

A Handy Treatise Upon the Subject of Judicial Notice

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which all have experienced who have had much to do with the trial of cases," and an expression to practically the same effect is to be found in the case of *Bucher vs. Wis. Cent. Ry. Co.*, 139 Wis. 597, in which the court characterizes expert testimony as "proverbially unreliable at best," although the testimony of physicians especially is not arraigned with that degree of severity which characterizes the *Baxter* case above cited. Whether or not the courts of Wisconsin have not been somewhat severe in their view of the probative force of expert medical testimony in view of the opinions of other jurisdictions, is a question; but the fact remains that expert medical testimony in this state is putting up its last defense, is being rendered limb from limb and is gradually succumbing to the force of judicial onslaught.

A HANDY TREATISE UPON THE SUBJECT OF JUDICIAL NOTICE.

(A paper prepared for the Review by Dr. M. I. Clear of the day shift of the Quick Result Correspondence School.)

I. NOTICE IN GENERAL.

As has perhaps never before been urged, there are several different kinds of notice in law. Besides the statutory 3-day and 30-day notices to quit or pay rent, which are too intimately known to the profession at large to deserve more than passing mention in this treatise, we have to consider the nature and effect of actual, constructive and judicial notice. Dr. Pomeroy, in his able and exhaustive work on Equity Jurisprudence has treated the subjects of actual and constructive notice to such an extent that it has been thought best not to revive them, but to proceed unhindered to the more restricted field of Judicial Notice.

II. JUDICIAL NOTICE—ORIGIN AND EARLY HISTORY.

After years of unceasing and intensive research into the archives of the past, together with a careful perusal of the many cogent and scholarly works on the subject prepared by authors of no little ability, the writer has been at pains to discover that

at some remote age—long before the compilers of the Year Books thought of issuing cumulative digests, a certain conversation took place at the city of London.

Although the author's conclusions as to the identity of the principal speaker may well be challenged by learned legal writers, it is advanced with some degree of certainty that the name of at least one of the parties to the conversation was "J. S." The aforesaid J. S., according to the musty records, was a layman, who, in the course of a conversation with several of his contemporary laymen, had occasion to praise the eloquence of a certain sergeant-at-law to whose acquaintance he laid some claim. He emphasized particularly the extraordinary powers of persuasion possessed by the object of his admiration, and said, in part: "Now wot ye welle, this same barristere might handsomely give ye believe and faythe that blacke were whyte."

The colorful language used by the aforesaid J. S. lived in the minds of his incredulous hearers, and spread and magnified until at last the words of praise met the flattered ears of the barrister himself. Sad to relate, he believed them. Spurred on by the consciousness that all humans are not entirely unappreciative of merit, this same good man of the law fairly outdid himself in the persuading business. So fiery became his eloquence, and so silvery his soothing words of logic, that it took no time at all for him to persuade every court in Merry England that black was white. But pride, unfortunately, too often precedes a fall. It is narrated in the annals that this honey-tongued pleader found a time when there were left no more woolsack-warmers to charm. Here was a plight for the gods—a master salesman who had sold the bottom out of his own market. The poor man, having found he could not cure himself of the persuading habit, at length crept upon himself unaware and—most wondrous of all, succeeded in persuading himself that black is white. To a man with a mission, such a state of affairs was unbearable, so he set about directly to go the rounds of the temples of justice retracing his steps and persuading them that black is black. For a man with his native and acquired talents, this was the work of but a week or two. Having a due regard for method, he brought his second persuading-crusade to an end by again convincing himself. Then came another, and another process of persuading, until at last the kingdom rocked from its very foundations. No one, in truth,

knew whether black was white, or black or white. Least of all was the author of all this confusion able to answer the perplexing problem. Having devoted the best years of a life-time to the consideration of the subject in all its phases and intricate details, he felt his great mind tottering, whereupon he purchased a cast-iron union suit and departed hurriedly for Eastern Wars.

The period that immediately followed upon the barrister's departure has been rightly termed the darkest part of the Dark Ages. There is no telling how long the kingdom might have reeled through an uncertain color riot of black and white, had not a genius risen to the front with a proffered solution of the great problem of the day.

His plan, like that of so many latter-day geniuses, was to arbitrate the whole matter. "Why not cease all strife," he said, "long enough to definitely agree upon the subject one way or the other. For it seemeth plain that black is either white or black."

So it was agreed, that in certain cases the courts would admit for the purposes of argument, that black is black and white is white.

III. *SAME—ITS NATURE.*

This was the germ of our present doctrine of judicial notice, which is nothing more or less than a kind of air-brake to be applied to legal reasoning—a safety station for use during heavy professional traffic. It means the admission of the truth of the one or two self-evident facts in this world which are not flexible enough to be twisted—but all, it is to be understood—for the purposes of argument.

IV. *SAME—APPLICATION.*

Plowing down through the centuries, we arrive at an examination of the results of the theory of "judicial notice" in our own day.

One of the greatest changes is, of course, the difference in the gravity and dignity of the subjects of which our present courts take judicial notice.

We have progressed, and have left the black-and-white problem far in the background.

A TREATISE UPON THE SUBJECT OF JUDICIAL NOTICE

The Supreme Court of the United States has reached the sagacious conclusion, as a result of observation, that railroad passenger trains are operated to carry passengers for hire.¹ The august tribunal of the State of New Hampshire was on at least one occasion willing to admit that the state is divided into counties.²

Indiana has gone on record as meeting any one half way on the proposition that leaks in gas pipes require immediate repair.³

It is judicially noted in New York that the presence of an undertaker's establishment in a residential portion of the city is objectionable.⁴

Sly old Uncle Sam betrays extraordinary familiarity with certain subjects of an arduous and spirituous nature when he confides that "Whiskey is an intoxicating drink—as is also a whiskey cocktail."⁵

V. *SAME—WISCONSIN RULINGS.*

Lest any one lay the charge against the Supreme Court of Wisconsin that its members are cold, unsympathetic beings, it is to be remembered that this court has delivered itself on at least two occasions of its observations concerning boys. Most boys of sixteen, according to the court, are playful and thoughtless and many of them are endowed with a "monkey-like mischievousness" which may be very dangerous.⁶

So much for the 16-year-olds. It has been laid down by the Supreme Court of this state that children seventeen months of age scarcely do more than toddle.⁷ And it is also declared that children have a tendency to meddle with a rope and pulley.⁸ The court judicially knows that a boy about four years of age can run about four miles an hour.⁹

1. 32 U. S. App. 182.

2. 40 New Hampshire 420.

3. 140 Indiana 107.

4. 139 N. Y. 93.

5. 75 Federal Rep. 657.

6. 146 Wis. 621.

7. 152 Wis. 618.

8. 152 Wis. 328.

9. 149 N. W. 698.

Back in territorial days, there was a certain fee of \$3.00 in connection with the courts. According to the Wisconsin court, those three dollars would be worth about twelve in these days, as far as purchasing power goes.¹⁰ Thus even the high cost of living has been noticed judicially.

We have the judicial word of the Supreme Court for it that carbolic acid will burn the skin,¹¹ and that Richland Center is in Wisconsin.¹²

Engine-cabs are not for use by passengers,¹³ and it is a matter of common knowledge that public utilities used to agree among themselves as to rates to cover the duplication of plants.¹⁴

We are told that it is a matter of common knowledge that farmers counsel with their wives and members of their families on business transactions¹⁵, but not whether they follow the advice given by the counsellors.

In Wisconsin, complete drunkenness is a defense to a note in the hands of an innocent purchaser, because the signing of notes is not the usual and probable result of drunkenness.¹⁶ The source or means of information of the court upon this subject is not disclosed.

10. 149 N. W. 378.
11. 149 N. W. 476.
12. 63 Wis. 474.
13. 154 N. W. 979.
14. 145 N. W. 233.
15. 145 N. W. 227.
16. 142 N. W. 263.