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CHAPTER 33

Evidence

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§33.1. Judicial notice: State administrative regulations. During the 1957 SURVEY year two cases came before the Supreme Judicial Court on appeal from decrees entered on findings by the Industrial Accident Board that the injury of the employee in the one case and his death in the other were not caused "by reason of the serious and wilful misconduct of an employer or any person regularly intrusted with and exercising the powers of superintendence," under G.L., c. 152, §28.[1]

In *Juozapaitis's Case*,[2] the Board found that the employer had employed a known minor without a work permit in violation of G.L., c. 149. The Court reversed the decree for failure to apply Section 28, which provides expressly that such employment "shall constitute serious and wilful misconduct." This case is, of course, an example of the common application of the rule that the Industrial Accident Board, like the courts, is bound to notice judicially and apply domestic law which is in the form of statutes of general application.

In the second of the cases, *Diaduk's Case*,[3] the claimant relied upon a violation of a regulation of the Department of Labor and Industries. The single member found that the employer's negligence and failure to comply with the regulations caused the death of the employee but further found that disregard of the regulations did not constitute serious and willful misconduct nor wanton or reckless disregard of its probable consequences, and dismissed the claim. The reviewing board affirmed. The Supreme Judicial Court said that it would in any event affirm the decree denying the claim since the issue of serious and willful misconduct of the employer is a question of fact upon which the burden of proof is on the claimant, and that the finding that the burden had not been sustained was not improper. A decision on this basis would have been of a routine nature.[4]

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§33.1. [1] As amended by Acts of 1943, c. 529, §9. For further comment on these cases see §30.2 *supra*.

[2] 335 Mass. 137, 138 N.E.2d 756 (1956).

[3] 1957 Mass. Adv. Sh. 623, 142 N.E.2d 356.

[4] The decision accords with the general rule that a violation of law, even of a

However, the foregoing remarks of the Court purport to constitute dicta only for the decision was placed upon another ground which has disturbing implications. The opinion states that the single member and the reviewing board took judicial notice of the regulations and appended a citation indicating its approval of this action.[5] As has already been noted, violation of the applicable regulations was found as a fact by the Board. The opinion also recites that the claimant's brief laid stress upon the regulations. The Court then states:

> but a close examination of the record fails to disclose that these regulations were introduced in evidence at the hearing before the single member. It is true that mention was occasionally made of such regulations but at no time were they formally placed before the single member "by some one of the recognized methods by which facts may be agreed upon or evidence introduced." We cannot take judicial notice of such regulations.... In the absence of these regulations there was no evidence before us that the death of the employee was caused "by reason of the serious and wilful misconduct of... [the] employer." [6]

Finlay v. Eastern Racing Assn., Inc.,[7] cited by the Court as authority for the decision, bears a surface similarity to the principal case, inasmuch as in the *Finlay* case, where rules of the State Racing Commission had not been placed in evidence or agreed upon before the trial court, the Court refused to notice them judicially on appeal. The Court in the *Diaduk* case has attempted to assimilate the cases further by using langauge "It is true that mention was occasionally made of such regulations," [8] which would have been apropos in the *Finlay* case, in which the opinion stated "Whether or not the judge saw the 'rule book' does not appear," [9] but which hardly seems adequate in reference to the *Diaduk* proceeding, in which both the single member and the reviewing board had judicially noticed and expressly found a violation of the applicable regulation.

However, the cases are clearly distinguishable. The Court has never held nor even intimated that a trial court should or could judicially notice such regulations. The *Finlay* case is the leading case on the point and holds that domestic law in the form of state administrative regulations is treated in the courts, both trial and appellate, as a pure question of fact. But to hold that the *Finlay* decision either re-

criminal statute, is merely evidence of negligence as to the consequences thereby intended to be prevented. See Milbury v. Turner Center System, 274 Mass. 358, 174 N.E. 471 (1931).

[5] 1957 Mass. Adv. Sh. 623, 624, 142 N.E.2d 356, 357. The Court cited Sciola's Case, 236 Mass. 407, 414, 128 N.E. 666, 672 (1920). On the cited page appears the statement "The Industrial Accident Board could take judicial notice of these rules," referring to regulations of the State Board of Labor and Industries.

[6] 1957 Mass. Adv. Sh. 623, 624, 142 N.E.2d 356, 357.

[7] 308 Mass. 20, 30 N.E.2d 859 (1941).

[8] 1957 Mass. Adv. Sh. 623, 624, 142 N.E.2d 356, 357.

[9] 308 Mass. 20, 27, 30 N.E.2d 859, 863 (1941).

quires or justifies a refusal by the Supreme Judicial Court to notice such regulations judicially on the review of a hearing before an administrative tribunal where such judicial notice is proper, is to create a hybrid procedural variant in administrative proceedings whereby these domestic laws are treated as law at the trial and as fact on review. Such an appellate procedure might well result in reversal of a decision perfectly proper to the tribunal below.[10] To avoid such a result counsel, despite the power of the administrative agency to notice such regulations judicially, should at the trial either obtain a stipulation of the text of the relevant regulations and see that the fact and content of the stipulation is inserted in the record, or, failing such stipulation, introduce the regulations in evidence and formally request an express finding of fact thereon.

Domestic law in the form of municipal ordinances[11] and town bylaws,[12] as well as state administrative agency regulations, is in Massachusetts courts treated as a question of fact to be proved by evidence and, when necessary, pleaded. The writer has earlier suggested[13] that it is anomalous for our courts to treat as pure fact these areas of domestic law when foreign law and federal administrative agency regulations must be judicially noticed upon being called to the attention of the trial court with adequate particularity,[14] and in any event may be the subject of discretionary judicial notice on appeal to the Supreme Judicial Court.[15]

[10] Such a possibility, in the converse situation, has been recognized and prevented by the United States Supreme Court. It generally judicially notices the law of the several states but, in reviewing a decision of a state court on a question arising under the full faith and credit clause of the Constitution, it limits the scope of its own judicial notice of the law of another state to that proper to the tribunal from which the appeal is taken. Hanley v. Donoghue, 116 U.S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535 (1885). Cf. Bay State Wholesale Drug Co. v. Whitman, 280 Mass. 188, 182 N.E. 361 (1932).

[11] Fournier v. Central Taxicab Co., 331 Mass. 248, 118 N.E.2d 767 (1954).

[12] See Mahar v. Steuer, 170 Mass. 454, 456, 49 N.E. 741, 742 (1898). To these might be added "private" acts of the legislature, but these are of little practical importance in the trial of cases generally. See Burnham v. Webster, 5 Mass. 265, 268 (1809).

[13] 1954 Ann. Surv. Mass. Law §26.3.

[14] *Foreign law:* Acts of 1926, c. 168, §1, now G.L., c. 233, §70; Richards v. Richards, 270 Mass. 113, 169 N.E. 891 (1930). *Regulations of federal administrative agencies:* Acts of 1935, c. 417, §7; 44 U.S.C. §307 (1952); Mastrullo v. Ryan, 328 Mass. 621, 105 N.E.2d 469 (1952).

[15] Bradbury v. Central Vermont Ry., 299 Mass. 230, 12 N.E.2d 732 (1938); Walker v. Lloyd, 295 Mass. 507, 4 N.E.2d 306 (1936). See Ralston v. Commissioner of Agriculture, 334 Mass. 51, 133 N.E.2d 589 (1956).

Whether the trial court also may in its discretion judicially notice foreign law and federal administrative regulations in the absence of their being called to its attention with adequate particularity has not yet been definitively stated. See, as to the former, Medeiros v. Perry, 332 Mass. 158, 124 N.E.2d 240 (1955); Seeman v. Eneix, 272 Mass. 189, 172 N.E. 243 (1930); Richards v. Richards, 270 Mass. 113, 169 N.E.2d 891 (1930); and, as to the latter, Mastrullo v. Ryan, 328 Mass. 621, 105 N.E.2d 469 (1952). Cf. Ralston v. Commissioner of Agriculture, 334 Mass. 51, 133 N.E.2d 589 (1956), and cases cited.

While it is true that the treatment accorded foreign law and federal regulations is the result of statutes, it is not beyond the power of the Court to hold that domestic law should be treated similarly, and that requirements that there be an adequate citation by one intending to rely thereon and a spelling out in the record of the tenor of the law judicially noticed would remove the commonly stated objections of complexity and ordinary unaccessibility of the text of such forms of law. Failing decisions by the Court to that effect, the General Court might well favor these areas of domestic law with statutory attention similar to that which it has given to foreign law.

§33.2. Judicial notice: Validity of blood-grouping tests. In *Commonwealth v. Stappen*[1] the Court judicially noticed that, because of their scientific accuracy, expert testimony of blood-grouping tests was admissible in suits involving paternity of children, but held that an order to submit to blood-grouping tests could not be made under the authority of G.L., c. 273, §12A.[2] The case is discussed elsewhere in the 1957 SURVEY.[3]

§33.3. Inference, presumption and prima facie evidence. Certain sets of basic facts may be expected to recur fairly frequently in litigation on particular issues of general importance. Whether such facts are legally relevant and admissible so as to furnish a basis on which the facts in issue may be established, and if they are, whether such relevance operates as a matter of law by way of inference (either logical or merely legally permissive), presumption or prima facie evidence are often questions of some complexity. Some noteworthy illustrations are found in cases decided during the current SURVEY year.

Cause of death: Accident or suicide. In *Krantz v. John Hancock Mutual Life Insurance Co.*[1] the beneficiary of a life insurance policy sought to recover under double indemnity provisions for the accidental drowning of the insured. The defendant insurer filed a motion for summary judgment on the ground that the plaintiff had failed to furnish "due proof" of the death of the insured caused solely by accident and not by suicide, as required by the policy. The trial judge ruled that the proof was insufficient as a matter of law and ordered judgment for the defendant. The plaintiff excepted.

The proof submitted to the insurer included affidavits tending to prove the following facts. The insured had a happy home life, was in good health and spirits and free from financial or other worries prior to an automobile accident in which he lost consciousness and was taken to a hospital. He said the accident resulted from his vision

§33.2. [1] 1957 Mass. Adv. Sh. 815, 143 N.E.2d 221. The case was an indictment for non-support.

[2] This section, added by Acts of 1954, c. 232, was commented on in 1954 Ann. Surv. Mass. Law §26.2. By its terms the act is limited in application to proceedings to determine paternity.

[3] See §23.5 *supra.*

§33.3. [1] 1957 Mass. Adv. Sh. 557, 141 N.E.2d 719. For further comment on this case see §28.1 *supra.*

becoming blurred while driving and complained of injury to his head. After treatment he left the hospital and went to the police station and to the garage to which his car had been towed. Late that same afternoon his jacket, with his automobile keys and wallet, was found on the bank of the Charles River near the place where he was accustomed to go to lie in the sun for relaxation after work. The weather that day was good, the sun shone, and the temperature in the afternoon reached 67°. The bank of the river at that place sloped in such a manner that one who lost his balance on the bank might accidentally fall into the river. The next day the drowned body of the insured was found in the river nearby.

The Court pointed out that "proof" means evidence in some form calculated to convince or persuade the mind, though not necessarily in form admissible in a court of law, and that "due proof" is evidence proper and sufficient in the opinion of the court, not that of the insurer.

The facts stated in the affidavits would, of course, give rise to a presumption that the death of the insured was non-suicidal. In evaluating this evidence, however, the Court held that it would not only raise the "legal presumption" against suicide but would also warrant a finding of accident both on the basis of "the inference which may be drawn from the usual conduct of mankind in the face of the normal strong urge to life and the compulsions of law and religion against self-destruction,"[2] and on the basis of the particular facts, operating as "circumstantial evidence supporting the inference of accident."[3]

The necessity for and importance of this ruling arises from the presence in the case of evidence of suicide. The plaintiff's proof submitted to the insurer included a certified copy of the record of death and a photostatic copy of an autopsy report by the medical examiner. Both of these documents originally contained statements which the plaintiff admittedly had deleted by obliteration from the copies before submitting them to the insurer. The defendant's affidavit supporting its motion for judgment showed that the statement so deleted from the death certificate was "Suicide during temporary state of insanity." The plaintiff had also crossed out printed matter on the "Proof of Death" form supplied by the insurance company that would bind her to all declarations in the documents.

The Court held that it would not construe the insurance contract as requiring in effect that the plaintiff accept the opinion of the medical examiner as conclusive of her rights. It also held that although the same result could have been obtained by filing the documents without deletion, accompanied by an unequivocal disclaimer of the statements as to suicide, the course followed by the plaintiff showed emphatically an intent to disclaim and disavow that evidence and that she was therefore not bound thereby. The Court said that no intent to deceive or take unfair advantage was present and no

2 1957 Mass. Adv. Sh. at 564, 141 N.E.2d at 725.
3 Ibid.

prejudice to the insurer resulted, as the information furnished would direct it to the public records for the further facts.

In a letter accompanying the proof, the plaintiff stated in connection with the deletions that she had been informed by counsel that the opinions as to cause of death appearing on the record of death and on the autopsy report were not admissible in evidence in the event of litigation. The Court pointed out that while it was true that the autopsy report would be inadmissible (as hearsay opinion), G.L., c. 46, §19 provides that "The record of the town clerk relative to a . . . death shall be prima facie evidence of the facts recorded," and G.L., c. 38, §7 and c. 46, §1 require in effect that the medical examiner give an opinion as to accident or suicide and that the clerk record it in the record of facts as part of the cause and manner of death.

In a case in which the medical examiner's opinion is based upon his superior knowledge applied to physical findings indicative to the medical expert of a particular disease or injury, it is admissable as expert opinion since it can be of real assistance to the jury, who do not have such learning. In the *Krantz* case, however, the facts are such that any inference as to suicide or accident is not a proper subject of expert opinion since the medical examiner is no better qualified to draw the inference than is the jury. Nevertheless, the opinion of the medical examiner contained in the record of death is admissible in evidence, not because of any probative force inherent in it but solely by virtue of the statute, which not only makes it admissible but ascribes to it the effect of prima facie evidence.

In the principal case, this prima facie evidence of suicide dissolves the presumption of accident raised by the facts stated in the affidavits submitted as proof. Under well-settled Massachusetts rules of evidence, there is then presented a case for the fact-finder to be decided on the basis of the opposing inferences remaining in the evidence, with the burden of proof upon the plaintiff. The Court so held, sustaining the plaintiff's exceptions to the ruling of the lower court that the plaintiff's case was insufficient as a matter of law.

The crucial point in the opinion is the holding that the plaintiff's proof created an inference as well as a presumption of accidental death. Had the Court held that the proof had given rise only to the presumption, the presence of the prima facie evidence of suicide would have dissolved the presumption, leaving the plaintiff with nothing by the way of evidence.[4] The holding that the proof had raised an inference as well left her with a case for the jury despite the dissolution of the presumption.

The decision is sound. Although the Court did not say so, however, when it held that there was an inference against suicide arising from the usual conduct of mankind (as distinguished from the circumstantial evidence created by the particular facts of this case), in effect it

[4] Epstein v. Boston Housing Authority, 317 Mass. 297, 302, 58 N.E.2d 135, 139 (1944), and cases cited.

was holding that what it called the "legal presumption" against suicide is in reality prima facie evidence of non-suicidal death. Prima facie evidence, in the technical sense in which the term is used in Massachusetts, means evidence which raises both an artificially compelling presumption and an inference.[5]

There was therefore presented prima facie evidence on both sides of the issue of suicide. When prima facie evidence thus meets prima facie evidence, as a matter of law the artificial compelling force of each is dissolved (as in the case of conflicting presumptions)[6] leaving the issue to the jury on the underlying opposing inferences.[7]

The inference which underlies the presumption in prima facie evidence may be either truly logical or merely permitted by law. It appears that the Court here ruled that the inference of accident was logical, on the basis of common experience and knowledge, and the inference of suicide created by the medical examiner's report was not logical but merely legally permissive. The plaintiff is of course also aided by the inference, also logical, which the Court held was created by the particular facts in the proof operating as circumstantial evidence of accident.

Appeal from a zoning board of appeals: "Person aggrieved." Marotta v. Board of Appeals of Revere[8] is another case in the field of evidence which the Court carried to closely reasoned conclusions. It arose on a bill in equity, by way of appeal under G.L., c. 40A, §21, from a decision of the board of appeals granting a variance. The Superior Court ruled that the board did not exceed its authority in allowing the variance and entered a decree thereon from which the plaintiffs appealed.

A ruling of special interest in the field of evidence came as the result of the defendant's contention — apparently raised for the first time before the Supreme Judicial Court — that the appeal must fail because it did not appear that the plaintiffs were "persons aggrieved" by the allowance of the variance, a requisite for jurisdiction in the Superior Court to entertain the appeal. On this point the judge found that the plaintiffs "are property owners determined by the board of appeals of Revere to be within the neighborhood affected by the petition" for variance.

The statute governing notice of a hearing on a petition for a variance, G.L., c. 40A, §17, requires, inter alia, that the board of appeals shall send notice "to the owners of all property deemed by the board to be affected thereby." The Court held that "it is reasonable to hold that there is a presumption that property owners to whom the board in the performance of its statutory obligation has sent notice as per-

[5] Cook v. Farm Service Stores, Inc., 301 Mass. 564, 17 N.E.2d 890 (1938).

[6] Turner v. Williams, 202 Mass. 500, 89 N.E. 110 (1909).

[7] Boyas v. Raymond, 302 Mass. 519, 20 N.E.2d 411 (1939); Lexington v. Ryder, 296 Mass. 566, 6 N.E.2d 828 (1937).

[8] 1957 Mass. Adv. Sh. 841, 143 N.E.2d 270.

experience with purely local factors entering into determination of value, in the absence of peculiar circumstances, would seem to be unnecessary.

A similar position was taken by the Court in *Newton Girl Scout Council, Inc. v. Massachusetts Turnpike Authority*,[5] involving a partial taking of wooded land whose best use was a camp. The trial court excluded testimony of the head of the real estate department of the National Bureau of Private Schools, with thirty years of experience in surveying property suitable for camp and school purposes all over the country, on questions dealing with the feasibility of continued operation of a resident camp on the land remaining to the petitioner after the taking. The apparent primary ground of exclusion was that the witness was not engaged in buying and selling real estate in Massachusetts. Holding the expert to be obviously qualified in the general field of use of real estate for camps and schools, and that the questions asked were pertinent to the specialized value of this property, the Court ruled the exclusion error.

§33.5. Hearsay: Prior identification. Identification of an individual in the courtroom by an eyewitness is often a dramatic procedure, particularly in the trial of a criminal case. It is clear upon reflection that by the time the witness makes the gesture in the courtroom, it usually comes as a foregone conclusion as a result of intervening events leading up to the trial. Nevertheless, the performance is apt to impress a jury greatly.

It is obviously proper to permit attack upon the weight to be given to a courtroom identification by a showing that on a prior occasion the witness identified someone else as the same person, as the Court held in *Commonwealth v. Roselli*.[1] A totally different problem is presented when a party seeks to prove that a witness who has made a courtroom identification had on a prior occasion also identified the same person. Some courts have held that the prior accusation is offered — or will be used by the jury — as evidence that the identified person committed the act in question. For this purpose, the evidence would clearly be objectionable as irrelevant or hearsay, and on this reasoning these courts exclude the evidence.

However, its admission may be justified, as an exception to the general rule, for the limited relevant and non-hearsay purpose of merely establishing the fact of the prior consistent identification of the same person as circumstantial evidence corroborative of the accuracy of the later courtrom identification. Massachusetts, the federal courts and a majority of the states so hold. The Massachusetts view was restated and affirmed in *Commonwealth v. Locke*.[2]

§33.6. Proof of value: Damages in land taking. The unprece-

[5] 335 Mass. 189, 138 N.E.2d 769 (1956).

§33.5. [1] 335 Mass. 38, 138 N.E.2d 607 (1956). For further comment on prior identification see §23.4 *supra*.

[2] 335 Mass. 106, 138 N.E.2d 359 (1956).

dented program of land taking entailed in the extensive highway development programs of the Commonwealth in recent years has produced a spate of land damage cases at the trial level and, as would be expected, many questions therein raised continue to furnish grist to the mill of the Supreme Judicial Court. Limitations of space permit notice of the evidence aspects of only a few of these cases.

In *Newton Girl Scout Council, Inc. v. Massachusetts Turnpike Authority* [1] there was a partial taking of land devoted to use as a camp, which was also its highest and best use. The land was well developed, with living and service quarters suitable for a camp but not for usual residential purposes. There was evidence that the remaining land would be practically valueless for camp purposes. There was also evidence, as the Court judicially noticed, that there is no very active market in such property and that sales of comparable property are not common.

In such cases, as was shown in the opinion by ample citation of Massachusetts precedents,[2] resort must be had to valuation data other than that of market value. Knowledge of values of local land suitable for ordinary residential or commercial use is not as helpful as knowledge of comparable specialized properties and their use and demand over a wide geographical area. Expert opinion testimony as to the real value of the land for the specialized use is admissible in such cases.[3]

It was also held error to admit over objection hearsay testimony (even by an expert) as to the price paid on a sale of other comparable land. The distinction therein made is clear. If an expert is giving his own opinion as to value, he may utilize information derived from such hearsay as a basis for and state it as a ground of his opinion. But where the evidence of the sale price of other land is itself offered directly on the issue of market value, it may not be established by hearsay evidence. The Court held that where the sale price is offered for this purpose a party to the sale must be produced who can be subjected to cross-examination.

Rental value of the land whose value is in issue on a taking is admissible as some indication of its fair market value. However, it was held in *Wenton v. Commonwealth* [4] that evidence of the rental value of another parcel of land is not admissible on that issue, even though the premises are comparable, so that a price paid on a sale of the other land would be admissible. The probative worth of rental value of other land was held to be not sufficient to justify the multiplication of issues and fact finding which its admission would necessarily entail.

In *Ford v. Worcester* [5] cross-examination of one of the petitioners

§33.6. [1] 335 Mass. 189, 138 N.E.2d 769 (1956).

[2] See Ford v. Worcester, 1957 Mass. Adv. Sh. 581, 142 N.E.2d 327, noted below in this section.

[3] Muzi v. Commonwealth, 335 Mass. 101, 138 N.E.2d 578 (1956).

[4] 335 Mass. 78, 138 N.E.2d 609 (1956).

[5] 1957 Mass. Adv. Sh. 581, 142 N.E.2d 327.

had brought out the price paid by them for the land taken. The purchase price having thus been made relevant, petitioners offered testimony to show that the sale to them was at a reduced price because of the entry of the former owners into military service. Exclusion of this evidence was held to be error. Such pressure on the sellers was held to be relevant and evidence thereof admissible, even though it did not amount to proof of compulsion.

Evidence of compulsion would dissolve the presumption that a sale price otherwise relevant to the issue of value was fixed freely and not under compulsion, and in the absence of evidence of non-compulsion, would render the other sale price inadmissible on the issue of value.[6] While the offered evidence would not rebut the presumption, it would reduce the weight to be given to the sale price as evidence, and for this purpose it was admissible.

In *Onorato Brothers, Inc. v. Massachusetts Turnpike Authority,*[7] petitioner offered evidence as to the amount remaining due upon a mortgage on the land taken on the issue of its market value. The Court held that the trial judge rightly excluded this evidence because there was no proof that the mortgage balance in this instance had any relation to the value of the property taken. Since the Court was apparently of the opinion that in a proper case relevance of mortgage value to at least the minimum market value of land might be shown, it avoided laying down a general rule to the effect that evidence of mortgage value is always to be excluded in eminent domain matters. The only Massachusetts case cited on the matter,[8] while its implications would favor a general rule of exclusion, is not squarely in point. The opinion in the principal case therefore indicates that evidence of mortgage value, which might well have been thought to be always inadmissible as remote, may on a proper showing be held to be relevant and admissible.

[6] See Epstein v. Boston Housing Authority, 317 Mass. 297, 58 N.E.2d 135 (1944).
[7] 1957 Mass. Adv. Sh. 675, 142 N.E.2d 389.
[8] Peirson v. Boston Elevated Ry. Co., 191 Mass. 223, 231-234, 77 N.E. 769, 772-774 (1906)