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PROVING FOREIGN DOCUMENTS IN NEW YORK*

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AS TECHNICAL progress shortens effective distances, the issues in lawsuits tend more and more to embrace foreign matters. One who has had to face the problem of authenticating a foreign record for use in a New York judicial proceeding will probably recall searching the statutes with a sense of bafflement and following their intricacies and bridging their omissions as best he could with crossed fingers and a fervent hope that the opposition would not be too captious about whether his authentication fulfilled the statutory requirements. For the dual purpose of untying some of the knots in the writer's own mind and of sparing other members of the Bar as much febrile research as possible, the following discussion will attempt to gather the applicable rules and make a reasonably straight line out of what appears at first impression to be a labyrinthine statutory system.

NATURE OF THE PROBLEM

The problem relates to the technique of putting a record emanating from a foreign jurisdiction in such form that the New York court will, without more, accept it as being what it purports to be and hence admissible in evidence. The problem arises most frequently in connection with copies of records on file in some court or other public office in a foreign jurisdiction. In such instances, the authentication means that the copy has been proven to be a correct representation of a genuine original. The problem may, however, also arise in a different but similar connection, namely, the original creation of affidavits made or instruments acknowledged in other jurisdictions. In such instances the authentication means that the oath is proven to have been administered or the acknowledgement taken in proper form by a qualified officer.

A Note on Nomenclature. The word "authentication" itself is defined, in this connection, by both *Webster* and *Bouvier,* as "legal attestation" (see also 6 *C.J.* 863). In turn, "attestation", which relates primarily to the witnessing of an action (such as the signing of a will) and

* This footnote is to explain the absence of any others in this article. Though footnotes are commonly held indispensable trappings of legal scholarship, they sorely try the reader's powers of attention, as if a treatise were a piece of piano music. The New York courts get along without them and so did the Supreme Court of the United States until recently. The eye can more easily read (or skip) cited matter in the text than find it in a footnote and then relocate the place in the text. Certain abbreviations will be used, *e.g.,* the New York Civil Practice Act will be referred to as "C.P.A." At the end of the paper there appears a bibliography of the authorities cited in the text.

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secondarily to the certification of a paper as being a copy of another (*Webster, Bouvier* and 6 *C.J.* 553-54) here imports the aggregate of all the recitals or certificates (or oral evidence) which are enough to be accepted as proving (a) that a paper was compared with an official record and found to be a copy, or that an oath was administered or an acknowledgement taken, as the case may be, and, whichever it was, (b) that the person who did it was qualified to do it. The question of what that aggregate is in connection with the various kinds of foreign documents will be the specific subject of this study.

Discussion of the question will also bring into use the familiar terms "certified copy" and "exemplified copy." "Certified" is commonly and correctly understood to relate to the certification by the public officer in charge of the original that the purported copy represents the original, *i.e.*, that it is a copy (C.P.A. § 329). It is usually taken to refer to copies of domestic records. "Exemplified", on the other hand, is the term usually used by lawyers to describe the kind of copy of a foreign record which is so authenticated as to be admissible here.

There is a widespread belief that the difference between a certified and an exemplified copy is that the exemplified copy carries, in addition to the certification, a peculiar rigamarole whereby a judge certifies that the clerk who certified the copy is the clerk and the clerk in turn certifies that the judge is the judge, with the result that the two certificates prove each other though neither of them is otherwise proved. This conception is apparently based on some mistakes which have crept into the form books. They will be noticed later. Actually, the word "exemplification", taken literally, means nothing more than that the paper exemplified has been made an example—*i.e.*, a copy—of another. (*Bouvier*). Legally, it specifically connotes a certified copy under seal (*Webster;* 24 *C.J.* 1224; 5 Wigmore § 1681 n. 1). Richardson §§ 623-24, defines exemplification as an authentication "in the name of the sovereign power." Since, as we shall see, the last step in the authentication of foreign documents is usually the great seal of the foreign jurisdiction, Richardson's concept does not vary in substance from the others. It is not true, however, that the great seal is theoretically necessary or even actually required in all cases. A lesser seal sometimes suffices (see *infra* pp. 57, 64, 70).

In point of fact, certified copies of domestic records must also be exemplified in order to be admissible without further proof, since C.P.A. §§ 330 and 382 require the certification to be made under the seal of the certifying officer.

Basis of Admissibility of Official Documents

The philosophy which underlies the admissibility of official records is that effect should be given to the act of a public officer, foreign or domestic, in the performance of his duty. Thus if the law of England requires a certain public officer to make and keep birth records, his certification, properly established as such, that he has a certain record will be accepted as proving that the record is there and as evidence (though not necessarily conclusive) that the fact recorded is true. In this respect, official records constitute a recognized exception to the hearsay rule on the theory that there is a certain presumption of correctness about information which public officers are required by law to acquire and keep on file in their offices (5 Wigmore § 1632).

If the law of France requires the clerk of a French court to preserve records of judicial proceedings in that court, his certification, properly established as such, that a certain paper is a correct copy of a judgment on file in that court will be accepted as proof that the original judgment is there and that the copy is correct.

Thus the official character of the original record removes any objection as to its competency (*e.g.*, where its purpose is to prove the truth of a fact recorded). The official character of the certification removes as to the copy any objection of incompetency directed to the question of its genuineness as representing the original.

Evidentiary Effect When Admitted

When the copy has been admitted as a competent copy of a competent original there may still, in some cases, be a question as to how much the document proves. An official birth record will be accepted as evidence that a person having the stated name was born at the time and place recorded. Whether that person was the same as the person involved in a New York lawsuit may still be a question. The presumption of identity of persons arising from identity of names is probably applicable but the question is not one of authentication (5 Wigmore § 1677; Matter of Kennedy, 82 Misc. 214 (Surr. Ct. 1913)).

So the problem of the evidentiary effect of the foreign official document may still confront counsel after authentication has been accomplished. Indeed, the Civil Practice Act expressly provides, with respect to judicial records from foreign countries (§ 397) that the admissibility of such records leaves open the question of their effect. The meaning of that section was considered by the Court of Appeals in Gould v. Gould, 235 N. Y. 14 (1923), which involved the question of the effect of a French judgment of divorce. The court pointed out that the section applies to judicial records of foreign countries and not to judicial records of sister

states, because of the full faith and credit provisions of the Constitution, which we shall notice presently. The question before the court in the *Gould* case was of the *substantive* effect to be given to the French judgment, and it would appear that this was what the legislature had in mind in enacting Section 397. Statute or no statute, there would necessarily be a problem of evidentiary effect both as to records from foreign countries and as to records from sister states. The full faith and credit provision of the Constitution requires New York to give the records of other states only so much effect as they would have where rendered. It can scarcely be doubted that there might be real questions of evidentiary effect in the sister state where the record originated.

In Blass v. Terry, 156 N. Y. 122 (1898), the court held that an exemplified copy of an Ohio deed, though admissible to prove the grant, did not prove acceptance of an assumption of mortgage recited in the deed.

Nature of Documents Involved

As may be inferred from the foregoing, there are many foreign documents which cannot be made to prove themselves. In respect of purely private documents there is really no significance in the fact that they originated in some foreign jurisdiction. For example, a private contract executed in Chicago or London presents no different problems in respect of authentication from a private contract executed in New York. Even the original will not be admitted without proof of execution if execution is contested. And a copy of such a contract, if admitted at all, will be admitted only in accordance with the conventional principles of the best evidence rule.

There may, however, be cases in which private documents acquire a certain official status, with the result that the originals or copies may, by fulfilling certain statutory requirements, be made to prove themselves. An acknowledged conveyance of realty is such a document. The notary, in taking the acknowledgement, has to certify that he knew the person executing the instrument and that that person acknowledged that he executed it. This satisfies the evidentiary requirement of proof of execution (5 Wigmore §§ 1648-51, 1676; Albany County Savings Bank v. McCarty, 149 N. Y. 71 (1896)); hence, the acknowledgement being certified in proper form, the conveyance may be recorded (Real Prop. Law § 291). Also, the original, or, in the case of a recorded conveyance, a properly authenticated copy, may be read in evidence without further proof thereof. This is true of deeds to domestic realty, under C.P.A. § 384. Under C.P.A. §§ 392, 393, and 386 it is likewise true, on certain conditions to be studied (*infra* pp. —), of originals and copies of deeds to foreign realty and other acknowledged instruments.

A private agreement which took on an official character by being filed in a foreign public office was involved in Strebler v. Wolf, 152 Misc. 859 (Sup. Ct. 1934). The problem there was to prove a French antenuptial agreement. The court admitted in evidence a copy certified by a French notary public after taking evidence that it was the official duty of such a notary to keep antenuptial agreements on file in his office. As to the proof of execution, the court pointed out that there was overwhelming evidence of the identity of the parties, and the fact that the paper was filed in a public office was enough, under Section 398 of the Civil Practice Act, to admit the document as proving execution without further evidence of the genuineness of the signatures.

Since it does not appear in the opinion that the original of the agreement was in any way acknowledged, the holding that the certified copy proved the execution of the contract by the parties to the case seems to oversimplify the problem. The fact that the certified copy was sufficient under C.P.A. § 398 to be admissible in place of the original solves the problem of proof of contents but does not solve the problem of proof of execution, since even an original instrument, or the record thereof, cannot itself prove execution in the absence of some official act like an acknowledgement attesting the fact of execution (5 Wigmore §§ 1648-51, 1676).

The decision in the *Strebler* case may perhaps be justified on the theory that the filing of the agreement according to the law of France was sufficient to establish the original as proving that it had been executed by the persons named therein, just as a judgment would prove that it had been rendered against the person named therein. So much being established by the record, the presumption (or evidence) of the identity of the parties might be enough to connect the agreement with the parties to the suit.

In Rosenbaum v. Podolsky, 97 Misc. 614 (Sup. Ct. 1916), it was hinted that the filing of a commercial contract with a court in Panama might furnish a basis for proving the terms of the contract by an exemplified copy. On what basis the contract was filed with the Panama court is not explained.

Thus it may be seen that in addition to authenticated copies of strictly public documents, *i.e.*, court records and records kept in other public offices, originals or authenticated copies of certain private documents which have acquired a kind of official character by reason of having been acknowledged, prove themselves. Similarly in the case of affidavits, which involve the administering of an official oath, where the original, properly authenticated, proves itself.

We shall deal first with the problem of authenticating copies of foreign

official records. We shall then proceed to a discussion of authenticating the administration of foreign oaths and acknowledgements—a problem not relating to copies but to the originals of the documents themselves.

In Which Court Does the Question Arise?

If the action is in a New York State court, the statutory scheme is presumably that contained in the Civil Practice Act, §§ 344-a, 359, 386 and 391-98. One who searches among these sections, however, will find that they are silent with respect to the authentication of copies of official records of sister states. The omission is apparently due to the full faith and credit rule of the Federal Constitution.

Article IV, Section 1 of the Constitution has two provisions. The first is that "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State." This, standing by itself, would seem to have nothing to do with the problem of authenticating papers purporting to be copies of foreign records. The question in such a case really is: is this piece of paper in such a condition that the court will accept it as proof of the contents of the foreign record? It is not until the foreign record has been properly proved that the question of full faith and credit arises.

There is, however, another clause in Section 1 of Article IV of the Constitution. This clause provides "And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Technically, this provision might likewise by claimed to be without application where the question is whether the authentication of a given piece of paper is sufficient to establish any connection between it and the foreign record. Nevertheless, the provisions of the United States Code certainly purport (as will be seen in detail later) to constitute general laws of Congress governing the method of proving official records of sister states and New York so treats them as controlling generally the problem of authenticity in such cases (Trebilcox v. McAlpine, 46 Hun 469 (N. Y. 1887)).

The federal provisions are found in Title 28 U. S. C. §§ 1738 to 1741, which became effective September 1, 1948, (replacing former Sections 687-88 and 695-e of Title 28) and 43(a), 44(a) and 44(c) of the Federal Rules of Civil Procedure.

With these preliminary considerations in mind, we proceed to examine the various requirements relating to the authenticity of copies of foreign official records. It will be helpful to discuss first the problems as they may face a litigant in a New York State court and then the problems as they may appear in a suit in a federal court for a district of New York.

STATE COURT SUIT—PROOF OF FOREIGN LAW

It is familiar ground to trial attorneys that the technique of proving foreign law in New York State has changed radically within the last few years. Up to 1933, the foreign law was like any other fact to be pleaded and proved. In 1933, Section 391 of the Civil Practice Act was amended to permit the court to make its own examination of the foreign statutes and decisions, but the problem was still regarded as an investigation of fact.

Since 1943, however, there has been no practical difference between the determination of foreign law and the determination of domestic law. In that year Section 344-a was added to the Civil Practice Act, permitting either the trial court or the appellate court to take judicial notice of the statute or case law of any sister state or foreign country. The section contains many other provisions. For present purposes, however, it is sufficient to note that it practically eliminates the problem of authenticating statutes or decisions of any other state or country.

STATE COURT SUIT—PROOF OF RECORD FROM FOREIGN COUNTRY

Typical instances of problems falling under this heading are certificates of birth, marriage, etc., and copies of judgments of foreign courts. The procedure for making self-authenticating copies of such records is governed generally by Sections 395 and 398 of the Civil Practice Act. If counsel wishes to take advantage of these provisions, he must comply strictly with all of their requirements (Lee v. Sterling Silk Manufacturing Co., 134 App. Div. 123 (2d Dep't 1909)). He may, however, if he wishes, authenticate any such record according to the methods used at common law. (C. P. A. §§ 344, 396). We shall pause for a moment to note the outlines of the common law method.

Common Law Authentication. It has always been possible to authenticate foreign records by the testimony of a witness under oath establishing that the document is what it purports to be. Copies so authenticated have been traditionally referred to as "sworn" or "examined" copies (4 Ford §§ 380-81; 4 Wigmore § 1273). The witness must establish by his testimony that the original record is in the foreign public office, that he compared the copy and that the copy is correct. It used to be debated whether a certain routine was necessary in making the comparison. Thus, it was said that if the witness held the copy while the officer held the original, it would be enough for the witness to say that the officer read the original, that the witness followed on the copy and that the copy was correct; but if the witness made the comparison with another private person, it had to be made a second time after an exchange

of the documents (Peake 58-61; Best § 486). Now it seems sufficient, however, if the witness testifies that he made a line by line comparison with the original either alone or with another person (Kellogg v. Kellogg, 6 Barb. 116 (N. Y. 1849)).

In the case of a foreign oath or acknowledgement, it would also seem to be sufficient if the officer himself were to testify as to his official character and the performance of the official act in question.

The obvious inconvenience of authenticating foreign documents by oral testimony explains why the legislature (and, to a degree, the common law itself) has supplied techniques for making documents self-authenticating.

When Does a Document Prove Itself? The points to be established in authenticating the certification of official records are (1) that there exists a public office, the incumbent of which has authority to make the certification, (2) that a particular individual holds that office, and (3) that the person who made the certification is that individual. Wigmore (Vol. 5 § 1679) designates the three points as authority, incumbency and genuineness.

Various doctrines have been resorted to, singly or in combination, to rationalize the sufficiency of one device or another to prove these points. As to incumbency and genuineness, judicial notice will sometimes suffice, as in the case of the more important officers of the state of the forum (9 Wigmore § 2576; Richardson §§ 30, 622; People v. Reese, 258 N. Y. 89, 98 (1932)).

In the case of domestic officers not judicially noticed, an exception to the hearsay rule permits a certificate by a higher officer to prove incumbency and genuineness with respect to the lower officer. This will suffice in the case of a domestic record, for incumbency and genuineness will be judicially noticed in the case of the higher officer. For foreign records, neither judicial notice nor the official certificate of a higher officer will do, as we shall see in a moment (5 Wigmore § 1679, Vol. 7 §§ 2161-69, Vol. 9, § 2576).

The problem of proving authority arose because of the rule in England that a public officer had no implied authority to certify a copy of a record in his possession. He could do so only when the authority had been specially conferred (5 Wigmore §§ 1674, 1677). In the case of judicial officers, the custom arose in England of using the seal of the court because that seal, presumably affixed by the judge, imported that the judge had authorized the clerk to certify the copy (5 Wigmore §§ 1677, 1679, 1681). In the case of nonjudicial records, the custom arose of using a certificate by a higher and judicially noticeable officer or affixing the great seal of England. The common law treated the great

seal as the equivalent of a certificate by the executive authority covering the authority, incumbency and genuineness of signature of the original certifying officer (5 Wigmore §§ 1677, 1679).

As to foreign judicial records, the custom arose in England of requiring the great seal of the foreign jurisdiction. Wigmore thinks (Vol. 5 § 1681) that this was unnecessary and came about because of an inappropriate suggestion to that effect made in Peake, *Evidence*, page 72. One is inclined to conclude, however, that Peake's suggestion was appropriate enough since judicial notice could not be taken of foreign officers and there was no presumption of genuineness of the purported seal of a foreign court, but there is a presumption of genuineness of the purported great seal of a foreign state. The presumption is probably founded on the unlikelihood that any attempt would be made to forge it (5 Wigmore § 1679, Vol. 7 §§ 2161-69).

It followed that in England the court seal and the great seal, both judicially known, authenticated, respectively, domestic judicial and non-judicial records since they covered the three points of authority, incumbency and genuineness. Foreign records, both judicial and non-judicial, were authenticated by the great seal of the foreign jurisdiction since anything which purported to be such a great seal was presumed to be genuine.

In the United States, the solution of the problem developed somewhat differently. The American doctrine has always been that a public officer has implied authority to certify a copy of a public record in his possession (Church v. Hubbart, 2 Cranch 187 (U. S. 1804); United States v. Percheman, 7 Pet. 51 (U.S. 1883); People v. Reese, 258 N.Y. 89 (1932)).

The principal English reason for using the seal on domestic records never applied, therefore, in the United States. Yet the American courts generally still required the officer's seal, probably through reluctance to take judicial notice of his office and signature without it (5 Wigmore §§ 1679, 1681).

In the case of foreign documents, as we shall see, the American statutes variously employ the certificate of a higher officer and the great seal of the foreign jurisdiction, singly or in combination, in various types of cases. Some indication of the origin of these methods may be found in Church v. Hubbart and United States v. Percheman (*supra*) and in Vandervoort v. Smith, 2 Caines 155 (N.Y. 1804).

Viewed against this historical and philosophical background, the New York statutory provisions lose some of their apparently esoteric character. We shall now discuss them, first with reference to judicial records from foreign countries.

Judicial Records. An attorney who wants to put in evidence a copy of a judicial record from a court of a foreign country will find his authentication procedure set forth in Section 395 of the Civil Practice Act. There are two distinct kinds of authentication there provided: the conventional kind which has long been in effect and an alternative kind which has been provided since 1933. It will be profitable to consider them separately, treating the older kind first since it involves some problems the answer to which will help to enlighten us in dealing with other statutes.

The older type consists of three steps:

1. The attestation (meaning, in this context, "certification") of the clerk of the court, with the seal of the court affixed, or of the officer in whose custody the record is legally kept, under the seal of his office, and
2. A certificate of the chief judge or presiding magistrate of the court to the effect that the person so attesting the record is the clerk of the court; or that he is the officer in whose custody the record is required by law to be kept; and that his signature to the attestation is genuine; and
3. A certificate, under the great or principal seal of the government under whose authority the court is held, of the secretary of state or other officer having the custody of that seal, to the effect that the court is duly constituted, specifying generally the nature of its jurisdiction; and that the signature of the chief judge or presiding magistrate to the certificate specified in the last subdivision is genuine.

The first step (*i.e.,* the certification proper) is no different from a domestic certification under Sections 329, 330 and 382 of the Civil Practice Act. The form and requisites of certifications represent an application of the basic principles already considered (*supra* p. 50). For the sake of completeness, we will develop them for a moment.

Domestic Certifications. Under C.P.A. § 382, copies of domestic records are admissible when certified as correct by the officer in whose custody the original is kept, under the seal of his office. The principle of judicial notice of the identity and incumbency of the more important state officers takes care of this. In addition, the official seal does not exist except by requirement of law and is judicially noticed in the case of domestic officers (Richardson § 622). The form of a domestic certification, as required by C.P.A. § 329, is that it must state that the copy has been compared by the officer with the original and that it is a correct transcript thereof and of the whole of the original. By C.P.A. § 330, all officers, domestic or foreign who have official seals, must use the same in certifying a copy except that a court seal need not be affixed if the copy is to be used in the same court.

The same principle of authentication holds in the case of oaths and acknowledgements which are domestic in the sense that they are offered in the particular jurisdiction in which the notary's authority is of record and may be judicially noticed. A similar principle applies to certified copies of legislative acts under C.P.A. § 380. Of course, public laws of this state are not to be treated as being read into evidence, but private statutes had to be so read until recently. Where the authenticity of a New York statute must be proved, it may be done by reading the statute "from a volume printed under the direction of the Secretary of State." Literally, this would mean a certificate by the Secretary of State and would raise problems as to the authenticity of the printed volume of the Session Laws which are commonly used. Yet the printed volume is always accepted even in the case of foreign statutes (Congregational Unitarian Society v. Hale, 29 App. Div. 396 (1st Dep't 1898)). This explains the portion of C.P.A. § 380 which permits the "printed certificate of the Secretary of State" such as may be found in the volumes of McKinney's Laws of New York. On ordinary principles of authentication, the printing would not prove that the certificate actually emanated from the Secretary of State, but here it is deemed enough to raise a presumption of genuineness—probably on grounds similar to those relating to the great seals of foreign states (*supra* p. 57).

In the light of the foregoing, C.P.A. § 395 appears to require more authentication than is logically necessary. The first step, namely, the certification proper, must be made by the clerk of the court or other officer in charge of the record (and presumably substantially to the same effect as a domestic certification under C.P.A. § 329). It must have the seal of the court affixed. As already seen, this was required in England only as proof of the clerk's authority to certify. Since the American doctrine has always implied such authority, there was no occasion to require the court seal. Nevertheless, the statute prescribes it and it must be on the certification. It is questionable whether the certificate may be made by a deputy clerk. Wigmore thinks (Vol. 5 § 1633, par. 8) that this should be permitted as a general proposition, but Morris v. Patchin, 24 N. Y. 394 (1862), holds the contrary, though under the federal, not the New York, statute.

The second step, the certificate of the chief judicial officer as to the incumbency and genuineness of signature of the certifying clerk or other officer, is a conventional method of authentication by a higher official, but really adds nothing to what is imported by the great seal where the great seal is also part of the authentication.

The phrase "chief judge", as used in step two, raises the question whether the certificate may be made by anyone else. In People v. Smith,

121 N. Y. 578 (1890), it was held, again under the federal statute, that the certificate might be made by one who describes himself as "the judge of the court" in the absence of evidence that there were any other judges of that court.

The third step provided by C.P.A. § 395 is the one which brings before the New York court evidence which it may presume to be genuine—the great seal of the government from which the record emanates. Under that seal, the Secretary of State or other custodian thereof certifies that the court is duly constituted, "specifying generally the nature of its jurisdiction", and further certifies the genuineness of the signature of the judge who made the intermediate certificate. Wigmore intimates (Vol. 9 § 2576) that the doctrine of judicial notice may extend to high officials of foreign states. Reliance on this doctrine hardly seems necessary since the great seal imports authority, incumbency and genuineness in respect to that officer.

The reason for requiring a specification of the court's jurisdiction is not clear. The jurisdiction of the court appears to have nothing to do with the authenticity of the copy as a copy. Yet the answer may be that some assurance is needed as to the court's jurisdiction in order to show that the original judgment is properly on file. (See, by way of analogy, Broeniman Co. v. Liberty Export & Import Corp., 117 Misc. 579 (Sup. Ct. 1922)).

In Dunstan v. Higgins, 138 N. Y. 70 (1893), an English judgment was certified by the clerk as being a true copy. The certification did not state, in the form of C.P.A. § 329, that the clerk had compared it with the original and that it was a correct transcript therefrom and of the whole of the original. Yet the court held the certification sufficient and the judgment, being otherwise sufficiently authenticated, was admitted in evidence.

It may strike a student as curious that neither C.P.A. § 395 nor any other statute to be noticed in this study requires any certificate stating that it was the *duty* of the certifying officer to keep the record in question. The whole basis for admitting official records, at least where they are offered in proof of the facts which they state, is that they are an exception to the hearsay rule based upon the presumption that public officers properly perform their duty of acquiring and keeping on record public information (5 Wigmore § 1632). The solution may be that there is a reasonably safe presumption that a public officer will do nothing which the law does not require him to do or, perhaps, that the seal imports the duty to keep the original, as it imports the authority to certify, except where the jurisdiction of a foreign court is involved.

The fact has already been noticed that since 1933 an alternative

method has been provided for authenticating a copy of a judicial record in a foreign country. This alternative, according to subdivision 4 of Section 395, consists of the authentication (*i.e.*, certification or exemplification) of the copy "in the manner prescribed by the laws of such foreign country" and a certificate to the effect that the copy offered has been so authenticated.

Before considering who may make the certificate, we may ask what is meant by the phrase just quoted. Since a certified copy must be an exact representation of the original, one is tempted to say that there can be only one form of certification, namely, a comparison to be sure of the identity of the original and copy. The legislature could scarcely have intended to approve a foreign method not designed to secure this assurance. It seems clear that the phrase "in the manner prescribed by the laws of such foreign country" does not permit any departure from the basic verity of the certification, but merely allows a form of attestation which may differ from our own. There may, for example, be countries in which the certification is not made under seal or in which it is made by someone other than the clerk or in which the form of words is different from ours, as in Dunstan v. Higgins (*supra* p. 60). Such variations are permitted as a practical necessity in view of the difficulty of getting officials to act in any way other than their accustomed routine. But a certificate, however well authenticated, by a local officer that certain facts appear from his records and other documents will not do (Matter of Johnson, 172 Misc. 1075 (Surr. Ct. 1939); Matter of Asterio, 172 Misc. 1081 (Surr. Ct. 1939); and see People v. Todoro, 224 N. Y. 129 (1918)).

The certificate that the copy has been so authenticated may be made by a New York attorney resident in the foreign country, or by a United States consular officer resident there and under his seal of office, or by a consular officer of the foreign country resident in this state under the seal of his office "or by such other person as the court may deem qualified." The statute itself offers no indication of what kind of "other person" the court may properly deem qualified, but the question was considered in DeYong v. DeYong, 263 App. Div. 291 (1st Dep't 1942) and in Matter of Burdak, 173 Misc. 839 (Surr. Ct. 1940), *aff'd mem.*, 261 App. Div. 952 (1st Dep't 1941), where a lawyer expert in Polish law was held a proper person to make such a certificate in the case of a Polish marriage record (under C.P.A. § 398, dealing with nonjudicial records of foreign countries, and containing an identical provision).

As a practical matter, the following method of procedure is recommended as offering the best chance of producing an admissible copy of a judicial record in a foreign country.

It will probably be quickest and cheapest in the long run to engage a correspondent attorney in the foreign jurisdiction and give him, or have him make, a copy of the record. The instructions sent to the foreign attorney should include an exposition of the two methods of authentication provided by Section 395 of the Civil Practice Act and the request that he attempt the second alternative first.

If this cannot be done, the correspondent should be asked to have the copy authenticated in accordance with the older method. If this becomes necessary, it will also be the part of caution to have a second copy certified according to the practice of the place, and forward it with the other. The reason for this is that it affords New York counsel an opportunity to attempt to get from the consul of the foreign country in New York or from some other person whom the court may deem qualified the certificate authorized by C.P.A. § 395(4) in case the complete foreign authentication goes wrong, as may happen. Attorneys who have had experience in attempting to procure authenticated copies of foreign records are well aware how often and how easily the process can go awry and result in a document covered with indecipherable stamps and seals in foreign languages which, if they can be analyzed at all, very often prove to have very little relationship to the things required by our authentication statutes (see, *e.g.*, Grillo v. Sherman-Stalter Co., 195 App. Div. 362 (3d Dep't 1921)). This is scarcely to be wondered at. The habits and customs in any foreign country may vary considerably from our own and the things that custodians of public records do there may not be responsive to the requirements of our law.

With appropriate variations, the suggestions just made can also be adopted for the records yet to be considered.

There is a special provision in the Decedent Estate Law § 45 for authenticating copies of wills established in foreign jurisdictions and official documents relating thereto. These are to be authenticated in the manner prescribed by the law of the foreign country (if such was their origin) and be accompanied by a certificate to that effect made by one of the same persons mentioned in C.P.A. § 395. If they come from a sister state, they must be authenticated under the seal of the court or officer and the signature of a judge or officer and the clerk of the court or officer, if any. Documents so authenticated are to be accepted here under Surr. Ct. Act. § 159.

In Matter of McCaffrey, 188 App. Div. 772 (1st Dep't 1919), a certified copy of a Canadian will on file in a Canadian court was accompanied by a certificate by a Canadian judge that the certification of the copy was in the Canadian form. The judge's signature and official character had been attested by a consular officer of the United States. It was held

that the authentication was sufficient under Section 45 of the Decedent Estate Law.

Nonjudicial Records. If the record to be authenticated is not a judicial record but some other kind of factual record kept in a public office in a foreign country, the procedure is similar, but is governed by C.P.A. § 398. That section prescribes that the copy should first be "certified according to the form in use in that country." The problem of authenticating that certification may be solved in alternative ways. The older way consists of two steps, of which the first is the certificate of a New York commissioner of deeds appointed for the foreign country in question to the effect that the document is of record or on file in the public office and that the copy is correct and certified in due form. The second step is a certificate under the hand and official seal of the Secretary of State of New York "to the same effect as prescribed by law for the authentication of the certificate of such a commissioner, upon a conveyance to be recorded within the state."

To learn what kind of certificate must be secured from the Secretary of State, we must refer to the Executive Law and the Real Property Law.

Commissioners of deeds for foreign countries are appointed pursuant to Sections 107 and 108 of the Executive Law for the purpose of taking the acknowledgement or proof of execution of written instruments, except bills of exchange, promissory notes or wills, of administering oaths and of certifying to foreign official records or to the due certification of copies thereof. Pursuant to Section 311 of the Real Property Law, the certificate of a commissioner of deeds made in a foreign country must be authenticated by a certificate of the Secretary of State of New York (in form as prescribed by Real Prop. Law § 312). A similar requirement is found in Section 108, subdivision 4 of the Executive Law, which section also affirms, independently, the power of New York commissioners of deeds for foreign countries to authenticate certified copies of foreign nonjudicial records. This section speaks obscurely of "a copy or copy of a certified copy" of such a foreign record, as if the commissioner of deeds were to make his own certified copy of the copy certified by the foreign official. Some of the language of C.P.A. § 398 squints in the same direction, and the net effect of the two sections is not clear. It would seem, however, that the commissioner of deeds must authenticate the foreign certification and add his own by certifying, as Section 398 prescribes, that the copy "is correct." There seems to be no escape from that redundancy.

The alternative method provided by Section 398 is similar to that

provided by Section 395. It is a certificate that the copy has been certified in the manner prescribed by the laws of the country where the record is kept. The certificate may be made by one of the same kinds of persons as those mentioned in Section 395 (see *supra* p. 61).

Another statute providing for exemplified copies of foreign nonjudicial records is Section 12 of the General Corporation Law. That section, applicable to corporations from any state or territory of the United States or from Canada permits a copy of the charter or any other certificate "certified or exemplified by any officer or officers of such state or territory or dominion" or duly exemplified copies thereof to be received in evidence here. This statute is more liberal than any previously studied.

STATE COURT SUIT—PROOF OF RECORD FROM SISTER STATE

Judicial Records. Section 45 of the Decedent Estate Law applies in part to probate records from sister states. Except for that section and Section 394 of the Civil Practice Act, regulating proof of proceedings before a justice of the peace within another state, there is (for reasons discussed *supra* p. 54) no statute of New York relating to the authentication of judicial records of sister states.

In New York State actions, such matters are regulated by the United States Judicial Code. Since September 1, 1948, the relevant provisions are to be found in Title 28 U.S.C. §§ 1738 and 1739, of which Section 1738 relates to judicial and Section 1739 to nonjudicial records.

Section 1738 contains three provisions. The first is that copies of legislative acts shall be authenticated by the seal of the state, territory or possession. The second is that copies of court records shall be authenticated by the clerk under the seal, if any, of the court, with a certificate of a judge of the court that the clerk's attestation is in proper form. The third provision is that all such authenticated copies shall be given the same full faith and credit in all courts in the United States and its possessions as in the state of origin.

Neither this section nor its predecessor, § 687, requires the reciprocal certificate of clerk and judge which some of the authorities and form books treat as necessary (see *e.g.,* Richardson § 628; Bradbury's Lawyers Manual 461-63, Forms 437-38). There is a good discussion of this common misconception in Wigmore (Vol. 5 § 1681-a).

The requirements of Section 1738 are conventional and present no special difficulties. The philosophy already discussed (*supra* pp. 56-57) explains how they have developed. The great seal of the state is not required. New York must presume the genuineness of the purported seal of the court.

Nonjudicial Records. Section 1739 covers the authentication of nonjudicial records of states, territories and possessions of the United States. Copies of such records are authenticated by the attestation of the custodian under the seal of his office, if any, together with a certificate of a judge of a local court of record that the attestation is in due form and by the proper officer. The certificate may also be made under the great seal by the Governor, Secretary of State, Chancellor or keeper of such seal. If made by a judge, the certificate must itself be authenticated by the clerk of the court, who is to certify under the seal of the court that the judge is duly commissioned and qualified.

This section does call for a dual certificate where the authentication is made by a judge. The certificate is not, however, reciprocal. The judge does not certify the authority of the clerk by whom his own authority is certified. The judge authenticates the certification made by the nonjudicial custodian. The clerk of the court authenticates, under the seal of that court, the certificate of the judge. Thus the seal of the court is enough by way of ultimate authentication in the case of judicial records from states, territories and possessions of the United States. In the case of nonjudicial records so originating, either the seal of the court or the great seal is enough. In Nolan v. Nolan, 35 App. Div. 339 (2d Dep't 1898), the court excluded a copy of an Illinois death certificate because the certification was insufficient in form under C.C.P. § 957, now C.P.A. § 329. The court also observed, however, that the authentication was insufficient under the federal statute.

Recorded Foreign Conveyances. Mention has already been made (*supra* pp. 52-53) that certain kinds of documents may acquire a *quasi*-official status for purposes of authentication by being recorded in public offices. Among these are recorded conveyances of real property located in sister states. An exemplified copy of such a recorded conveyance is presumptive evidence in New York, provided the original cannot be produced, if it is "certified under the hand and seal of the officer having custody of the record" (C.P.A. § 393). The statute does not require any authentication of the signature and seal of the recording officer (but see Blass v. Terry, 156 N. Y. 122, 131 (1898), where an elaborate authentication was supplied). In this respect it is more liberal than the United States Code. C.P.A. § 393 must, of course, be distinguished from C.P.A. § 392, governing the admissibility of *original* conveyances of foreign realty (see *infra* pp. 66-67).

Notice has already been taken of Section 12 of the General Corporation Law providing for exemplified copies of corporate records from other jurisdictions, including sister states (*supra* p. 64).

The local statutes just mentioned are exceptions to the general rule that in the case of records from sister states, New York looks to the federal statutes. The constitutional provision does not, of course, preclude any state from enacting for such records more liberal authentication provisions than those in the United States Code (28 U. S. C. (old) § 687, annotations in note 52).

State Court Suit—Proof of Foreign Oaths and Acknowledgements

If an affidavit be made outside the state for use in some judicial proceeding here, counsel must be in a position, if called upon to do so, to show that the oath was duly administered. Or if an instrument be acknowledged outside the state for use here, the same problem exists with regard to the acknowledgement.

The question whether this type of document is in proper form to prove itself is sometimes treated as a problem of authentication under those sections of the Civil Practice Act which relate to copies of foreign official records. (See, *e.g.*, DiIonna v. Terry & Tench Co., 203 App. Div. 270 (3d Dep't 1922), where the question arose with respect to an Italian affidavit which, if properly executed, would have been admissible). Actually, the problem in such cases relates to the authority of the officer to administer the oath or acknowledgement, as the case may be, and the sufficiency in form of the document to show his authority and the regularity of his action.

Since the point is cognate to the main subject, it will be worthwhile to note in passing the rules relating to foreign oaths and acknowledgements. Under Section 359 of the Civil Practice Act, oaths administered outside New York have the same force as oaths administered inside the state if administered by "an officer authorized by the laws of the state (*i.e.*, New York) to take and certify the acknowledgement and proof of deeds to be recorded in the state" and when certified by him to have been so taken "and accompanied with the like certificates as to his official character and the genuineness of his signature as are required to entitle a deed acknowledged before him to be recorded within the state."

C.P.A. § 392 makes a conveyance of foreign realty admissible if it is acknowledged or proved and if the acknowledgement or proof is certified as in a deed to be recorded within the county where it is offered in evidence. (Under the same section, deeds to realty in states or territories of the United States are admissible if authenticated according to the laws of the locality where the realty is situated. The statute does not say how that conformity is to be shown. Judicial notice of the foreign law under

C.P.A. § 344-a will probably suffice. This is an exception to the general rule for foreign acknowledged originals).

Under C.P.A. § 386, instruments other than bills of exchange or wills may be acknowledged in the same way as conveyances of real property and thereupon are evidence as if they were conveyances of real property. A foreign power of attorney is within this provision (Lythgoe v. Smith, 140 N. Y. 442 (1893)).

Both as to sworn and acknowledged instruments coming from outside the state, therefore, we revert to the Real Property Law to see in what form they must be cast to be used as evidence here.

That subject is governed by §§ 299 to 301-a, 306-09 and § 311 of the Real Property Law. Section 299 permits acknowledgements in other states and possessions of the United States to be taken by judges, mayors, notaries public, New York commissioners of deeds and persons authorized by the laws of the place where the acknowledgement is taken.

Section 301 of the Real Property Law authorizes the same type of officers to take acknowledgements in foreign countries, adding, however, diplomatic and consular officers of the United States and persons specially commissioned by the Supreme Court of the State of New York. Sections 299-a and 301-a govern the form of the acknowledgement. They provide, in substance, that the form shall be either that prescribed by the law of New York or by the law of the state or country where it is taken. If it conforms to the latter, it must be accompanied by a certificate to that effect made by one of a class of persons described as in C.P.A. § 395 (*supra* p. 61). The signature on the certificate of conformity is presumptively genuine and the qualification of the person whose name is signed to the certificate is presumptively established by the recital thereof in the certificate. Sections 306-08 prescribe the form, contents and sealing of the certificate of acknowledgement.

Section 311 governs the source of authentication of the authority of the officer who takes the acknowledgement. The provisions of the section are too long to be set forth here in detail and must be studied in each case, but they offer no difficulty. In substance, the section requires a county or court clerk's certificate or the equivalent for states of the United States, a similar certificate or a consular certificate for notaries public in foreign countries, and comparable certificates in the case of other foreign officers. For New York commissioners of deeds, a certificate by the Secretary of State of New York must be appended.

Section 312 of the Real Property Law prescribes the contents of the authenticating certificate. This, in substance, must cover the official character of the officer taking the acknowledgement, the authenticating officer's familiarity with the handwriting of the officer who took the ac-

knowledgement, the fact that a comparison of handwriting has been made and the belief of the authenticating officer that the signature of the original officer is genuine. If the acknowledgement is required to be under seal, the certificate must cover the same requirements regarding the genuineness of the seal. If the acknowledgement was taken, not by one of the specific types of officer listed in the Real Property Law but by one authorized by the law of the foreign state or country, the authenticating certificate must also cover that authority. This, in brief outline, is the method of authenticating foreign oaths and acknowledgements.

There is a special provision for proof of foreign presentment or protest of promissory notes or bills of exchange. At common law, the purported seal of a foreign notary on a certificate of presentment or protest of a negotiable instrument was presumed genuine—an exception to the general rule that there was no presumption of validity of purported foreign seals other than the great seal of a foreign state (7 Wigmore § 2165). C.P.A. § 368, subdivision 1, makes a domestic notary's certificate under his hand and seal presumptive evidence without further authentication. (Under certain circumstances the original protest is also admissible but must be authenticated; C.P.A. § 368 (2)). Under C.P.A. § 369, proof of foreign presentment or protest may be made in any manner authorized by the laws of the place where the instrument was payable.

State Court Suit—Proof of Federal Law and Regulations

When dealing with matters originating in other jurisdictions there is, as we have seen, a problem of proving the law of the foreign jurisdiction as well as problems of authenticating factual records. Where, however, the question relates to the law of the United States, there is no such problem since the courts of New York have always taken judicial notice of United States public statutes (Millikan v. Dotson, 117 App. Div. 527 (1st Dep't 1907)). Of late, however, regulations of federal administrative agencies have increasingly come into play and questions may arise as to the extent to which New York State courts will require evidence of them. C.P.A. § 344-a sanctions judicial notice of regulations of United States departments and agencies as well as private statutes of Congress. In People v. Lipoff, 181 Misc. 618 (Magistrate's Ct. 1943), this was held to include price ceiling regulations of the O.P.A.

State Court Suit—Proof of Records in United States Courts and Departments

Since the United States is not treated as a foreign jurisdiction in the same sense as sister states or foreign countries, it follows that the procedure for authenticating records in United States courts and depart-

ments is simpler than in the cases already considered. Under C.P.A. § 399, any judicial record in a court of the United States need only be certified by the clerk or officer in whose custody it is required by law to be. Judicial notice has always been taken of the authority, incumbency, identity and genuineness of signature of federal officers, at least where evidenced by official seal (5 Wigmore § 2166; Richardson §§ 622, 629; 4 Ford § 382).

Under C.P.A. § 400, records and documents in United States departments are sufficiently authenticated when certified by the head or acting chief officer for the time being of the department, or by the officer in charge of the record pursuant to federal law, or otherwise in accordance with a statute of the United States relating to certifying the same. The section offers no difficulty except for the last alternative, the trouble with which is that there is now no United States statute relating to the method of certifying such records. As the Reviser's note to new Section 1733 of Title 28 shows, no such provision was inserted in the revised Judicial Code since authentication is covered by Rule 44 of the Federal Rules of Civil Procedure. It is not clear that the Federal Rule has the force of statute within the meaning of Section 400 of the Civil Practice Act. What its requirements are we shall see below (pp. 70-71) in dealing with authentication in federal court actions.

Federal Court Suit—Proof of State or Foreign Law

In an action in a United States District Court within the State of New York, judicial notice is taken of New York law as if the action were in a state court. If, in such a suit, the law of some other state must be proved, the federal court will take judicial notice of it if the state court will do so. Rule 43(a) of the Federal Rules of Civil Procedure permits proof either according to federal statutes or federal rules of evidence or under the rules of evidence in effect in the state in which the United States court is held (and see also 9 Wigmore § 2573 I(d)).

The rule further prescribes that the statute or rule which favors the reception of the evidence governs and that the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules referred to.

It follows that a United States District Court within the State of New York would take judicial notice of the law of another state of the United States or even of a foreign country to the same extent as New York State courts will do.

FEDERAL COURT SUIT—PROOF OF RECORD FROM OTHER STATE OR FOREIGN COUNTRY

A suit in a federal court within the State of New York may involve the authentication of an official record, judicial or nonjudicial, from within New York State, from a sister state or from a foreign country. The application of Rule 43(a) of the Federal Rules of Civil Procedure will result in the admission of any of these documents if it is in form sufficient for admission in a New York State court. The rule applies to documentary as well as oral evidence (Fakouri v. Cadais, 147 F. 2d 667 (C. C. A. 5th 1945), *cert. denied,* 326 U. S. 742 (1945)). Authentication in such form will, therefore, be sufficient. There is, however, a separate provision for authentication in federal court suits which simplifies the problem even further.

Under Rule 44(a) of the Federal Rules of Civil Procedure, an official record therein may be evidenced by an official publication or by a copy attested (*i.e.,* certified) by the officer having the legal custody of the record or his deputy and accompanied with a certificate that such officer has the custody. If the record is kept within the United States or one of its territories or possessions, the certificate may be made by a judge of a court of record of the political subdivision in which the record is kept, authenticated by the seal of the court, or it may be made by any public officer having a seal and having official duties in such political subdivision, authenticated by the seal. If the record is kept in an office in a foreign country, the certificate may be made by a secretary of embassy or legation, or a consular official or officer in the foreign service of the United States stationed there, and authenticated by the seal of his office.

It would serve no useful purpose to make an extended comparison bebetween the requirements of Rule 44(a) and those of the statutes we have already considered, but it may easily be seen that these requirements are easier than most though not as easy as some. In any event, such an authentication will always serve in a federal court suit, as will an authentication under applicable statutes or by common law evidence, under Rule 44(c).

Wigmore (Vol. 5, § 1681-a) questions whether Rule 44(a) applies to judicial records. The language is not as clear as it might be and no cases have been found. Yet one would hardly be rash, in view of the general policy of the Rules, in predicting that Rule 44(a) will be held to embrace judicial records.

Title 28 U. S. C. § 1740 makes admissible copies of records in consular offices when authenticated by the consul or vice-consul. Section 1741 makes admissible copies of records on file in public offices in foreign

countries when certified by the lawful custodian, the certification being authenticated by a consular officer of the United States resident in such foreign country, under his seal of office.

As for oaths and acknowledgements coming from other states or foreign countries, the federal court in New York will, under Rule 43(a), accept the authentication prescribed by New York since there is no federal statute or rule on the subject. There is a common belief among lawyers that although New York State law does not require the use of the notary's seal (Executive Law § 103) the seal has to be affixed if the document is intended for use in a federal court. It is doubtful whether the seal was required under federal law at any time after 1876 (Title 28 (old) § 642 (now Rule 28(a) Fed. R. Civ. P.); The Tug E. W. Gorgas, 8 F. C. 920 (S. D. N. Y. 1879); In re Donnelly, 5 Fed. 783 (D. N. J. 1881)) though it might, like the county clerk's certificate, sometimes authenticate the notary's certificate. The county clerk's certificate may still be required in a federal court even as to a notary within the same state where the state statute (*e.g.*, Real Prop. Law § 310) requires it.

Federal Court Suit—Proof of Records in United States Courts and Departments

Rule 44(a), already noticed, probably covers the authentication of judicial records from other United States courts. Title 28 of the new Judicial Code has certain provisions relating to proof of records from government departments. Thus Section 1733 makes admissible "properly authenticated copies of transcripts" of records of any department or agency of the United States. As already noted, the details of authentication were not prescribed since they were covered by Rule 44 of the Federal Rules of Civil Procedure.

Section 1736 makes admissible extracts from United States legislative journals certified by the secretary of the Senate or the Clerk of the House of Representatives. Sections 1744, 1745 and 1746 provide for the certification of copies of patent office documents.

It is believed that the foregoing discussion covers the situations most likely to arise in a state or federal court suit in New York requiring the authentication of documents originating outside the state. Of necessity, many statutes relating to particular types of records, domestic and foreign, had to be passed over. They are collected in 5 Wigmore § 1680 and 4 Ford § 443.

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