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EVIDENCE-JUDICIAL NOTICE BY APPELLATE COURTS OF FACTS AND FOREIGN LAWS, NOT BROUGHT TO THE ATTENTION OF THE TRIAL COURT

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EVIDENCE — JUDICIAL NOTICE BY APPELLATE COURTS OF FACTS AND FOREIGN LAWS NOT BROUGHT TO THE ATTENTION OF THE TRIAL COURT — The doctrine of judicial notice represents one of the oldest and most valuable constituents of our jurisprudence. From the days of the *Year Books*,[1] courts have noticed matters of many diverse kinds

[1] "We find in the Year Books the Judges reasoning about the ability of knights, esquires and gentlemen to maintain themselves without wages: distinguishing between private chaplains and parochial chaplains from the nature of their employments: and in later days we have ventured to take judicial cognizance of the moral qualities of Robin-

which they have considered (a) sufficiently notorious and (b) commonly recognized. Thus courts have recognized that games such as ping-pong are not "toys,"[2] that short delays often occur in mail deliveries,[3] that street cars often jolt their passengers when rounding curves,[4] that the duties of chef and steward are different,[5] that tobacco is a farm product,[6] that the front fender of an automobile is about the height of a man's knee,[7] that real estate values generally decreased between 1927 and 1930,[8] that purchasing power fluctuates,[9] that the price of cotton fluctuates with its color,[10] that a mule is a dangerous instrumentality,[11] and that Missouri sent representatives to the provisional Congress of the Confederacy until the end of the War between the States.[12] Today, as in earlier times, the doctrine remains a kind of common-sense "taking-for-granted" of certain facts which experience has shown need not be proved. To put the matter another way, it declares that there are certain propositions in a party's case as to which he will not be required to offer evidence.[13]

The general problem to be discussed in this comment is the process and supporting reasons used by appellate courts in their determination of the propriety of taking official cognizance of facts not brought to the attention of the trial court. This necessarily removes that great and complex body of case and statutory law dealing with situations where a court is called upon to take judicial notice of local statutes,[14] municipal

son Crusoe's 'man Friday' . . . and Esop's 'frozen snake,' . . ." Lumley v. Gye, 2 El. & Bl. 216 at 267, 118 Eng. Rep. 749 (1853).

[2] United States v. Strauss Bros. & Co., (C. C. A. 2d, 1905) 136 F. 185.

[3] Oxford Bank v. United States, (Ct. Cl., 1930) 44 F. (2d) 253.

[4] Mareiniss v. Sheenan, (C. C. A. 2d, 1929) 31 F. (2d) 976.

[5] Dykstra v. State, 42 Ohio App. 141, 181 N. E. 488 (1932).

[6] Ellsey v. Smith, 159 Miss. 57, 132 So. 92 (1931).

[7] Grzybowski v. Connecticut Co., 116 Conn. 292, 164 A. 632 (1933).

[8] In re Williamson's Estate, 302 Pa. 462, 153 A. 765 (1931).

[9] Rowe v. Rennick, 112 Cal. App. 576, 297 P. 603 (1931); Ehrenheim v. Yellow Cab Co. 239 Ill. App. 403 (1926).

[10] Jackson County Gin v. McCuistion, 177 Ark. 60, 5 S.W. (2d) 729 (1928).

[11] Borden v. Falk Co., 97 Mo. App. 566, 71 S. W. 478 (1903). Contra: John T. Griffin Truck Corp. v. Smith, 150 Va. 95, 142 S. E. 385 (1928).

[12] Wood v. Cooper, 49 Tenn. 441 (1871). But see Douthitt v. Stinson, 63 Mo. 268 (1876), insisting that Missouri did not secede.

[13] 9 WIGMORE, EVIDENCE, 3d ed., § 2565 (1940). In this general connection, it is well to remember that the act of taking notice does not conclusively establish a fact—at most it creates a presumption, a prima facie acceptance of the fact, which may be rebutted by argument of opposing counsel. People v. Mayes, 113 Cal. 618, 45 P. 860 (1896); State v. Kincaid, 133 Ore. 95, 285 P. 1105, 288 P. 1015 (1930); Thayer, "Judicial Notice and the Law of Evidence," 3 HARV. L. REV. 285 at 309 (1890). In some states, the presumption may be rebutted by refusal of the jury to accept the matter noticed as true. 9 WIGMORE, EVIDENCE, 3rd ed., §2567 (1940).

[14] For a discussion of the problems involved here, see 9 WIGMORE, EVIDENCE, 3d ed. § 2572 (1940). The rule at common law would seem to be that only general or

ordinances,[15] and other similar matters of law. Also specifically excluded from discussion are the cases where error is alleged because the trial court refused to take notice of a fact drawn to its attention. However, an attempt will be made to ascertain the principles underlying notice of foreign laws, not because it is felt that such law differs in nature from local law,[16] but because the courts have commonly treated its existence as a question of fact.[17]

When a party wishes a court of first instance to excuse him from producing evidence on a given point, he is expected to make a request; [18] and, if necessary, to have available sources of information so that the judge may refresh his memory.[19] When he fails to follow this procedure and brings up the matter for the first time on appeal, our precise case arises. The power of the appellate court to notice such a fact cannot be doubted.[20] But this power is not used unrestrictedly, for the general rule as commonly stated would seem to be that the appellate court will not take judicial notice of a fact unless it was brought to the attention of the trial court.[21]

public statutes would be noticed, Leland v. Wilkinson, 6 Pet. (31 U. S.) 317 (1832), but this has been largely changed by statute.

[15] In the absence of statute, these usually are not noticed, Metteer v. Smith, 156 Cal. 572, 105 P. 735 (1909); Garvin v. Wells, 8 Iowa 286 (1859); Hinderer v. Ann Arbor R. R., 237 Mich. 232, 211 N. W. 734 (1927); Mooney v. Kennett, 19 Mo. 551 (1854); 15 CHI-KENT L. REV. 140 (1937).

[16] In all these cases involving matters of law, recognition seems to hinge largely upon the uniformity of the application of the contested rule or statute in the jurisdiction of the reviewing court. Thus municipal ordinances and private laws, which have but limited application, are seldom dignified by notice in the absence of a statute. And, of course, foreign laws have no standing at all in the domestic jurisdiction. But statutes and treaties of the United States which operate uniformly throughout the state are accorded full recognition. Metropolitan Stock Exchange v. Lydonville Nat. Bank, 76 Vt. 303, 57 A. 101 (1904); Carson v. Smith, 5 Minn. 78 (1860); Federal Farm Mortgage Corp. v. Hughes, 137 Neb. 454, 289 N. W. 866 (1940); Seaboard Trust Co. v. Topkin, 130 N. J. Eq. 46, 20 A. (2d) 709 (1941).

[17] Ferris v. Commercial Nat. Bank of Chicago, 158 Ill. 237, 41 N. E. 1118 (1895); State v. Horn, 43 Vt. 20 (1870).

[18] ". . . there are many things that courts would notice if brought before them that beforehand they do not know. It rests with counsel to take the proper steps, and if they deliberately omit them, we do not feel called upon to institute inquiries on our own account." Holmes, J. in Quong Wing v. Kirkendall, 223 U. S. 59 at 64, 32 S. Ct. 192 (1912).

[19] Walton v. Stafford, 14 App. Div. 310, 43 N. Y. S. 1049 (1897), affd. 162 N. Y. 558, 57 N. E. 92 (1900); People ex rel. McCallister v. Keokuk & Hamilton Bridge Co., 287 Ill. 246, 122 N. E. 467 (1919). The party should notify his opponent of his sources of information so that he may have an opportunity to consult the same sources or produce others. 9 WIGMORE, EVIDENCE, 3d ed., § 2568 (1940).

[20] Parrish v. Williams, 169 Tenn. 186, 83 S. W. (2d) 895 (1935); Shapleigh v. Mier, 299 U. S. 468, 57 S. Ct. 261 (1936).

[21] Line v. Line, 119 Md. 403, 86 A. 1032 (1913); cases cited 15 R. C. L. 1063, note 13 (1917).

1. *Cases Dealing with Nonlegal Facts*

For the purpose of this discussion, the cases on judicial notice of nonlegal facts, as distinguished from foreign law, seem to fall into two general classes:[22] (a) where the appellate court takes notice of a fact in order to save a satisfactory decision from reversal; and (b) where the appellate court takes judicial notice of a fact in order to reverse the judgment of the trial court.

The first group of cases presents no great problem; indeed, the average or mine-run case of judicial notice of a matter of fact by an appellate court is of this kind. Every legal[23] and practical consideration would seem to make judicial notice proper in this case. The effort and expense of a trial is finished; a fair result has presumably been reached. When the notice taken has the effect of supporting the judgment below, we do not suggest a lack of perspicacity and diligence on the part of the trial judge because of a failure to notice the particular fact; and there can be no feeling that the judge was lured into his decision by treacherous counsel.

Thus in *One Chevrolet Coach Automobile v. Oklahoma*,[24] the owner of an automobile in which whiskey had been found sought to have a verdict authorizing confiscation of the car reversed because it had not been shown that whiskey was "intoxicating" and the prohibition statute[25] applied only to intoxicating beverages. The court held that proof of the intoxicating character of whiskey was unnecessary, there being evidence that the liquid was whiskey and the court taking judicial notice of the intoxicating nature thereof.[26] And in *Hufstedler v. Sides*[27] a deed from a corporation executed in 1935 by its vice-president was attacked on the ground that the applicable statute[28] required conveyances of a corporation to be signed by "the president or presiding member or trustee,"[29] and that there was no proof of the functions discharged by

[22] There are various classifications of the facts that are susceptible of judicial notice. See MCKELVEY, EVIDENCE, 4th ed., § 17 et. seq. (1932); 9 WIGMORE, EVIDENCE, 3d ed., § 2571 et. seq. (1940); Cooper, "Judicial Notice in the Law of Illinois," 12 ILL. L. REV. 260 at 262, 317 (1917).

[23] There is a general rule of wide application that an appellate court will indulge all reasonable presumptions in favor of the judgment below. Taylor v. Shell, 102 Ark. 649, 145 S. W. 539 (1912); Butler v. Soule, 124 Cal. 69, 56 P. 601 (1899); Usher v. Severance, 86 Vt. 523, 86 A. 741 (1912). The rule extends to chancery cases. Manhattan Life Ins. Co. v. Wright, (C. C. A. 8th, 1903) 126 F. 82.

[24] 171 Okla. 545, 43 P. (2d) 774 (1935).

[25] Okla. Stat. (1931), §§ 2635, 2636, 2640-42. Oklahoma still has a prohibition law. Okla. Stat. (1941), tit. 37.

[26] Accord: Latta v. State, 19 Okla. Cr. 441, 200 P. 551 (1921).

[27] (Tex. Civ. App., 1942) 165 S. W. (2d) 1006.

[28] Tex. Civ. Stat. (Vernon, 1925), art. 1322.

[29] In 1939, this statute was amended so as to permit signing by the "president,

a "vice-president." The court held that the deed was not invalid on that account, pointing out that it knew judicially that a vice-president is an officer designated for the purpose of performing the functions of the president when for any reason the latter could not act, and, that, in the absence of evidence to the contrary, it is presumed in cases such as the one then before the court that the contingency which authorizes action by the vice-president has arisen.[30]

These two cases suffice to illustrate the manner in which the doctrine is generally applied in this kind of situation; in effect the court is but filling in some formal statement which has been left out below by inadvertence. To put the matter another way, the appellate court but articulates a state of affairs which the lower court had silently assumed to exist and which had been implicit in the judgment as rendered.[31]

The second group of cases, those where the appellate court is asked to take cognizance of a fact not brought to the attention of the trial court in order to reverse a judgment, is somewhat more difficult to understand; and this difficulty is not lessened by the fact that the courts are not in agreement on this point. The majority rule, represented by cases such as *Line v. Line*,[32] *Wood v. Northwestern Fire Insurance Co.*,[33] *and Buxton v. Nashville*,[34] is that an appellate court will not take judicial notice of a fact not called to the attention of the trial court. Both *Buxton v. Nashville* and *Line v. Line* involved a consideration of the Sunday laws. In those cases, it was held that the fact that a contract was entered into[35] or an ordinance passed[36] on a Sunday, and hence was unenforceable, would not be considered when raised for the first time on appeal. In *Wood v. Northwestern Fire Insurance Co.*,[37]

vice-president or presiding member or trustee of said corporation." Tex. Laws, 1939, c. 7, p. 133, § 1.

[30] See also Ballard v. Carmichael, 83 Tex. 355, 18 S. W. 734, (1892); Thomason v. Pacific Mutual Life Ins. Co. of Calif. (Tex. Civ. App., 1934) 74 S. W. (2d) 162.

[31] Other cases illustrating this general principle are Varcoe v. Lee, 180 Cal. 338, 181 P. 223 (1919); Commonwealth v. Peckham, 2 Gray (68 Mass.) 514 (1854); United States Fidelity & Guaranty Co. v. Youmans, 49 Ga. App. 678, 176 S. E. 808 (1934). Murphy v. Daly, 206 Ind. 179, 188 N. E. 769 (1934); Schnitz v. Grand River Ave. Development Co., 271 Mich. 253, 259 N. W. 900 (1935); Killen v. Stanford, (Tex. Civ. App., 1943) 170 S. W. (2d) 792. That numerous group of cases in which an appellate court takes judicial notice of existing economic conditions in order to pass upon the excessiveness of a verdict is worthy of special mention. Collections of the cases may be found in 3 A. L. R. 610 (1919); 10 A. L. R. 179 (1921); 18 A. L. R. 564 (1922); and 60 A. L. R. 1395 (1929).

[32] 119 Md. 403, 86 A. 1032 (1913).

[33] 46 N. Y. 421 (1871).

[34] 132 Ark. 511, 201 S. W. 512 (1918).

[35] Line v. Line, supra, 119 Md. 403, 86 A. 1032 (1913).

[36] Buxton v. City of Nashville, 132 Ark. 511, 201 S. W. 512 (1918).

[37] 46 N. Y. 421 (1871).

the New York Court of Appeals was asked to take judicial notice of the fact that kerosene was inflammable in order to show the breach of a condition contained in an insurance policy. The court refused to notice such a quality in kerosene and observed that it would not find a fact which had not been found below, since that would be an intrusion into the province of the trial court.[38]

The minority viewpoint, permitting notice under these circumstances, is represented by cases such as *New York Indians v. United States*,[39] *Parrish v. Williams*,[40] and *Nelson v. Jorgenson*.[41] In the *New York Indians* case, the Supreme Court recognized that it ordinarily did not take notice of facts when not found by the court below, but proceeded to take cognizance of certain documents emanating from the executive and legislative departments with a view to determining whether the government intended to treat certain acts as a forfeiture of the Indians' grant. No reason was given for taking notice, but reversal was ordered.[42]

In *Parrish v. Williams*[43] and again in *Nelson v. Jorgenson*[44] judicial notice was taken of the fact that a certain date was a Sunday in order to reverse a judgment below. The reasons upon which the minority decisions are based are much more difficult to determine than those of the majority. Most of the cases simply state that the court will take notice of the fact even though it was not mentioned below. Where reasons are given, the effect is to weaken the authority of the case as a precedent for the position that a court will notice on appeal a fact not brought to the attention of the court below. Thus the court in *Parrish v. Williams*[45] refers to the case of *Tutten v. Darke*[46] in which is found the statement that the almanac is a part of the law of England. It

[38] Id. at 426. Also refusing notice on appeal are Russell v. Kniffen, 118 Misc. 808, 194 N. Y. S. 792 (1922); Christy v. Wabash R. R., 195 Mo. App. 232, 191 S. W. 241 (1916), error dismissed, 246 U. S. 656, 38 S. Ct. 424 (1916); Town of Hempstead v. Gregory, 53 App. Div. 350, 65 N. Y. S. 867 (1900); Fassler v. Streit, 92 Neb. 786, 139 N. W. 628 (1913); Amundson v. Wilson, 11 N. D. 193, 91 N. W. 37 (1902).

[39] 170 U. S. 1, 18 S. Ct. 531 (1898).

[40] 169 Tenn. 186, 83 S. W. (2d) 895 (1935).

[41] 66 Utah 360, 242 P. 945 (1926). Accord: Sentinel Co. v. Meiselbach Motor Wagon Co., 144 Wis. 224, 128 N. W. 861 (1910); Bosworth v. Union R. R., 26 R. I. 309, 58 A. 982 (1904).

[42] See New York Indians v. United States, 170 U. S. 1 at 32, 18 S. Ct. 531 (1898).

[43] 169 Tenn. 186, 83 S. W. (2d) 895 (1935).

[44] 66 Utah 360, 242 P. 945 (1926).

[45] See supra, note 43.

[46] 5 H. & N. 647 at 649, 157 Eng. Rep. 1338 at 1340 (1860).

would seem that this is true, various statutes[47] having been passed to attain this object. If the court considered that statute in force in Tennessee, it could be considered as taking notice of a matter of local law[48] rather than of a fact. And in *Nelson v. Jorgenson*,[49] reference is made to a statute[50] of the jurisdiction which states that courts take judicial notice of the measure of time.

The considerations supporting the majority rule are much more clearly indicated. First of all, there is a strong moral disapproval of a silence which may have in effect lured the trial court into an erroneous decision.[51] And secondly, the courts are strongly influenced by those principles which declare that all intendments and presumptions should be indulged in to support the judgment below.[52]

One other general principle is fairly inferable from the cases. It would seem easier to get an appellate court to recognize a generalization of fact not mentioned at the trial than to obtain notice of a specific fact under the same circumstances.[53] Such an attitude would seem reasonable when it is taken into consideration that generalizations of fact are in reality but inferences drawn from a host of specific facts; and that, when the court notices new generalizations, it is but carrying out its accepted function of coloring, evaluating, and testing the sufficiency of the specific factual evidence upon which the judgment of the lower court rested.[54]

[47] 14 Car. 2, c. 4, § 1 (1662); Calendar (New Style) Act, 24 Geo. II, c. 23, § 3 (1750). It follows that judicial notice is taken of the day on which a feast mentioned in the calendar falls. Rex v. Dyer, 6 Mod. 41, 87 Eng. Rep. 803 (1702); Brough v. Parking, 2 Ld. Raym, 992 at 994, 92 Eng. Rep. 161 (1703); 32 HALSBURY, LAWS OF ENGLAND, 2d ed., 114 (1939).

[48] To the effect that a court must notice the law of its own state, see MCKELVEY, EVIDENCE, 4th ed., §§ 20 et seq. (1932).

[49] See supra, note 41.

[50] Utah Comp. Laws (1917), § 7076 (8).

[51] "To permit appellants to remain silent, in the court below, . . . and to invoke here the doctrine that the court will take judicial cognizance of the fact that such date was on Sunday, would be tantamount to firing upon the holdings of the trial court from a battery that was kept masked in the court below. This cannot be done." Buxton v. Nashville, 132 Ark. 511 at 516, 201 S. W. 512 (1918).

[52] See note 23, supra.

[53] The principle stated here would not appear to be limited in its scope to matters not brought to the attention of the lower court. It should apply equally where the lower court was asked to take notice of the fact. Thus courts do not judicially notice the price of wheat on a particular day. Towne v. St. Anthony & Dakota Elevator Co., 8 N. D. 200, 77 N. W. 608 (1898). But courts will notice the fact that the market price of different grades of wheat bear a direct though varying, relation to each other. Sheffield-King Milling Co. v. Jacobs, 170 Wis. 389, 175 N. W. 796 (1920). Also rejecting notice of specific facts: Birdsong v. Jones, 222 Mo. App. 768, 8 S. W. (2d) 98 (1928), size of a newspaper plant; West v. Town of Lake Placid, 97 Fla. 127, 120 So. 361 (1929), probable life of a certain fire truck.

[54] Thus in American Nat. Bank v. Wade, 12 Tenn. App. 367 (1930), the court

2. *Cases Dealing with Foreign Laws*

The problem of judicial notice of the laws of foreign jurisdictions involves essentially different considerations. Although such laws are commonly said to be matters of "fact" as to the reviewing domestic tribunal,[55] it would seem that the problem involved is essentially a legal or judicial one.[56] While the cases readily draw a distinction between the existence of foreign law and the construction thereof, the former being for the jury and the latter within the province of the court,[57] it would still seem somewhat difficult to explain logically in what respect the law of another state differs in nature from the law of the forum and should therefore receive different treatment, i.e. be proved as any nonlegal fact.[58]

Despite the above considerations, courts historically have treated foreign law as a question of fact and proper for the attention of the jury. For this reason, this discussion of notice by appellate courts of facts not called to the attention of the trial court purposes to include a brief consideration of the principles involved in judicial notice of foreign law by appellate courts when no proof has been made below that such law existed.

At the outset, we face an additional obstacle not present in a discussion of judicial notice of nonlegal facts. It would seem to be a general rule of law that, in the absence of a statute, the courts of one state will not take judicial notice of the laws of another state.[59] While this rule

held that in an action involving the release of a vendor's lien on realty, the court could properly take judicial notice of certain matters of history bearing on the controversy in determining the weight of the evidence.

[55] Eastern Bldg. & Loan Assn. v. Williamson, 189 U. S. 122, 23 S. Ct. 527 (1903); annotation, 34 A. L. R. 1447 (1925).

[56] In cases involving notice of foreign law, the attorney does not attempt to show notoriety and common knowledge as with other matters of fact. Rather he brings into court his briefs, decisions, statute books and expert witnesses. It would also seem that the rules of evidence associated with the proof of facts generally are not applied to the proof of foreign law. See Field, "Judicial Notice of Public Acts under the Full Faith and Credit Clause," 12 MINN. L. REV. 439 at 466 (1928).

[57] Alexander v. Pennsylvania Co., 48 Ohio St. 623, 30 N. E. 69 (1891); Moore v. Gwynn, 27 N. C. 187 (1844); Bondi Bros. v. Holbrook Grocery Co., 96 Vt. 160, 118 A. 486 (1922). Some states have gone so far as to allow interpretation of foreign law to be made by the jury. Wylie v. Cotter, 170 Mass. 356, 49 N. E. 746 (1898); Thayer, " 'Law and Fact' in Jury Trials," 4 HARV. L. REV. 147 (1890); 34 A. L. R. 1447 (1925).

[58] Historically, the reason for the rule would seem to have been the difficulty in obtaining access to information concerning the law of other jurisdictions—or for that matter, of one's own state. Of course, this problem no longer exists. See 17 BOST. UNIV. L. REV. 738 at 741 (1937).

[59] Peet v. Hatcher, 112 Ala. 514, 21 So. 711 (1895); Bopst v. Williams, 287 Mo. 317, 229 S. W. 796 (1921); 67 L.R.A. 34 (1905); 31 C.J.S. § 18, p. 532 (1942).

is subject to exceptions[60] and while a few contrary decisions may be found,[61] it would appear that this is one of the more firmly established rules of our jurisprudence. The effect of this rule is to declare that pleading and proof[62] are necessary in every case involving foreign law, and that it would be improper for the trial court to take judicial notice of that law even though the trial court was perfectly willing to do so and was itself familiar with the applicable rule of law.[63]

However, a majority of the jurisdictions where the rule was not already established by decision[64] have now enacted statutes requiring the courts to take judicial notice of foreign law;[65] and, as one result, some cases have arisen in these states in which the appellate court has been asked to recognize a matter of foreign law not brought to the attention of the trial court.

Here, as in the cases involving nonlegal facts, the weight of judicial authority would seem committed to the view that the statutory or common-law rule must be properly brought to the attention of the trial

[60] A commonly recognized exception to this rule is that a court will take judicial notice of the laws of another state for the purpose of giving full faith and credit to a judgment of a sister state. Butcher v. Bank of Brownsville, 2 Kan. 70 (1863); Shriver v. Garrison, 30 W. Va. 456, 4 S. E. 660 (1887); Shotwell v. Harrison, 22 Mich. 410 (1871); Hull v. Webb, 78 Ill. App. 617 (1898), but here there was a stipulation by counsel to consider the law in evidence; 23 C. J. 131, note 15 (1921); 31 C. J. S. 534, note 59 (1942). The reason originally given for the rule was that a judgment, adverse to rights arising under the Constitution, would be reviewable by the Supreme Court of the United States which would notice the laws of all the states without pleading and proof and that it would hence be proper for the state court to adopt the same rule of decision that would govern the court of last resort. Ohio v. Hinchman, 27 Pa. St. 479 (1856). This reason was overturned by the decision of the Supreme Court in Hanley v. Donaghue, 116 U. S. 1, 6 S. Ct. 242 (1885), that it would not notice the laws of a state other than that from which the appeal was brought, unless the state courts noticed them. The rule remained.

[61] Herschfeld v. Drexel & Co., 12 Ga. 582 (1853); State v. Rood, 12 Vt. 396 (1840); Saloshin v. Houle, 85 N. H. 126, 155 A. 47 (1931); In re Holden's Estate, 110 Vt. 60, 1 A. (2d) 721 (1938); Hillmer v. Grondahl, 109 Vt. 388, 199 A. 255 (1938).

[62] Regarding the technique of proving the law of sister states, see Field, "Judicial Notice of Public Acts under the Full Faith and Credit Clause," 12 MINN. L. REV. 439 at 456 (1928). On the manner of proving foreign law generally, including that of other nations, see Nussbaum, "The Problem of Proving Foreign Law," 50 YALE L. J. 1018 (1941).

[63] State v. Horn, 43 Vt. 20 (1870).

[64] Supra, note 8.

[65] Illinois, Indiana, Kentucky, Maine, Maryland, Minnesota, Montana, New Jersey, North Dakota, Ohio, South Dakota, Washington, Wyoming, and Hawaii have adopted the Uniform Judicial Notice of Foreign Law Act. Statutory citations may be found in 9 UNIFORM LAWS ANN. 269 (1942), 15 (Supp., 1943). Other states with analogous statutes are Arkansas, California, Connecticut, Georgia, Massachusetts, Michigan, Mississippi, Missouri, New York, Tennessee, Virginia, West Virginia, and Wisconsin.

court if counsel desires notice by the appellate court. Thus in *Watkins v. Watkins*,[66] the Supreme Court of Tennessee was asked to take judicial notice of the Alabama law of purchase-money trusts. This the court refused to do. Although it recognized the judicial notice statute, it insisted that notice would not be taken unless "such laws are read in evidence in the lower court—pleaded, or at least proven, below."[67] And in *Turner v. Missouri, K.-T. R. R.*[68] the Missouri court refused to notice a Kansas statute[69] extending the period of the statute of limitations where plaintiff had failed otherwise than on the merits because the statute had not been pleaded or introduced in evidence below.[70]

On the other hand, there are cases such as *Walker v. Lloyd*[71] holding that an appellate court can notice the law of a sister state despite lack of mention of it at the trial. There, defendant asked the Massachusetts court to recognize a Vermont statute[72] relating to liability of automobile operators to their passengers which, as interpreted by the Vermont court,[73] required gross negligence in order to ground recovery unless the occupant was a "passenger for hire."[74] The court said without equivocation that "the fact that certain . . . statutes of Vermont were not brought to the attention of the trial judge does not preclude this court from considering decisions and statutes of that State which are brought to the attention of this court."[75] And the Wyoming[76] and Illinois[77] courts have similarly taken notice of foreign laws under their judicial notice statutes although they were not introduced in evidence below.

[66] 160 Tenn. 1, 22 S. W. (2d) 1 (1929).

[67] Id. at 10.

[68] 346 Mo. 28, 142 S. W. (2d) 455 (1940).

[69] Kan. Gen. Stat. (1935), § 60-311.

[70] Accord: Seemann v. Eneix, 272 Mass. 189, 172 N. E. 243 (1930); Bristol v. Noyes, 106 Vt. 418, 174 A. 924 (1934); Brown v. Perry, 104 Vt. 66, 156 A. 910 at 1300 (1931); Esmar v. Haeussler, 341 Mo. 33, 106 S. W. (2d) 412 (1937), 115 S. W. (2d) 54 (1938); Daniels v. Detroit, etc. G. H. & M. R. R., 163 Mich. 468, 128 N. W. 797 (1910); Phillips v. Griffin, 236 App. Div. 209, 259 N. Y. S. 105 (1932).

[71] 295 Mass. 507, 4 N. E. (2d) 306 (1936).

[72] Vt. Pub. Laws (1933), § 5113.

[73] Shappy v. McGarry, 106 Vt. 466, 174 A. 856 (1934).

[74] Id. at 470.

[75] 295 Mass. 507 at 510 (1936). Cf. Lennon v. Cohen, 264 Mass. 414, 163 N. E. 63 (1928), where plaintiff asked the court to recognize an applicable New York statute. Held, "An important question of foreign law, even under said c. 168, [Mass. G. L. c. 233, sec. 70] cannot be raised as of right at the argument in this court for the first time: and this court cannot thus be required to make decision about it by taking judicial notice of it." Id. at 421.

[76] Trepanier v. Standard Mining & Milling Co., 58 Wyo. 29, 123 P. (2d) 378 (1942).

[77] Christensen v. Blinstrup, 284 Ill. App. 163, 1 N. E. (2d) 273 (1936).

A large part of the seeming disagreement between these two lines of cases may be resolved by reference to the language of the statutes. Thus in the Uniform Act[78] and in states such as Connecticut,[79] Georgia,[80] Massachusetts[81] and Virginia,[82] it is required that the courts *shall* judicially notice the laws of other states or other nations, as the case may be. In other statutes, such as those of Michigan,[83] New York,[84] and Tennessee,[85] it is provided that the court *will* or *may* take notice of foreign law. Although the courts of those states with mandatory statutes have not uniformly recognized an obligation to take judicial notice of foreign law,[86] it would seem that in this instance the courts have applied themselves with more than usual diligence to effectuating the purpose of a statute changing a common-law rule. Furthermore, decisions such as those of the Missouri court[87] apparently deny notice under a mandatory statute by observing the rule of pleading,[88] found there and in several other states, that a foreign law must be pleaded if counsel wishes to rely upon it.[89]

With regard to the general problem of judicial notice of facts and foreign laws by appellate courts, when the attention of the trial judge has not been directed to the matter, certain things would seem reasonably clear.

(a) Where there is a mandatory statute, the appellate court will generally notice foreign law although not brought to the attention of the trial court, subject, of course, to the rule of pleading in some states

[78] On this act, see Hartwig, "Congressional Enactment of Uniform Judicial Notice Act," 40 MICH L. REV. 174 (1941).

[79] Conn. Gen. Stat. (1930), § 5599.

[80] Ga. Code Ann. (1937), § 38-112.

[81] Mass. Gen. Laws (1932), c. 233, § 69.

[82] Va. Code Ann. (1942), § 6192a.

[83] Mich. Stat. Ann. (1938), §§ 27.874, 27.876.

[84] N. Y. Civil Practice (Cahill, Supp., 1943), § 344-a.

[85] Tenn. Code Ann. (Michie 1938), § 9767.

[86] Thus the appellate courts of Massachusetts, which had a mandatory statute, did not take notice of foreign law not proved in the trial court until 1936. Cf. Walker v. Lloyd, 295 Mass. 507, 4 N. E. (2d) 306 (1936), and Lennon v. Cohen, 264 Mass. 414, 163 N. E. 63 (1928).

[87] Esmar v. Haeussler, 341 Mo. 33, 106 S. W. (2d) 412 (1937); Corbett v. Terminal Assn., 336 Mo. 972, 82 S. W. (2d) 97 (1935).

[88] This rule is integrated into the Missouri statute which expressly requires pleading of the foreign statute. Mo. Rev. Stat. (1939), § 958. Prior to the passage of this statute in 1927 it was held that foreign law was so strictly fact that a demurrer pleading such a statute constituted a "speaking demurrer." Bennett v. Lohman, 292 Mo. 477, 238 S. W. 792 (1921).

[89] The Uniform Act also demands that opposing counsel be given notice in the pleading, the object being to prevent surprise rather than to treat such statutes as a doubtful fact. See Commissioner's Notes, 9 UNIFORM LAWS ANN. 272 (1937).

and incorporated in some statutes which requires pleading of the foreign statute.

(b) If the statute permitting the court to take judicial notice of a foreign statute is merely discretionary[90] or if the common law obtains,[91] the appellate court will not take notice of the foreign law unless proved as any other fact.[92]

(c) With respect to nonlegal facts, although there is no established rule declaring the impropriety of notice as in the case of foreign law,[93] the courts are on the whole committed to a refusal to judicially notice facts not brought to the attention of the court below.

(d) Finally, both groups of cases show clearly a tendency to treat all matters susceptible of discretionary judicial notice, both fact and law, as any other evidence in the case. This view rests on a conception that facts judicially noticed stand in place of evidence[94] and logically must be handled in the same way.[95]

It would seem more difficult to criticize the judicial attitude with regard to nonlegal fact than it is to censure judicial conservatism in regard to foreign law; for, although the fact seems well-established, there yet remains the practical problem of determining the weight to give to it—of deciding how much the judgment would have varied, if at all, had the fact been found below. Foreign law, on the other hand, involves considerations no different from the law of the forum; and there would seem to be little reason for an appellate court's refusal to use all available legal materials in repairing and correcting the judgment of the trial court.[96] The recent trend of legislation in this field would seem to show a more general acceptance of this viewpoint.

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[90] See statutes of Michigan, New York and Tennessee cited above, notes 83-85.

[91] In the absence of proof of foreign law, most courts raise a presumption as to the nature of the foreign law. Some presume that it is the same as the common law of the forum prior to statutory change; others that it is the same as the present law, common and statutory, of the forum; others that as to states formerly under English authority the common law unmodified by statute controls, and that as to other states the law of the forum applies. The cases are collected in 30 MICH. L. REV. 747 at 755-761 (1932).

[92] Cf. cases cited, supra, note 61.

[93] Cf. note 59, supra.

[94] See Wood v. Northwestern Ins. Co., 46 N. Y. 421 (1871).

[95] And, of course, the general rule is that evidence not before the trial court will not be considered on appeal, and this is true although the new evidence be brought into the record on appeal by agreement of the parties. Liberty Coal Co. v. Bassett, 108 W. Va. 293, 150 S. E. 745 (1929).

[96] The reasons of expediency which formerly supported the common-law rule no longer exist. See Hartwig, "Congressional Enactment of Uniform Judicial Notice Act," 40 MICH. L. REV. 174 at 177 (1941).