

1955

## When Law is Fact

Benjamin Busch

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

Benjamin Busch, *When Law is Fact*, 24 Fordham L. Rev. 646 (1955).

Available at: <https://ir.lawnet.fordham.edu/flr/vol24/iss4/8>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

or Poor Man's Court exercising unified jurisdiction over small civil matters and minor crimes, and all family matters where the awards for support or maintenance are small. This court should be so administered as to provide to the poor citizens of that city the expeditious and complete judicial relief in one hearing and in one court to which the citizens of this great democratic city are of right entitled. For much too long this right has been denied our poorer citizens by the statutory disorganization of the inferior courts of New York City.<sup>39</sup>

### WHEN LAW IS FACT\*

BENJAMIN BUSCH†

There are not many subjects upon which legal theorists and practical lawyers alike have in recent times centered such avid attention as the matter of pleading and proof of foreign law.<sup>1</sup> The occasion of an appellate court decision which

---

39. No article on our New York City inferior courts should end without some comment, though it be a footnote, upon the selection of its judges; for though its organization be corrected, it will still be the character of its judges which will determine the quality of the court. Since the "poor man's court" will so vitally affect the normal life of the citizenry, that citizenry must be equipped with some means of expressing approval or disapproval and effecting a change at the ballot box if necessary. Direct election of judges, while theoretically attractive, is unworkable, for what voter can possibly inform himself to intelligently vote upon candidates for over one hundred judgeships. Centralization of responsibility upon the Mayor for all important appointive, administrative and judicial offices has provided a practical means of accountability at the polls, for the quality or lack of quality in such appointments has been a determining factor in his or his party's election or defeat at the periodic accounting periods called elections. In years past Mayors have been subjected to not inconsiderable political pressures from district leaders of their party. In more recent years these pressures have been somewhat tempered by the practice of the Mayor's submitting the names of all judicial appointees to the appropriate committees of the Association of the Bar, and the findings of these committees as to "qualified" or "not qualified" have been a determining factor in city judicial appointments. It would seem wise to write this salutary practice into the statute creating and organizing the proposed new court. The Mayor should be empowered to appoint as judges only those named by him on an unpublicized panel of nominees which the committees of the Bar have found to be qualified. Our Mayors should welcome such a provision since it would tend to free them from political pressures and ensuing embarrassments. Such statutory provision would place great responsibility and possibly subject to great political pressures the committees of our bar association, but it is believed they would be found worthy of rendering true public service none the less. However, it would become necessary for the various appropriate committees of our several bar associations to effect a much more coordinated means of working together than presently exists.

---

\* Extension of an address before 78th Annual Meeting of the American Bar Association, August 21, 1955, International and Comparative Law Committee.

† Member of the New York Bar. Member of the firm of Katz and Sommerich, New York City.

1. Nussbaum, *The Problem of Proving Foreign Law*, 50 *Yale L.J.* 1018 (1941); Keefe, *Landis & Shaad, Sense and Nonsense About Judicial Notice*, 2 *Stan. L. Rev.* 664 (1950); Schlesinger, *Comparative Law Cases and Materials* (1950); McCormick, *Judicial Notice*, 5

challenges concepts on that subject, long viewed as well settled, is certain to be stimulating and full of interest. The case of *Siegelman v. Cunard White Star*,<sup>2</sup> recently decided by the United States Court of Appeals for the Second Circuit, accordingly warrants a close inspection and analysis.

### I. THE SIEGELMAN CASE

The complaint in that action alleges that on September 24, 1949, while plaintiff's wife was a passenger on the S.S. Queen Elizabeth, she suffered an injury when both she and the dining room chair, in which she was seated, were overturned by the action of the sea. The answer, in addition to a general denial, alleges that the passenger had assumed the risk of the voyage, and also, that the passage was governed by the terms and conditions of the ticket which provided that there could be no recovery from damage due to dangers of the sea or acts of God. It was also alleged as a defense that the ticket contract required a suit to be commenced within one year from the day of injury, and that since the action was brought on December 14, 1951, the contract had not been complied with and that recovery was barred.

The suit, which had been commenced in the New York State court, was removed to the federal courts on the grounds of diversity. A motion was made in the District Court for a dismissal of the complaint, on the ground that the action was barred by the period of limitations specified in the contract.<sup>3</sup>

The affidavit in support of the motion briefly set forth the pertinent dates referred to above, which were conceded, and referred to the terms and provisions of the contract of passage, which were likewise conceded. In addition to the one year limitation on suits, the ticket also contained a provision that "All questions arising on this contract ticket shall be decided according to English Law with reference to which this contract is made."

The affidavit in opposition to the motion to dismiss brought forth the facts that the original attorney for the plaintiffs had discussed settlement with the Cunard claim agent, and that shortly before the expiration of the year from the date of injury, he had asked said claim agent whether it would be necessary to begin suit in order to protect his clients' rights. Upon being told that no suit was necessary, in view of the prospect of an early settlement, the attorney took no further action. Thereafter, Mrs. Siegelman died from a coronary thrombosis (it does not appear that this had any relationship to the injury originally sustained), and the settlement offer was withdrawn, on the ground that it could be tendered only to the injured party.

A contest for letters of administration ensued between the plaintiff and relatives of the deceased, and such letters were not issued to the plaintiff until June 7, 1951. On December 14, 1951, the suit was begun.

---

Vand. L. Rev. 296 (1952); H. L. Jones, *International Judicial Assistance Act*, 62 *Yale L.J.* 515 (1953); Sommerich & Busch, *The Expert Witness and the Proof of Foreign Law*, 38 *Cornell L.Q.* 125 (1953); Nussbaum, *Proving the Law of Foreign Countries*, 3 *Am. J. Comp. L.* 60 (1954); Note, *Evidence: Presumptions as to the Law of Foreign Countries*, 42 *Calif. L. Rev.* 701 (1954).

2. 221 F. 2d 189 (2d Cir. 1955).

3. *Siegelman v. Cunard White Star*, Civil No. 72-148, S.D.N.Y., Jan. 3, 1952.

No reference was made to English law by either of the parties upon the hearing of the motion to dismiss. Upon that state of the record, there would have been authority for a determination by the District Court that the law of this jurisdiction is the only law before the court in the absence of proof of the law of the foreign jurisdiction;<sup>4</sup> or stated in another manner, the failure of the parties to prove foreign law raised the presumption that they acquiesced in the application of the law of the forum.<sup>5</sup>

The District Court relied upon neither of these presumptions and based its opinion upon the language of the contract which provided for the one year limitation for suits and which made invalid any changes in the contract unless signed by the chief agent at the port of embarkation, and which required all questions arising on the contract to be decided according to English law.

The only question which the court considered decisive was whether a claim agent could, under British law, waive the one year contractual limitation. After pointing out that under New York law, the modification of a contractual limitation must be in writing and signed by the chief agent at the port of embarkation, the opinion states: "There has been no allegation or proof that the law of England is different from that of New York,"<sup>6</sup> and English precedent is cited<sup>7</sup> to show that the law of England is allegedly in accord with the law of New York, as stated.

The opinion further states that if either of the parties contended that the law of England has been misinterpreted by the court, they could submit additional affidavits of experts on the subject of English law within ten days from the date of the decision. The record of the case fails to show that any affidavits were submitted by any of the parties on the subject of English law.

The motion to dismiss the action was granted, and an appeal was taken to the United States Court of Appeals. The appellant's brief<sup>8</sup> argued that under New York and federal law, a contractual stipulation limiting the time to sue may be waived by words or conduct despite a condition prohibiting alteration or amendment except by a designated person in writing. The English precedent cited by the District Court was distinguished on the theory that the sole question there involved was the scope of authority of a person whose duties were ministerial. The appellant likewise contended that "English law, if it be considered, is no different than that enunciated by New York and federal authority,"<sup>9</sup> *citing three English cases in support of that proposition.*<sup>10</sup> The second point in appellant's brief was that the defendant's promise of settlement and its representation that a timely suit need not be commenced, constituted a waiver

---

4. *Bayer v. Lovelace*, 204 Mass. 327, 90 N.E. 538 (1910).

5. *Leary v. Gledhill*, 8 N.J. 260, 84 A. 2d 725 (1951); *Sturm v. Sturm*, 111 N.J. Eq. 579, 587, 163 Atl. 5, 8-9 (1932); 67 L.R.A. 33, 34 L.R.A. (N.S.) 261.

6. See note 3 *supra*.

7. *Barnett, Hoares & Co. v. South London Tramways Co.*, 18 Q.B.D. 815 (1887).

8. Brief for Appellant, p. 6, *Siegelman v. Cunard White Star*, 221 F. 2d 189 (2d Cir. 1955).

9. *Id.* at 8.

10. *Id.* at 8.

of the limitation on the suit. No English cases were relied upon in connection with this argument.

Appellee, in its brief,<sup>11</sup> argued that under the law of the United States, it had neither waived its contract nor was it estopped from asserting it, and that there was no waiver of appellant's contract rights under the governing English law. The clause in the ticket, that English law governs, was quoted and many English cases cited in support of the last contention.

A reply brief<sup>12</sup> was filed by the appellant, taking violent objection to appellee's reliance upon English law. The brief states: "Appellee failed to submit any English law on the hearing of the motion in District Court, and here for the first time cites such justification of its position."<sup>13</sup> The brief continues: "English law is not applicable to this case. First, it has not been pleaded or proved. *Liverpool & G.W. Steam Nav. Co. v. Phoenix*, 129 U.S. 397, 445, 9 S. Ct. 469, 473, 32 L. Ed. 788. Second, because both the *lex loci contractus* and the forum are American, the application of English law to lessen, weaken or avoid appellant's claim for damages is contrary to public policy. . . ."<sup>14</sup>

Several grounds were open to the Court of Appeals for its determination that English law governed the case before it even though not pleaded or proved. It could have been determined that the parties, having failed to take advantage of the opportunity to submit affidavits of experts on the English law relied upon by the District Court, must be presumed to have acquiesced in the application of the laws of England. It could also have been determined that the appellant himself had rested his case on English law, inasmuch as he had submitted English authority to support his contention that both under English, New York, and federal authorities, the limitation for suit had been waived. Having advanced English precedents to support his own case, he could hardly have been heard to object to the submission by appellee of English authority in support of its contentions.

The majority opinion of the Circuit Court avoided either of these alternatives and fired, with complete abandon, the edict that it was within its competence to apply English law, because pleading foreign law is unnecessary and because judicial notice could be taken of foreign law, whether or not pleaded or proved.<sup>15</sup>

In tacit recognition of the fact that pleading the foreign law relied on had always, at least in the past, been a requirement,<sup>16</sup> the opinion rests for support upon Rule 8 of the Federal Rules of Civil Procedure,<sup>17</sup> which states that a short and plain statement of the claim, showing that the pleader is entitled to relief, is sufficient, and that furthermore it is not necessary to set out the legal theory on which the claim is based, citing *Gins v. Mauser Plumbing Supply Co., Inc.*<sup>18</sup>

---

11. Brief for Appellee, p. 4, *Siegelman v. Cunard White Star*, 221 F.2d 189 (2d Cir. 1955).

12. Reply brief for Appellant, p. 1, *Siegelman v. Cunard White Star*, 221 F. 2d 189 (2d Cir. 1955).

13. *Id.* at 1.

14. *Id.* at 1-2.

15. 221 F. 2d at 196.

16. *Liverpool & G.W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 444-46 (1889).

17. 28 U.S.C.A. (1950).

18. 148 F. 2d 974 (2d Cir. 1945).

So startling an innovation as the pronouncement that foreign law need not be pleaded merits a study of the authority relied upon. *Gins v. Mauser*, it turns out, does not involve foreign law at all, but relates solely to the law of bankruptcy. The pleading in that case contained five separate causes of action, which recited the same underlying facts five separate times in the light of five different legal theories, and the court properly indicated its criticism with the suggestion that the repetition was unnecessary for each particular legal theory of counsel, and that it was "the court's duty to grant the relief to which the prevailing party is entitled, whether demanded or not."<sup>19</sup>

The distinction between that case, involving statutory domestic bankruptcy laws, and cases involving the laws of other countries would seem to be apparent without the necessity of further comment.

The prevailing rule with regard to pleading foreign law was quite recently stated in New York upon the dismissal of a complaint for insufficiency in pleading as follows:<sup>20</sup> "As to common law countries, the courts of this state will assume, in the absence of a contrary showing, that their common law is the same as that of this state, which recognizes no right of privacy. As to other than common law countries, no assumption will be indulged in that their law is the same as ours, and the foreign law must be proved."<sup>21</sup>

A Federal District Court stated the same rule even more forcibly in *F.A.R. Liquidating Corp. v. Brownell*<sup>22</sup> with the following language: "If foreign law is relied on, it must be pleaded and its substance, at least, laid out as a fact." (Citing: *Empresa Agricola Chicama Ltda. v. Amtorg Trading Corp.*, 57 F. Supp. 649, 650; *Iafrate v. The Liberte*, 106 F. Supp. 619; *United States v. National City Bank of New York*, 7 F.R.D. 241, 243; *The Jean Jadot*, 14 F. Supp. 161.)<sup>23</sup> And again: "Unless foreign law is expressly pleaded 'the case must be decided according to the law of the federal courts as a question of general commercial law.' *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 444-446, 9 S. Ct. 469, 473, 32 L. Ed. 788."<sup>24</sup>

A very pointed indication of the rule of law in force in New York State on this subject was most recently made by the Appellate Division, First Department, in *Greiner v. Freund*.<sup>25</sup> The plaintiff in that case had been ordered to

---

19. *Id.* at 976.

20. *Schumann v. Loew's Inc.*, 135 N.Y.S. 2d 361 (Sup. Ct. 1954).

21. *Id.* at 366. It is of interest to compare this with the following statement of the United States Supreme Court in *Lutwak v. United States*, 344 U.S. 604, 621 (1953): "It does not seem justifiable to assume what we all know is not true—that French law and our law are the same. Such a view ignores some of the most elementary facts of legal history—the French reception of Roman law, the consequences of the Revolution, and the Napoleonic codifications. If the Government contends that these marriages were ineffectual from the beginning, it would seem to require proof of particular rules of the French law of domestic relations."

22. 130 F. Supp. 691 (Del. 1955).

23. *Id.* at 694.

24. *Id.* at 695. It should be noted that the court relies upon the *Liverpool* case which the majority opinion in the *Siegelman* case stated was out of date.

25. 286 App. Div. 996, 144 N.Y.S. 2d 766 (1st Dep't 1955). Cf. *Pfleuger v. Pfleuger*, 304 N.Y. 143, 106 N.E. 2d 495 (1952), where the court took judicial notice of the statute of a sister state

allege facts sufficient to charge the defendant with a certain obligation. The plaintiff endeavored to comply by pleading that such obligation was imposed upon the defendant under the laws of Austria, without setting out the text or substance upon which he allegedly relied. The dismissal for insufficiency of that cause of action was affirmed by the appellate court upon the ground that no hint was given ". . . as to the nature or identity of the laws, as to whether they are statutory or decisional . . ." or ". . . the purport of the allegedly applicable laws as allegations of fact."<sup>26</sup>

In the opinion of the court, the failure of the plaintiff to indicate within which one of the several statutory codes in force in Austria the transaction fell, hampered the defendant in answering the complaint and rendered the pleading defective. The court flatly stated its refusal to exercise its discretion under section 344-a of the Civil Practice Act and take judicial notice of laws ". . . where merely their purported effect is pleaded in complete disregard of the requirement of the plain and concise statement of material facts recited in section 241, C.P.A."<sup>27</sup>

It does not appear that there is any adequate body of precedent to support a contention that pleading the foreign law is now clearly unnecessary. There is authority to the contrary.<sup>28</sup>

The majority opinion in the *Siegelman* case indicates that it was no great difficulty for the court to dispose of the question pertaining to the necessity of pleading the foreign law, and states that the question whether the appellate court was at liberty to interpret and apply foreign law, which had not been proved below, was a more difficult question.

Analyzing the problem, the court finds that when sources of foreign law were not readily accessible, it was impractical to expect a judge to ascertain applicable foreign law, and that this accounts for the requirement heretofore in this country that foreign law be proved as a fact, if it is to be applied. It is noted that an increasing availability of the laws of jurisdictions within the United States encouraged statutes for the judicial notice of such laws.<sup>29</sup> The opinion further finds that while difficulty of ascertainment of foreign law might have been a

---

(Pa.), and held that the defendants could obtain relief as to knowledge of the statutes relied upon by a motion to make more definite and certain or by a motion for a bill of particulars, citing *Busch*, Bills of Particulars of Foreign Law, 125 N.Y.L.J., No. 46, p. 836, col. 1 (March 8, 1951); *Meijer v. General Cigar Co.*, 73 N.Y.S.2d 576 (Sup. Ct. 1947), modified, 273 App. Div. 760, 75 N.Y.S. 2d 536 (1st Dep't 1947), where it was held that the allegation of a specific foreign decree was evidentiary and should be stricken; *de Cordova v. Sanville*, 214 N.Y. 662, 108 N.E. 1092 (1915), decided on the dissenting opinion in 165 App. Div. 128, 150 N.Y. Supp. 709 (1st Dep't 1914), where it was held that the ultimate fact, and not the evidence must be alleged in a pleading; *Raul International Corp. v. Morrison Corp.*, 282 App. Div. 1042, 126 N.Y.S. 2d 271 (1st Dep't 1953).

26. 286 App. Div. at 997, 144 N.Y.S. 2d at 767.

27. *Ibid.*

28. *Schumann v. Loew's Inc.*, 135 N.Y.S. 2d 361 (Sup. Ct. 1954); *Bergman v. Lax*, 107 N.Y.S. 2d 266 (Sup. Ct. 1951); *Schumann v. Loew's Inc.*, 199 Misc. 38, 102 N.Y.S. 2d 572 (Sup. Ct. 1951). See also *Sommerich*, Report of the Committee on Foreign Law, 2 N.Y.C. Bar Ass'n Rec. 128 (1947); *Pleading, Proof, and Judicial Notice of Foreign Law* (Editorial), 117 N.Y.L.J., No. 93, p. 1560, col. 1 (April 22, 1947).

29. Citing Comment, 42 Mich. L. Rev. 509, 517, n. 65 (1943).

reason for *empowering* a judge to disregard such law, if not proven, it was not cause for *requiring* him to disregard it, and that some statutes, such as section 344-a of the Civil Practice Act, have permitted judges to apply unproven foreign law, even though it is not readily accessible.<sup>30</sup>

Finally, the court concludes that since Rule 43 (a) of the Federal Rules of Civil Procedure permits the presentation of evidence according to the rules of evidence applied in the courts of general jurisdiction of the state in which the federal court is held, or whatever method is most convenient within the selection permitted by said rule, that the New York judicial notice procedures, if most liberal, should apply.<sup>31</sup>

Without limiting the rule thus enunciated to the facts before it and without basing its conclusion upon the particular type of foreign law involved or its characteristics, the majority opinion states: "The most convenient method of presenting the foreign law is obviously not to have to introduce evidence on it at all, but simply to treat it in the same fashion as domestic law. Consequently, since a New York judge could consider and apply unproven foreign law, a federal district judge sitting in New York may do likewise. To this extent the Liverpool case, 1889, 129 U.S. 397, 9 S. Ct. 469, 32 L. Ed. 788, and the authorities cited therein, are out of date."<sup>32</sup>

Although not relevant to this discussion, it might be added that the majority of the court did, as a result of its finding that it could interpret and apply foreign law not proved below, ascertain that under English authorities (not referred to either by the trial court or by counsel), in order to raise the issue of estoppel, there must be a misrepresentation of a fact and not of intention, and that, therefore, it was not necessary to decide the effect that English law would give to the provision requiring alterations of a contract to be in writing and over the signature of the Cunard's chief agent at the port of embarkation.

The court assumed the authority of the Cunard claim agent to say that no suit was necessary despite the forthcoming expiration of the time limitation within which to bring such suit, but found that this was a statement of opinion, and not of fact, and that, therefore, no estoppel had been proved. It was further concluded that the plaintiff's delay in obtaining letters of administration would not toll the Statute of Limitations under English law, but that even if the running of the period were suspended thereby, the lawsuit was begun too late, for letters of administration were granted on June 7, 1951, and the action was not commenced until December 14, 1951.<sup>33</sup>

The outcome of the lawsuit is at least significant here, in that, as a result of the ascertainment and application of a rule of foreign law, which had been neither pleaded nor proved, nor discussed by the trial court or by counsel, the plaintiff was denied any recovery whatever.<sup>34</sup>

---

30. Citing Callahan & Ferguson, Evidence and the New Federal Rules of Civil Procedure, 47 Yale L. J. 194, 210-13 (1937).

31. 221 F. 2d at 196, citing 5 Moore, Federal Practice, § 43.09 (2d ed. 1955).

32. Ibid.

33. Ibid.

34. The dissenting opinion, assuming the propriety of applying English law, contributes a brilliant discussion of "take-it-or-leave-it" contracts of "adhesion". Id. at 199-209.



It is fair to inquire whether the authority cited on the point sustains the majority's broad pronouncements as to an appellate court's right to interpret and apply foreign law which has not been proved below.

Professor Hartwig's discussion of "the Uniform Judicial Notice of Foreign Law Act,"<sup>35</sup> cited by the majority opinion, relates exclusively to "*jurisdictions within the United States.*"<sup>36</sup> This appears to be equally true of a comment<sup>37</sup> dealing with the same topic, also cited by the majority opinion, which ends with the contention that ". . . there would seem to be little reason for an appellate court's refusal to use all available legal materials in repairing and correcting the judgment of the trial court. The recent trend of legislation in this field would seem to show a more general acceptance of this viewpoint."<sup>38</sup>

The article by Callahan and Ferguson, referred to by the majority opinion, is the only reference which discusses foreign law based upon a different system of jurisprudence,<sup>39</sup> and in this connection the authors concede that such laws "*may require more than mere statement and argument; the court should not be called upon to make unreasonable researches, and in such cases might rightfully require proof.*"<sup>40</sup>

Since all of the three scholarly works referred to deal with the question of judicial notice on the broad view of philosophical inquiry, without reference to the more limiting aspects of case law precedent, it may not be amiss to show that both in theory and practice good reason exists why an appellate court should not be permitted to interpret and apply the law of jurisdictions not within the United States which has not been proved below.

Doubt concerning the propriety of a court's private research of foreign law was very ably expressed by Mr. Justice Walter of the New York Supreme Court in *Arams v. Arams*,<sup>41</sup> where he stated: ". . . if cases now can be decided according to whatever law the judge sees fit to apply *and is able to discover by his own private researches, undisclosed to the parties*, then much that hitherto has been regarded as essential to the right to pronounce judgment—the raising of an issue determinable by reference to the law of a specified place, and an opportunity to know what the deciding tribunal is considering and to be heard with respect to both law and fact—would seem to have been abolished. I am unwilling to assume that a power so contrary to the plainest principles of fair-dealing and due process of law was intended or has been conferred."<sup>42</sup>

35. Hartwig, Congressional Enactment of Uniform Judicial Notice Act, 40 Mich. L. Rev. 174, 176 (1941).

36. *Ibid.* (Emphasis added.)

37. Comment, 42 Mich. L. Rev. 509 (1943).

38. *Id.* at 520.

39. Callahan & Ferguson, Evidence and the New Rules of Federal Procedure, 47 Yale L.J. 194, 210-13 (1937).

40. *Id.* at 212 (Emphasis added.)

41. 182 Misc. 328, 45 N.Y.S. 2d 251 (Sup. Ct. 1943).

42. *Id.* at 330, 45 N.Y.S. 2d at 253 (Emphasis added.) The court cited *Crowell v. Benson*, 285 U.S. 22, 48 (1932); *United States v. Abilene & So. Ry.*, 265 U.S. 274, 288-89 (1924); *I.C.C. v. Louisville & N.R.R.*, 227 U.S. 88, 93 (1913); *Standard Oil Co. v. Missouri*, 224 U.S. 270, 281 (1912); *Reynolds v. Stockton*, 140 U.S. 254, 264-66 (1891); *Cohen v.*

United States District Judge Charles E. Wyzanski, Jr., of the District of Massachusetts, expressed the same sentiments when he delivered the 1952 Benjamin N. Cardozo Lecture in New York City, entitled *A Trial Judge's Freedom and Responsibility*, and stated: ". . . when a judge has tended to reach his result partly on the basis of general information and partly on the basis of his studies in a library . . . it seems to me that the judge, before deriving any conclusions from any such extra-judicial document or information, should lay it before the parties for their criticism."<sup>43</sup>

The Model Code of Evidence of the American Law Institute envisions similar restraints, even though it deals with judicial notice of the common law and statutes of every jurisdiction of the United States.<sup>44</sup> Thus, it provides: "(1) The judge shall inform the parties of the tenor of any matter to be judicially noticed by him and afford each of them reasonable opportunity to present to him information relevant to the propriety of taking such judicial notice or to the tenor of the matter to be noticed."<sup>45</sup>

A recent article<sup>46</sup> contains an interesting observation in point, stating: "The construction of an edifice of factual data—dicta of judges inadequately trained or completely untrained in international law and its appropriate techniques, and assertions in diplomatic correspondence that partake more of the character of advocacy than of judgment—and the weighing of this edifice in metaphorical scales is not a satisfactory process."<sup>47</sup>

These statements of principle are supported by well-established precedent, both in New York, in the federal courts, and the courts of England.

Since the advent of section 344-a of the Civil Practice Act, upon which the majority opinion in the *Siegelman* case wholly based its actions, the Court of Appeals of New York, in *Sonnesen v. Panama Transport Co.*,<sup>48</sup> refused to take judicial notice of the laws of Panama and ordered a new trial to enable the foreign law to be proved. The court explained its action with the following statement: "We are not entitled to assume that the maritime law of Panama (a "civil law" country) is the same as ours, or as any part of ours (*Ozanic v. United States*, 165 F. 2d 738, 744). Furthermore, we do not think this an appropriate case in which, under section 344-a of the Civil Practice Act, to take judicial notice of the foreign law. Since the trial was on an erroneous theory, we, in the interests of justice, order a reversal and grant a new trial as to the first alleged cause of action."<sup>49</sup>

---

City Company, 283 N.Y. 112, 27 N.E.2d 803, 805 (1940); *Jackson v. Strong*, 222 N.Y. 149, 154, 118 N.E. 512, 513 (1917); *Lamphere v. Lang*, 213 N.Y. 585, 588, 108 N.E. 82, 83 (1915); *Clapp v. McCabe*, 84 Hun 379, 387-90 (Sup. Ct. 1895), *aff'd*, 155 N.Y. 525, 50 N.E. 274 (1898), followed in *Berg v. Oriental Consolidated Mining Co.*, 70 N.Y.S. 2d 19 (Sup. Ct. 1947).

43. N.Y.C. Bar Ass'n Rec. 280, 294-95 (1952).

44. See Schlesinger, *Cases and Materials on Comparative Law* 124 (1950).

45. Model Code of Evidence rule 804 (1942).

46. O'Connell, *A Critique of the Iranian Oil Litigation*, 4 *Int'l & Comp. L.Q.* 267 (1955).

47. *Id.* at 293.

48. 298 N.Y. 262, 82 N.E. 2d 569 (1948), *cert. denied*, 337 U.S. 919 (1949).

49. *Id.* at 267, 82 N.E.2d at 571. See also *Industrial Export & Import Corp. v. Hongkong*, 302 N.Y. 342, 98 N.E. 2d 466 (1951); 8 *Carmody-Wait* 740, n. 14 (1954).

These principles are well grounded in the roots of English law and are firmly observed by the English courts today.<sup>50</sup>

One of the surprising features of the decision in the *Siegelman* case is that the same court had earlier handed down decisions at complete variance with the new doctrine, and these contradicting decisions were approved by two of the judges sitting on the *Siegelman* case.

Thus, in *United States ex rel. Jelic v. District Director of Immigration*,<sup>51</sup> the majority opinion specifically held that the court could not take judicial notice of German law where no evidence of the German law was presented below, notwithstanding the provisions of Rule 43 (a) of the Federal Rules or section 391 of New York Civil Practice Act (permitting judicial notice).

In *United States v. Uhl*,<sup>52</sup> it was stated that "foreign law itself is a fact to be proved."<sup>53</sup>

More recently, the same court in *Usatorre v. The Victoria*,<sup>54</sup> stated that foreign law is a fact and remanded the case, amongst other reasons, for additional proof and findings with respect to applicable Argentine law.

A hasty review of recent federal and New York decisions plainly indicates that there is no trend whatever toward the elimination of any requirement that foreign law be pleaded and proved; indeed the trend is quite to the reverse.

In *Mosbacher v. Basler Lebens Versicherungs G.*,<sup>55</sup> the court stated: "In complex matters exclusively governed by foreign law, such as the case at bar, expert testimony is critically important to the Court. No issue as important as this should be resolved on partial or inadequate disclosure."<sup>56</sup>

In *Valle v. Stockard S/S Corp.*,<sup>57</sup> relief was denied for failure of full proof of Italian law, citing *Sonnesen v. Panama Transport Co.*

In *Matter of Lopez*,<sup>58</sup> the court conceded its power to take judicial notice of the laws of Spain, but in the exercise of discretion, decided to require proof of such laws.

In *Berweger v. Berweger*,<sup>59</sup> no offer of proof was made as to the laws of Germany, and the court refused to take judicial notice thereof.

---

50. "Before the question whether foreign law is applicable can arise at all—with its consequent problems of classification and the interpretation of the relevant foreign provisions—the parties must have raised the issue. It is not for the judge to suggest that a foreign system of law might be appropriate in a case before him. He is an English judge in an English court, sworn to administer English law, and, indeed, English law is the only system of which knowledge can be imputed to him. In consequence, foreign law, if the parties wish to raise it, must be proved to him; it is a matter of fact, and, like other facts, must be established by evidence." J.A.C. Thomas, *Private International Law* 31 (1955).

51. 106 F. 2d 14 (2d Cir. 1939).

52. 137 F. 2d 858 (2d Cir. 1943).

53. *Id.* at 861.

54. 172 F. 2d 434 (2d Cir. 1949).

55. 111 F. Supp. 551 (S.D.N.Y. 1951).

56. *Id.* at 552.

57. 129 N.Y.L.J., No. 126, p. 2155, col. 4 (Sup. Ct. 1953), reargued, 130 N.Y.S. 2d 550 (Sup. Ct. 1953).

58. 131 N.Y.L.J., No. 19, p. 10, col. 7 (Surr. Ct. 1954).

59. 131 N.Y.L.J., No. 107, p. 7, col. 7 (Sup. Ct. 1954), appeal dismissed, 137 N.Y.S. 2d 346 (App. Div., 1st Dep't 1954).

In *Harris v. American International Fuel & Petroleum Co.*,<sup>60</sup> the court held that it could not judicially notice foreign law which must be pleaded and proved as facts.

In *Albert v. Brownell*,<sup>61</sup> the Ninth Circuit Court of Appeals held that the laws of Luxembourg are a question of fact in a domestic forum.

In *Sinai v. Levi*,<sup>62</sup> the court refused to take judicial notice of the Statute of Limitations prescribed by Italian law, the effect of which had not been pleaded.

The case of *F.A.R. Liquidating Corp. v. Brownell*, which has already been discussed, is another evidence of the judicial trend to refuse to take judicial notice of unproved foreign law.

In *Sundberg v. Aktiebolaget Svenska Amerika Linien*,<sup>63</sup> the court, while acknowledging that it could take judicial notice of foreign law, refused to do so with respect to Swedish law, because "nothing has been placed before me which is informative or helpful in that connection."<sup>64</sup>

Instances where courts have taken, or have indicated that they could take, judicial notice of the laws of a foreign jurisprudence without proof, are few and are open to explanation and distinction.<sup>65</sup>

## II. CONCLUSION

In conclusion it may be stated that the legal literature prior to the enactment of section 344-a<sup>66</sup> actually sought the elimination of the *formalities of proof* of foreign law without any suggestion that the courts, at any stage of the proceeding, should resort to the interpretation and application of foreign law which had not been proved.

A recent statement to the same effect is to be found in *Medvin v. Semken*,<sup>67</sup> where the following is stated: "The court recognizes that under section 344-a of the Civil Practice Act it has discretion to take judicial notice of the law of a sister state . . . . But the enactment of section 344-a does not dispense with the need for proof; it simply devised a process by means of which the technical rules of proving the matter specified in section 344-a could be dispensed with in the discretion of the court."<sup>68</sup>

60. 124 F. Supp. 878 (W.D. Pa. 1954).

61. 219 F. 2d 602 (9th Cir. 1954).

62. 144 N.Y.S. 2d 316 (City Court, City of N.Y., 1955). In another hearing of the same case, *Sinai v. Levi*, 134 N.Y.L.J., No. 76, p. 7, col. 4 (City Ct., City of N.Y., 1955) the court again refused to exercise its discretion under § 344-a of the Civil Practice Act, basing its decision upon the fact that "Neither litigant anywhere sets forth the Italian statute itself. . . ."

63. 134 N.Y.L.J., No. 64, p. 3, col. 4 (City Ct., City of N.Y., Sept. 30, 1955).

64. *Ibid.*

65. *Matter of Baruch*, 131 N.Y.S. 2d 84, 86 (Surr. Ct. 1954); *National City Bank of N.Y. v. Beebe*, 131 N.Y.S. 2d 67, 72 (Sup. Ct. 1954); *Matter of Altman*, 138 N.Y.S. 2d 336, 337 (Surr. Ct. 1954); *Mangrelli v. Italian Line*, 208 Misc. 685, 688, 144 N.Y.S. 2d 570, 573 (Sup. Ct. 1955).

66. Wachtell, *Proof of Foreign Law in American Courts*, 69 U.S.L. Rev. 526 (1935); 9 N.Y. Judicial Council Rep. 267, 279 (1943).

67. 131 N.Y.L.J., No. 109, p. 13, col. 2 (Sup. Ct. 1954).

68. *Ibid.*