

1974

Proposed Rule Broadens Scope of Judicial Notice

David L. Hefflinger

Omaha, Nebraska, and American Bar Associations, member, dhefflinger@mcgrathnorth.com

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

Recommended Citation

David L. Hefflinger, *Proposed Rule Broadens Scope of Judicial Notice*, 53 Neb. L. Rev. 333 (1974)

Available at: <https://digitalcommons.unl.edu/nlr/vol53/iss3/3>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

By David L. Hefflinger*

Proposed Rule Broadens Scope of Judicial Notice

I. ROLE OF JUDICIAL NOTICE

The traditional notion that trials involve a judge and a jury has had a profound impact on the development of doctrines relating to judicial notice. The existence of the jury has created a demand for guarantees of accuracy. Facts in dispute are generally established by the jury after the controlled introduction of formal evidence. However, proving facts with evidence takes time and effort; noticing facts is simpler, easier and more convenient. The objectives of the evidentiary rules may sometimes be accomplished by taking judicial notice. On numerous occasions, therefore, judges have taken a question of fact and excused the party having the burden of establishing the fact from the necessity of producing formal proof. The recognition by a court that certain facts are true without the production of evidence constitutes the substance of judicial notice.

Professor McCormick has stated that formal evidence is not needed when: (1) the fact in question is known immediately by reasonable men without going to other sources of information; or (2) the fact in question is not immediately known by reasonable men but they agree that the fact is verifiable by going to other sources.¹ Under (1), judicial notice may be taken of facts which may be regarded as forming part of the knowledge of every person of ordinary understanding and intelligence.² Under (2), judicial notice may be taken of facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy.³

* B.A. cum laude 1969 and J.D. summa cum laude 1972, Creighton University. Member Omaha, Nebraska and American Bar Associations.

1. C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 323 (1st ed. 1954).

2. *In re Estate of Bose*, 136 Neb. 156, 285 N.W. 319 (1939).

3. *State ex rel. Johnson v. Wagner*, 139 Neb. 471, 297 N.W. 906 (1941).

Applying these general rules, courts have judicially noticed that electric wires carry deadly currents,⁴ the normal period of gestation is two hundred eighty days,⁵ whiskey and beer are intoxicating⁶ and blood tests to disprove paternity are scientifically accurate.⁷ Judicial notice has also been taken with respect to history,⁸ distances⁹ and geographic facts.¹⁰

II. PROBLEM AREAS

The few examples cited above indicate that courts have utilized judicial notice in a variety of fact situations. In developing a codification of the system and in determining the procedural aspects to be followed, courts and writers alike have encountered several problem areas.

A. Adjudicative and Legislative Facts

Adjudicative facts are simply the facts in a particular case as applied to the parties involved. Legislative facts, on the other hand, are facts which inform the tribunal's legislative judgment in developing law or policy. Professor Kenneth Davis has defined adjudicative facts as follows:

When a court or an agency finds facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent—the court or agency is performing an adjudicative function and the facts are conveniently called adjudicative facts. . . . Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses.¹¹

With respect to legislative facts, Professor McCormick has written:

It is conventional wisdom to observe that judges not only are charged to find what the law is but must regularly make new law when deciding upon the constitutional validity of a statute, interpreting a statute, or extending or restricting a common law rule. The very nature of the judicial process necessitates that

-
4. *Johnson v. New Omaha Thompson-Houston Elec. Light Co.*, 78 Neb. 27, 113 N.W. 526 (1907), *aff'd on rehearing* 78 Neb. 24 (1907).
 5. *Koepke v. Delfs*, 95 Neb. 619, 146 N.W. 962 (1914).
 6. *Peterson v. State*, 63 Neb. 251, 88 N.W. 549 (1901).
 7. *Houghton v. Houghton*, 179 Neb. 275, 137 N.W.2d 861 (1965).
 8. *J.K. Armsby Co. v. Raymond Bros.-Clarke Co.*, 90 Neb. 553, 134 N.W. 174 (1912) (general depression of 1908).
 9. *Gorman v. Dalgas*, 151 Neb. 1, 36 N.W.2d 561 (1949) (city block ordinarily three hundred feet long).
 10. *Grosch v. Bredthauer*, 136 Neb. 43, 284 N.W. 869 (1939) (city of Waterloo situated within Douglas County, Nebraska).
 11. 2 K. DAVIS, *ADMINISTRATIVE LAW* § 15.03 (1958).

judges be guided, as legislators are, by considerations of expediency and public policy. They must in the nature of things act either upon knowledge already possessed or upon assumptions or upon investigation of the pertinent general facts, social, economic, political, or scientific. An older tradition once prescribed that judges should rationalize their result solely in terms of analogy to old doctrines leaving the considerations of expediency unstated. Contemporary practice indicates that judges in their opinions should render explicit the factual grounds therefor. These latter have been helpfully classed as "legislative facts," as contrasted with the "adjudicative facts" which are historical facts pertaining to the incidents which give rise to lawsuits.¹²

Generally, adjudicative facts must be supported by evidence and resolved by the trier of fact; legislative facts need not and often cannot be supported by evidence. For this reason, legislative facts are alternatively called "extra-record facts." Well known examples of a court's use of legislative facts are *Brown v. Board of Education*¹³ in which the United States Supreme Court noticed that segregation of the races in public schools has a detrimental effect upon black children, and *Dennis v. United States*¹⁴ in which the Court noticed the ascendancy of Communist doctrines.

The distinction between adjudicative facts and legislative facts is important when attempts are made to codify the law of judicial notice. Because legislative facts are seldom indisputable, and adjudicative facts may or may not be disputable, a codified system of judicial notice based on indisputable facts would seem to require the exclusion of legislative facts. In addition, the process by which a judge notices legislative facts may not be an appropriate subject for codified judicial notice treatment.¹⁵ Attempted codifications of judicial notice of adjudicative facts have been successful, but a viable formulation of rules concerning legislative facts has not proved feasible. Professor McCormick notes the following trend:

[There are indications] that the doctrine of judicial notice may ultimately be reduced to a workable consensus. Current trends would indicate that this consensus will, if it comes to fruition, in-

12. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 331 (2d ed. 1972) [hereinafter cited as MCCORMICK]. See B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113-25 (1921); Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955).

13. 347 U.S. 483 (1954).

14. 341 U.S. 494 (1951).

15. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269 (1944). Professor Davis disagrees, arguing that the right to be heard in opposition to the noticing of legislative facts is a sufficient safeguard; Davis also presents statistics indicating that a majority of "judicial notice situations" involve legislative facts. See Davis, *Judicial Notice*, 1969 LAW & SOC. ORDER 513, 525.

volve reducing judicial notice to narrow confines within an adjudicative context.¹⁶

B. Disputable and Indisputable Facts

The effect of the disputability of judicial notice may be considered from two perspectives. First, what type of fact may be noticed? Must a given fact be "not subject to reasonable dispute" or may disputable extra-record facts also be noticed? Second, what is the effect of taking judicial notice? Is the fact noticed conclusive against all parties, or may the adverse party introduce rebuttal evidence? The conflicting answers to these questions may be summarized as follows:

1. *Morgan's Conclusive Theory*

Morgan argues that once the judge indicates that he will take judicial notice of a fact, it is conclusively established and rebutting evidence is inadmissible.¹⁷ This theory follows from Professor Morgan's premise that the purpose of judicial notice is to prevent unnecessary litigation of moot issues, and therefore it should be confined to indisputable questions of fact. Since the matter noticed is indisputably true, it cannot be rebutted and is conclusive upon the jury. Professor McNaughton agrees that judicial notice should be limited to indisputable facts, in order to eliminate the necessity of proof where dispute is unlikely.¹⁸

2. *Wigmore's Challenge Theory*

Wigmore takes the position that notice of a fact by the court is not conclusive, and may be challenged by rebuttal evidence.¹⁹ Therefore, a judge may notice facts other than those patently indisputable, because the adverse party may offer additional evidence. Professor Thayer argues that the "disputables" approach is more convenient, speeds the conduct of the trial and lessens jury confusion, by allowing the judge to notice many more facts.²⁰ No-

16. MCCORMICK § 334.

17. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269 (1944).

18. McNaughton, *Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy*, 14 VAND. L. REV. 779, 783 (1961). Accord, C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 330 (1st ed. 1954). The problem caused by the "conclusive" approach in the criminal area is discussed *infra* § C.

19. 9 J. WIGMORE, EVIDENCE § 2571 (3d ed. 1940).

20. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE 308 (1898). Note that proponents of the indisputable theory also argue that their approach saves trial time since the judge need not allow rebuttal evidence.

tice of the generally "disputable" legislative facts should not pose a problem under the "challenge" theory because the disputable area admits contrary evidence. The same is not true under Morgan's theory, because the judge's notice of a legislative fact would be conclusive. The Wigmore theory has been stated in various ways; a court may simply say that the taking of judicial notice eliminates the requirement of offering evidence by one of the parties.²¹

The Morgan-Wigmore controversy is one of procedure, not fact. The Wigmore procedure allows the judge to notice facts which reasonable men would find notorious, subject to rebuttal evidence. If the judge determines the fact noticed is not "notorious," he may reverse his prior taking of judicial notice; the fact may then be proved by the proponent's submission of evidence.²² Under the Morgan "indisputable" procedure, the judge must carefully determine that the fact is indisputable because his decision is final. Judicial notice has developed as a time-saving, procedural tool. As applied to adjudicative facts, the "disputable" procedure is more likely to complete this development by freeing the judge from the task of determining whether a particular fact is indisputable.²³

C. Civil and Criminal Cases

A final problem area concerns the taking of judicial notice in criminal cases. In general, the doctrine of judicial notice has developed without differentiation between civil and criminal cases. Proponents of the "indisputable" approach concede, however, that in criminal cases the jury must be left free to determine ultimately the truth or falsity of an adjudicative fact.²⁴ Under Morgan's "conclusive" theory, the adversary nature of criminal proceedings is violated because the defendant may not test the propriety of the noticed facts. If the jury is not allowed to weigh alternatives, a conflict with the sixth amendment's right to trial by jury would arise.²⁵

21. See, e.g., *Piechota v. Rapp*, 148 Neb. 442, 451-52, 27 N.W.2d 682, 688 (1947):

That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. 9 Wigmore, *Evidence* (3rd ed.), § 2567, p. 535. It has no other effect than to relieve one of the parties of the burden of resorting to the usual forms of evidence.

22. See Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in *PERSPECTIVES OF LAW* 69 (1964).

23. See Comment, *Judicial Notice and Presumptions Under the Proposed Federal Rules of Evidence*, 16 WAYNE L. REV. 135, 142 (1969).

24. McCORMICK § 332.

25. See generally, Comment, *Judicial Notice in the Proposed Federal*

A similar problem arises when an appellate court takes judicial notice in a criminal case. However, appellate courts have judicially noticed facts without commenting on the constitutional difficulty. For example, in *Ross v. United States*,²⁶ Judge Blackmun judicially noticed that social security checks are sent with instructions to return them to the sender if the addressee is deceased; a conviction for obstruction of correspondence was affirmed. Similarly, the Nebraska Supreme Court in *Peterson v. State*²⁷ judicially noticed that beer and whiskey are intoxicants, without proof of that fact; a conviction for possession of intoxicants was affirmed under a complaint alleging possession of beer and whiskey.

Assuming that the facts noticed were indisputable, the defendant nonetheless was denied the opportunity both to present opposing evidence and to submit the issue to a jury. The United States Supreme Court has held presumptions in criminal cases unconstitutional unless there is a rational connection between the fact proved and the fact presumed.²⁸ Presumably, at least that much is required with respect to judicial notice in a criminal case. Judicial notice should be proper in a criminal case only if (1) the defendant has been given an opportunity to present controverting evidence and (2) the jury is instructed that the noticed fact is not conclusive upon them.

III. PRIOR CODIFICATIONS

Both the Model Code of Evidence²⁹ and the Uniform Rules of Evidence³⁰ attempted to codify the doctrine of judicial notice. Their respective solutions are summarized below.

A. The Model Code

The Model Code establishes three categories in which judicial notice may be taken: (1) compulsory notice without request;³¹ (2)

Rules of Evidence, 1969 WASH. L.Q. 453, 458. The constitutional argument is presented in Note, *The Presently Expanding Concept of Judicial Notice*, 13 VILL. L. REV. 528, 542-43 (1968).

26. 374 F.2d 97, 103 (8th Cir. 1967).

27. 63 Neb. 251, 254, 88 N.W. 549, 551 (1901).

28. *Leary v. United States*, 395 U.S. 6 (1969). For a summary of arguments on both sides, see *State v. Lawrence*, 120 Utah 323, 234 P.2d 600 (1951) (majority and dissenting opinions). See also Davis, *Judicial Notice*, 1969 LAW & SOC. ORDER 513, 519.

29. MODEL CODE OF EVIDENCE (1942) [hereinafter MODEL CODE].

30. UNIFORM RULES OF EVIDENCE (1953) [hereinafter UNIFORM RULES].

31. MODEL CODE rule 801. Compulsory notice without request applies to "such propositions of generalized knowledge as are so notorious as not to be the subject of reasonable dispute."

discretionary notice without request;³² and (3) compulsory notice on request.³³ To be judicially noticed, a fact must be "so notorious as not to be the subject of reasonable dispute" or be a "specific fact or proposition of generalized knowledge" capable of accurate verification by indisputable sources.³⁴ The Model Code fails to distinguish between legislative and adjudicative facts, although the phrase "proposition of generalized knowledge" has been interpreted to apply to a judge's legislative function.³⁵ Since only indisputable facts are recognized, the Model Code includes the corollary that evidence in dispute of the noticed fact will not be allowed.³⁶ However, notice must be given to the adverse party so that party can prepare to meet the request.³⁷ Civil and criminal cases are treated alike, and the "conclusive" effect of judicial notice applies to both.

B. The Uniform Rules

The Uniform Rules provide for mandatory judicial notice for "universally known facts which cannot reasonably be the subject of dispute."³⁸ Discretionary judicial notice applies to "generally known facts within the territorial jurisdiction of the court, not reasonably the subject of dispute," and to "specific facts and propositions of generalized knowledge" that are capable of accurate determination by undisputable sources.³⁹ The Uniform Rules copy the Model Code's treatment of the "problem areas." No distinction is made between legislative and judicial facts.⁴⁰ Only indisputable facts are judicially noticed, so rebuttal evidence is not allowed.⁴¹ The Morgan "conclusive" effect of taking judicial notice applies to criminal and civil cases.

32. *Id.* rule 802.

33. *Id.* rule 803. The moving party must furnish the judge with sufficient information to enable him to properly comply with the request.

34. *Id.* rule 802.

35. PROP. FED. R. EVID. 2-01, Advisory Committee's Note (Prelim. Draft 1969).

36. MODEL CODE rule 805.

37. *Id.* rule 803.

38. UNIFORM RULE 9(1).

39. *Id.* rule 9(2). The rule requires a request, the furnishing of sufficient information to the judge and notice to each adverse party.

40. Professor Davis has criticized both the Model Code and the Uniform Rules for this failure: "My opinion is that the Model Code and the Uniform Rules are fundamentally unsound in failing to recognize the cardinal distinction between legislative facts and adjudicative facts." Davis, *A System of Judicial Notice Based on Fairness & Convenience*, in PERSPECTIVES OF LAW 69, 82 (1964).

41. UNIFORM RULE 11.

IV. THE PROPOSED RULES OF EVIDENCE

The drafters of the Proposed Federal Rules of Evidence (hereinafter "Federal Rule[s]" or "federal proposal") did not make any major changes in the prior codifications of the law of judicial notice. The 1972 federal proposal⁴² on judicial notice was adopted without change by the drafters of the Proposed Nebraska Rules of Evidence (hereinafter "Nebraska Rule[s]," "Nebraska proposal" or "Rule[s]"). The drafters did not hesitate to take a stand; both the Federal Rules and the Nebraska Rules present clear-cut answers to the problem areas of judicial notice.

A. Scope of the Rule

The drafters first considered the legislative-adjudicative controversy. Rule 2-01(a) of the preliminary draft of the Federal Rules read:

(a) SCOPE OF RULE. This rule governs judicial notice of facts in issue or facts from which they may be inferred.

At first blush, this Federal Rule appeared to cover both legislative and adjudicative facts, since a legislative fact may be a "fact in issue." However, the Advisory Committee's Note indicated that such was not the case—the rule was designed to deal only with adjudicative facts.⁴³ Recognizing that the rule was unclear,⁴⁴ the Advisory Committee amended the rule as follows:

(a) SCOPE OF RULE. This rule governs only judicial notice of adjudicative facts.

Both the Federal Rule and the Nebraska Rule are therefore limited to adjudicative facts.⁴⁵ They provide no guidelines for the

42. Approved by United States Supreme Court on Nov. 20, 1972, and submitted to Congress.

43. PROP. FED. R. EVID. 2-01(a), Advisory Committee's Note (Prelim. Draft 1969).

44. See criticism in Davis, *Judicial Notice*, 1969 LAW & SOC. ORDER 513, 524.

45. The proposed rules specifically exclude any rules relating to judicial notice of law; the Federal Advisory Committee's note in support of the exclusion reads:

By rules effective July 1, 1966, the method of invoking the law of a foreign country is covered elsewhere. Rule 44.1 of the Federal Rules of Civil Procedure; Rule 26.1 of the Federal Rules of Criminal Procedure. These two new admirably designed rules are founded upon the assumption that the manner in which law is fed into the judicial process is never a proper concern of the rules of evidence but rather of the rules of procedure. The Advisory Committee on Evidence, believing that this assumption is entirely correct, proposes no evidence rule with respect to judicial notice of law, and sug-

notice of legislative facts; nor do they provide any standards to guide a judge in answering the threshold question of whether a given fact is adjudicative or legislative. The Federal Advisory Committee felt that "fundamental differences exist between adjudicative facts and legislative facts," and that the notice requirements imposed on adjudicative facts would be undesirable and unworkable if imposed on notice of legislative facts; any restriction upon a judge in his search for legislative facts is unwise, and this view

renders inappropriate any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level. It should, however, leave open the possibility of introducing evidence through regular channels in appropriate situations.⁴⁶

However, if Professor Davis is correct in his assertion that a majority of facts judicially noticed are legislative,⁴⁷ it also seems inappropriate to exclude this large category from formalized requirements of notice and opportunity to be heard. The Advisory Committee's conclusion can best be understood in light of their "indisputable" approach to the effect of judicial notice—an approach not well-suited to legislative facts. Under Rule 201(a), then, judges must look to existing law and practice for guidance when judicially noticing legislative facts.

B. Kinds of Facts

The Rules follow well-established patterns with respect to the kinds of facts subject to judicial notice. Following the lead of the Model Code and the Uniform Rules, the disputable-indisputable controversy is resolved by a "cautious approach," making only indisputable facts subject to judicial notice. The preliminary draft of Federal Rule 2-01(b) read:

(b) KINDS OF FACTS. A judicially noticed fact must be either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by

gests the expansion of the Rules of Civil and Criminal Procedure to include those matters of law which, in addition to foreign-country law, have traditionally been treated as requiring pleading and proof and more recently as the subject of judicial notice . . .

PROP. FED. R. EVID. 2-01, Advisory Committee's Note on Judicial Notice of Law (Prelim. Draft 1969). Current cases and statutes are therefore controlling. For a synopsis of Nebraska judicial notice of law, see D. DOW & J. NORTH, NEBRASKA EVIDENCE 3-7, 3-8 (State Bar, 1969).

46. PROP. FED. R. EVID. 201, Advisory Committee's Note.

47. Note 15 *supra*.

resort to sources whose accuracy cannot be reasonably questioned, so that the fact is not subject to reasonable dispute.⁴⁸

The original draft was somewhat confusing because it appeared that facts generally known under (1) were removed from the requirement of being "not subject to reasonable dispute." Such an interpretation would be contrary to the complete "indisputable" approach of the Rules. To eliminate this confusion, the final draft of both the Federal Rule and the Nebraska Rule states:

(b) **KINDS OF FACTS.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

The only significant departure from the Model Code and Uniform Rules is the absence of the "propositions of generalized knowledge" category. The Advisory Committee explains:

The phrase "propositions of generalized knowledge," found in Uniform Rule 9(1) and (2) is not included in the present rule. It was, it is believed, originally included in Model Code Rules 801 and 802 primarily in order to afford some minimum recognition to the right of the judge in his "legislative" capacity (not acting as the trier of fact) to take judicial notice of very limited categories of generalized knowledge. The limitations thus imposed have been discarded herein as undesirable, unworkable, and contrary to existing practice. What is left, then, to be considered, is the status of a "proposition of generalized knowledge" as an "adjudicative" fact to be noticed judicially and communicated by the judge to the jury. Thus viewed, it is considered to be lacking practical significance.⁴⁹

C. Procedural Matters

Procedural matters relating to judicial notice are considered in the following subdivisions of Rule 201 in both the Federal and Nebraska proposals:

(c) **WHEN DISCRETIONARY.** A judge or a court may take judicial notice, whether requested or not.

(d) **WHEN MANDATORY.** A judge or court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) **OPPORTUNITY TO BE HEARD.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) **TIME OF TAKING NOTICE.** Judicial notice may be taken at any stage of the proceeding.⁵⁰

48. PROP. FED. R. EVID. 2-01(b) (Prelim. Draft 1969).

49. PROP. FED. R. EVID. 201, Advisory Committee's Note.

50. The final draft of the Federal Rules, as approved by the United States

Only one change has been made in the procedural subdivisions from the preliminary federal draft. As originally written, subdivision (e) did not include the present final sentence covering a hearing after notice has been taken.⁵¹ The preliminary draft was criticized severely for this omission.⁵² In the analogous area of agency notice, the Administrative Procedure Act provides for notice to parties after judicial notice has been taken.⁵³ The United States Supreme Court has held, in an agency case, that judicial notice "does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable."⁵⁴ In light of these precedents, the final draft was amended and the Advisory Committee's Note now reads in part:

An adversely affected party may learn in advance that judicial notice is in contemplation, either by virtue of being served with a copy of a request by another party under subdivision (d) that judicial notice be taken, or through an advance indication by the judge. Or he may have no advance notice at all. The likelihood of the latter is enhanced by the frequent failure to recognize judicial notice as such. And in the absence of advance notice, a request made after the fact could not in fairness be considered untimely.⁵⁵

The mandatory-discretionary division of the Rules is an improvement over the prior codifications. The Model Code and the Uniform Rules partially based the division on the type of fact being noticed, which forced the judge to make an initial determination on that point.⁵⁶ The present rule bases the division solely on whether a request has been made and necessary information furnished. Assuming such a request is made, either at the trial or appellate level,⁵⁷ the judge would hold a hearing to determine whether the fact was an adjudicative fact not subject to reasonable dispute, and also the relevance and materiality of the fact to the case. If an affirmative finding is made, the fact is judicially noticed and conclusive upon the jury.

Supreme Court, was transmitted to Congress. In the House version of the Rules, adopted by the House of Representatives on Feb. 6, 1974, the words "judge or" are eliminated from subdivisions (c) and (d). H.R. 5463, 120 CONG. REC. H545-46 (daily ed. Feb. 6, 1974).

51. PROP. FED. R. EVID. 2-01(e) (Prelim. Draft 1969).

52. See, e.g., Davis, *Judicial Notice*, 1969 LAW & SOC. ORDER 513, 519.

53. 5 U.S.C. § 556(e) (1970).

54. *Ohio Bell Tel. Co. v. Public Util. Comm.*, 301 U.S. 292, 301-02 (1937).

55. PROP. FED. R. EVID. 201(e), Advisory Committee's Note.

56. UNIFORM RULES 9(1), (2).

57. Rule 201(f) is in accord with Model Code rule 806 and Uniform Rule 12 in allowing an appellate court to judicially notice facts. See *Armstrong v. Board of Supervisors*, 153 Neb. 858, 46 N.W.2d 602 (1951).

D. Effect of Judicial Notice

Since both the Federal Rule and the Nebraska Rule are limited to indisputable facts, the logical corollary is a "conclusive" effect to the taking of judicial notice. An unresolved problem, however, is whether the conclusive effect applies to both civil and criminal cases. The preliminary draft of the Federal Rules read:

(g) INSTRUCTING JURY. In civil jury cases, the judge shall instruct the jury to accept as conclusive any facts judicially noticed. In criminal jury cases, the judge shall instruct the jury that it may but is not required to accept as conclusive any fact that is judicially noticed.⁵⁸

The Advisory Committee's Note justified the distinction between civil and criminal cases by referring to the "considerations which underlie the general rule that a verdict cannot be directed against an accused."

Criminal cases are treated somewhat differently in the rule. While matters falling within the common fund of information supposed to be possessed by jurors need not be proved, . . . these are not, properly speaking, adjudicative facts but an aspect of legal reasoning. The considerations which underlie the general rule that a verdict cannot be directed against the accused in a criminal case seems to foreclose the judge's directing the jury on the basis of judicial notice to accept as conclusive any adjudicative facts in the case. . . . However, this view presents no obstacle to the judge's advising the jury as to a matter judicially noticed, if he instructs them that it need not be taken as conclusive.⁵⁹

Considering also the constitutional problems caused by the sixth amendment's right to jury trial, the preliminary rule was an admirable solution to the problem. However, the Advisory Committee apparently had second thoughts. The final draft of the Federal Rule, which also was adopted by the Nebraska drafters, eliminates the distinction:

(g) INSTRUCTING JURY. The judge shall instruct the jury to accept as established any facts judicially noticed.

The rationale for the change is explained as follows:

Authority upon propriety of taking judicative notice against an accused in a criminal case with respect to matters other than venue is relatively meager. Proceeding upon the theory that the right of jury trial does not extend to matters which are beyond reasonable dispute, the rule does not distinguish between criminal and civil cases.⁶⁰

58. PROP. FED. R. EVID. 2-01(g) (Prelim. Draft 1969).

59. PROP. FED. R. EVID. 2-01(g), Advisory Committee's Note (Prelim. Draft 1969).

60. PROP. FED. R. EVID. 201(g), Advisory Committee's Note.

No mention is made of the "considerations" against directed verdicts in criminal cases, and the sixth amendment is not discussed. When the Federal Rule was submitted to the House Committee on the Judiciary, Rule 201(g) was again amended to provide for a civil-criminal distinction. The House of Representatives version of the subdivision, passed on February 6, 1974, reads:

(g) INSTRUCTING JURY. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.⁶¹

The Committee on the Judiciary's report on the amendment speaks of the "spirit of the sixth amendment:"

Being of the view that mandatory instruction to a jury in a criminal case to accept as conclusive any fact judicially noticed is inappropriate because contrary to the spirit of the Sixth Amendment right to a jury trial, the Committee adopted the 1969 Advisory Committee draft of this subsection, allowing a mandatory instruction in civil actions and proceedings, and a discretionary instruction in criminal cases.⁶²

The Federal Rule is currently in a state of flux, since the Senate has not yet not addressed itself to the problem. If the final Federal Rule for jury instructions includes a civil-criminal distinction, the Nebraska Rule would stand alone in applying the conclusive effect in both cases.⁶³

V. CONCLUSION

Proposed Rule 201 should broaden the scope of judicial notice in federal and state courts. Although limited to indisputable adjudicative facts, the Rule does not prevent the noticing of legislative facts. Trial time should be saved in civil cases under the "conclusive approach" because the judge need not consider rebuttal evidence; it is recommended that the conclusive effect of taking judicial notice not be applied to criminal cases.

The mere existence of Rule 201 will alert trial counsel to the availability of the doctrine. Its formalized procedures for notice and hearing should allay the fears of some judges concerning the

61. H.R. 5463, 120 CONG. REC. H546, H570 (daily ed. Feb. 6, 1974).

62. H.R. REP. NO. 650, 93d CONGRESS, 1st Sess. 6-7 (1973).

63. The present Nebraska rule in any event changes existing Nebraska law on adjudicative facts. Nebraska has followed the Wigmore "disputable" approach. See note 21 *supra*. Under the new Rule, no rebuttal evidence would be allowed once an adjudicative fact has been judicially noticed.

safeguards surrounding the rule. The doctrine of judicial notice therefore should expand within the framework of Rule 201. The result may be the development of judicial notice as envisioned by Wigmore:

The doctrine of Judicial Notice contains the kernel of great possibilities, as yet not used, for improving trial procedure in the courts of to-day. . . . The principle is an instrument of a usefulness hitherto unimagined by judges. Let them make liberal use of it; and thus avoid much of the needless failures of justice that are caused by the artificial impotence of judicial proceedings.⁶⁴

64. 9 J. WIGMORE, EVIDENCE § 2583 (3d ed. 1940).