BENJAMIN BUSCH *

Outline on How to Find, Plead, and Prove Foreign Law in U.S. Courts With Sources and Materials

Foreign Law

Traditionally, here in the United States and in England, the Courts were unfamiliar with any but the law of the forum and often equally unfamiliar with the language of the foreign jurisdiction. The remoteness of alien places and their laws, the unavailability of translations and authentic interpretation, and the suspicion of strange legal concepts understandably compelled the Courts to treat foreign law as a fact, to be pleaded and proved as any other fact.

Justice Holmes, as late as 1912, summed up the situation in *Cuba Railroad v. Crosby*, 222 U.S. 473, when he declared that the only justification for allowing a party to recover on a cause arising in another civilized jurisdiction was a well-founded belief that it was a cause of action in that place; and that this was a part of the plaintiff's case which he must allege and prove, or else be denied recovery.

Changes created by increased international trade, wars, the arrival of people from foreign shores bringing with them rights and obligations based upon foreign laws requiring judicial determination here, a greater interest in private international law in the law schools, the encouragement of study abroad, and the welcome to foreign law scholars to settle and study here resulted in a more critical review of our insular position on foreign law. More commentaries and translations of foreign laws went side by side with the creation of comparative law centers, faculties and societies, and more outspoken criticism of instances where justice was impeded by a too resolute approach to foreign law as fact and not law.

Reforms were suggested and adopted, first by a breakthrough

* L.L.B. Brooklyn Law School.

away from outmoded requirements under the laws of evidence, by the utilization by state Legislatures of judicial notice of foreign law, and more recently, as signified by the new Federal Rule of Civil Procedure 44.1, by the treatment of foreign law as law, from the viewpoint of the litigants, the Trial Judge, and the Appellate Court.

The Responsibility of the Advocate in Uncharted Reform Areas in Foreign Law

The advocate is often severely criticized as being unduly conservative and unwilling to relinquish old rules of practice and procedure. Such criticism is often unjust and much is to be said in defense of conservatism that is unwilling to gamble away a client's rights and property in the absence of clear proof as to what the Courts will permit under reform legislation and precisely what is the meaning of what is often ambiguous language in this legislation. Here is the clear difference between the practicing advocate and the scholar theoretician. The practitioner cannot find solace in a law review article that proves him right when his client has lost a cause for failure of pleading or proof.

A few instances where the plaintiff has suffered by his lawyers' understanding of reform in the pleading and proof of foreign law are:

Luckett v. Cohen, 145 F. Sup. 155 (D.C.N.Y. 1956), where the plaintiff was compelled to plead the foreign law relied on, although he relied upon *Siegelman v. Cunard White Star,* 221 F. 2d 189 (2nd Cir. 1954), to the effect that foreign law need not be pleaded; *Walton v. Arabian American Oil Co.,* 233 F. 2d 541 (2nd Cir. 1956), where the complaint was dismissed for failure to prove the Saudi Arabian Law of Torts although the plaintiff relied upon his understanding of the *Cuba Railroad* case (*supra*), that the Court could assume that the law of all civilized countries regarding rudimentary contracts and torts was the same as ours; *Greiner v. Freund,* 286 App. Div. 996 (New York 1955), where a complaint was dismissed as insufficient although the plaintiff assumed that statutes permitting judicial notice of law also permitted the pleading of the legal effect of the foreign law rather than the material facts of the foreign law; *Heyl v. R. P. Farnsworth Co., Inc.,* N. Y. L. J., March 23, 1964, where a complaint was dismissed as insufficient although it contained allegations of German law as fact, and the plaintiff relied upon a reform in pleading (CPLR 3016-e) which its authors had announced

as permitting, in the same manner as the new Federal Rule of Civil Procedure 44.1, mere notice to be given of the foreign law. The Court in the *Heyl* case apparently disagreed, stating that the defendants were entitled to:

> a more specific statement of the substance of the foreign law relied upon . . . so that they may be enabled to move or interpose appropriate answer thereto and to prepare adequately for the defense of the action (see CPLR 3016-e).

The client is entitled to a counsel who "acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*" (*Anders v. State of California,* 87 S. Ct. 1396, 1400 [1967]), i. e., a careful and conservative advocate, regardless of his personal philosophy, as opposed to a detached, critical theoretician. This should lead the advocate to a knowledge of every development of the law but a readiness and ability, wherever possible, to plead and prove foreign law as a fact, because this is the most that can be required of him and because it leads to the clearest understanding of the problem on the part of the trier of the issues. Moreover, it will facilitate preparation for pre-trial and trial procedures.

Finding Foreign Law

American law is essentially the common law and statutes as interpreted by the precedents of our Courts. Foreign law is for the most part Civil Code Law, i. e., a development of Roman law and the Code Napoleon as embodied in the Civil Codes of the respective foreign jurisdiction. Although the Courts of Civil Code countries may follow the reasoning of former decisions, they are theoretically not bound by precedents and often consider the commentaries of legal scholars as more important guidelines. The American jurist should therefore look more to the language of the code provision and its interpretation by the leading scholars.

Unfortunately, there is no civil code country whose codes and commentaries have been completely and fully translated into English. Accordingly, unless the American researcher is completely at home in the legal nuances of the foreign language, it is not possible for such researcher to look up the foreign law as he would his own.

The best source is the expert who has studied the foreign law, who has practiced law in the country of its origin, and who can translate and interpret it in the idiom of the American lawyer.

Sources for materials and guides and the names of foreign law experts include: The International and Comparative Law Section of the A.B.A.; Bilateral Studies in Private International Law and Guides to Foreign Legal Materials, published by the Parker School of Foreign and Comparative Law, Columbia University; The Martindale-Hubbel Law Digests, published as part of its law list and directory; and the law libraries of the New York City Bar Association, the Columbia Law School, the University of Chicago Law School, the University of Michigan Law School, the Duke University Law School, amongst other fine law schools. The Library of Congress is extremely useful and helpful. The various consular offices of foreign nations often employ lawyers of their country as consular officials who can give leads to ascertainment of foreign law, also the missions to the United Nations and Foreign Chambers of Trade or Commerce who have offices here.

Pleading Foreign Law

The Common Law Requirements

The allegations should be limited solely to the substance, the ultimate material fact; not the evidence (i. e., not the decisions and statutes relied upon) and not the conclusions of the pleader about the effect of the laws upon the rights and obligations of the parties.

Illustrations of approved common-law pleadings follow:

Pleading a Liability Under a Foreign Statute

> The Laws of Switzerland provide:
> That at all the times hereinafter mentioned, the applicable statutes of the Confederation of Switzerland, as set forth in the Law of Persons, provided that where either of the parties to an agreement to marry breaches or renounces said agreement to marry, both parties can claim the return of their presents to each other, and that where the presents no longer exist in their original form, the same rules shall apply as in the case of money had and received to the use of a plaintiff.

The Same: Another Method of Averment

> The Laws of Turkey provide:
> That immediately upon the death of a subject of Turkey, the legal title to the estate of such deceased person vests in the plaintiff and that the Shiek-Ul-Islamat, which is invested by the

> plaintiff with the exclusive jurisdiction and power over the interpretation and administration of all laws pertaining to religion and domestic relations of the land, must assume physical control of all the property and estate of the said deceased person and distribute it according to the Domestic Relations Law of Turkey, which requires the heirs and other persons who may claim any part of such property and estate to appear before the court at the place where the said deceased person departed this life and prove their claims.

The above was sustained in *Sultan of Turkey v. Tiryakian,* 213 N. Y. 429, where it was *held* that this was an effective allegation against demurrer of the legal effect of the laws, written or otherwise of the foreign country. The case of *Berney v. Drexel,* 33 Hun 34, is cited with approval; there the allegation was "that under and by virtue of the laws of France" plaintiff became the owner, and the court held it was an allegation of fact under which the laws of France could be proved.

Allegation of Foreign Common or Unwritten Law

> That at all the times hereinafter mentioned, pursuant to the customary law, or the law of custom and usage, in effect in the Confederation of Switzerland, a competent court of any of the cantons of said Confederation having jurisdiction of the subject matter of the action or proceeding before it can obtain jurisdiction with respect to a defendant of Swiss nationality not within Switzerland, must do so by service of process through diplomatic channels by the submission by the court of the summons to the Cantonal Government, Department of Justice; by the submission of said summons by the Department of Justice to the Swiss Central Council, Department of Justice; by the submission of the summons by the Department of Justice of the Swiss Central Council to the Department of Foreign Affairs of the Swiss Federal Council; and by the submission by the latter of the said summons to the competent Swiss Consul of the residence of the defendant and by the service of said summons by said Swiss Consul by registered mail addressed to the defendant.

The Same: Another Method of Averment

> That at all the times hereinafter mentioned, it was and still is the law of the State of [*set forth the right or liability which plaintiff invokes, as:*] that incorporated and unincorporated religious societies may appoint trustees, not exceeding five in number, to hold and manage bequests for their benefit.

The above was sustained in *Cong. Unit. Soc. v. Hale,* 29 App. Div. 396, 51 N. Y. Supp. 704, against an objection at the trial, as sufficient to authorize proof of the foreign law, whether resting upon statute or decisions, or both. See also *Worthington v. Griesser,* 77 App. Div. 203, 79 N. Y. Supp. 52; *Gleitsmann v. Gleitsmann,* 60 App. Div. 371, 70 N. Y. Supp. 1007; *Rothschild v. Rio Grande, etc., Ry. Co.,* 59 Hun 454, 13 N. Y. Supp. 361, 26 Abb. N. C. 312, and note.

The Same: Another Method of Averment

> That it is and was at all the times mentioned in the complaint the law of the Province of Quebec and of the Dominion of Canada established by courts of competent jurisdiction that the word 'approximately,' or words of similar meaning when used in a contract such as the one on which this action is brought apply only to such accidental or immaterial variations in quantity as would naturally occur in connection with such a transaction.

Pleading and Written Notice of Reliance Upon Foreign Law

Rule 44.1 simply requires that the party who intends to raise an issue of foreign law "give notice in his pleadings or other reasonable written notice." CPLR 3016(e) of the State of New York was intended, by the Advisory Committee which drafted it, to be modeled after Rule 44.1 so that it should be sufficient merely to apprise the Court and one's adversary, that an issue of foreign law is being advanced and that an identified rule of foreign law is claimed to be applicable. Suggested allegations by some of the authorities who recommended the new statutes are: [1]

1. A statement of defendant's conduct;
2. That the defendant's conduct is actionable according to the tort law of Mexico [or under the French Civil Code, etc.];

or

2. The plaintiff asserts a right of action in tort recognized by the following provision of the laws of the Republic of Mexico [or of the French Civil Code, etc.];

or

2. The tort law of Mexico (or the Republic of France, etc.)

[1] (See Weinstein-Korn-Miller, N.Y. Civil Practice, para. 3016.16.)

applies and the pleader intends to request the Court to take judicial notice of it.

The sufficiency of the above under the rules of New York may be open to some question in view of the requirement of the statute CPLR, Section 3016(e) that the "substance of the foreign law shall be stated." [2]

Pretrial Procedures

Where the theory that "foreign law is a fact" applies in a particular forum, it has been traditional to support the right of a party to know the provisions of law relied upon by the adversary, whether statutory or decisional; where the provisions are to be found; and, if in a foreign language, the meaning in English of what it is claimed is the equivalent of the foreign tongue.

This is accomplished through pretrial hearings or conferences, *Seminar on Pretrial Hearings,* 23 F. R. D. 319 *et seq.* (1958); Sec. 44.1 on *Judicial Notice,* proposed in *Second Preliminary Report of the State of New York Advisory Committee on Practice and Procedure* (Feb. 15, 1948); bills of particulars, *Pfleuger v. Pfleuger,* 304 N. Y. 148, 106 N. E. E. 2d 495 (1952); Editorial, *N. Y. L. J.,* March 8, 1951, p. 836; a corrective motion to make the pleading more definite and certain, *Pfleuger v. Pfleuger, supra;* a motion to dismiss for insufficiency, *Greiner v. Freund, supra*; written interrogatories, *contra, Empresa Agricola Chicama Ltda. v. Amtorg Trading Corp.,* 57 F. Supp. 649 (S. D. N. Y. 1944); and notices to admit matters of fact and the genuiness of documents, *Moumdjis v. SS The Ionian Trader,* 157 F. Supp. 319 (D.C. Va. 1957). James, "The Revival of Bills of Particulars under the Federal Rules," 71 *Harv. L. Rev.* 1473 (1958).

Additionally, Federal Rule 28(b) cites methods available including depositions and letters rogatory (see also *Danisch v. Guardian Life Ins. Co. of America,* 19 F. R. D. 235 (S.D.N.Y. 1956); *Harris v. American Intl. Fuel & Petroleum Co.,* 124 F. Supp. 878 (W. D. Pa. 1954); *Bernstein v. N. V. Nederladsche-Amerikaansche Goomvaart-Maatschappi,* 11 F. R. D. 48 (S. D. N. Y. 1951). However instances where details of foreign law were refused are *Fisherman & Merchants Bank v. Burin,* 11 F. R. D. 142 (S. D. Cal. 1951);

[2] (See Heyl v. R. P. Farnsworth Co., Inc., *supra.*)

Empresa Agricola Chicama Ltda v. Amtorg Trading Corp., 57 F. Supp. 649 (S. D. N. Y. 1944).

Rule 44.1 does not indicate clearly what pretrial rules shall apply in the disclosure and discovery of foreign law issues, but perhaps an indication was given in a New York State Appellate Division decision construing the philosophy of the notice of theory of pleading foreign law. In *Gevinson v. Kirkeby-Natus Corp.*, 26 A. D. 2d 71, 74 (1st Dept. 1966). Judge Breitel stated:

> It is no longer logical, then, for the pleading or particularization of foreign or sister—State law to be analogized to the pleading or particularization of facts. Rather, all that may be required is notice. . . . In the case of foreign law, notice is required, if the court is to be compelled to accord it recognition, and the degree of notice will vary directly with the inaccessibility, strangeness, abstruseness, uncertainty, and other general difficulty in apprehending the foreign law.

It would be well, however, for all Courts and commentators who would treat all foreign law as if it were ascertainable by all, without need of clear allegation and discovery in advance of trial, to bear in mind the statement of the Supreme Court of the United States that discovery rules are intended to "make a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." (*U. S. v. Proctor & Gamble Co.*, 1958, 78 S. Ct. 983, 987, 356 U. S. 677, 683.)

Whether foreign law is to be treated as fact or law, the "sporting theory of justice" has been rejected (*Tiedman v. American Pigment Corp.*, C. A. 4th, 1958, 253 F. 2d 803, 808) and rules of practice and procedure should be interpreted to that end.

Proof of Foreign Law

The law of a foreign jurisdiction is usually evidenced by such written proofs as statutes, codes, acts of state, judicial records, judicial decisions, commentaries, and official certificates emanating from administrative or other governmental bodies; by such oral proof as the testimony of expert witnesses learned in the law involved; by presumptions based upon common law, the rule of the forum to apply its own law or by the agreement or stipulation of the parties, and by judicial notice, when authorized by statute, either based upon the assistance of counsel or the Court's independent research.

Records

Official records were admitted in evidence under common law where correctness and authenticity were established by the custodian of the records through certificates, exemplification or other required forms of authentication. *Yeaton v. Fry,* 9 U. S. (5 Cranch) 335 (1809); *Watson v. Walker,* 23 N. H. (3 Foster) 471 (1851); *Heckla Powder Co. v. Sigua Iron Co.,* 157 N. Y. 437, 52 N. E. 650 (1899); *Lincoln v. Battelle,* 6 Wend. (N. Y.) 475 (Sup. Ct. 1931); *Packard v. Hill,* 2 Wend. (N. Y.) 411 (Sup. Ct. 1829); *Story, Conflict of Laws* § 641 (3d ed. 1876).

A form of exemplification admissible under common law requirements which illustrates the proof necessary under common law follows.

Authentication of Judgment-Roll of Court of Foreign Country

I certify that the foregoing are true copies of the records in the action of A. B. against Y. Z., filed in the [Central Office of the Supreme Court of Judicature in England], and legally kept in the custody of the masters of the said court, and the whole of such records.

[*Dated.*] [*Signature.*]
[*Official title, as:* Head Clerk in the Writ, Appearance, and Judgment Department, Central Office.]

This is to certify that the above [*name*] is the officer in charge of the documents filed in the [Central Office of the Supreme Court of Judicature in England], on which file are the documents of which the above are certified to be true copies, and that he is the proper officer to testify to the correctness of such copies.

[*Date.*] [*Signature.*]
[*Official title, as:* One of the Masters of the Supreme Court of Judicature, having the superintendence and control of the Central Office of the Court.]

I, [the Right Honorable John, Duke, Baron Coleridge, Lord Chief Justice of England,] hereby certify that the above [*name*] is a master of the High Court, and one of the legal custodians of the

records of such court, and that the above signature [*name*] is in the proper handwriting of the said master.

[*Seal of the Supreme Court of Judicature, England.*] [Coleridge, L. C. J.]

I, [the Right Honorable Stanley, Baron Halsbury, Lord High Chancellor of Great Britain, Keeper of the Great Seal thereof,] do hereby certify that the within signature ["Coleridge, L. C. J."] is of the proper handwriting of the [Right Honorable John, Duke, Baron Coleridge, Lord Chief Justice of England, the President of the Queen's Bench Division of the Supreme Court of Judicature,] and that the said court is duly constituted and has jurisdiction in all actions, matters, and proceedings in the said Division.

In witness whereof, I have hereunto set my hand and caused the Great Seal to be affixed at Westminster this day of , 19 .

[*Great Seal.*] [Halsbury, C.]

Rule 44 of the Federal Rules of Civil Procedure governs the authentication required for proof of official records in the Federal courts and permits as admissible an official publication or a copy attested in the manner there prescribed.

In New York, CPLR 4511 states that books containing the statutory law or the decisional law will be deemed "prima facie evidence of such law" if "commonly admitted as evidence of the existing law in the judicial tribunals of the jurisdiction where it is in force." It would seem to require the testimony of a qualified person to prove what is commonly admitted as evidence in any foreign tribunal. Under New York and Federal rules the authorized attesting officer need not be the legal custodian of the record.

Oral Testimony of Witnesses

The witness must be properly qualified as having sufficient knowledge of the foreign laws involved so as to be able to aid the court. *Fusco v. Fusco,* 200 Misc. 1039, 107 N. Y. S. 2d 286 (Sup. Ct. 1951). But, he need not be a member of the bar of the foreign country involved, and is required only to show a familiarity with those laws. *Eustathiou & Co. v. United States,* 154 F. Supp. 515 (D.C. Va. 1957); *Danisch v. Guardian Life Ins. Co.,* 19 F. R. D. 235, 237 (S.D.N.Y. 1956); *Abbott Laboratories v. Bank of London,* 351 Ill. App. 227, 114 N. E. 2d 585 (1953); *Wottrich v. Freeman,* 71 N. Y.

601, 602 (1877); *Kenny v. Clarkson,* 1 Johns 385, 393, 3 Am. Dec. 336, 338 (N.Y. 1806); *Masocco v. Schaaf,* 234 App. Div. 181, 184-185, 254 N.Y. Supp. 439, 443-4 (3rd Dep't 1931), citing *American Life Ins. Co. v. Rosenagle,* 77 Pa. 507 (1875).

Direct Examination

In the direct examination of the expert witness, hypothetical questions should be used based upon matters and facts that the evidence tends to support. The opinion and conclusion of the witness should be founded upon these facts. *Jewett v. Brooks,* 134 Mass. 505 (1883); *Weibert v. Hanan,* 202 N. Y. 328, 331, 95 N. E. 688 (1911); *Stearns v. Field,* 90 N. Y. 640 (1882). Sommerich and Busch, *Foreign Law,* pp. 48, 49 (1959).

A suggested form of direct examination follows:

Q. Dr. ———, are you now an attorney admitted to the Chamber of Lawyers in the Canton of Zurich, Switzerland, and duly admitted to practice in all the courts of said Canton of Zurich? A. Yes.

Q. Are you also entitled to practice before the Federal Courts of Switzerland? A. Yes.

Q. How long have you practiced your profession before the Courts of the Canton of Zurich and the Federal Courts of Switzerland? A. ——— years.

Q. What was your education and what schools did you attend before you became a practicing attorney? A. [Witness states his education, emphasizing special studies, if any, and honors achieved.]

Q. Have you had any judicial experience and, if so, in what courts? A. [This question should be asked only if the witness has had judicial experience, but it is usually impressive if the witness has had such experience.]

Q. Have you written any articles, treatises, or books on legal subjects? If so, what were they? A. [If the witness has been an author of legal periodicals, it is helpful and impressive to adduce this fact.]

Q. Have you had any experience with litigation in the field of the law of persons, either as a practicing attorney, as an author, or as a judge? A. Yes. [If actually the witness has specialized in this type of case, this should be emphasized.]

Q. Assuming that in the Canton of Zurich, in the Confederation of Switzerland, in the year 195. ., the plaintiff entered into a valid

agreement in writing to marry the defendant, and assuming that the plaintiff thereafter gave to the defendant a diamond brooch, a platinum ring with a diamond of 1½ carats, a pearl necklace consisting of a single strand of cultured pearls, and a purse of French brocade, and assuming further that the defendant approximately one year after the date of the said written agreement stated in a letter addressed and delivered to the plaintiff that she had changed her mind and would not marry the plaintiff, can you state, Doctor, your opinion, with reasonable certainty, whether under the laws of the Confederation of Switzerland plaintiff can claim the return from the defendant of the presents mentioned? A. Yes.

Q. Assuming, Doctor, that these presents no longer exist in their original form, can you give your opinion as to the remedies provided by the applicable laws of the Confederation of Switzerland? A. Yes, both questions are covered by the provisions of Section 94 of the "Personenrecht," which can be translated as the Law of Persons and which is contained in the Swiss Civil Code.

Q. I show you this volume and ask you whether you can identify it. A. Yes, this is the Swiss Civil Code printed in the German language, and it contains the Law of Persons to which I have referred.

Q. Is this volume printed with the authority of the Government of Switzerland or the Canton of Zurich, and is it commonly admitted as evidence of the existing law in the Courts of Switzerland and particularly the Canton of Zurich? A. Yes.

Q. Will you kindly turn to Section 94 of the Law of Persons. A. Here it is.

Q. Doctor, are you conversant with the English and German languages? A. I am familiar with both and have been educated in both languages.

Q. I show you this typewritten sheet which purports to be a translation in the English language of the text in the German language which you have pointed out as Section 94 of the Law of Persons, and I ask you whether it is a true and correct translation in the English language of the German text of the said Section 94 of the Law of Persons? A. Yes, it is.

Counsel: If the Court pleases, I offer in evidence a photostatic copy of Section 94 of the Law of Persons in lieu of the original volume, to be marked as *"Exhibit I,"* and I offer the translation thereof to be marked as *Exhibit I-a."*

[Documents marked in evidence.]

Q. Are there any authorities, commentaries, texts, or treatises upon which you have relied in formulating your opinion and in giving your answer, and if so, kindly name them. A. Yes, there are.

[Witness names them.]

In New York, CPLR 4515 eliminates the necessity of hypothetical questions where the opinion of an expert witness is called for unless the Court orders otherwise and the expert may upon direct examination be asked to state his opinion and reasons without first specifying the date upon which they are based.

Cross Examination

On cross examination, the witness should be questioned about his qualifications, any possible contingent retainer or connection with the case, any possible unfamiliarity with recent trends or authorities, and errors in reasoning. (Sommerich and Busch, *supra,* at p. 53.) Even under Rule 4515 CPLR of New York the witness, upon cross examination may be required to specify the data upon which his opinion is based.

An example of effective cross examination, by means of which defendant's counsel obtained a damaging admission from the plaintiff's expert on Italian law, is contained in the case of *Southwest Corp. v. Nat. City Bank,* 11 Misc. 2d 397, 406, and is quoted below:

> Q. Assume that Mr. Anlyan at Milan, Italy, in September of 1951, executed a letter to the National City Bank of New York in which he told the National City Bank of New York that he expected to receive from Italy $37,222 from an Italian bank, and that he wanted the National City Bank of New York upon receipt of those funds to pay them, not to him but to Southwestern Shipping Corporation. Now, further assume that Mr. Anlyan, while in Italy, takes that letter and hands it to an Italian citizen. Now I ask you: Does that violate the foreign exchange regulations of Italy? A. Not in itself.
>
> Q. I ask you to please refer to———
>
> The Court: I would like to ask you this question: But these funds do not belong to Mr. Anlyan. Does that change your answer; that he is assigning, but they are in fact the funds of an Italian citizen?
>
> The Witness: Then we have to go into the background of the transaction, which I do not know.
>
> Q. Let me ask you to please take into consideration in your answer the ministerial decree of December 8, 1934, Paragraph 9, which says: 'The power to transfer every credit

which may be used to effect payments abroad is reversed to the National Office for Foreign Exchange.' Have you taken that into consideration in your answer? A. Yes, sir.

Q. Now, if Mr. Anlyan executes a transfer or an attempted transfer of funds, of foreign exchange funds, in Italy and delivers that in Italy, doesn't that contravene the ministerial decree of December 8, 1934? A. Let's see, Anlyan is a gentleman who———

Q. He is in Italy. A. Let me see—who happens to be in Italy, a resident of New York or a resident of the United States, who knows—well, we have to go into the background—who knows that he is going to receive a certain sum of money.

Q. He hopes to receive it. A. He hopes to receive a certain amount of money from an Italian bank in dollars, and he writes a letter whereby he assigns that money to another American resident?

Q. No, to an Italian citizen and resident. A. That he couldn't do. He couldn't assign it to an Italian resident.

Q. That would be illegal, would it not? A. Then he would be selling American dollars in Italy.

Q. That is right; that is my point.

Other Written Forms of Proof

With the court's consent, or upon its direction and the agreement of the parties, matters of foreign law may be adduced by means of official declarations or certificates emanating from administrative bodies in the foreign jurisdiction entrusted with the enforcement of the law. *United States v. Pink,* 315 U. S. 203 (1941). Stipulations of the parties as to matters of foreign law may also be used. Some cases indicate a request by the court for affidavits on the subject. *Komlos v. Compagnie Nationale Air France,* 11 F. Supp. 393 (S.D.N.Y. 1952); *Werkley v. K.L.M.,* 110 F. Supp. 746 (S.D.N.Y. 1952); *La Nationale v. Lavan,* 2 Misc. 2d 100, 151 N. Y. S. 2d 539 (City Ct. 1956). Generally, in Anglo-American law, documents that do not present an opportunity for cross examination, are not admissible. *Schneider v. City of Rome, Italy,* 193 Misc. 180, 83 N. Y. S. 2d 756 (City Ct. 1948); 5 Wigmore, *Evidence* § 1367 (3rd ed., 1940).

Presumptions

Presumptions are indulged in to supply the place of facts; they disappear in the presence of proved facts to the contrary. See *North-*

west Orient Airlines v. Gorter, 254 F. 2d 652 (9th Cir. 1958); *Matter of Marchant v. Mead-Morrison M. Co.,* 252 N. Y. 284, 303, 169 N. E. 386, 392 (1929); *Masocco v. Schaaf,* 234 App. Div. 181, 254 N. Y. Supp. 439 (3d Dep't 1931).

The presumption that foreign law is the same as the law of the forum deals only with the common law, and will not be indulged in where the foreign jurisdiction is a code or civil law country; moreover, the presumption does not take account of statutory changes that may have occurred in the forum or in the foreign jurisdiction. See *Miller v. Vanderlip,* 285 N. Y. 116, 123, 33 N. E. 2d 51, 55 (1941). In dealing with rudimentary contracts made or torts committed abroad, courts would assume a liability to exist if nothing to the contrary appeared. *Cuba Railroad v. Crosby,* 222 U. S. 473 (1912), but see *Walton v. Arabian Oil Co.,* 233 F. 2d 541 (2d Cir. 1956). It has also been claimed that in the absence of other proof it should be presumed that the law of the foreign jurisdiction is the same as the law of the forum because the law of the forum is the only law before the Court, *Bayer v. Lovelace,* 204 Mass. 327, 90 N. E. 538 (1910), Currie, "Displacement of the Law of the Forum," 58 *Colum. L. Rev.* 964 (1958).

Judicial Notice

In the absence of statutory authorization, the court cannot take judicial notice of the law of a foreign nation, *Liverpool & G.W.S. Co. v. Phenix Ins. Co.,* 129 U. S. 397 (1889); *Dainese v. Hale,* 91 U. S. 13 (1875); *Ennis v. Smith,* 55 U. S. (14 How.) 399 (1852); *Electric Welding Co. v. Prince,* 200 Mass. 386, 86 N. E. 947 (1909); *Petrogradsky M. K. Bank v. National City Bank,* 253 N. Y. 23, 34, 170 N. E. 479, 483 (1930); nor of the laws of a sister state. *Eastern Bldg. & L. Ass'n v. Ebaugh,* 185 U. S. 114 (1902); *Chicago & A.R. Co. v. Wiggins Ferry Co.,* 119 U. S. 615 (1877); *Hanna v. Lichtenhein,* 225 N. Y. 579, 122 N. E. 625 (1919); 9 Wigmore, *Evidence* § 2573 (3d ed. 1940).

The UNIFORM JUDICIAL NOTICE OF FOREIGN LAW ACT § 1 (1936), permitting judicial notice of the law of sister states, has been adopted by 28 states. These are Delaware, Florida, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina,

South Dakota, Tennessee, Virgin Islands, Washington, Wisconsin, and Wyoming. The Uniform Law relates to the law of sister states and the United States, but not to the law of foreign countries (§ 5). California, Connecticut, Massachusetts, Mississippi, Virginia, and West Virginia require courts to notice judicially the laws of foreign countries as mandatory.

CPLR 4511(d) of New York provides that the Court shall take judicial notice of the laws of foreign countries if requested by a party who furnishes the court sufficient information to enable it to comply with the request. If the court can reach a decision with the information furnished, it must take judicial notice; if not, it need only state that it has not been furnished "sufficient information to comply with the request." CPLR 4511(d) also provides that the court may rely on any document, testimony, information, or argument on the subject, whether offered by a party or produced through its own research. The result is likely to be virtually the same under the predecessor statute, Section 344-a C. P. A., which the New York Courts generally construed as requiring the parties to introduce evidence of the foreign law as a condition precedent to its judicial notice (*Arams v. Arams,* 182 Misc. 328 (1943). Federal Rule 44.1 has no specific requirement as to the sufficiency of the information to be furnished, but it remains to be seen whether the Courts will require the assistance of the parties before it will take judicial notice. As stated by Judge Breitel in *Gevinson* (*supra*) it will no doubt depend upon "the inaccessibility, strangeness, abstruseness, uncertainty, and the general difficulty in apprehending the foreign law."

Role of Court

The trend is to the effect that the determination of foreign law shall be made by the Court and not by the jury.

The Court is required to determine the foreign law issue and include its findings in its decision or charge to the jury, as the case may be. The Court is not bound by the testimony of the expert witnesses, even if they are not contradicted, and may deduce for itself, from the statutes and decisions proffered in evidence, what the law of the foreign jurisdiction is. *Finney v. Guy,* 189 U. S. 335, 342 (1903). However, it has been urged that even the unsupported opinion of an expert witness should not be disregarded lightly unless "so contrary to logic, justice, or generally accepted legal concepts, as to suggest strong doubt as to the correctness of the opinion." *De*

Sayve v. De La Valdene, 124 N. Y. S. 2d 143 (Sup. Cit. 1953), aff'd 283 App. Div. 918, 130 N. Y. S. 2d 865 (1st Dep't 1953), *appeal dismissed,* 307 N. Y. 861, 122 N. E. 2d 753 (1954).

As we have seen, the New York and Federal rules permit the Court, which would also include the Appellate Court, to ascertain foreign law through its own research. It has been suggested that this should not be done without disclosing to the parties the results of such private researches and permitting them to be heard (*Arams v. Arams, supra*). Rule 804 of THE MODEL CODE OF EVIDENCE of The American Law Institute would also require a judge to inform the parties of any matter to be noticed judicially by him, and to afford them a reasonable opportunity to present information as to the propriety of taking judicial notice or as to the tenor of the matter to be noticed. If a substantial issue of foreign law is first raised on appeal, the Appellate Court, under the New York and federal rules, may nevertheless ascertain the proper law to be applied through its own research, but it would seem that good practice requires a new trial to enable the foreign law to be proved. *Sonnesen v. Panama Transport Co.,* 298 N. Y. 262, 82 N. E. 2d 569 (1948), *cert. denied,* 337 U. S. 919 (1949).

Conclusion and Bibliography

This outline, although seemingly lengthy, is nevertheless only an outline. Much has been written on the subject and more remains for further study, contemplation, and discussion. A list of some articles on the subject follows:

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* (2d ed. 1959); McCormick, "Judicial Notice," 5 *Vand. L. Rev.* 296 (1952); H. L. Jones, "International Judicial Assistance Act," 62 *Yale N. J.* 515 (1953); Sommerich and 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); McKenzie and Sarabia, "The Pleading and Proof of Alien Law," 30 *Tulane L. Rev.* 353 (1956); Busch, "When Law is Fact," 24 *Fordham L. Rev.* 646 (1956); Domke, "Expert Testimony

in Proof of Foreign Law in American Courts," 137 *N.Y.L.J.* 4 (March 12, 13, 1957); Stern, "Foreign Law in the Courts: Judicial Notice and Proof," 45 *Calif. L. Rev.* 23 (1957); Nussbaum, "Proof of Foreign Law in New York: A Proposed Amendment," 57 *Colum. L. Rev.* 348 (1957); Note to Walton v. Arabian American Oil Co., 233 F. 2d 541 (2 Cir. 1956), cert. den. 352 U. S. 872, 43 *Iowa L. Rev.* 125 (1957); note entitled "Proof of the Law of Foreign Countries; Appellate Review and Subsequent Litigation," 72 *Harv. L. Rev.* 318 (1958); Currie, "Displacement of the Law of the Forum," 58 *Colum. L. Rev.* 964 (1958); Jones, "International Judicial Assistant; Procedural Chaos and a Program for Reform," 62 *Yale L. J.* 515 (1953); Note, "Judicial Notice of Foreign Law," 18 *Vand. L. Rev.* 1962, 1971-74 (1965); "Comment, Conflict of Laws—Judicial Notice of Foreign Law," 30 *Mich. L. Rev.* 747 (1932); Husserl, "The Foreign Fact Element in Conflict of Laws," 26 *Va. L. Rev.* 243 (1940); Drachsler, "Judicial Initiative in the Proof of Foreign Law," *A. B. A. Sec. Intl. & Comp. L. Proceedings,* 126 (1956); Busch, "Reply to Report on 'Judicial Initiative in the Proof of Foreign Law,' " *id.,* 136 (1956); McKenzie, "The Proof of Alien Law," *id.,* 50, 52 (1959); Sommerich and Busch, *Pleading and Proof of Foreign Law Under the New Civil Practice Law and Rules,* Vol. 1, No. 2, New York Continuing Legal Education (1963); Busch, "New Trends in Pleading Foreign Law," Vol. 152, No. 110 *N.Y.L.J.* 1 (Dec. 8, 1964); Jefferies, "Recognition of Foreign Law by American Courts," 35 *Un. of Ann. L. Rev.* 578 (1966); Miller, "Federal Rule 44.1 and the 'Fact' Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine," 65 *Michigan Law Rev.* 615 (1966).