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no access until a period prior to the birth of the child which is too short for the person to have been the father according to the laws of nature. The *Holder* case follows the modern trend which fixes this period somewhere between 190 and 216 days prior to the birth of the child. This seems to be stretching the laws of nature beyond a natural point since the average period of conception is 270 days; however, the motivating forces of public policy and the long historic strength of the presumption favoring the legitimacy of children seem sufficient justification.

EVIDENCE—JUROR OBTAINING INFORMATION ON “ARCING” BY READING BOOK ON ELECTRICITY DURING TRIAL HELD REVERSIBLE ERROR

The decedent suffered death by electrocution while installing an outdoor television antenna. The plaintiff (the decedent's wife) brought the action against the defendant corporation, alleging its highwire, which passed through the decedent's yard, was the cause of death. Although the plaintiff introduced evidence which tended to prove that the defendant had not maintained the highwire the required distance above the ground as specified by the Kansas statute, she did not introduce evidence showing exactly how this highwire resulted in her husband's death. While the jury was recessed, Noll, one of its members, read a book on electricity and, when the jury reconvened, reported his findings concerning the arcing and jumping characteristics of electricity.¹ The majority of the jury admitted hearing Noll's statements, but only a few admitted to giving them any consideration. Upon discovering Noll's statements, the defendant filed a motion for a new trial which was denied. The Supreme Court of Kansas reversed and remanded the cause because of jury misconduct. *Thomas v. Kansas Power & Light Co.*, 340 P.2d 379 (Kan., 1959).

The court, in reversing, accepted the plaintiff's admission that the juror was guilty of misconduct as conclusive, but stated that it would have found the same result even if no such admission had been made. As a result of this finding, the court gave a very cursory explanation as to why the juror's statement would constitute jury misconduct. Although not specifically stated, the issue of the case was whether arcing is a matter of common knowledge.

At early common law, it was permissible for a member of the jury to have personal knowledge of the case and, in fact, a juror was chosen because he was possessed of this personal knowledge.² This rule had such a wide scope that the jury could return a verdict notwithstanding

¹ Although arcing has a strict technical meaning, it is referred to in some cases as the jumping characteristic of electricity. The latter meaning will be used in this note.

² Blackstone's Commentaries, Vol. 3, pp. 373, 4 (1768).

the fact that no evidence had been introduced concerning the issues of the dispute. Today, however, the exact opposite prevails in the courts of the United States and a juror may consider only that knowledge which he has acquired by the introduction of evidence.³ The reason for this procedure is that today's concept of fair play requires that all parties to an action be given a fair opportunity to rebut any evidence which might be damaging to their position.⁴ Obviously, this would be quite impossible where a juror has imparted knowledge to his fellow jurors in the secrecy of the jury room.

As is true with most rules, it is subject to qualification. The exception may be stated as follows: The jury may arrive at a conclusion concerning those matters which have not been introduced in evidence but which relate to the issues where the fact propounded by the juror is a matter of common knowledge. The exception is succinctly summed up by the court in the case of *Harris v. Pounds*.⁵

[A jury may take] into consideration all that knowledge which is common to the average man and springs from the ordinary relations and experiences of life, and in their adjudication may use and apply their own knowledge and observation as regards such ordinary experience and relations. . . .⁶

From the above concepts, it logically follows that a juror's misconduct flows not from the manner in which he acquired the knowledge, but from whether that knowledge is common to a few as opposed to the multitudes. Therefore, it is incumbent upon the lawyer to determine whether a matter is, or is not, a matter of common knowledge. The lawyer's task in this area is difficult because of the scarcity of cases in which the court has decided what the jury may, and may not, conclude without the introduction of evidence. Further, this is a matter upon which the court passes judgment and its ruling will be reversed only in cases where the judge has blatantly overstepped his judicial discretion.⁷

In relation to the few decisions on this point, there is, perhaps, another area to which the lawyer may resort in finding precedents—judicial

³ *Klein v. Wilson*, 167 Neb. 779, 94 N.W.2d 672 (1959); *State v. Drainage District No. 25*, 280 S.W.2d 683 (Mo., 1955); *Scherz v. Platte Valley Public Power & Irrigation Dist.*, 151 Neb. 415, 37 N.W.2d 721 (1949); *Rothstein v. Monette*, 17 N.Y.S.2d 369 (1940).

⁴ *Scherz v. Platte Valley Public Power & Irrigation Dist.*, 151 Neb. 415, 37 N.W.2d 721 (1949).

⁵ 185 Miss. 688, 187 So. 891 (1939).

⁶ *Ibid.*, at 893. Accord: *Gettloeb v. Melrose Health Baths*, 148 Cal. App. 313, 306 P.2d 568 (1957); *State v. Drainage District No. 25*, 280 S.W.2d 683 (Mo., 1955); *Gange v. Gange*, 79 N.D. 372, 56 N.W.2d 688 (1953).

⁷ *Scherz v. Platte Valley Public Power & Irrigation Dist.*, 151 Neb. 415, 37 N.W.2d 721 (1949).

notice.⁸ In this area, one's attention is directed toward a judge's right to judicially notice facts as opposed to laws.⁹ This above-mentioned hypothesis is posed by a number of cases which hold that the jury's knowledge is, at best, no broader than the knowledge of a judge who sits upon the bench.¹⁰

It is a well established principle that a judge may take judicial knowledge of those facts which are notorious and a matter of common knowledge.¹¹ This matter of common knowledge extends into all fields of knowledge, e.g., geography, science, history and politics are examples, but these technical fields are limited to theories or facts which are of general knowledge to the public at large as opposed to the members of these fields. This rule can best be explained by a discussion of scientific facts—an area with which this note ultimately is concerned.

The general rule pertaining to scientific facts is that the court may take judicial notice only of those scientific facts which are generally or universally known and so generally understood as to form a part of the common knowledge of every man.¹² This rule may be illustrated by the following cases in which the court has taken judicial notice of a scientific fact: (1) expansion and contraction of metals in heat and cold;¹³ (2) a black surface will reflect substantially less light than a light surface,¹⁴ and (3) for every action there is a compensating reaction and the action and reaction equalize.¹⁵

Specifically, it has been established that courts will judicially notice the nature and properties of electricity.¹⁶ This precedent flows from the more general rule that courts will take judicial notice of the elementary natural laws of general application and the characteristics of scientifically

⁸ This is a theory adopted in the apparent absence of cases which specifically state that the areas of judicial common knowledge and juror common knowledge are the same.

⁹ *Strain v. Isaacs*, 135 Ohio St. 495, 18 N.E.2d 816 (1938).

¹⁰ *Harris v. Pounds*, 185 Miss. 688, 187 So. 891 (1939); cf. *Shelly v. Chilton*, 236 Ky. 221, 32 S.W.2d 974 (1930); *Tullgren v. Karger*, 173 Wis. 288, 181 N.W. 232 (1921).

¹¹ *Elder v. Delcur*, 364 Mo. 835, 269 S.W.2d 17 (1954); *Zinc v. Basham*, 164 Kan. 456, 190 P.2d 203 (1948); *Alabama Power v. Hensoff*, 238 Ala. 348, 191 So. 379 (1939).

¹² *Kennedy v. Parrott*, 243 N.C. 355, 90 S.E.2d 754 (1956); *State v. Williams*, 245 Iowa 401, 62 N.W.2d 241 (1954); *Roberts v. Wofford Beach Hotel*, 67 So.2d 670 (Fla., 1953). Contra: *Jordan v. Mace*, 144 Me. 351 (1949).

¹³ *Fla. Amer. Dist. Electric Protective Co. v. Seaboard Air Line Ry. Co.*, 139 Fla. 451, 190 So. 820 (1939).

¹⁴ *Zickefoose v. Thompson*, 347 Mo. 579, 148 S.W.2d 784 (1941).

¹⁵ *Leavitt v. Bacon*, 89 N.H. 383, 200 Atl. 399 (1938).

¹⁶ *Central of Georgia Ry. Co. v. Lawley*, 33 Ga.App. 375, 126 S.E. 273 (1925); *Crawfordsville v. Braden*, 130 Ind. 149, 28 N.E. 849 (1891). Accord: *Lothrop Theatres v. Edison Electric Illuminating Co. of Boston*, 290 Mass. 189, 195 N.E. 305 (1935).

established general properties of material substances and forces.¹⁷ However, courts will not take judicial notice of highly technical properties of electricity¹⁸ and, in relation to this, one can only guess what the courts will term as being highly technical.

There are very few cases which even mention arcing and, in relation to these cases, it must be remembered that, as the general knowledge of the public increases, there will be a corresponding increase in matters over which a court may take judicial cognizance.

In *Georgia Ry. Co. v. Lawley*,¹⁹ the trial court refused to judicially notice that electricity would not arc a distance of two feet from a high wire maintained by the defendant company to a metal tape held by the decedent. From this, it can be fairly implied that a court would not judicially notice that electricity would jump two feet.

That the court's view does change from time to time with an increase of knowledge is pointed out by the case of *Pascal v. Southern Cal. Edison*.²⁰ It was held that the arcing propensity of electricity is a well-known physical fact of which all *capable workmen* are deemed to have common knowledge. This case implied that arcing is not a matter of general knowledge and, therefore, a jury may not apply it to issues of a case without the introduction of evidence.

The *Pascal* case indicates the beginning of a trend toward the judicial recognition of arcing; this trend is braked by the *Thomas* case, which holds arcing not to be a matter of common knowledge. However, the *Thomas* case does not completely extinguish this apparent trend. In the *Thomas* dissent, written by Justice Wertz, and concurred in by two other justices, it is stated that arcing or jumping is a fact of common knowledge. It appears that their primary basis for arriving at this conclusion is that the defendant, in his brief, states that a ten year old boy knows it is dangerous to come into close proximity with an electrically charged wire. It is reasoned that, since the only danger in coming into close proximity with an electrically charged wire is that the electricity might jump or arc to a metal object on the person, a ten year old boy must know of the arcing or jumping characteristic of electricity. It obviously follows that since a ten year boy knows of arcing, it must be a matter of common knowledge.

What little case law there is concerning the arcing property of electricity indicates that it is not regarded as a matter of common knowledge but that there is some pressure among the judiciary to recognize it as such.

¹⁷ *Central of Georgia Ry. Co. v. Lawley*, 33 Ga. App. 375, 126 S.E. 273 (1925).

¹⁸ *Ibid.*

¹⁹ 33 Ga. App. 375, 126 S.E. 273 (1925).

²⁰ 102 Cal. App. 254, 227 P.2d 555 (1951).