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Judicial Notice of Foreign Law

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I. INTRODUCTION

A fundamental cleavage exists between the two methods of viewing judicial notice. Both views must be understood before the doctrine of judicial notice can be said to have a real meaning applicable to the whole variety of legal problems which arise today. This understanding must be achieved before many of the seeming inconsistencies in what has been written about the doctrine can be clarified. Finally, this basic understanding must be had if any comprehension of the operation of judicial notice in any specific field of law is possible.

This discussion will deal primarily with judicial notice of foreign law. Around this base, several tangential subjects will be developed. First and foremost, a rather detailed development of the doctrine of judicial notice will be presented in an attempt to achieve the requisite basic understanding. Secondly, some consideration will be given to the use of judicial notice in specific areas apart from that of foreign law. Finally, some discussion of the use of foreign law generally, other than the taking of judicial notice thereof, is essential. This will be accomplished by examining the primary means by which foreign law is introduced in a trial: The proof of foreign law and the presumption of similarity which the court of the forum will indulge in with respect to the law of a foreign state.

II. JUDICIAL NOTICE: WHAT IS IT?

Professor Wigmore highlights the "anamolous meanings of the term Judicial notice" and details the usages thereof, both traditional and common.[1] This variety of usages has no special relevance here, except to illustrate the looseness with which the doctrine of judicial notice is often treated. The important conflict occurs with respect to the different theories as to the nature and effect of judicial notice.

A. *Two Views—The Conflict*

1. *Wigmore's Theory.*—Professor Wigmore advances the thesis that the effect of judicial notice is its non-conclusiveness on the matter in dispute. Reasoning from nature to effect, his argument is basically that judicial notice is nothing more than the concept that a "matter"[2]

1. 9 WIGMORE, EVIDENCE § 2566 (3d ed. 1940) [hereinafter cited as WIGMORE].

2. There is little point at this stage in the discussion of becoming entangled by using the concepts of "facts" or "law." The differences between the various "matters" of which judicial notice may be taken will be evaluated at an appropriate time in the development of the subject of judicial notice.

is taken as true without adhering to the usual formal requirements of proof. Therefore, one's "opponent is not prevented from disputing the matter by evidence, if he believes it disputable."[3] These conclusions flow easily, of course, from the underlying conception of "judicial notice [as] an expedient for hastening the trial and eliminating superfluities."[4]

This viewpoint virtually labels judicial notice as a presumption, with the matter which is so noted being subject to rebuttal in every case. The view is supported by a number of scholars in the field of evidence.[5] Professor Thayer, in his excellent discussion of the development of judicial notice, concluded that it does

> not necessarily [grant] anything more than a *prima facie* recognition, leaving the matter still open to controversy. [I]n very many cases, then, taking judicial notice of a fact is merely presuming it, *i.e.*, assuming it until there shall be reason to think otherwise.[6]

Carrying this conception of judicial notice to its logical conclusion, should a court notice that Missouri is east of the Rocky Mountains, a party may yet attempt to prove that the State is indeed west of the Rocky Mountains, *if he believes it to be disputable.* Whether this belief need be reasonable would require a further refining of the theory which, at this point, would not be profitable. The important point is that this view of judicial notice does not give the doctrine a very great important in defining matters essential to the litigation.

2. *Morgan's Theory.*—Professor Morgan, on the other hand, sets forth a substantially different nature-effect conception of judicial notice:

> Just as the court cannot function unless the judge knows the law and unless the judge and jury have the fund of information common to all intelligent men in the community as well as the capacity to use the ordinary processes of reasoning, so it cannot adjust legal relations among members of society and thus fulfill the sole purpose of its creation if it permits the parties to take issue on, and thus secure results contrary to, what is so notoriously true as not to be the subject of reasonable dispute, or what is capable of immediate and accurate demonstration by resort to sources of indisputable accuracy easily accessible to men in the situation of members of the court. This, it is submitted, is the rock of reason and policy upon which judicial notice of facts is built.[7]

3. 9 WIGMORE § 2567, at 535.

4. *Id.* at 536.

5. Among these are: THAYER, EVIDENCE AT THE COMMON LAW 277-312 (1898) [hereinafter cited as THAYER]; TRACY, EVIDENCE 44-54 (1952).

6. THAYER 308-09.

7. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 273-74 (1944) [hereinafter cited as Morgan, 57 HARV. L. REV.]. While this basis for judicial notice is attributed here by Professor Morgan only to facts, the reasoning inherent in his analysis will be developed later to show that it applies to facts as well.

This concept involves several integral parts.[8] The first of these is that the sole purpose of a judicial system is the adjustment of legal relations. This being so, that system must use all reasonable efforts to arrive at such an adjustment without allowing unnecessary controversy. When the probability of a matter is so great as to make the truth of the proposition notoriously indisputable among reasonable men, or when its existence is capable of accurate demonstration, judicial notice of that matter must be taken. The fact that the trial may be expedited by the use of judicial notice—the foundation stone on which Professor Wigmore's theory of judicial notice is constructed—is irrelevant to this concept of judicial notice. It is, of course, an advantageous by-product when its presence is felt; it should not, however, be its *raison d'être*.[9]

At this point the "mechanical" aspects of Professor Morgan's theory of judicial notice should be spelled out. A matter which is judicially noticeable does not simply appear to the court as "revealed truth." Actions of the parties to a lawsuit and by the judge are required to determine whether a matter is to be judicially noticed. It is proper for a judge to take judicial notice of a matter on his own. Should he do so, however, he should notify the parties of this fact, as well as the reasons for which he is taking judicial notice. A challenge to such action should even be allowed, for, in no case, can the judge be allowed to take judicial notice of a factual matter merely because he believes the matter to be indisputable.[10]

In the more likely event in which one of the parties moves for the taking of judicial notice, that party should be allowed to present to the judge any and all sources of information in establishing the propriety of judicial notice. The opposing party should likewise be given the opportunity to present information denying that the matter sought to be judicially noticed is a proper subject for such notice. This process should not be subject to the strict rules of evidence; the jury should not be allowed to play any part in this determination. The final judgment as to whether the particular matter is susceptible of being judicially noticed should rest with the judge. The procedural effect of taking judicial notice necessarily is to remove the matter

8. Professor Morgan has detailed these parts and examined the general problems involved. Morgan, 57 HARV. L. REV. at 269-72.

9. It need not be true in all cases that the taking of judicial notice will expedite the trial. The basic function of judicial notice is to keep the jury from the necessity of reaching a determination on a matter which cannot reasonably be disputed. The fact that this will generally speed up the conduct of the trial should not be used as the major basis for the doctrine of judicial notice.

10. It has been noted, perhaps too often to warrant comment here, that the judge must not be allowed to take judicial notice in this manner of some matter which, because of personal knowledge, he believes to be indisputable.

from dispute in the lawsuit. If judicial notice is not taken, the matter remains one subject to proof, with the trier of fact then being required to make its usual factual determination on the matter.[11]

Three discernible gradations in Professor Morgan's view demand examination. These concern the types of propositions which may be judicially noticed and the proof required as a condition to their being noticed. A matter which the judge knows only of his own personal knowledge is not properly subject to judicial notice. For example, in a tort action arising out of an automobile accident which occurred somewhat coincidentally on the judge's street, the fact that the judge knows that the street is two lanes wide (or does or does not allow parking and so on) is not properly subject to being judicially noticed without proof by one party that such is the case and should be judicially noticed.

The second type of proposition concerns a fact that is known in only a specific or limited area, but, within that area, is generally known. Such a fact—known to virtually every Tennessean—is that the Grand Old Opry originates live every Saturday night in Nashville. This fact may not be known to a court in Pennsylvania, for example, but, under Professor Morgan's theory of judicial notice, the fact could properly be judicially noticed, as it is capable of accurate demonstration. Such a fact in a Tennessee court is, of course, subject to being judicially noticed on the court's own motion.

Thirdly, there are propositions of general or universal knowledge such as the fact that an object, when released from a height, will fall. This type of fact, as will be explained later, is one which is *intuitively* known.

3. *A Possible Resolution.*—An overly simple explanation of the difference between the views of Professors Morgan and Wigmore would note that both views involve the taking of proof, but in different manners. Professor Wigmore's view allows proof to be presented challenging a matter which has already been judicially noticed—noticed, that is, at a time when it appeared indisputable. This proof is, of course, to the jury; the effect of taking judicial notice has been eliminated, because one of the parties believed the matter to be disputable.

Professor Morgan, on the other hand, requires that the proof be presented to the court which, in turn, determines, on the basis of such proof, whether the matter in question should be judicially noticed at all. Once the matter has been noticed, it becomes indisputable; the jury plays no part in this determination.

11. This development is from Morgan, 57 HARV. L. REV. at 286-87.

This, it is submitted, is the fundamental difference in these two theories. It is further submitted here that the proper interpretation to be put on judicial notice is that advanced by Professor Morgan. Before the doctrine may be used the fundamental concepts outlined earlier must be kept in mind. Once these are firmly grasped, the logic of granting a conclusive nature to a matter judicially noticed becomes plain. Against this backdrop, it is possible to review the specific areas in which judicial notice can be used.

B. *Two Areas of Application*

A lawsuit is society's method for adjusting legal relationships between members of that soeiety. Achieving such an adjustment is the basic function of the courts. Every lawsuit necessarily has a fact situation and an applicable legal theory. In this context, the fact situation initially is the most important part of the lawsuit.[12]

1. *Judicial Notice of Fact.*—This is the first stage at which judicial notice becomes relevant at trial. The basic question is whether any facts may be judicially noticed. In a federal habeas corpus proceeding, for example, the existence of state remedies, the exhaustion of which is normally a prerequisite for federal action, is a major fact in issue. One federal district judge recently faced with the problem of whether petitioner had exhausted his state remedies held that

> this court will take judicial notice of the fact that at the Michigan State Judicial Conference in August of 1964, a seminar was held with the Supreme Court Justices and the State trial judges present, at which time the impact of the new Constitution and the recent United States Supreme Court decisions . . . were discussed.[13]

In denying the petition, the judge was influenced by the fact, of which he took judicial notice, that state remedies existed which the petitioner had not exhausted. In Professor Morgan's terminology, such a fact is one "capable of immediate and accurate demonstration by resort to sources of indisputable accuracy easily accessible to men in the situation of members of the court."[14] Here, anyone in the situation of the parties concerned in the instant action could readily demonstrate the fact of this expansion of state remedies.

A fact of the type "so notoriously true as not to be the subject of reasonable dispute"[15] is of the following nature: "We take judicial

12. If, of course, no legal theory is applicable, the best factual situation is for naught. Thus, a wife with a tort claim against her husband at the common law could not, regardless of the factual validity of such a claim, legally enforce the claim.

13. Herron v. Birzgalis, 235 F. Supp. 982, 983 (W.D. Mich. 1964).

14. Morgan, 57 HARV. L. REV. at 273.

15. *Ibid.*

notice of the fact that the Legislature in its statutes sometimes uses terms and phrases that may leave the individuals involved perplexed as to the meaning of such terms."[16] Intuitively, reasonable men cannot question the fact that statutes are often vague; in fact, one of the functions of the court is to clarify this vagueness.

The basic difference in these two types of facts revolves around this intuitive aspect. The first is a fact not intuitively known; yet, this type of fact—*e.g.*, that "January 6, 1963, which this court judicially knows was on Sunday"—[17] is demonstrable by resort to a source of indisputable accuracy—in this case, a calendar. The second is the type of fact which is intuitively known. Thus, in an action attacking the constitutionality of a price-fixing law for milk, the Maine court intuitively knew "that the milk industry is one of the important industries in this state; that it is a food absolutely essential to the health of practically every individual in this state; that it is the primary diet of babies . . . ."[18] Both of these types of facts are equally susceptible of being judicially noticed.

No dispute exists as to a court's power, in a proper case, to take judicial notice. Actually, the right of the court to take such notice is inherent in the power of the court. "The maxim that what is known need not be proved . . . may be traced far back in the civil and the canon law; indeed it is probably coeval with legal procedure itself."[19]

2. *Judicial Notice of Law.*—If the fact situation has been established, the second important matter at trial concerns the applicable legal theory; here, judicial notice of domestic law becomes important. According to Professor Morgan "the trial judge must take judicial notice of the domestic law of the jurisdiction of which he is a judicial officer."[20] "The judicial office in our system cannot be rationally administered on any other premise."[21]

Professor Wigmore reaches a similar conclusion, but immediately introduces a gradation of cases to which Professor Morgan's canon will apply.[22] In fact, if Professor Wigmore's theory is rigidly adhered

16. Calio v. Equitable Life Assur. Soc'y, 169 So. 2d 502, 505 (Fla. Dist. Ct. App 1964). This example is given in only a slightly tongue-in-cheek fashion.

17. Holman v. Baker, 277 Ala. 310, 169 So. 2d 429, 431 (1964).

18. Main Milk Comm. v. Cumberland Farms Northern, Inc., 205 A.2d 146, 152 (Me. 1964). Saying that "the court intuitively knew" certain facts is not the same as saying that the court took judicial notice of a fact which "it believed to be indisputable."

19. THAYER 277.

20. MORGAN, BASIC PROBLEMS OF EVIDENCE 1 (1962) [hereinafter cited as MORGAN].

21. Morgan, 57 HARV. L. REV. at 271.

22. 9 WIGMORE § 2572. "A Court may be expected to dispense with production of evidence of the law of its own sovereiguty; for it must be credited with a knowledge

to—if judicial notice resembles a presumption, subject to rebuttal in any given case—the conclusion is inescapable that any party could challenge the law which the judge finds applicable to the case.

Common sense dictates that the courts of the forum judicially know the law of their state. Some question may arise as to precisely what law is included, for example, whether a municipal ordinance is law subject to being judicially known. This, however, cannot obscure the necessity of the judge knowing the law of the state in which he sits. While a detailed study of this subject is beyond the scope of this article, it can be noted that such law should at least include statutes of the state legislature and decisions of the highest court of the state, as well as the intermediate courts of appeal.

One further point should be mentioned here. Courts of original jurisdiction of the United States are bound to take judicial notice of the laws of each of the states.[23] State courts, likewise, are bound to judicially notice the laws of the federal government.[24] In no sense are the laws of one of these governments to be considered "foreign" to the other. Problems of judicial notice of foreign law in this federal-state context arise only indirectly.

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of it, or at least with competent knowledge where to search for it. No evidence of it need therefore be offered . . . "There are, however, certain natural limitations . . . ."

23. "We are of opinion, that the circuit courts of the United States are created by Congress, not for the purpose of administering the local law of a single state alone, but to administer the laws of all the states in the Union, in cases to which they respectively apply. The judicial power conferred on the general government, by the constitution, extends to many cases arising under the laws of the different states. And this court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the states. That jurisprudence is, then, in no just sense, a foreign jurisprudence, to be proved in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established; but it is to be judicially taken notice of, in the same manner as the laws of the United States are taken notice of by these courts." Owings v. Hull, 34 U.S. (9 Pet.) 397, 409 (1835).

24. "The State courts are bound to take judicial notice of the existence of the Federal courts; it is also supposed that they will know something of the laws of Congress, though not generally called on to administer them." Mims v. Swartz, 37 Tex. 13 (1873). This point seems well settled; the courts which have been faced with the question have not been troubled with citing authority to support their conclusion. "It is argued in behalf of the plaintiff that this is a traverse of fact, the ground of the argument being that as the states of the union are foreign to each other, so the Federal government and each state are foreign each to the other and that a statute of one is a fact to be pleaded and proved in the courts of the other if there relied on. But in each state the acts of the Legislature of that state and the acts of Congress operate alike upon every one and alike claim recognition and due application by the courts. The public statutes of the general government are no more facts to be alleged and proved in the courts of a state than are the public statutes of that state. Under our complex system there are in every state two bodies of statutory law equally entitled to direct recognition." Metropolitan Stock Exch. v. Lyndonville Nat'l Bank, 76 Vt. 303, 307, 57 Atl. 101, 102 (1904).

III. Judicial Notice of Foreign Law

Quite often in a trial, foreign law is determinative of the cause of action. At this point, judicial notice of foreign law becomes important. Some basic concepts must be enunciated to foreshadow a later discussion of the subject.

A. *The Problem*

The facts of modern American society make contact by each citizen with a state other than his own practically inevitable. Whether these contacts be for business or pleasure legal relationships arise which need adjustment by the courts. The factual situation out of which the suit arises probably will have occurred, at least partially, outside the forum. The question which is inevitably posed in such cases is which law is applicable.[25] Must the court of the forum apply its own law in the case merely by virtue of the fact that it is the forum state's court which is being used?

1. *How It Arises.*—In a probate proceeding, the problem of determining which law will be applied to a trust created in a state other than that in which the will is being probated is a very real one when the laws of the states involved conflict. Florida law recognizes Totten-type trusts[26] while, on the other hand, New Jersey law does not.[27] A probate court in New Jersey faces a difficult problem when a Totten trust created in Florida by the New Jersey testator is attacked in the probate proceedings.[28]

In all its aspects, the law of Florida on this point (or, for that matter, on any point) is law, whether an action under it is brought in Florida or another state. To this extent, therefore, Florida law is analogous to the law of New Jersey. The problem arises as to which law will be used, a troublesome problem here, as the law of Florida and New Jersey on the matter of Totten trusts is conflicting. A secondary problem is how Florida law enters the picture, should the New Jersey court be inclined to apply it.[29]

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25. As will be shown later, these can indeed be two separate and distinct problems.

26. "This well-known common-law doctrine has been adopted in many jurisdictions. . . . We accept it without hesitation." Seymour v. Seymour, 85 So. 2d 726, 727 (Fla. 1956).

27. In Nicklas v. Parker, 69 N.J. Eq. 743, 61 Atl. 267 (1905), New Jersey had rejected the Totten trust as an invalid testamentary disposition violative of the will statute at virtually the same time such trusts were being sanctioned by the New York Court of Appeals in the case which gave the trust its name. *In re* Totten, 179 N.Y. 112, 71 N.E. 748 (1904). The question of whether Howard Sav. Institute v. Kielb, 38 N.J. 186, 183 A.2d 401 (1962), affects the status of Totten trusts in New Jersey is not essential for present purposes.

28. *In re* Damato, 86 N.J. Super. 107, 206 A.2d 171 (App. Div. 1965).

29. New Jersey has enacted the Uniform Judicial Notice of Foreign Law Act. N.J. Stat. Ann. §§ 2A:82-27 to -34 (1941).

The various theories concerning the effect of territorial boundaries of a state on the laws of that state, that is, whether a law of one state can be said to exist or have any effect as law outside that state, now come into play.[30] No dispute exists as to the basic nature of the law of a foreign state, as law, within that foreign state. The problem arises when the forum court is faced, directly or inferentially, with the question of the effect of foreign law within its boundaries. It has often been said that "foreign law is dealt with by the courts as a fact to be taken into consideration in a proper case in creating legal relations at the forum. . . . *since the foreign law is a fact* on which the claims of the parties depend. . . ."[31]

While it is generally true that foreign law is treated as a fact to be pleaded and proved, the better view accords the foreign law its status as law, even within the forum state, subject only to the practical difficulties of how to use this law.

> What is the law of another State, or of a foreign country, is as much a "question of law," as what is the law of our own State. . . . But it is said our Courts are not presumed to know the laws of other States, or of foreign countries. Admit it; still, can it be questioned that the court is more competent to ascertain and understand such laws, than the jury? or that the jury stands as much in need of instruction in respect thereto, as in respect to our own laws? Again, it is said the existence of such laws must be alleged and proved as *facts*. Admit it. But how are they to be proved. To the court, or to the jury? Surely to the court, because they are "questions of law."[32]

The North Carolina Court went on to demonstrate why the question of foreign law should not be left to the jury to determine. This reasoning will be expanded later to demonstrate how it forms a perfect basis for the forum court to take judicial notice of foreign law.

The problem is raised to indicate the difficulties which arise when foreign law becomes important in a trial. The New Jersey court in the case mentioned above did decide to apply Florida law;[33] the problem which must be developed here is the permissible scope of judicial notice of foreign law in a forum court.

2. *Why Use Foreign Law?*—Parties seek to use foreign law in a trial not merely because they desire to have a law other than that of the forum applied. For whatever reason, they feel that the law of a foreign state—a law which will favor them—should be applied to

30. STUMBERG, CONFLICT OF LAWS 1-15 (3d ed. 1963).
31. *Id.* at 175.
32. Hooper v. Moore, 5 N.C. 130, 132-33 (1857).
33. The fact that New Jersey subscribes to the Uniform Judicial Notice of Foreign Law Act is if no moment here, as the provisions of the Uniform Act had not been compiled with in this case. The Uniform Act of course, will be discussed subsequently.

the case. Naturally, they would prefer not to have to prove this law as a fact to the jury, for such proof generally involves considerations out of proportion to the effort it should realistically take to find and apply such law.

B. *Development of a Rule*

1. *"Foreign" Law in England.*—The statement is made that "the laws of foreign nations and States—not being laws of the forum at all, except by casual adoption—at the common law would not be noticed."[34] Thus, reference must be made to the common law treatment of foreign law at trial. American courts have long ascribed their reluctance to take judicial notice of foreign law to this common law treatment.

a. *The Common Law Rule Evolves.*—The common law rule undoubtedly is that the laws of other states and nations are to be proved here by documentary evidence or the testimony of witnesses, in which case the jury is the judge of the proofs as in other questions of fact.[35] The mild expression of doubt as to whether this really was the rule at the common law is well founded.

Fremoult v. Dedire[36] is the English case most often cited as deciding that judicial notice would not be taken of foreign law. The opinion in this case is not very specific.

> Then it was contended, that these marriage articles were made in *Holland,* and that by the law of *Holland,* such articles take place of any other debts, wherefore they should be here construed according to the law of *Holland,* where they appeared to have been made, which was said to have been held in the case of *Feaubert* and *Turst* . . . To which it was answered, and so ruled, that it ought to have been proved in this cause what is the law of *Holland,* as in the case of *Feaubert* and *Turst,* it was proved what was the law of *France,* without which proofs our courts cannot take notice of foreign laws.[37]

The court did not say that such proof had to be made to the jury. What was done in the case of *Foubert v. Turst,*[38] moreover, constitutes little justification for the conclusion that foreign law can be used at trial only if it is pleaded and proved as a fact. In that case, domiciliaries of France contracted to marry there and subsequently entered

34. 9 WIGMORE § 2573, at 554. No attempt will be made here to determine precisely what the various states meant by "the common law" in their respective reception statutes.

35. Lockwood v. Crawford, 18 Conn. 361, 370 (1847).

36. 1 P. Wms. 429, 24 Eng. Rep. 458 (Ch. 1718).

37. *Id.* at 431, 24 Eng. Rep. at 459. In this, as well as in all the English cases cited, the emphasis is that of the court, unless otherwise noted.

38. 1 Brown C.C. 129, 1 Eng. Rep. 464 (Ch. 1703).

into a new contract as to the disposition of the property of each in case of the death of one. The couple then went to England, where the wife died several years later. Appellants were the wife's next-of-kin, who sued on the original marriage contract; respondent-husband defended on the ground that the subsequent agreement rendered the original void.

The noteworthy point about the *Foubert* case is that neither party especially wanted the law of France, specifically, the custom of Paris to be applied in the case. The appellants argued this was "by no means an attempt to introduce *foreign* laws or customs as binding here, any otherwise than by express and positive agreement."[39] Likewise, respondent contended

> that the custom of Paris could only affect the parties while they lived there; and therefore, upon their removing into England, their estates, as to all such things as were not specifically agreed upon, but only left to the custom of Paris, ought to go according to the laws of England.[40]

Neither party sought to use foreign law; the court did not affirmatively address itself to the question and decided the case on the basis of the original marriage contract. This would seem a shaky foundation at best for establishing a "doctrine" that foreign law may be used at trial only if proved as a fact.[41] The subsequent history of this doctrine in England, however, is even more interesting than the founding of the doctrine itself.

Lord Mansfield was faced with the question, in *Mostyn v. Fabrigas*,[42] of whether Governor Mostyn was amenable to suit for false imprisonment on the Island of Minorca. The action was brought in London, with the question being one of jurisdiction. Yet, by way of dictum, Lord Mansfield reiterated the "doctrine" of *Foubert v.*

39. *Id.* at 131, 1 Eng. Rep. at 465-66.

40. *Id.* at 132, 1 Eng. Rep. at 466.

41. A very valid question, the answer to which seems to be presumed in all of these cases, is whether the custom of Paris was indeed "law." If it were not, at least in the sense which American courts today discuss "foreign law," the very foundation would have been taken from under the rule that forum courts will not notice foreign law, as the rule would have been founded on a mistaken hypothesis. The subsequent discussion of the development of the rule in America highlights the mistaken hypotheses on which the rule has been based in this country.

42. 1 Cowp. 161, 98 Eng. Rep. 1021 (K.B. 1774). "But it is objected, supposing the defendant to have acted as the Spanish governor was empowered to do before, how is it to be known here that by the laws and constitution of Spain he was authorized so to act. The way of knowing foreign laws is, by admitting them to be proved as facts, and the Court must assist the jury in ascertaining what the law is. For instance, if there is a French settlement the construction of which depends upon the custom of Paris, witnesses must be received to explain what the custom is; as evidence is received of customs in respect of trade. There is a case of the kind I have just stated."

Turst.[43] It was on such a basis that the common law rule of refusal to notice foreign law was founded.

b. *Applicability of the Foreign Law.*—Disregarding, temporarily, the uncertainty as to how such law was to be produced, the English courts never questioned the necessity of having foreign law apply when it was determinative of the matter at hand.

> I hold myself not warranted in saying that such a contract is void by the law of Scotland, because it is void by the law of England. The law of the country where the contract arose, must govern the contract; and what that law is, should be given in evidence to me as a fact.[44]

This case is also considered authority for the point that the judge will indulge in no presumption of similarity with respect to this foreign law. Ostensibly, such a presumption was not a part of the common law. By this time, the period of wholesale incorporation of the English common law by the American states had passed; accordingly, the common law doctrine that judicial notice may not be taken of foreign law had been established on a shaky foundation.

c. *Subsequent Development in England.*—Keeping this in mind, the subsequent history of the doctrine of *Foubert v. Turst* in England is interesting to trace. Several later cases show precisely how unsettled this point was at common law. One later case attempted to prove the existence of a divorce and,

> to prove this she produced an instrument under the seal of the synagogue there, whereby they were divorced from each other. But Lord Kenyon held this to be no evidence, for before he could take notice of any proceeding in a foreign Court, he must know the law of the country, which was a matter of evidence, and should be proved by witnesses.[45]

This seems determinative of the question, but several later cases cast a great doubt on the point. The same Lord Kenyon added to the confusion in the following manner:

> Can the laws of a foreign country be proved by a person who may be casually picked up in the street? Can a court of justice receive such evidence of such a matter? I shall expect it to be made out to me, not by such loose evidence, but by proof from the country, whose laws you propose to give in evidence, properly authenticated. . . . *Such proof, and so authenticated, I shall submit, as such only I hold to be legal.*[46]

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43. *Id.* at 174, 98 Eng. Rep. at 1028.
44. Male v. Roberts, 3 Esp. 163, 164-65, 170 Eng. Rep. 574 (C.P. 1800).
45. Ganer v. Lady Lanesborough, 25 Peake 25-26, 170 Eng. Rep. 66 (K.B. 1790).
46. Boehtlinck v. Schneider, 3 Esp. 58, 59-60, 170 Eng. Rep. 537, 538 (C.P. 1799). (Emphasis added.) The attorney for the plaintiff in this case had "proposed to call a person conversant with the law of that country, to prove that the law was so. Lord

A distinction thus emerged as to the treatment of foreign law, based on whether that law was written or unwritten. Hinted at earlier, the distinction was expanded in *Clegg v. Levy*.[47] "The law being in writing, an authenticated copy of it ought to be produced."[48]

At first glance, one might believe that the best evidence rule was being called into use here. This may be so; yet, such an explanation does not clarify the reason why Lord Eldon demanded that the law of the foreign country "should be proved by witnesses" in one case and in a later case should be "properly authenticated," "not by such loose evidence" as might be given by witnesses. A logical explanation of this is that there was no immutable rule in England with respect to the use of foreign law at trial. If this is so, the experience of such a rule in America has been based on a faulty assumption.

2. *The American Experience.*—As late as 1812, the status of the use of foreign law in a trial in England was uncertain. It was from this uncertainty that the American experience was drawn. Yet, even with the law in England so relatively unsettled on this point, American courts wasted little time in concluding that foreign law could not be noticed at trial and that foreign law included the laws of sister states.

While American jurisprudence necessarily developed out of the common law of England, two points should be noted to indicate the inappositeness of applying the rule that the forum court would not judicially notice foreign law, at least when applied to the forum's sister states. The first point is this unsettled nature of the doctrine in England.[49]

The more important point holds true regardless of what the rule in England with respect to foreign law was. The American states—by virtue of the compact which they had newly entered into—should have felt more receptive to the use of the actual foreign law in a suit in the particular state. England is insular, with one law for the whole country. Within that country, no political subdivision similar

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Kenyon said, he could not admit such evidence of the law of a foreign country." *Id.* at 59, 170 Eng. Rep. at 537-38. Buchanan v. Rucker, 1 Camp. 63, 170 Eng. Rep. 877 (K.B. 1807), bearing on this point, held that a foreign judgment could not be respected when, on its face, it showed that the court was without jurisdiction over the defendant.

47. 3 Camp. 166, 170 Eng. Rep. 1343 (K.B. 1812).

48. *Id.* at 167, 170 Eng. Rep. at 1343.

49. The answer given to this contention is extremely intriguing. "That a court will not take judicial notice of the law of a foreign country is so well established that in the majority of the cases it is assumed without discussion." 3 BEALE, CONFLICT OF LAWS § 621.2, at 1664 (1935). This is, of course, one way of saying that the doctrine that a forum court would not notice the law of a sister state was founded without a substantial basis.

to those in the United States exist; thus, in England itself there is no concept of "foreign law." Necessarily, all law from outside England is foreign law. In the United States, on the other hand, such is not the case. The English experience does not fit, a fortiorari, all American problems.

a. *Applicability of Foreign Law.*—Frank recognition of this fact was the dual development in this country of providing a "non-foreign status" to federal and state law when the law of one was involved in the courts of another. Jealousy of their prerogatives appears to be the main reason why the American states would not give similar effect to the law of a sister state.

For, as in England, at no time did the American courts doubt the conclusive nature of foreign law, where applicable.[50] Accordingly, it has been said that

> All the cases agree that, *whatever the law of the forum may be,* the plaintiff's case must stand, if at all, so far as his right of action is concerned, upon the law of the place where the injury occurred.[51]

b. *Conceptual Basis of Rule.*—The very courts maintaining the applicability of this foreign law nevertheless maintained very strict rules with respect to the actual use of such law. This introduced the dichotomy that the law determinative of the case might not really be law after all, or, at least, might not be the law which would be applied to determine the case.

The problem is said to have been occasioned by the inability of the courts to apply a law other than their own—that is, a jurisprudential disability. Thus,

> a court neither will nor can apply any law to the case before it other than the law of the forum. It must necessarily follow that foreign law, in so far as it is in any way material to the issue, must operate not as law but as fact. This is the fundamental premise underlying the rules. . . .[52]

c. *Factual Development of the Rule.*—This explanation makes for a very neat conceptual theory to excuse forum courts from applying foreign law. In the law, however, conceptual theories, regardless of how neat, are quite often not practicalities. In the early American cases, the courts did not base their reluctance to judicially notice foreign law on a jurisprudential foundation. The history of the rule that a forum court may not notice foreign law in Alabama is typical of this development.

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50. Louisiana & No. W. Ry. v. Phelps, 70 Ark. 17, 65 S.W. 709 (1901).

51. Burns v. Grand Rapids & Ind. R.R., 113 Ind. 169, 176, 15 N.E. 230, 233 (1888). (Emphasis added.)

52. 3 BEALE, *op. cit. supra* § 621.1, at 1664.

An Alabama statute provided that the Secretary of State should compile a list of interest rates allowable on contracts in other states. This list was to be bound with the acts of assembly, and

> the act makes the table of the rate of interest of the several States prima facie evidence of the rate to be computed upon contracts, etc.; *but this evidence may be controverted,* and it may be shown that a rate different from that certified to, obtained at the time the contract was made.[53]

This analysis shows that the very matter which one of the parties sought to have judicially noticed—the list prepared by the Secretary of State—was not law at all and did not have the nature of law. The Alabama court reaffirmed its position on this point on numerous occasions;[54] yet, one such reaffirmation was taken to establish, for the state of Alabama, the doctrine that its courts would not take judicial notice of the *law* of a sister state.[55] The Alabama court was simply saying that the list of interest rates, so published, constituted presumptive evidence of the various state interest rates allowed on contracts.[56] Yet, on this weak basis, the doctrine has been founded in the United States.

Unlike Alabama, however, many state courts fell into a trap of their own making. Such was the case in Connecticut where the court stated that

> All the determinations concur in this, as an established principle, 'that the way of knowing foreign laws, is, by admitting them to be proved as facts; and the court must assist the jury in ascertaining what the law is.' . . . In the *United States,* this doctrine has often been recognized. . . . In *Hebron v. Marlborough,* 2 *Conn. Rep.* 18, this court adopted the same principle in respect of the laws of *Massachusetts.*[57]

This analysis was first based on the supposed status of the doctrine in England. More importantly, however, the Connecticut case cited as controlling is weak authority for the proposition for which it was cited. The earlier action was one for assumpsit for support of a bastard born in the State of Connecticut, whose mother had no settlement in that state. "In this case, the mother had no settlement in this state. She had one in *Taunton* in *Massachusetts,* but it does not appear that, by the laws of *Massachusetts,* bastards follow the settlement of the mother. . . ."[58]

53. Mobile & Cedar Point R.R. v. Talman, 15 Ala. 472, 493 (1849). (Emphasis added.)

54. Clark v. Pratt, 20 Ala. 470, 472 (1852); Harrison v. Harrison, 20 Ala. 629, 649-50 (1852).

55. 9 WIGMORE § 2573, at 555 n.2.

56. "Courts can not take judicial notice of the rates thus published." Insurance Co. of No. America v. Forcheimer & Co., 86 Ala. 541, 550, 5 So. 870, 875 (1889).

57. Brackett v. Norton, 4 Conn. 517, 520-21 (1823).

58. Hebron v. Marlborough, 2 Conn. 18, 20 (1816).

The court nowhere explained whether the Massachusetts law was in evidence or whether it had judicially noticed that bastards do not follow the settlement of their mother in Massachusetts; it merely declared what the Massachusetts law "appeared" to be, without detailing from which source this appearance had come. On this understanding of the laws of a sister state was the "doctrine" founded in Connecticut.

Many states established the doctrine on such earlier uncertainties; some few courts were honest enough to admit that practical difficulties, not theoretical considerations, were what kept them from taking judicial notice of the law of a foreign state. "A court of this State cannot go through all the decisions of the Supreme Court of another State and determine for itself what the law of that State is."[59] Such practical difficulties should not form the basis for keeping a state court from judicially noticing, in a proper case, the law of another state. Yet, when placed on such realistic grounds, the plight facing the court is easier to understand than when the court attempts to shield itself in jurisprudential niceties.

As has been intimated earlier, however, the judge should not be expected to make a search such as the Kentucky court mentioned. The judge has the right to expect that the party seeking to have foreign law applied will offer proof on the point. The basic criticism of the method American courts developed for using foreign law was the submission of such law to the jury for a factual determination.

C. *How Can The Rule Be Changed*

At any rate, these courts were soon enunciating that "the laws of our sister states are facts to be pleaded and proved like other facts. . . . We do not take judicial notice of them . . ."[60] This was an unfortunate and wholly unnecessary step in the development of American law. Several courts recognized the foolishness of such a holding, but felt helpless to change it. A few states adopted laws allowing their courts to judicially notice foreign law. A synthesis of these will be undertaken to see what logically could have been the development of judicial notice of foreign law in this country.

The Uniform Judicial Notice of Foreign Law Act will then be examined to see what changes it makes in this situation. Finally, the status of foreign law at trial in this country at the present time will be studied. This will necessarily entail a discussion of the presumption of similarity and the proof of foreign law as a fact.

1. *Judge or Jury?*—Difficulties with langnage in the communication

59. Pittsburgh, C.C. & St. L. Ry. v. Austin's Adm'r, 141 Ky. 722, 728, 133 S.W. 780, 783 (1911).

60. Sammis v. Wrightman, 31 Fla. 10, 30, 12 So. 526, 532 (1893).

of ideas are undoubtedly responsible for many needless problems today. This is in large part true of the use of foreign law. "Foreign law is a matter of fact, to be pleaded and proved as such." A seemingly innocuous statement which is deceptive by virtue of its simplicity. Where is the emphasis to be put? Is foreign law really a *fact,* equivalent in nature to the fact that the Ohio and the Mississippi Rivers join at Cairo, Illinois? If so, must it be proved to the jury, as the fact that these two rivers come together at a certain point would have to be? The problems created are haunting, and their solutions have not been easy.

The North Carolina Supreme Court has given the most forthright answers to these questions; this court's analysis of why foreign law is a "question of law" has been examined earlier.[61] The reasoning which prompted this analysis is equally important.

> When an issue of fact involves a question of law, the jury are not entrusted to decide it; but it is the duty of the court to give to the jury instruction in regard to the law, and it is the duty of the jury to be governed by such instructions. In this way, as much accuracy, and as great a degree of fixedness, in respect to questions of law, is secured, as the nature of the subject admits of. Such being the case in respect to questions arising about our own laws, it would seem a matter of course to be likewise so in respect to questions arising about the laws of other States, or of foreign countries, whenever, in the administration of justice, our Courts are called upon to deal with them.[62]

The North Carolina court was saying that juries are even more incompetent to decide questions of foreign law than they are to decide questions of domestic law with which, after all, they might be presumed to have some familiarity. The court did not, however, allow foreign law merely to be introduced at trial. Such foreign law did have to be proved, and this is as it should be; but, *such proof is to be made to the court,* which is the proper body to decide upon the applicability of law—be it domestic of foreign.

Nothing in this analysis negates the concept of judicial notice as spelled out earlier, in fact, that earlier concept finds actual support here. Before judicial notice may be taken of a matter, the court must make a determination of whether the matter "is so notoriously true as not to be the subject of reasonable dispute or what is capable of immediate and accurate demonstration by resort to sources of indisputable accuracy easily accessible to men in the situation of members of the court."[63] There are no valid reasons why these

61. See text accompanying note 32 *supra.*

62. Hooper v. Moore, *supra* note 32.

63. Morgan, 57 HARV. L. REV. at 273. It should be remembered here that this analysis is very similar to that spelled out earlier in this paper, see text accompanying notes 8-11 *supra,* with respect to the "mechanical" aspects of taking judicial notice.

classifications cannot be applied when a question of foreign law arises.[64]

In this context, the party seeking the use of foreign law would present to the judge the sources of that law—reported decisions, statutes, executive orders, and so forth. The party opposing the taking of judicial notice of the foreign law would have a full opportunity to show that the law put forward by his opponent was not, in fact, the law of the foreign state. This proof would be to the court, which alone would decide whether the foreign law merited the taking of judicial notice.

If the judge decided this question in the affirmative, he would instruct the jury as to the nature and effect of that law, precisely as he now does with domestic law. If the judge decided in the negative, the party seeking the use of the foreign law would then have to prove the matter in question to the jury, if he still desired to claim the benefit of it. Even a refusal by the judge to take such judicial notice would be of aid to the party seeking the use of foreign law. He might be convinced that he was, in fact, seeking to have other than law noticed. More importantly, however, the parties would have a ruling, *as a matter of law*, that the foreign matter was not indeed law —a ruling which, of course, would be reviewable by an appellate court. Presently, the most they have is the factual determination by the jury of what the foreign law is.

2. *The Necessity of Statutory Change.*—This could easily have been the history of judicial notice of foreign law in this country—a logical development of the idea of judicial notice applied to what is, in reality, law in order to give it the same dignity as is given to the law of the forum. The development was not, however, to be along these lines. Ideas and concepts were expressed in early cases which were solidified into an inflexible dogma, in many states, that a court of the forum could not notice foreign law. Courts were not unaware of the foolishness of this dogma:

> In support of its first assignment appellant has cited Illinois cases as exemplifying the principles of law which it insists are controlling with respect thereto, the cause of action having arisen in the state of Illinois. The law as so interpreted would be controlling if we were cognizant of it. It was neither pleaded nor proven, and we cannot take judicial notice of it. This last seems an absurd thing to say when it is considered that the official reports of the courts of last resort of our sister state are lying here before us and that we frequently cite cases reported in them as persuasive authority in support of our own rulings.[65]

64. While the forum court will not intuitively know the law of a foreign state, it can immediately and accurately discover that law, given the modern system of legal research which exists in this country today.

65. Gorman v. St. Louis Merchant's Bridge Terminal Ry., 325 Mo. 326, 332-33, 28 S.W.2d 1023, 1024 (1930).

a. *General Changes.*—Yet, as in many areas of the law in which the courts had themselves made a rule of law absent legislative aid, and then hesitated to change it without legislative modification, the courts in this area felt constrained to defer to the various state legislatures to bring about any modification. "But, until the Legislature sees fit to fully release us from this archiac rule . . . we are supposed to abide by it."[66] Thus, the matter was left, by and large, to statutes in the individual states.

An exceptionally broad statute is that of Mississippi which has been law since 1848, and, in the present language since 1906.

> When any question shall arise as to the law of the United States, or of any other state or territory of the United States, or of the District of Columbia, or of any foreign country, the court shall take notice of such law in the same manner as if the question arose under the law of this state.[67]

This statute contains numerous salutory features: It applies equally to the law of sister states and foreign countries; it requires no formalistic proceeding to enable its use, such as pleading, for a question of foreign law can arise in a number of ways, and it leaves to the courts the determination of whether what it is faced with is actually law. This latter determination thus becomes a question of law reviewable on appeal.

Under such a statute it is not necessary to plead the foreign law relied on;[68] nor is the law of the forum at all important—the foreign law being determinative in fact as well as in theory. If a foreign law is relied upon in this situation, the forum court is bound by that law and must dismiss the case if no remedy exists under that law. The forum court may not use the remedy, if any, provided by its own law in such cases.[69]

It should be remembered here that many courts have maintained this applicability of foreign law while failing to apply it in cases in which it was admittedly applicable. Even if the inflexible common law rule existed as claimed, such relatively simple language as that of the Mississippi statute could be used to free the courts of the forum to give effect to what all courts, at least in theory, have admitted is the controlling law in such cases.

66. *Id.* at 333, 28 S.W.2d at 1024.

67. MISS. CODE ANN. § 1761 (1956).

68. Floyd v. Vicksburg Cooperage Co., 156 Miss. 567, 126 So. 395 (1930). Pleading is not, of course, per se, an evil, but a requirement that foreign law must be pleaded or else it cannot be used is hypertechnical.

69. Runt v. Illinois Cent. R.R., 88 Miss. 575, 41 So. 1 (1906). "The question is whether, by the laws of Louisiana, any right of action survives to the natural mother, or to the administrator of the deceased, or to both. The laws of Mississippi have no pertinency whatever to the case, since the accident occurred in Louisiana. A right of action for damages is transitory, of course; but, if there was no right of action at all by the law of the place, there is nothing to be transitory." *Id.* at 581, 41 So. at 1.

b. *The Uniform Act.*—Other states have had narrower statutes, as was the case in Missouri;[70] in these states, the courts took a restricted—although, perhaps, not a wholly realistic—view of their powers under such a statute. This being the case, a Uniform Judicial Notice of Foreign Law Act was proposed by the National Conference of Commissioners on Uniform State Laws in 1936.[71] The prefatory note to the Uniform Act highlighted the dual problem which existed in most states, that is, the inappositeness of a state in the American Union refusing to know the law of a sister state and the foolishness of requiring law to be proved to a jury.[72]

It was generally agreed by this time that this twin common law rule was outmoded.

> Most of the foregoing quiddities are thoroughly unpractical. The judges manipulate an esoteric logical dream-machine which has caused them to forget the world of reality. Judicial power should be used to get at the *facts* more directly and candidly. The professional common sense, fortunately, began some time ago to revolt at the needless expenditure of effort involved in compelling formal proof of what was in most instances *virtually indisputable.* Particularly absurd was the technical insistence on treating the States of the Union as foreign to each other. . . .[73]

The proposed Uniform Act attempted to accomplish in a number of sections what can easily be accomplished under the relatively simple language of the Mississippi statute.[74] The basic purpose of the pro-

70. "In every action or proceeding wherein the law of another state of the United States of America is pleaded, the courts of this state shall take judieial notice of the public statutes and judicial decisions of said state." 1927 Laws of Missouri 157. It is to be noted that this statute is no longer in force in Missouri. See MO. ANN. STAT. §§ 490.070-.120 (1959).

71. UNIFORM JUDICIAL NOTICE OF FOREIGN LAW ACT §§ 1-9, 9A U.L.A. 318-30 (1957).

72. *Id.* at 318-19.

73. 9 WIGMORE § 2573(II), at 558. (Emphasis added.) Even here, Professor Wigmore indicated his basic feelings about judicial notice. Talking about foreign law, he yet argnes that judicial power must be directed at obtaining the "facts." Such law is indisputable—"virtually."

74. UNIFORM JUDICIAL NOTICE OF FOREIGN LAW ACT §§ 1-9, 9 U.L.A. 320-30 (1957). "Section 1. Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States. Section 2. The court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information. Section 3. The determination of sueh laws shall be made by the court and not by the jury, and shall be reviewable. Section 4. Any party may also present to the trial court any admissible evidence of such laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise. Section 5. The law of a jurisdiction other than those referred to in Section 1 shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice. Section 6. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. Section 7. This act may be cited as the Uniform Judicial Notice

posed act was to relieve the difficulties the courts had faced in the past when foreign law was involved in a cause of action. Twenty-eight jurisdictions in the United States presently subscribe to the Uniform Act, wholly or in part.[75] Well over half of these jurisdictions had enacted the Act within five years of its proposal, undoubtedly indicative of the desire on the part of many states to eliminate the outmoded rule that held American states to be foreign to each other.[76] Theoretically, as well as practically, such a rule has no place in modern American jurisprudence.

Unfortunately, the Uniform Act has not proved to be a panacea. Not all states have adopted it, although some states have their own rules with respect to judicial notice of foreign law outside of the Uniform Act.[77] Thus, uniformity, at least in form, has not been achieved. While this is important, more distressing is the fact that some of the states which have adopted the Uniform Act have done so with reservation, adding requirements which serve to retain the old problems.[78] This, of course, does not aid in accomplishing at least one of the hopes of the Commissioners in proposing the Uniform Act, namely, making uniform the treatment of foreign law in the various states.

Even when enacted in its entirety, as recommended, the Uniform

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of Foreign Law Act. Section 8. All acts or parts of acts inconsistent with the provisions of this act, are hereby repealed. Section 9. This act shall take effect [—]."

75. Delaware, Florida, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Virgin Islands, Washington, Wisconsin, and Wyoming.

76. In 1937: Indiana, Montana, North Dakota, Oregon, and South Dakota; 1939: Illinois, Maine, Maryland, Minnesota, Ohio, and Pennsylvania; 1940: Rhode Island; 1941: Hawaii, New Jersey, Washington, and Wyoming. These states are listed alphabetically within the respective years; they are not, therefore, necessarily in exact chronological order within those years.

77. New York has undoubtedly the most important such provision. N.Y. CIV. PRAC. LAW § 4571 (New York courts *must* judicially notice the laws of other states). See Pfleuger v. Pfleuger, 304 N.Y. 148, 106 N.E.2d 495 (1952) (interpreting the supplanted N.Y. CIV. PRAC. ACT § 344-a).

78. New Jersey was the first state to require that foreign law be pleaded as a condition to the court taking judicial notice of it. N.J. STAT. ANN. § 2A:82-27 (1952). The statute has since been amended and would appear to place additional restrictions on the use of foreign law at trial. N.J. STAT. ANN. § 2A:82-27 (Supp. 1964). Ohio allows judicial notice to be taken only of statutes. OHIO REV. CODE ANN. § 2317.44 (Baldwin 1964). South Carolina also requires that the foreign law must "have been put in issue by the pleadings" before judicial notice may be taken of it. S.C. CODE ANN. § 26-62 (1962). Furthermore, Washington, in adopting the Uniform Act, changed § 4 to require the party using the foreign law to plead that law as he would have prior to the adoption of the Uniform Act. WASH. REV. CODE § 5.24. 040 (1963). "Thus in Washington pleading it is now absolutely necessary, not merely one of several ways of giving notice to the opponent of intent to rely on foreign law." Comment, 38 WASH. L. REV. 802, 808 (1963).

Act contains weaknesses which tend to make its application less than uniform. One particular problem facing the courts has been whether the foreign law must still be pleaded before judicial notice may be taken of it. Surprising as it may seem, this problem exists even in states which have adopted the Uniform Act in its entirety.[79] The Commissioners, in their prefatory note recommending adoption of the Uniform Act, commented that

> two or three of the sentences or clauses in this Uniform Act may seem needlessly to state the obvious. But they are useful and even necessary for their educative purpose. . . . A well-drawn statute may contain some details which aim to prevent such doubts in advance. Every one of such clauses in this Act is meant to represent a detail which has been well settled already, but needs to be mentioned to prevent raising those doubts all over again.[80]

It is suggested that the past history of judicial notice of foreign law was indeed *well settled* on grounds too nebulous to enable such an attempt to clarify the situation. A proposed statute such as that in Mississippi—leaving a large discretion for its application with the court—would appear to offer a preferable attempt to achieve some measure of uniformity in the use of foreign law. In addition to the good points previously noted with respect to this statute, one major feature exists in it which is unfortunately absent in the Uniform Act.

This is that part of the Mississippi act which provides that "the court shall take notice of such law *in the same manner as if the question arose under the law of this state.*"[81] This "may seem needlessly to state the obvious," but such a provision is extremely important in indicating to a forum court that it need not, with respect to foreign law, do anything other than it does with respect to its domestic law. For example, if the forum court of Mississippi would not take judicial notice of ordinances of towns in Mississippi,[82] under this statute the court would not be expected to take judicial notice of such ordinances of a foreign town.

Such a result is only logical in keeping with the attempt to achieve

79. The above comment discusses these problems with the note that the treatment given them by the courts has not always been consistent with the purpose of making foreign law more available in the forum court. *Id.* at 810-16. The "Commissioners' Notes" to § 4 of the Uniform Act do nothing but add to the confusion as to whether a forum court should continue to require pleading of the foreign law before it could be judicially noticed. UNIFORM JUDICIAL NOTICE OF FOREIGN LAW ACT, 9A U.L.A. 326-27 (1957). Of course, the ideal situation might well be for the foreign law to be pleaded in every case; it is suggested here, however, that to erect a rigid rule that foreign law *must* be pleaded in every case before it may be judicially noticed is definitely not in keeping with the general purpose of the Uniform Act of making foreign law more accessible in the forum court.

80. 9A U.L.A. 319 (1957).

81. MISS. CODE ANN. § 1761 (1956).

82. Naul v. McComb City, 70 Miss. 699, 12 So. 903 (1893).

uniformity of treatment of law, both domestic and foreign, within the forum. No party litigant should reasonably expect a court of the forum to judicially notice a type of foreign law which the court would not notice if the law were that of the forum. It is possible that such a result is implied by the terms of the Uniform Act, but, for a document purporting to state the obvious for educative purposes, this seems a decided shortcoming.

D. *The Use of Foreign Law Today*

The situation in the United States today with respect to judicial notice of foreign law is, at best, uncertain. It would be profitable at this point to examine the ways in which foreign law is used in those states which have no provision for taking judicial notice of it or in which, in any particular case, these provisions have not been complied with. These ways are, of course, proof of such law as a matter of fact and the presumption of similarity that the foreign law is the same as that of the forum.

1. *Proof of Foreign Law.*—Proof of foreign law as a fact is a requirement which obtains in states which have the Uniform Act as in those which do not. It is undoubtedly one of the most archaic rules in American jurisprudence today. Three different situations may arise with respect to the proof of foreign law as a fact.

a. *No Provision For Judicial Notice.*—The first situation is the most complicated and involves a state which has no, or only a limited, provision for judicially noticing foreign law. In Georgia, the foreign law relied on must be pleaded and proved completely as a fact.[83] In Iowa, on the other hand, the situation is somewhat more confusing. Iowa has a statute which would appear to sanction the use of judicial notice with respect to foreign law, but this is not entirely clear.[84] The Iowa Court was faced with a case in which "the decisive question . . . [was] one of judicial notice."[85] Yet, the court strongly indicated that it might not always apply foreign law, even if it was decisive.[86] These examples naturally are given to indicate the foolish results often obtained by rigid adherence to the old common law rule.

b. *Rules Other Than The Uniform Act.*—The second type of case is one in which the state has a substantial rule providing for the

83. Record Truck Line v. Harrison, 109 Ga. App. 653, 137 S.E.2d 65 (1964).

84. "Matters of which judicial notice is taken need not be stated in any pleading. But a pleading asserting any statute, or a right derived therefrom, shall refer to such statute by plain designation. The court shall judicially notice the statutes of any state, territory or other jurisdiction of the United States so referred to." IOWA R. CIV. PROC. 94 (1943). This rule is not directed at the taking of judicial notice of foreign law, hut it would appear that this result can be accomplished under it.

85. *In re* Estate of Drumheller, 252 Iowa 1378, 1380, 110 N.W.2d 833-34 (1961).

86. *Id.* at 1385, 110 N.W.2d at 837.

taking of judicial notice of foreign law other than the Uniform Act. New Mexico is such a state, and its provision "is almost identical in language and clearly has the same intent and meaning as the Uniform Judicial Notice of Foreign Law Act."[87] The interpretation placed upon this rule appears to be one which also requires pleading, and perhaps proof, of the foreign law which a party may seek to use.[88] The New York Court of Appeals has construed its statute as being "permissive, not mandatory."[89]

c. *Under The Uniform Act.*—The harshest result with respect to proving foreign law, however, has been obtained in a state which does have the Uniform Act. Shortly after the adoption of the Uniform Act in Florida, that state's supreme court placed a very strict construction on its use. "Under the provisions of the Uniform Act, a matter pertaining to foreign law may become a question of law to be determined by the court. However, the act does not operate automatically in every case."[90] The court then proceeded to detail, rather sharply, the procedure which must be followed in using the Uniform Act in Florida.[91]

Since that time, the Florida courts have not become any more lenient in their interpretation of the Uniform Act. In fact, it is arguable whether the act in Florida has not been eliminated by judicial erosion. "If the law of a foreign state is to be relied upon as governing a given transaction it must be pleaded and proved as any other issue of fact, for the local courts will not take judicial notice of it."[92] What constructive effect the Uniform Act can have in a state after such an interpretation is highly debatable.

2. *The Presumption of Similarity.*—Such questions have a tendency to blur into the presumption of similarity, so that sharp distinctions between the two are difficult to draw. In states which do not have the Uniform Act, so that foreign law must be pleaded and proved, "where the law of a sister state is not pleaded, this court will presume that the law of such states is the common law, as interpreted by the decisions of the courts of this state."[93]

The holding is the same when the state has adopted the Uniform Act, but one of the procedural requirements under it has not been

87. Boswell v. Rio De Oro Uranium Mines, 68 N.M. 457, 460-61, 362 P.2d 991, 994 (1959).

88. *Id.* at 461, 362 P.2d at 994.

89. Pfleuger v. Pfleuger, *supra* note 77, at 149, 106 N.E.2d at 496.

90. Kingston v. Quimby, 80 So. 2d 455-56 (Fla. 1955).

91. *Ibid.*

92. This being true, the appellate court may not take judicial notice of the foreign law when it is first raised before that court. Miller v. Shulman, 122 So. 2d 589-90 (Fla. D. Ct. App. 1960).

93. Greenfield v. Chronicle Printing Co., 107 Ga. App. 442, 130 S.E.2d 526-27 (1963).

carried out. "Plaintiff has not brought to our attention any statutory or decisional law of Connecticut . . . . We presume, therefore, that the parties are content to have New Jersey law apply."[94] There is some lack of clarity as to precisely what law the forum court will apply in such a case, but this can be clarified by determining whether the state involved was one of the original thirteen colonies.

If the state were one of these, its courts talk in terms of presuming with respect to the common law.

> If no statute of the foreign State is pleaded the common law as interpreted by the courts of this State determines the rights of the respective parties. . . . The common law as applied by the courts of this State is the common law and statutes of England that were of force May 14, 1776.[95]

If the state were not one of the original colonies, it merely talks in terms of presuming with respect to the state's law.

> We need spend no time on whether the case is governed by Iowa or Oklahoma law. The trial court concluded that in the absence of pleading and proof of Oklahoma law it is presumed to be the same as Iowa's (the forum) and therefore our law governs the case. This accords with our decisions . . . .[96]

Of course, the only real difference is the manner in which the forum court words its manner of presuming; it is basically presuming that the law of the foreign state is the same as its law.

3. *The Remaining Hope.*—It will be re-iterated here that confusion is the keynote with respect to the use of foreign law in the forum state in America today. This situation fortunately is not hopeless. The Arizona Supreme Court shed the most recent ray of hope in this area and did so in a quite remarkable manner.[97] It fiatly decided that the common law rule with respect to judicial notice of foreign law was anachronistic and rejected it.

The entire tenor of the decision by the Arizona court is so refreshing that no part of the opinion will be specifically quoted. In this very well-reasoned, well-written opinion, the Arizona court made three observations: (1) that in the past foreign law had been a matter of pleading and proof in Arizona, (2) that the basis of the rule in England was inapposite for use in America today, where no realistic view of the United States can really treat the states as foreign to one another, and (3) that, since this was a rule judicially created, the courts need not wait for the legislature to change it.[98]

The Nevada Supreme Court reached a similar conclusion several

94. MacKay v. Avison, 82 N.J. Super. 92, 99, 196 A.2d 691, 695 (App. Div. 1964).
95. Record Truck Line v. Harrison, *supra* note 83, at 658, 137 S.E.2d at 69.
96. Reed v. Bunger, 255 Iowa 322, 329, 122 N.W.2d 290, 295 (1963).
97. Prudential Life Ins. Co. of America v. O'Grady, 97 Ariz. 9, 396 P.2d 246 (1964).
98. *Id.* at 11, 396 P.2d at 248-49.

years prior to the Arizona court.[99] To say that such decisions are refreshing is an understatement. These courts were accomplishing the highest purpose of our judicial system—reaching an adjustment of the legal relations between parties and doing so by recognizing the practical facts of modern legal life. In so doing, these courts were showing a courage often lacking in state courts today. When a court is faced with a judicially created doctrine which has fossilized into an untenable rule, it is only shirking its duty when it defers to the legislature for the necessary change.

Unfortunately, such unwarranted deference, until very recently, has been the cause of a highly unrealistic judicial attitude with respect to the use of foreign law in forum courts. If, in coming years state legislatures do not take steps to simplify the necessary procedure before their courts can take judicial notice of foreign law, it is to be hoped that more courts demonstrate courage similar to that of the Arizona and Nevada courts. Those states which are subscribers to the Uniform Act, being bound by statute, will likely be the last to reach such a salutory result.

When the problems exist under the framework of a statute, judicial "change" is more difficult to obtain. However, it can be hoped that courts will begin, in the states which do have the Uniform Act, to place a less restrictive interpretation on that statute. The restrictive amendments and interpretations given the Uniform Act have not advanced the purpose it sought to achieve.

IV. Conclusion

By virtue of reliance on uncertain precedents and mistaken hypotheses, American courts found themselves on the horns of a dilemma with respect to the use of foreign law at trial. On the one hand, these courts staunchly maintained the conclusiveness of such foreign law when applicable with respect to a cause of action brought in the forum.

These same courts, however, erected a wall designed to prevent the actual application of this admittedly applicable foreign law. Alternately, and at times cumulatively, these courts relied on the common law of England, jurisprudential theories as to the lack of effect of a state's laws beyond its boundaries, and, less frequently, the practical difficulties involved in asking that the foreign law be searched out by the forum court.

All of this succeeded to a very great extent in keeping the foreign law from being applied and, even less satisfactorily, in having the law of the forum applied.

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99. Choate v. Ransom, 74 Nev. 100, 323 P.2d 700 (1958).

The courts admitted their dissatisfaction with this state of affairs. Yet, they were unwilling to change a rule of their own creation and preferred to defer to the legislatures to bring about the needed change. This, however, is where the courts for the most part met their greatest failing. When the legislatures responded by permitting the court of the forum to judicially know foreign law, the court, more often than not, very narrowly construed its power under such permission.

To say that this is unrealistic is of no avail, the courts of this country were simply not facing reality when they insisted that the law of their sister states was a matter of fact which had to be pleaded and proved whenever a party to a lawsuit wished to rely on such law, which all courts admitted was applicable law.

The supreme courts of Arizona and Nevada have recently demonstrated the proper function of a court in such a situation. It can only be hoped that more courts will be convinced that such is the proper step for them to take in the future.

JEROME J. KRASA