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Evidence -- Judicial Notice -- Law of Foreign Countries

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CASES NOTED

EVIDENCE — JUDICIAL NOTICE — LAW OF FOREIGN COUNTRIES

The plaintiff, a citizen of Arkansas, was injured in Saudi Arabia when his automobile collided with a truck driven by the defendant's employec. Action was brought against the defendant, a Delaware corporation, in a federal court in New York. Neither party pleaded or attempted to prove the Saudi-Arabian law. The trial court refused to take judicial notice of such law, which was applicable under the New York conflict of laws rule,¹ and directed a verdict for the defendant. *Held*, affirmed, the court's refusal to take judicial notice of Saudi-Arabian law was not an abuse of discretion under section 344-a of the New York Civil Practice Act.² *Walton v. Arabian American Oil Co.*, 233 F.2d 541 (1956), *cert. denied*, 352 U.S. 872 (1956).

The general rule in the United States is that foreign law is fact which must be pleaded and proved as fact; courts will not take judicial notice of the law of foreign countries.³ In some instances courts will judicially notice matters of common knowledge⁴ concerning such law and will notice its

1. It is the duty of a federal court to follow the conflicts of law rule of the state in which it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

New York follows the doctrine that the substantive law of the place where the tort occurred (the *lex loci delicti*) is controlling. *Conklin v. Canadian-Colonial Airways, Inc.*, 266 N.Y. 244, 194 N. E. 692 (1935).

That this is also the federal doctrine, see *Slater v. Mexican Nat'l. R.R.*, 194 U.S. 120 (1920); *Cuba R.R. v. Crosby*, 222 U.S. 473 (1912).

2. The discretionary power, which the plaintiff contends the court abused, is granted by the N.Y. CIV. PRAC. ACT § 344-a which reads, in part:

"A. Except as otherwise expressly required by law, any trial or appellate court, in its discretion, may take judicial notice of the following matters of law:

"1. A law, statute, proclamation, edict, decree, ordinance, or the unwritten or common law of a sister state, a territory or other jurisdiction of the United States, or of a foreign country or political subdivision thereof. * * *

"D. The failure of either party to plead any matter of law specified in this section shall not be held to preclude either the trial or appellate court from taking judicial notice thereof."

3. 31 C.J.S., *Evidence* § 21; U.S.: *Cuba R.R. v. Crosby*, 222 U.S. 473 (1912); *Ala.*: *Constantine v. Constantine*, 261 Ala. 40, 72 So.2d 831 (1954); *Cal.*: *Perkins v. Benguet Consol. Mining Co.*, 55 Cal. App.2d 720, 132 P.2d 70 (1942), *cert. denied*, 319 U.S. 774 (1943); *Ill.*: *Detroit v. Wabash Refining Co.*, 223 Ill. App. 246 (1921); *Ky.*: *Stewart v. Bacon*, 253 Ky. 748, 70 S.W.2d 522 (1934); *Me.*: *Giberson v. York County Mut. Fire Ins. Co.*, 127 Me. 182, 142 Atl. 481 (1928); *Minn.*: *Traders' Trust Co. v. Davidson*, 146 Minn. 224, 178 N.W. 735 (1920); *Mo.*: *Scott v. Vincennes Bridge Co.*, 220 Mo. App. 1213, 299 S.W. 145 (1927); *Nev.*: *Geller v. McCown*, 64 Nev. 102, 177 P.2d 461 (1947), *rehearing denied*, 64 Nev. 102, 178 P.2d 380 (1947); *Pa.*: *In re Lyon's Estate*, 164 Pa. Super. 140, 63 A.2d 415 (1949); *Tex.*: *Carras v. Birge*, 211 S.W.2d 998 (Tex. Civ. App. 1948); *Vt.*: *Wellman v. Mead*, 93 Vt. 322, 107 Atl. 396 (1919).

4. E.g., "It is common knowledge that private ownership of property has been abolished in the Union of Soviet Socialist Republics . . . with the result that none of its nationals . . . is permitted . . . to have the personal control of any property" *In re Landau's Estate*, 172 Misc. 651, 16 N.Y.S.2d 3 (Surr. Ct. 1939).

source or foundation,⁵ but will not take notice of its substance. However, an increasing awareness of the inconvenience of adducing proof of foreign law has brought about a trend advocating legislative action to insure judicial notice.⁶ Care must be exercised in examining the statutes and their judicial interpretation, for they generally do not authorize taking judicial notice of the law of *foreign countries*.⁷ The most widely adopted statute empowering the courts to judicially notice foreign law—the Uniform Judicial Notice of Foreign Law Act⁸—draws a distinction between the law of “foreign” jurisdictions within the United States and the law of foreign countries.⁹ Although the uniform act, adopted in Florida in 1949,¹⁰ falls short of authorizing the courts to judicially notice the law of foreign countries, it is a significant improvement over the former alternatives of requiring proof of the law of sister states as fact or indulging in common law presumptions.¹¹

In his treatise on Evidence, Professor Wigmore wrote, “No one would *demand* that a court take judicial notice of foreign systems of law in foreign languages.”¹² (Italics added). In keeping with this concept, a statute was enacted in Maryland¹³ which states that the courts *shall* take judicial notice of the law of any jurisdiction “. . . having a system of law based on the common law of England.”¹⁴ Applying this statute to the merits in *Reisig v. Associated Jewish Charities*¹⁵ the court found that a law in Palestine was in conformity with the common law and doctrines of equity in England and said, “In this situation, the courts . . . are specially required to take judicial notice of this foreign law”¹⁶

Several states have statutes which specifically provide for their courts to judicially notice the law of any foreign country.¹⁷ The Massachusetts stat-

5. E.g., “Our courts will not assume judicial knowledge of foreign law . . . but . . . will assume judicial knowledge of historical facts . . . as to whether they were derived from the Roman civil law” *Masocco v. Schaaf*, 234 App. Div. 181, 254 N.Y.Supp. 439 (1931).

6. Sommerich and Busch, *The Expert Witness and the Proof of Foreign Law*, 38 CORNELL L.Q. 125, 132 (1953).

7. 9 WIGMORE, EVIDENCE § 2573 (3d ed. 1940).

8. UNIFORM JUDICIAL NOTICE OF FOREIGN LAW ACT §§ 1-8. This act was adopted in 26 jurisdictions by 1956. For listing, see 9 U.L.A. (Supp. 1956).

9. That the framers of the act considered this distinction important is emphatically pointed out by the commissioners' note. 9 U.L.A. § 5 n.1.

10. FLA. STAT. § 92.031 (1955).

11. Comment, 3 U. FLA. L. REV. 94 (1950).

12. 9 WIGMORE, *op. cit. supra* note 7 at 558.

13. MD. ANN. CODE art. 35 § 56 (1951).

14. For a criticism of the view that treats the English and American languages as identical, see Mous, *The Speech of Judges: A Dissenting Opinion*, 29 VA. L. REV. 625 (1943).

15. 182 Md. 432, 34 A.2d 842 (1943).

16. *Id.* at 437, 34 A.2d at 844.

17. Statutes in four states provide that the courts *shall* take judicial notice. MASS. GEN. LAWS, c.233 § 70 (1932); MISS. CODE ANN. § 1761 (1942); N.C. GEN. STAT. §8-4 (1953); W. VA. CODE ANN. § 5711 (1955). Two states *permit* the courts to take judicial notice. N.Y. CIV. PRAC. ACT § 344-a; MICH. COMP. LAWS §§ 617.25, 617.27 (1948).

ute,¹⁸ which on its face *requires* the courts to take judicial notice, reads as follows:

The courts shall take judicial notice of law of the United States or of any state, territory or dependency thereof or of a foreign country whenever the same shall be material.

It appears that this "far-reaching" statute dispenses with the requirement of pleading and proving foreign law and places the full burden of discovery on the court. However, in *Roderique v. Roderique*¹⁹ the court stated, "Merely to direct attention to the law of a foreign country . . . does not make it a matter for judicial knowledge."²⁰ There is also evidence that judicial treatment has rendered the Massachusetts act completely discretionary.²¹

The leading case in the trial courts of New York which interpreted section 344-a²² of the New York statutes is *Arams v. Arams*.²³ In that decision, which has been widely approved in later New York decisions,²⁴ the court held that it could not judicially notice the law of Switzerland *because the plaintiff failed to plead it*. However, the defendant's motion for dismissal was overruled on the grounds that the tort law involved was so *rudimentary* that any civilized country would enforce it.²⁵ After a rather passive history of nearly nine years,²⁶ section 344-a was interpreted by the highest court of New York in *Pfleuger v. Pfleuger*.²⁷ In discussing the general construction of the statute, the court said, "Under its provisions judicial notice of the *matters of foreign law specified therein* may be taken by a court 'in its discretion'. In the exercise of such discretion the court may — in passing on the pleading — take . . . judicial notice of the specified matters of foreign law depending upon the factors of *time, cost, and other adverse considerations . . .*"²⁸ (Italics added). The court then proceeded to judicially notice a Pennsylvania statute *which had not been pleaded*. When the defendant objected that it was entitled to be informed of the law on which the claim against it was based, the court directed attention to sub-

18. MASS. GEN LAWS, c.233, § 70 (1932).

19. 286 Mass. 77, 190 N.E. 20 (1934).

20. *Id.* at 83, 190 N.E. at 22.

21. See, *New England Trust Co. v. Wood*, 326 Mass. 239, 93 N.E.2d 547, 549 (1950) where the court said, "Although not so required, we might take notice of Turkish law. But here this is not practicable."

22. See note 2 *supra*.

23. 182 Misc. 328, 45 N.Y.S.2d 251 (Sup. Ct. 1943).

24. *Meijer v. General Cigar Co.*, 273 App. Div. 760, 73 N.Y.S.2d 576 (1st Dept. 1947); *Berg v. Oriental Consol. Mining Co.*, 70 N.Y.S.2d 19 (Sup. Ct. 1947); *Silberfeld v. Swiss Bank Corp.*, 183 Misc. 234, 50 N.Y.S.2d 838 (Sup. Ct. 1944).

25. The effect of this presumption is that the case is, in the absence of proof by the defendant that the foreign law is different, tried by the law of the forum. Thus, the burden of proof is shifted to the defendant. For worthy discussions of proving foreign law and the common law presumptions, see Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L. J. 1018, 1035 (1941); Keefe, Landis and Shaad, *Sense and Nonsense About Judicial Notice*, 2 STAN. L. REV. 664, 680 (1950); Comment, 3 U. FLA. L. REV. 94 (1950).

26. See Nussbaum, *Proving the Law of Foreign Countries*, 3 AM. J. COMP. L. 60 (1954).

27. 304 N.Y. 148, 106 N.E.2d 495 (1952).

28. *Id.* at 152, 106 N.E.2d at 496.

division D²⁰ of section 344-a and said, “. . . upon that subject we think it appropriate to suggest that the information the defendants seek may be the objective of a corrective motion . . . or a bill of particulars . . .,” but its absence will not result in dismissal for failure to state a cause of action.²⁰

In the instant case, the court followed the rule set down in the *Arams* case, but refused to adopt the theory that the tort law involved was rudimentary. In the latter context the court can not be criticized, since the action was for non-fault liability, a doctrine dependent upon master-servant relationships which are not universally recognized. The federal court—which was bound to apply New York law as it is, not as the court thinks it ought to be,²¹ or thinks it *will* be—made no mention of the opinion expressed in the *Pfleuger* case by the New York high court. The plaintiff was a stranger to Saudi Arabia; the defendant corporation conducted extensive business there and could in all probability have easily assisted the court in judicially learning the Saudi-Arabian law with savings in time and cost. Perhaps this was the type of adverse consideration the court had in mind in the *Pfleuger* case in its *general* discussion concerning the statute and *matters specified therein*. However, since that decision concerned the law of a sister state, the court could not properly follow it as precedent in the instant case and reluctantly permitted an apparent injustice to occur.

With the ever increasing rate of international intercourse, an increase in the number of actions involving the law of foreign countries is inevitable. The international traveler will need available means of establishing claims and defenses based on foreign law. The majority of such actions will undoubtedly be tried in the larger cities where necessary facilities, such as a panel of experts and foreign law libraries, *could* be annexed to the courts. It is submitted that a two-fold purpose would be served by equipping the courts to judicially notice the law of foreign countries: economies would be effected in valuable courtroom time, and a better form of justice would be available to the traveler of modest means.

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AGENCY — INDEPENDENT CONTRACTORS — NEWSBOYS

A newspaper carrier, while making his deliveries on a motorcycle, negligently struck and injured the plaintiff. *Held*, plaintiff could not recover from newspaper company, as carrier was an independent contractor and not an employee. *Miami Herald Pub. Co. v. Kendall*, 88 So.2d 276 (Fla. 1956).

29. See note 2 *supra*.

30. *Pfleuger v. Pflenger*, *supra* at 152, 106 N.E.2d at 497.

31. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).