there is no provision in the revised rules requiring or permitting judicial notice of them.

**"Universally known" facts.** Subdivision (1)(d) requires the court to take judicial notice of indisputable facts and propositions universally known. "Universally known" does not mean that every man on the street has knowledge of such facts. A fact known among persons of reasonable and average intelligence and knowledge will satisfy the "universally known" requirement. *Cf. People v. Tossetti*, 107 Cal. App. 7, 12, 289 Pac. 881, 883 (1930).

Subdivision (1)(d) should be contrasted with paragraphs (f) and (g) of subdivision (2), which provide for judicial notice of indisputable facts and propositions that are matters of common knowledge or are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. Paragraphs (f) and (g) permit notice of facts and propositions that are indisputable but are not "universally" known.

Judicial notice does not apply to facts merely because they are known to the judge to be indisputable. They must fulfill the requirements of subdivision (1)(d) or subdivision (2)(f) or (g). If a judge happens to know a fact that is not widely enough known to be subject to judicial notice under Revised Rule 9, he may not "notice" it.

It is clear under existing law that the judge may judicially notice the matters specified in subdivision (1)(d); it is doubtful, however, that he *must* notice them. See *Varcoe v. Lee*, 180 Cal. 338, 347, 181 Pac. 223, 227 (1919) (dictum). Since subdivision (1)(d) covers universally known facts, the parties ordinarily will expect the judge to take judicial notice of them; the judge should not be permitted to ignore such facts merely because the parties fail to make a formal request for judicial notice.

### **Subdivision (2)**

Subdivision (2) includes both matters of law and fact. The judge *may* take judicial notice of these matters, even when not requested to do so; he is *required* to notice them if a party requests it and satisfies the requirements of Proposed Rule 9.5.

The matters of law included under subdivision (2) may be neither known to the judge nor easily discoverable by him because the sources of information are not readily available. However, if a party requests it and furnishes the judge with "sufficient information" for him to take judicial notice, the judge must do so if proper notice has been given to each adverse party. See Proposed Rule 9.5, *infra*. Thus, judicial notice of these matters of law is mandatory only if counsel adequately discharges his responsibility for informing the judge as to the law applicable to the case. The simplified process of judicial notice can then be applied to all of the law applicable to the case, including such law as ordinances and the law of foreign countries.

Although subdivision (2) extends the process of judicial notice to some matters of law which the courts do not judicially notice under existing law, the wider scope of such notice is balanced by the assurance that the matter need not be judicially noticed unless adequate information to support its truth is furnished to the judge. Under Proposed Rule 9.5, this burden falls upon the party requesting that notice be taken. In addition, the parties are entitled under Revised Rule 10 to a reasonable opportunity to present information to the judge as to the propriety of taking judicial notice and as to the tenor of the matter to be noticed.

Listed below are the matters that are included under subdivision (2).

**Resolutions and private acts.** Subdivision (2)(a) provides for judicial notice of the resolutions and private acts of the Congress of the United States and of the legislature of any state, territory, or possession of the United States.

The California law on this matter is not clear. Our courts are authorized by subdivision 3 of Code of Civil Procedure Section 1875 to take judicial notice of private statutes of this State and the United States, and they probably would take judicial notice of resolutions of this State and the United States under the same subdivision. It is not clear whether such notice is compulsory. It may be that judicial notice of a private act pleaded in a criminal action pursuant to Penal Code Section 963 is mandatory, whereas judicial notice of the same private act may be discretionary when pleaded in a civil action pursuant to Section 459 of the Code of Civil Procedure.

Although no case has been found, California courts probably would not take judicial notice of a resolution or private act of a sister state or territory or possession of the United States. Although Section 1875 is not the exclusive list of the matters that will be judicially noticed, the courts did not take judicial notice of a private statute prior to the enactment of Section 1875. *Ellis v. Eastman*, 32 Cal. 447 (1867).

**Regulations, ordinances, and similar legislative enactments.** Subdivision (2)(b) provides for judicial notice of the legislative enactments and regulations of governmental subdivisions and agencies of the United States and of any state, territory, or possession of the United States. The words "legislative enactments and regulations" have been substituted for "ordinances" in the revised rule to include other similar legislative enactments as well as ordinances. Not all governmental subdivisions legislate by ordinance.

This subdivision would change existing California law. Under existing law, municipal courts take judicial notice of ordinances in force within their jurisdiction. *People v. Cowles*, 142 Cal. App.2d Supp. 865, 867, 298 P.2d 732, 733-734 (1956); *People v. Crittenden*, 93 Cal. App.2d Supp. 871, 877, 209 P.2d 161, 165 (1949). In addition, an ordinance pleaded in a criminal action pursuant to Penal Code Section 963 must be judicially noticed. On the other hand, neither the superior court nor a district court of appeal will take judicial notice in a civil action of municipal or county ordinances. *Thompson v. Guyer-Hays*, 207 Cal. App.2d 366, 24 Cal. Rptr. 461 (1962); *County of Los Angeles v. Bartlett*, 203 Cal. App.2d 523, 21 Cal. Rptr. 776 (1962); *Becerra v. Hochberg*, 193 Cal. App.2d 431, 14 Cal. Rptr. 101 (1961). It seems safe to assume that ordinances of sister states and of territories and possessions of the United States would not be judicially noticed under existing law.

Notice of certain regulations of California and federal agencies is mandatory under subdivision (1)(b). As revised, paragraph (b) of subdivision (2) provides for notice of California and federal regulations that are not included under subdivision (1)(b) and for notice of regulations of other states and of territories and possessions of the United States.

Both California and federal regulations have been judicially noticed under subdivision 3 of Code of Civil Procedure Section 1875. 18 CAL. JUR.2d *Evidence* § 24. Although no case has been found, it is unlikely that regulations of other states or of territories or possessions of the United States would be judicially noticed under existing law.

**Official acts of the legislative, executive, and judicial departments.** Paragraph (c) of subdivision (2) provides for judicial notice of the official acts of the legislative, executive, and judicial departments of this State and of the United States. This paragraph is not found in the URE, but it states existing law as found in subdivision 3 of Code of Civil Procedure Section 1875. Under this provision, our courts have taken judicial notice of a wide variety of administrative and executive acts, such as proceedings and reports of the House Committee on Un-American Activities and records of the State Board of Education and a county planning commission. See WITKIN, CALIFORNIA EVIDENCE § 49 (1958), and 1963 Supplement thereto.

**Court records.** Paragraph (d) of subdivision (2) provides for judicial notice of the records of any court of this State or of the United States. This paragraph is not found in the URE, but it states existing law. *Flores v. Arroyo*, 56 Cal.2d 492, 15 Cal. Rptr. 87, 364 P.2d 263 (1961). While the provisions of paragraph (c) are comprehensive enough to include court records, specific mention of these records is desirable in order to eliminate any uncertainty in the law on this point. See the *Flores* case, *supra*.

**Law of foreign countries.** Paragraph (e) of subdivision (2) provides for judicial notice of the law of foreign countries and governmental subdivisions of foreign countries. Paragraph (e) should be read in connection with Proposed Rule 10.5 and paragraph (c) of subdivision (2) of Revised Rule 10. These provisions retain the substance of the existing law which was enacted in 1957 upon recommendation of the California Law Revision Commission. CODE CIV. PROC. § 1875.



See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *Recommendation and Study Relating to Judicial Notice of the Law of Foreign Countries* at I-1 (1957).

Paragraph (e) refers to "the law" of foreign countries and governmental subdivisions of foreign countries. This makes all law, in whatever form, subject to judicial notice. Since the law of a foreign country may take a number of unanticipated forms, it is best not to limit this paragraph by a definition of "law."

**Matters of "common knowledge" and verifiable facts.** Paragraph (f) of subdivision (2) provides for judicial notice of matters of common knowledge within the court's jurisdiction that are not subject to dispute. This paragraph states existing California case law. *Varcoe v. Lee*, 180 Cal. 338, 181 Pac. 223 (1919); 18 CAL. JUR.2d *Evidence* § 19 at 439-440. The California courts have taken judicial notice of a wide variety of matters of common knowledge. WITKIN, CALIFORNIA EVIDENCE §§ 50-52 (1958).

Paragraph (g) of subdivision (2) provides for judicial notice of indisputable facts immediately ascertainable by reference to sources of reasonably indisputable accuracy. In other words, the facts need not be actually known if they are readily ascertainable and indisputable. Sources of "reasonably indisputable accuracy" include not only treatises, encyclopedias, almanacs, and the like, but also persons learned in the subject matter. This would not mean that 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 and to determine the tenor of the matter to be noticed.

Paragraphs (f) and (g) include, for example, facts which are accepted as established by experts and specialists in the natural, physical, and social sciences if those facts are of such wide acceptance that to submit them to the jury would be to risk irrational findings. These paragraphs include such matters listed in Code of Civil Procedure Section 1875 as the "geographical divisions and political history of the world" and "the true signification of all English words and phrases." To the extent that paragraphs (f) and (g) overlap with subdivision (1)(d), notice is, of course, mandatory under subdivision (1)(d).

The matters covered by paragraphs (f) and (g) are included in subdivision (2)—rather than subdivision (1)(d)—because it seems reasonable to put the burden on the parties to bring adequate information before the judge if judicial notice is to be mandatory. See Proposed Rule 9.5 and the Comment thereto, *infra*.

Under existing California law, courts take judicial notice of the matters that are included under paragraphs (f) and (g), either pursuant to Section 1875 of the Code of Civil Procedure or because such matters are matters of common knowledge which are certain and indisputable. WITKIN, CALIFORNIA EVIDENCE §§ 50-52 (1958). Notice of these matters probably is not compulsory under existing law.

### Subdivision (3)

URE subdivision (3) has been deleted from this rule, but much of its substance is restated in Proposed Rule 9.5, *infra*.

Revised Rule 9(3) provides that judicial notice may not be taken of any matter unless authorized or required by statute, *i.e.*, unless it is listed in Rule 9 or in some other statute. By way of contrast, the principal judicial notice provision found in existing law—Code of Civil Procedure Section 1875—does not limit judicial notice to matters specified by statute. Judicial notice has been taken of various matters not so specified, principally matters of common knowledge which are certain and indisputable.

Subdivision (3) should not be thought to prevent courts from considering whatever materials are appropriate in construing statutes, determining constitutional issues, and formulating rules of law. That a court may take note of legislative history, discussions by learned writers in treatises and law reviews, and similar materials is inherent in the requirement that it take judicial notice of the law. In many cases, the meaning and validity of statutes, the precise nature of a common law rule, or the correct interpretation of a constitutional provision can be determined only with the help of such extrinsic aids. *Cf. People v. Sterling Refining Co.*, 86 Cal. App. 558, 564, 261 Pac. 1080, 1083 (1927) (statutory authority to notice “public and private acts” of legislature held to authorize examination of legislative history of certain acts). Revised Rule 9 will neither broaden nor limit the extent to which a court may resort to extrinsic aids in determining the rules of law it is required to notice.

### **Rule 9.5. Matters Conditionally Required to Be Judicially Noticed**

**RULE 9.5.** (1) *Except as provided in subdivision (2), judicial notice shall be taken of each matter specified in subdivision (2) of Rule 9 if a party requests it and:*

(a) *Furnishes the judge sufficient information to enable him to take judicial notice of the matter; and*

(b) *Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request.*

(2) *Judicial notice need not be taken under subdivision (1) if:*

(a) *An adverse party disputes the propriety of taking such notice or the tenor thereof; and*

(b) *The party requesting that judicial notice be taken fails to persuade the judge as to the propriety of taking such notice and as to the tenor thereof.*

#### **Comment**

This rule provides that the judge must take judicial notice of any matter specified in Revised Rule 9(2) if a party (a) requests that such notice be taken, (b) provides the judge with sufficient information to enable him to take judicial notice of the matter, and (c) gives each adverse party sufficient notice of the request to prepare to meet it. However, the judge may decline to take judicial notice of such matters if an adverse party disputes the propriety of taking such notice (or

the tenor thereof) and the party requesting that notice be taken fails to persuade the judge both as to the propriety of taking judicial notice of the matter and as to the tenor of the matter to be noticed.

Proposed Rule 9.5 is intended as a safeguard and not as a rigid limitation on the power of the judge to take judicial notice. The proposed rule does not affect the discretionary power of the judge to take judicial notice under subdivision (2) of Revised Rule 9 where the party requesting that judicial notice be taken fails to give the requisite notice to each adverse party or fails to furnish sufficient information as to the propriety of taking judicial notice or as to the tenor of the matter to be noticed. Hence, when he considers it appropriate, the judge may take judicial notice under Revised Rule 9(2) and may consult and use any source of pertinent information, whether or not provided by the parties. However, even though the judge may take judicial notice under Revised Rule 9(2) when the requirements of Proposed Rule 9.5 have not been satisfied, the party adversely affected must be given a reasonable opportunity to present information as to the propriety of taking judicial notice and as to the tenor of the matter to be noticed. See Revised Rule 10 and the Comment thereto, *infra*.

**The “notice” requirement.** The person requesting the judge to judicially notice a matter under Proposed Rule 9.5 must give each adverse party sufficient notice, through the pleadings or otherwise, to enable him to prepare to meet the request. In cases where the notice given does not satisfy this requirement, the judge may decline to take judicial notice. A somewhat similar notice to the adverse parties is required under subdivision 4 of Section 1875 when a request for judicial notice of the law of a foreign country is made. Proposed Rule 9.5 broadens this existing requirement to cover all matters specified in subdivision (2) of Revised Rule 9.

The notice requirement is an important one since judicial notice is binding on the jury under Rule 11. Accordingly, the adverse parties should be given ample notice so that they will have an opportunity to prepare to oppose the taking of judicial notice and to obtain information relevant to the tenor of the matter to be noticed.

Since subdivision (2) of Revised Rule 9 relates to a wide variety of facts and law, the notice requirement should be administered with flexibility in order to insure that the policy behind the judicial notice rules is properly implemented. In many cases, it will be reasonable to expect the notice to be given at or before the time of the pretrial conference. In other cases, matters of fact or law of which the judge should take judicial notice may come up at the trial. Proposed Rule 9.5 merely requires reasonable notice, and the reasonableness of the notice given will depend upon the circumstances of the particular case.

The notice requirement of Proposed Rule 9.5 replaces the somewhat similar requirement of URE Rule 9(3). URE Rule 9(3) is unsatisfactory because it requires the judge to make an initial determination in each case as to the time and form of the notice to be given.

**The “sufficient information” requirement.** Under the proposed rule, the judge is not required to resort to any sources of information not provided by the parties. If the party requesting that judicial notice

be taken under the proposed rule fails to provide the judge with "sufficient information," the judge may decline to take judicial notice. For example, if the party requests the judge to take judicial notice of the specific gravity of gold, the party requesting that notice be taken must furnish the judge with definitive information as to the specific gravity of gold. The judge is not required to undertake the necessary research to determine the fact, though, of course, he is not precluded from doing such research if he so desires.

The proposed rule does not define what is "sufficient information"; this will necessarily vary from case to case. While the parties will understandably use the best evidence they can produce under the circumstances, mechanical requirements that are ill-suited to the individual case should be avoided. In particularly complicated cases, the judge justifiably might require that the party requesting that judicial notice be taken provide expert testimony to clarify especially difficult problems.

**Burden on party requesting that judicial notice be taken.** Where a request is made to take judicial notice under the proposed rule and an adverse party disputes the propriety of taking judicial notice or disputes the tenor of the matter to be noticed, the judge may decline to take judicial notice unless the party requesting that notice be taken persuades the judge that the matter is one that properly may be noticed under Revised Rule 9(2) and also persuades the judge as to the tenor of the matter to be noticed. The degree of the judge's persuasion regarding a particular matter is determined by the paragraph of Revised Rule 9(2) which authorizes judicial notice of the matter. For example, if the matter is claimed to be a fact of common knowledge under paragraph (f) of Revised Rule 9(2), the party must persuade the judge that the fact is of such common knowledge within the territorial jurisdiction of the court that it cannot reasonably be subject to dispute, *i.e.*, that no reasonable person having the same information as is available to the judge could rationally disbelieve the fact. On the other hand, if the matter to be noticed is a city ordinance under paragraph (b) of Revised Rule 9(2), the party must persuade the judge that a valid ordinance exists and also as to its tenor; but the judge need not believe that no reasonable person could conclude otherwise.

Without regard to the evidence supplied by the party requesting that judicial notice be taken, the judge's determination to take judicial notice of a matter specified in Revised Rule 9(2) will be upheld on appeal if the matter was properly noticed. The reviewing court may resort to any information, whether or not available at the trial, in order to sustain the proper taking of judicial notice. See Revised Rule 12, *infra*. On the other hand, even though a party requested that judicial notice be taken under Proposed Rule 9.5 and gave notice to each adverse party in compliance with subdivision (1)(b) of the proposed rule, the decision of the judge not to take judicial notice will be upheld on appeal unless the reviewing court determines that the party furnished information to the judge that was so persuasive that no reasonable judge would have refused to take judicial notice of the matter.

## Rule 10. Determination as to Propriety of Taking Judicial Notice and Tenor of Matter Noticed

RULE 10. (1) *Before judicial notice of any matter specified in subdivision (2) of Rule 9 may be taken, the judge shall afford each party reasonable opportunity to present to him information relevant to (a) the propriety of taking judicial notice of a the matter or to and (b) 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, *including the advice of persons learned in the subject matter, may be consulted or used*, whether or not furnished by a party. ; ~~and~~

(b) No exclusionary rule except a valid claim of privilege shall apply.

(c) *With respect to any matter specified in subdivision (2) of Rule 9, if the judge resorts to any source of information not received in open court, including the advice of persons learned in the subject matter, such information and its source shall be made a part of the record in the action or proceeding, and the judge shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.*

~~(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.~~

### Comment

**Subdivision (1).** This subdivision guarantees the parties a reasonable opportunity to present information to the judge as to the propriety of taking judicial notice and as to the tenor of the matter to be noticed. The URE provision has been revised to limit its application to the matters specified in subdivision (2) of Revised Rule 9, for it would not be practicable to make Rule 10(1) applicable to subdivision (1) of Revised Rule 9.

What constitutes a "reasonable opportunity to present . . . information" will depend upon the complexity of the matter and its importance to the case. For example, in a case where there is no dispute as to the existence and validity of a city ordinance, no formal hearing

would be necessary to determine the propriety of taking judicial notice of the ordinance and of its tenor. But where there is a complex question as to the tenor of the law of a foreign country applicable to the case, the granting of a hearing under subdivision (1) would be mandatory. The New York 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 both law and fact is guaranteed by due process of law. *Arams v. Arams*, 182 Misc. 328, 182 Misc. 336, 45 N.Y.S.2d 251 (Sup. Ct. 1943).

**Subdivision (2).** Since one of the purposes of judicial notice is to simplify the process of proofmaking, the judge should be given considerable latitude in deciding what sources are trustworthy. This subdivision permits the judge to use any source of pertinent information, including the advice of persons learned in the subject matter. As revised, it probably restates existing California law as found in Section 1875 of the Code of Civil Procedure. See *Estate of McNamara*, 181 Cal. 82, 89-91, 183 Pac. 552, 555 (1919), and the Study, *infra* at 850-851.

If the judge resorts to sources of information not previously known to the parties, Revised Rule 10(2)(c) requires that such information and its source be made a part of the record when it relates to taking judicial notice of a matter specified in subdivision (2) of Revised Rule 9. This requirement is based on a somewhat similar requirement found in Section 1875 regarding the law of a foreign country. Making the information and its source a part of the record assures its availability for examination by the parties and by a reviewing court. In addition, Revised Rule 10(2)(c) requires the judge to give the parties reasonable opportunity to meet such additional information before judicial notice of the matter may be taken.

**Subdivision (3).** This subdivision of the URE rule has been deleted. To the extent that it merely repeats the principle of sufficiency set forth in Proposed Rule 9.5, subdivision (3) is unnecessary duplication. See the Comment to Proposed Rule 9.5, *supra*. To the extent that it makes Rule 9 an exclusive list of matters that may be judicially noticed, it is unnecessary since that principle is more clearly stated in subdivision (3) of Revised Rule 9.

**Subdivision (4).** This subdivision of the URE rule has been deleted as superfluous. The principle is well established that matters of law are for the judge, not for the jury; and under Rule 11, any matter judicially noticed that would otherwise have been for determination by the jury must be accepted as a fact by the jury.

### **Rule 10.5. Procedure When Judge Unable to Determine What Foreign Law Is**

**RULE 10.5.** *If the judge is unable to determine what the law of a foreign country or a governmental subdivision of a foreign country is, he may, as the ends of justice require, either (a) apply the law of this State if he can do so consistently with the Constitution of this State and of the United States or (b) dismiss the action or proceeding without prejudice.*

### Comment

This rule restates existing California law as found in the last sentence of Code of Civil Procedure Section 1875. The rule continues in effect statutory language enacted in 1957 upon recommendation of the California Law Revision Commission. See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *Recommendation and Study Relating to Judicial Notice of the Law of Foreign Counties* at I-1, I-6 (1957).

### Rule 11. Noting for Record Matter Judicially Noticed; Instructing Jury

RULE 11. (1) If a matter judicially noticed is other than ~~the common law or constitution or public statutes of this state~~ a matter specified in paragraph (a) of subdivision (1) of Rule 9, the judge shall at the earliest practicable time indicate for the record the matter which is judicially noticed and *the tenor thereof*.

(2) If ~~the~~ a matter judicially noticed is a matter which would otherwise have been for determination by a trier of fact other than the judge, ~~he~~ the jury, the judge may and upon request shall instruct the trier of the fact jury to accept as a fact the matter so noticed.

### Comment

**Subdivision (1).** This subdivision requires the judge to indicate for the record at the earliest practicable time a matter which is judicially noticed. However, matters of law judicially noticed under paragraph (a) of subdivision (1) of Revised Rule 9 are not included within this requirement. The requirement is imposed in order to provide the parties with an adequate opportunity to try their case in view of the judicially noticed law and facts applicable to the case. In addition, needless dispute sometimes results from the failure of the judge to put in the record matters which he has judicially noticed. No comparable requirement is found in existing California law.

**Subdivision (2).** This subdivision makes matters judicially noticed binding on the jury and thereby eliminates any possibility of presenting to the jury evidence disputing the fact as noticed by the judge. The subdivision is limited to instruction on a matter that would otherwise have been for determination by the jury; instruction of juries on matters of law is not a matter of evidence and is covered by the general provisions of law governing instruction of juries. Subdivision (2) states the substance of the existing law as found in Code of Civil Procedure Section 2102. See *People v. Mayes*, 113 Cal. 618, 625-626, 45 Pac. 860, 862 (1896); *Gallegos v. Union-Tribune Publishing Co.*, 195 Cal. App.2d 791, 797-798, 16 Cal. Rptr. 185, 189-190 (1961).

Under subdivision (2), the judge need not instruct the jury unless requested. This revision of the URE rule is intended to avoid time-consuming and unnecessary instructions.

## Rule 12. Judicial Notice in Proceedings Subsequent to Trial

RULE 12. (1) The failure or refusal of the judge to take judicial notice of a matter, or to instruct the ~~trier of fact~~ *jury* with respect to the matter, ~~shall~~ *does* 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.~~

*(2) The reviewing court shall judicially notice each matter specified in Rule 9 that the judge was required to notice under Rule 9 or 9.5. The reviewing court may judicially notice any matter specified in subdivision (2) of Rule 9 and has the same power as the judge under Rule 10.5. The reviewing court may judicially notice a matter in a tenor different from that noticed by the judge.*

*(3) In determining the propriety of taking judicial notice of a matter or the tenor thereof, the reviewing court has the same power as the judge under paragraphs (a) and (b) of subdivision (2) of Rule 10.*

*(4) ~~A~~ The judge or a reviewing court taking judicial notice under Paragraph ~~(1)~~ or ~~(3)~~ of this rule of a matter not theretofore so noticed in the action specified in subdivision (2) of Rule 9 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 comply with the provisions of Rule 10 if the matter was not theretofore judicially noticed in the action or proceeding.*

*(5) In determining the propriety of taking judicial notice of a matter specified in subdivision (2) of Rule 9, or the tenor thereof, if the reviewing court resorts to any source of information not received in open court or not included in the record of the action or proceeding, including the advice of persons learned in the subject matter, such information and its source shall be made a part of the record in the action or proceeding, and the reviewing court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.*

### Comment

Rule 12 sets forth a separate set of rules for the taking of judicial notice in proceedings subsequent to trial and in appellate proceedings.

**Subdivision (1).** This subdivision provides that the failure or even the refusal of a judge to take judicial notice of a matter at the trial



does not bar the 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. Although no California case has been found, it seems safe to assume that the trial judge has the power to take judicial notice of a matter in subsequent proceedings, since the appellate court can properly take judicial notice of any matter that the trial court could properly notice. See *People v. Tossetti*, 107 Cal. App. 7, 12, 289 Pac. 881, 883 (1930).

**Subdivision (2).** Subdivision (2) of the revised rule requires that a reviewing court take judicial notice of any matter which the trial judge was obliged to notice. This means that the matters specified in subdivision (1) of Revised Rule 9 must be judicially noticed by the reviewing court even though the trial court did not take judicial notice of such matters. The matters specified in subdivision (2) of Revised Rule 9 also must be judicially noticed by the reviewing court if an appropriate request was made at the trial level and the party making the request satisfied the conditions specified in Proposed Rule 9.5. However, if the trial court erred, the reviewing court is not bound by the tenor of the notice taken by the trial court.

Having taken judicial notice of such a matter, the reviewing court may or may not apply it in the particular case on appeal. The effect to be given to matters judicially noticed on appeal, where the question has not been raised below, depends on factors that are not evidentiary in character and are not mentioned in these rules. For example, the appellate court is required to notice the matters of law mentioned in Revised Rule 9(1), but it may hold that an error which the appellant has "invited" is not reversible error or that points not urged in the trial court may not be advanced on appeal, and refuse, therefore, to apply the law to the pending case. These principles do not mean that the appellate court does not take judicial notice of the applicable law; they merely mean that, for reasons of policy governing appellate review, the appellate court may refuse to apply the law to the case before it.

In addition to requiring the reviewing court to judicially notice those matters which the trial court was required to notice, the subdivision also provides authority for the reviewing court to exercise the same discretionary power to take judicial notice as is possessed by the trial court.

**Subdivision (3).** This subdivision has been added to remove any doubt that may exist with respect to the power of the reviewing court to consult any source of pertinent information for the purpose of determining the propriety of taking judicial notice or the tenor of the matter to be noticed. This includes, of course, the power to consult such sources for the purpose of sustaining or reversing the taking of judicial notice by the trial judge. As to the rights of the parties when the reviewing court consults such materials, see subdivision (5) of the revised rule and the Comment thereto.

**Subdivision (4).** Subdivision (4) of the revised rule provides the parties with the same procedural protection when judicial notice is taken in proceedings subsequent to trial as is provided by Revised Rule 10.

**Subdivision (5).** This subdivision assures the parties the same procedural safeguard at the appellate level that they have in the trial court. If the appellate court resorts to sources of information not included in the record in the action or proceeding, or not received in open court at the appellate level, either to sustain the tenor of the notice taken by the trial court or to notice a matter in a tenor different from that noticed by the trial court, the parties must be given a reasonable opportunity to meet such additional information before judicial notice of the matter may be taken. See Revised Rule 10(2)(c) and the Comment thereto, *supra*.

**Deleted provisions of URE rule.** Subdivision (2) of the URE rule has been deleted as unnecessary. The principle of this subdivision is well established by existing case law. See extensive annotations to Code of Civil Procedure Section 1875 (West 1955, and Deering 1959). No comparable provision is included in existing law or in other URE rules.

Subdivision (3) of the URE rule also has been deleted. This subdivision is superseded by subdivision (2) of the revised rule.

## AMENDMENTS AND REPEALS OF EXISTING STATUTES

Set forth below is a list of existing statutes relating to judicial notice that should be revised or repealed in light of the Commission's tentative recommendation concerning Article II (Judicial Notice) of the Uniform Rules of Evidence. The reason for the suggested revision or repeal is given after each section. References to the Uniform Rules of Evidence are to the Uniform Rules as revised by the Commission.

### Civil Code

**Section 53** should be revised to read:

53. (a) Every provision in a written instrument relating to real property which purports to forbid or restrict the conveyance, encumbrance, leasing, or mortgaging of such real property to any person of a specified race, color, religion, ancestry, or national origin, is void and every restriction or prohibition as to the use or occupation of real property because of the user's or occupier's race, color, religion, ancestry, or national origin is void.

(b) Every restriction or prohibition, whether by way of covenant, condition upon use or occupation, or upon transfer of title to real property, which restriction or prohibition directly or indirectly limits the acquisition, use or occupation of such property because of the acquirer's, user's, or occupier's race, color, religion, ancestry, or national origin is void.

(c) In any action to declare that a restriction or prohibition specified in subdivision (a) or (b) of this section is void, the court ~~may take~~ *takes* judicial notice of the recorded instrument or instruments containing such prohibitions or restrictions *in the same manner that it takes judicial notice of the matters listed in subdivision (2) of Rule 9 of the Revised Uniform Rules of Evidence.*

This revision makes the procedure provided in Rules 9-12 applicable when judicial notice is taken of a matter specified in subdivision (c) of Section 53.

## Code of Civil Procedure

**Section 433** should be revised to read :

433. When any of the matters enumerated in Section 430 do not appear upon the face of the complaint, the objection may be taken by answer ; except that when the ground of demurrer is that there is another action *or proceeding* pending between the same parties for the same cause ; *and* the court may take judicial notice of ~~other actions and proceedings pending in the same court, or in other courts of the State, and for this purpose only the other action or proceeding under Article II of the Revised Uniform Rules of Evidence,~~ an affidavit may be filed with the demurrer ~~to establish for the sole purpose of establishing~~ such fact or ~~invoke~~ *invoking* such notice.

This revision is necessary to conform Section 433 to Rule 9(2)(d) and Rule 9.5.

**Section 1875** provides :

1875. Courts take judicial notice of the following :

1. The true signification of all English words and phrases, and of all legal expressions ;
2. Whatever is established by law ;
3. Public and private official acts of the legislative, executive and judicial departments of this State and of the United States, and the laws of the several states of the United States and the interpretation thereof by the highest courts of appellate jurisdiction of such states ;
4. The law and statutes of foreign countries and of political subdivisions of foreign countries ; provided, however, that to enable a party to ask that judicial notice thereof be taken, reasonable notice shall be given to the other parties to the action in the pleadings or otherwise ;
5. The seals of all the courts of this State and of the United States ;
6. The accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive, and judicial departments of this State and of the United States ;
7. The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States ;
8. The seals of courts of admiralty and maritime jurisdiction, and of notaries public ;
9. The laws of nature, the measure of time, and the geographical divisions and political history of the world.

In all these cases the court may resort for its aid to appropriate books or documents of reference. In cases arising under subdivision 4 of this section, the court may also 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.

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 Constitutions of this State and of the United States or dismiss the action without prejudice.

This section should be repealed. Each portion of this section is superseded by the revised rules indicated below.

<i>Section 1875</i>	<i>Revised Rules</i>
Portion of subdivision (1) relating to "true signification of all English words and phrases"	Superseded by paragraphs (f) and (g) of subdivision (2) of Rule 9
Portion of subdivision (1) relating to "legal expressions" and all of subdivision (2)	Superseded by subdivision (1) of Rule 9 and paragraphs (a), (b), (c), (d), and (e) of subdivision (2) of Rule 9
Subdivision (3)	Superseded by subdivision (1) of Rule 9 and paragraphs (a), (c), and (d) of subdivision (2) of Rule 9
Subdivision (4)	Superseded by subdivision (2)(e) of Rule 9 and Proposed Rule 9.5
Subdivision (5)	Superseded by revised Article IX (Authentication and Content of Writings) <sup>4</sup>
Subdivisions (6) and (7)	The portions relating to official signatures and seals are superseded by revised Article IX (Authentication and Content of Writings) <sup>5</sup> ; the balance is superseded by paragraphs (f) and (g) of subdivision (2) of Rule 9
Subdivision (8)	Superseded by revised Article IX (Authentication and Content of Writings) <sup>6</sup>
Subdivision (9)	Superseded by subdivision (1)(d) of Rule 9 and paragraphs (f) and (g) of subdivision (2) of Rule 9
Next to last paragraph	Superseded by subdivision (2) of Rule 10
Last paragraph	Superseded by Proposed Rule 10.5

**Section 2102** should be revised to read:

2102. ~~QUESTIONS OF LAW ADDRESSED TO THE COURT.~~ All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the Court, and all discussions of law addressed to it. ~~Whenever the knowledge of the Court is, by this Code, made evidence of a fact, the Court is to declare such knowledge to the jury, who are bound to accept it.~~

The deleted portion of Section 2102 is superseded by subdivision (2) of Rule 11.

<sup>4</sup> See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article IX. Authentication and Content of Writings)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 101 (1964).

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

## Corporations Code

**Section 6602** should be revised to read:

6602. In any action or proceeding, the court ~~shall take~~ *takes* judicial notice ~~without proof in court of the Constitution and statutes applying to foreign corporations, and any interpretation thereof, the seals of State and state officials and notaries public, and, in the same manner that it takes judicial notice of the matters listed in subdivision (2) of Rule 9 of the Revised Uniform Rules of Evidence,~~ of the official acts affecting corporations of the legislative, executive, and judicial departments of the State or place under the laws of which the corporation purports to be incorporated.

This revision makes the procedure provided in Rules 9-12 applicable to the matters listed in Section 6602. The portion of Section 6602 which has been deleted is unnecessary because it duplicates the provisions of Rule 9.

## Government Code

**Section 34330** provides:

34330. Courts shall take judicial notice of the organization and existence of cities incorporated pursuant to this chapter.

This section should be repealed. It is superseded by Rule 9(2) and Proposed Rule 9.5.

## Penal Code

**Section 961** should be revised to read:

961. Neither presumptions of law, nor matters of which judicial notice is *authorized or required to be* taken, need be stated in an accusatory pleading.

This revision makes it clear that matters that will be judicially noticed, whether such notice is mandatory or discretionary, need not be stated in an accusatory pleading.

**Section 963** should be revised to read:

963. In pleading a private statute, or an ordinance of a county or a municipal corporation, or a right derived therefrom, it is sufficient to refer to the statute or ordinance by its title and the day of its passage, and the court must thereupon take judicial notice thereof *in the same manner that it takes judicial notice of matters listed in subdivision (2) of Rule 9 of the Revised Uniform Rules of Evidence.*

This revision makes the procedure provided in Rules 9-12 applicable when judicial notice is taken of a matter listed in Section 963. Note that, notwithstanding Proposed Rule 9.5, notice is mandatory if the private statute or ordinance is pleaded by reference to its title and the day of its passage.



**A STUDY RELATING TO THE JUDICIAL  
NOTICE ARTICLE OF THE UNIFORM  
RULES OF EVIDENCE \***

**TABLE OF CONTENTS**

	Page
INTRODUCTION .....	831
Background .....	831
The URE Judicial Notice Rules .....	832
Judicial Notice Versus Formal Proof .....	834
General Scheme of the URE Judicial Notice Rules .....	834
Present California Law—Generally .....	835
 RULE 9 .....	 837
Compulsory Notice Without Request—Subdivision (1) .....	837
Domestic and Federal Law .....	838
Laws of Sister States .....	839
Laws of the Territories of the United States .....	840
Indisputable Facts and Propositions Universally Known .....	840
Conclusion and Recommendation—Rule 9(1) .....	841
Permissive Notice Conditionally Mandatory Upon Request—	
Subdivisions (2) and (3) .....	841
The Rationale of the Rule 9(3) Conditions .....	842
Conditions Precedent and Compulsory Notice in Present Cali-	
fornia Law .....	842
Private Acts and Ordinances .....	843
Regulations .....	844
Foreign Law .....	846
Indisputable Facts Locally Known .....	848
Verifiable Facts .....	849
Optional Notice Under Rule 9(2) .....	849
Conclusions and Recommendations .....	849
 RULE 10 .....	 850
Subdivision (1) .....	850
Subdivision (2) .....	850
Subdivision (3) .....	851
Subdivision (4) .....	851

---

\* This study was made at the request of the California Law Revision Commission by Professor James H. Chadbourn, formerly of the U.C.L.A. Law School, now of the Harvard Law School. The opinions, conclusions, and recommendations contained herein are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the Law Revision Commission.

## TABLE OF CONTENTS—Continued

	Page
<b>RULE 11</b> .....	852
<b>Making Record of Matters Noticed</b> .....	852
<b>Conclusiveness of Notice</b> .....	852
<b>RULE 12</b> .....	854
<b>Subdivisions (1) and (3)</b> .....	854
<b>Professor Currie's Objections to Subdivisions (1) and (3) of</b> <b>    Rule 12</b> .....	854
<b>Subdivision (2)</b> .....	856
<b>Subdivision (4)</b> .....	856
<b>JUDICIAL NOTICE OF "LEGISLATIVE FACTS"</b> .....	857
<b>INCORPORATING THE JUDICIAL NOTICE ARTICLE INTO CALIFORNIA</b> <b>    LAW</b> .....	859
<b>Code of Civil Procedure Section 1875</b> .....	859
<b>Code of Civil Procedure Section 2102</b> .....	860



## INTRODUCTION

### Background

The California Law Revision Commission has been authorized to make a study to determine whether the law of evidence in this State should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference.<sup>1</sup>

The present study, made at the request of the Law Revision Commission, is directed to the question whether California should adopt the provisions of the Uniform Rules of Evidence (hereinafter sometimes designated as the "URE") relating to judicial notice—i.e., Rules 9 through 12 and other related provisions of the Uniform Rules. The study undertakes both to point up what changes would be made in the California law of evidence if these URE provisions were adopted and also to subject these provisions to an objective analysis designed to test their utility and desirability. In some instances, modifications of the provisions of the Uniform Rules are suggested. The problem of incorporating these provisions of the Uniform Rules into the California

<sup>1</sup> Cal. Stats. 1956, Res. Ch. 42, p. 263.

The Uniform Rules are the subject of the following law review symposia: *Institute on Evidence*, 15 ARK. L. REV. 7 (1960-61); *Panel on Uniform Rules of Evidence*, 8 ARK. L. REV. 44 (1953-54); *Symposium—Minnesota and the Uniform Rules of Evidence*, 40 MINN. L. REV. 297 (1956); Comment, *A Symposium on the Uniform Rules of Evidence and Illinois Evidence Law*, 49 NW. U. L. REV. 481 (1954); *The Uniform Rules of Evidence*, 10 RUTGERS L. REV. 479 (1956); Chadbourn, *The "Uniform Rules" and the California Law of Evidence*, 2 U.C.L.A. L. REV. 1 (1954).

See also Brooks, *Evidence*, 14 RUTGERS L. REV. 390 (1960); Cross, *Some Proposals for Reform in the Law of Evidence*, 24 MODERN L. REV. 32 (1961); Gard, *Why Oregon Lawyers Should be Interested in the Uniform Rules of Evidence*, 37 ORE. L. REV. 287 (1958); Levin, *The Impact of the Uniform Rules of Evidence on Pennsylvania Law*, 26 PA. B. ASS'N Q. 216 (1955); McCormick, *Some High Lights of the Uniform Evidence Rules*, 33 TEXAS L. REV. 559 (1955); Morton, *Do We Need a Code of Evidence?*, 38 CAN. B. REV. 35 (1960); Nokes, *Codification of the Law of Evidence in Common-Law Jurisdictions*, 5 INT. & COMP. L. Q. 347 (1956); Nokes, *American Uniform Rules of Evidence*, 4 INT. & COMP. L. Q. 48 (1955).

The Uniform Rules also have been scrutinized by committees appointed by the Supreme Courts of New Jersey and Utah. See REPORT OF THE COMMITTEE ON THE REVISION OF THE LAW OF EVIDENCE TO THE SUPREME COURT OF NEW JERSEY (1955) and FINAL DRAFT OF THE RULES OF EVIDENCE (1959), the report of the Utah Committee on the Uniform Rules of Evidence. A Commission appointed by the New Jersey Legislature also has studied the Uniform Rules. See REPORT OF THE COMMISSION TO STUDY THE IMPROVEMENT OF THE LAW OF EVIDENCE (1956). In 1960, the New Jersey Legislature enacted a revised version of the Privileges Article of the Uniform Rules and granted the New Jersey Supreme Court the power to adopt rules dealing with the admission or rejection of evidence. (N.J. Laws 1960, Ch. 52, p. 452 (N.J. REV. STAT. §§ 2A : 84A-1 to 2A : 84A-49).) Following this enactment, the New Jersey Supreme Court appointed another committee to study the Uniform Rules. The report of this committee in 1963 (REPORT OF THE NEW JERSEY SUPREME COURT COMMITTEE ON EVIDENCE (March 1963)) contains a comprehensive analysis of the Uniform Rules and many worthy suggestions for improvements.

The new evidence article in the Kansas Code of Civil Procedure, enacted in 1963, following a report by the Kansas Judicial Council (see *Recommendations as to Rules of Civil Procedure, Process, Rules of Evidence and Limitations of Actions* in KANSAS JUDICIAL COUNCIL BULLETIN (Nov. 1961)), is substantially the same as the Uniform Rules. See Kan. Laws 1963, Ch. 303, Art. 4, §§ 60-401 through 60-470, pp. 670-692.

codes is also discussed. Similar studies of the other Uniform Rules are contemplated.

In considering these rules, it should be kept in mind that Rule 7<sup>2</sup> proclaims, *inter alia*, that "all relevant evidence is admissible" except "as otherwise provided in these Rules." (Emphasis added.) Thus, it is contemplated that where the Uniform Rules are adopted, all pre-existing exclusionary rules would be superseded. Only the Uniform Rules would be consulted as the exclusive source of law excluding relevant evidence. If nothing in the Uniform Rules permits or requires the exclusion of an item of relevant evidence, it is to be admitted, notwithstanding any pre-existing law which required its exclusion,<sup>3</sup> for Rule 7 wipes from the slate all prior exclusionary rules. The slate remains clean, except to the extent that some other rule or rules write restrictions upon it.

### The URE Judicial Notice Rules

Rules 9 to 12, constituting Article 2 of the Uniform Rules of Evidence, relate to judicial notice and provide 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.

<sup>2</sup> Rule 7 of the Uniform Rules provides: "Except as otherwise provided in these Rules, (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is disqualified to testify to any matter, and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (f) all relevant evidence is admissible."

<sup>3</sup> However, evidence inadmissible on constitutional grounds would, of course, remain so under the Uniform Rules. The comment on Rule 7 states: "Illegally acquired evidence may be inadmissible on constitutional grounds—not because it is irrelevant. Any constitutional questions which may arise are inherent and may, of course, be raised independently of this rule."

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

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

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

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

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

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

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

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

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

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

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

All of these rules deal with "judicial notice." However, none of these rules nor any other Uniform Rule defines the term "judicial notice." It seems certain, therefore, that throughout the Uniform Rules, the expression "judicial notice" is used in its traditional sense. A brief discussion of this traditional meaning is thus in order.

### Judicial Notice Versus Formal Proof

According to Code of Civil Procedure Section 1827, there are four kinds of evidence:

1. The knowledge of the Court;
2. The testimony of witnesses;
3. Writings;
4. Other material objects presented to the senses.<sup>1</sup>

The knowledge of the court (or judicial notice) is thus a species of evidence. It is, however, distinct from the other types of evidence stated, namely, the testimony of witnesses and documentary and real evidence. Furthermore, since the knowledge of the court is thus distinct, many restrictive requirements respecting testimony of witnesses, documents, and objects as sources of proof (*e.g.*, rules defining the competency of witnesses, the "knowledge" and "opinion" rules, the "hearsay" rule, the "best evidence" rule, and the rule requiring formal authentication) are inapplicable when the knowledge of the court is used as a source of proof. Thus, for example, if a matter is to be established by the formal testimony of a witness, the witness must be a competent witness, must be sworn, must possess knowledge, must state his knowledge without infringing the opinion rule, the hearsay rule, and other rules restricting a witness' testimony. And, if the matter is to be proved by a document, the document must be authenticated, must not infringe the hearsay rule, must be formally offered and received in evidence as an exhibit, and must comply with other restrictive rules relating to documentary evidence. On the other hand, where the matter can be established by the knowledge of the court, none of these formalities is requisite; rather, the court simply declares its knowledge of the fact and thereby establishes the fact. Hence, as the California Supreme Court states in *Varcoe v. Lee*,<sup>2</sup> judicial notice is "a judicial shortcut, a doing away with the *formal* necessity for evidence." This is the traditional sense of the term "judicial notice." As thus used in the Uniform Rules, the process of judicial notice is, therefore, a substitute for formal proof.

### General Scheme of the URE Judicial Notice Rules

In general terms, the design of the judicial notice rules of the Uniform Rules is as follows: First, it is provided that certain matters of

<sup>1</sup> See also CAL. CODE CIV. PROC. § 1825:

The law of evidence, which is the subject of this part of the Code, is a collection of general rules established by law:

1. For declaring what is to be taken as true without proof;
2. For declaring the presumptions of law, both those which are disputable and those which are conclusive; and,
3. For the production of legal evidence;
4. For the exclusion of whatever is not legal;
5. For determining, in certain cases, the value and effect of evidence.

The first category is, of course, judicial notice.

Code of Civil Procedure Section 1823 defines "evidence" as follows:

Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact.

Judicial notice is, of course, a "means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact."

<sup>2</sup> 180 Cal. 338, 344, 181 Pac. 223, 226 (1919) (emphasis added). See also 9 WIGMORE, EVIDENCE §§ 2565-2566 (3d ed. 1940) [hereinafter cited as WIGMORE]; McCORMICK, EVIDENCE § 323 (1954) [hereinafter cited as McCORMICK].

law and certain matters of fact *must* be noticed without request. (Rule 9(1).) Next, it is provided 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 (Rules 10 and 11) and certain provisions regarding post-trial judicial notice (Rule 12) are included.

In appraising the scope of these rules, it is important to bear in mind that, whereas most matters of law are included in the category of Rule 9(1), *i.e.*, the mandatory notice rule, a few such matters are in the category of Rule 9(2) (*e.g.*, foreign country law, domestic ordinances, regulations, and private statutes). It is well to remember also that certain matters of fact are allocated to Rule 9(1) and others to Rule 9(2). Thus, all matters of judicial notice cannot be lumped together, and it cannot be assumed that all are subject to the same treatment.

Another preliminary point which is, perhaps, worth noting is that the Uniform Rules seemingly do not purport to state when any of the enumerated subject matters of judicial notice are material to any case. For example, Rule 9(1) seemingly does not supply (or purport to supply) any criterion for determining when the rule of decision for any case is to be found in domestic law and when it is to be found in non-domestic law (*i.e.*, federal, sister-state, territorial, or foreign law). Again Rule 9(1) and paragraphs (c) and (d) of Rule 9(2) seemingly do not state (or purport to state) when the facts and propositions there referred to are germane to a particular case. (It may well be, of course, that the materiality of such a matter will depend upon whether it has been properly raised under the laws of pleading applicable to the case.)

It seems to follow, therefore, that Rules 9 to 12 are all subject to other principles respecting materiality (such as "choice-of-law" rules<sup>3</sup>) and are likewise subject to presently prevailing pleading requirements.

### Present California Law—Generally

California's judicial notice statute is Code of Civil Procedure Section 1875. The design of this statute is markedly different from that of the Uniform Rules. The statute lumps together all matters of judicial notice and (with one exception) treats all such matters alike:

Courts take judicial notice of the following:

1. The true signification of all English words and phrases, and of all legal expressions;
2. Whatever is established by law;

<sup>3</sup> Professor Brainerd Currie is, however, of the opinion that the Uniform Rules "proceed on the basis of the . . . vested-rights theory" as to choice of law. His opinion seems to be based (at least in part) upon his belief that the rules provide for "mandatory judicial notice without request" of foreign law. See Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 998-999 (1958).

It seems, however, that the Uniform Rules do *not* provide for "mandatory judicial notice without request" of foreign law. Under Rule 9, subdivisions (2) and (3), foreign law is subject to mandatory notice only upon request. However, the above point is but a minor one in Professor Currie's article, and the article remains a most acute analysis of and attack upon the "vested-rights theory."

Query: Conceivably, could not courts in a jurisdiction adopting the Uniform Rules be persuaded to accept Professor Currie's views as to choice of law? Is there in the Uniform Rules anything necessarily incompatible with revising the choice of law concept?

3. Public and private official acts of the legislative, executive and judicial departments of this State and of the United States, and the laws of the several states of the United States and the interpretation thereof by the highest courts of appellate jurisdiction of such states;

4. The law and statutes of foreign countries and of political subdivisions of foreign countries; provided, however, that to enable a party to ask that judicial notice thereof be taken, reasonable notice shall be given to the other parties to the action in the pleadings or otherwise;

5. The seals of all the courts of this State and of the United States;

6. The accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive, and judicial departments of this State and of the United States;

7. The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States;

8. The seals of courts of admiralty and maritime jurisdiction, and of notaries public;

9. The laws of nature, the measure of time, and the geographical divisions and political history of the world.

In all of these cases the court may resort for its aid to appropriate books or documents of reference. In cases arising under subdivision 4 of this section, the court may also 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.

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 Constitutions of this State and of the United States or dismiss the action without prejudice.<sup>4</sup>

Nine matters of which the courts take notice are thus set forth. These nine categories are not, however, the exclusive measure of the courts' power of notice. As the court states in *Standley v. Knapp*:<sup>5</sup>

It may be conceded that the term "judicial notice" or the facts of which such notice may be taken is not definitely circumscribed by the section.

In *Berry v. Chaplin*,<sup>6</sup> the court makes the same point in the following language:

The scope of judicial notice has been amplified by the courts far beyond the matters enumerated in section 1875 of the Code of Civil Procedure . . . .

<sup>4</sup> Wigmore would regard the various references throughout the section to "judicial notice" of certain seals as a usage of the term "judicial notice" in an anomalous sense. He thinks that what is meant is not "judicial notice" in the true sense but, rather, "merely a rule that the production of something purporting to be a seal shall be in these cases sufficient evidence of genuineness to go to the jury or shall suffice to raise a presumption of genuineness." 9 WIGMORE § 2566.

<sup>5</sup> 113 Cal. App. 91, 94-95, 298 Pac. 109, 111 (1931).

<sup>6</sup> 74 Cal. App.2d 669, 675, 169 P.2d 453, 458 (1946).

## RULE 9

### Compulsory Notice Without Request—Subdivision (1)

Subdivision (1) of Uniform Rule 9 reads as follows:

(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.<sup>7</sup>

This subdivision should be considered in connection with subdivision (2) of Rule 12, which provides, in part, that:

(2) The rulings of the judge under [Rule 9] . . . are subject to review.

Putting together the two subdivisions above stated and reading them literally, they seem to mean that, without any request so to do and without requiring any formal proofs, the judge *must* discover—and discover correctly—all rules of law which are of the character stated and which are germane to the case. Assuming this is true—and unqualifiedly true—it follows that, if in any case the judge overlooks (and, therefore, omits to apply) some statute or decision or constitutional provision applicable to the case, he errs—even though he has been either wholly uninformed or misinformed by counsel. But, conceding that in the case just supposed the judge's ruling is reviewable "error," the appellate court must decide whether the "error" is *reversible* error. Depending upon the circumstances, the appellate court may or may not invoke the doctrine that an error which the appellant has "invited" is not reversible error or the doctrine that points not urged in the trial court may not be advanced in the appellate court.<sup>8</sup> Surely it is not the intent of Rule 9(1) to abrogate these doctrines.<sup>9</sup> This being so, it must follow that where the doctrine of "invited error" or a like doctrine is applicable at the appellate level, the fact that on the trial level the judge shirks or misperforms his duty to take judicial

<sup>7</sup> The full text of Rule 9 is set forth in the text, *supra* at 832, together with each of the other rules constituting the URE Judicial Notice Article.

<sup>8</sup> For a general statement of these doctrines, see *Grimes v. Nicholson*, 71 Cal. App.2d 538, 162 P.2d 934 (1945); *Abbott v. Cavalli*, 114 Cal. App. 379, 383, 300 Pac. 67, 69 (1931). See also Comment, *Overlooking Statutes*, 30 YALE L. J. 855 (1921), and MCCORMICK § 326, at 695 n.2.

<sup>9</sup> Rule 9(1) is based on Rule 801 of the American Law Institute's Model Code of Evidence. The following Comment on the Model Code rule suggests that both rules are subject to the "invited error" doctrine:

That the judge must apply the proper rule of law is axiomatic. In a few cases both the judge and counsel have overlooked a pertinent statute to the detriment of the losing party. This has been held to be reversible error, except where the circumstances make applicable the doctrine which forbids reversal for invited error.

Rule 9(1) would not, it seems, change any pleading rules (such as the requirement to plead certain matters as affirmative defenses). In fact, such rules would be part of the law of which judicial notice is required under Rule 9(1).

notice of a matter is of no *practical* aid to the losing party. In other words, when no request for notice is made and no citation of the materials requisite for the court's information is supplied, any error of the judge in not correctly discharging the duty of judicial notice imposed upon him by Rule 9(1) may be purely academic.

Code of Civil Procedure Section 1875 provides, *inter alia*, for notice of most of those matters which are stated in Rule 9(1) to be subjects of judicial notice. But, whereas Rule 9(1) states that the matters "shall" be judicially noticed even in the absence of any request, Section 1875 is silent on the question of request and is neutral on the question of compulsion. Section 1875 merely proclaims the declaratory, descriptive proposition that "Courts take judicial notice." This does not reveal whether the courts' action is because of compulsion or is because of discretion. Nor do California decisions shed much light on these questions which the statute leaves open.<sup>10</sup> It cannot be determined precisely whether, under present law, a party must request the court to judicially notice Rule 9(1) matters and whether such notice is obligatory upon the court. However, such information as has been found on this problem is discussed below in connection with a detailed comparison of Rule 9(1) and Section 1875.

### Domestic and Federal Law

Rule 9(1) provides as follows respecting domestic law:

Judicial notice shall be taken without request by a party, of the common law, [constitution] and public statutes in force in [this] state . . . .

Together with the doctrine of invited error, this seems to state the view which is generally prevalent.<sup>1</sup> Code of Civil Procedure Section 2102 provides, in part, that "All questions of law . . . are to be decided by the Court, and all discussions of law addressed to it." Code of Civil Procedure Section 1875 provides, in part, that "Courts take judicial notice of the following: . . . Public . . . acts of the legislative . . . and judicial departments of this State."

Undoubtedly, judicial notice of domestic law is compulsory. No one would contend that the judge possesses a discretion to require formal proof of the matters of domestic law stated in Rule 9(1). Certainly no California judge is permitted to require of the parties that they authenticate and formally introduce into evidence as exhibits such data as books containing the California Constitution, the codes, or

<sup>10</sup> Some cases state by way of dicta that notice is compulsory. *E.g.*, *People v. Stewart*, 107 Cal. App. 757, 764, 288 Pac. 57, 60-61 (1930); *People v. Cowles*, 142 Cal. App.2d Supp. 865, 866-867, 298 P.2d 732, 733-734 (1956). Others state by way of dicta that notice is optional. *E.g.*, *Varcoe v. Lee*, 180 Cal. 338, 181 Pac. 223 (1919).

No case has been found that directly rules on the question, nor does any case suggest that judicial notice of some facts is compulsory whereas such notice of others is optional. The uncertainty which prevails in the California precedents may be characteristic of precedents elsewhere. See 9 WIGMORE § 2568.

<sup>1</sup> McCormick states:

As to domestic law generally, the judge is not merely permitted to take judicial notice but required to do so, at least if so requested, although in a particular case a party may be precluded on appeal from complaining of the judge's failure to notice a statute where his counsel has failed to call it to the judge's attention. [McCORMICK § 326, at 695.]



decisions. If by some stretch of the imagination it might be supposed that a judge did require such formal proof, surely his conduct would not be excusable on the ground that the parties forgot to ask him to take judicial notice. It is certain, therefore, that California law is in accord with Rule 9(1) as to judicial notice of the matters of domestic law stated in Rule 9(1).

What is said above as to the matters of domestic law undoubtedly is applicable *mutatis mutandis* to the matters of federal law stated in Rule 9(1).<sup>2</sup>

### Laws of Sister States

Rule 9(1) provides as to notice of the law of sister states:

Judicial notice shall be taken without request by a party, of the common law, constitutions and public statutes in force in every state . . . of the United States . . . .

Code of Civil Procedure Section 1875(3) provides, in part:

Courts take judicial notice of the following: . . . the laws of the several states of the United States and the interpretation thereof by the highest courts of appellate jurisdiction of such states.

The word "laws" in Section 1875(3) covers both statutory and non-statutory laws.<sup>3</sup> Possibly, a request for judicial notice is requisite<sup>4</sup> and, possibly, such notice is mandatory.<sup>5</sup>

Under Rule 9(1), relevant decisions of *all* courts of sister states should be judicially noticed, whereas Section 1875(3) seems to preclude such notice of intermediate-appellate and trial court decisions in sister states. There seems to be no reason for this restriction.<sup>6</sup> Therefore, approval of the broader principle stated in Rule 9(1) is recommended.

<sup>2</sup> Rule 9(1) provides, in part:

Judicial notice shall be taken without request by a party, of the common law, constitutions and public statutes in force in every . . . jurisdiction of the United States.

Code of Civil Procedure Section 1875 provides, in part:

Courts take judicial notice of . . . :

\* \* \* \* \*

Public . . . official acts of the legislative . . . and judicial departments . . . of the United States.

<sup>3</sup> *Zinn v. Ex-Cell-O Corp.*, 148 Cal. App.2d 56, 81, 306 P.2d 1017, 1033 (1957).

<sup>4</sup> So argued on the basis of out-of-state authority in Comment, 24 CAL. L. REV. 311, 316 (1936).

<sup>5</sup> See opinion of the Supreme Court in denying a hearing in *Estate of Moore*, 7 Cal. App.2d 722, 726, 48 P.2d 28, 29 (1935). See also *In re Bartges*, 44 Cal.2d 241, 282 P.2d 47 (1955); *Recommendation and Study Relating to Judicial Notice of the Law of Foreign Countries*, 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study at I-1, I-14 (1957); Comment, 24 CAL. L. REV. 311, 316 (1936).

<sup>6</sup> At least twelve states have intermediate appellate courts. (See Comment, 24 CAL. L. REV. 311, 315 n.23 (1936).) Are not decisions reported in the *New York Supplement* and *Pennsylvania Superior Court Reports* good indications of the law of New York and Pennsylvania? What reason is there in requiring such reports as these to be formally introduced into evidence? If a judge of a state other than California were confronted with the necessity to determine California law, would it not be senseless to preclude him from consulting decisions reported in the *California Appellate Reports* unless they were formally introduced into evidence? Is not the California restriction as senseless?

### Laws of the Territories of the United States

Rule 9(1) provides as follows:

Judicial notice shall be taken without request by a party, of the common law, constitutions and public statutes in force in every . . . territory . . . of the United States . . . .

Code of Civil Procedure Section 1875(3) has been held inapplicable to laws of the territories.<sup>7</sup> Thus, adoption of Rule 9(1) would change the present California law as to the taking of judicial notice of the law governing United States' territories. This change in present law is recommended.

### Indisputable Facts and Propositions Universally Known

Rule 9(1) provides:

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.

McCormick regards this proposition as in accord with present law:

In some instances it will be apparent to the court that the matter is one which the parties are expecting him to notice. . . . [such as] facts of universal knowledge [and therefore no request for notice is necessary] . . . .

Assuming that . . . [such] a case is presented where request is unnecessary, is the court bound to take judicial notice wherever the fact is proper for it? It seems to be agreed that in some cases it is mandatory as for example in respect to . . . facts universally known. [Footnotes omitted.]<sup>8</sup>

The thought here seems to be that the judge errs if he puts upon a party the onerous burden of formal proof of a fact which is universally known. The judge should be forbidden (as Rule 9(1) forbids him) to squander time, money, and energy by requiring such formal proof. Therefore, when both the relevancy of the fact and the universality of the acceptance of the fact are obvious, the judge should have no option to refuse to take judicial notice and to require formal proof.

Yet, it may be that in current California practice the judge does possess such an option. It is clear that the California judge *may* judicially notice matters of general knowledge and notoriety (even though not specified in Section 1875). It is doubtful, however, that he *must* take notice of such matters. This doubt springs from the following emphasized dictum from the leading California case of *Varcoe v. Lee*:<sup>9</sup>

The tests, therefore, in any particular case where it is sought to avoid or excuse the production of evidence because the fact to be proven is one of general knowledge and notoriety are: (1) is

<sup>7</sup> *Perkins v. Benguet Consol. Min. Co.*, 55 Cal. App.2d 720, 132 P.2d 70 (1942).

The holding might have been different on the basis of Code of Civil Procedure Section 17(1), which provides that "state" includes the "District of Columbia and the territories." (In 1942, the Philippines were a territory.)

<sup>8</sup> *McCORMICK* § 330, at 708-709.

<sup>9</sup> 180 Cal. 338, 346-347, 181 Pac. 223, 227 (1919).

the fact one of common, everyday knowledge *in that jurisdiction*, which every one of average intelligence and knowledge of things about him can be presumed to know; and (2) is it certain and indisputable. If it is, it is a proper case for dispensing with evidence, for its production cannot add or aid. On the other hand, we may well repeat, if there is any reasonable question whatever as to either point, proof should be required. Only so can the danger involved in dispensing with proof be avoided. *Even if the matter be one of judicial cognizance, there is still no error or impropriety in requiring evidence.* [Emphasis added.]

Assuming this dictum is operative today (and there seems to be no basis to doubt that it is), it must be concluded that California law is not today in accord with that part of Rule 9(1) which makes notice of universally known facts mandatory. For the reasons stated above, however, the Rule 9(1) principle is preferable.

### **Conclusion and Recommendation—Rule 9(1)**

Rule 9(1) is probably in accord with present California law with respect to judicial notice of domestic law and federal law. The rule is broader as respects the taking of judicial notice of the law of sister states and of the law of United States' territories. It is also broader in regard to taking judicial notice of universally known facts.

In the respects in which it is broader, Rule 9(1) is preferable to the present California law. Therefore, approval of Rule 9(1) is recommended.

### **Permissive Notice Conditionally Mandatory Upon Request—Subdivisions (2) and (3)**

Subdivision (3) of Rule 9 provides, in part:

Judicial notice shall be taken . . . 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.

If these conditions are met, "judicial notice shall be taken" of the following matters listed in subdivision (2) of Rule 9:

(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 the 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.

### The Rationale of the Rule 9(3) Conditions

As indicated above, subdivision (3) of Rule 9 sets forth three conditions precedent to the duty of the court to take judicial notice of the matters stated in subdivision (2) of Rule 9, the three conditions being request for notice, supplying information for same, and notice of the request to adverse parties. Under subdivision (1), none of these conditions is requisite to the court's duty. A glance at the matters subject to unconditional mandatory notice under subdivision (1) and a comparison of such matters with those only conditionally subject to required notice under subdivision (2) and (3) reveals the reason for dispensing with the conditions under Rule 9(1) and for imposing the conditions under Rule 9(2) and (3). The reason is relative accessibility and comprehensibility of source materials. When the matter is one of domestic or federal law or of the law of sister states or of United States' territories (matters for notice under subdivision (1)), the necessary books of reference are ordinarily available to the judge and he possesses the requisite skill in their use. Therefore, his duty of taking judicial notice is not dependent upon the party's supplying him with the source materials which he must consult. On the other hand, if the matter is one relating to a private legislative act, municipal ordinance, or governmental regulation, the reference books are probably not within the easy reach of the judge. If the matter is one of foreign law, not only may the books be inaccessible, they may (even if accessible) require translation and other special aids to understanding.

Thus, the thought underlying the conditions of subdivisions (2) and (3) is that the party must procure the source materials needed by the judge if the party would create a duty devolving upon the judge to take judicial notice of the matters stated in Rule 9(2).

### Conditions Precedent and Compulsory Notice in Present California Law

Code of Civil Procedure Section 1875 mentions many<sup>1</sup> of the matters stated in Rule 9(2) and states that "courts take judicial notice" of the same. The section does not state, however, whether judicial notice is compulsory or, if so, whether any conditions (such as request) are requisite to making such notice compulsory.<sup>2</sup> The elements of doubt springing from these omissions in the statute have not been removed by cases. It is true that courts occasionally have cautioned counsel of the desirability of informing the court respecting matters to be noticed. Thus, in *McPheeters v. Board of Medical Examiners*,<sup>3</sup> the court spoke to the point as follows:

<sup>1</sup> Thus, Code of Civil Procedure Section 1875(3) covers private official acts, as does Rule 9(2)(a), and Section 1875(4) covers foreign country law, as does Rule 9(2)(b). Section 1875(9) covers the "laws of nature, the measure of time, and the geographical divisions and political history of the world." Rule 9(2)(c) and (d) cover these matters. Rule 9(2)(c) and (d) are not, however, limited to these matters. On the contrary, they extend to *all* facts which are notorious or verifiable as stated in the rule. Hence, it seems correct to state that Section 1875 expressly covers many (but not all) of the matters stated in Rule 9(2).

<sup>2</sup> In only one instance does Code of Civil Procedure Section 1875 impose a condition. This is the requirement of Section 1875(4) that, "to enable a party to ask that judicial notice . . . be taken [of "the law and statutes of foreign countries and of political subdivisions of foreign countries"], reasonable notice shall be given to the other parties to the action in the pleadings or otherwise."

<sup>3</sup> 74 Cal. App.2d 46, 168 P.2d 65 (1946).

While it is true that we may take judicial notice of the records of a public agency, as suggested by counsel, they should realize that we should be furnished with some official information of what those records contain as we should not be called upon to take judicial notice of facts of which we are in actual ignorance. This is especially true in the instant case as counsel do not agree as to the contents of those records.<sup>4</sup>

In *Popcorn Equipment Co. v. Page*,<sup>5</sup> the court emphasized the same point in the following language:

There is a vast difference between judicial notice and judicial knowledge. The party on whom rests the burden of establishing a fact of which the court may take judicial notice is not relieved of the necessity of bringing the fact to the knowledge of the court.<sup>6</sup>

Such language does not justify the conclusion that in present California practice the conditions stated in Rule 9(3) are enforced as to judicial notice of *all* matters stated in Rule 9(2). Nor does such language (or any other available statement or ruling) indicate whether judicial notice of Rule 9(2) matters is in general compulsory in California courts. It cannot, therefore, be stated by way of general proposition whether the current California law is or is not in accord with subdivisions (2) and (3) of Rule 9. With reference to some of the specific matters stated in Rule 9(2), however, it is possible to be somewhat more definite, as is indicated in the following discussion of each of the specific matters mentioned in Rule 9(2).

### Private Acts and Ordinances

Given compliance with the conditions set forth in Rule 9(3), Rule 9(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."

Code of Civil Procedure Section 1875 provides, in part:

Courts take judicial notice of . . . private . . . acts of the legislative [department] . . . of this State and of the United States.

Under some circumstances, such notice under Section 1875 is, it seems, compulsory. Thus, Penal Code Section 963 provides as follows:

In pleading a private statute, or an ordinance of a county or a municipal corporation, or a right derived therefrom, it is sufficient to refer to the statute or ordinance by its title and the day of its passage, and the court must thereupon take judicial notice thereof.

By way of contrast, Code of Civil Procedure Section 459 contains a similar provision as to pleading but is silent as to judicial notice. It *may* be, therefore, that, whereas notice of a private act pleaded in a criminal action pursuant to Penal Code Section 963 is mandatory,

<sup>4</sup> *Id.* at 47, 168 P.2d 66.

<sup>5</sup> 92 Cal. App.2d 448, 207 P.2d 647 (1949) (disapproved on other grounds in *Flores v. Arroyo*, 56 Cal.2d 492, 15 Cal. Rptr. 87, 364 P.2d 263 (1961)).

<sup>6</sup> *Id.* at 454, 207 P.2d at 651.

notice of such act pleaded in a civil action pursuant to Code of Civil Procedure Section 459 is not.<sup>7</sup>

The situation respecting notice of ordinances is similarly confused.<sup>8</sup> It is frequently stated that courts of record do not take judicial notice of ordinances.<sup>9</sup> It would seem, however, that these courts should take such notice in Penal Code Section 963 cases.<sup>10</sup> Moreover, there is some authority to the effect that a municipal court must take judicial notice of ordinances of the municipality within the judicial district.<sup>11</sup>

It would seem that there is uncertainty and confusion in the present California law respecting judicial notice of private statutes and ordinances. Adoption of Rule 9(2) and (3) would, therefore, constitute a meritorious clarification in this area.

### Regulations

Given compliance with the conditions set forth in Rule 9(3), Rule 9(2) *requires* notice of "duly published regulations of governmental subdivisions or agencies of this state." (Emphasis added.) Note that

<sup>7</sup> See Comment, 7 CAL. L. REV. 135, 136-137 (1919).

<sup>8</sup> See Keeffe, Landis & Shaad, *Sense and Nonsense About Judicial Notice*, 2 STAN. L. REV. 664, 673 n.34 (1950).

<sup>9</sup> See the quotation in note 11, *infra*.

<sup>10</sup> Penal Code Section 963 (quoted in the text, *supra* at 843) specifically includes ordinances.

<sup>11</sup> *People v. Cowles*, 142 Cal. App.2d Supp. 865, 866-867, 298 P.2d 732, 733-734 (1956). In holding that the Municipal Court for the Oakland-Piedmont Judicial District did not err in taking notice of Section 123 of the Oakland Traffic Code, the court states as follows:

Appellant does not question the sufficiency of the evidence. He contends, however, that the municipal court in which he was tried is a court of record; that as such, it does not take judicial notice of ordinances and his conviction must therefore be reversed, since no attempt was made on the part of the prosecution to prove either the contents or enactment of section 123.

That the municipal court in question is a court of record, there can be no doubt. It was declared to be such by constitutional amendment enacted in 1924. See California Constitution, article VI, section 12. That numerous cases categorically state that courts of record do not take judicial notice of ordinances, also cannot be doubted. [Citations omitted.]

This statement when originally made was no doubt factually correct. Its basis, however, is entirely historical, having been originally made when the only courts of record were courts of general jurisdiction. As such, they did not take judicial notice of ordinances which are private statutes.

Code of Civil Procedure, section 1875, subdivision 2, provides that "courts shall take judicial notice of whatever is established by law." Thus, in obedience to this section, the superior court as a court of general jurisdiction takes judicial notice of enactments of the state Legislature. By the same token, a municipal court which has exclusive jurisdiction of cases involving the violation of ordinances of cities or towns situated in the district in which it is established (Pen. Code, § 1462) takes judicial notice of those ordinances.

Appellant relies upon a decision of the appellate department of the superior court of a neighboring county, wherein a conviction of the violation of an ordinance was reversed because of the failure of the prosecution to introduce the ordinance in evidence. (*People v. Lum*, Criminal Appeal 5867, Contra Costa County, February 8, 1936.) This decision while persuasive is, of course, not binding upon this court. We are unable to agree with the conclusions therein reached.

The rule is correctly stated in 18 Cal. Jur.2d 452, as follows:

"A municipal or a justice court in which a proceeding is instituted for the express purpose of enforcing a city or county ordinance, which is the peculiar law of that forum, is bound to take notice of the ordinance. In such cases the rule that judicial notice will not be taken of ordinances does not apply. A municipal court holds the same relation to ordinances that the superior court holds to acts of the legislature, and the rule as to judicial notice of 'whatever is established by law' applies."

(Note that the court *misquotes* Section 1875 by adding the mandatory "shall.") See also *People v. Crittenden*, 93 Cal. App.2d Supp. 871, 209 P.2d 161 (1949).

regulations of agencies of the United States are not included. There appears to be no logical reason for this omission. It seems clear that such matters as presidential proclamations and regulations appearing in the *Federal Register* should be judicially noticeable on the same basis as the other matters stated in Rule 9(2).<sup>1</sup> Therefore, it is recommended that Rule 9(2) (a) be amended as follows:

. . . (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 *or of the United States* . . . .  
[Amendment in italics.]

Under present California law, judicial notice of regulations seems to be mandatory and is not subject to any conditions like those stated in Rule 9(3). Government Code Section 11384 provides, in part:

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.  
[Emphasis added.]<sup>2</sup>

Official acts, both state and federal, which do not fall under Government Code Section 11384 are covered by Code of Civil Procedure Section 1875(3), which provides, in part:

Courts take judicial notice of . . . Public and private official acts of the legislative, executive and judicial departments of this State and of the United States . . . .

Judicial notice under Code of Civil Procedure Section 1875(3) probably is compulsory.<sup>3</sup> However, it is not clear whether such notice is dependant upon such conditions as those stated in Rule 9(3).

<sup>1</sup> Section 307 of Title 44, United States Code, provides that the "contents of the Federal Register shall be judicially noticed." There is doubt, however, whether this requires that judicial notice be taken by state courts. See Note, 59 HARV. L. REV. 1137, 1141 (1946).

<sup>2</sup> See also CAL. GOVT. CODE § 11383:

The filing of a certified copy of a regulation or an order of repeal with the Secretary of State raises the rebuttable presumptions that:

- (a) It was duly adopted.
- (b) It was duly filed and made available for public inspection at the day and hour endorsed on it.
- (c) All requirements of this chapter and the regulations of the department relative to such regulation have been complied with.
- (d) The text of the certified copy of a regulation or order of repeal is the text of the regulation or order of repeal as adopted.

The courts shall take judicial notice of the contents of the certified copy of each regulation and of each order of repeal duly filed.

<sup>3</sup> In *Livermore v. Beal*, 18 Cal. App.2d 535, 64 P.2d 987 (1937), the court spoke as follows in holding that there was no error in judicially noticing matters of record in the land office of the U. S. Department of the Interior and in considering such matters in sustaining defendant's demurrer to plaintiff's complaint:

From what we have stated, it is absolutely unescapable that the trial court was bound, and this court is also bound to take judicial knowledge of every act of the commissioner of the general land office having to do with the lands involved in the respective actions, and even though the amended complaints are absolutely silent as to any of such facts, and the question is presented only upon demurrer, the respective amended complaints must each one be read as though they incorporated everything of which the courts are bound to take judicial knowledge. One of the acts of which the courts are bound to take judicial knowledge is the order of withdrawal issued by the President of the United States on September 27, 1909, and subsequent withdrawal orders confirmed by what is known as the "Picket Act" of June 25,

If California were to adopt Rule 9(2)(a) (amended as advised above) together with Rule 9(3), the principle of Government Code Section 11384 would be retained but would be subject to the conditions stated in Rule 9(3). Further, the law would be clarified as to taking judicial notice of federal executive acts and administrative regulations and as to such notice of those state administrative regulations which are not governed by Government Code Section 11384.

### Foreign Law

Rule 9(2)(b) provides for judicial notice of "the laws of foreign countries." This should be considered in connection with subdivisions (3) and (4) of Rule 10, which provide as follows:

(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.

The comparable provisions of Code of Civil Procedure Section 1875 provide:

Courts take judicial notice of . . . :

\* \* \* \* \*

The law and statutes of foreign countries and of political subdivisions of foreign countries; provided, however, that to enable a party to ask that judicial notice thereof be taken, reasonable

---

1910, by the terms of which certain lands and premises were withdrawn from location. The exterior boundaries of such lands included all the premises described and involved in the respective actions presented for our consideration on the appeals herein. Thereafter, permits were issued to the various defendants and their assignors to enter upon the premises involved herein and prospect the same for oil and gas. It does not seem necessary for us to schedule all the orders, letters and documents issuing from the general land office having to do with the premises involved, the rights of the defendants as lessees thereunder, and the large sums of money expended by them in the development of the premises, further than to state that such records show that the United States of America not only claims an interest therein, but has an interest as owner of the fee title to all of said premises.

The appellants rely strongly upon the case of *Varcoe v. Lee*, 180 Cal. 338, wherein the court expresses the thought that in taking judicial knowledge, great care and caution must be exercised. A careful reading of that case, however, discloses that there is not a single word in the opinion of the court limiting in anywise the duty of the court to take judicial knowledge of the acts of officers and executive departments, as required by subdivision 3 of section 1875 of the Code of Civil Procedure. In other words, the only conclusion that can be drawn from the case of *Varcoe v. Lee*, *supra*, is that the court should be reasonably certain as to everything of which it takes judicial notice, not that judicial notice should not be taken when the circumstances obviously require such action. [*Id.* at 542-543, 64 P.2d 987, 992.]

See also *Watson v. Los Altos School Dist.*, 149 Cal. App.2d 768, 772-73, 308 P.2d 872, 875 (1957) (notice of records of State Board of Education and county planning commission); *People v. Mason*, 72 Cal. App.2d 699, 706-707, 165 P.2d 481, 485 (1946) (notice taken of presidential and executive proclamations).



notice shall be given to the other parties to the action in the pleadings or otherwise.

•                   •                   •                   •                   •

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 Constitutions of this State and of the United States or dismiss the action without prejudice.<sup>4</sup>

The principal difference between Section 1875 and the provisions of Rules 9 and 10 relates to the problem that arises when the court is unable to determine the foreign law. Rule 10(3) explicitly provides that the court is relieved of the duty to take judicial notice under these circumstances. The same result is implicit in the provisions of Section 1875 relating to this situation. But, being thus relieved of the duty of taking judicial notice, what is the court's next step? Rule 10(4) gives the judge little guidance. It states only that "in any event" the determination of foreign law is "a matter for the judge and not for the jury." Thus, Rule 10(4) does not, so to speak, state what the judge may do. Rather, it states only what he may *not* do, namely, he may not submit the question to the jury.

Rule 10(4) is included in the Uniform Rules because, as the Comment thereon states, under "the old common law rule," the "issue of what the foreign law is . . . was commonly one of fact for the jury" and it is the intent of the Uniform Rules to make it clear that "the old common law rule is changed."

It seems that the provisions of Section 1875 respecting this problem are preferable to those of the Uniform Rules. Section 1875 also changes the common law rule by specifying alternatives open to the judge who is unable to decide the foreign law and by omitting submission of this question to the jury as one of such alternatives. This has the dual effect of abolishing the common law rule and, at the same time, opening up for the judge possibilities for affirmative action. That is, Section 1875 tells the judge not only what he may not do (*i.e.*, submit the question to the jury) but also what he may do (*i.e.*, dismiss without prejudice or, state and federal constitutions permitting, decide the issue on the basis of California law).

The present California solution is preferable to Rule 10(4). It is, therefore, recommended that Rule 10(4) be revised by striking its present language and substituting therefor the present language of the last paragraph of Code of Civil Procedure Section 1875.<sup>5</sup>

<sup>4</sup> The provisions quoted in the text were added to Section 1875 by amendment in 1957 upon the recommendation of the California Law Revision Commission. Cal. Stats. 1957, Ch. 249, p. 902. See *Recommendation and Study Relating to Judicial Notice of the Law of Foreign Countries*, 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study at I-1 (1957). For a criticism of parts of the Commission's report, see Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 988, 1006, 1025 (1958).

<sup>5</sup> Neither the California statute nor the Uniform Rules undertake to decide the debatable question of *when* foreign country law is to be applied to the case. This basic "choice-of-law" problem is extensively and constructively discussed in Professor Currie's recent article which demonstrates the inadequacies of the "territorial vested-rights" view. See Currie, *supra* note 4.

### Indisputable Facts Locally Known

Rule 9(2)(c) provides for the court taking judicial notice of "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."

*Varcoe v. Lee*<sup>6</sup> states this principle as follows:

[C]ourts should take notice of whatever is or ought to be generally known, within the limits of their jurisdiction . . . .<sup>7</sup>

It will be remembered that Rule 9(1) provides for automatic, mandatory, unconditional notice of certain matters whereas Rule 9(2) provides for compulsory notice of other matters subject to certain conditions. Thus, under Rule 9(1) "specific facts and propositions of generalized knowledge . . . so universally known that they cannot reasonably be the subject of dispute" are subjects of compulsory notice without request. On the other hand, under Rule 9(2)(c), "facts . . . so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute" are subjects of compulsory notice only if the conditions stated in Rule 9(3) (request, supplying information, and notice to adversary) are complied with. In view of the character of the facts in question, under both of these subdivisions, the condition stated in Rule 9(3)(a) (that the requesting party must furnish "the judge sufficient information to enable him properly to comply with the request") is obviously inappropriate. Why, then, should the other conditions of Rule 9(3) (request and notice to adversary) be applied to locally known facts (*i.e.*, facts under Rule 9(2)(c)) and not to universally known facts (*i.e.*, facts mentioned in Rule 9(1))? It seems reasonable to suppose that facts generally known and facts generally known throughout the jurisdiction should be treated alike for purposes of judicial notice. Therefore, it is recommended that the substance of what is presently Rule 9(2)(c) be transferred to Rule 9(1). This could be accomplished by deleting clause (c) from Rule 9(2) and by amending Rule 9(1) to add after the word "known" the following:

or so generally known or of such common notoriety within the territorial jurisdiction of the court.

As indicated above, the dictum in *Varcoe v. Lee, supra*, may mean that judicial notice of facts generally known or generally known throughout the jurisdiction is optional. Adoption of Rule 9 in California, amended as recommended, would change the present rule by making judicial notice of such matters compulsory. This appears to be a desirable change.

<sup>6</sup> 180 Cal. 338, 181 Pac. 223 (1919) (holding that the Superior Court in and for the City and County of San Francisco could judicially notice that Mission Street between Twentieth and Twenty-Second Streets in San Francisco is a business district).

<sup>7</sup> *Id.* at 344, 181 Pac. at 226.

**Verifiable Facts**

Rule 9(2)(d) provides for notice of:

. . . specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy.

Since consultation of source books is contemplated by Rule 9(2)(d), it seems reasonable to make compulsory notice conditional upon compliance with Rule 9(3)(a), *i.e.*, the requesting party must supply the judge with requisite information.<sup>8</sup>

**Optional Notice Under Rule 9(2)**

The conditions stated in Rule 9(3) affect the right of a party to demand that the court take judicial notice of a matter. Such conditions do not affect the power of the court to act under Rule 9(2) on its own motion, absent compliance by the party having to satisfy the conditions. However, under subdivision (1) of Rule 10, it is required that:

(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.

Thus, if the judge complies with Rule 10(1), he has discretion to dispense with the conditions stated in Rule 9(3).

Since it has not been possible to determine whether, under present California law, the Rule 9(3) conditions are imposed in any situation at present, it cannot be said that the problem arises in this State as to whether the judge possesses the type of discretion provided in Rule 9(2).

**Conclusions and Recommendations**

Because it is not clear whether the conditions stated in subdivision (3) of Rule 9 are generally operative in California today, it is not possible to state whether present law is in accord with the provisions of Rule 9, subdivisions (2) and (3). Nevertheless, it is recommended that subdivision (2), amended as suggested above,<sup>9</sup> and subdivision (3) of Rule 9 be approved for adoption in California.

<sup>8</sup> Possibly, notice today is optional. See the text, *supra* at 840-841.

<sup>9</sup> See the text, *supra* at 848.

## RULE 10

### Subdivision (1)

Rule 10(1) provides:

(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.

The right to the opportunity to be heard, stated in Rule 10(1), would seem to be implicit in the traditional concept of what constitutes a fair trial. It seems reasonable to presume, therefore, that subdivision (1) of Rule 10 is presently the law in California. Approval of Rule 10(1) is, therefore, recommended.

### Subdivision (2)

Rule 10, subdivision (2), provides as follows:

(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.

The comparable provision of Code of Civil Procedure Section 1875 is that "the court may resort for its aid to appropriate books or documents of reference." It is further provided that, "in cases arising under subdivision 4 of this section [*i.e.*, notice of foreign country law], the court may also 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." This provision was added to Section 1875 by amendment in 1957.<sup>1</sup> Conceivably, this amendment might be construed as indicative of the legislative intent that in all cases, save cases following under subdivision 4 of Section 1875, the court is limited to books and documents of reference. Such construction, however, does not appear to be sound. Long before the 1957 amendment, the California Supreme Court stated on at least two occasions that, for "the purpose of informing itself, the court [in taking judicial notice] might *inquire of others*, or refer to books or documents, or *any other source* of information which it might deem authentic . . . ."<sup>2</sup>

There is no suggestion, either express or implied, that the judge's inquiries must be in open court or must be made part of the record. There appears to be no reason to believe that in making the 1957 amendment it was the purpose of the legislature to nullify this general rule.<sup>3</sup> Rather, the restrictions introduced by the 1957 amendment to

<sup>1</sup> Cal. Stats. 1957, Ch. 249, p. 902. And see note 4, *supra* at 847.

<sup>2</sup> *People v. Mayes*, 113 Cal. 618, 626, 45 Pac. 860, 862 (1896); *Rogers v. Cady*, 104 Cal. 288, 290, 38 Pac. 81 (1894) (Emphasis added).

<sup>3</sup> As to the reasons for the 1957 amendment, see *Recommendation and Study Relating to Judicial Notice of the Law of Foreign Countries*, 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study at I-1 (1957).

Section 1875 (*viz.*, that if the judge consults foreign law experts, he must do so in open court or in writing made part of the record) must be viewed as an exception to the general rule that the court may "inquire of others, or refer to . . . any other source of information which it might deem authentic."<sup>4</sup>

Is this exception justified? Or, to rephrase the question, is Rule 10(2) desirable to the extent that it would abrogate this exception?

When the question is one of local or federal law or the law of a sister state, the judge may, under the general rule, "inquire of others" without making the inquiry in open court or in writing as part of the record. (For example, it is a fairly common practice for judges to "inquire" informally of law professors.) There seems to be no reason why the situation should be different when the question is one of foreign law. In fact, the present requirement that advice must be received in open court or in writing made part of the record seems to be in some measure a return to the philosophy of the old and generally discredited<sup>5</sup> common law idea that notice could not be taken of foreign law and that formal proof must, therefore, be made.<sup>6</sup>

It is, therefore, recommended that Rule 10(2) be adopted and that the present special exception in Section 1875 in regard to foreign law be nullified.

### Subdivision (3)

Subdivision (3) of Rule 10 provides that:

(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.

In view of the mandatory character of notice under Rule 9(1), it would seem that Rule 10(3) is applicable only to notice of matters stated in Rule 9(2). As such, this subdivision seems to state an obvious proposition. Although there appears to be no necessity for it, its inclusion does not seem to be harmful in any sense. Approval of Rule 10(3) is, therefore, recommended.

### Subdivision (4)

Rule 10(4) has been discussed above.<sup>7</sup> Its elimination is recommended in favor of the last paragraph of Code of Civil Procedure Section 1875.

<sup>4</sup> *People v. Mayes*, 113 Cal. 618, 626, 45 Pac. 860, 862 (1896); *Rogers v. Cady*, 104 Cal. 288, 290, 38 Pac. 81 (1894).

<sup>5</sup> See note 3, *supra*.

<sup>6</sup> However, Professor Currie defends the restrictions of the California statute, stating as follows:

Draftsmen of judicial notice statutes would do well to heed the admonition of Judge Wyzanski: "[a] judge, before deriving any conclusions from any such extra-judicial document or information, should lay it before the parties for their criticism. . . . [B]efore a judge acts upon a consideration of any kind, he ought to give the parties a chance to meet it. This opportunity is owed as a matter of fairness and also to prevent egregious error." A TRIAL JUDGE'S FREEDOM AND RESPONSIBILITY 18-19 (1952). [Currie, *On Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 997 n.95 (1958).]

<sup>7</sup> See the text, *supra* at 847.

## RULE 11

### **Making Record of Matters Noticed**

Rule 11 provides, in part:

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 . . . .

Rule 11 requires the judge to make a record of all matters which he judicially notices under Rule 9(2) and of all matters, excepting only matters of "the common law or constitution or public statutes of this state," of which he takes judicial notice under Rule 9(1).

The rationale for this requirement is stated in the Comment on the American Law Institute's Model Code Rule 805 (on which Uniform Rule 11 is based):

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

There is no comparable requirement in California. However, the requirement is reasonable and, therefore, its adoption is recommended.

### **Conclusiveness of Notice**

Code of Civil Procedure Section 2102 states, in part, as follows:

Whenever the knowledge of the Court is, by this Code, made evidence of a fact, the Court is to declare such knowledge to the jury, who are bound to accept it.

This seems to be a clear negation of any right to introduce evidence disputing the fact as judicially noticed by the court. This interpretation is supported, for example, by the following extract from *People v. Mayes*:<sup>1</sup>

A witness on behalf of the defendant testified that on the night when the animal was taken he met Ruiz, one of the witnesses for the prosecution, driving a dark colored animal; that the moon was up and shining, and the night was pretty light. On being asked what time of the night it was, he said that he was unable to tell, but thought that it was "along about 10 o'clock, somewhere about there, I suppose," and at another time he said that it was "betwixt 9 and 10, I suppose." The court instructed the jury as a matter of judicial knowledge that the moon on that night rose at 10:57 P. M. . . . Upon his motion for a new trial, the appellant assigned the above instruction as error, and in support thereof presented an affidavit by Lewis Swift that on that night the moon rose at 10:35 P. M. No precedent in support of the practice of showing by affidavits that the court erred in instructing

<sup>1</sup> 113 Cal. 618, 624-626, 45 Pac. 860, 862 (1896).

a jury upon matters within its judicial knowledge has been cited to our attention, and we are of the opinion such practice ought not to prevail. . . . [The] knowledge of the court does not depend upon the weight of evidence, and is not to be determined upon a consideration of the credibility of witnesses . . . .

Rule 11 is in accord with this view. Thus, Rule 11 provides that, if “a matter judicially noticed . . . would otherwise have been for determination by [the jury, the judge] shall instruct the [jury] to accept as a fact the matter so noticed.” This view has been criticized by Wigmore.<sup>2</sup> It is, however, advocated by McCormick,<sup>3</sup> Morgan,<sup>4</sup> and other writers.<sup>5</sup> Approval of Rule 11 is, therefore, recommended.

<sup>2</sup> 9 WIGMORE § 2567.

<sup>3</sup> MCCORMICK § 330, at 710-711.

<sup>4</sup> Morgan, *The Law of Evidence 1941-1945*, 59 HARV. L. REV. 481, 482-487 (1946); Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 273-287 (1944).

<sup>5</sup> Keefe, Landis & Shaad, *Sense and Nonsense About Judicial Notice*, 2 STAN. L. REV. 664 (1950).

## RULE 12

### Subdivisions (1) and (3)

Subdivisions (1) and (3) of Rule 12 provide:

(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.

\* \* \* \* \*

(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.

The intent of these provisions seems to be to provide for post-trial notice and to make such notice discretionary. As is stated in the Comment on Model Code Rule 806 (on which subdivisions (1) and (3) of Rule 12 are based):

The fact that the judge at one stage of a proceeding failed to take judicial notice of a matter properly so noticeable should not prevent his doing so later. Nor should it affect the power of the reviewing court. In this respect both the trial Judge and the reviewing court should be free to exercise a sound discretion.

Such post-trial notice is presently recognized in California practice.<sup>6</sup> Approval of subdivisions (1) and (3) of Rule 12 is, therefore, recommended.

### Professor Currie's Objections to Subdivisions (1) and (3) of Rule 12

As a part of his recent study entitled "On the Displacement of the Law of the Forum," Professor Brainerd Currie registers objections to subdivisions (1) and (3) of Rule 12. His objections are that, insofar as these provisions authorize post-trial notice of foreign law as the rule of decision for a case, they are instruments of potential injustice.<sup>7</sup>

<sup>6</sup> See *People v. Tossetti*, 107 Cal. App. 7, 12, 289 Pac. 881, 883 (1930), stating as follows:

That "an appellate court can properly take judicial notice of any matter of which the court of original jurisdiction may properly take notice," was stated in *Varcoe v. Lee* . . . ; and the opinion of the court further is: "In fact a particularly salutary use of the principle of judicial notice is to sustain on appeal, a judgment clearly in favor of the right party, but as to which there is in evidence an omission of some necessary fact which is yet indisputable and a matter of common knowledge and was probably assumed without strict proof for that very reason." We take it that it is just as important that a judgment should be reversed when it is rendered by a court having no jurisdiction of a cause. This was done in *People v. Wong Wang*, 92 Cal. 277. There a motion in arrest of judgment was made, and the only ground noticed in the opinion was that the lower court had no jurisdiction of the offense charged. While other matters were discussed therein, the court invoked the doctrine of judicial notice, and there, as here, it was the "fact" of population that was involved and which determined jurisdiction. The failure of a trial court to take judicial notice of a fact does not prevent an appellate court from giving proper effect thereto.

<sup>7</sup> Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 995-1001 (1958).



He points to the possibility that, by such notice in a case, "the rule of decision may be changed; the assumptions on which the case has been tried may be destroyed; new standards may be erected which may not be met by the case which has been made," thus creating "a wholly new frame of reference" and destroying "the chain of reasoning."<sup>8</sup>

By way of answer, it should be pointed out that subdivisions (1) and (3) of Rule 12 are rules of discretion and there is, therefore, the possibility of persuading the court to exercise its discretion to withhold post-trial notice of foreign law when the taking of such notice would be unjust. In California today, when post-trial notice of domestic or federal law is involved, an appeal to the court to withhold judicial notice in the interests of justice may be effective.<sup>9</sup> There is no reason

<sup>8</sup> *Id.* at 1010. Professor Currie concedes, however, that there "may be some situations in which the ends of justice will be served by permitting the court at a late stage of the proceedings to supply an inadvertent omission by noticing foreign law," as, for example, "when the plaintiff has deliberately staked his claim on the foreign law, but has failed to furnish the court with information regarding some detail of that law necessary to complete the logical chain." *Id.* at 999.

<sup>9</sup> Consider the following from the opinion in *Grimes v. Nicholson*, 71 Cal. App.2d 538, 542-543, 162 P.2d 934, 936-937 (1945):

The case was tried on the theory that certain regulations of the Office of Price Administration controlled the contract and the work performed thereunder, and said regulations were presented to and considered by the trial court. It now appears, and appellant concedes in his brief, that the same were not applicable to work of the character of that which was performed for appellant by respondent. Appellant, in his closing brief, has presented other regulations to this court and asks us to find that the work was controlled thereby and to reverse the judgment upon appellant's claim that the same were not complied with by respondent.

The theory adopted by counsel for appellant and respondent at the trial charts the course of the case in this court. Such regulations, if any, as were applicable to the contract here under consideration and to the work performed by respondent, were public documents and were available and could have been drawn to the attention of the trial judge. We refuse to embark upon an investigation of regulations that have been discovered by appellant since the rendition of the judgment, even though they, like statutes, are within the judicial knowledge of this court, and by the same token were before the trial court. Where a contract is claimed to be invalid under the preemption laws of the United States, of which the court is bound to have knowledge, if the question was not raised in the trial court, the point is not available on appeal. The law is well settled in this state that "an appellate court will not consider a theory of a case different from that urged in the trial court and which is presented for the first time on appeal." When a cause is tried and evidence introduced on the theory that a material issue has been raised by the pleadings and the court renders judgment on that theory, the parties will not be allowed to say for the first time on appeal that there was no such issue. If a case is tried, submitted, and decided on a certain theory, a party will not be permitted to raise for the first time on appeal an objection that could have been obviated if it had been made in the court below. Errors not taken advantage of at the trial cannot be raised in the appellate court.

It is obvious that if the regulations now asserted to be controlling had been presented at the trial, respondent would have been accorded the privilege of offering evidence to show, if he so claimed, that the same were not pertinent to the case. Appellant relied at the trial on the regulations there presented, and, albeit unwittingly and unintentionally, led the court and respondent to believe that he depended solely thereon. The court rendered its judgment upon the record before it. Appellant cannot now insist that this court consider regulations proffered for the first time in his closing brief. [Citations omitted.]

to believe that it may not likewise be effective when foreign law is involved.<sup>10</sup>

### Subdivision (2)

Subdivision (2) of Rule 12 provides:

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

This is in accord with present California law. Currently, such rulings are constantly reviewed.<sup>11</sup> Approval of Rule 12(2) is, therefore, recommended.

### Subdivision (4)

Rule 12(4) provides:

(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.

It is difficult to determine whether the principle here stated is currently a feature of judicial notice in post-trial proceedings in California trial and appellate courts. However, the requirement seems reasonable and is recommended for approval.

<sup>10</sup> Professor Currie concedes that there are restrictions on post-trial notice insofar as domestic law is concerned, such restrictions being derived from "the general rule that a party ordinarily cannot complain of the judge's failure to apply domestic law—even domestic statutes—not called to his attention." Currie, *supra* note 7, at 1009. However, he thinks that "the provisions of the Uniform Rules of Evidence regarding judicial notice of foreign law would give foreign law in general a more imperative quality than is ordinarily given to domestic law." *Id.* at 1009 n.134. Or, as he expresses the same thought in different words: "[Judicial notice] attributes to foreign law an imperative force quite out of proportion to that possessed by domestic law generally." *Id.* at 1026.

These last two statements may be questioned. There appears to be nothing in Rule 9 giving foreign law superior force. In fact, so far as there is a difference, it seems to be that domestic law possesses superior force since, under Rule 9(1), that is the subject of compulsory, unconditional judicial notice whereas, under Rule 9(2), notice of foreign law is compulsory only when the conditions of Rule 9(3) are met. Moreover, there appears to be nothing in Rule 12 or any other Uniform Rule giving foreign law superior force to domestic law. Therefore, it cannot be maintained that the Uniform Rules *ex proprio vigore* give to foreign law any force superior to domestic law.

<sup>11</sup> See the extensive annotations to Section 1875 in CAL. CODE CIV. PROC. (West 1955).

## JUDICIAL NOTICE OF "LEGISLATIVE FACTS"

There remains for consideration a type of judicial notice—notice of so-called "legislative facts"—which is not comprehended by any of the categories set forth in Uniform Rule 9. This type of notice and the incidents of its use are explained by McCormick:

Under modern views, the judge has not only the task of finding what the law is, but between the gaps of existing doctrines to create new law. In doing this, he will be guided as a legislator would be by considerations of expediency and public policy. In doing so he must act either upon knowledge already possessed or upon assumptions, or upon investigation of the pertinent general facts, social, economic, political, or scientific.

\* \* \* \* \*

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

In cases where the validity of a statute is attacked for want of due process the nature of the issue narrows sharply the need for certainty. The court is asking not whether the social facts support the statute, but only whether the legislature had reasonable grounds for believing that they do. On this issue, the court considers such data as reports of legislative committees, investigating commissions, and administrative bureaus, compilations of legislation in the various states and countries, encyclopedias, dictionaries, and scientific books and articles. In this context, when the courts state that they take judicial notice of such writings, they mean merely that they take notice that such sources are authentic and sufficiently reliable for the legislature reasonably to give weight to their statements—not that they take notice of the truth of the statements. A similarly restrictive use may be made when such fact-reports are noticed for the purpose of aiding in the interpretation of a statute. Committee reports and other sources reciting social facts may often be used not to show what the facts were, but what was reported to the legislature, or what was so widely or authoritatively believed that it was probably considered by them.

Situations remain, however, where these discriminations are inapplicable and where the judge as law-maker must search for the social facts as they are in truth, and not merely for what the legislature could reasonably have supposed them to be. Shall the court in a state where the question is new, accept or reject, in the light of the social and economic consequences, the traditional doctrine that in letting a dwelling-place the landlord has no duty to repair

defects that are dangerous to the life of the occupant? In fixing common-law liability for injury to a pedestrian shall an automobile be classed as a "dangerous machine"?

At a time when the tests were relatively new should the court admit evidence of the results of a blood-test for paternity? The courts today are coming more and more to bring into the open such policy questions as the basis for making law by a choice of doctrines. On some such questions, particularly those of scientific cast as in the paternity-test example, the court might be willing to hear formal expert testimony, but its normal reliance is judicial notice. Under this process the social, economic and scientific data can be conveniently and cheaply presented in the briefs, or can be found by the research of the judge or his assistants. And here again, it is believed, the usual requirements for judicial notice of certainty and indisputability should not be insisted on. The reports, statistics and professional opinions which the judge relies on will be those which he thinks most trustworthy, but they will not usually be indisputable. Nor should the ultimate fact-conclusions of the judge on which his policy-judgment is based be required to be certain. In the realm of basic "legislative" facts, as in respect to policy-valuations themselves, certainty "is not the destiny of man." [Footnotes omitted.]<sup>12</sup>

The American Law Institute considered but rejected a proposal to include in the Model Code a provision covering judicial notice of "legislative facts." The proposal was in the form of the following rough draft:

"In an action in which the constitutionality or validity of construction or effect of a constitutional provision, statute, ordinance, order or regulation of the United States or of this State or of any board or agency thereof is involved or in which the judge has reason to believe that the public interest will otherwise be involved, the judge shall of his own motion take judicial notice of the existence and tenor of the accepted or conflicting views concerning the economic and social conditions and policy and other matters affecting the public interest involved in the action."<sup>13</sup>

In rejecting this proposal, the Institute seemed motivated not by disapproval of the principle and practice suggested, but rather by doubts as to the propriety of including it as a matter of judicial notice in a Code of Evidence.<sup>14</sup>

In omitting any like provision, the Uniform Rules follow the Model Code pattern.

In view of the difficulty of stating in statutory form the process of taking judicial notice of "legislative facts," 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 "legislative facts." This could be satisfactorily accomplished by including a statement to this effect by way of commentary upon Rule 9.

<sup>12</sup> McCORMICK § 329, at 705-707.

<sup>13</sup> 19 A.L.I. PROCEEDINGS 240 (1942).

<sup>14</sup> *Id.* at 239-248.

## INCORPORATING THE JUDICIAL NOTICE ARTICLE INTO CALIFORNIA LAW

Assuming that Uniform Rules 9 to 12, amended as suggested, are adopted in California, the following present sections in the Code of Civil Procedure should be repealed as superfluous:

*Section 1875* provides:

Courts take judicial notice of the following:

1. The true signification of all English words and phrases, and of all legal expressions;
2. Whatever is established by law;
3. Public and private official acts of the legislative, executive and judicial departments of this State and of the United States, and the laws of the several states of the United States and the interpretation thereof by the highest courts of appellate jurisdiction of such states;
4. The law and statutes of foreign countries and of political subdivisions of foreign countries; provided, however, that to enable a party to ask that judicial notice thereof be taken, reasonable notice shall be given to the other parties to the action in the pleadings or otherwise;
5. The seals of all the courts of this State and of the United States;
6. The accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive, and judicial departments of this State and of the United States;
7. The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States;
8. The seals of courts of admiralty and maritime jurisdiction, and of notaries public;
9. The laws of nature, the measure of time, and the geographical divisions and political history of the world.

In all these cases the court may resort for its aid to appropriate books or documents of reference. In cases arising under subdivision 4 of this section, the court may also 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.

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 Constitutions of this State and of the United States or dismiss the action without prejudice.

Rule 9, stating facts which are the subject of judicial notice, supersedes Section 1875 up to the last two paragraphs of the section. Rule 10(2) supersedes the next to the last paragraph. The suggested amendment of Rule 10(4) embodies the substance of the last paragraph of Section 1875. Hence, this section should be repealed.

*Section 2102, second sentence*, provides that:

Whenever the knowledge of the Court is, by this Code, made evidence of a fact, the Court is to declare such knowledge to the jury, who are bound to accept it.

Rule 11 supersedes this sentence; hence, it should be repealed.

o