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PROOF OF FOREIGN LAW IN TEXAS

by

A. J. Thomas, Jr.*

I. FOREIGN LAW AS FACT

A COURT of the forum, called upon by its principles of conflict of laws to apply the law of another state or nation because of a foreign fact element in the case before it, must make a determination of what that law is—its content and meaning. A legacy of the common law is the rule that law of a foreign country is fact, not law.¹ The mechanism for ascertaining the foreign law evolves from this rule, so that foreign law must be pleaded like any other fact, and it must be established by strict or formal proof as required by the law of evidence for the proof of any other fact.² Moreover, treating foreign law as fact means that it is decided by the trier of fact,³ and such a finding of fact is not subject to review by a court limited in its powers to questions of law only.⁴

Regarding the law of another state as fact, and thereby placing the burden of pleading and proof upon the litigants in accordance with courtroom laws of evidence pertaining to proof of fact, has been criticized as most cumbersome.⁵ Too, the notion has been advanced that there is no necessity for such unwieldy procedure, for just as the judge is duty-bound to know the law of his own state, he is also under a similar duty to know foreign law and can, therefore, make his own determination without such strict pleading and proof. In some European countries this conception has crystallized.⁶ In these jurisdictions the judge is obligated to know not only the law of the forum, but he must also know the foreign law in question, which he must ascertain through his own research efforts. To place upon the judge the responsibility to make his own determination of foreign law imposes upon him an onerous task. Not only must he for the most part deal with an alien legal system and

¹ See notes 47-50 infra, and accompanying text. It is interesting to note, however, that in the federal courts foreign law is not considered fact, subject to the rules of evidence, but rather it is deemed to be law, governed by the rules of procedure and reviewable on appeal. See Note on Judicial Notice of Law, 46 F.R.D. 205 (1969); Fed. R. Civ. P. 44.1.
² See notes 76-84 infra, and accompanying text.
⁵ Nussbaum, supra note 1, at 1019-20, summarizes the continental thought.
another language, which makes discovery difficult, but he will also usually encounter a scarcity of available source books.\textsuperscript{7} The supposition that a Texas judge would always find himself equipped with the wherewithal to make serious inquiry into a foreign legal system would be a doubtful one at best. Therefore, it would seem that the common-law English judges of an earlier time demonstrated a good deal of wisdom in their refusal to take judicial notice of foreign law. Reasons militating against judicial notice of the law of a foreign nation, however, become minimal, or at least diminished, when the law of a sister state is in issue. The foreign language problem disappears and there is widespread publication and diffusion of basic legal materials of all states so that usually the court can ascertain the content of sister state law without great difficulty. Nevertheless, until relatively recent times the common-law rule has prevailed, and it has been requisite to plead and prove sister state law as fact in the same manner as prescribed for foreign nation law. Judicial notice would only be taken by an American state court of the law of its own jurisdiction and of federal law, while federal courts took judicial notice of federal law and the law of the states of the United States.\textsuperscript{8}

\section*{II. Judicial Notice}

To correct the antiquated common-law rule the Uniform Judicial Notice of Foreign Law Act was approved in 1936.\textsuperscript{9} By its terms the common-law position was modified so that it became incumbent upon the court to take judicial notice of the common law and statutes of sister states, territories, and jurisdictions of the United States. This uniform act has won widespread acceptance. Texas did not adopt it, but in 1943 the Supreme Court of Texas promulgated an independent rule for Texas based on certain rules of the Model Code of Evidence.\textsuperscript{10} This 1943 rule granted wide latitude to the trial judge and the reviewing court to take judicial notice of the laws of other states, territories, and jurisdictions of the United States. This rule was amended and somewhat restricted in 1946 when the present rule 184a of the Texas Rules of Civil Procedure was adopted. Rule 184a provides:

\begin{quote}
The judge upon the motion of either party shall take judicial notice of the common law, public statutes, and court decisions of every other state, territory, or jurisdiction of the United States. Any party requesting that judicial notice be taken of such matter shall furnish the judge sufficient information to enable him properly to comply with the request, and shall give each adverse party such notice, if any, as the judge may deem necessary, to enable the adverse party fairly to prepare to meet the request.\textsuperscript{11}
\end{quote}

While the original Texas rule permitted the judge to take judicial notice of the law of other states upon his own motion, the present provision requires the judge to take judicial notice of such law upon the motion of either party.

\textsuperscript{7} \textit{Wigmore} § 2573.
\textsuperscript{8} \textit{Id.}
\textsuperscript{9} \textit{Uniform Judicial Notice of Foreign Law Act} §§ 1-8; see Annot., 23 A.L.R.2d 1437 (1952).
\textsuperscript{10} \textit{Model Code of Evidence} rule 803 (1942).
\textsuperscript{11} \textit{Tex. R. Civ. P.} 184a.
This change has been considered unfortunate or a retrogression, despite the fact that to permit judicial notice on the court's own initiative can raise some problem of procedural fairness in that proper notice might not be given to the parties of the law upon which the judge relies. This defect, of course, was cured by the former Texas rule which, in permitting the judge to take judicial notice on his own motion, went on to enjoin him to "inform the parties of the tenor of such matter to be judicially noticed by him and to afford each of them a reasonable opportunity to present to him information relevant to the propriety of taking such judicial knowledge or to the tenor of the matter to be noticed." The only other criticism of the old rule might be directed to the fact that a requirement that a judge act sua sponte would perhaps burden the court. This reason has generally not been accorded weight when sister state law is involved, although the contrary is true with respect to foreign state law. Moreover, the previous Texas rule used permissive—not mandatory—language, stating that the judge may take judicial notice on his own motion. Thus, it would seem that the judge could make the determination of whether to accept the burden.

Following the language of the later rule, one would conclude that the judge can take judicial notice only upon motion of one of the parties—i.e., that judicial notice depends upon request. The judge would be barred from acting on his own initiative. Authority is in accord. The court in Harris v. Harris declares with precision that Texas courts "may not take judicial notice of the laws of another state in the absence of a request to do so." This same language is repeated in the opinion of a later case, Hamm v. Berrey. Nevertheless, Gould v. Awapara would permit the judge to take such notice even though no motion was made to him by the parties that he do so. The cases might be thought to be in conflict, but differentiation can be made on the facts. In Harris and Hamm the courts noted that judicial notice of the governing sister state law was not requested, nor was it pleaded or proved. To permit the judge to take judicial notice in such a situation would be unfair to the opposing party. As has been stated:

[Rule 184a] should be construed to mean that [the opposing] party should have the right to contest the propriety of taking judicial notice of the law and also to point out any error in the information presented by the request—

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   A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as a ruling on a question of law.
15 9 Wigmore § 2573.
16 403 S.W.2d 445 (Tex. Civ. App.—Houston 1966), error ref. n.r.e.
17 Id. at 447.
18 419 S.W.2d 401 (Tex. Civ. App.—San Antonio 1967), error ref. n.r.e.
ing party and to supplement such information to the end that the trial judge
is in fact properly informed of the law.¹⁹

In Gould the court pointed out that despite the lack of a formal motion
requesting the taking of judicial notice, the sister state statutes were pleaded
in such a way as to indicate to the opposing party an intention to rely upon
them. The record, according to the court, showed that the opposing party
had full notice of reliance on the sister state law, time to prepare argument
on the law, and contained no complaint of a lack of adequate time to pre-
pare. Under these facts no reversible error was found because the court took
judicial notice of the sister state law. Although noting that it was not clear
whether Gould stands for the proposition that on such facts motion for
judicial notice is not necessary or that judicial notice can be taken by the
judge on his own motion, one commentator is of the opinion that a judge
may, in his own discretion and upon his own initiative, take judicial notice
of sister state law when such a procedure would not be unfair to the oppos-
ing party—even though the words of rule 184a clearly require the notice."²⁰
In view of these words the better part of valor would warrant a formal motion.

Not only does the rule require a request for judicial notice of sister state
law, but sufficient notice must be given to the adverse party to permit him to
meet the request for judicial notice. The reason for such notice is to prevent
surprise of and prejudice to the other party. It has been stated²¹ that such
notice should comply with rule 21a,²² which requires notice other than citation
to be served by delivery of a copy of the notice to the party, his authorized
agent, or attorney either personally or by registered mail or in such a manner
as the court in its discretion directs. However, cases indicate that such strict
notice is not always required. For example, Gard v. Gard²³ stands for the
proposition that rule 184a would ordinarily necessitate reasonable notice to
be given the other party of the request to take judicial notice, but when the
facts indicate no harmful error, such notice is not necessary. The court pointed
out that notice of the filing of the motion is not mandatory under rule 184a,
for the language speaks of notice which "the judge may deem necessary, to
enable the adverse party fairly to prepare to meet the request."²⁴ In Gard
a motion was made that the court take judicial notice of the law of the sister
state while admissibility of the evidence of such law was being argued to
the court. Objection was made to the introduction of such law and to the
time of the filing of the motion. The objection was not based on surprise or
prejudice. The court was of the opinion that it would have been impossible
to ground the objection on these reasons, inasmuch as exhibits of the sister
state law and its construction had been attached to pleadings and on file for
more than two years.

Doppke v. American Bank & Trust Co.²⁵ was also concerned with the notice

¹⁹ Id. at 675.
²¹ Id. at 121.
²⁴ Id. at 887.
of request of judicial notice sufficient to permit the adverse party to prepare to meet such request. Here, prior to the date of the trial, motion was filed for judicial notice of sister state law, and notice of this motion was given to the opposing party. It was contended, however, that such motion was insufficient because it did not set out with particularity the sister state laws or court decisions which were being relied upon and which were to be judicially noticed. Finding that an application for summary judgment filed several months before the trial had set forth the applicability of sister state law as the governing law on the question of usury in the contract involved, and that no exception to the contents of the formal notice or the date on which it was filed had been made, the appellate court concluded, citing *Gard*, that the trial court had not abused its discretion, and that notice was timely and sufficient.

Since the principle reason for taking judicial notice of the law of another jurisdiction is to abrogate the necessity for strict or formal pleading and proof of such law as fact, and since through judicial notice law of another jurisdiction is placed on a plane similar to domestic law which the judge is duty-bound to know, it might be thought that the judge is required via judicial notice to assume the full responsibility and initiative for the determination and application of sister state law through his own research. Certain proponents of judicial notice have taken this position, although it has not prevailed. It goes without saying that even in purely domestic cases much of the preparatory work in the ascertainment of the law governing the case falls upon the litigants. What judicial notice does or should do is to substitute for the strict proof requirement a less formal manner for the establishment of the law of the other jurisdiction. In order that the whole burden of finding and discovering the applicable law shall not be cast upon the judge, and so that a fair procedure of notice of the law upon which the case is to be based or upon which it is sought to be based can be given to the adverse party, a duty is still placed upon the litigants to present some evidence of the foreign law.

That such a duty exists is borne out by the Model Code of Evidence as by the Texas rule. Both obligate the party requesting judicial notice of the law of another jurisdiction to furnish sufficient information to the judge to permit him to comply with the request, and to give notice to the opposing party so that such party has an opportunity to meet the request.

Inasmuch as information must be presented by the parties, it would seem that the judge's own research becomes additory. It has even been said that the parties under judicial notice rules are still subject to the rules of pleading, and that a mere informal allusion to the foreign law sometime during the proceeding is not sufficient. On the other hand, authority exists which no longer considers the pleading of the law of another state necessary so long as the one relying upon that law gives reasonable notice of his intention in the pleadings or otherwise; *i.e.*, he must merely call attention to the other law in the manner provided by the judicial notice provisions. Following

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88 *See Currie, supra* note 1, at 982-83, for a discussion of Wigmore's assumption to the effect that it is up to the judge to ascertain the foreign law himself.

91 *See note 10 supra.*

92 *Nussbaum, The Problem of Proving Foreign Law, 50 YALE L.J. 1018, 1021 (1941).*

93 *See Currie, supra note 1, at 983, 987 n.65.*
the wording of Texas rule 184a, this latter conclusion could be reached, so
that pleading of the foreign law—as required by the practice in the absence
of a judicial notice requirement—is not needed. The Texas rule simply re-
quires a motion to the judge that judicial notice be taken and the furnishing
of information to permit the judge to comply and to allow the giving of
timely notice to the adverse party. According to the Subcommittee on Inter-
pretation of Rules this language of rule 184a would abrogate the pleading
requisite.38 King v. Bruce,39 a 1946 civil appeals case, seems to support this
view. In King the law of New York, which was alleged to be the law con-
trolling the validity of a contract, was not pleaded. Appellant contended that
the appellee failed to discharge the burden of proof to establish the validity of
the contract under New York law. Appellant’s point of error was overruled
because it was found that the trial court, after a motion under rule 184a,
judicially noticed New York law and that the parties had stipulated what
that law was.

Substantiation of the fact that pleading is unnecessary when proper motion
is made for judicial notice under rule 184a is further provided by Marsh v.
Millward.40 Here it was argued on appeal that the law of a sister state for
which a judicial notice motion had been made should form no part of the
record in a summary judgment proceeding under the Texas Rules of Civil
Procedure. Therefore, such law should not have been resorted to by the judge
for the determination of the case. The court agreed that under the Texas
rules sister state laws should not form part of the record in a summary judg-
ment, but went on to say: “These are matters of which courts take judicial
knowledge in the manner prescribed by law. Rule 184a . . . merely provides
the manner in which laws of other jurisdictions are brought within the judicial
knowledge of the Judge. When this is done Courts have the same judicial
knowledge of foreign laws that they have of their own laws.”41

From these and other authorities the conclusion has been reached that the
pleading of the law of another jurisdiction under the rule is not necessary.42
Nevertheless, one cannot be sure, for conflict exists and certain authority ad-
heres to the opinion that laws of other jurisdictions are not provable unless
pleaded. Perkins v. Perkins exemplifies the necessity of pleading, and al-
though the opinion is most unclear, the Texas Court of Civil Appeals at
Amarillo ostensibly concluded that the judicial notice rule has no real signifi-
cance.

In Perkins the trial court had, according to the appellate court, taken judi-
cial notice of the Oklahoma law in accordance with rule 184a. It is not stated
in the case, but one can assume that proper motion was made and informa-
tion furnished to comply with the rule. Nevertheless, the court of civil appeals
said that the Oklahoma statutes must be pleaded by the party relying upon

38 For opinions of the Subcommittee, see 6 TEx. B.J. 355 (1943); 8 TEx. B.J. 37
(1945).
39 197 S.W.2d 830 (Tex. Civ. App.—Fort Worth 1946), rev’d on other grounds, 145
tex. 647, 201 S.W.2d 803 (1947).
40 381 S.W.2d 110 (Tex. Civ. App.—Austin 1964), error ref. n.r.e.
41 Id. at 112.
42 See Crutsinger, supra note 20, at 119-21.
them regardless of whether they serve as a basis for recovery or defense, and that unless they are pleaded, they are not provable. This holding has been subject to the criticism that it either creates uncertainty as to the construction of rule 184a or it emasculates it. It would appear that the Perkins interpretation is incorrect, since when judicial notice is requested and proper compliance with the rule’s procedure is made, it then becomes immaterial whether or not the sister state law was pleaded. However, one authority continues to assert, in the light of the Perkins case, that when reliance is had upon sister state law such law should be alleged, and that proof of the allegations should be supplied.

Although strict pleading and proof of the law of the other jurisdiction may not be necessary, still rule 184a does require that the party requesting judicial notice present sufficient information to permit the judge to meet the request. There is no absolute rule on the sufficiency of requisite information. Such sufficiency rests in the discretion of the judge. Nevertheless, to be correct, the motion for judicial notice of the law of another jurisdiction should set forth with some particularity the law that is to be relied upon. This should be set forth with sufficient specificity to bear out the pleaded cause of action or defense. The point or matter of law that is alleged to govern should be stated along with the sister state statutes or court decisions which establish that law—although quotation of the exact wording of the law would not seem necessary. Accurately cited authorities and materials of the other jurisdiction supportive of the rule that is to be noticed should be given. If such matter is presented, the judge will be furnished sufficient information to comply with the request for judicial notice; however, such complete information does not seem to be absolutely necessary. Cases in other states have held rather vague references to the law of the other state sans citations to be sufficient, and in a Texas case an unsuccessful attempt to set forth the law of another state was held sufficient information for the judge. Generally, the information furnished should present “relevant information both as to the tenor of the matter to be noticed and upon the propriety of taking judicial notice of it.” Further, the judge should not take judicial notice unless he has before him information which convinces him that the matter is a proper subject of such notice.

The original rule on judicial notice of law of another jurisdiction permitted a reviewing court to take judicial notice of such law even though the trial judge had not done so. The Uniform Rules of Evidence Act grants such discretion to the reviewing court provided the court affords opportunity to the parties to present information on the propriety of taking such judicial notice as well as the tenor of that which is to be noticed. To permit judicial notice

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87 2 R. McDonald, Texas Civil Practice § 5.09.3 (rev. 1970).
88 See Nussbaum, supra note 28, at 1021-22.
91 Morgan, Foreword to Model Code of Evidence 67 (1942).
92 Id. at 68.
of the law of another jurisdiction for the first time on appeal and in the absence of a ruling by the trial court has been criticized as coming too late and as working an injustice. On the other hand, one commentator has argued that there seems "to be little reason for an appellate court's refusal to use all available legal materials in repairing and correcting the judgment of the trial court." Apparently taking note of the criticism, the drafters of the present rule 184a granted power to appellate courts to review the rulings of the trial judge pertaining to judicial notice of sister state law, but did not authorize the taking of judicial notice by the reviewing court if the trial judge had not taken notice.

### III. Pleading and Proof of Foreign Law

Texas rule 184a does not extend to the law of a foreign nation. Judicial notice will not be taken of such law. The common-law rule still prevails. Foreign law is regarded as fact, and is, therefore, subject to the rules which require pleading and strict proof. The law of a sister state is similarly regarded when rule 184a has not been complied with so as to permit judicial notice.

The foreign law must be pleaded, and if it is not, no proof may be proffered with respect thereto. If there is a failure of proof, Texas courts—as will be seen—will presume the foreign law to be identical with Texas law. Texas authority relating to the type and sufficiency of pleading is scarce, other than to general rules concerned with pleading fact. However, commentators seem agreed that the foreign law should be pleaded with sufficient clarity to permit the adversary to be informed of the provisions of the foreign law upon which the pleader is resting his case. Disagreement prevails as to the specificity required. One view favors pleadings stated in general terms containing a clear-cut statement of the foreign law upon which reliance is to be had. Pleading in general terms will permit evidence to be given at the trial of details of foreign law that were not known or were thought to be unimportant at the earlier time of pleading. Very detailed pleading, particularly to the extent of setting forth foreign written law in haec verba, may go beyond the ultimate facts and leave the pleader open to an objection for pleading evidence.

On the other hand, it is contended that general pleading of the substance and effect of foreign law opens the pleader to an objection that the pleader is advancing his own conclusion, which may well be fatal to the pleader.

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44 Currie, supra note 1, at 984-85, 992-93, 1009-10.
46 See original Texas rule as set out in Historical Note, 2 Tex. R. Civ. P. at 250-51 (1967). See also note 2 supra.
47 See 1 McCormick & Ray § 173, and n.81.
49 See notes 91-93 infra, and accompanying text.
50 Texas & N.O.R.R. v. Miller, 128 S.W. 1165 (Tex. Civ. App. 1910), error ref., teaches that when the cause of action rests upon foreign law that law must be averred or pleaded so that the right may be disclosed. See Annot., 134 A.L.R. 570 (1941).
51 Stern, supra note 1, at 26.
Thus, pleading the foreign law *in haec verba* is recommended. It is said that if the foreign law is in a foreign language, the pleading should contain a statement of the existence of the law with the law itself set forth as an exhibit in the appendix which is incorporated by reference. Following in the next paragraph of the pleading a translation of the law should be set forth.\(^a\)

Detailed pleading of unwritten law should contain statements as to the place of judicial precedent and its force and effect in the foreign country. The precedent to be relied upon and the rules established by the precedent should also be given.\(^b\)

As to proof of foreign law, at one time foreign statutory law was proven by the production of a copy of the statute properly authenticated under the seal of the foreign state.\(^c\) This rule has long been relaxed in Texas. Article 3718\(^d\) now provides that statute books not only of Texas and the United States, but also of the District of Columbia, sister states or territories, and foreign governments which purport to have been printed under the authority thereof are to be received as evidence of their contents. Language in certain cases indicates that proof of the statutory law of other states may be received in evidence only following the terms of the statute—*i.e.*, that the statute provides the exclusive mode. This is too restrictive a point of view as *Burge v. Broussard*\(^e\) shows. In *Burge* a certificate of the Secretary of State of California under the great seal of the state which set forth periods prescribed by California statute for the commencement of certain actions in that state was offered as evidence. Objection was raised on the ground that California statutory law could be properly proved only by the introduction of a statute book purporting to be printed under the authority of the State of California. The court disagreed, holding that the Texas Legislature did not intend to make article 3718 the exclusive method of proving sister state statutory law, but only meant to provide an additional method of proof. This viewpoint was reinforced by reference to a federal statute enacted under the full-faith-and-credit provision of the Constitution of the United States, which, for full faith and credit purposes, required legislation of any state to be authenticated by a certificate of the Secretary of State under seal. It was noted that if the procedure required by the Texas statute was construed as the only way of proving sister state statutes, then the question would arise whether the Texas statute could be considered controlling in the face of the full-faith-and-credit clause. Thus, it would seem that statutes of states may be proved when the printed law purports to be printed under the authority of the sister state or foreign government, or by a certified copy from the Secretary of State of the sister state authenticated with the great seal. The statutory law of another state or nation may not be proved by the parol testimony of lawyers, nor by the decisions of courts of that state which have construed the statute.\(^f\)

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\(^a\) See McKenzie & Sarabia, *supra* note 1, at 361-64.

\(^b\) Id. at 362-63.

\(^c\) See 4 Wigmore § 1271.


\(^e\) 258 S.W. 502 (Tex. Civ. App.—Beaumont 1924), error ref.

\(^f\) Seiders v. Merchants' Life Ass'n, 93 Tex. 194, 54 S.W. 753 (1900); Vickers v. Faubion, 224 S.W. 803 (Tex. Civ. App.—Amarillo 1920); Illinois Cent. Ry. v. Ryan, 214
nesses familiar with the law of the state may testify that the statute was printed under the authority of the state. The nonexistence of a statutory provision in another state may, however, be proved by parol evidence. For example, parol testimony was offered to a Texas court to the effect that Oklahoma has no rule of community property. Objection was raised on the ground that the statutory law of the state was the best evidence and should have been presented. The court did not heed the objection, contending in effect that since community property is the outgrowth of statute, the parol testimony negating the existence of community property in Oklahoma also negated the existence of a statutory rule. The endeavor was not to prove the existence of a controlling statute, but to prove no statute. Parol evidence was admissible to prove sister state law.

Article 3718 permits the printed statute book to be introduced into evidence if it purports to be published under the authority of the state. In the early Texas case, Martin v. Payne, an unofficial compilation of the laws of Tennessee was sought to be introduced. Lawyers acquainted with Tennessee law who were licensed to practice there proved that the compilation contained the law of the state and was received as evidence in Tennessee. Nevertheless, the Texas court ruled against receipt of the compilation in evidence, stating that only books purporting to have been printed under the authority of the state were receivable, and that private and unofficial publications did not so qualify. Admittance was, therefore, not permitted.

In the rather recent case, Garza v. Greyhound Lines, admission of a translation of provisions of the Mexican civil code was denied because it was not shown that the volume containing such provisions was purportedly printed under the authority of the Mexican government. In Hunter v. West the court also held noncompliance with article 3718. Here a party invoked Mexican law by making references to a written code which he had in his possession and which he said contained the statutory enactments. He did not prove in any way that the book was purportedly printed under the authority of the Mexican government.

Reprints of foreign law may be introduced in evidence so long as they purport to be printed under the authority of a government and such is duly proven by a competent witness. Reprints have been held admissible without other evidence of sanction by the government, the court presuming that the second edition was also sanctioned by the government.

Beard v. State permitted the introduction of Oklahoma territorial law contained in a compilation which provided that the compilation was only


In re Cupp, 129 Tex. Crim. 25, 84 S.W.2d 731 (1935).


11 Tex. 292 (1854).


47 Tex. Crim. 183, 83 S.W. 824 (1904).
presumptive evidence of the laws in force in the territory. The court stated that the compilation was made under the authority of the state.\(^6\)

While a printed statute of another state or country itself must be proved by a duly authenticated copy or by a statute book printed under the authority of the state, the doctrine is well settled that the construction given a statute by the judicial decisions of the other state must be proved by production of the applicable judicial decision or decisions. Such decisions must either be properly authenticated or contained in a report of cases published by the authority of the state or by testimony in person or by deposition of one who is expert in the law of the other state. The same is true when the question is governed by the unwritten common or case law.\(^7\) As has been stated: "[E]xpert evidence is always admissible to prove what the law is, or the sources in which it may be found, and the mode of its application."\(^6\) Generally the expert sought is a lawyer engaged in practice in the law of the other state. But this may not always be true. In fact in some instances non-lawyers have been regarded as skilled in the foreign law. In \textit{State v. Cuellar}\(^9\) the court pointed out that a practice had long existed in land litigation cases of receiving evidence in Texas courts from intelligent Mexicans who were not lawyers. It was noted that these persons "often evince a creditable intelligence relating to the laws, as deduced from the conduct of the officers who administered them."\(^7\) This language was echoed in \textit{State v. De Leon} in which it was held that intelligent Mexicans, one of whom was an alcalde (a mayor exercising some judicial power), would prove valuable in giving testimony "as to the previous or contemporaneous construction given to the laws of Mexico by the officers who executed them."\(^7\)

The question arises whether legal treatises, commentaries, and articles in legal periodicals may be offered to prove foreign law. The impediment militating against their introduction into evidence is the hearsay rule. Wigmore is of the opinion that works of recognized authorities should be received as proof of law of other states as an exception to the hearsay rule and cites authority establishing the propriety of receiving such authorities in evidence.\(^7\) If learned authorities are considered as sources of law as they are in France, they should certainly be used as proof of the foreign law by a court of the forum.\(^8\) The problem does not seem to have been brought out in Texas courts. Courts do often escape the hearsay stumbling block by permitting an expert witness on the stand to read from authoritative treatises; the foreign text then merely becomes a part of his testimony, being incorporated by reference.\(^7\)

\(^6\) \textit{Id.} at 191, 83 S.W. at 826.
\(^9\) 47 Tex. 295 (1877).
\(^7\) \textit{Id.} at 305.
\(^7\) 6 \textit{WIGMORE} § 1697.
\(^3\) \textit{See} Stern, \textit{supra} note 1, at 35.
\(^7\) 6 \textit{WIGMORE} § 1697. Because of the hearsay rule Texas courts are strict in excluding
If the law is not only foreign, but also in a foreign language, a translation of written foreign law and court decisions relied upon should be presented. Excellent translations may be hard to come by, for the translator must not only possess knowledge of both English and the foreign language, but he must be versed in the legal terminologies of the two languages and the differing nuances of words and phrases. Literal translations from one language to another simply will not convey the true meaning of the foreign law.

IV. OTHER CONSEQUENCES OF LAW AS FACT

Not only must foreign law be pleaded as fact and proven in accordance with the laws of evidence, but since it is a question of fact, its existence, according to common-law doctrine, is to be determined by the trier of fact—in many cases the jury. This rule has been subjected to harsh criticism by courts and commentators alike, for it is believed that the issue of foreign law should be left entirely to the judge inasmuch as he is the appropriate and proper person to make the determination. The jury is considered to be just as incompetent, if not more so, to ascertain foreign law as it is to ascertain domestic law. A Texas Supreme Court case of long standing purportedly followed this more enlightened view. The question whether to impanel a jury to determine the law of another jurisdiction was answered in the negative, the court stating: "Foreign law must be proven as facts and the better opinion is that this must be made to the Court rather than to the jury." This is also borne out by Williams v. State, which opined that the court, not the jury, determines "when the laws of another state have been established in evidence," and further by El Paso & Southwestern Co. v. La Londe, which again declared that all matters of law are to be determined by the court and that the purpose of proof of foreign law is to make it possible for the court to instruct the jury as "to what in point of law is the result of the foreign law to be applied to the matter in controversy."

A final case apparently following this line of thought is Banco Minero v. Ross. Here in issue was the validity of a Mexican judge's order under Mexican law. The provisions of the Mexican code and the testimony of one expert witness construing the code in such a way as to give validity to the order constituted all of the evidence. The judge refused to follow the expert testimony of the Mexican witness and construed the code himself. His decision was upheld by the Supreme Court of Texas which concluded that he...
was empowered to construe the code himself and was not obliged to accept
the construction of the witness.

These cases seem at odds with the civil appeals cases of St. Louis & S.F. Ry. v. Conrad and Western Union Telegraph Co. v. White. In the former
the court enunciated a doctrine to the effect that in instances in which the
evidence of foreign law consists of statutes and reports of judicial decisions,
their construction and effect are for the judge. Nevertheless, the court went
on to say that when the judicial decisions are in conflict, or inferences of
fact must be drawn, or when the evidence consists of the parol evidence of
experts as to the construction given to the statute, then the determination
of foreign law becomes fact and in any case of controverted fact the jury
must make the determination.

The Western Union case follows and cites this language. Here the court
decided that the effect of a New Mexico opinion was for the court to decide,
not the jury, for there was no controversy with respect to the testimony of
the expert witness. The court does muddy the water somewhat via a discus-
son of a statement of a textual authority in the field of conflict of laws
which sets forth the notion that the jury's province is only to ascertain whether
a certain foreign statute has been enacted or a foreign judicial decision ren-
dered, and that construction and effect of written instruments or documentary
evidence is for the court. Does this mean that such is for the court even
when the decisions are conflicting or the evidence consists of parol testimony
of expert witnesses regarding the construction of a statute? One author ap-
parently so concludes, for he declares a Texas rule to the effect that it is for
the jury to determine whether a statute has been enacted or judicial decision
rendered, while the court ascertains the construction and effect of statutes
and decisions of other jurisdictions.

In any event, the determination of questions of foreign law should be de-
cided by the judge, and the trend is away from the common-law rule. The
adoption of a rule which would submit the construction and interpretation of
a foreign statute or of foreign unwritten law which is controversial to a jury
(with the benefit of expert testimony) and permit the judge to decide the
foreign law in the few cases when construction and interpretation is clear
and not involved, seems absurd. The jury is most ill-equipped to act in such
a situation.

Another consequence of treating foreign law as fact is that review of
foreign law findings is precluded, inasmuch as appellate courts normally
are empowered to review questions of law only. Thus, determinations made
below as to the foreign law, its existence, meaning, and effect will remain
undisturbed. Criticism has been made of such a rule, for it has been thought
desirable that difficulties inherent in the determination of foreign law should
be reviewable by appellate courts, and that the possibility of the review should
not rest upon a categorizing of foreign law as law or fact. Some states

162 S.W. 905 (Tex. Civ. App.—Amarillo 1913), error ref.
Curtisinger, supra note 20, at 114. But see 1 McCORMICK & RAY § 8.
See Nussbaum, supra note 28, at 1033-35.
have by statute permitted the findings on foreign law to be reviewed on appeal.86 Even in the absence of such a statute it has been suggested that review should be possible when the determination of foreign law is taken out of the jury's hands and assumed by the court.87

There are a dearth of Texas cases on this point, but indication is that Texas abides by the old rule which treats foreign law as fact so as to disallow appellate review.88 To regard foreign law as fact has been said to prevent the holding of a court with respect to foreign law from controlling decisions of other courts under the doctrine of stare decisis. Issue has been taken with this view, for it has been pointed out that treating foreign law as fact does not prevent a decision on foreign law from gaining the force of precedent. The real reason is based upon the notion that precedent is restricted to domestic law.89

V. Failure To Prove Foreign Law

Discussion has centered upon the problem of the presentation of the law of another jurisdiction to the court either by strict pleading and proof or through the more lenient procedure of judicial notice. The remaining problem involves those cases in which there is an absence of proof or pleading of foreign law, and, when judicial notice is proper, there is a failure to comply with judicial notice procedures. What occurs under such circumstances? Courts have applied differing rules. Courts, for example, have, in the absence of proof of foreign law, simply dismissed the complaint for inability to establish a cause of action.89 If the defense depends upon the law of another jurisdiction and the defendant fails to prove it, the question will go against him. Courts in certain other jurisdictions, however, have relied upon presumptions. It has been presumed that certain fundamental principles of law exist in all civilized countries which will support a particular claim because of its inherent justice.

Again, the presumption has been made that the law of the foreign jurisdiction (if a common-law country) is the same as the common law of the forum, unmodified by the statutes of the forum. Finally, the presumption has been made that the law of the foreign jurisdiction is the same as that of the forum whether such law is common law or statutory and with no regard as to whether the foreign law is founded upon a common-law base, a civil-
law, or some other base. Some jurisdictions simply apply the law of the forum without resorting to the fiction of presumption.91

An overwhelming number of Texas decisions apply the law of the forum (Texas) upon the basis of a presumption that the law of another jurisdiction is the same as that of Texas when the former law is not judicially noticed and when it is not pleaded or proved. Such a rule is applied without regard to whether the law in question is a common-law or statutory rule or whether the other jurisdiction is based upon the common law or civil law.92 A few Texas cases have simply applied the law of the forum without speaking of a presumption. In the old Texas case of Pauk v. Daus93 the facts indicated that Mexican law should control, since Mexico was the place of contracting. Since Mexican law was not pleaded or proved, the statutory law of Texas governing rate of interest was applied—the court reasoning that there was no reliance upon Mexican law because it was not pleaded. Therefore, the law of the forum was properly applicable.

A few Texas cases have departed from the majority rule. Stevenson v. Pullman Palace Car Co.,94 although applying the law of the Texas forum on a presumption that the law of Mexico would be the same, spoke, as ground for the court's reasoning, in terms of the fundamental principle presumption. The court stated that any system of laws based on the common sense and justice which prevailed worldwide could not be presumed to have a rule different from that of Texas.

Cases have refused to indulge in the presumption when the law of the other jurisdiction is not proved, but evidence is offered showing that such law is different. In Abeel v. Weil the court said: "[C]learly the evidence offered in evidence by the plaintiff shows a difference between the laws of the two states on this subject and prevented the trial court from presuming that the laws of California and of Texas are the same."95

Language of a recent case arising in federal court differs from the usual Texas rule, which presumes identity of the foreign rule with that of the forum. Bostrom v. Seguros Tepeyac, S.A.96 concerned a Mexican insurer's liability to the insured for negligence. A federal district court concluded that Mexican law should govern, if properly proved. Credible proof was not presented; therefore, resort was had to the Texas presumption, but then the court went on to say that the presumption was not applicable "when the system of jurisprudence of the foreign country is fundamentally different from that of Texas."97 It was thought, however, that the two systems were not fundamentally different because the civil law had originally prevailed in both Texas and Mexico when Texas was a part of Mexico. The presumption could,

91 For discussion of various theories, see Annot., 75 A.L.R.2d 529 (1961); Currie, supra note 1, at 977; Nussbaum, supra note 28, at 1035.
92 See 1 McCormick & Ray §§ 99, 193; Parker, Judicial Notice and Presumptions as Devices for the Ascertainment of Foreign Law, 12 Texas L. Rev. 333 (1933).
93 31 Tex. 68 (1868).
95 115 Tex. 490, 506, 283 S.W. 769, 776 (1926). See also Brand v. Eubank, 81 S.W.2d 1023 (1935).
97 Id. at 229.
therefore, prevail. But this reasoning is somewhat shaky. To assume that the laws of Texas and Mexico today are not fundamentally different because originally the two had the same system is hardly a valid assumption. Texas is primarily a common-law state and has been since separation from Mexico. Mexico is a civil-law nation.

The court of appeals treated the case differently. Discussion of the controlling law in absence of proof was set forth in a footnote. The decision did not turn on that point. The court refused to apply the law of the place of injury, which would have been Mexico and which would have called for application of Mexican law. Instead the court adopted the new "most significant relationship" rule, which, incidentally has not been held to be the law of Texas. Proceeding upon this theory the appellate court found that the most significant relationships pointed to Texas for the determination of liability. Its law should control.

In the footnote discussion, the court of appeals disagreed with the resort to a presumption which would view the laws of the Texas forum and Mexico as the same. The reasonableness of the basis of the presumption (a common, civil-law historical background) was rejected. The judge then brushed off the old dissimilarity rule of conflict of laws and tort under which Texas has, in some cases, refused to give a cause of action in tort when the law of the place of injury governed and was materially different from that of the Texas forum. Is the judge setting forth a rule that the usual Texas presumption will not hold when the system of law of the foreign jurisdiction is different from that of the forum? That seems to be his thought, that the presumption will only be resorted to when the two systems are based on the same system of law—e.g., the English common law. It is respectfully submitted that the dissimilarity rule did not come into being from a problem of proof of foreign law or lack thereof. In cases applying the dissimilarity rule the proof had been presented to the court, and it had been determined from that proof that the foreign law which was applicable to the facts at hand was too dissimilar to permit its application and enforcement at the forum.

Two additional cases may be mentioned in which Texas courts refused to apply the law of the forum on the presumption of sameness. In Robert v. Hodges the enforcement of an Oklahoma default judgment was attacked in a Texas court. The judgment recited that service of process had been obtained against a nonresident in accordance with an Oklahoma statute, which was cited, although the statute itself was not introduced into evidence in the Texas court. It was contended that in the absence of pleading and proof of the statute, the Oklahoma law would be presumed to be the same as that of Texas. The court of civil appeals rejected this contention, holding that a presumption of validity accorded a sister state judgment for purposes of full faith and credit could not be overcome by a presumption. McCormick and Ray were quoted by the court as follows: "[E]very reasonable presumption will be indulged to sustain a judgment and nothing will be presumed against it.

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88 347 F.2d 168 (5th Cir. 1965).
89 Stumberg, Conflict of Laws—Torts—Texas Decisions, 9 Texas L. Rev. 21 (1930).
90 401 S.W.2d 332 (Tex. Civ. App.—Amarillo 1966), error ref. n.r.e.
All prior requisites to the rendition of a judgment will be presumed to have been fulfilled and the recitals in a judgment or order will be presumed to be the truth.\footnote{Id. at 334.}

The other case in which the presumption was not involved is \textit{Ruggles v. Seedig}\footnote{247 S.W. 650 (Tex. Civ. App.—Amarillo 1923).} wherein the Texas forum presumed the common law to prevail in Oklahoma despite the fact that the law of Texas was different and statutory. It was shown by parol evidence that there was no governing statute in Oklahoma, specifically that there were no statutory rights of community property there as in Texas. This negatived the existence of community property in Oklahoma, for community property is a creature of statute. In such an instance, when no law of Oklahoma was offered in evidence, but the evidence did show that there was no statute, the court presumed that the common law prevailed in the other state.

\section*{VI. CONCLUSION}

From this discussion it can be seen that the Texas law pertaining to proof of foreign law as gleaned from cases is confused, incomplete, and in some instances behind the times. It is unfortunate that most of the cases are civil appeals cases which often differ in their legal conclusions. As a result, authoritative precedent from the highest state court is not extant. It is hoped that the rule of the court of civil appeals in the \textit{Perkins} case, which apparently requires strict pleading and proof of sister state law before judicial notice will be taken, does not prevail. It is further to be hoped that Texas will follow the majority view in the United States and the language of its old cases so as to remove all questions of foreign law from jury determination and make them subject to the decision of the judge.

Competent evidence of foreign law appears to be overly restricted. The courts speak in terms of statutes, court reports and decisions, and expert witnesses only. It has been suggested that the rules of evidence should be relaxed so as to allow foreign law to be ascertained by expert opinion, not under oath, by court appointed experts, by treatises and commentaries on foreign law, and by certificates emanating from foreign courts or other appropriate governmental officials.\footnote{For discussion pro and con concerning the taking of judicial notice of foreign law, see Currie, supra note 1, at 981-1001; Keefe, Landis, & Shaad, \textit{Sense and Nonsense About Judicial Notice}, 2 STAN. L. REV. 664 (1950); Nussbaum, supra note 28, at 1020-23; Sommerich & Busch, supra note 1, at 136.}

Finally, there is strong support for the extension of judicial notice to foreign law just as it is extended to the law of other American jurisdictions.\footnote{See, e.g., UNIFORM RULES OF EVIDENCE ACT rule 9, and states which have adopted it.} Some American states do require judicial notice to be taken not only of the law of other American jurisdictions, but also of the law of foreign jurisdictions,\footnote{E.g., Massachusetts and North Carolina, as well as others. See MASS. GEN. LAWS ANN. ch. 233, § 70 (1956); N.C. GEN. STAT. § 8-4 (1969).} while others merely make the taking of judicial notice of foreign law permissive.\footnote{Id. at 334.}
To extend the judicial notice provision to foreign law would remove most of the deficiencies which come about by treating foreign law as fact, and under a judicial notice provision like rule 184a objections to placing the whole burden on the judge are mitigated, for as has been seen the parties must present the judge with information with respect to the foreign law. Judicial notice, however, would not solve all problems, because if the judicial notice provision is not complied with by proper motion and information, what then? Should the case be dismissed, which might work substantial injustice, or should procedure accord with the present Texas rule to the effect that when foreign law is not properly pleaded and proved the foreign law will be presumed to be the same as that of Texas? This rule, which permits application of the forum's law by presuming the foreign law to be identical, has also been subjected to criticism. The presumption itself has been said to be untenable in that it "is nothing but a crude fiction disguising the substitution of the law of the forum for the unproved or unascertainable foreign law." To apply the law of the forum when under choice-of-law rules another law should govern would, of course, be anathema to a follower of the vested rights theory. He would believe that rights were created according to the law of a certain jurisdiction. Failure to apply the law of that jurisdiction in the proper case and application of the law of the forum so as to change or cut off vested rights simply should not be done.

Resorting to the law of the forum would not be viewed with indifference by the supporters of the most significant relationship theory; that is, if the forum did not have the most significant relationship with the transaction. On the other hand, it has been recommended that the law of the forum should be the normal rule of decision in all cases, even those in which foreign fact elements exist. Thus, under such a theory application of the law of the forum, with or without proof of foreign law, would usually be best.

The contention has been made that unfortunate results can come about through application of the forum's law in certain types of cases, such as those involving status and property rights which should, on the facts of the case, be controlled by some other law. Nevertheless, the law of the forum will usually reach a reasonable result. For one thing, it prevents dismissal of the complaint and a refusal to decide the case. Danger of injustice is thus reduced by failure to plead and prove the foreign law. All in all as has been noted, the party wishing application of the law of another jurisdiction can always invoke it by judicial notice if it is the law of a sister state, or by pleading and proving it if it is foreign nation law. The lesson of Pauska

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107 Nussbaum, supra note 28, at 1037.
108 For a short discussion of the vested rights theory, see G. Stumberg, Conflict of Laws 7-12 (3d ed. 1963).
109 See Restatement (Second) of Conflict of Laws § 6(2) (1967) for a discussion of the significant relationship doctrine. Comment g under § 136 points out that usually the law of the forum will be applied if no or insufficient information of the foreign law is supplied.
v. Daus remains: "[I]f the rate of interest in Mexico had been relied upon and pleaded in the cause, that general law in contra-distinction to the municipal law of the place of the remedy, would have been applicable, but that since it was not so relied upon, the rule of decision of the domestic forum was properly adopted."