

Washington Law Review

Volume 38 | Number 4

12-1-1963

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Recommended Citation

Robert L. Beale, Comment, *Judicial Notice of Foreign Law*, 38 Wash. L. Rev. 802 (1963).

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COMMENT

JUDICIAL NOTICE OF FOREIGN LAW

In 1936 the Commissioners on Uniform State Laws promulgated the Uniform Judicial Notice of Foreign Law Act.¹ To date the Act has been adopted by twenty-eight jurisdictions, including Washington.² Although the purpose of the Act was commendable, and the modernization it sought to achieve greatly needed, it seems that further action, either judicial or legislative is needed in some of the states where it has been adopted. Reform is particularly necessary in Washington. This comment will explore the Washington law prior to the enactment of the Uniform Act, the intent of the Act, and the actual effect that its enactment has had upon the existing law. The operation of the Uniform Act in the other jurisdictions will be discussed with a view toward exposing both its strengths and weaknesses. A comparison of the rule as to judicial notice of the law of the various states by the federal courts will also be made. Finally, there will be suggestions for improvement, both in the way of judicial interpretation and of legislative action.

WASHINGTON LAW PRIOR TO ADOPTION OF THE UNIFORM ACT

Very early the Washington court aligned itself with the then prevailing view that foreign law must be pleaded and proved. In 1892 the court stated, "Laws of foreign countries must be pleaded and proven as any other fact, and in this respect the law of another state of the union is the law of a foreign country and the court will not take

¹ Section 1. Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States. § 2. The court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information. § 3. The determination of such laws shall be made by the court and not by the jury, and shall be reviewable. § 4. Any party may also present to the trial court any admissible evidence of such laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise. § 5. The law of a jurisdiction other than those referred to in Section 1 shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice. § 6. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. § 7. This act may be cited as the Uniform Judicial Notice of Foreign Law Act. 9A U.L.A. 318 (1957), hereafter referred to as the Uniform Act.

² 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, Wyoming.

judicial notice of it.”³ That this was the accepted common-law rule even as late as 1935 is evident from categorical statements in both Beale’s treatise, and the *Restatement of Conflicts* to the effect that the law of a sister state must be pleaded and proved.⁴ The conceptual underpinning for the rule, as articulated by Beale, is as follows: Because the court can apply only the law of the forum, foreign law, insofar as it is relevant, must operate not as law but as fact.⁵ The full implications of the rule would be not only that foreign law must be pleaded, but that the determination of the content of the foreign law must be a question for the jury, and that the only evidence as to that “fact” must not run afoul of the exclusionary rules which have been developed as part of the law of evidence.

Even before the passage of the Uniform Judicial Notice of Foreign Law Act, however, Washington had moved away from these bizarre implications. A statute, authorizing proof of foreign statutes by introduction of printed copies thereof which were either published under the authority of the respective government, or which were commonly used in the court of that state, was enacted as section 435 of the Code of 1881. This statute apparently dates from 1854, and now appears as RCW 5.44.050. The case of *Rood v. Horton*, decided in 1924, disposed of the idea that foreign law was a jury question, the court saying, “In our opinion, where proof of foreign laws is necessary to be introduced, such proof should be addressed to the court and not to the jury, and the court should interpret the foreign laws for the jury and instruct the jury thereon.”⁶

Although proof of foreign statutes was simplified by this statute, proof of foreign case law was not. There seem to be no Washington cases on this point, but the well accepted rule was that foreign case law should be proven by expert testimony.⁷

The pleading requirement as to foreign law raises at least three questions: How must it be pleaded? Are there any exceptions to the requirement? What is the effect of failure to plead?

There are no Washington cases in which the court prescribes the proper method for pleading foreign case law. Presumably the rule would be that the pleading is acceptable unless it merely states con-

³ *McDaniel v. Pressler*, 3 Wash. 636, 639, 29 Pac. 209, 210 (1892).

⁴ 3 BEALE, *CONFLICT OF LAWS* 1665 (1935); *RESTATEMENT, CONFLICTS* § 621 (1934).

⁵ 3 BEALE, *CONFLICT OF LAWS* 1664 (1935).

⁶ *Rood v. Horton*, 132 Wash. 82, 89, 231 Pac. 450, 452 (1924).

⁷ 3 BEALE, *CONFLICT OF LAWS*, 1670 (1935); 20 *AM. JUR. EVIDENCE* § 801 (1939); *Annot.* 25 L.R.A. 449 (1894).

clusions of the pleader.⁸ With respect to the proper method of pleading statutes, the opposite situation prevails. Two cases set forth the proposition that a foreign statute must be pleaded verbatim.⁹ Another case, decided between these two, held that introduction of the actual language of the statute upon trial amounted to an amendment of the answer, which originally had set forth the statute in effect, but had not done so verbatim.¹⁰ The most recent case, *Allard v. LaPlain*¹¹ retreats completely from the verbatim requirement, but does not even mention the earlier cases. There the defendant urged the court to consider a Maine statute as giving a defense in the suit on a Maine judgment. The court said, "This statute is not pleaded in that affirmative defense by copy, but is pleaded in substance and by reference to section and chapter of the revised statutes of that state, in such manner that we feel justified in noticing its exact language as found therein."¹² Since the earlier cases were not expressly overruled, and were categorical in establishing a rule contrary to that in the *Allard* case, one can only say that the present Washington rule as to the proper manner to plead a foreign statute is unsettled.

Washington case law presents two exceptions to the rule that foreign law must be pleaded. A well established exception is that the court will take judicial notice of the law of another state when suit is brought on a judgment of that state.¹³ There are, however, two recent cases which, while recognizing the exception, severely limit it. In *Scott v. Holcomb*¹⁴ suit was brought on a New York judgment. New York law was not pleaded, and the court refused to take judicial notice of New York law to determine if the defendant's counterclaim should have been asserted in the New York action and was therefore barred. *Edlin v. Edlin*¹⁵ was a suit for accrued alimony and child support payments under a Missouri judgment. Missouri law had been neither pleaded nor proved, and the court refused to take judicial notice of it, saying,

⁸ 3 BEALE, CONFLICT OF LAWS 1668 (1935); Annot. 134 A.L.R. 570 (1941).

⁹ *Martin Bros. v. Nettleton*, 138 Wash. 102, 244 Pac. 386 (1926); *Lowry v. Moore*, 16 Wash. 476, 48 Pac. 238 (1897).

¹⁰ *Lipsett v. Dettering*, 94 Wash. 629, 162 Pac. 1007 (1917).

¹¹ 147 Wash. 497, 266 Pac. 688 (1928).

¹² *Id.* at 517, 266 Pac. at 695.

¹³ *Rubin v. Dale*, 156 Wash. 676, 288 Pac. 223 (1930); *Miller v. Miller*, 90 Wash. 333, 156 Pac. 8 (1916); *Trowbridge v. Spinning*, 23 Wash. 48, 62 Pac. 125 (1900). The rationale of this exception is criticized in Comment, 14 WASH. L. REV. 222 (1939) where the writer points out that the United States Supreme Court has held such a rule not to be required by the full faith and credit clause.

¹⁴ 49 Wn.2d 387, 301 P.2d 1068 (1956).

¹⁵ 42 Wn.2d 445, 256 P.2d 283 (1953).

[I]n a case such as this, involving a judgment providing for monthly payments, and where the statute of limitations is involved, and where the question might arise as to whether particular rights are substantive, and would thus be governed by the *lex loci*, or whether such rights are remedial, and would be governed by the *lex fori*, a trial judge should not be required, on his own motion, to ferret out the laws and decisions of a sister state, but should have such matters properly presented to him, in order that he may make decisions thereon.¹⁶

It would appear from the tone of this last decision that the court is anxious to keep the exception within narrow limits. Probably the only issue on which the court will notice foreign law that has not been pleaded is whether the foreign court had personal jurisdiction over the defendant based on that state's law as to service of process.¹⁷

Another exception to the pleading requirement is illustrated in *Matson v. Kennecott Mines Co.*¹⁸ where suit was brought against a Nevada corporation for personal injuries incurred while the plaintiff was working its mines in Alaska. Defendant corporation proved that it had been dissolved pursuant to Nevada law. Plaintiff was allowed to introduce a Nevada statute, not previously pleaded, which provided that a dissolved corporation continued for a year after dissolution for the purpose of service of process and suit. The court said that no prior pleading of the statute was required, "in view of the fact that it was introduced to negative the claimed disincorporation of the company."¹⁹ Clearly this case holds that there is an additional exception to the pleading requirement, but the scope of this "negative use" exception is somewhat conjectural. If the case means that foreign law need not be pleaded whenever it would be used to negative a contention by the other party, then the exception is sweeping. The logical extension of this approach would be that defendants are never required to plead foreign law, and plaintiffs need not either, when they meet affirmative defenses. A more restricted rationale for the case would be in terms of estoppel. Since defendant invoked Nevada law, the procedure for dissolving a corporation, he cannot now object to plaintiff's use of Nevada law, even though it was not pleaded. A few cases in other jurisdictions have used the estoppel concept as a means of evading the requirement that foreign law be pleaded.²⁰

¹⁶ *Id.* at 450-51, 256 P.2d at 287.

¹⁷ This was the issue for which foreign law was noticed in *Trowbridge v. Spinning* *supra*, note 14.

¹⁸ 101 Wash. 12, 171 Pac. 1040 (1918), *rev'd on other grounds* 103 Wash. 499, 175 Pac. 181 (1918).

¹⁹ *Id.* at 29, 171 Pac. at 1045.

²⁰ See Annot., 149 A.L.R. 759 (1944).

Where the party who wishes to rely on foreign law has failed to plead it, the rule is well established that the court indulges in the "presumption" that the applicable foreign law is the same as the law of the forum.²¹ Washington even goes so far as to presume that the foreign jurisdiction has the same statutes that are currently in force in Washington.²²

THE PURPOSE OF THE UNIFORM ACT

Dissatisfaction with the common-law rules that foreign law could not be judicially noticed, but must be proved, and that the content of foreign law was a question of fact for the jury led to statutory change. Proliferation of statutes, each different, led to the promulgation in 1936 of the Uniform Judicial Notice of Foreign Law Act.²³ A factor which made such a change in the law reasonable and desirable in 1936, whereas it would not have been so earlier, was the ready accessibility that courts of one state had to the statutes and decisions of the courts of all the other states.²⁴ With this background, one could at least say that the purpose of the Act was to dispense with the necessity of proving foreign law the way material facts must be proven. One could go further, and say that the purpose of the Act was to eliminate any distinction between the manner in which foreign law is applied to the facts of a case, and the manner in which the law of the forum would be applied. If this was not the purpose of the Act when proposed, and when adopted by the various states, then this writer believes that this should be the purpose of legislation in this area.

Both the language of the Act, and contemporaneous statements at the time of promulgation support the contention that the purpose was to make the process of ascertaining the applicable law identical, regardless of whether it was "foreign" or "domestic." The label chosen to describe the process of law-finding which was to substitute for formal proof was "judicial notice." This is the same term that is applied to the process by which a judge ascertains the applicable law

²¹ *Chandler v. Doran Co.*, 44 Wn.2d 396, 267 P.2d 907 (1954); *Norm Advertising Inc. v. Monroe St. Lumber Co.*, 25 Wn.2d 391, 171 P.2d 177 (1946); *Smaby v. Shrauger*, 9 Wn.2d 691, 115 P.2d 967 (1941); *Walnut Park Lumber & Coal Co. v. Roane*, 171 Wash. 362, 17 P.2d 896 (1933); GOODRICH, *CONFLICT OF LAWS* § 83, p. 235 (3rd ed. 1949); *RESTATEMENT, CONFLICTS* § 622 (1934).

²² *Nissen v. Gatlin*, 60 Wn.2d 259, 373 P.2d 491 (1962).

²³ Commissioners' Prefatory Note, *UNIFORM JUDICIAL NOTICE OF FOREIGN LAW ACT*, 9A U.L.A. 318 (1957); Committee on Improvements in the Law of Evidence, Section of Judicial Administration, *Report*, 63 A.B.A. REP. 593 (1938).

²⁴ Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018, 1021 (1941); Committee on Improvements in the Law of Evidence, *Report*, *op. cit. supra*, note 23 at 593.

in a purely domestic case.²⁵ Judicial notice was a concept with a fairly well-defined meaning when the Act was drafted. The draftsmen must have meant that meaning to be attached to the term as used in the statute. Generally, judicial notice means that the court is free from the exclusionary rules of evidence, and that a judge is free to make independent inquiry.²⁶ In the report which indorsed the Uniform Act, the Committee on Improvements in the Law of Evidence of the American Bar Association indicated the manner in which counsel would invoke judicial notice: "by producing the statutes and decisions of that state for information of the court."²⁷ Obviously this is the same manner in which counsel would present domestic law to the court.

There are two elements in section 4 of the Uniform Act that are inconsistent with the contention that the purpose of the Act was to have the court find and apply foreign law in the same way that domestic law is handled. The first of these elements is the use of the term "admissible evidence."²⁸ This is indeed a peculiar phrase to find in a statute purporting to authorize judicial notice. As argued earlier, judicial notice and admissible evidence are inconsistent concepts. Part of the meaning of judicial notice is that the exclusionary rules of evidence will not be applied. Why this phrase was used is a mystery. Perhaps the only explanation is that old ideas die slowly.

Section 4 of the Uniform Act also provides that the party intending to request judicial notice of foreign law must give reasonable notice to the adverse party, either in the pleadings or otherwise.²⁹ It is clear from the accompanying Commissioners' notes that the primary purpose of this section was to prevent one party from surprising the other. This notice requirement is clearly an intentional addition to the process of presenting foreign law which is not present when only domestic law is to be used. It is believed that this is the only real distinction which the draftsmen intended to make between the presentation of domestic and foreign law.

EFFECT OF THE WASHINGTON STATUTE

In 1941 the Washington legislature enacted a statute which purported to be the Uniform Judicial Notice of Foreign Law Act.³⁰ In

²⁵ McCORMICK, EVIDENCE § 326 (1954).

²⁶ *Id.* § 323.

²⁷ Committee on Improvements in the Law of Evidence, *Report, supra* note 23, at 593.

²⁸ "Any party may also present to the trial court any *admissible evidence* of such laws. . . ." (Emphasis added.)

²⁹ *Supra* note 1.

³⁰ Wash. Sess. Laws 1941, ch. 82.

fact the Washington act differed from the Uniform Act in one important detail. In lieu of section 4 of the Uniform Act which was intended to require notice from one party to the other that foreign law would be introduced, and which provided that this notice could be given "either in the pleadings or otherwise," section 4 of the Washington act substituted the following:

This act shall not be construed to relieve any party of the duty of hereafter pleading such laws where required under the law and practice of this state immediately prior to the enactment hereof.³¹

Thus in Washington pleading is now absolutely necessary, not merely one of several ways of giving notice to the opponent of intent to rely on foreign law.

One might think that such a change would surely have been made intentionally by the legislature, but it is believed that such is not the case. The law enacted in 1941 and the bill as originally introduced in the 1941 session are identical.³² The bill was introduced by Senator Duggan, chairman of the Senate judiciary committee, and a member of the judicial council. Prior to 1941 the following events had taken place: A bill embodying the Uniform Act as drafted by the Commissioners on Uniform State Laws had been introduced in the 1937 legislature,³³ but did not pass, although it passed the House by a vote of ninety-one to nothing,³⁴ and received a "do-pass" recommendation from the Senate judiciary committee.³⁵ In 1939 the Evidence Section of the Committee on Judicial Administration of the Washington State Bar Association recommended that the act as drafted by the Commissioners on Uniform State Laws be enacted.³⁶ In 1941 the judicial council recommended the passage of the Uniform Act, as it appeared in House Bill No. 242 of the 1937 Session.³⁷

The interesting fact is that while the judicial council does not intimate in the text of its report that the statute it recommends is different from the Uniform Act, the statute as set out in the appendix to that

³¹ Wash. Sess. Laws 1941, ch. 82, § 4; currently codified as RCW 5.24.040.

³² S.B. 28, 1941 Sess.

³³ H.B. 242, 1937 Sess.

³⁴ H.R. Jour., 1937 Sess., p. 679.

³⁵ S. Jour., 1937 Sess., p. 655.

³⁶ 14 WASH. L. REV. 342 (1939).

³⁷ The Judicial Council made its recommendation as follows: "An act entitled Uniform Judicial Notice of Foreign Laws Act which was introduced in the 1937 session of the legislature as House Bill No. 242, passing the House by a vote of ninety-one to nothing and apparently being lost in the Senate after having been recommended by the Senate Judiciary Committee for passage, is recommended by the Council for adoption in the 1941 session of the legislature and is attached hereto as Appendix M." Seventh Report of Judicial Council 9 (1941).

report is different. It is here for the first time that the substituted section 4 appears. Since the Uniform Act as originally drawn had been approved by the American Bar Association, the Washington Bar Association, the House of Representatives in 1937, and apparently, but not actually, by the judicial council in 1941, and since the act which was introduced in 1941 purported to be the Uniform Act, it seems quite possible that the substituted section 4 was slipped in without the majority of the legislature being aware of the change. It is at least arguable that the legislators who finally approved the bill thought that they were approving the Uniform Act in its original form. The point is that these facts would argue against any contention that the substituted section 4 indicates clear legislative purpose to restrict the operation of the statute.

In brief, one can say that the adoption of this peculiar version of the Uniform Act has done little to ameliorate the problems involved in placing foreign law before a Washington court. One purpose of the act—making determination of the foreign law a question for the judge instead of the jury—had already been achieved in Washington through case law since 1924.³⁸ The other purpose of the act—elimination of the difference between presentment of foreign and domestic law—was partially frustrated from the beginning by the substituted section 4 which expressly retained the prior law as to pleading. Any hope that the apparently restrictive section would be softened by a liberal judicial interpretation was dashed when the court decided *Allen v. Saccomanno* in 1952.³⁹ The suit was for personal injuries incurred in a collision between plaintiff's car and defendant's bulldozer in Idaho. The court said:

We have considered this case in the light of the Idaho statutes governing the operation of motor vehicles which were pleaded. No decisions of the Supreme Court of Idaho upon this subject were pleaded, nor was any effort made to amend the pleadings to include them. Our consideration of them, as a matter of judicial notice, is *prevented* by RCW 5.24.040⁴⁰

A more restrictive approach to a remedial statute could hardly be imagined. The court took a section of a statute intended to allow foreign law to be applied freely, and used it as the reason for refusing to consider foreign law.

³⁸ *Rood v. Horton*, *supra* note 5.

³⁹ 40 Wn.2d 283, 242 P.2d 747 (1952).

⁴⁰ *Id.* at 285, 242 P.2d at 748. (Emphasis added.)

Another decision of the Washington court adopted an unnecessarily restrictive interpretation of section 2 of the Act. *State v. Jackovick*⁴¹ was an action to find the defendant to be an habitual criminal. At issue was the question whether offenses for which the defendant had been convicted in Minnesota were felonies in Washington. Interpreting section 2 of the Uniform Act,⁴² the court said, "This section has been interpreted not to require courts to take judicial notice of the law of another state, unless pertinent decisions or statutes are called to its attention in the records or briefs; but a court may, on its own motion, inform itself of such foreign law."⁴³ As will be seen hereafter, Washington is not alone in its effort to protect judges from doing the work of counsel, but it is submitted that this solicitude is not only unnecessary, but conflicts with the clear meaning of section 1 of the Act which is not permissive, but mandatory.⁴⁴

Perhaps adoption of the statute has changed the Washington law in the area of proof. Certainly if case law of a sister state is properly pleaded it is no longer necessary to adduce additional proof in the form of expert testimony, affidavits, or depositions from attorneys or others familiar with the foreign law. But even in the area of proof the statutory law has not changed drastically because under the proof of statutes act⁴⁵ a copy of the foreign statute was sufficient.

THE UNIFORM ACT IN OTHER STATES

The Uniform Act has met with varying degrees of success in the states which have adopted it. There are many cases in which the statute has obviously achieved the purpose of eliminating the old common-law rule of pleading and proof of foreign law because the courts simply say that they are authorized to take judicial notice of the law of sister states, and then proceed to do so.⁴⁶ There are, how-

⁴¹ 56 Wn.2d 915, 255 P.2d 976 (1960).

⁴² RCW 5.24.020: "The court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information."

⁴³ 56 Wn.2d at 918-19, 355 P.2d at 978.

⁴⁴ RCW 5.24.010 "Every court of this state *shall* take judicial notice..." (Emphasis added.)

⁴⁵ RCW 5.44.050.

⁴⁶ *Hotchkiss v. Martin*, 52 So. 2d 113 (Fla. 1951); *Meenen v. Meenen*, 178 Kan. 510, 289 P.2d 766 (1955); *Fischer v. Kipp*, 177 Kan. 196, 277 P.2d 598 (1954); *Leiserson & Adler Inc. v. Keam*, 266 S.W.2d 352 (Ky. 1954); *Gourley v. Miller*, 302 Ky. 759, 196 S.W.2d 360 (1946); *Malcom v. Stondall Land & Invest. Co.*, 129 Mont. 142, 284 P.2d 258 (1955); *In re Hunter's Estate*, 125 Mont. 315, 236 P.2d 94 (1951); *Snyder v. Lincoln*, 153 Neb. 611, 45 N.W.2d 749 (1951); *Fitzgerald v. Chemical Serv. Corp.*, 84 Ohio App. 423, 84 N.E.2d 754 (1948); *Application of Lorenz*, 194 Ore. 355, 241 P.2d 142 (1952); *Hansen v. Hansen*, 274 Wis. 262, 80 N.W.2d 230 (1956).

ever, some problems which have shown up. The cases under the Uniform Act discuss whether it is still necessary to plead foreign law, the duty of counsel to inform the court, and various problems surrounding the notice requirement of section 4 of the Act. There have also been some interesting statutory modifications of the Uniform Act.

Whether the Uniform Act abolished the requirement that foreign law must be pleaded has, oddly enough, been a bothersome question. Some courts felt that it was necessary to state in so many words that the pleading requirement as such had been abolished, having been replaced by a notice requirement which might take the form of pleading, or some other form.⁴⁷ Two states, Florida and Nebraska, seem to require that foreign law must be pleaded even under the Uniform Act. Florida originally started off with a liberal interpretation of the Act. In *Peterson v. Paoli*⁴⁸ the court held that the Uniform Act required it to notice New York law, including a statute which had been overlooked in the lower court. Several subsequent decisions of the Florida court have retreated drastically from this position, until now it seems clear not only that foreign law must be pleaded,⁴⁹ but that statutes should be pleaded by section number,⁵⁰ and case law should be pleaded by citation and not by general tenor only.⁵¹ Nebraska also seems to have a similarly strict pleading requirement. *Scott v. Scott*⁵² was a suit for separate maintenance. The issue was whether there had been a ceremonial marriage in South Dakota or a common-law marriage in Iowa. Defendant had pleaded generally that there was no common-law marriage in Iowa. The court refused to apply either the law of South Dakota or the law of Iowa, giving this interpretation of the Uniform Act:

The foregoing statutes were not intended to remove the necessity of pleading and presenting the common law or statutes of another jurisdiction of the United States when recovery based thereon is sought in an action brought in this state to enforce a cause of action arising thereunder. It only removes the requirement of proving it. A court may require that it be pleaded and presented.⁵³

⁴⁷ *Fardy v. Mayerstein*, 221 Ind. 339, 47 N.E.2d 966 (1943); *Poteet v. Simmons*, 172 Kan. 310, 240 P.2d 147 (1952); *Vogt v. Power's Adm'r[x]*, 291 S.W.2d 840 (Ky. 1956).

⁴⁸ 44 So. 2d 639 (Fla. 1950).

⁴⁹ *Miller v. Shulman*, 122 So. 2d 589 (Fla. 1960); *Aboandandolo v. Vonella*, 88 So. 2d 282 (Fla. 1956); *Lanigan v. Lanigan*, 78 So. 2d 92 (Fla. 1955).

⁵⁰ *Pacific Mills v. Hillman Garment Inc.*, 87 So. 2d 599 (Fla. 1956).

⁵¹ *Kingston v. Quimby*, 80 So. 2d 455 (Fla. 1955).

⁵² 153 Neb. 906, 46 N.W.2d 627 (1951).

⁵³ *Id.* 46 N.W.2d at 630-31.

It is possible that the impact of this decision has since been softened, although it is difficult to determine to what extent. In *Abramson v. Abramson*⁵⁴ the same issue was presented on almost identical facts. The plaintiff had alleged in her complaint that the parties "were lawfully married on September 5, 1929 in Clarinda, Iowa." The court held that this was sufficient pleading to authorize judicial notice of Iowa law, but instead of overruling *Scott v. Scott*, purported to follow it, quoting the same excerpt set out above. Who knows what the Nebraska rule is now.

It is quite likely that the retention by Florida and Nebraska of a pleading requirement under the Uniform Act is related to another idea expressed by courts when they interpret the Act—that the duty of ascertaining the foreign law falls on counsel and not on the court. Since it seems that this idea is not really unique to the area of foreign law, but rather is a basic premise of our judicial system, it is difficult to understand why the courts have chosen the area of foreign law to articulate this duty. The leading case on this point is *Strout v. Burgess*⁵⁵ where the court said:

Unless pertinent decisions or statutes of foreign jurisdictions are called to our attention either in the record or in the briefs, and if no evidence as to the foreign law is offered . . . it is not the duty of the court to inform itself thereof, suo moto. We do not mean to deny our authority to do so.⁵⁶

While the court is no doubt correct in what it says, it is submitted that there is nothing to gain, and a real chance of retarding the development of the law, by saying this in the context of a discussion about judicial notice of foreign law. If courts focus on their right not to notice foreign law unless counsel bring it to their attention, they might lose sight of the clear commandment of the first section of the Uniform Act that they shall take notice of foreign law. Further, in emphasizing that the function of the pleadings or the record is to place the foreign law before the court rather than to give notice to the adverse party, courts have added something to the Act which was not intended. Obviously a pleading must be much more specific and detailed if it is meant to apprise the court of the entire law of another

⁵⁴ 161 Neb. 782, 74 N.W.2d 919 (1956).

⁵⁵ 144 Me. 263, 68 A.2d 241 (1949).

⁵⁶ *Id.* 68 A.2d at 250; *accord*, *Roberts v. Robben*, 188 Kan. 217, 362 P.2d 29, 31 (1961); *Succession of Shadrick*, 129 So. 2d 606, 613 (La. 1961); *State v. Jackovick*, 56 Wn.2d 915, 918, 355 P.2d 976, 978 (1960); *Edlin v. Edlin*, 42 Wn.2d 445, 450-51, 256 P.2d 283, 287 (1953).

state on a particular point than if it is meant only to apprise the opposing counsel of the possibility that foreign law will be argued. Fear of imposition upon judges then results in the erection of barriers to judicial notice of foreign law. It could be just this fear which led the courts of Florida and Nebraska to retain a pleading requirement by judicial interpretation, and which led to the surreptitious insertion of a pleading requirement in the Uniform Act as adopted in Washington.

Even in those states in which it is recognized that the only real requirement of the Uniform Act is notice to the opposing party that judicial notice of foreign law will be requested, there is some divergence of opinion about how such notice should be given, what the effect of failure to notify should be, and whether there is some exception to the notice requirement. Apparently where the party wishing to rely on foreign law has not given the required notice, the trial court is not required to take judicial notice of the foreign law.⁵⁷ However, it would seem that where the trial court did take notice of foreign law even though one party had not expressly notified the other, this would not normally be prejudicial error, because if the correct law was applied, the result would be the same even if the case were remanded for a new trial. One case so holds.⁵⁸ Assuming that the primary objective of section 4 of the Act is to insure that opposing counsel is not taken by surprise when foreign law is argued at trial,⁵⁹ one might think that allegations of fact which clearly showed that by the applicable conflicts rule foreign law should be applied, would be sufficient to put a competent attorney on notice that foreign law would be argued. However, there is only sparse case authority for this position,⁶⁰ and almost all of the cases which refused to take judicial notice because there had been no notice given would be *contra*.⁶¹

⁵⁷ *Hogan v. Q.T. Corp.*, 230 Md. 69, 185 A.2d 491 (1962); *Estate of Gallagher v. Battle*, 209 Md. 592, 122 A.2d 93 (1956); *Maccabees v. Lipps*, 182 Md. 190, 34 A.2d 424 (1943); *Prudential Ins. Co. of America v. Shumaker*, 178 Md. 189, 12 A.2d 618 (1940); *Smith v. Brooks*, 154 Neb. 93, 47 N.W.2d 389 (1951); *Cliff v. Pinto*, 74 R.I. 369, 60 A.2d 704 (1948).

⁵⁸ *Patterson v. Consumers Roofing Co.*, 209 Minn. 50, 295 N.W. 401 (1940).

⁵⁹ The Commissioners' notes to § 4 of the Uniform Act, 9A U.L.A. 326 (1957) give an illustration that indicates this is the primary objective: "For example, if a plaintiff sued in Minnesota for damage done to freight by a railroad, and on the trial the plaintiff invokes the law of Illinois because the bill of lading was issued in Illinois, and if the plaintiff is ready with books of Illinois law, it is unfair to the opponent not to have given him notice that the Illinois law will be relied upon."

⁶⁰ *Commercial Credit Corp. v. Fatz*, 346 Ill. App. 541, 105 N.E.2d 789 (1952); *Meyers v. Columbia Cas. Co.*, 81 Ohio App. 434, 78 N.E.2d 64 (1947); *but see Bowling v. Bowling*, 62 Ohio L. Abs. 178, 100 N.E.2d 725 (1951).

⁶¹ Note 54 *supra*.

It is, of course, possible to allege something in the pleading in addition to facts which will be sufficient to give notice to the opposing party. In *Lorch v. Eglin*⁶² the defendant's answer alleged that the plaintiff's cause of action was governed by Virginia law and that under Virginia law the plaintiff could not recover, and added, "All of which defendants aver to be true and expect to be able to prove at the trial of the cause."⁶³ This was held sufficient notice. In *Revlett v. Louisville & N. R. Co.*,⁶⁴ the court held that a simple allegation that the law of a sister state controlled was sufficient to give notice of intent to rely on that law. An example of conservative practice is that followed in *Gordon's Transports Inc. v. Bailey*⁶⁵ where the defendant's attorney not only pleaded applicable foreign statutes, but served upon plaintiff's attorney a memorandum of the foreign authorities on which he intended to rely. Under section 4 of the Uniform Act as originally drafted, notice can be given by means of a separate document, as well as by being expressly or impliedly contained in the pleadings.⁶⁶

Where there has been no notice either by pleading, or by separate document, it is still possible for the court to be authorized to take judicial notice of the foreign law where the parties stipulate that the law of another jurisdiction should apply.⁶⁷ It also appears to be possible for the parties in effect to stipulate that the law of the forum will be applied even though the applicable conflicts rule would indicate otherwise, simply by refusing to present and argue foreign law to the court.⁶⁸ The propriety of these decisions is seriously open to question in view of the policy behind the whole idea of conflict of laws—that the same law should be applied to the rights of the parties no matter where the case is tried.⁶⁹

Another situation in which express or implied notice is not required

⁶² 369 Pa. 314, 85 A.2d 841 (1952).

⁶³ *Id.* 85 A.2d at 842, n.2.

⁶⁴ 144 Ind. App. 187, 51 N.E.2d 95 (1943).

⁶⁵ 41 Tenn. App. 365, 294 S.W.2d 313 (1956).

⁶⁶ *Steger v. Egyud*, 219 Md. 331, 149 A.2d 762 (1959); *Wilson v. Dailey*, 191 Md. 472, 62 A.2d 284 (1948); *United Factors Corp. v. Mogul*, 142 Pa. Super. 506, 16 A.2d 735 (1940); *Kennedy v. Lenzine*, 76 R.I. 231, 69 A.2d 231 (1949).

⁶⁷ *Moscov v. Mutual Life Ins. Co. of N.Y.*, 387 Ill. 378, 56 N.E.2d 399 (1944); *Staley v. Safe Deposit & Trust Co. of Baltimore*, 189 Md. 447, 56 A.2d 144 (1947); *Morneault v. Boston & M. R.R.*, 144 Me. 300, 68 A.2d 260 (1949); *Colozzi v. Beuko Inc.*, 17 N.J. 194, 110 A.2d 545 (1954).

⁶⁸ *Tracy v. Prudential Ins. Co. of America*, 34 Del. Ch. 207, 101 A.2d 321 (1953); *Alexander v. Hergenroeder*, 215 Md. 326, 138 A.2d 366 (1958).

⁶⁹ GOODRICH, CONFLICT OF LAWS § 4 (1949).

occurs when one party has pleaded certain portions of foreign law, or has indicated that he will rely on foreign law, and the opposing party requests judicial notice of other portions of the foreign law. The party who has first interjected foreign law into the case is estopped from claiming that he was not given notice that his opponent intends to rely on foreign law.⁷⁰

There have been some statutory modifications of the Uniform Act which have greatly aided the goal of placing foreign law before the court with a minimum of procedural barriers. Missouri has the Uniform Act in its original form,⁷¹ but has adopted a court rule which greatly simplifies the matters discussed above, and apparently this works quite well. In effect the rule clearly accomplishes what only one or two courts came to through interpretation—namely that allegations of fact alone will for the most part be sufficient notice to the other party that foreign law will be relied on.⁷²

Of particular interest to Washington is the New Jersey experience. Prior to 1960 New Jersey also had a pleading requirement in its version of the Uniform Act. But even with the requirement in the statute, the New Jersey court was much more liberal than was the Washington Court. In *Axim Co. v. Gibraltar Dev. Inc.*,⁷³ the court said:

Although the law of New York was not pleaded under section 1 of our Uniform Judicial Notice of Foreign Law Act, or even mentioned in the trial court, this court may, under section 2 of that act, "inform itself of such laws in such manner as it may deem proper . . ." The act is remedial and should be liberally interpreted.⁷⁴

Compare the statement by the Washington court, interpreting the pleading requirement in *Allen v. Saccomanno*: "No decisions of the Supreme Court of Idaho upon this subject were pleaded, nor was any effort made to amend the pleadings to include them. Our consideration of them, as a matter of judicial notice, is prevented by RCW

⁷⁰ *Gross v. Fraser*, 140 Mont. 95, 368 P.2d 163 (1962); *Continental Assur. Co. v. Henson*, 297 Ky. 764, 181 S.W.2d 431 (1944).

⁷¹ VERNON'S ANN. MO. STAT. §§ 490.070-120 (1949).

⁷² "In every action or proceeding wherein the pleading states that the law of another state is relied upon or contains allegations which show that the law of another state must be applied, the courts of this state shall take judicial notice of the public statutes and judicial decisions of said state. The court may inform itself of such laws in such manner as it may deem proper, and may call upon counsel to aid it in obtaining such information." VERNON'S ANN. MO. RULES, Rule 55.23 (b).

⁷³ 45 N.J. Super. 523, 133 A.2d 341 (1957).

⁷⁴ *Id.* 133 A.2d at 347.

5.24.040. . . ."⁷⁵ New Jersey also allowed its pleading requirement to be waived by stipulation of the parties.⁷⁶ Notwithstanding the fact that the process of taking judicial notice was going well, New Jersey in 1960 amended its statute to eliminate the pleading requirement and to substitute the alternatives of pleading or notice at or before pre-trial conference, or ten days before trial.⁷⁷

Oregon has also modified its statute, with apparently beneficial results. In 1937 Oregon adopted the Uniform Act as originally proposed. However, in 1945, section 4 of the Act, which has produced most of the litigation because of the various interpretations of the notice requirement, was amended to eliminate completely any requirement of notice.⁷⁸ A subsequent Oregon case gives an illustration of how judicial notice of foreign law should work. *Estate of Schultz*⁷⁹ was a suit to determine heirship. The plaintiff claimed the right to inherit from the decedent because of an agreement to adopt which had been made in Nebraska. The court said, "Notwithstanding that the *lex loci* bearing on the enforcement of this kind of contract is not here pleaded, we will . . . take notice of the foreign law as far as may be necessary to resolve the question."⁸⁰ The court then examined Nebraska law, found that the agreement had the effect in Nebraska of making the plaintiff an heir of the decedent, and allowed her to inherit. The applicable Oregon law would have required formal court proceedings; hence, had the court refused to apply Nebraska law and sought refuge in the presumption that the foreign law was the same as the law of the forum, the plaintiff would have lost. By comparison to the action of the Washington court in *Nissen v. Gatlin*,⁸¹ where in the absence of proper pleading the presumption was indulged that Alaska had a statute identical with that of Washington, the superiority of the Oregon approach is apparent. The statutes of Alaska are now readily available. If one of them was relevant to the outcome of the case, the court in the *Nissen* case could easily have found the appropriate statute and applied it. The status of applicable case law is more difficult to ascertain than the language of a statute, but the Oregon court in *Schultz* undertook the task anyway, so that the rights of the parties would be decided under the appropriate law.

⁷⁵ 40 Wn.2d 283, 285, 242 P.2d 747, 748 (1952).

⁷⁶ *Colozzi v. Beuko Inc.*, 17 N.J. 194, 110 A.2d 545 (1954).

⁷⁷ N.J. Acts, 1960, ch. 52 § 48.

⁷⁸ Ore. Sess. Laws 1945, ch. 281 § 1.

⁷⁹ 220 Ore. 350, 348 P.2d 22 (1959).

⁸⁰ *Id.* 348 P.2d at 26.

⁸¹ 60 Wn.2d 259, 373 P.2d 491 (1962).

JUDICIAL NOTICE IN FEDERAL COURTS

The problem presented is whether federal courts, under the doctrine of *Erie R. Co. v. Tompkins*⁸² are required to follow the judicial notice rule of the state where the court is sitting. There has been no Supreme Court decision on this point, and the decisions of the lower federal courts are not clear. Some commentators think that, in diversity cases, at least, *Erie* requires the federal courts to follow the state rule as to judicial notice of foreign law.⁸³ However, the opposite view is expressed in Moore's *Federal Practice*.⁸⁴ It appears that Moore is correct, and that the current federal rule is that a federal court is not bound by the state rule on judicial notice. *Parkway Baking Co. v. Freihoffer Baking Co.*,⁸⁵ is an illustration of the present law in the federal courts. In that case suit was begun in Pennsylvania, but under the appropriate conflicts rule interpretation of the contract in question would be determined by Illinois law. One party objected to application of Illinois law because it had not been raised below and because the other party had not given the notice required by the Pennsylvania Judicial Notice of Foreign Law Act. In rejecting this argument the court said, "Neither the failure of National to raise the issue of Illinois law below, nor its lack of compliance with the Pennsylvania Judicial Notice Act can bar our application of Illinois law on this appeal."⁸⁶ Thus the federal courts are now operating the way that each state court should operate. The law, from whatever source, is presented and argued in only one way, and the law that should be applied, is applied, without regard to artificial barriers long since outdated.

SUGGESTIONS FOR REFORM IN WASHINGTON

Assuming that the desired goal is the identity of procedure which is exemplified by federal practice, and which was intended by the draftsmen of the Uniform Act, what can be done in Washington? Obviously, something needs to be done, in view of the bizarre results of the *Nissen*⁸⁷ and *Allen* cases.⁸⁸ Even though the statute now in force has an express pleading requirement, one might hope that the Washington court would follow the lead of New Jersey, and read the

⁸² 304 U.S. 64 (1938).

⁸³ Keefe, Landis & Shaad, *Sense and Nonsense About Judicial Notice*, 2 STAN. L. REV. 664, 688 (1950).

⁸⁴ 1A MOORE'S FEDERAL PRACTICE ¶ 0.316[4] (2d ed. 1961). This section discusses the relevant cases so completely that further discussion here is unnecessary.

⁸⁵ 255 F.2d 641 (3d Cir. 1958).

⁸⁶ *Id.* at 646.

⁸⁷ See text accompanying note 81 *supra*.

⁸⁸ See text accompanying note 81 *supra*.

statute liberally instead of restrictively.⁸⁹ Legislation is the more likely salvation in this area, however. It is not so much that new statutes are needed, but rather elimination of portions of the existing statutes is needed. Oregon's experience after having entirely removed the provision for notice and/or pleading seems to be satisfactory. RCW 5.24.040 could be repealed. Should bench or bar remain uneasy, then some provision for notice to the adverse party could be supplied in a court rule, as was done in Missouri. The rule adopted there, making facts alone sufficient notice if they show foreign law should be applied under a recognized conflicts rule, appears to be a good one. It is interesting to note that the Uniform Rules of Evidence, promulgated by the Commissioners on Uniform State Laws in 1953⁹⁰ do not include a notice requirement. Rule 9 (1) treats judicial notice of the law of sister states in the same manner as judicial notice of facts generally known to courts.⁹¹ Washington could repeal all of RCW ch. 5.24 and substitute Rule 9 (1) of the Uniform Rules of Evidence without losing any of the advantages of the Uniform Act, and thereby gain much more freedom for both judges and attorneys. Of course, if the Uniform Rules of Evidence should be adopted in toto, then RCW ch. 5.24 would be superseded. Pending such wholesale revision of Washington law, the minor statutory changes suggested above could be made. Even if no statutory changes are made, the court should adopt a liberal interpretation of the existing statute.

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⁸⁹ See *Axinn Co. v. Gibraltar Dev. Inc.*, 45 N.J. Super. 523, 133 A.2d 341 (1957); *Colozzi v. Beuko Inc.*, 17 N.J. 194, 110 A.2d 545 (1954); and *Franzen v. Equitable Life Assur. Soc. of United States*, where the court says, "it is a remedial statute; and on well-settled principles the language is to be given a liberal interpretation to suppress the mischief and advance the remedy." 130 N.J.L. 957, 33 A.2d at 602-03.

⁹⁰ 9A U.L.A. (Supp. 1962, 159).

⁹¹ Rule 9 (1) "Judicial notice shall be taken without request by a party, of the common law, constitutions and public statutes in force in every state, territory and jurisdiction of the United States, and of such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute." 9A U.L.A. (Supp. 1962, 166).