Cornell Law Review

Volume 38
Issue 2 *Winter 1953*

Article 1

Expert Witness and the Proof of Foreign Law

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CORNELL
LAW QUARTERLY

VOLUME 38 WINTER, 1953 NUMBER 2

THE EXPERT WITNESS AND THE PROOF OF FOREIGN LAW

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I. INTRODUCTION

Few lawyers, scholars or students, are exempt from the fascination that comes from a glimpse into the legal systems of other nations or communities, revealed by the reading of decisions dealing with that subject. It is a truism that the history of a civilization is the history of its laws.

A survey of legal decisions based on foreign law does not, however, tell the whole story, for these decisions generally discuss the laws that have already been pleaded and proved, without indicating the rocky and treacherous course that the legal practitioners must have traveled before these laws came within the technical cognizance of the court.

Today, more than at any other time in our legal history, it is necessary for each practicing lawyer to have a full appreciation of the technical aspects of foreign law in litigation. The problem is no longer exclusively the field of a small segment of the Bar, but rather the responsibility of every member of the profession. The recent war and its consequent displacement of population, as well as the increased reliance of all nations upon foreign trade, have brought to our midst persons of all degrees of wealth, with claims and disputes that have originated from or are dependent for their solution upon the laws of countries from almost every part of the globe.

Nor is it a subject that may be relegated to a period of hasty preparation immediately prior to trial. The most disastrous consequences await the individual attorney and his client when the problem of proving foreign law has been ignored at the very start of the litigation.

Indeed, from the very first interview, the practitioner must at least

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be aware that differences exist between civil law systems and our common law; that the translation of a foreign language is not a mere clerical detail; that differences in the nuances of language may well make the difference in legal results; that even as the client speaks, the decision to sue or not to sue must be thought of in terms of the necessity and availability of statutes, commentaries, authorities, translators, and experts to support the necessary contentions.

The decision to sue is but the start of a building process. The legal counsel prepares his material and builds the structure into the final form of submission for the decision of the court. The process includes reducing new concepts of law to statements of ultimate fact for the purpose of pleading[1] and arraying them in greater detail for particularization; collecting foreign documents and foreign legal literature and obtaining authentications and certifications of them; supervising their translations; interviewing foreign experts; studying their qualifications and integrating their knowledge into common law forms and elements.

But the role of the attorney is more than that of a mere technician; he is indeed an impresario upon whom falls the responsibility of preparing the entire drama that will unfold at the trial or the submission to the court. With the preparation for the presentation must come an employment of the psychology of human nature, a sensitivity to the existence of prejudice against foreign institutions, and an ability to overcome it. The testimony of each witness must bespeak a preparation that has eliminated every element which may erase welcome attention by a court or jury.

The purpose of the discussion that follows, which must necessarily be limited and generalized in view of the complexity of the problem, is largely to promote an awareness and understanding of these problems.[2]

Foreign Law As An Evidentiary Fact in Common Law Jurisdictions

The ordinary principles of conflict of laws will largely determine what rights of action and what defenses in a particular case should be governed by foreigu law.[3] But once it has been decided exactly what

[1] For an illustration of pleading foreign law, see note 48 *infra.*

[2] See Russell, Book Review, 46 AM. J. INT'L L. 760 (1952), where the author, reviewing *Comparative Law Cases and Materials* by Professor Rudolf B. Schlesinger, refers to the " 'bread-and-butter' problem of how to prove foreign law in our courts."

[3] The problem of proving foreign law, of course, did not arise until it was established that the courts of a particular forum could determine rights and liabilities that did not originate from the laws of the forum. The development of the conflict of laws in England is, historically speaking, quite recent, and for a long period of time it was an incontrovertible maxim that every action tried by an English court must be tried by the law of England. See Sack, *Conflicts of Laws in the History of the English Law* in 3

elements of foreign law are to be introduced into the case and as those rules are being analyzed, the question arises of how they are to be introduced. In preparing the pleadings and in marshalling the evidence, what procedural techniques are to be understood? In short, how is the foreign law to be applied?

The attitude of courts and legislatures toward the procedural problems involved in giving effect to foreign law has had a long and perhaps difficult history. The prevailing idea under the common law in England and in the United States has been that foreign law is a fact and must be proved as a fact; courts will not take judicial notice of foreign laws. The exact origin of this view is somewhat obscure. One rather formalistic rationale that has been suggested is that since the only "law" applied by a court is domestic law, every other element in the case must, in the nature of things, be a fact.[4] Foreign law, therefore, more or less by definition being thrust into the category of facts, must be proved as facts are proved. Generally, however, the fact theory is explained on the ground that although the court can reasonably be expected to know the law of its own forum, it is unreasonable and impractical to presume its knowledge of the laws of other jurisdictions and that ". . . the foreign law and its application, like any other results of knowledge and experience in matters of which no knowledge is imputed to the Judge, must be proved as facts are proved, by appropriate evidence . . .";[5] hence the rule that foreign law must be proved as a fact:

> With foreign laws an English Judge cannot be familiar; there are many of which he must be totally ignorant: there is, in every case of foreign law, an absence of all the accumulated knowledge and ready associations which assist him in the consideration of that which is the English law, and of the manner in which it ought to be applied, in a given state of circumstances to which it is applicable. He is not only without the usual and necessary assistance afforded by the accumulated knowledge and suggestions contained in the argnments which are addressed to him, but he is constantly liable to be misled by the erroneous suggestion of analogies which arise in his own mind, and are pressed upon him from all sides.[6]

LAW: A CENTURY OF PROGRESS 342 (1937). The modern legal theory was first formulated by Lord Mansfield in Holman v. Johnson, 1 Cowp. 341, 98 Eng. Rep. 1120 (1775):

> Every action tried here must be tried by the law of England; but the law of England says, that in a variety of circumstances, with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern.

Id. at 344, 98 Eng. Rep. at 1121. See also Scrimshire v. Scrimshire, 2 Hag. Con. 393, 161 Eng. Rep. 782 (1752).

[4] 3 BEALE, CONFLICT OF LAWS § 621.1 (1935).

[5] Nelson v. Bridport, 8 Beav. 527, 536, 50 Eng. Rep. 207, 211 (1845).

[6] *Id.* at 534, 50 Eng. Rep. at 210.

This common law approach of treating foreign law as a fact to be proved like any other fact did not, however, receive universal recognition. Legal scholars of central Europe found the fact theory, with its rather sceptical attitude toward the dignity of foreign law, poorly adapted to their conception of the principles of conflict of laws. Savigny in the nineteenth century had urged that the recognition of foreign legal systems necessarily followed from the equality between nationals and foreigners demanded by the law of nations. Under this impetus, knowledge of the foreign law was imposed as a duty upon the court, regardless of what was pleaded or proved by the parties concerning the foreign laws. The maxim was that the court knows the law! *"Jura novit curia"*. The jurisprudence of Germany, Holland, Italy, and other European nations bears the imprint of this tradition.[7]

It is the procedural rules and techniques that have developed from the application in practice of these two ideas that are of primary interest in planning and preparing a case dealing with foreign law; it is not the intention here to dwell on purely theoretical or historical origins. Nevertheless, it is interesting and perhaps helpful to keep in mind the background and theoretical source of the procedural principles in tracing the development of the mechanics of proving foreign law: much of the current practice is a composite that borrows features from each school. However sharply contrasting and inconsistent the fact theory and juridical notice appear in their theoretical formulation, experience in handling foreign law problems has revealed deficiencies in one system which could be remedied by adopting some of the methods of the other.

The emphasis in England concerning the proof of foreign law has been on the oral testimony of witnesses qualified to speak as experts upon the law in question. It was apparently thought at one time that the proper method of proving foreign written law was by producing a copy of it properly authenticated.[8] The *Sussex Peerage*[9] case, however, from which the prevailing common law technique for proving foreign law in England originated, established in 1844 that the foreign law should be proved by the testimony of an expert witness and not by producing merely a copy of a statute or legislative text:[10]

[7] Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018, 1019 (1941).

[8] See the Sussex Peerage, 11 Cl. & Fin. 85, 8 Eng. Rep. 1034 (1844); 2 TAYLOR, EVIDENCE 905 (12th ed., Croom-Johnson and Bridgman, 1931); PHIPSON, EVIDENCE 405 (9th ed 1952).

[9] The Sussex Peerage, note 8 *supra*.

[10] 7 WIGMORE, EVIDENCE § 2090-a (3d ed. 1940); citing also 2 TAYLOR, EVIDENCE § 1525 (12th ed. Croom-Johnson and Bridgman, 1931). In addition, see to the same effect: Lozard Bros. & Co. v. Midland Bank, [1933] A.C. 289; Beatty v. Beatty, [1924] 1 K.B. 807, 814; Nelson v. Bridport, 8 Beav. 527, 50 Eng. Rep. 207 (1845).

> The witness may refer to the sources of his knowledge; but it is perfectly clear that the proper mode of proving foreign law is not by showing to the House the book of the law; for the House has not organs to know and to deal with the text of that law, and therefore requires the assistance of a lawyer who knows how to interpret it.[11]

In the United States, with modifications in details, the courts adopted the fact theory established in England: foreign law must be pleaded and proved by the party who has the affirmative of the issues on the merits. In *Monroe v. Douglass*,[12] for example, the New York Court of Appeals stated:

> The courts of a country are presumed to be acquainted only with their own laws; those of other countries are to be averred and proved, like other facts of which courts do not take judicial notice; and the mode of proving them, whether they be written or unwritten, has long been established.[13]

In its broadest aspects, the method of proving foreign law in this country is described by the statement that, "The proof of the law of a foreign country may be by the introduction in evidence of its statutes and judicial decisions, or by the testimony of experts learned in the law, or by both."[14] A more detailed explanation, however, is obviously needed for a working knowledge of the actual techniques available. The law of New York has developed along the following lines.[15]

Where the case turned on foreign written law—statutes, codes, proclamations or decrees, and the like—that law was to be proved in the first instance by copies of the statutes or decrees themselves; oral testimony alone of the foreign written law was insufficient.[16] According to the common law rules, a copy of the foreign statute was required to be authenticated by exemplification, the testimony of a witness who had examined the original, or by the certification of a judicial officer of the foreign jurisdiction.[17] As a result of successive

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[11] 11 Cl. & Fin. 85, 115, 8 Eng. Rep. 1034, 1046 (1844).

[12] 5 N.Y. 447 (1851).

[13] *Id.* at 451.

[14] Electric Welding Co. v. Prince, 200 Mass. 386, 390, 86 N.E. 947, 948 (1909).

[15] See for a thorough exposition of the proof of foreign law in New York, 9 N.Y. JUDICIAL COUNCIL REP. 267, 271-85 (1943).

[16] Russian Re-Insurance Co. v. Stoddard, 211 App. Div. 132, 207 N.Y. Supp. 574 (3d Dep't 1925) *rev'd on other grounds*, 240 N.Y. 149, 147 N.E. 703 (1925), *reargument denied*, 240 N.Y. 682, 148 N.E. 757 (1925); Pirrung v. Supreme Council, 104 App. Div. 571, 93 N.Y. Supp. 575 (4th Dep't 1905) (foreign country); Taylor v. Chamberlain, 6 App. Div. 38, 39 N.Y. Supp. 737 (2d Dep't 1896); Toulandou v. Lachenmeyer, 6 Abb. N.S. 215, 37 How. Prac. 145 (1869) (sister state).

[17] Lincoln v. Battelle, 6 Wend. 475 (N.Y. 1831); Packard v. Hill, 2 Wend. 411 (N.Y. 1829); STORY, CONFLICT OF LAWS § 641 (3d ed. 1876).

statutory modifications, the requirement of authentication has been discarded, and copies of the statutes or ordinances that can be proved to have been issued by the authority of the other state or foreign country or proved to be recognized as evidence of the existing law in its courts are admissible.[18] In the langnage of the statute, "A printed copy of the statute, or other written law . . . or a printed copy of a proclamation, edict, decree or ordinance . . ." are admissible and are presumptive evidence of the law contained in them.[19] If it should happen, however, that the statutes or decrees cannot be proved to be official publications or commonly admitted as evidence in the foreign jurisdiction, the copies must be certified or authenticated in the manner prescribed by statute before they are acceptable evidence.

One of the important things to bear in mind under the rules governing the formal proof of foreign law in New York is the relation between the admissibility of documentary evidence and oral testimony. Although oral testimony cannot be substituted for the proof of foreign written law required by the statute,[20] it is clear that the testimony of expert witnesses can accompany the written proof as evidence to support the particular interpretation urged by the party;[21] indeed, where the proof of the law of a foreign country rather than of a sister state is involved, it is possible that the New York courts may require the testimony of experts.[22] In only one, perhaps relatively rare situation, is this proposition doubtful: where the law is found in a single statute or decision and the only question concerns its contents. The New York Supreme Court in dealing with this question in applying a statute of Quebec spoke in the following langnage:

> [W]here the evidence of foreign law consists entirely of a written document, statute or judicial opinion, the question of its construction and effect is for the court alone, and evidence of a lawyer of another State or country, as to what in the opinion of lawyers there, should be the construction of a statute of that State or country is not admissible where the language of the statute is plain, and there is no decision by the courts of that State or country upon the point in controversy.[23]

It is to be questioned whether courts would or should go so far today.

Where the "unwritten" law of a foreign jurisdiction—its common law contained in its decisions, and its customs and usages—is in issue,

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[18] N.Y. Laws 1848, c. 312; N.Y. Laws 1920, c. 925; N.Y. Civ. Prac. Act § 391.

[19] N.Y. Civ. Prac. Act § 391.

[20] See note 16 *supra.*

[21] See Matter of Masocco v. Schaaf, 234 App. Div. 181, 254 N.Y. Supp. 439 (3d Dep't 1931).

[22] See Nussbaum, *supra* note 7, at 1018, 1026.

[23] Molson's Bank v. Boardman, 47 Hun 135, 142 (N.Y. 1888); see also note 102 *infra.*

it may be proved either by the testimony of experts or by documentary evidence. The statute provides that in the latter instance, books of reports of cases must be admitted as presumptive evidence of the unwritten or common law.[24]

In short, the rule remained uniform in New York that foreign law was a fact to be pleaded and proved by the party who relied on it.[25] And the application of foreign law by the court where it was not formally introduced by the proper party was error.[26]

Despite the persuasiveness of the explanations in favor of the fact theory, the idea in practice tended to develop some rather oppressive requirements that in many cases fell short of assisting in the efficient and fair trial of the action. The materials and testimony used in proving the foreign law were, for example, subject to the objections of incompetency or hearsay and the other formal evidentiary rules of exclusion that applied to the proof of ordinary facts. Often it was needlessly time consuming and expensive to prepare evidence to withstand these technical objections when there could be no genuine dispute about the authority of the proffered records. Furthermore, the assimilation of foreign law to the status of a fact involved the courts in logical exercises that invited conclusions which could not be sustained by either reason or justice. The foremost of these was the question whether, for the purposes of appellate review for example, a question of foreign law was a question of law or fact. In New York there were cases that supported either answer,[27] and the question was not finally

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[24] N.Y. Civ. Prac. Act § 391.

[25] Croker v. Croker, 252 N.Y. 24, 168 N.E. 450 (1929); Riley v. Pierce Oil Corp., 245 N.Y. 152, 156 N.E. 647 (1927); Hanna v. Lichtenhein, 225 N.Y. 579, 122 N.E. 625 (1919); Hifler v. Calmac Oil & Gas Corp., 10 N.Y.S.2d 531 (Sup. Ct. Steuben County 1939).

[26] Phillips v. Griffin, 236 App. Div. 209, 210, 259 N.Y. Supp. 105, 106 (3d Dep't 1932); Schweitzer v. Hamburg-Amerikanische P.A.G., 149 App. Div. 900, 904, 134 N.Y. Supp. 812, 815 (2d Dep't 1912).

[27] Bank of China v. Morse, 168 N.Y. 458, 61 N.E. 774 (1901); Fitzpatrick v. Int'l Ry., 252 N.Y. 127, 169 N.E. 112, 68 A.L.R. 801 (1929) (question of law); *contra,* Read v. Lehigh Valley R.R., 284 N.Y. 435, 31 N.E.2d 891 (1941); Los Angeles Investment Securities Corp. v. Joslyn, 158 Misc. 164, 284 N.Y. Supp. 36 (Sup. Ct. Albany County 1939), *aff'd,* 254 App. Div. 711, 4 N.Y.S.2d 140 (3d Dep't 1939), *aff'd without opinion,* 279 N.Y. 734, 18 N.E.2d 684 (1939), *rehearing denied,* 280 N.Y. 570, 20 N.E.2d 19 (1935), *new trial granted,* 12 N.Y.S.2d 370 (Sup. Ct. Albany County 1938), *rev'd,* 258 App. Div. 762, 14 N.Y.S.2d 798 (1939), *motion to resettle decision denied,* 258 App. Div. 821, 15 N.Y.S.2d 175 (1939), *motion granted,* 258 App. Div. 1018, 15 N.Y.S.2d 830 (1939), *appeal granted,* 282 N.Y. 592, 25 N.E.2d 146 (1940), *appeal dismissed,* 282 N.Y. 438, 26 N.E.2d 968 (1940).

settled until the passage of a statute in 1943 providing that the issue was clearly one of law.[28]

The Growth of Judicial Notice of Foreign Law

The influence of Savigny had undoubtedly left its mark on scholars both in England and the United States. Professor Thayer, in his *Treatise on Evidence,*[29] strongly advocated that judicial notice be taken of foreign law. Both this influence from the commentators and an increasing awareness of the inconvenience of adducing proof of foreign law under the common law and formal statutory requirements brought about a distinct trend advocating legislative action to insure judicial notice.

In Massachusetts, a statute was enacted in 1926[30] *requiring* courts to notice judicially the laws of foreign countries. A uniform act was proposed, which was later adopted by many of the states under the title, *Uniform Judicial Notice of Foreign Law Act.* This act, however, provided for judicial notice of only the laws of sister states.[31]

The first evidence of a shift of attitude in New York came in 1933[32] with an amendment to Section 391 of the Civil Practice Act providing that foreign law was to be determined by the court and charged to the jury, if there was one, and that in determining the foreign law,

> . . . neither the trial court nor any appellate court shall be limited to the evidence produced on the trial by the parties, but may consult any of the written authorities above named in this section, with the same force and effect as if the same had been admitted in evidence.

The wording of the amendment implied, and interpretation by the courts confirmed, that the judicial notice then allowed by the statute could only supplement evidence of the foreign law introduced in the orthodox way by the parties.[33] If there was an omission to produce any evidence at all, it remained, as before the amendment, error for the

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[28] N.Y. CIV. PRAC. ACT § 344-a(B):

> Whether a matter of law is judicially noticed pursuant to this section, or formal proof thereof is taken pursuant to other sections of this act, such law shall be determined by the court or referee and included in its findings, or charged to the jury as the case may be. Such finding or charge shall be subject to review on appeal and shall be known and otherwise treated as a finding or charge on a matter of law.

[29] THAYER, PRELIMINARY TREATISE ON EVIDENCE, 257 (1898).

[30] Mass. Stat. 1926, c. 168, MASS. GEN. LAWS c. 233, § 70 (1932).

[31] UNIFORM JUDICIAL NOTICE OF FOREIGN LAW ACT § 1, 9 U.L.A. 401 (1951).

[32] The trend in New York resulted entirely from statutory changes; there were no judicial attempts to revise the prior law. In 1930, then Chief Judge Cardozo stated in Petrogradsky M.K. Bank v. Nat. City Bank, 253 N.Y. 23, 34, 170 N.E. 479, 483 (1930): "True, of course, it is that there is no judicial notice of the law of foreign lands."

[33] Cherwien v. Geiter, 272 N.Y. 165, 5 N.E.2d 185 (1936).

court to apply the foreign law. The path of reform therefore was not yet completed, and under the prodding of writers who pointed out the still existing difficulties preventing a complete and flexible system of judicial notice,[34] amendments were still suggested.

In 1943, the Judicial Council of New York in its Ninth Annual Report, recommended a comprehensive new section of the Civil Practice Act, explaining:

> The proposed new section would eliminate the necessity of introducing in evidence a copy of a decision of statute of a sister state or a foreign country as a condition precedent to the court's taking judicial notice of its law.[35]

As a result of the Judicial Council's Recommendation, Section 344-a of the Civil Practice Act was enacted in 1943, providing in part as follows:

> Sec. 344-a. JUDICIAL NOTICE OF MATTERS OF LAW.
>
> A. Except as otherwise expressly required by law, any trial or appellate court, in its discretion, may take judicial notice of the following matters of law:
>
> 1. A law, statute, proclamation, edict, decree, ordinance, or the unwritten or common law of a sister state, a territory or other jurisdiction of the United States, or a foreign country or political subdivision thereof.
>
> * * *
>
> C. Where a matter of law specified in this section is judicially noticed, the court may consider any testimony, document, information or argument on the subject, whether the same is offered by counsel, a third party or discovered through its own research.
>
> D. The failure of either party to plead any matter of law specified in this section shall not be held to preclude either the trial or appellate court from taking judicial notice thereof.

In 1944, the question still remained open whether Section 344-a could be applied in cases triable as of right by jury.[36] This question was settled in 1947, however, when the constitutionality of the foregoing provisions was upheld in *Matter of Jongebloed v. Erie R.R.*[37]

Pleading and Proving Foreign Law Still Necessary

In the face of the broad provisions contained in Section 344-a of the Civil Practice Act, permitting courts to take judicial notice of foreign law, the Bar of New York could properly ask itself whether it was

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34 Wachtell, *Proof of Foreign Law in American Courts,* 69 U.S.L. REV. 526 (1935).

35 9 N.Y. JUDICIAL COUNCIL REP. 267, 279 (1943).

36 Graybar Elec. Co. v. New Amsterdam Cas. Co., 292 N.Y. 246, 250, 54 N.E.2d 811, 813 (1944).

37 297 N.Y. 534, 74 N.E.2d 470 (1947), *cert. denied,* 333 U.S. 855 (1948).

necessary to plead foreign law at all or even to prove it. Was it not now the function of the court to act as Savigny and the international school had prescribed and to determine the law for itself without the assistance of the parties? Now, almost ten years after the effective date of the statute (September 1, 1943) although many of these questions presented by the statute are still in dispute, the trends are noticeable and offer definite guide posts.

As far as pleading is concerned, it followed quite logically that adherence to the fact theory, requiring foreign law to be introduced into the case by the same technique as were ordinary facts, required that the law be pleaded as an ultimate fact. Beyond being logical, however, this result had a good deal to recommend it in the way of fairness and decency: where the right of action was based on strange and unfamiliar law, the requirement of pleading that law gave the adverse party an indication of how to approach the preparation of his case. Although under the language of Section 344-a it may not have appeared as self-evident as before that foreign law should be pleaded, the practical reason for requiring pleading still retained considerable validity. It could not be realistically argued that permissive authority for the court to judicially notice foreign law—either by accepting information from the parties or by engaging in its own research—converted foreign law into a matter of such common knowledge that pleading it would in all cases be superfluous.

Until May 29, 1952, the lower courts were fairly well agreed that the pre-existing law, which had required that the foreign law upon which a party relied should be pleaded,[38] still continued and had not been changed by Section 344-a,[39] at least where the law involved was the statute of a foreign country having an unfamiliar jurisprudence.

On May 29, 1952, however, the New York Court of Appeals announced its decision in *Pfleuger v. Pfleuger*,[40] a case that should cause considerable discussion on the subject of pleading foreign law.

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[38] Croker v. Croker, 252 N.Y. 24, 168 N.E. 450 (1929).

[39] Bergman v. Lax, 107 N.Y.S.2d 266 (Sup. Ct. N.Y. County 1951); Schumann v. Loew's Inc., 199 Misc. 38, 102 N.Y.S.2d 572 (Sup. Ct. N.Y. County 1951). *But see*, Chesny v. Chesny, 278 App. Div. 586, 102 N.Y.S.2d 227 (2d Dep't 1951); *contra*, Raphael v. Raphael, 189 Misc. 144, 71 N.Y.S.2d 42 (Sup. Ct. N.Y. County 1947); Silberfeld v. Swiss Bank Corp., 183 Misc. 234, 50 N.Y.S.2d 838 (Sup. Ct. N. Y. County 1944), *aff'd*, 268 App. Div. 984 (1st Dep't 1944) (the pleadings alleged facts which the court held created an obligation under the law of any civilized country). See also, Sommerich, *Report of the Committee on Foreign Law*, 2 N.Y. CITY BAR ASS'N RECORD 128 (1947); Editorial, *Pleading, Proof, and Judicial Notice of Foreign Law*, 117 N.Y.L.J. 1560, col. 1 (Apr. 22, 1947).

[40] 304 N.Y. 148, 106 N.E.2d 495 (1952).

The action in the *Pfleuger* case was one to recover for the wrongful death of the plaintiff's intestate, which had been caused by an automobile accident in the state of Pennsylvania. The complaint, however, did not specify the Pennsylvania statute upon which plaintiff based her cause of action. Defendant, contending that failure to allege the Pennsylvania statute was a fatal defect, moved at Special Term to dismiss the complaint for failure to state facts sufficient to constitute a cause of action. The motion failed at Special Term, but the Appellate Division reversed and ordered the complaint dismissed,[41] with leave to appeal to the Court of Appeals.[42] The Appellate Division in its decision stressed that Subdivision D of Section 344-a, in allowing a court to take judicial notice notwithstanding the failure of a party to plead foreign law, applied only to either the trial or appellate court, and not to a Special Term.[43] In other words, where an objection is raised before trial to the omission to plead foreign law, the defect cannot be cured by judicial notice.

The Court of Appeals, however, was of the opinion that such a narrow interpretation would thwart the purpose of Section 344-a and that "trial court" referred to the court of original jurisdiction, including its Special Term for Motions as well as its trial term, as distinguished from appellate courts.

The Court further pointed out that Section 344-a is permissive and not mandatory, but that since the law upon which the plaintiff relied was the statute of a sister state, the discretion of the court should have been exercised to take judicial notice of it:

> Obviously the statute which we are considering is permissive, not mandatory. Under its provisions judicial notice of the matters of foreign law specified therein may be taken by a court "in its discretion". In the exercise of such discretion the court may—in passing on the sufficiency of a pleading—take, or refuse to take, judicial notice of the specified matters of foreign law depending upon the deterrent factors of time, cost, and other adverse considerations which may be involved in making available to the court accurate knowledge of such foreign law. *No such difficulties should be encountered in the present case,* where the law upon which the plaintiff relies is a statute of the State of Pennsylvania.[44] (Emphasis added.)

In answer to the argument on appeal that a defendant should be in-

[41] 278 App. Div. 247, 105 N.Y.S.2d 427 (4th Dep't 1951).

[42] 278 App. Div. 1022, 105 N.Y.S.2d 988 (4th Dep't 1951).

[43] Subdivision D reads as follows:

> The failure of either party to plead any matter of law specified in this section shall not be held to preclude either the trial or appellate court from taking judicial notice thereof.

[44] 304 N.Y. 148, 152, 106 N.E.2d 495, 496 (1952).

formed of the statutes upon which the plaintiff relies, the court pointed out that the defendants could have reached their objective by a corrective motion to make the pleading more definite and certain,[45] or by a motion for a bill of particulars.[46]

The exact holding of the *Pfleuger* case is that the Supreme Court at its Special Term for Motions is empowered to take judicial notice of foreign law to sustain a pleading, and that under the particular facts it was a proper exercise of discretion to notice the statute of a sister state. Although the decision is clear on the question of the *power* of the court to take judicial notice in such a situation, it does not say that the power, clearly a discretionary one, must be exercised in every case. In some cases, a motion could properly be brought to dismiss for failure to state a cause of action a complaint that omits to allege the pertinent foreign law. While no arbitrary rule should be laid to the Court of Appeals, it would seem proper that in cases arising upon motions addressed to the pleadings, a court, in the exercise of its discretion, should refuse to take judicial notice of a statute relied upon by a party who has failed to plead it in his complaint where the foreign law in question is one that has been enacted in a language other than English and cannot be readily located in the law libraries available to the average practitioner. The reference by the Court of Appeals in the *Pfleuger* case to Wigmore's statement[47] that the technical insistence on treating the States of the Union as foreign to each other is absurd, lends credence to the belief that the decision of the court is limited to instances involving the laws of a sister state.

It is clear that a litigant who is served with a pleading setting forth the substance and effect of foreign laws relied upon is entitled to something more in order to prepare for the trial of the action.[48]

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[45] N.Y.R. CIV. PRAC. 102(1).

[46] The Court of Appeals cited the cases collected in Busch, *Bills of Particulars of Foreign Law,* 125 N.Y.L.J. 836, col. 1 (Mar. 8, 1951), as its authority on this subject.

[47] WIGMORE, EVIDENCE § 2573 (3d ed. 1940).

[48] The general rule regarding particularity in the pleading of foreign law is that the substance of the laws relied upon must be set forth in a manner that enables the court to determine the meaning and effect thereof. See for example, Grossman v. Western Financial Corp., 280 App. Div. 833, 114 N.Y.S.2d 198 (2d Dep't 1952). The allegation there approved read as follows:

> That, under the provision of Military Government Law No. 56, enacted in 1947 by the Office of Military Government for Germany (U.S.) for the United States area of control, and of Order No. 78, enacted in 1947 by the Control Commission for Germany (British Element) for the United Kingdom area of control, and effective at all times mentioned in the complaint herein, it was and is illegal to enter into contracts or engage in practices which promote or continue acts or entities in Western Germany which operate to or tend to restrain trade or commerce.

The need for a bill of particulars would be self-evident if the allegation had read:

The statement of the Court of Appeals to that effect in *Pfleuger v. Pfleuger*[49] has come after a series of conflicting decisions on the subject.[50]

Decisions prior to Section 344-a held that a bill of particulars should be furnished of the foreign laws relied upon[51] and in some cases required that there should be stated the title, section, and paragraph numbers of the statutes, and the volume, gazette or pamphlet from which they were compiled or in which they were contained.[52] On one occasion the Appellate Division required a party to furnish particulars of decisional law, as distinguished from statutes.[53]

After the effective date of Section 344-a, a question was raised in one case whether it was proper to require a bill of particulars concerning foreign law, since under the statute,[54] the court would not be limited by the bill, but could consider any testimony, document, information or argument on the subject of the foreign law, whether offered by counsel, a third party, or discovered through independent research.[55] Although in this case the court accepted this argument and disapproved the demand for the bill, this limitation has not been followed, and it has been suggested that the statement was *dictum*.[56]

Under the law of the (mythical) Kingdom of Utopiana, effective at all times mentioned in the complaint herein, it was and is illegal to enter into contracts or engage in practices which operate or tend to restrain trade or commerce.

Such an allegation alleges the effect of foreign law as an ultimate fact and would seem to be sufficient for a pleading. Chesny v. Chesny, 275 App. Div. 945, 89 N.Y.S.2d 604 (2d Dep't 1949); Sultan of Turkey v. Tiryakian, 162 App. Div. 613, 147 N.Y. Supp. 978 (1914), *aff'd*, 213 N.Y. 429, 108 N.E. 72 (1915); Rothschild v. Rio Grande Western R.R., 26 Abb. N.C. 312, 13 N.Y. Supp. 361 (1st Dep't 1891); Throop v. Hatch, 3 Abb. Pr. 23 (N.Y. 1856).

It must be borne in mind that in pleading foreign law, as with any other fact, the ultimate fact, and not the evidence, must be alleged. de Cordova v. Sanville, 214 N.Y. 662, 108 N.E. 1092 (1915); decided on the dissenting opinion in 165 App. Div. 128, 150 N.Y. Supp. 709 (1st Dep't 1914); *accord*, Sultan of Turkey v. Tiryakian, *supra*. In Meijer v. Gen. Cigar Co., 73 N.Y.S.2d 576 (Sup. Ct. N.Y. County 1947), *modified*, 273 App. Div. 760, 75 N.Y.S.2d 536 (1st Dep't 1947), it was held that the allegation of a specific foreign decree was evidentiary and should be stricken.

[49] See note 46 *supra*.

[50] See Busch, *Bills of Particulars of Foreign Law*, 125 N.Y.L.J. 836, col. 1 (Mar. 8, 1951); also referred to by the court in Estate of Hatchwell, 127 N.Y.L.J. 1164, col. 4 (Surr. Ct. Mar. 24, 1952).

[51] Haik v. Nebenzahl, 102 N.Y.L.J. 2336, col. 4 (Sup. Ct. Dec. 28, 1939); Georgas v. Nat. Bank of Greece, 100 N.Y.L.J. 2049, col. 5 (Sup. Ct. Dec. 9, 1938).

[52] Nachmann v. Bergdoll, 102 N.Y.L.J. 1732, col. 3 (Sup. Ct. Nov. 21, 1939).

[53] Leonor v. Ingenio Porvenir C. Por A., 262 App. Div. 992 (1st Dep't 1941). See also De Gorter v. Banque de France, 109 N.Y.L.J. 157, col. 2 (Sup. Ct. Jan. 13, 1943).

[54] N.Y. Civ. Prac. Act § 344-a(C).

[55] Kraus v. Kraus, 183 Misc. 667, 51 N.Y.S.2d 886 (Sup. Ct. N.Y. County 1944).

[56] Duboisky v. Duboisky, 118 N.Y.L.J. 1721, col. 5 (Sup. Ct. Dec. 12, 1947). See also Souers v. Flota Aerea, etc., 121 N.Y.L.J. 229, col. 4 (City Ct. Jan. 19, 1949).

Generally speaking, it seems well settled that an adverse party, despite the possible effect of judicial notice, is entitled to a bill of particulars. The bill may be granted, however, subject to the proviso that furnishing particular items concerning the foreign law will not limit the party supplying the particulars from establishing other and further provisions of foreign law.[57] And, the court while allowing particulars on foreign statutory law, may deny them in regard to decisional law.[58]

In the Federal courts where judicial notice is not taken for pleading purposes,[59] particulars of applicable statutes as well as of decisional law have been required.[60]

Presumptions Concerning Foreign Law

The power to notice judicially is unrestricted under the statute, but whether the court will exercise its broad authority to notice foreign law is clearly within its discretion. The Judicial Council, in its report recommending Section 344-a, emphasized that the statute was not intended to dispense with the need for proof,[61] and the courts have, generally speaking, exhibited a considerable degree of caution in determining the proper circumstances for the judicial notice of matters of foreign law. There has been, for example, the feeling that it would be basically inconsistent with our notions of a fair trial to interpret the statute as a mandate to the court to substitute its own researches on questions of foreign law for those of the parties and to intervene upon any occasion to supply proof of the law by judicial notice. There is some support for the proposition that Section 344-a should properly be used only to supplement evidence of the foreign law introduced by the parties themselves. *Arams v. Arams*,[62] one of the first cases interpreting the new statute, imported into its construction of Section 344-a the rule of former Section 391, that evidence of the law introduced by the parties is a condition precedent to the availability of judicial notice, and that the amendment becomes operative only when foreign law has been invoked by one of the parties and after an opportunity has been given to both parties to litigate the question of what the foreign law is:

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57 Cappel v. Vassen, 114 N.Y.L.J. 3, col. 1 (Sup. Ct. July 2, 1945).

58 Von Hofmannsthal v. Wolfe, 277 App. Div. 858, 98 N.Y.S.2d 215 (1st Dep't 1950)

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

60 Bernstein v. N.V. Nederlandsche, 11 F.R.D. 48, 49 (1951).

61 9 N.Y. JUDICIAL COUNCIL REP. 267, 272 (1943).

62 182 Misc. 328, 45 N.Y.S.2d 251 (Sup. Ct. N.Y. County 1943).

> Substantially, therefore, wherever, before the new section, a party was under the necessity of pleading and proving foreign law that same party now is under a like necessity, subject only to the qualification that the consequences of partial failure to prove such law may be mitigated, in the discretion of the court, by the court's supplementing the proof by its own researches.[63]

(It would seem that this proposition, although phrased in absolute terms, can best be given effect by interpreting it as a principle of discretion rather than as a rule of law. Taken as a limitation on the power to judicially notice, it seems contrary to the wording of Section 344-a.)

Similarly, in *Matter of Mason,*[64] where the defendant, contending that the contract on which the plaintiff based his claim was invalid under the law of Italy, asked that judicial notice be taken "of such Italian law as may be applicable," the court replied:

> Under Section 344-a of the Civil Practice Act, the court in its discretion may take judicial notice of foreign law but there seems to be no occasion for independent research by the court when the parties themselves do not indicate in any manner the law upon which they rely. The Italian restrictions, if any apply to this transaction, are disregarded because not shown.[65]

A further consideration is, of course, the convenience with which the court may acquaint itself with the foreign law and the probability that it may make an accurate determination of it without argument. Although the foregoing opinions indicate that the court may be more favorably inclined to take judicial notice of certain matters of foreign law when the parties have introduced their own proof, the question whether the court will judicially notice or not is still completely discretionary. It seems clear that in many cases there will be a justifiable feeling by the court that an adequate and fair decision on the issue of the foreign law can be had only by requiring the parties to sustain their burden of proving the foreign law as part of their case. Especially

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[63] *Id.* at 331, 45 N.Y.S.2d at 254.

[64] 194 Misc. 308, 86 N.Y.S.2d 232 (Surr. Ct. N.Y. County 1948).

[65] *Id.* at 310, 86 N.Y.S.2d at 234. The danger of relying upon judicial notice without supplying satisfactory proof of the foreign law can also be gleaned from the cryptic statement made by the court in Pacios v. Frank & Moloney, Inc., 109 N.Y.S.2d 805 (Sup. Ct. N.Y. County 1951), *aff'd,* 279 App. Div. 1057, 113 N.Y.S.2d 283 (1st Dep't 1952): "The proof with respect to the Argentine law was skimpy and the court is in doubt as to what it is." 109 N.Y.S.2d at 808. See also Valentine v. Valentine, 109 N.Y.S.2d 466 (Sup. Ct. Kings County 1951), *rev'd on other grounds,* 280 App. Div. 795, 112 N.Y.S.2d 879 (2d Dep't 1952); Estate of Feiner, 122 N.Y.L.J. 1746, col. 1 (Surr. Ct. N.Y. County Dec. 22, 1949); Taubenfeld v. Taubenfeld, 122 N.Y.L.J. 1212, col. 4 (Sup. Ct. Nov. 14, 1949); *Cf.* Eisler v. Soskin, 272 App. Div. 894, 71 N.Y.S.2d 682 (1st Dep't 1947), *aff'd mem.,* 297 N.Y. 841 (1948).

is this so where the principles involved are derived from the unfamiliar jurisprudence of a civil law country. In *Berg v. Oriental Consolidated Mining Co.*,[66] for example, the plaintiff claimed ownership under a Swiss contract, and therefore was required to show that he had acquired title under Swiss law. The court, in determining the question, observed that the plaintiff's proof was incomplete and fell short of establishing his ownership, and refusing to take judicial notice of any further Swiss law, dismissed the complaint.

Assuming then that foreign law is relevant, but that the court has refused to take judicial notice of the foreign law and has required proof, what are the consequences of the parties' failure to adduce proof?

In the first instance, of course, the court may dismiss the case simply for the reason that the party relying on foreign law, not having introduced any proof of the law, has failed to make out his case.[67] The courts, however, have recognized the often harsh results that follow from a dismissal and have attempted to mitigate the burden of proving foreign law by the use of various devices, all of which have the one feature in common of substituting, with varying degrees of conclusiveness, the law of the forum for the foreign law.

It is frequently stated that presumptions should be indulged in by the court where no evidence has been adduced regarding the laws of a foreign jurisdiction. Where, for example, the legal systems of the forum and the foreign jurisdiction have both originated from the common law, the court may presume that the foreign jurisdiction still adheres to the common law and that it is the same as the common law of the forum.[68] The effect of this presumption is to relieve the party having the affirmative of the issues on the merits from pleading and proving the foreign law as a fact in order to establish a prima facie case: through the aid of the presumption the foreign law is introduced into the case by the plaintiff's showing what the domestic law is. As a result, an immediate dismissal of the suit is avoided. Although this is ordinarily a desirable outcome, it should be apparent that this presumption of similarity is often less satisfactory than actual proof of the foreign law and that as a matter of safest approach, every

[66] 70 N.Y.S.2d 19 (Sup. Ct. N.Y. County 1947).

[67] Cuba R.R. v. Crosby, 222 U.S. 473 (1912).

[68] Read v. Lehigh Valley R.R., 284 N.Y. 435, 31 N.E. 891 (1940); Cherwien v. Geiter, 272 N.Y. 165, 5 N.E.2d 185 (1936); International Text Book Co. v. Connelly, 206 N.Y. 188, 99 N.E. 722 (1912); Crashley v. Press Pub. Co., 179 N.Y. 27, 71 N.E. 258 (1904); Hopkins v. Amtorg Trading Co., 265 App. Div. 278, 38 N.Y.S.2d 788 (1st Dep't 1942); Smith v. Compania Litografica, 127 Misc. 508, 217 N.Y. Supp. 39 (1926), *aff'd*, 220 App. Div. 782 (2d Dep't 1926).

effort should be made from the beginning to prove foreign law and not to rely on presumptions. The presumption, in the first place, deals only with the common law, and generally takes no account of statutory changes that may have occurred in the forum or in the foreign jurisdiction.[69] Furthermore, it may only postpone the time when the plaintiff will be required to introduce proof of the foreign law or lose his case. The presumption aids the plaintiff in establishing only a prima facie case, and the defendant is free to show that the foreign law is different from that of the forum.[70] If he succeeds in rebutting the presumption, therefore, the plaintiff will be compelled to prove that he is entitled to recover under the foreign law or fail.

The presumption of similarity furthermore does not commonly exist with respect to states or countries that administer the civil law;[71] if in such a case the party relying on the foreign law fails to prove it, and the court does not take judicial notice, the case must be dismissed. *Cuba Railroad v. Crosby*[72] is a frequently cited authority for this proposition. In the *Crosby* case, an employee had sued his employer to recover for injuries sustained as a result of an accident that took place in Cuba. No evidence was given at the trial regarding the Cuban law, but the jury was charged on the law of the forum, the trial judge stating that if the Cuban law was different from the *lex fori,* it was for the defendant to allege and prove it.

In an opinion by Mr. Justice Holmes, the Supreme Court reversed the judgment recovered by the plaintiff, holding in effect that the Federal Courts cannot assume, without proof, that the law of Cuba is the same as the law of the forum. The opinion states that the law of Cuba was based upon the law of Spain, and that there is no general presumption that that law is the same as the common law.

Mr. Justice Holmes dismissed the suggestion that hardship in requiring the plaintiff to prove the law of Cuba had been overlooked, by stating

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69 Miller v. Vanderlip, 285 N.Y. 116, 123, 33 N.E.2d 51, 55 (1941); First Nat. Bank v. Nat. Broadway Bank, 156 N.Y. 459, 472, 51 N.E. 398, 402, 42 L.R.A. 139, 147 (1898); Cutler v. Wright, 22 N.Y. 472 (1860); Venner v. N.Y. Cent. & Hudson River R.R., 160 App. Div. 127, 133, 145 N.Y. Supp. 725, 730 (3d Dep't 1914), *aff'd,* 217 N.Y. 615, 111 N.E. 487 (1916).

70 Weissman v. Banque de Bruxelles, 254 N.Y. 488, 495, 173 N.E. 835 (1930); Matter of Marchant v. Mead-Morrison M. Co., 252 N.Y. 284, 303, 169 N.E. 386, 392 (1929); International Text Book Co. v. Connelly, 206 N.Y. 188, 201, 99 N.E. 722, 727 (1912).

71 Russell v. Societe, 242 App. Div. 801 (1933); *aff'd,* 268 N.Y. 173, 197 N.E. 185 (1934); Savage v. O'Neil, 44 N.Y. 298 (1871); Matter of Masocco v. Schaaf, 234 App. Div. 181, 254 N.Y. Supp. 439 (3d Dep't 1931); SCHLESINGER, COMPARATIVE LAW—CASES AND MATERIALS 129, 134 (1950).

72 222 U.S. 473 (1912).

that, "The only just ground for complaint would be if [the parties'] rights and liabilities, when enforced by our courts, should be measured by a different rule from that under which the parties dealt."[73]

The New York Court of Appeals took the same position in *Riley v. Pierce Oil Corporation*,[74] when it refused to permit recovery in a conversion action—the property in question being located in Mexico—no proof having been supplied of the law of Mexico. The court held that whether the plaintiff possessed the requisite title or right to possession depended on the law of Mexico, and that it could not pass upon the question in the absence of proof of that law.

Another presumption sometimes employed is that rudimentary contracts or torts—a promise to pay for goods or a battery, for example—create a liability in any civilized country and that if an obligation of this nature should initially be governed by foreign law, the court may nevertheless enforce it in the absence of proof of that law by applying universal rules or principles of justice presumed to be recognized by the courts of all nations:[75] for example, that contracts are enforceable or that there may be a recovery for intentional injuries to person or property. This presumption is equally applicable whether the foreign jurisdiction has a common law or civil law jurisprudence, but it often becomes a question of some difficulty to determine what is elementary enough to be deemed universally recognized. In *Cuba Railroad v. Crosby,* for example, the court held that there could be no presumption that the detailed rules of master and servant were fundamental to the jurisprudence of all civilized countries.

As another means of curing the omission of the parties to prove the laws of another forum, some courts, without the application of presumptions, have simply administered the law of their own jurisdictions, with the explanation that, in the absence of proof, that is the only law before the court.[76] A variant of this theory is that adopted by the New Jersey Supreme Court in *Leary v. Gledhill*[77]—that the failure of the parties to prove foreign law raises a presumption that they have acquiesced in the application of the law of the forum.[78]

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[73] *Id.* at 480.

[74] 245 N.Y. 152, 156 N.E. 647 (1927).

[75] Parrot v. Mexican Cent. Ry., 207 Mass. 184, 93 N.E. 590 (1911); Arams v. Arams, 182 Misc. 328, 45 N.Y.S.2d 251 (Sup. Ct. N.Y. County 1943).

[76] Bayer v. Lovelace, 204 Mass. 327, 90 N.E. 538 (1910).

[77] 8 N.J. 260, 84 A.2d 725 (1951).

[78] Citing 67 L.R.A. 33, 34 L.R.A. (N.S.) 261, and Sturm v. Sturm, 111 N.J. Eq. 579, 587, 163 Atl. 5, 8-9 (1932). The presumption is also espoused by Professor Nussbaum in 50 YALE L.J. at 1040 (1941).

The *Leary* case involved an action to recover an alleged loan made by plaintiff to defendant in France. In accordance with the pre-trial procedures now in effect in New Jersey, the issue as stated in an amended pre-trial order was limited to whether the money given by the plaintiff to defendant was a loan or an investment in a business venture. At the end of the plaintiff's case and at the end of the entire case, defendant moved for a dismissal because there had been no pleading or proof of the law of France, where the transaction occurred.

The trial court denied both motions, not on the theory of judicial notice since the New Jersey Statute contains no authorization for judicial notice of the laws of *foreign countries*,[79] but rather on the presumption that the law involving loans is the same in France as in other civilized countries, and also because no issue with respect to the law of France had been set forth in the pre-trial order. Judgment was entered for the plaintiff.

In affirming the judgment, the New Jersey Supreme Court, while recognizing the dictum of Mr. Justice Holmes in *Cuba R.R. v. Crosby*[80] that a presumption may exist that all civilized countries recognize that obligations and liabilities may arise under certain basic and fundamental transactions and acts, preferred to substitute the theory of acquiescence for a presumption. The presumption that the law of the foreign jurisdiction like all civilized countries recognizes fundamental principles had, the court observed, decided limitations:

> . . . in many cases it would be difficult to determine whether or not the question presented was of such a fundamental nature as reasonably to warrant the assumption that it would be similarly treated by the laws of all civilized countries.[81]

The presumption of acquiescence in the law of the forum, on the other hand, Chief Justice Vanderbilt wrote, does not involve such difficulties since it can be applied without regard to the nature of the transaction.

The *Leary* decision, however, is colored somewhat by the special facts of the case, and the court recognized that cases might arise in which it would be unreasonable for a court to indulge in any presumption as an alternative to requiring proof of the applicable foreign law.[82] Especially significant is the fact that the pre-trial order foreclosed the defendant from raising issues of French law. In deciding that the parties

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79 N.J. STAT. ANN. § 2.98-28 (1951).

80 222 U.S. 473 (1912); see also Gerli & Co. v. Cunard S.S. Co., 48 F.2d 115 (2d Cir. 1931).

81 8 N.J. at 269, 84 A.2d at 730.

82 8 N.J. at 269, 84 A.2d at 730.

could fairly be presumed to have acquiesced in the application of the law of New Jersey the opinion states:

> The defendant is in no way prejudiced by the application of the law of this State. If he had desired to raise an issue as to the foreign law, he might have done so in his answer or at the pre-trial conference or, with permission of the court, at the trial itself, and himself have introduced proof as to the law of France.[83]

In summary, then, it would appear that in most instances and where exceptional circumstances do not prevail, a party relying upon foreign law should be prepared by his pleadings and his proof to establish the foreign law upon which he relies at the trial. The court in the first instance, may refuse, in the sound exercise of its discretion, to take judicial notice of foreign law. In such a case, the rules that developed when proof of the law in all cases was required will apply: the party having the affirmative of the issues on the merits will be required to introduce his proof of the foreign law and to sustain his burden of proving it or be defeated, unless he can be aided by any of the presumptions discussed above. In view of the fact that the presumptions available to the court may afford only temporary relief from proving the foreign law, and may, even if they are successful, result in an objectively incorrect result because of the substitution of the law of the forum, it would appear that the safest approach is to be ready with proof.

II. The Proof of Foreign Law

Formal Proof as the Safest Approach in Practice

Section 344-a of the Civil Practice Act "obviously . . . is permissive, not mandatory," as the Court of Appeals stated in *Pfleuger v. Pfleuger;*[84] hence, a trial court may request more or less formal proof of the law in question. It would seem, as the foregoing discussion shows, that the practitioner should be prepared from the beginning to prove as much of the case as possible by the statutory and common law methods. A trial judge cannot be expected to state that he is satisfied with the proof to be offered until the completion of the proof; by that time it may be too late for counsel to attempt to secure additional evidence.

Wherever possible, statutes, decrees or decisions of another state or country should be shown by publications or books purporting or proved to have been published by the authority of those jurisdictions, or proved to be commonly admitted as evidence of the existing law in their judicial

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[83] *Id.* at 270, 84 A.2d at 730. The case is criticized in Note, 37 Cornell L.Q. 748 (1952).
[84] 304 N.Y. 148, 152, 106 N.E.2d 495, 496 (1952).

tribunals.[85] Copies of foreign court records, proceedings and documents, should be certified and authenticated in the manner prescribed by statute.[86]

Documents in foreigu languages should be translated and the sworn translation should be offered in evidence, together with the original foreign document from which it was taken. Since disputes may arise concerning the accuracy of the translation in general or concerning particular passages, it is advisable to have available or in attendance at the trial the translator, or some other person versed in the foreign language, to serve as a witness in support of the translation offered in evidence.

In most civil law countries, judicial precedents do not have the same controlling force that they have in our country, and the courts of those civil law countries are guided by the statute itself and commentaries on it written by the leading legal writers.[87] These commentaries are, therefore, an important method of proving the law of civil law countries and should be offered in evidence, with translations, in the same fashion as statutes and decisions. While the intrinsic force of the argument or views of the writer of the commentary will appear from the writing itself, the prestige of the author will not, and it is advisable in such cases to prove the reputation and standing of the author.

All of the foregoing discussion is, of course, as pertinent to motion practice (where proof of foreign law is required) as it is to a trial itself. For the main part, however, courts are reluctant to decide issues of foreign law on a motion. They usually hold that the effect of foreign laws must be established on a trial.[88]

The Use of Official Declarations

In most continental countries, the departments dealing with the administration of justice, and similar governmental agencies, enjoy a position

85 N.Y. CIV. PRAC. ACT § 391. The proof of the foreign document itself under the Civil Practice Act is discussed in Butler, *Proving Foreign Documents in New York,* 18 FORD. L. REV. 49 (1949).

86 N.Y. CIV. PRAC. ACT §§ 395-398.

87 SCHLESINGER, COMPARATIVE LAW—CASES AND MATERIALS 23 (1950).

88 Werfel v. Zivnostenska Banka, 287 N.Y. 91, 38 N.E. 382 (1941), is frequently cited for the proposition that foreign law is a question of fact. See also Zitreen v. Zitreen, 128 N.Y.L.J. 184, col. 6 (Sup. Ct. Aug. 1, 1952; citing Valentine v. Valentine, 109 N.Y.S.2d 466 (Sup. Ct. Kings County 1951), *rev'd on other grounds,* 280 App. Div. 795, 112 N.Y.S.2d 884 (2d Dep't 1952). In Stephen v. Zivnostenska Banka, 128 N.Y.L.J. 1574, col. 7 (Sup. Ct. Dec. 23, 1952), the matters raised on motion were referred to a referee to determine the "applicable law of the foreign state." On the other hand, motions for summary judgment involving foreign law were decided in Albert v. McGrath, 104 F. Supp. 891 (S.D. Cal. 1952); Credito Italiano v. Rosenbaum, 246 App. Div. 687 (1st Dep't 1935); Goldman v. Mulligan, 128 N.Y.L.J. 866, col. 7 (Sup. Ct. Oct. 20, 1952).

considerably different from our own administrative bodies that are entrusted with the enforcement of the law. These continental agencies frequently are called upon to pass judgment, *ex parte,* on legal problems and to issue opinions in support of their determinations. It is quite common, therefore, for a litigant in an American court to procure so-called official declarations or certificates from a foreign country on the basis of facts submitted by him.

It might at first blush appear that the use of these certificates would be an admirable means of proving foreign law: it is comparatively inexpensive, and the declarations are issued by the very country whose laws are in question. Closer scrutiny of the problem, however, indicates considerations that compel reluctance in the acceptance of such "official" declarations or certificates.

In the first place, not all the facts may have been placed at the disposal of the author of the certificate; nor is he available for questioning by the court or the parties concerning what facts motivated his conclusions. Furthermore, the qualifications of the writer, his studies, prestige, and sources—factors that are the very touchstone of expert testimony—are not before the court. Also, since these declarations are usually issued in a foreign langnage, disputes on translations cannot be settled by questioning the author about what he really means to say.

A further reason for questioning "official" declarations arises from the fact that their inspiration may not be impartial. With the growth of nationalization[89] and the increased appearance in our courts of nationalized entities as litigants, there are increasing instances where the source of the official certificate is hardly distingnishable from the litigant who supplies the certificate. As has been stated:

> Interpretation of foreign law by officials of the foreign country has been permitted, but what seems objectionable is to give decisive value to the interpretation of expropriation decrees by the expropriating governments themselves. . . .[90]

The notable instance in which official declarations have been admitted and used as the basis for the decision of the court is, of course, *United States v. Pink.*[91] In that case the Supreme Court of the United States relied upon a certificate of a Commissar of the Soviet Union—which

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89 An interesting commentary upon the increase in nationalization and its effect is contained in 1 INT'L AND COMP. L.Q. 14 (1952).

90 Domke, *Some Aspects of the Protection of American Property Interests Abroad,* 4 N.Y. CITY BAR ASS'N RECORD 268, 271 (1949).

91 315 U.S. 203 (1941).

was not part of the record before the trial court—in its quest for proof of Soviet law.[92] The case itself was argued on December 15, 1941, four days after we entered World War II as an ally of the Soviet Government. It is doubtful that the case would be decided in the same way if it were presented for determination today, nor is there sufficient ground for claim that precedent favors the adoption of such a practice.[93]

While no arbitrary rule should be laid down, since the interests of justice and unusual cases may indicate otherwise, it would nevertheless seem that proof of foreign law, by official declarations or certificates, should not be encouraged by the courts.

The Expert Witness and His Qualifications

In spite of the existence of foreign statutes, judgments, treatises and commentaries, or even of "official" declarations or certificates, irreconcilable conflict will frequently arise in bitterly contested proceedings. Such instances call for the opinions of experts in the foreign law involved. It would otherwise seem to be placing too much burden upon the court to expect it to determine the foreign law without other

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92 *Cf.* Egyes v. Magyar Nemzeti Bank, 165 F.2d 539 (2d Cir. 1948).

93 Nussbaum, *supra* note 7 at 1030: "But the civil law system of admitting statements by foreign governmental agencies does not seem to have been adopted in English or American courts."

A very able and brilliant comparative study of the proof of foreign law was written in 1908 by Dr. Ervin Doroghi, former Barrister-at-Law, Budapest, and former Professor of Law at the University of Budapest, and was presented at the 25th Conference of the International Law Association, held in Budapest. In general, this report also urges the adoption of a uniform procedure for ascertaining foreign law by the use of foreign governmental agencies. The report suggested that one court in each state be entrusted with the duty of delivering opinions upon the request of courts in foreign states or, in the alternative, the institution of separate commissions attached to the office of the Minister of Justice of the several states, with qualifications at least as high as those demanded by the state in question of its judges, which commissions were also to be charged with the duty of delivering opinions upon request, as mentioned. Doroghi, *The Authentication of Foreign Law in Court Procedure* in INT'L LAW ASS'N 25TH REP. 221 (1909). The inherent danger in having courts place full reliance upon certificates as to foreign law issued by foreign governmental agencies is touched upon to some extent in the criticism of the delegate Professor Baumgarten who stated:

> I am of the opinion that the issuing of certificates about law in general is a very dangerous procedure, and we should confine ourselves to issuing certificates as to acts or rules of law.

Id. at 259. The unsatisfactory quality of proof, which does not permit cross-examination, would justify the refusal of our courts to accept such certificates even as to "acts or rules of law," and would indicate that proof of such acts or rules would best be obtained through the testimony of an expert witness who can present himself for cross-examination and questioning by the court.

assistance when such situations arise. This need for expert testimony was indicated in the dissenting opinion in *Credito Italiano v. Rosenbaum:*

> We have then the irreconcilable opinions of two authorities on Italian law on a question on which the Italian courts appear to be divided. Under these circumstances, the question ought not to be decided by affidavit but by trial. It may be that on a trial the defendant will produce evidence by leaders of the Italian bar to the effect that such a note is unenforceable in Italy. The determination may depend not only on decisions by the Italian courts, which appear to be in hopeless contradiction, but upon the opinions of experts in Italian law whose standing and sincerity cannot be determined on such a motion as this.[94]

As this excerpt suggests, the use of the expert witness may frequently be essential; in all cases expert witnesses are desirable. All misunderstandings concerning facts, differences in translations, paths of reasoning and foundations for conclusions can be explored by direct and cross-examination in the presence of the parties, the court and the jury. The fullest compliance with every concept of fair play is possible in such events.

The practical consideration of expense, of course, weighs upon the decision to procure the expert witness, and in the past it was often difficult to locate one who was resident or available in this country. Recent world events have changed this situation considerably[95] and many former continental lawyers and students of foreign laws have now made their home on our shores.

The courts have been perplexed on occasions by the difference between the English Rule,[96] which requires an expert witness regardless of the clarity of foreign statutes involved, and the statements in old New York cases[97] that where the statute is plain, witnesses are not necessary. An illustration of the problem was presented by the recent decision in *Fusco v. Fusco,*[98] which involved the question of the validity of a marriage, which in turn depended upon the effect of a Royal Decree of Italy of November 17, 1938. A question arose whether the decree must speak for itself, or whether the court could accept the testimony

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94 246 App. Div. 687, 690, 284 N.Y. Supp. 177, 181 (1st Dep't 1935).

95 In March 1950, a report was submitted to the Association of the Bar of the City of New York, urging preparation of a list of lawyers in New York City, qualified to advise or testify concerning the laws of foreign countries. Although the usefulness of such a list was recognized, the proposal was not adopted, possibly because of the restrictive influence that such a list might have. N.Y. CITY BAR ASS'N REP. 1950, p. 252.

96 Sussex Peerage, 11 Cl. & Fin. 85, 115, 8 Eng. Rep. 1034, 1046 (1844).

97 See, *e.g.,* note 23 *supra.*

98 200 Misc. 1039, 107 N.Y.S.2d 286 (Sup. Ct. Onondaga County 1951).

of an Italian barrister regarding the construction to be given to it. The court, in admitting the testimony of the Italian barrister, stated:

> Defendant sought to question the applicability of this royal decree and sought to elicit from a witness, who had been admitted to and practiced as a barrister in the Kingdom of Italy, his interpretation as to the meaning and import of this Italian statute. This court received the evidence subject to a reservation to later strike it out. Wigmore (Vol. 7, 3d ed., § 1953) discusses the question. The English rule is liberal in this respect (*Baron de Bode's Case*, 8 Q.B. [A. & E.N.S.] 208, 265; Sussex Peerage Case, 11 Cl. & F. 115). What few American cases can be found are not in accord. In a somewhat recent New Jersey case (Max v. Max, 123 N.J.L. 580, 589 [10 A.2d 163, 167] [1940]) the court received the testimony of a New York attorney relative to his opinion as to the meaning of a statute of the State of New York. The logical conclusion would be, it seems to me, that a court could properly admit a witness to construe a foreign statute, provided the witness is properly qualified, to aid the court to the extent the court saw fit to accept such interpretation. In the instant case this court, therefore, denies plaintiff's motion to strike out the evidence, with an exception noted.[99]

The fact that in many of the cases the witness was a barrister duly admitted to practice in the courts of the foreign country involved might serve to confuse situations arising in the future, where explanations of foreign statutes are sought to be elicited from witnesses who are *not* practicing lawyers of the foreign jurisdiction. Any implications that the testimony only of attorneys admitted to practice in the foreign jurisdiction is acceptable on the issue of the laws of that jurisdiction, would be unfortunate. Such a narrow concept is not only inconsistent with Section 344-a, but also with the common law.

An impression in accord with this narrow concept has arisen, however, as a result of hasty interpretation of the language used by Circuit Judge Frank in *Usatorre v. The Victoria*.[100]

In that case—an action in admiralty for salvage with respect to a derelict vessel flying the Argentine flag and owned by an Argentine corporation—the court held that the issues should be determined by Argentine law. The expert witness who testified with respect to the Argentine law was an American lawyer, a member of the Bars of New York, Cuba, and Puerto Rico, who had studied Argentine law and who was the author of a digest of that law.

The court, in commenting upon the fact that the expert witness cited no decisional law, but merely gave his interpretation of "uncited commentators' interpretations of the Code" of Commerce of Argentine, stated that:

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[99] *Id.* at 1041-42, 107 N.Y.S.2d at 287-88.

[100] 172 F.2d 434 (2d Cir. 1949).

> The judge is not bound to accept the testimony of a witness concerning the meaning of the laws of a foreign country, *especially when, as here, the witness had never practiced in that country.*[101] (Emphasis supplied).

Judge Frank was undoubtedly discussing only his reasons for not accepting the testimony of the expert witness, a matter that was entirely in his discretion,[102] and the opinion should not be construed as touching upon the competency of the testimony. In any event, whether a witness has ever practiced in the country of whose laws he purports to be an expert, is hardly a conclusive consideration. The testimony of the expert witness is merely opinion, and the true test of its value has been stated by Judge Cardozo as follows: ". . . opinion has a significance proportioned to the sources that sustain it."[103] Measured by the above standard, the question of previous practice of the expert may become quite irrelevant.

An examination of available English and New York cases on the subject indicates persuasive precedent for the conclusion that expert witnesses on foreign law need not be members of the Bar of the foreign jurisdiction with respect to which the testimony is given, and indeed, need not even be lawyers. Professor Wigmore[104] accepts as the law of England the rule laid down in the *Sussex Peerage* case, that foreign law must be proved by calling an expert witness, and not by producing merely the copy of the statute or legislative text,[105] and that besides professional persons, individuals of any occupation that enabled them to acquire special knowledge of legal topics may be *"listened"* to upon those topics.[106] Professor Cheshire[107] also states the English rule that foreign law is a matter of opinion and must, therefore, be proved by an expert.

The practicing lawyer in the particular legal system is not exclusively

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101 *Id.* at 438, 439.

102 See Matter of Masocco v. Schaaf, 234 App. Div. 181, 185, 254 N.Y. Supp. 439, 445 (3d Dep't 1931), where the court stated: "The attempted interpretation of the statute by the appellants' witnesses is not controlling. The statute being in evidence, its construction was for the court." Bank of China v. Morse, 168 N.Y. 458, 61 N.E. 774 (1901). See also cases cited and discussed in O'Rourke v. Cunard S.S. Co., 169 App. Div. 943, 154 N.Y. Supp. 29 (2d Dep't 1915). Further discussion on this subject *infra.*

103 Petrogradsky M.K. Bank v. Nat. City Bank, 253 N.Y. 23, 35, 170 N.E. 479, 483 (1930).

104 7 WIGMORE, EVIDENCE § 2090-a (2d ed. 1940).

105 Citing also 2 TAYLOR, EVIDENCE § 1525 (12th ed. 1931); see also Lozard Bros. & Co. v. Midland Bank, [1933] A.C. 289; Beatty v. Beatty, [1924] 1 K.B. 807, 814; Nelson v. Bridport, 8 Beav. 527, 50 Eng. Rep. 207 (1845).

106 2 WIGMORE, EVIDENCE § 564 (3d ed. 1940), also referring to precedent to the contrary; see also 3 *id.* § 690.

107 CHESHIRE, PRIVATE INTERNATIONAL LAW 171 (3d ed. 1947).

regarded as a competent witness in England, according to Cheshire, and an individual is regarded as qualified to testify upon the law of the particular foreign jurisdiction if the occupation, calling or position of the witness indicates that he has acquired a practical working knowledge of the foreign law.[108]

As early as 1611, in *Anonymous* case, the English court stated:

> . . . if at the common law one matter comes in question upon a conveyance, or other instrument made beyond sea: according to the course of the civil law, or other law of the nations where it was made; the *Judges ought to consult with the civilians or others which are expert in the same law;* and according to their information, give judgment, though that it be made in such form, that the common law cannot make any construction of it.[109] (Emphasis supplied).

In the case of the *Sussex Peerage,* which seems to have established the method of proof of foreign law in England, a bishop of the Roman-Catholic Church was permitted to give testimony concerning the matrimonial law of Rome, on the ground that the performance of his official duties required a knowledge of such law. Further examples of the same rule have multiplied in the years since the foregoing cases.[110] In other words, the court may listen to any source of testimony indicating knowledge or acquaintance with the foreign law, since the quality of the testi-

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108 *Ibid.*

109 ("Admiral Court"), 2 Brownl. 16, 17, 123 Eng. Rep. 789 (1611).

110 In Vander Donckt v. Thellusson, 8 C.B. 812, 137 Eng. Rep. 727 (1849), the Belgian law of promissory notes was proved through the testimony of a native of Belgium who had formerly been a commissioner of stocks in Brussels (but at the time of his testimony was a hotel-keeper in London), on the theory that his occupation in Belgium had enabled him to become skilled in mercantile law.

In the case of The Goods of Dost Aly Khan, 6 P.D. 6 (1880), it was shown that there were no professional lawyers in Persia, but that all diplomatic officials of Persia were required to become versed in the law of that land, and upon that foundation, the testimony of a secretary of the Persian Embassy was admitted with regard to the law of Persia.

In Brailey v. Rhodesia Consolidated, Ltd., [1910] 2 Ch. 95, a Reader in Roman Dutch Law to the Council of Legal Education, who had made a special study of the laws of Rhodesia for the purposes of lectures, was permitted to testify as to Rhodesian law.

In Wilson v. Wilson, [1903] P. 157, an English barrister, who had researched the marriage laws of Malta in connection with matters relating to his practice, was permitted to testify as to such laws on the issue of the validity of a marriage solemnized on that island.

In The Goods of Whitelegg, [1899] P. 267, the testimony with respect to the laws of Chile was obtained from an English solicitor who, while never a practicing lawyer in Chile, had, as a result of his practice, acquired skill and experience in connection with the laws of that country.

In the case of De Beéche v. South American Stores, [1935] A.C. 148, involving a bill of exchange given in Chile, the court preferred the testimony of a London bank director with many years of banking experience in South America, to that of a young lawyer who had been a member of the Chilean Bar for only 4 years.

mony will determine the issue, and not the qualifications of the witness. Moreover, the court, which is solely responsible for determining the question of foreign law, will take both factors into consideration.

The New York cases are substantially in accord and establish the principle that a layman or a jurist of another country may testify with respect to the laws to be proved, upon a showing of familiarity with those laws.[111]

Decisions may be found in other jurisdictions that are also in accord with this proposition. In Connecticut[112] and in the Federal Court of Claims[113] it has been held that study alone may qualify the witness to testify upon the law with which he has familiarized himself, and an Ohio court has stated that the fact that a witness is not well qualified to give opinion evidence affects the weight and not the admissibility of his evidence.[114] The California Code of Civil Procedure requires merely that the witness be skilled in the foreign law.[115]

The New York decision of *Kirsten v. Chrystmos*[116] sometimes cited for the proposition that the opinion of a layman cannot be accepted on questions of law, is not authoritative upon that issue. That case involved a motion for summary judgment in which the opinion of the layman with respect to New Jersey law was submitted in affidavit form and stated only that he was advised with respect to the law in question, without giving the source of his advice and not otherwise showing knowledge of any kind with respect to the laws of New Jersey.

111 Kenny v. Clarkson, 1 Johns. 385, 393, 3 Am. Dec. 336 (N.Y. 1806). See also Chanoine v. Fowler, 3 Wend. 173, 177 (N.Y. 1829); Wottrich v. Freeman, 71 N.Y. 601, 602 (1877); Matter of Masocco v. Schaaf, 234 App. Div. 181, 184-5, 254 N.Y. Supp. 439, 443-4 (3d Dep't 1931), citing American Life Ins. Co. v. Rosenagle, 77 Pa. 507 (1875); Vander Donckt v. Thellusson, 8 C.B. 812, 137 Eng. Rep. 727 (1849); Lacon v. Higgins, 3 Stark. 178, 171 Eng. Rep. 813 (1822); and Hecla Power Co. v. Sigua Iron Co., 157 N.Y. 437, 52 N.E. 650 (1899). (In the latter case it does not appear from the opinion whether the witness was an attorney and, in addition, the testimony was received without objection). To the same effect see Reilly v. Steinhart, 161 App. Div. 242, 146 N.Y. Supp. 534 (1st Dep't 1914), *reversed on other grounds,* 217 N.Y. 549, 112 N.E. 468 (1916); Johnston v. Compagnie Generale Transatlantique, 242 N.Y. 381, 152 N.E. 121 (1926). A more recent example is indicated by *In re* Schneiders Estate, 198 Misc. 1017, 96 N.Y.S.2d 652 (Surr. Ct. N.Y. County 1950), on reargument 100 N.Y.S.2d 371 (1950), which involved an application of Swiss law where testimony on behalf of the prevailing party was given by an expert who had given much study to Swiss law, but who had never practiced in any of the courts in that jurisdiction.

112 Barber v. Int'l Co. of Mexico, 73 Conn. 587, 48 Atl. 758 (1901).

113 Dauphin v. United States, 6 Ct. Cl. 221 (1870).

114 Cincinnati Street Ry. v. Hickey, 29 Ohio App. 399, 163 N.E. 310 (1928).

115 Cal. Code Civ. Proc. § 1902 (Deering 1949).

116 14 N.Y.S.2d 442 (Sup. Ct. Kings County 1939).

In the last analysis, the control of any proceeding and the witnesses that testify therein is left to the discretion of the court, but it would appear to be an abuse of that discretion under modern standards[117] to reject any proffered witness on foreign law, save only in flagrant instances demanding such course. The practitioner should not, of course, abuse these privileges, nor should he be denied such rights because his witness, a student of foreign law, is not a practicing lawyer in the foreign jurisdiction. The weight to be attached to the testimony, that is offered, is, after all, solely the responsibility of the court, which, as the next subdivision indicates, may disregard it in its entirety, if it so chooses.

The Court Determines Questions of Foreign Law

When the evidence is in the foreign law that has been proved as fact assumes a new role and becomes law:

> It is true that foreign law is ordinarily proved as a fact, still it is not in its essential nature a fact any more than domestic law is a fact.[118]

By precedent and by statute, the court must ascertain and determine this law and where a jury trial is involved, must charge the jury accordingly. The responsibility of determining the foreign law is placed squarely upon the court by Subdivision B of Section 344-a of the Civil Practice Act, which states that whether the law is judicially noticed or formally proved,

> . . . such law shall be determined by the court or referee and included in its findings, or charged to the jury as the case may be.

This provision is actually a restatement of principles earlier enunciated by the New York Court of Appeals on many occasions.[119] And the statute provides further that in determining a question of foreign

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[117] N.Y. CIV. PRAC. ACT § 344-a(C) permits the court to "consider any testimony . . . on the subject . . ." The suggestion has historical precedent, albeit with respect to witnesses of another kind. Learned Hand in *Historical and Practical Considerations Concerning Expert Testimony,* 15 HARV. L. REV. 40 (1901), quotes Lord Ellenborough in Beckwith v. Sydebotham, 1 Camp. 116, 170 Eng. Rep. 897 (1807) as follows: "Their opinion might not go for much; but still it was admissible evidence."

[118] Knickerbocker Trust Co. v. Iselin, 185 N.Y. 54, 58, 77 N.E. 877, 878 (1906).

[119] Fitzpatrick v. Int'l Ry., 252 N.Y. 127, 169 N.E. 112 (1921); Hanna v. Lichtenhein, 225 N.Y. 579, 122 N.E. 625 (1919); Bank of China *et al.* v. Morse, 168 N.Y. 458, 77 N.E. 877, 878 (1901).

English statutory law is to the same effect, as contained in the Supreme Court of Judicature Act 1925, where it is provided as follows:

> "Where it is necessary to ascertain the law of any other country which is applicable to the facts of the case, any question as to the effect of the evidence given with respect to that law shall, instead of being submitted to the jury, be decided by the judge alone."

law, the court is clearly deciding a question of law. Thus the court's determination without question is appealable.

A recent decision in the Appellate Division[120] is an interesting application of the principle that the court is to determine questions of foreign law. The issue involved was whether under Hungarian law, the plaintiff could recover a lump sum equivalent to future periodic pension installments allegedly due him. After hearing conflicting expert testimony on the subject, the trial court first submitted the question to the jury as an issue of fact. The jury found that the foreign law did not permit such a recovery, and that plaintiff was entitled to only annual pension payments. This determination was then overruled by the trial court upon the ground that under Subdivision B of Section 344-a, the court rather than the jury should decide questions of foreign law and the periodic payments were commuted to a lump sum. The Appellate Division approved both actions of the trial court.

From the mass of evidence, which may consist of codes, statutes, treaties, certificates, text-books, commentaries, monographs, treatises, periodicals, dictionaries and written opinions,[121] the American Judge is faced with the task of stating the foreign law. The original language of this testimony is usually in so technical a form as to defy understanding even by an educated layman of the foreign country in question, and the translations may be cumbersome and somewhat less than comprehensible.[122] The court will indeed have been fortunate if it had the benefit during the trial of oral testimony of an expert witness to answer the many questions that may arise in the American judicial mind concerning the meaning of foreign words, the background and prestige of the authors of commentaries, analogies in comparative law, the facts of cases cited as precedents and so many other frequent and difficult questions.

The expert will, of course, offer his personal opinion to support the side that has called him, and the court must evaluate the degree that partisanship has played in the giving of the opinion.[123] Justice

120 Sulyok v. Penzintezeti Kozpont, Budapest, 279 App. Div. 528, 111 N.Y.S.2d 75 (1st Dep't 1952), *modified on other grounds,* 304 N.Y. 704, 107 N.E.2d 604 (1952).

121 N.Y. CIV. PRAC. ACT § 344-a(C) states that where the foreign law is judicially noticed, ". . . the court may consider any testimony, document, information or argument on the subject. . . ."

122 Moses, *International Legal Practice,* 4 FORD. L. REV. 244 *et seq.* (1935).

123 The subject of natural bias was interestingly commented upon by Learned Hand in *Historical and Practical Considerations Concerning Expert Testimony,* 15 HARV. L. REV. 40, 53 (1901), where he stated:

> Enough has been said elsewhere as to the natural bias of one called in such matters to represent a single side and liberally paid to defend it. Human nature is too weak

will not be shackled by the mere rendition of the opinion; the latter must be sustained by sources and intrinsic merit:

> . . . it is entirely proper to ask an expert witness to state what in his opinion is the foreign law applicable to any given case. That is primarily the purpose for which the expert is called. The weight to be given to his opinion will, of course, depend upon the reasons he advances and the authorities he cites to sustain his conclusions.[124]

Precedent exists, as in the *Usatorre* case, for example, showing instances where expert testimony has been disregarded. In *Dougherty v. Equitable Life Assurance Soc'y*,[125] the court arrived at a conclusion wholly contrary to the opinions of the experts on both sides, approving the statement of the Trial Referee:

> Whatever witnesses called as experts may say, I must interpret the result of these decrees.[126]

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for that; I can only appeal to my learned brethren of the long robe to answer candidly how often they look impartially at the law of a case they have become thoroughly interested in, and what kind of experts they think they would make, as to foreign law, in their own cases.

[124] Reis v. N.Y. Trust Co., 136 Misc. 141, 143, 239 N.Y. Supp. 568, 571 (N.Y. City Ct. 1929). In Petrogradsky M.K. Bank v. Nat. City Bank, 253 N.Y. 23, 34, 170 N.E. 479, 483 (1930), the court stated:

> This does not mean, however, that the mere opinion of a witness will control the judgment of a judge except to the extent that it is a reasonable inference from statute or from precedent or from the implications of a legal concept, such as contract or testament or juristic personality.

It is interesting to note that Sections 212-225 of the Civil Practice Act of the Canton of Zurich, Switzerland, (Law Concerning Civil Proceedings), make provision for the use of experts in matters requiring specialized knowledge, including law. Although these experts are appointed by the judge, the parties make suggestions for their selection, and in no way is a judge bound by the testimony of the experts. The files in the case may be submitted to the experts in advance to prepare written opinions answering questions put to them by the judge. These opinions can be expanded and clarified by further opinions requested by the court or by oral examination, if the court feels it necessary. The foregoing is analogous to our own "Model Expert Testimony Act" which was recommended by the National Conference of Commissioners on Uniform State Laws as a Uniform Act and which was redesignated a "Model Act" in 1943. The act is designed to cover the need for expert testimony and to eliminate the evils of bias and partisanship. Its provisions authorize the court to select and summon expert witnesses for conferences, joint reports, or their personal examination on the subject matter. Another of the purposes of the act is to remove the objectionable features of hypothetical questions. Statutes which have similar effect have been enacted in California, Rhode Island and Wisconsin. CAL. CODE CIV. PROC. § 1871 (Deering 1949); R. I. GEN. LAWS c. 537, § 20 (1938); WIS. STAT. § 357.27 (1951).

[125] 266 N.Y. 71, 193 N.E. 897 (1934).

[126] *Id.* at 87, 193 N.E. at 902 (1934); *accord,* Moscow Fire Ins. Co. v. Bank of N.Y., 280 N.Y. 286, 20 N.E.2d 758 (1939); Bank of China *et. al.* v. Morse, 168 N.Y. 458, 61 N.E. 774 (1901); Matter of Masocco v. Schaaf, 234 App. Div. 181, 254 N.Y. Supp. 439 (1931). See also the cases cited and discussed in the opinion in O'Rourke v. Cunard Steamship Co., Ltd., 169 App. Div. 943, 154 N.Y. Supp. 29 (1915); A/S Tallinna Laevauhisus v. Estonian State S.S. Line, Ll. List L.R. 99, 108 (1947); Note, 49 YALE L.J. 324 (1940).

Should the Court Rely on Its Own Research

In most jurisdictions, the evidence of the foreign law will be confined to the actual record before the Court because of an absence of authority to take judicial notice of foreign law. The judge is confined to the material referred to by the expert, but he may examine the law in question to see if the expert's interpretation is proper.[127] In respect to foreign countries, this is even true, as already indicated,[128] in the approximately twenty-five states that have adopted the Uniform Judicial Notice of Foreign Law Act[129] because of the limitation of that Act to states, territories, and other jurisdictions of the United States.[130]

A question of considerable importance arises in such jurisdictions as Massachusetts, where it is compulsory that the court take judicial notice of foreign law of sister states and foreign countries,[131] and in New York where, under Section 344-a of the Civil Practice Act, an equal power is permissive.[132]

For example, Subdivision C of the New York Statute states that the court (trial or appellate) may consider sources *"discovered through its own research."*[133]

It would seem questionable, both as to propriety and efficacy, for a

127 Russian Commercial & Industrial Bank v. Comptoir d'Escompte de Mulhouse, [1923] 2 K.B. 630, 643. See the discussion in DiSora v. Phillipps, 10 H.L.C. 624, 636, 11 Eng. Rep. 1168, 1173 (1863).

128 See note 31 *supra*.

129 DEL. REV. CODE §§ 4696, 4697 (1935); FLA. STAT. ANN. § 92.031 (Cum. Supp. 1952); HAW. REV. LAWS §§ 9931—9934 (1945); ILL. STAT. ANN. c. 51, §§ 48g—48n (Smith-Hurd 1950); IND. STAT. ANN. §§ 2-4801—2-4807 (Burns 1946); KAN. GEN. STAT. ANN. §§ 60-2878—60-2880 (Cum. Supp. 1947); KY. REV. STAT. §§ 422.081—422.087 (1948); ME. REV. STAT. c. 100, §§ 135—140 (1944); MD. ANN. CODE, art. 35, §§ 56—62 (Flack 1952); MINN. STAT. ANN. §§ 599.05—599.10 (West 1947); MO. REV. STAT. §§ 490.070—490.120 (1949); MONT. REV. CODES ANN. §§ 93-501-1—93-501-8 (1947); NEB. REV. STAT. §§ 25-12,101—25-12,107 (1948); N.J. STAT. ANN. §§ 2A:82-27—2A:82-33 (1953); N.D. REV. CODE §§ 31-1003—31-1005 (1943); OHIO GEN. CODE §§ 12102-31—12102-37 (Cum. Supp. 1952); ORE. COMP. LAWS ANN. §§ 2-503—2-509 (1940); PA. STAT. ANN. tit. 28, §§ 291—296 (Cum. Supp. 1952); R.I. Acts and Resolves 1940, c. 939; S.C. CODE ANN. §§ 716-1—716-8 (Supp. 1948); S.D. CODE ANN. § 36.0702 (1939); TENN. CODE ANN. §§ 9773.1—9773.7 (Williams Cum. Supp. 1952); WASH. REV. CODE §§ 5.24.010—5.24.060 (1952); WIS. STAT. § 328.01 (1951); WYO. COMP. STAT. ANN. §§ 3-3109—3-3115 (1945).

130 Uniform Judicial Notice of Foreign Law Act §§ 1, 5, 9 U.L.A. 401, 408 (1951). Maryland has extended judicial notice to all common law jurisdictions outside as well as within the United States. See SCHLESINGER, COMPARATIVE LAW—CASES AND MATERIALS 125 (1950).

131 MASS. GEN. LAWS c. 233, § 70 (1932).

132 See 9 N.Y. JUDICIAL COUNCIL REP. 281 (1943) for rule in other states.

133 Where a matter of law specified in this section is judicially noticed, the court may consider any testimony, document, information or argument on the subject, whether the same is offered by counsel, a third party or discovered through its own research.

court to rely upon its own research in matters dealing with the law of foreign countries, except in special cases where the ends of justice compel that action.

The doubt concerning the propriety of a court's private research was very ably expressed by Mr. Justice Walter of the New York Supreme Court in *Arams v. Arams,* where he stated:

> . . . if cases now can be decided according to whatever law the judge sees fit to apply *and is able to discover by his own private researches, undisclosed to the parties,* then much that hitherto has been regarded as essential to the right to pronounce judgment—the raising of an issue determinable by reference to the law of a specified place, and an opportunity to know what the deciding tribunal is considering and to be heard with respect to both law and fact—would seem to have been abolished. I am unwilling to assume that a power so contrary to the plainest principles of fair-dealing and due process of law was intended or has been conferred.[134] (Emphasis supplied).

United States District Judge Charles E. Wyzanski, Jr., of the District of Massachusetts, expressed the same sentiments when he delivered the 1952 Benjamin N. Cardozo Lecture in New York City, entitled *A Trial Judge's Freedom and Responsibility* and stated:

> . . . when a judge has tended to reach his result partly on the basis of general information and partly on the basis of his studies in a library . . . it seems to me that the judge, before deriving any conclusions from any such extra-judicial document or information, should lay it before the parties for their criticism.[135]

The Model Code of Evidence of the American Law Institute envisions similar restraints, even though it deals with judicial notice of the common law and statutes of every jurisdiction of the United States.[136] Thus, Rule 804 provides:

> (1) The judge shall inform the parties of the tenor of any matter to be judicially noticed by him and afford each of them reasonable opportunity to present to him information relevant to the propriety of taking such judicial notice or to the tenor of the matter to be noticed.

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134 182 Misc. 328, 330, 45 N.Y.S.2d 251, 253 (Sup. Ct. N.Y. County 1943). The court cited Crowell v. Benson, 285 U.S. 22, 48 (1932); U.S. v. Abilene & So. Ry., 265 U.S. 274, 288, 289 (1924); I.C.C. v. Louisville & N. R.R., 227 U.S. 88, 93 (1913); Standard Oil Co. v. Missouri, 224 U.S. 270, 281 (1912); Reynolds v. Stockton, 140 U.S. 254, 264-66 (1891); Cohen v. City Company, 283 N.Y. 112, 117, 27 N.E.2d 803, 805 (1940); Jackson v. Strong, 222 N.Y. 149, 154, 118 N.E. 512, 513 (1917); Lamphere v. Lang, 213 N.Y. 585, 588, 108 N.E. 82, 83 (1915); Clapp v. McCabe, 84 Hun 379, 387-90, 32 N.Y. Supp. 425, 432-33 (2d Dep't 1895); *aff'd,* 155 N.Y. 525, 50 N.E. 274 (1898); followed in Berg v. Oriental Consolidated Mining Co., 70 N.Y.S.2d 19 (Sup. Ct. N.Y. County 1947).

135 7 RECORD OF N.Y. CITY BAR ASSOCIATION 280, 294, 295 (1952).

136 See SCHLESINGER, CASES AND MATERIALS ON COMPARATIVE LAW 124 (1950).

Aside from the conflict with fundamental concepts of fair play[137] and the right to cross-examination, there are other reasons why courts should not embark upon private research in the field of the law of foreign countries, especially civil law countries.

In the first instance, there are few complete foreign law libraries in this country,[138] and indeed in some jurisdictions[139] there are no collections of the decisions of its courts to which reference may be made, and the texts of its statutes can be found for the most part, in this country, only in the Congressional Library, Washington, D. C.

Then, too, there is a drastic difference in concepts and practice between the civil and the common law systems, and no uniformity necessarily in the civil law systems of the non-Anglo-American countries.[140] Moreover, the differences in language set a trap of the most treacherous type. Words that sound alike in two different languages may have different meanings,[141] and the same word may mean different

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137 Schoch, Book Review, 1 AM. J. COMP. L. 295, 297, 298 (1952):

. . . [T]he kind of evidence that American lawyers would regard as an equivalent of testimony obtained through examination and cross-examination by counsel, a procedure which they will always consider "the most effective method of arriving at the truth that man has devised".

Because I share this view, I find myself in disagreement with Professor Nussbaum on the subject of proof of foreign law (pp. 38-39). He favors the Swiss system which permits the judge to employ "any serviceable means of information" on foreign law. There may be room for some measure of elasticity in our procedure, although experience in New York has shown that the judges are well aware of the inherent limitations of "judicial notice" of foreign law, which Section 344-a of the Civil Practice Act authorizes. A Swiss judge may find no great difficulty in ascertaining a point of French or German law by an investigation of his own. But he will not get very far if he attempts to grope his way through American decisions, statutes, textbooks, and other legal materials. The common law method of testimony of witnesses may be "cumbersome" and "over-expensive" (which, incidentally, is a general criticism civil lawyers voice against American procedure); but it does not deserve to be graded "inadequate" in comparison with the haphazard ways by which civil law courts ascertain foreign law. While it is, of course, true that proof of foreign law cannot be treated exactly like proof of a fact, because it necessarily involves conclusions and opinions, yet I believe that oral testimony and cross-examination furnish an invaluable test of an expert's opinion. It rarely happens that all that is required in a case is the text of a statute or a code provision; as a rule, the applicability and interpretation of such texts and of court decisions applying them are disputed. "Opinions of renowned experts" submitted in writing, which are customary in Switzerland as in other civil law countries, seem a poor substitute for the viva-voce probings of an expert on the witness stand.

138 Nussbaum, 50 YALE L.J. at 1023.

139 Liechtenstein.

140 Moses, 4 FORD. L. REV. 244 (1935).

141 *In re* Zietz' Estate, 201 Misc. 580, 105 N.Y.S.2d 876 (Surr. Ct. N.Y. County 1951), *aff'd without opinion,* 280 App. Div. 919, 115 N.Y.S.2d 923 (1st Dep't 1952). Although not indicated in the opinion, the minutes of the trial show that a German domicile was sought to be proved for the decedent by introduction into evidence of a passport of the decedent which contained the phrase "domicileado actualmente en Berlin." The opinion of an expert witness familiar with the language was introduced to show that the correct translation of this phrase was "at the present time living in

things in different countries, although the language employed is the same.[142]

The restraints upon independent research by the trial court apply equally to the appellate court, and the few instances where appellate courts have relied upon their own research in foreign law were attended with compelling reasons in the interests of justice.

Thus in *Matter of Peart,*[143] the Appellate Division explained its action as follows:

> We could remit the proceedings to the Surrogate's Court to take testimony concerning the pertinent Virginia and Maryland law. In view of the small size of the estate, however, . . . we feel that in the interests of justice we should decide the new question raised on the basis of the cases submitted by counsel on this appeal, aided by our own independent although necessarily circumscribed research (Civ. Prac. Act, § 344-a; Graybar Elec. Co. v. New Amsterdam Cas. Co., 292 N.Y. 246).[144]

In view of the fact that the court's independent research related to the law of a sister state (Virginia), and not to the law of a foreign nation, the *Peart* case is doubtful authority for the proposition that in the absence of a stipulation or the consent of counsel, the court should independently determine for the first time on appeal questions relating to laws of foreigu nations, especially if they involve foreign languages. This is indicated by the fact that the Court of Appeals of New York in *Sonnesen v. Panama Transport Co.,*[145] where the issue of foreign law was first raised on appeal, reversed the lower court which had based its decision on the law of the forum, and ordered a new trial to enable the foreign law to be proved. The opinion, in that respect, reads as follows:

> We are not entitled to assume that the maritime law of Panama (a "civil law" country) is the same as ours, or as any part of ours (*Ozanic v. United States,* 165 F.2d 738, 744). Furthermore, we do not think this an appropriate case in which, under section 344-a of the Civil Practice Act, to take judicial notice of the foreign law. Since the trial was on an erroneous theory, we, in the interests of justice, order a reversal and grant a new trial as to the first alleged cause of action.[146]

Berlin." In other words, "domiciliado actualmente" means "temporary place of abode," not "actual domicile."

142 See note 140 *supra.* See also FLESCH, ART OF CLEAR THINKING 35 *et seq.* (1951), for an interesting discussion of the complexities in the translation and determining the meaning of foreign words.

143 277 App. Div. 61, 97 N.Y.S.2d 879 (1st Dep't 1950).

144 *Id.* at 63, 97 N.Y.S.2d at 881. See also Woodward's Appeal, 81 Conn. 152, 70 Atl. 453 (1908); Walker v. Lloyd, 295 Mass. 507, 510, 4 N.E.2d 306, 307-08 (1936); Saloshin v. Haule, 85 N.H. 126, 155 Atl. 47 (1931); Tarbell v. Grand Trunk, 96 Vt. 170, 118 Atl. 484 (1922).

145 298 N.Y. 262, 82 N.E.2d 569 (1948), *cert. denied,* 337 U.S. 919 (1949).

146 298 N.Y. at 267, 82 N.E.2d at 571.

III. Conclusion

The history of law indicates an ever progressive removal of legal restraints and limitations that might otherwise prevent the enforcement of rights and liabilities measured by the laws under which the parties dealt, even if those laws were enacted by foreign nations.

New statutory enactments, like Section 344-a of the New York Civil Practice Act, have liberalized the law of evidence and tend to dispense with certain formalities, formerly required by the law of evidence, regarding the manner in which the laws of foreign states or countries may be invoked and determined.

On the whole, while courts have acted with discretion and liberality in dealing with foreign law to avoid miscarriage of justice, prior rules respecting the pleading and proof of foreign law are still observed.

The task of ascertaining the foreign law, which is imposed upon the court, is made complex because of langnage difficulties, differences in theories and thought and lack of uniformity.

A way out of the dilemma would appear to be the use of an expert witness skilled in the foreign law. The criticism, that the expert's testimony may be broken down by skillful cross-examination, due to lack of knowledge of the English langnage and technical legal terms,[147] obscures the fact that since the court is in the last analysis responsible for finding the foreign law, and not the jury,[148] unfair use of cross-examination will have little effect upon the experienced judge. Perhaps the greatest assistance to the court is that the expert witness is present to offer translations and answer questions of the trial judge and of counsel.

This witness need not be a practicing attorney in the foreign jurisdiction, the laws of which are sought to be proved, but the weight to be given to the opinions expressed should be left to the court and should depend upon the qualifications and background of the expert, the reasons advanced and authorities cited.

In all fairness to the litigants, their right of cross-examination and their right to know what the deciding tribunal is considering, the court should not do independent research on questions of foreign law, nor should it accept "official" declarations or certificates concerning foreign law. The authority to do so, accorded by Section 344-a and other statutes, should be reserved for very unusual situations and solely in the interests of substantial justice.

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147 Hirschfeld, *Proof of Foreign Law*, 11 L.Q. Rev. 241-42 (1895); 9 N.Y. Judicial Council Rep. 283 (1943); Wood & Selick v. Compagnie Generale Transatlantique, 43 F.2d 941 (2d Cir. 1930).

148 Section 344-a(C).