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Judicial Notice of the Law of Sister States Under the Full Faith and Credit Clause of the Federal Constitution

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> that the loss or destruction, if any, was not caused by the gross negligence of, or theft by, himself or employees."[21]

It is submitted that the Washington Supreme Court, in the *Goodwin* case correctly interpreted the statute in its true meaning. However, the legislature, by the Act of 1933, placed the State of Washington in a unique position as regards the liability of innkeepers. It is doubtful whether the legislature wished to or intended to take such an extreme turn from the common law as is taken in the Act of 1933. Under the normal statute few cases ever reached the courts because the statute clearly set forth the liabilities of the innkeeper and he knew that in certain cases he had to pay. On the other hand under the Act of 1933, an interpreted by the court, there is grave possibility of increased litigation, for the innkeeper may now hide behind the statute to avoid the consequences of his own negligence.[22]

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JUDICIAL NOTICE OF THE LAW OF SISTER STATES UNDER THE FULL FAITH AND CREDIT CLAUSE OF THE FEDERAL CONSTITUTION

A year ago in the case of *State v. Johnson*[1] the court approved the admission in evidence of certified photostatic copies of fingerprint records from penitentiaries of Oregon and California to prove the identity of the defendant as a prior inmate of those institutions. The court relied on a federal statute[2] which, under authority of Article IV, § 1, of the Federal Constitution,[3] sets forth the procedure for certification of records that was followed in that case. The statute further provides that when such procedure shall have been followed,

> "the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the state, territory, or country, as aforesaid, from which they are taken."

It therefore became necessary for the court to investigate the

[21]See Watt v. Kilbury, 53 Wash. 446, 102 Pac. 403 (1909); Gillett v. Waldorf Hotel Co., 136 Wash. 615, 241 Pac. 14 (1925); Davis v. Cohen, 253 Mich. 330, 235 N. W. 173 (1931).

[22]In handing down the decision in the Georgian Hotel case the court pointed out with approval a statement of the New York Court of Appeals in the case of Milhiser v. Beau Site Co., in which that court reversed a lower court decision interpreting the New York statute in the same manner as the Washington statute has been interpreted, and in which the court said: "Such a holding by this court would nullify the purpose of the statute and be in conflict with the spirit and intent thereof." The Washington statute is copied from the New York statute of 1897, and, with the exception of the final clause in the act, follows the present New York law very closely.

[1]194 Wash. 438, 78 P. (2d) 561 (1938).

[2]REV. STAT. § 906 (1875), 28 U. S. C. 688 (1934).

[3]"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

laws or usages of the Oregon and California courts to determine whether or not those courts admitted in evidence photostatic copies of fingerprint records for identification purposes; this the court did by citing a case in point from each jurisdiction:

> "The courts of California and Oregon have approved the introduction in evidence of copies of fingerprints for the purpose of identifying individuals accused of crime. *State v. Smith*, 128 Ore. 515, 273 Pac. 323; *People v. Purcell*, ... Cal. ...., 70 P. (2) 706."

Thus the court took judicial notice of the law of a sister state in seeming contradiction to the well settled rule that a court will not judicially notice the law of a foreign jurisdiction.[4]

The state did not attempt to prove as a part of its case in chief that copies of fingerprint records were admissible in California and Oregon courts for identification purposes, nor did the court in any way attempt to justify its action in noticing the law of those states. The problem of finding some valid basis or justification for the action of the court is clearly presented.

The common method of handling a situation where the person relying on the law of another state fails to plead and prove that law is to assume or presume that the law of the other state is the same as the law of the forum,[5] and to proceed on that basis.[6] The court could readily have followed such an approach in this case, for fingerprint records are admissible in the courts of Washington to show identity.[7]

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[4]McDaniel v. Pressler, 3 Wash. 636, 29 Pac. 209 (1892); Lowry v. Moore, 16 Wash. 476, 48 Pac. 238, 58 Am. St. Rep. 49 (1897); *in re* Stewart's Estate, 26 Wash. 32, 66 Pac. 148, 67 Pac. 723 (1901); Ongaro v. Twohy, 49 Wash. 93, 94 Pac. 916 (1908); Martin Brothers v. Nettleton, 138 Wash. 102, 244 Pac. 386 (1926); Walnut Park Lumber & Coal Co. v. Roane, 171 Wash. 362, 17 P. (2d) 896 (1933). *Cf.* Rader v. Stubblefield, 43 Wash. 334, 350, 86 Pac. 560 (1906), and Rubin v. Dale, 156 Wash. 676, 288 Pac. 223 (1930).

[5]Yeaton v. Eagle Oil and Refining Co., 4 Wash. 183, 29 Pac. 1051 (1892); Gunderson v. Gunderson, 25 Wash. 459, 65 Pac. 791 (1901); Daniel v. Gold Hill Mining Co., 28 Wash. 411, 68 Pac. 884 (1902); Clark v. Eltinge, 29 Wash. 215, 69 Pac. 736 (1902); 38 Wash. 376, 80 Pac. 556, 107 Am. St. Rep. 858 (1905); Mantle v. Dabney, 44 Wash. 193, 87 Pac. 122 (1906); Murrilla v. Guis, 51 Wash. 93, 98 Pac. 100 (1908); Colpe v. Lindblom, 57 Wash. 106, 106 Pac. 634 (1910); Pitt v. Little, 58 Wash. 355, 108 Pac. 941 (1910); Sheppard v. Coeur d'Alene Lumber Co., 62 Wash. 12, 112 Pac. 932, 44 L. R. A. (N. S) 267, Ann. Cas. 1912C, 909 (1911); German-American Bank of Seattle v. Wright, 85 Wash. 460, 148 Pac. 769, Ann. Cas. 1917D, 381 (1915); Plath v. Mullins, 87 Wash. 403, 151 Pac. 811 (1915); Marston v. Rue, 92 Wash. 129, 159 Pac. 111 (1916); Freyman v. Day, 108 Wash. 71, 182 Pac. 940 (1919); Williams v. Great Northern Ry. Co. 108 Wash. 344, 184 Pac. 340 (1919); Tatum v. Marsh Mines Consolidated, 108 Wash. 367, 184 Pac. 628 (1919); Wamsley v. Rostad, 150 Wash. 192, 272 Pac. 722 (1928); Lino v. Hole, 159 Wash. 16, 291 Pac. 1079 (1930); Walnut Park Lumber & Coal Co. v. Roane, 171 Wash. 362, 17 P. (2d) 896 (1933); Kales, *Presumption of the Foreign Law* (1906), 19 HARV. L. REV. 401.

[6]The result of this presumption is to cast upon the opposing party the burden of proving, if he wishes, that the law of the sister state is actually different from the law of the forum. Whether this burden amounts to a burden of persuasion or merely to a burden of going forward with the evidence has not been decisively determined, although the court in Lino v. Hole, 159 Wash. 16, 291 Pac. 1079 (1930), indicates that the presumption may be overcome by "substantial" proof.

[7]State v. Bolen, 142 Wash. 653, 254 Pac. 445 (1927).

Another basis on which the notice of the Oregon and California laws may be sustained is found by analogy to the rule laid down in the case of *Trowbridge v. Spinning*,[8] subsequently followed in two Washington cases.[9] By the rule in these cases the court will take judicial notice of the law of a sister state giving jurisdiction to a court which rendered a judgment on which one of the parties is relying. The three Washington cases involve records of judicial proceedings only, and each raises the question of the jurisdiction of the court which entered the judgment. The *Johnson* case, on the other hand, deals with non-judicial records from penitentiaries and raises a problem of the effect of such records rather than any question of jurisdiction. These two differences seem insufficient to destroy the analogy,[10] for both cases are embraced within the terms of the federal statute and the section of the United States Constitution mentioned above; and the following language from *Trowbridge v. Spinning, supra,* is likewise broad enough to cover the situation of the *Johnson* case:

> "Where a question arises under that part of the Constitution of the United States and the act of Congress which requires full faith and credit to be given in each state to the public acts, records and judicial proceedings of every other state, our courts will take judicial notice of the local laws of the state from which the record comes."

It should be mentioned also that Congress has treated judicial and non-judicial records in nearly the same manner.[11]

The rule of *Trowbridge v. Spinning, supra,* is an established exception in this and in other states to the general doctrine that the court will not take judicial notice of the laws of sister states; but an examination of the reasons behind this exception brings to light a logical anomaly. The reasoning used to sustain the rule is well stated in *Ohio v. Hinchman*,[12] an authority relied on in the *Trowbridge* case, as follows:

> "A judgment of this court, adverse to the right arising out of the Federal Constitution and legislation, would be reviewable in the Supreme Court of the United States, and there the states of the confederacy are not regarded as foreign states, whose laws and usages must be proved, but as domestic institutions, whose laws are to be noticed without pleading or proof. It would be a very imperfect and discordant administration for the court of original

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[8]23 Wash. 48, 62 Pac. 125, 83 Am. St. Rep. 806, 54 L. R. A. 204 (1900).

[9]Dormitzer v. German Savings & Loan Soc., 23 Wash. 132, 62 Pac. 862 (1900), *aff'd*, 192 U. S. 125, 48 L. Ed. 373, 24 S. Ct. 221 (1904); Miller v. Miller, 90 Wash. 333, 156 Pac. 8 (1916).

[10]In Garigues v. Harris, 17 Pa. 344 (1851), the court used the reasoning of Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. 125, 83 Am. St. Rep. 806, 54 L. R. A. 204 (1900), to determine the effect in New Jersey of a recorded abstract of a mortgage—a non-judicial record. In Paine v. Schnectady Ins. Co., 11 R. I. 411 (1877), a case cited in Trowbridge v. Spinning, *supra,* the reasoning of Ohio v. Hinchman, 27 Pa. 479 (1856), was relied upon to determine the effect of certain judicial records from a sister state.

[11]Compare 28 U. S. C. § 688 with 28 U. S. C. § 687.

[12]27 Pa. 479 (1856).

> jurisdiction to adopt one rule of decision, while the court of final resort was governed by another; and hence it follows, that in questions of this sort, we should take notice of the local laws of a sister state in the same manner the Supreme Court of the United States would do on a writ of error to our judgment."

In 1856, when *Ohio v. Hinchman* was decided, this argument was reasonably persuasive because there had been no definitive statement on the point,[13] but in 1885, the United States Supreme Court in *Hanley v. Donoghue*[14] expressly rejected the reasoning used in this case and in *Paine v. Schenectady Insurance Co.*,[15] another case cited as authority in *Trowbridge v. Spinning,* in these words:

> ". . . whenever it becames necessary for a court of one state, in order to give full faith and credit to a judgment rendered in another state, to ascertain the effect which it has in that state, the law of that state must be proved, like any other matter of fact.
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> "The opposing decisions in *Ohio v. Hinchman,* 27 Pa. St. 479 and *Paine v. Schenectady Ins. Co.,* 11 R. I. 411, are based upon the misapprehension that this court, on a writ of error to review a decision of the highest court of one state upon the faith and credit to be allowed to a judgment rendered in another state, always takes notice of the laws of the latter state; . . .
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> "But in this court, exercising an appellate jurisdiction, whatever was matter of law in the court appealed from is matter of law here; and whatever was matter of fact in the court appealed from is matter of fact here."[16]

Although *Hanley v. Donoghue* was fifteen years old when *Trowbridge v. Spinning* was decided in 1900, the court in the latter case apparently overlooked the Supreme Court decision and relied instead upon the two cases expressly disapproved in *Hanley v. Donoghue.*

In the *Trowbridge* case and the two subsequent Washington cases there was actually no necessity for the court to take judicial notice of the laws of the sister state to determine whether or not

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[13] *Contra:* Thomas v. Robinson, 45 N. Y. 267 (1829); Pelton v. Platner, 13 Ohio 209, 42 Am. Dec. 197 (1844), where the court expressly refused to take judicial notice of the laws of a sister state to determine the jurisdiction of the court from which the record issued: "This court is not bound to take notice, ex officio, of the laws of other states, and it is no enviable task to keep pace with the Solons of our own. When a question depends on the laws of a sister state, in our courts, such laws are a part of the evidence in the case, and, like another fact, must be proved by him who holds the affirmative . . . If such judgments bind property in Michigan, we would give them the same effect here . . . but before the courts here can give them any such effect, the law of Michigan must be proved."

[14] 116 U. S. 1, 29 L. Ed. 535, 6 S. Ct. 242 (1885).

[15] 11 R. I. 411 (1877).

[16] This case has been followed in Chicago & Alton Ry. v. Wiggins Ferry Co., 119 U. S. 615, 30 L. Ed. 519, 7 S. Ct. 398 (1886); Huntington v. Attril, 146 U. S. 657, 36 L. Ed. 1123, 13 S. Ct. 224 (1892); Lloyd v. Matthews, 155 U. S. 222, 39 L. Ed. 128, 15 S. Ct. 70 (1894). Accord: Renaud v. Abbott, 116 U. S. 277, 29 L. Ed. 629, 6 S. Ct. 1194 (1885).

the court of that state had sufficient jurisdiction to render the judgment, for in each of the three cases there was an allegation by the party relying on the judgment in the sister state that the court which had rendered the judgment was a court of general jurisdiction. Such an allegation will be sufficient under a well settled rule to raise a presumption that the court which originally issued the judgment had jurisdiction of the subject matter of the case and of the parties. This rule of presumption has been widely applied in several variations[17] and was recognized by the United States Supreme Court in the case of *Hanley v. Donoghue, supra,* itself:

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[17]A few cases indicate that the court of the sister state which issued the judgment will be presumed to have had jurisdiction of the subject matter and of the parties merely from the fact that the record of that judgment has been admitted in evidence. Welch v. Sykes, 8 Ill. 208, 3 Gilman 197, 44 Am. Dec. 689 (1846); Rae v. Hulbert, 17 Ill. 572, 577 (1856); Shumway v. Stillman, 4 Cow. (N. Y.) 292, 15 Am. Dec. 374 (1825); Baxley v. Linah, 16 Pa. 241 (1851); Clark v. Eltinge, 38 Wash. 376, 80 Pac. 556, 107 Am. St. Rep. 858 (1905).

But the majority rule requires the proponent to allege or the face of the record to show that the judgment was rendered by a court of general jurisdiction in order to raise the presumption of jurisdiction. Hanley v. Donoghue, 116 U. S. 1, 29 L. Ed. 535, 6 S. Ct. 242 (1885); Bimeler v. Dawson, 5 Ill. 554, 4 Scammon 536, 39 Am. Dec. 430 (1843); Rape v. Heaton, 9 Wis. 301 (1859); Jarvis v. Robinson, 21 Wis. 530, 94 Am. Dec. 560 (1867); Kunze v. Kunze, 94 Wis. 54, 68 N. W. 391, 59 Am. St. Rep. 857 (1896). Compare McLaughlin v. Nichols, 13 Abb. (N. Y.) 244 (1861), where the court dismissed the action for failure to allege that the court was one of general jurisdiction, with Foot v. Stevens, 17 Wend. (N. Y.) 483 (1837), where the court was very lenient in finding an allegation of general jurisdiction.

A few courts, erroneously interpreting Mills v. Duryee, 7 Cranch 481, 3 L. Ed. 411 (1813), and Hampton v. M'Connel, 3 Wheat. 234, 4 L. Ed. 378 (1818), have held the judgments of sister states conclusive on the parties and not subject to any type of attack. Napier v. Gidiere, 1 Spear's Equity (S. C.) 215, 40 Am. Dec. 613 (1843); Wheeler v. Raymond, 8 Cow. (N. Y.) 311 (1828).

Most courts, however, allow the presumption of jurisdiction of the court over the parties to be rebutted. Thompson v. Whitman, 85 U. S. 457, 21 L. Ed. 897 (1874); Andrews v. Andrews, 188 U. S. 14, 47 L. Ed. 366, 23 S. Ct. 237 (1902); German Savings and Loan Society v. Dormitzer, 192 U. S. 125, 48 L. Ed. 373, 25 S. Ct. 221 (1904); Bimeler v. Dawson, 5 Ill. 554, 4 Scammon 536, 39 Am. Dec. 430 (1843); Bartlet v. Knight, 1 Mass. 401, 2 Am. Dec. 36 (1805); Long v. Long, 1 Hill (N. Y.) 597 (1841); McLure v. Benceni, 2 Iredell's Equity (N. C.) 513, 40 N. C. 437 (1843); Rape v. Heaton, 9 Wis. 301 (1859); Jarvis v. Robinson, 21 Wis. 530, 94 Am. Dec. 560 (1867). And correlatively some sourts have allowed the defendant to rebut the presumed authorization of the attorney alleged in the record to have appeared for him. Aldrich v. Kinney, 4 Conn. 380, 10 Am. Dec. 151 (1822); Welch v. Sykes, 8 Ill. 208, 3 Gilman 197, 44 Am. Dec. 689 (1846).

Some courts attempt to make a distinction between courts of general jurisdiction and courts of special jurisdiction, requiring in the latter case that the state statutes which provide for the jurisdiction of the court which issued the judgment be proven as facts. Gay v. Lloyd, 1 G. Greene (Iowa) 78, 46 Am. Dec. 499 (1847). But the Washington court in Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. 125, 83 Am. St. Rep. 806, 54 L. R. A. 204 (1900), relying on Kunze v. Kunze, *supra,* rejected the distinction on the ground that the presumption of jurisdiction throws the burden of proof on the opponent in all cases.

A few courts repudiate the presumption doctrine and the judicial

> ". . . a record of a judgment so authenticated doubtless proves itself without further evidence; and if it appears upon its face to be a record of a court of general jurisdiction, the jurisdiction of the court over the cause and the parties is to be presumed unless disproved by extrinsic evidence or by the record itself."

The Wisconsin court has reached the solution here suggested. On the one hand it has refused to take judicial notice of the law of the sister state to determine jurisdiction,[18] while on the other hand it has recognized the rule which raises a presumption of jurisdiction from the allegation that the court was a court of general jurisdiction.[19] This solution seems to be the best, in that it is consistent with the orthodox interpretation of the cases arising under the full faith and credit clause; and still it reaches the desired end.

Of course the judicial notice taken in the case of *State v. Johnson, supra,* could not be justified on this rule of presumption, for the question there is one of the effect to be given certain records rather than any question of jurisdiction. The *Johnson* case may be supported by analogy to the rule of the *Trowbridge* case; but it is submitted that that case is of doubtful validity.

Wigmore's comment on the whole problem of judicial notice of foreign law is interesting:

> "All the foregoing quiddities are thoroughly unpractical. The judges manipulate an esoteric logical dream-machine which has caused them to forget the world of reality. Judicial power should be used to get at the facts more directly and candidly."[20]

This criticism is especially applicable to the rule which prevents a state court from taking judicial notice of the laws of a sister state. Correction of the rule, however, should come by way of legislation, rather than by sporadic judicial decisions, to the end of developing a uniform practice of judicial notice of foreign law.[21]

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notice doctrine of Trowbridge v. Spinning, *supra,* altogether, holding that in all cases the proponent must prove the jurisdiction of the court rendering the judgment as a fact. Gebhard v. Garnier, 75 Ky. 321, 23 Am. Rep. 721 (1876); Pelton v. Platner, 13 Ohio 209, 42 Am. Dec. 197 (1844).

[18]Rape v. Heaton, 9 Wis. 301 (1859); Walsh v. Dart, 12 Wis. 709 (1860).

[19]Jarvis v. Robinson, 21 Wis. 530, 94 Am. Dec. 560 (1867); Kunze v. Kunze, 94 Wis. 54, 68 N. W. 391, 59 Am. St. Rep. 857 (1896).

[20]5 WIGMORE, EVIDENCE (2d ed. 1923) § 2573.

[21]WIGMORE, EVIDENCE, § 2573 (Supp. 1934); "Uniform Judicial Notice of Foreign Law Act," Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings p. 355 (1936).