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Judicial Notice and "Indisputables"

Ralph Slovenko*

UNDER THE ADVERSARY SYSTEM of trying cases, the litigant and not the trier is responsible for gathering and presenting the evidence. However, under the doctrine of judicial notice, the tribunal accepts the existence of certain evidence without the necessity of a party offering formal proof.¹

The test for judicial notice is usually said to be "the indisputability of the facts." For example, in the California case of *Varcoe v. Lee*,² the defendant was charged with violating a city ordinance which was applicable to the business district." The defendant drove his automobile along Mission Street, in San Francisco, when approaching the crossing of Twenty-first Street, at a greater speed than fifteen miles an hour. No evidence was offered that this location was in the "business district." The question was whether the court was entitled to take judicial notice of the character of the street. The court said that judicial notice could not be taken "if there were *any possibility* of dispute as to whether or not that character was such as to constitute it a business district within the definition of the statute applicable" (emphasis added).³ The court said that the test "in any particular case where it is sought to avoid or excuse the production of evidence is: Is it certain and indisputable?"⁴

As a result of this formulation, the court, when it believes that it has hold of an "indisputable," does not allow the adversely affected litigant to introduce contrary evidence, "for its produc-

* Assoc. Prof. of Law, Tulane University School of Law.

¹ Thus, a party is not required to prove formally that water runs downhill, that light travels 186,427 miles per second, that vitamin D acts as do ultra-violet rays, that minerals cannot be located with a divining rod, that Bulgaria was an independent kingdom and that a native of that country was not a citizen of Russia, or that in 1940 "existing conditions in Poland are serious." See cases cited in Note, 13 Rocky Mt. L. R. 374 (1941). When the United States Supreme Court in 1959 enjoined the steel strike, Justice Douglas, dissenting, said the case should be returned to the district court "for particularized findings as to how the steel strike imperils the 'national health' and what plants need to be reopened to produce the small quantity of steel now needed for the national safety . . . I am unwilling to take judicial notice that it requires 100% of the workers to produce the steel needed for national defense when 99% of the output is devoted to purposes entirely unconnected with defense projects." *United Steelworkers of America v. United States*, 80 S. Ct. 1, 11-12 (1959).

² 180 Cal. 338, 181 P. 223 (1919).

³ *Ibid.*

⁴ *Ibid.*

tion cannot add or aid.”⁵ The court also instructs the jury to consider judicially noticed data as settled and definitive data from which the decision is to be drawn. In the case of *State v. Lawrence*,⁶ the defendant was on trial for larceny. The prosecutor did not introduce evidence of the value of the property stolen, a one-year-old Ford automobile. The court took judicial notice that the property was worth more than fifty dollars, the statutory minimum for the crime of grand larceny. The court thereupon instructed the jury that the property was worth more than fifty dollars, and that if the defendant were guilty of a crime, he was guilty of grand larceny. The return by the jury of a verdict of guilty of petty larceny was thus ruled out by the instruction of the trial court.

In view of these results, the judicial test of “indisputability” as the criterion for judicial notice merits analysis. In the history of philosophy, we learn, Bishop Berkeley maintained that sensations give one a collection of ideas: the existing world is dependent upon the mind. Berkeley’s subjective metaphysics moved into David Hume’s metaphysical scepticism. Hume went one step further than Berkeley and “idealized” causation. It was the contention of Hume that causation is an association of ideas, a convention or convenient fiction of the mind. Since law implies causation, the philosophy of Hume represents an attack on the so-called “laws of nature.” Hume drew the conclusion that there could be no such thing as a law of nature because the very principle of causality is nothing but a set of happenings, connections in our experience, in which one impression succeeds another according to our habit of expectation. Hume maintained that when we interpret the phenomena of experience as manifesting universal causal connections, we are thereby reading into the phenomena what they themselves do not contain, but that with which they have been invested by our thought. Granted that necessity and universality are found everywhere in our consciousness, what reason have we, Hume would ask, for asserting that these characteristics are also the attributes of things themselves? We observe regular patterns or successions in nature. On the basis of these patterns, we “jump” to the idea of cause and effect or necessary connection. Causation is acceptance through custom—sensations simply give a sequence in time and

⁵ *Ibid.*

⁶ 234 P. 2d 600 (Utah 1951).

not causation. We have been in the habit of expecting things to happen in the future in the same order as they have happened in the past, and we expect them to continue to do so.⁷

Immanuel Kant faced the question: If Hume is right how can scientific thought have a rational foundation? Kant's position was that our minds give laws to *nature*. Scientific knowledge, Kant maintained, is concerned exclusively with phenomena, that is to say, with the "outside" of things. Phenomena, however, can be known only in so far as they conform to certain laws of our own mind. Such laws are presupposed in every act of knowledge. It is we who "work up" into coherent objects or things the multiplicity or "manifold" presented to our senses. The mind, according to Kant, has certain forms into which experience must fall, so that one can be certain in advance that our experience will be subject to the structure and laws of space and time, because these are forms of our sensibility; and subject also to the categories of substance and attribute, of cause and effect, et cetera, because we cannot think at all without making a constitutive use of these categories. These forms and categories are given in advance of experience, and every thing that occurs in experience must take on these forms.⁸ However, we cannot tell in advance what the cause of an event will be; we can only know in advance that every event must have some cause. The empirical part of our experience, the content of our sensuous experience, will all fall into these forms; but forms do not determine what the content will be. They determine only how we shall experience that content, and this means, even for Kant, that our expressions of the "laws of nature" may not be universally necessary.

The positivist tradition in philosophy, insofar as phenomenology goes, has its principal origin in the work of Hume and Kant. This philosophy has involved an analysis of the nature and limitations of the knowledge attained by the science of phenomena. Basically, the positivist conception of these sciences is to the effect that the knowledge gained through their investigative method, which chiefly involves a mathematical reading of sensible phenomena, cannot penetrate to the substance of things so as to

⁷ See von Mises, *Positivism* 156 (1951).

⁸ See Boutroux, *La Philosophie de Kant* (1926); Clark, *An Introduction to Kant's Philosophy* (1925); Ewing, *A short Commentary on Kant's Critique of Pure Reason* (1950); Mead, *Movements of Thought in the Nineteenth Century* (1936).

constitute an ontological knowledge of nature but rather is confined to describing the connection and relations among sensible phenomena. The faculty which is able to synthesize natural phenomena cannot penetrate to the essence or inside of things. According to this view, the certitudes attained by the sciences are relative to the data upon which they are based and thus cannot be considered final or absolute since new data must inevitably be discovered.⁹

The courts, as we have pointed out, maintain that judicial notice is taken of those matters which are "indisputable" and that the litigants, perforce, are not allowed to dispute the "indisputable." The legal meaning of the term "indisputable," and the way it is distinguished from the disputable, is naive, at least, philosophically and scientifically naive. If "laws of nature" cannot be considered final or absolute, as philosophers and scientists have pointed out, what then can be considered to be indisputable? The "facts of history" are subject to even more dispute, as they are elicited from past events the knowledge of which is particularly hypothetical in nature.

It is customary for logicians to distinguish between analytic and synthetic judgments. It is in the analytic judgment where we can find the "indisputable." The analytic proposition is necessary and certain, for it simply records our determination to use words in a certain fashion. The predicate of the judgment is contained in the concept of the subject, as for example, a triangle has three angles. Analytic judgments are universally and necessarily true simply because no more is said in the predicate than what is stated in the subject. It is a tautology (word formed from two Greek words *tauto*, the same, and *logia*, to say), a statement of the same, a repetition.

The synthetic judgment, on the other hand, unlike the analytic proposition which is necessary and certain, is continually subject to the test of further experience. The reason why the analytic proposition cannot be confused in experience is that it does not make any assertion about the empirical world. The validity of the analytic judgment depends solely on the definitions of the symbols it contains, whereas the validity of a synthetic judgment is determined by experience.

⁹ See Russell, *The Problems of Philosophy* 96, 101, 107 (1912); see also Boutroux, *The Contingency of the Laws of Nature* (1916); Maritain, *Philosophy of Nature* 45-72 (1951); Russell, *Our Knowledge of the External World* 221-22 (1915).

Science of the present day does not claim absoluteness or infallibility, or "iron laws of necessity." Certitude in science is alien to the spirit of science. It does not regard its own findings as final. The proposition that "all bodies heavier than air fall to the ground" must now contain a reservation with respect to the possibility of aviation. In no area of experience, can a proposition that is not a tautology be not subject to check by future observations. In no case can statements be asserted about reality in the form of "eternal laws." Science has changed its attitude from a philosophy of fixed laws to a philosophy of hypotheses.¹⁰ Natural science is not dogmatic. Dogmatism assumes the possibility of certain knowledge, whereas hypotheses yield probable knowledge.¹¹ The history of natural science has been well described as a history of discarded hypotheses. Except among jurists, ordinary people, and dialectical materialists, the view that we do not know for certain the truth of any empirical statement is very popular. C. I. Lewis says, "All empirical knowledge is probable only";¹² Bertrand Russell says, "We have found reason to doubt external preception, in the full-blooded sense in which common-sense accepts it"¹³ and "we can never be completely certain that any given proposition is true";¹⁴ A. J. Ayer says, "No

¹⁰ See Nagel, *Sovereign Reason* 304-306 (1954); Feibleman, *Viennese Positivism in the United States*, 4 *Tulane Studies in Philosophy* 31 (1955); Lee, *A Criticism of the Marxian Interpretation of History*, 1 *Tulane Studies in Philosophy* 95 (1952); Royce, *The Search for Meaning*, 47 *American Scientist* 515 (1959).

¹¹ It has been customary in the history of philosophy for those who found no dogmatic or absolute certainty of their knowledge to become skeptics. It is essential to distinguish hypothetical or probable knowledge from scepticism, which doubts the possibility of knowledge. Science of the present time does not claim absoluteness or infallibility, or "iron laws of necessity." Science, at the beginning of the twentieth century, changed its attitude from a philosophy of fixed laws to a philosophy of hypotheses. Hypotheses yield probable knowledge. Formally there is no essential difference between a scientific "law," "theory," and "hypothesis." The distinction between them depends on a difference in the degree to which they are based on evidence and have been confirmed by evidence. In the broader, more fundamental use of the terms, all generalizations are theoretic and theory is hypothetical. See Lee, *Theoretic Knowledge and Hypothesis*, 57 *Psychological Rev.* 31 (1950); see also Cornforth, *The Theory of Knowledge* 153 (1955). The change in attitude of science from a philosophy of fixed laws to a philosophy of hypotheses does not preclude reliable knowledge as a basis for decision or action. Knowledge need not be infallible to be genuine knowledge.

¹² Lewis, *Mind and the World Order* 309 (1929).

¹³ Russell, *Philosophy* 10 (1927); see also Russell's *Introduction to Wittgenstein, Tractatus Logico-Philosophicus* 16 (1955).

¹⁴ Russell, *An Inquiry into Meaning and Truth* 166 (1940).

genuine synthetic proposition can be absolutely certain”¹⁵ and “Statements about material things are not conclusively verifiable.”¹⁶

Contemporary dialectical materialists cling to the theory of absolute and objective truth. It is their contention that to every scientific theory or hypothesis there is a corresponding objectivity which is absolutely true in nature, and with greater and greater exactitude, these objective laws become known.¹⁷ The acceptance of the existence of objective laws of nature as a chain of necessity, however, does not require a dogmatic position. Under either the subjective or objective position the door cannot be closed to further examination. To the subjectivists, it is asked: When is an hypothesis verified? To the objectivists, it is asked: When is a law established in a “pure form”? The answer for both is the same: the examination is never finished. The possibility of continued testing must always remain open, since new evidence may become available at any time.

The position that “all empirical statements are hypotheses” admittedly goes against “common sense.” The statement that “I had dinner an hour ago,” or that “Elephants do not come out of pianos,” is empirical, and it might appear ridiculous to call it an hypothesis. It is necessary to point out that when a philosopher says that all empirical statements are hypotheses, he means that they do not possess logical certainty, as does the *a priori* statement that “40 minus 20 equals 20.” The empirical proposition does not have a self-contradictory negative. The denial of an empirical proposition is a logical possibility. The philosopher therefore says that empirical statements do not have absolute certainty but at most high probability.¹⁷

“Probable knowledge” is not an elliptical or oxymoronic statement. It is wrong for a jurist to assume that, since no one can know reality with certainty, “no evidence is sufficient for establishing the identity of the criminal.” Probable knowledge really is knowledge. In the case of *Nicketta v. National Tea Co.*,¹⁸ the plaintiff suggested that because science is progressive and new discoveries are constantly being made, no scientific fact however well established should be judicially noticed. This position

¹⁵ Ayer, *Language, Truth and Logic* 127 (1936). See also p. 132: “Empirical statements are one and all hypotheses.”

¹⁶ Ayer, *The Foundations of Empirical Knowledge* 239 (1940).

¹⁷ See Engels, *Dialectics of Nature* 158-160 (1940).

¹⁸ 338 Ill. App. 159, 87 N. E. 2d 30 (1949).

is without merit. A scientific philosophy of hypothesis does not preclude reliable knowledge as a basis for decision or action. It is the contention of this paper that judicial notice is properly taken of well-attested propositions, thereby dispensing with the burden of formal proof on the part of the proponent, but, since "laws of nature" and "facts of history" are simply hypotheses, the door should not be shut to dispute. Synthetic judgments, requiring actual observation for validity, are always subject to verification and reverification. Under its view of things, however, the court excludes itself as a place for investigation. The suggestion of "indisputables" commits the supreme sin against the scientific spirit: It blocks the road of inquiry.¹⁹

The sole purpose of the doctrine of judicial notice is to relieve one of the parties of the burden of resorting to the usual forms of evidence in order to establish a point of general knowledge. In practice (life is short), it is not possible to prove everything. Trials would be impossible without the concept of judicial notice.

As Thayer put it, "In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved."²⁰ The doctrine of judicial notice is fundamentally based on practical convenience and necessity, and to say that a court will take judicial notice of a fact is merely another way of saying that the usual forms of evidence will be dispensed with. The formal proof of all points involved in a trial would encumber beyond belief the process of litigation. A party need not have to prove something which is generally recognized. However, the view that the facts of the world depend upon the frame of reference means for the judicial enquiry that the adversely affected party should be allowed to bring forward a viewpoint contrary to the one judicially noticed, and the jury should have the right of making the final determination when the validity of a proposition is called into question. Another way is always possible. One is more likely to entertain another way if one thinks in terms of probabilities rather than in terms of indisputables.

The court of law, of course, can entertain only those positions of the adversely affected party which have probative or convincing value, for it must as a practical matter get on with

¹⁹ See Ayres, *The Vale Economy*, in Lepley (ed.), *Value, A Cooperative Inquiry* 59 (1949).

²⁰ Thayer, *A Preliminary Treatise on Evidence* 279 (1898).

the case and must therefore be governed by rules of practical efficacy.²¹ However, the doctrine of judicial notice must not be treated with a sense of inviolability. It should be applied flexibly.²²

The judicial notice provisions of the Model Code of Evidence and the Uniform Rules of Evidence leave much to be desired. They provide that judicial notice is taken of facts which "are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy."²³ In a comment, it is said: "If a matter falls within the domain of judicial knowledge, it is beyond the realm of dispute."²⁴ The thinking of the Model Code and the Uniform Rules is antiquated.

²¹ Suppose a state statute requires dance halls to have a license in all towns over 500 population. The defendant is prosecuted for running a dance hall without a license. The court takes judicial notice that the town is over 500 population. But the defendant should be entitled to prove that the population is under 500. Compare *State v. Kincaid*, 133 Ore. 95, 285 P. 1105 (1930). The defendant's contention may have force in Slippery Rock, but not in Chicago or New Orleans, unless they have been deserted.

²² The recommendation is also appropriate for the opinion rule. See Slovenko, *The Opinion Rule and Wittgenstein's Tractatus*, 14 U. Miami L. R. 1 (1959).

²³ The judicial notice provisions of the Model Code and the Uniform Rules are essentially the same. See Rules 9 to 12 of the Uniform Rules and Rules 801 to 806 of the Model Code.

²⁴ Model Code of Evidence rule 804 (2, 3), comment (1942).