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JUDICIAL NOTICE BY ADMINISTRATIVE BODIES

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A nationally known lawyer in a recent lecture upon administrative law and procedure stated that judicial notice by administrative bodies is mentioned in only two or three reported decisions and has received scarcely any mention in the books.

The highly practical question of whether an administrative body, such as the Interstate Commerce Commission, exercising legislative or quasi-legislative functions[1] which of necessity usually have a judicial aspect, may invoke the doctrine of judicial notice upon its own motion should be of interest. If the doctrine may be so invoked the extent of the use thereof, in order to minimize the record is of extreme importance for many obvious reasons.

A search of the authorities discloses that only a few published decisions and treatises refer to the question.

The discussion of a matter such as this necessitates the iteration of many matters which are well known to those of the legal profession. So if apology is appropriate, it is rendered upon the ground that review is to "refresh the recollection," if that accommodating theory may again be imposed upon.

Matters of which the courts will take judicial notice are almost countless. Any list of such matters must add the qualification: "as well a thousand and one other similar matters of like notoriety * * *."[2] No useful purpose could be served

* See p. 193 for biographical note.

[1] Act to Regulate Commerce, as amended by Valuation Act, March 1, 1913, chap. 92, 37 Stat. at L. 701, 41 Stat. at L. 493, and 42 Stat. at L. 624.

[2] 15 *Ruling Case Law*, 1082.

by attempting even to enumerate the broad classes of matters properly cognizable.

While the power of judicial notice is to be exercised with caution, courts should take notice of whatever is, or ought to be, generally known, and justice does not require that courts profess to be more ignorant than the rest of mankind. Nor is it essential that matters of judicial cognizance be actually known to the judge, for if proper subjects of judicial knowledge, he may inform himself in any way which may seem best to his discretion and act accordingly.[3] A judge will, or more accurately, may assume judicial knowledge of facts which he has learned through former litigation in the same jurisdiction.[4] Having learned many things from the hearing of many cases he may avail himself of that knowledge. In other words, the fact that the knowledge was gained on the bench does not debar it from application.

Since the underlying reason for the doctrine of judicial notice is to shorten and simplify trials or hearings, a wholly uninformed judge may take judicial notice of matters which require him to engage in personal research to determine the facts. Courts are supposed to notice without proof all that is necessary or justly to be imputed to them, by way of general outfit for the proper discharge of their judicial function.[5] But, because a court can not be required to notice much which it may judicially notice, the failure to use the doctrine makes for needless protraction of trials and smothers them with technicalities.[6]

Courts apparently forget that they *may* notice much which they can not be required to notice by general rule made in advance.[7]

The doctrine of judicial notice is generally considered as a doctrine belonging peculiarly to the law of evidence. This habit tends to obscure the true conception of both subjects.[8] In support of this observation it is pointed out that a very great proportion of the cases involving judicial notice raise no question at all in the law of evidence; they relate to pleading, to the construction

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[3] 15 *Ruling Case Law*, 1057, 1060.

[4] *Corpus Juris*, vol. 23, p. 61, sec. 1811.

[5] Thayer, *Judicial Notice and Law of Evidence*, 3 Harv. L. R. 285, 287.

[6] Thayer, *Treatise on Evidence*, (1898) p. 300.

[7] Wigmore, *Evidence in Trials at Common Law*, (1923) vol. 5, pp. 599, 603.

[8] Thayer, *supra*, note 5.

of the record or of other writings, a legal definition of words, an interpretation of conduct, the process of reasoning, the regulation of the order of trials.

After stating that the cases involving the doctrine relate to the exercise of the function of judicature in all its scope and at every step, Professor Thayer observes that the nature of the process as well as its name find the best illustration in some of the older cases long before questions in the law of evidence engaged attention; that 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. He states: "that the general head of proof, and the means used, of making the court aware of the existence of a given fact, include the whole topic of legal reasoning; they spread far beyond the law of evidence. The same reach belongs to the burden of proof. * * * It seems a very inadequate conception of the subject of judicial notice to speak of it as a 'means of making the court aware' of a fact; it has to do not merely with the action of the court when the parties are seeking to move it, but when acting alone and acting upon its own motion."

The codes of several states, such as California, Georgia, Idaho, Montana, North Dakota, Oregon, and Utah, provide more or less specifically the classes of things of which a court may take judicial notice. These enumerations are not limitations upon the court, but are merely descriptive of certain things of which the court *may* take notice. Among the seventy odd classes of matters enumerated by the North Dakota Code of 1913, are such comprehensive headings as transactions and objects which form a part of the history and geography of the country, its topography and general conditions, the government surveys and the legal subdivisions of public lands, the laws of nature, the measure of time and the geographical conditions and the political history of the world. These classes alone obviously embrace hundreds of thousands of facts.

It has been stated with authority that broadly the facts which may be noticed include in a general way: (1) matters with which the judicial function supposes the judge to be acquainted, either actually or in theory, (2) matters which are so notorious to all that the production of evidence would be unnecessary, and (3) matters which though neither actually notorious nor bound to be judicially known, yet are of such a character that they

are capable of instant and unquestionable demonstration.[9] This, or any other classification, is not inelastic.

In a case involving a patent or preserving apparatus the Supreme Court had the duty of passing upon facts as well as law. It reversed the decree for plaintiff, and adverted to a matter of fact which was nowhere mentioned in pleadings or proof, stating that the same principle was found in the common ice cream freezer. Of this, and of the preservative effect of cold, it took judicial notice, and dealt with it as if set up in the answer and fully proved. The Court, after reviewing certain treatises upon the preservative effect of cold, stated: "Examined by the light of these considerations, we think this patent was void on its face, and that the court [below] might have stopped short at that instrument and without looking beyond it into the answers and testimony, *sua sponte*, if the objection were not taken by counsel, well have adjudged in favor of the defendant."[10]

Thus a court, bound as it is by the rules of evidence, may invoke the doctrine of judicial notice upon its own motion, not only to supplement evidence but actually to provide the *only evidence* upon which to base a proper determination of a question of fact and law.

An appellate court reversed a judgment for plaintiff for personal injuries received in defendant's service as a brakeman while passing through a tunnel on top of a freight car. The jury found the plaintiff's testimony true, and that while in a sitting position his head had come in contact with an arch in the tunnel. The appellate court, *disregarding this finding of fact*, noticed judicially that a man sitting down would not come in contact with an arch four feet and seven inches above the top of the car.[11]

Here a court invoked the doctrine upon its own motion even to the extent of contradicting positive evidence.

However, a court in reviewing a record made before an administrative body displays an inherent tendency to confine its decisions rather strictly to the record.[12]

Professor Wigmore, after stating that the federal courts do not deem that the Interstate Commerce Commision is bound in law to follow the jury-trial rules of evidence, observes that occa-

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[9] Wigmore, *supra*, vol. 5, sec. 2570.

[10] *Brown et al. v. Piper*, 91 U. S. 37, 44 (1875).

[11] *Hunter v. N. Y., O. & W. Ry. Co.*, 116 N. Y. 615, 23 N. E. 9 (1889).

[12] *Interstate Commerce Com. v. Louisville & Nashville R. Co.*, 227 U. S. 38, 93; 57 L. ed. 431, 434 (1913).

sionally where an important controversy turns essentially on the observance of some fundamental rule of fair and thorough inquiry, there appears to be a disposition to scrutinize the commission's observance of it.[13]

This may be for several reasons. First, they may have a distrust of the ability of the board's members to consider and weigh evidence. Second, courts may fail to recognize that administrative bodies, such as commissions, are created to secure expertness in the making of determinations, and to provide a tribunal free from the cumbersomeness of court procedure which is unsuitable for coping with the complexities of administrative duties. Third, courts are composed of lawyers, who as a class, are particularly concerned with tradition and precedent, and one of whose most proper functions is to prevent so-called progress, as mere change is frequently denominated, from being recklessly fast and disorderly.

On the other hand in the Spiller case[14] where the Interstate Commerce Commission had found reparation due certain shippers based upon evidence which the circuit court of appeals had characterized as hearsay, the Supreme Court reversed the judgment and affirmed that of the district court which had decreed the payment of reparation. The court pointed out that the statute permitted the commission to conduct its hearings in such manner as will best conduce to the proper dispatch of business and to the ends of justice, and found that the order of the commission should not be rejected as evidence because of any errors in its procedure not amounting to a denial of the right to a fair hearing, so long as the essential facts found are based upon substantial evidence.

The court cited the decision in the Baird case[15] wherein it was said: "The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation, and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law, where a strict correspondence is required between allega-

[13] Wigmore, *Evid., supra,* vol. 1, sec. 4c, par. 4, substantially the same article appeared in *Illinois Law Review,* vol. XVII, p. 263, December, 1922.

[14] *Spiller v. Atchison, T. & S. F. R. Co.,* 253 U. S. 117, 64 L. ed. 810 (1920).

[15] *Interstate Commerce Com. v. Baird,* 194 U. S. 25, 44, 48 L. ed. 860, 869 (1904).

tion and proof." Thereafter it quoted from the Louisville & Nashville case, *supra,* which stated that an administrative body, even where acting in a quasi-judicial capacity, is not limited by the strict rules as to the admissibility of evidence which prevail in suits between private parties.

The circumstances in the Spiller case were distinguished from those in the Louisville & Nashville case in that in the former the commission did not act upon evidence of which the carriers were not cognizant, and to which they had no opportunity to reply, as was supposed to have been the fact in the latter case.

This decision goes a long way toward establishing the proposition that an adminstrative body is not and should not be bound by the narrow rules which circumscribe the determinations of a court.

A state supreme court stated that a regulatory commission should be thoroughly familiar with the many financial and economic problems which enter into the business of constructing and operating railroads, and inquired how, on the other hand, a judge, who is not supposed to have any of this special learning or experience and "could not take judicial notice of it if he had it," is to review the decision of commissioners who have such learning and experience and should act thereon. The court finally concluded that the only way to dispose of the question was to hold that upon appeal from the commission, the court should, to the best of their ability, take judicial notice "of all such technical learning, knowledge and information of a general character as should be known and understood by the commission."[16]

In other words, the court found itself entitled to take notice of the technical learning, knowledge and information which the commissioners are presumed to have, although, at the same time, legally unable to use any such information or technical learning the court as individuals personally might possess. Whether this is a correct construction to be put upon the court's decision it is certain that the court recognized the fact that the commission probably possessed certain special knowledge which would enable it more intelligently to decide the complicated technical questions presented.

The Supreme Court has also given weight to the decisions of tribunals "informed by experience" and has attributed to their

[16] *Stennerson v. Railroad Company,* 69 Minn. 353, 72 N. W. 713 (1897).

findings a probative force because of their "knowledge of conditions, of environment, and of transportation relations."[17]

Where a commission contended that its action could not be set aside by a court "merely on the ground that the action taken was based on facts erroneously assumed, or of which there was no evidence," the Supreme Court held that "facts conceivably known to the commission, but not put in evidence, will not support an order." Furthermore, the refusal to consider evidence introduced, or the making of a finding without supporting evidence was held to be arbitrary action.[18]

In an earlier case the Supreme Court held that although the practice of admitting testimony was very liberal, the commissioners could not act upon their own information as could jurors in primitive times. Otherwise the deficiency of evidence could always be explained on the theory that the commission had before it extraneous, unknown, but presumptively sufficient information to support the finding.[19]

These two decisions should not be regarded as denying to administrative bodies the right to invoke the doctrine of judicial notice. They turn upon a deficiency in or utter lack of supporting evidence upon which the finding of fact was based.

It has been stated that in cases brought and prosecuted by an aggrieved party there is naturally a considerable similarity between the procedure of a commission and that of a court. One of the greatest differences, however, comes from the fact that the commission may, at any time, assume the initiative and may turn its vast machinery to securing new evidence for the case at hand and to applying to it the results of investigations made in other cases. Although not bound by the ordinary rules of evidence, the substance of the more fundamental rules is frequently enforced.[20]

The Interstate Commerce Commission, exercising a legislative or quasi-legislative function in the valuation of railroad property, conducts hearings provided for by statute.[21] These hearings are not adversary proceedings.[22] The statute does not pre-

[17] *Illinois C. R. Co. v. Interstate Commerce Com.*, 206 U. S. 441, 454, 51 L. ed. 1128, 1133, 1134, (1907), and cases cited.

[18] *Baltimore & O. R. Co. v. United States*, 264 U. S. 258, 263, 68 L. ed. 667, 672 (1924).

[19] *Louisville & Nashville* case, see note 12, *supra*.

[20] Bevis, *Administrative Law*, Cincinnati L. R. vol. 1, No. 3, May, 1927.

[21] See note 1, *supra*.

[22] *U. S. ex rel. St. L. S. W. R. Co. v. I. C. C.*, 264 U. S. 64, 78, 68 L. ed. 568 (1924).

scribe a method of procedure to be followed. The fact that the bureau of valuation of the commission appears nominally as a party, examines witnesses and offers evidence does not remove the hearing from the class of an investigation. This is merely a practice of the commission to cause its employees to present evidence and otherwise assist in developing facts. In its hearings upon valuation matters the commission is not required to observe the strict rules of evidence or, in fact, any rules at all. It does observe the rules of evidence in so far as practicable. Its limitations are beyond a doubt only those it chooses to impose upon itself in the interest of the accuracy of its results, and the fairness of its conclusions.[23] The commission in describing its work has stated that if it were compelled to apply the strict rules of evidence not a single case before it could be properly decided.

In its valuation work it is, of course, dealing with but one class of cases, for the proper determination of which it has for years been assembling data and information about all of the railroads of the country. It has a large staff of experts, with whom it may consult. In its employment are engineers, accountants, lawyers, economists, analysts, etc. Its jurisdiction is so extensive that matters of fact noticeable, because of being within its jurisdiction, are numerous.

In one case the commission stated that it had taken judicial notice of economic conditions, price levels, the history of railroad building and financing, the present conditions in the securities markets, and the effect of the application of rates sufficient to make a return upon a valuation arrived at by certain methods. It said: "We have described above a course of events of which it has been our duty under the law to have knowledge and of which we have been a part. The description is supported *by our own published reports* and *by common knowledge.*"[24]

The commission has taken judicial notice of its finding of fact in one case by referring thereto in a subsequent case, although not expressly stating that it has taken judicial notice thereof. For example, evidence as to the cost of general expenditures is reviewed in one decision, and in the report of a separate and distinct case involving the valuation of an entirely

[23] *U. S. v. Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, 71 L. ed. 651 (1926).

[24] *Excess Income of St. Louis & O'Fallon Ry. Co.*, 124 I. C. C. 3, 34 (1927).

different carrier the commission adverted to its finding made in the former case upon substantially the same set of facts.[25]

The published reports of the state regulatory commissions are almost wholly silent upon the subject of judicial notice, although it is a "notorious" fact, at least to those who are interested in administrative law, that commissions actually do take judicial notice of many things. In a published decision the New York Public Service Commission stated that it took judicial notice of the fact that in recent years railroads have been subjected to increased costs of operation; that they have converted obsolete equipment to modern equipment; that they have installed safety devices; and that the cost of labor has increased.[26]

The absence of published statements to the effect that the several regulatory commissions have taken judicial notice of certain matters should probably be taken to indicate merely a failure to mention the fact, because of the lack of necessity for adhering strictly to the rules of evidence, rather than as showing that they have not actually taken notice of many things.

In a California case one of the questions before the court involved the power of a board of dental examiners to take notice of its own records and files for the purpose of ascertaining whether a dental license had ever been issued to a person who, it was alleged, had been illegally employed by respondent or appellant.[27] The court said: "There are, in addition to courts, certain boards and special tribunals for determining certain classes of rights; and while they are not strictly courts, they partake of their nature and their findings partake of the nature of judgments. The jurisdiction of such bodies rests upon the same basis as inferior courts, and they, too, may take judicial notice of certain matters."

In support of this decision the court cited a New York case where a local excise board, whose procedure was not prescribed by statute, were permitted to take judicial notice of the fact that their records showed a license for a hotel located at a certain place, and to utilize that fact in connection with the evidence taken, although no proof was offered that the premises where

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[25] *Chicago & North Western Ry. Co.*, 137 I. C. C. 1, 23 (1928).

[26] *Re Passenger Fares on N. Y. C. R.*, P. U. R. 1916E, 745.

[27] *Anderson v. Board of Dental Examiners*, 27 Calif. 336, 149 Pac. 1006 (1915); see also *Benton v. Industrial Commission*, 240 Pac. 1021, 1023 (Cal. 1925).

the alleged unlawful acts were committed had ever been licensed.[28]

In a court case we may consider that there are two "records," i. e., the one which records the institution of and all proceedings had in the case from beginning to end; and the other, the record of the hearing of the case, the trial.

A court will take judicial notice of every fact appearing in its full record in determining questions arising in the hearing or trial of the case. These facts are known to the court. No proof is necessary. In a valuation proceeding, for example, before a commission there is a full and complete record of what has been done by the commission and its employees and of all data gathered from start to finish. There is also a record of the evidence taken before the commission in support of the pleadings, if any. The commission has knowledge of all facts in the more comprehensive record.

Two cases before the Supreme Court were "not nominally between the same parties," but involved substantially the same subject matter in a reasonably direct way. The court reversed the first case pending; and when the second came up for decision, the question arose as to whether it could take judicial notice of the facts in the case the decision of which was reversed in determining the action to be taken in the second. The court said:

"The judgment complained of is based directly upon the judgment of the Supreme Judicial Court of Massachusetts, which we have just reversed. It is apparent from an inspection of the record that the whole foundation of that part of the judgment which is in favor of the defendant is, *to our judicial knowledge*, without any validity, force, or effect, and ought never to have existed. Why, then, should not we reverse the judgment which we know of record has become erroneous, and save the parties the delay and expense of taking ulterior proceedings in the court below to effect the same object?

"Upon full consideration of the matter we have come to the conclusion that we may dispose of the case here."[29] (Italics ours.)

The doctrine was reaffirmed in a criminal case where the court held that it might properly refer to the record which shows that the information charged the defendant with murder in the first degree,[30] citing the Butler case.[29]

In a later case the court referred to a record in that court in another case involving the same question, saying:

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[28] *People v. Board of Excise*, 17 Misc. Rep. 98, 40 N. Y. Supp. 741 (1896).

[29] *Butler v. Eaton*, 141 U. S. 240, 243 (1891).

[30] *Craemer v. Washington*, 168 U. S. 123, 127 (1897).

"As against this it may be said that the decree in the other suit was neither pleaded nor proved, and no question of *res judicata* can be considered unless the earlier decision is formally presented on the hearing of the later case. This, doubtless, is technically true, but we take *judicial notice of our own records*, and, if not *res judicata* we may, on the principle of *stare decisis*, rightfully examine and consider the decision in the former case as affecting the consideration of this."[31] (Italics ours.)

As to the propriety of an administrative body taking notice of knowledge gained in other proceedings a state court said:

"It appears from the report that the engineers of the board checked the inventory and the appraisal was subjected to a careful analysis by a study of the unit prices and a comparison of the prices used with similar figures used by the Board in other appraisal work. The prosecutor contends that the work of the engineers of the Board and the Board's comparison was not embodied in the record, and hence a result was arrived at and decision made outside of the record, which constitutes error. We think that the Board was within its powers in using the knowledge it had obtained in other proceedings of unit prices and in using its engineers to check the inventory."[32]

It may be stated with confidence that an administrative tribunal in the exercise of its quasi-legislative or legislative functions, which of necessity usually have a judicial aspect, may (1) take notice of anything which a court may judicially know; (2) take notice of many matters and things not cognizable by a court which may be within its own peculiar province of inquiry, knowledge of which is necessarily and justly imputed to them "by way of general outfit for the discharge" of their duties; and (3) invoke upon its own motion the doctrine of judicial notice.

But it must be remembered that an administrative body can not justify an arbitrary finding by the mere recitation that it is based upon matters and things within its own knowledge. This is particularly true where the finding or order is one which commands a party to do or refrain from doing something; or which grants or withholds authority, privilege, or license; or which extends or abridges any power or facility; or which determines any right or obligation. Such an order or finding is distinguishable from a mere formal record of conclusions reached after a study of data collected in the course of extensive research by the administrative body, such as the valuation of a utility's property made pursuant to statutory requirement, but to be used, if at all, as the basis for some future action in the

[31] *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 217 (1902).

[32] *City of Elizabeth v. Board of Utility Commissioners, et al.*, 99 N. J. Law 496, 123 Atl. 358 (1924).

form of an order which is judicially reviewable as are those above mentioned.[33]

Let us assume a hypothetical case. A board, pursuant to statutory mandate, is required to find the value of the lands of certain public utilities. It has tentatively found and published its finding of value for A's lands. A, under right granted by statute, protests the value tentatively found. The matter is set for hearing and A produces voluminous evidence, both testimony, including that of well qualified experts, and exhibits. After consideration of this evidence the board finds the value as tentatively fixed to be inadequate and accordingly increases it. This finding is published, pursuant to statute, as a final valuation of A's lands as of a given date.

Later B, whose lands are adjacent to those of A, protests against the value assigned its lands and in a hearing submits evidence intended to support a value per unit, i. e., per square foot, for example, materially higher than that finally fixed for A's land.

The lands of A and B are located on a harbor and are terminal lands. The board in A's case received evidence as to the geography, topography, and geology of the territory. It was informed as to the population, development, and tonnage of the port, of the character of the shipping and the harbor facilities. In short, the board received in minute detail all data, statistics and information relevant to the value of lands at this point.

Now B insists that it has a *right* to present any matter relative and material, which it may choose to present in support of its protest. Its *right,* according to B, is the provision of the statute which provides that the board *shall* hear and consider any matter relative and material to the issue in protest which *may* be presented by the protestant.

To receive B's evidence, which is practically identical with that of A except for the conclusions drawn therefrom by B's expert witnesses, would take weeks of time in hearing and would be repetitious of matters already actually known to the board. But B argues that it was not a party to A's case, that it had no opportunity to present evidence or cross-examine witnesses, that it should be permitted to proceed in its own way, and that it should not be "prejudiced" by any finding made with respect to A's lands.

The administrative body in this case is confronted with the

[33] Los Angeles case, note 23, *supra.*

difficult task of determining upon a course of procedure which will not be violative of due process, a *hearing* having been made mandatory, and yet preserve its own right to regulate the character and extent of evidence particularly to prevent cumulation.

To meet the requirement for due process of law, the leading cases, involving situations where a hearing is mandatory, appear to hold that the hearing may be such as is *practicable* and *reasonable* in the particular case, but it must give the party an *opportunity* to be heard and to be heard *effectively*.[34]

It would be neither practicable nor reasonable to permit the cumulation of evidence already before the board. The practical difficulty arises when an attempt is made to perfect the record in B's case by incorporating therein, by reference or otherwise, evidence on matters common to both it and A's case which was taken in the hearing upon A's protest. Undoubtedly the tribunal has already received unnecessarily in A's case evidence upon many matters which could have been and should have been made a matter of judicial cognizance. But, when B attempts to present evidence respecting the geography, topography, industrial and commercial development, and port and harbor facilities, the tribunal may very properly exercise its power to invoke the doctrine and exclude evidence on these subjects, with a direction to the party to make reference in its brief or otherwise to the matters of which it desires the tribunal to take notice with appropriate citations to the sources of information.

Now assume that A has also produced in support of its proposed land value data with respect to actual real estate transactions in the vicinity, and the details of these transactions are not only in the record made in A's case but independently thereof in the files of the commission. These data are not of such character as would make them judicially cognizable, unless the fact that the record made in another case before the tribunal contained the same data or the tribunal had acquired the data in its preliminary investigation, might make them judicially noticeable.

It is inconsistent with the theory that an administrative body is presumed to be especially equipped to decide matters presented

[34] 6 *Ruling Case Law*, 449; *Kwoch Jan Fat v. White*, 253 U. S. 454; *Chin Yow v. U. S.*, 208 U. S. 8; *Tomlinson v. Board*, 88 Tenn. 1, 12 S. W. 414, 6 L. R. A. 204; *San Christiana v. San Francisco*, 167 Cal. 762, 141 Pac. 384, 52 L. R. A. (N. S.) 676, 681; *Denver v. Investment Co.*, 49 Colo. 219, 112 Pac. 789, 33 L. R. A. (N. S.) 395; *Windsor v. McVeigh*, 93 U. S. 274.

to it, and is given great latitude in the conduct of its hearings, to conclude that it could not avail itself of the information and data already actually in its possession without having to permit a petitioner to go through the useless formality of presenting these data which actually are as well known to the commission as matters of fact of which it is presumed to have knowledge. The tribunal would be justified in compelling the party to make a comparison of the data offered with those already before the commission and produce evidence only with respect to data, if any, which were not already before it. If the party should decline so to do, it is extremely unlikely that a court would find that the party had been denied an opportunity to be heard, and to be heard effectively.

Let us assume that in the decision of B's case the commission has before it the record made by B in its hearing, the information and data of which it took notice because already before it, all the conditions and circumstances of which it properly takes judicial notice, and finally the finding which was made in the other case as to the value of A's land. We have seen above that administrative bodies actually do take notice of their findings made in other cases concerning entirely different parties,[35] although the propriety of so doing, it is believed, has not been passed upon by a higher court. In our assumed case it would appear to be nothing short of ridiculous to deny the administrative body the right to notice its previous finding especially where the evidence showed that the lands of both A and B are of substantially the same value and where B was unable to produce evidence materially different from that produced in the former case. It should be borne in mind that no question is here involved relative to the propriety of incorporating in one record the testimony taken in another proceeding upon the motion of one or the other parties to the present hearing. The assumed hearing is not of an adversary character. The only question is whether the tribunal itself had the right to minimize the record by considering the evidence received in a former hearing involving identical issues and whether its finding in the former hearing could properly be considered in its finding in the latter. Both questions should be answered in the affirmative.

It is undeniable that adminstrative bodies continually receive evidence, merely cumulative of data which they have in their files or in records previously made; and worse still, hear testi-

[35] See note 25, *supra*.

mony and receive exhibits in proof of facts which they might notice judicially without evidence. Matters of the latter character should be presented to the commission in such a form that its attention would be directed to the facts the party desires to bring to its attention, with appropriate references, if necessary. On the other hand, where the tribunal makes a finding apparently not supported by the evidence presented by the party, but based upon data and information of which it has actual and/or judicial knowledge, the finding of the tribunal should with some degree of explicitness state the facts upon which its finding is based.

Upon principle there is every reason for according to administrative tribunals the widest latitude in taking judicial notice, especially of subject matter embraced in the special field where the tribunal has been given jurisdiction. Indeed, unless this is done, the board or commission becomes gradually hardened into the mold of a sort of inferior court with all of the slowness of procedure characteristic of judicial institutions. It cannot too often be recalled in considering matters of this kind that one of the impelling reasons for the creation of administrative tribunals was to avoid the slow and laborious processes of the courts which proved unsuitable for the solution of the innumerable and ramified problems of a complex modern system. Again, while there are controversies between opposing parties before adminstrative boards and tribunals, it is, nevertheless, true that the decision rendered is often one affecting many other persons, and, not infrequently, great sections of the general public. In essence, the administrative tribunal is not a judicial institution for the settlement of private controversies.

A great deal of reliance should be placed in the fairness and soundness of judgment of the board or commission in the exercise of its function of taking judicial notice. But, of course, mistakes will be made. In those cases a sufficient remedy would be afforded by permitting the party injured to prove, in seeking to enjoin the order complained of, the erroneousness of the fact which the board or commission had supposed to be true. This would provide a satisfactory practical remedy and should have the further advantage of preventing a reversal of the order upon the wholly technical complaint that the tribunal had gone outside of the record. There is no harm in going outside of the record by taking judicial knowledge of a fact whose correctness is undisputed. A distinction must here be made, however, between facts recited in the opinion or order of the commission and those

which may have influenced its action but which appear neither in the record of evidence nor in the opinion or order. In the latter case it would be necessary in order to avoid opening the door to arbitrary action to hold that the essential fact of which judicial notice is taken must at least appear in the opinion or order rendered.