PART FIFTEEN

APPLICATION OF FOREIGN LAW

CHAPTER 76

Ascertainment of Foreign Law [1]

AN international discussion involving almost every country has been directed to the following questions:

I. Is the foreign law a fact, or is it at least to be evidenced as a fact? Or is the court entitled to investigate it on its own motion? Or is this a duty of the court?

II. Is the application or nonapplication of foreign law reviewable on appeal?

III. What methods of evidence are admitted?

IV. What effect has the absence of proof of the foreign law?

The debates have been so comprehensive that little can be added. The third question concerns exclusively, the others greatly, the rules of procedure, which are not here considered. But a summary is advisable with the accent upon the evolution in court practice and legislation. Reporting on this topic in the United States and in certain countries is sometimes anachronistic.

I. JUDICIAL NOTICE OF FOREIGN LAW

1. Mere Party Evidence

(a) *Foreign Law is a fact.* At common law the treatment of foreign law has been connected with the idea that only domestic law is law, hence foreign law must be proved

[1] NUSSBAUM, "Proof of Foreign Law," 50 Yale L.J. (1941) 1018; *Id.*, Grundzüge des internationalen Privatrechts (1952) 235; RUDOLF B. SCHLESINGER, Comparative Law Cases and Materials (1950) 32-139.

as a fact.[2] A party basing a claim or defense on a foreign rule must plead and prove it as "any other fact," that is, in the same manner and time; as such, it goes to the jury, if there is any in the case. Thus taught, following older Continental authors, Story,[3] and his disciple Foelix in France,[4] as well as Calvo in international law.[5] On paper, this doctrine remains the accepted dogma in the British and most American jurisdictions and sometimes abroad.[6]

The British aloofness from "foreign law" has gone so far that English executors have been held justified in ignoring Scotch law when distributing inheritance assets to the wrong beneficiary.[7] And the Restatement asserts that if the court disbelieves the evidence offered by a party, it cannot resort to evidence refuting the allegation.[8]

However, this belief has been thoroughly shaken. Many writers practically everywhere have protested. Compromises have been sought in various forms, as when it is said that foreign law is to be regarded on one side as fact and on the other side as law. Some scholars and courts have resorted to the theory of "material" or "formal reception" or the "local law theory" whereby the foreign law is deemed

[2] DICEY (ed. 6) 866, rule 194; 3 BEALE 1664 § 621.1; STUMBERG (ed. 2) 176; on the old cases see NUSSBAUM, Grundzüge 246.

[3] LESSONA, Rev. Droit Int. (Bruxelles) 1905, 547.

[4] STORY § 637; FOELIX § 18.

[5] CALVO, 2 D. Int. § 886.

[6] United States: see 67 L.R.A. 33; GOODRICH § 83; NUSSBAUM, 50 Yale L.J. 1018.

France: e.g., BATIFFOL, Traité 352 § 332.

Spain: long series of decisions from 1880 to 1926, see YANGÚAS 308; T.S. (Dec. 4, 1935) Clunet 1936, 671.

Chile: C.C. art. 13 and note of VELEZ SARSFIELD; Trib. Sup. (Nov. 12, 1926), 24 Rev. Der. I 289; ALBÓNICO 152.

Colombia: RESTREPO HERNANDEZ 232 § 1923 seem to refer to the common view, criticizing it.

[7] Re Hellmann's Will (1866) L.R. 2 Eq. 363.

[8] Restatement § 621 comment b; *contra* NUSSBAUM, Grundzüge 244 n. 40.

incorporated into the law of the forum; [9] these immediately come to the directly opposed result that foreign law is within the rule *jura novit curia.*[10] But we know that foreign law applies not by reception but "as such and because such." [11]

Italian and Dutch courts have largely abandoned the old conception.[12] In the United States, the axiom has been condemned by such scholars as Thayer and Wigmore; [13] the difficult transition may be gathered from the thoughtful argument with which the Supreme Court of New Hampshire overruled its former adherence to the fact theory:

". . . But as grave and serious doubts of the propriety of the treatment of foreign law as an ordinary question of fact have presented themselves, the rule has been reexamined and consideration given its standing. Its logical support and its practical merits are so open to objection and inviting to criticism that the rule of stare decisis is not strong enough to close the door to the consideration. . . . Conceding that foreign law is a matter of fact, yet it also is law in every true sense . . . it is a fact as domestic law is." [14]

In the end, the court found that judicial notice must be taken.

The Commissioners of Uniform state laws have drafted

[9] *Supra* Vol. I, p. 62 f.; see most recently YNTEMA, Festschrift für Rabel (1954) 535 f. against W. W. COOK's local law theory.

[10] Trib. Milano (June 10, 1949) Foro Padovano 1949 I 676.

[11] CERETI, 14 Riv. Dir. Proc. (1936) II 100, 107 n. 1: "non come recetticio ma come tale e perchè tale."

[12] Italy formerly: Cass., (May 13, 1937) 7 Giur. Comp. D.I.P. 281; (July 9, 1941) 10 Riv. Dir. Proc. 135 with many precedents. MONACO, L'efficacia 87 in 1952 considers this still as the dominant practice; but see *infra* n. 33.

Netherlands: formerly H.R. (April 21, 1876) W. 3989; now: *infra* n. 31.

[13] THAYER, "Judicial Notice and the Law of Evidence," 3 Harv. L. Rev. (1890) 285; *id.* "Law and Fact in Jury Trials," 4 Harv. L. Rev. (1891) 172; WIGMORE, 10 System of Evidence (ed. 3, 1940) 529; GOODRICH 222: both the fact theory and the submission to the jury "does not evoke admiration."

[14] Allen, J. in Saloshin v. Houle (1931) 85 N.H. 126, 155 Atl. 47; of course, the court could have gone to the logical end, Note, 30 Mich. L. Rev. (1932) 753 f.

their law on judicial notice "to correct two outworn rules of the common law," namely, that the law of a sister state is a fact and the decision is for the jury, an "inheritance from the insular common law of England of two centuries ago" when all foreign countries spoke foreign languages and had alien systems.[15]

(b) *Like a fact.* Under the leadership of such writers as Fiore and Diena, continental doctrine has abandoned the "fact" cliché, but retained its main practical results with a changed justification. The maxim, *jura novit curia,* is considered inconvenient for application. It is inappropriate to a law not promulgated in the forum and therefore difficult to know. Foreign law exceeds the ordinary range of knowledge expected of the judiciary. As it was said, long ago, in England:

"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 association which assist him in the consideration of what is the English law . . . "[16]

Hence, the party must plead and prove the foreign rules on which he bases his contention. This opinion has been adopted throughout the world and now governs in most countries.[17]

[15] 9 U.L.A. (1951) 399.

[16] Nelson v. Bridport (1845) 8 Beav. 527, 534, 50 Eng. Rep. 207, 210.

[17] In addition to the citations above n. 6:

United States: Cuba Railroad Co. v. Crosby (1912) 222 U.S. 473; 15 C.J.S. 840 n. 67 (speaking of avoiding the danger that the "hospitality" of the courts be stressed).

Belgium: POULLET §§ 336 f.

France: Cass. req. (Oct. 31, 1923) Revue 1934, 140; Cass. civ. (May 25, 1948) S. 1949.1. 21, Rev. Crit. 1950, 663; LEREBOURS-PIGEONNIÈRE (ed. 6) 232 § 212.

Greece: see the reports by TENEKIDES, Clunet 1932, 589, 593; FRAGISTAS, 10 Z. ausl. PR. (1936) 535; MARIDAKIS, 1 PIL. § 22; GOFAS, 6 Rev. Hell. (1953) 78.

Numerous writers, it is true, have found this combination of assumptions trying. If foreign law is law, some conclude that it must be treated like domestic law. Others revert to the characterization as fact, because the party has the burden of proof—non sequitur—or because the court has to take the ready-made law from the foreign source instead of examining its logical and social background.[18] But again, the latter argument is open to doubt. Neither is a judge in any country entirely free to create municipal law, nor is he bound to receive the presentation of foreign rules like an automaton. There are certainly degrees of freedom in the two situations, but the origin of the doctrine has caused an exaggerated emphasis on dependence on the foreign sources.

However, there is no doubt that the present doctrine is based on real or fancied convenience. So much as possible, the judge should be spared research in systems alien to him and the hazards of decision. Even so, in dealing with foreign law, he cannot be dispensed from the typical judicial operations which are not applicable in examining facts.

Thus, it is plainly settled that the court has the right and duty to weigh the evidence offered by the parties in its

Italy: former prevailing opinion, supported in C. Proc. Civ. art. 294; Cass. (May 23, 1930) Rivista 1931, 90, Foro Ital. 1930.1.968; (Dec. 1, 1930) Clunet 1931, 760; (July 8, 1931) Giur. Ital. 1932 I 1, 741, Rivista 1931, 280; (March 9, 1935) Rivista 1935, 405; (Dec. 19, 1933) Revue crit. 1935, 360; (Jan. 29, 1936) *ib.* 1936, 290; see UDINA, Rev. crit. 1935, 359; PERASSI, Lezioni 8; MORELLI, Elementi DIP. (1946) 16.

Portugal: C. Proc. Civ. art. 521.

Spain: Trib. Sup. (May 28, 1880); *id.* (Nov. 7, 1896); *id.* (Nov. 15, 1898); ORUE 492.

Argentina: C.C. art. 13; 1 ALCORTA 119, 137 f. *cf.*, 3 Z. ausl. PR. (1929) 394; Cám. Cio. (July 7, 1952) J.A. 1953, 5212.

Brazil: C. Proc. Civ. art. 212 and the writers on procedural law; Sup. Ct. (Nov. 12, 1926) 24 Rev. Der. I 289, but see *infra* n. 30.

Costa Rica: C.C. art. 11.

Guatemala: Law on Jurisdiction (1936) art. XXVI.

Nicaragua: C.C. art. VII.

[18] BATIFFOL, Traité 352 § 332.

judicial capacity, not as a trier of fact.[19] Although the German supreme court goes farther than other courts in reserving a place for its own research, its practice should be followed, holding that the judge in construing a foreign contract—where no formal canons of interpretation interfere—is not bound to foreign interpretations.[20]

Most manifestly, the legal nature of the task is recognized in common law jurisdictions by transferring the decision from the jury to the court,[21] as concerns the law of a foreign country.[22]

Judicial notice is taken, of course, of treaties to which the state of the forum is a party, provided that these are applied as domestic law.[23]

2. Discretionary Right of the Court to Investigate

In Brazil, article 14 (Int. C.C.), permits the judge to require a party to prove the text and validity of an enactment which he pleads. This is a partial legislative acceptance of a faculty which is either conceded as an enlargement of the court's power beyond passive waiting for the party evidence[24] or borrowed from the principle of judicial

[19] England: CHESHIRE (ed. 4) 130.
United States: 1 BEALE § 54; 3 *id.* § 682.
France: Cass. req. (July 29, 1929) D.H. 1929, 457, Clunet 1930, 680.
Spain: Trib. Sup. (July 12, 1904).

[20] RG. (Nov. 14, 1929) Jur. Woch. 1930, 1855. 1.

[21] England: Judic. (Consol.) Act, 1925, sec. 102; Lazard Broth. & Co. v. Midland Bank [1933] A.C. 289, 298.
United States: Note, 30 Mich. L. Rev. (1932) 749; Uniform Jud. Not. of For. L. Act, § 3.
New York: C. Civ. Prac. § 344 a, B.

[22] United States: Uniform Act, cited, § 5; Leary v. Gledhill (1951) 8 N.J. 260, 84 Atl. (2d) 725.

[23] Argentina: C.C. art. 13.
Germany: RG. (Feb. 25, 1904) 57 RGZ. 142: The Bern Railway Convention is irrevisible when offered as Austrian law; *cf.*, MELCHIOR § 292.
Nicaragua: C.C. art. VII and other codes.
Spain: CASTILLO, 4 Rev. Espan. D. Int. (1951) 409, 447.

[24] Thus also in France: Cour Paris (March 14, 1952) Rev. Crit. 1952, 325; BATIFFOL, note *ibid.* understands that even judicial notice is taken.

notice.[25] This right may also directly follow from the modern conception that the court is responsible for the course of the proceedings and has to advise the parties of failures to complete their activity.[26]

The American Uniform Act expressly states:

§ 2. The court may inform itself of such law in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information.

What is here in discussion, is a mere right of the court which is not reviewable on appeal. There is a difference according as theories unfavorable or favorable to judicial notice of foreign law are taken as a starting-point. The New York rule, as well as the provision of the Uniform Act and similar statutes, has been commonly construed to the effect that the court would only act when a party has pleaded the foreign law. The statute, it has been held, removes the necessity of proof but not that of pleading, or, at least, of drawing the attention of the court to the foreign rule.[27]

On the basis of the broadly drafted New York statute of 1943, which literally would allow any spontaneous research by the court, thus far the Court of Appeals has only once disapproved this position.[28] This decision still leaves

[25] Italy: Cass. (May 12, 1937) 7 Giur. Comp. DIP. 281; (March 28, 1938) *ib.* 327.

Netherlands: H.R. (June 28, 1937) W. 1938 No. 1.

[26] German C. Civ. Proc. § 137, as generally interpreted; *ib.* § 293 (*infra* n. 3) had originally just this meeting.

[27] E.g., Strout v. Burgess (Me. 1949) 68 Atl. (2d) 241, 12 A.L.R. (2d) 939; Scott v. Scott (1951) 153 Neb. 906, 46 N.W. (2d) 627, 23 A.L.R. (2d) 1431; Bergman v. Lax (1951) 107 N.Y.S. (2d) 266; Allen v. Saccomanno (Wash. 1952) 242 P. (2d) 747.

[28] Pfleuger v. Pfleuger (1952) 304 N.Y. 148, 106 N.E. (2d) 495; on the recent New York practice, see NUSSBAUM, "Proving the Law of Foreign Countries," 3 Am. J. Comp. L. (1954) 60.

intervention to the discretion of the judge,[29] but it ruled that any court of original jurisdiction can cure the failure of the party to specify the foreign rule relied upon by taking notice ex officio. Moreover, the court stated that the discretion of the court ought to be exercised with respect to the statute of a sister state.

If this stage is reached, it is more certain than before that judges may use their private knowledge in evaluating party evidence. It is not probable, however, in this connection that a court may, on its own motion, introduce a foreign law that was not pleaded into the suit otherwise than by questioning the parties.

3. Duty to Take Judicial Notice

Is there a duty of the court to insert into the procedural matter (a) the question of the applicable law, (b) the materials to solve this question, (c) the solution of this question? So far no provision seems to have stated an absolute duty of this kind. The duty in question is always tempered by some measure of discretion, obliging judges to make appropriate efforts rather than to achieve results. However, such a provision definitively changes judicial passivity into active responsibility.

Common law procedure has not encouraged such enterprise. Central European judges could be charged with more linguistic aptitude and familiarity with the basic Romanistic ideas of the surrounding countries. The greatest influence, however, has come from the writers who since Savigny infer from the position of the national laws within the international community the dignity of a true

[29] The Appellate Division states that it may, according to its discretion, take judicial notice of the law of a sister state or a foreign country, or in the absence of actual proof indulge in presumptions of similarity. In re McDougald's Est. (1947) 272 App. Div. 176, 70 N.Y.S. (2d) 200.

law of conflicts and the equality of the laws before the judge.[30]

The German Code of Civil Procedure provides:

> The law in force in a foreign country, the customary law and the local enactments need proof only insofar as they are unknown to the court. In ascertaining such law the court is not limited to the evidence adduced by the parties; it is entitled to use other sources of knowledge and to issue orders for providing what is necessary to such use.[31]

While the New York statute has been construed narrowly as an effect of judicial prerogative, the German provision, which verbally expresses just this conception, is recognized as establishing a formal duty.[32] The court finds ex officio what law is applicable to the case and, if it knows its content, has to apply it; otherwise it must ask the parties to supply information.

A number of other countries have joined this group; in particular, as mentioned before, Italy and the Nether-

[30] E.g., United States: HARTWIG, "Construction and Enactment of Uniform Judicial Notice," 40 Mich. L. Rev. (1940) 174 advocates a federal provision on taking judicial notice.

France: WEISS, 4 Traité . . . ; PILLET, Principes 84.

Germany: common opinion from 1 ZITELMANN 287 f.

Greece: STREIT-VALLINDAS § 14; MARIDAKIS D.I.P. § 22 and many others.

Italy: FEDOZZI 442 f.; MORELLI, Lezioni (ed. 2, 1943) 46 § 18 (more determined than in D. Proc. Civ. Int. (1938) 54 f.)

Spain: YANGUAS MESSIA, 1 D.I.P. 303.

Argentina: A. ALCORTA.

Brazil: 2 MACHADO VILLELA 256; BALMACEDA CARDOSO 179; Institute of International Law, 11 Annuaire (1892) 330.

Colombia: CAICEDO CASTILLA 135 ff.

[31] ZPO. § 293.

[32] RG. (March 23, 1897) 39 RGZ. 371, 376; (June 18, 1900) Jur. Woch. 1900, 585; (Nov. 11, 1911) Jur. Woch. 1912, 196; (Oct. 24, 1912) 80 RGZ. 262; (Nov. 5, 1928) Jur. Woch. 1929, 1434; and constantly. MELCHIOR 421 § 284; NUSSBAUM 96.

lands have veered to the principle of taking judicial notice.[33] The Latin-American treaties have adopted it.[34]

In the United States, the Uniform Act and the New York statute are formulated in agreement with this doctrine,[35] although the courts hesitate to give it full effect. The clearest expression is found in the Massachusetts statute:

The courts shall take judicial notice of the law of the United States or of any state, territory or dependency thereof or of a foreign country whenever the same shall be material.[36]

This sounds imperative, and foreign countries are included. Under this approach, there is no burden of proof nor of pleading.[37] The party has an interest to aid in procuring the means of persuasion, and in practice the party takes the

[33] Austria: ZPO. § 273; OGH. GlU No. 394, 2473, 6511, etc.; WALKER 244; WAHLE, Schweiz. Jur. Zeit. 1932, 188.

Greece: isolated decisions: Trib. civ. Rhodos (1948 and 1949) 5 Rev. Hell. (1951) 221; Trib. civ. Athens No. 2260/1951, 6 Rev. Hell. (1952) 77, note GOFAS.

Hungary: C.C. Proc. of June 6, 1952, § 200, 19 Z. ausl. PR. (1954) 150.

Italy: Cass. (June 28, 1940) Rivista 1942, 242, 8 Giur. Comp. D.I.P. 232; (July 31, 1941) Foro Ital. 1942 I 9, 10 Giur. Comp. D.I.P. 73; (Aug. 12, 1946) Foro Padovano 1947 I 285 (including foreign conflicts law); DE NOVA, Rev. Crit. 1951, 174.

Netherlands: foreign law is law: H.R. (June 4, 1915) W. 9871; (March 20, 1931) W. 12287, N.J. 1931, 890; to state ex officio; Rb. Rotterdam (Jan. 9, 1918) W. 10355; Rb. Amsterdam (March 9, 1918) W. 11593, N.J. 1925, 861; VAN BRAKEL 48 § 27.

Switzerland: to the partial effect that the courts determine ex officio whether foreign or Swiss law applies. BG. (Nov. 3, 1900) 26 BGE. II 719; (Nov. 24, 1933) 60 BGE. II 433; (May 16, 1950) 76 BGE. III 60. SCHNITZER 172. But cantonal restrictions of judicial inquiry are maintained by the Federal Tribunal, as NIEDERER, Allg. Lehren 346 notes.

Hungary: DE MAGYARY, Clunet 1924, 590, 600.

Poland: IPL. art. 39 par. 1.

Chile: Sup. Trib., 15 Rev. Der. I 253; 16 *ib.* II 70; 25 *ib.* I 544; ALBONICO 15.

Soviet Ukraine; C. Proc. Civ. art. 8; MAKAROV, Précis 100.

[34] Treaty of Montevideo, art. 2 and Prot. Add.

Código Bustamante, art. 408-410.

[35] 9 U.L.A. 399 ff. sec. 1; N.Y. Civ. Prac. Act § 344a, A.

[36] Mass. Stat. 1926 c. 168; Ann. L. 1951, c.233 § 70; but see Note 32 Mass. L.Q. (1947) 20; SCHLESINGER *supra* n. 1.

[37] RG. (June 2, 1918) Warn Rspr. 1918 No. 147.

initiative. The system tends rather to cooperation than to revolutionary intervention of judges.

For the American federal courts, the rule has been that they should take judicial notice of federal law and all state laws.[38] Consequently, in diverse citizenship cases, they are not limited to the state laws of which the state takes judicial notice.[39]

In matters of "voluntary jurisdiction" (noncontentious judicial decisions), unlimited judicial responsibility for application of the competent law is prescribed in Germany.[40] Where administrative authorities decide, they require everywhere full evidence by the petitioner.

Also within this group, the statutes and their interpretation are at variance in defining the intensity of purpose. The German Reichsgericht insists that the court is charged with the duty of examination, even though counsel present concordant statements on the foreign law,[41] but this is rarely observed anywhere. Great influence must be accorded to the procedural law of the court. Where, for instance, the rules of procedure require the plaintiff to indicate not only his cause of action in terms of fact but also the legal rule on which he relies, judicial initiative is somewhat restricted.[42] The nature of the individual case and of the foreign law involved has varying significance. For understandable reasons, many courts are reluctant to use their power of examination, especially when the attorneys are

[38] Restatement § 324. *Cf.*, Australia: State and Territorial Laws and Records Recognition Act 1901-1950.

[39] Thus since the Erie RR. v. Tompkins case, GOODRICH 234 n. 27; Waggeman v. Gen. Fin. Co. of Philadelphia (1940) 116 F. (2d) 254.

[40] SCHLEGELBERGER, 1 Kommentar zum Gesetz über freiwillige Gerichtsbarkeit (ed. 4) § 27 n. 26; MELCHIOR 422 n. 4; KG. (June 24, 1937) Jur. Woch. 1937, 2827 over-ruling its former decisions; LG. Saarbrücken (Oct. 20, 1949) IPRspr. 1945-49, No. 1.

[41] See *infra*, IV.

[42] Colombia: RESTREPO HERNANDEZ 238 § 1950.

negligent. On the other hand, it is wrong to speak of a danger in the administration of justice when a judge invokes a foreign law ignored by the parties. Surprise, of course, must be avoided by a party in relation to the adverse party, as the New York statute realizes, and quite equally by the court in relation to both parties; they must be timely invited to take position. That even the broadest mandate to the court can result only in a restricted response when libraries, experience, and funds for consultation are deficient, is too trite a truth not to be borne in mind by all legislators.

4. Sources of Foreign Law

There are no more lawyers, we hope, who believe that any foreign code exhausts the legal system of the country. Decisions must be explored also for civil law countries.[43] Contrary to former errors,[44] again, a foreign rule is given the construction adopted by the foreign courts, even though the same text, derived from the same model or borrowed from the forum, may be construed differently by the court itself.[45] This is by no means a limitation on the creative intelligence of a judge; he acts simply as the foreign judge supposedly would do; American judges are very familiar with this operation.

[43] Permanent Court of Int. Justice (July 12, 1929) Publications, Ser. A No. 20/21.

England: Lazard Broth. v. Midland Bank [1933] *supra* n. 21.

France: Cass. req. (Nov. 18, 1924) Gaz. Pal. 1925.1.150.

Germany: RG. (March 12, 1906) Jur. Woch. 1906, 297.

Italy: Cass. (Dec. 19, 1933) Revue crit. 1935, 360.

Anglo-German T.A.M. The Thames & Mersey v. Allianz, 8 Recueil Trib. Arb. Mixtes 68.

[44] See NUSSBAUM 99 n. 2; *id.*, Grundzüge 234.

[45] United States: Los Angeles Inv. Sec. Corp. v. Joslyn (1939) 12 N.Y.S. (2d) 370, 379.

France: Ap. Douai (March & May 7, 1901) Clunet 1901, 180.

Germany: RG. (March 12, 1906) Jur. Woch. 1906, 297.

One should not, however, forget the literature, at least as represented by the leading handbooks. Case law as well as statutes may lead foreign observers to strange conclusions.

Some writers hold that an American statute may be subjected in a foreign court to judicial review of its constitutionality as might occur at home.[46] This is a queer contention. Not only would such a supervision be delicate,[47] but it is totally unfounded. It would be tantamount to anticipating the overruling of a decision of a foreign supreme court which, in a system of stare decisis, binds the lower courts.

II. Review on Appeal [48]

1. Review of Conflicts Law

(a) *No review.* If foreign law is earnestly considered to be a fact "like other facts," review is excluded where new facts are barred in appellate courts and where review is barred on questions of fact.[49] Not even an error in applying Spanish conflicts law has been held reviewable by the Spanish supreme court.[50]

An impediment of another kind exists in English and American procedure, where the all important evidence by expert witnesses on foreign law can only be offered to a trial court. However, the upper court has various opportunities of evaluation and reversal, and statutory innovations

[46] Niboyet, 3 Traité §§ 970 f.; Maury, 57 Recueil 1936 III 966.

[47] Pontes de Miranda, 1 Trat. (1935) 365 § 7; Batiffol, Traité 355 § 334.

[48] Lewald, "Le control des cours suprêmes sur l'application des lois étrangères," 57 Recueil (1936 III) 205; *id.*, "Kollisionsfrage und revisio in jure," in Basler Studien zur Rechtswissenschaft, Heft 15 (Basel 1942) 205; Riezler, Internat. Zivilprozessrecht 500 ff.

[49] Spain: Trib. Sup. (Nov. 19, 1904).
Colombia: Restrepo Hernandez § 1968.

[50] Spain: Trib. Sup. (June 7, 1875) despite art. 1602 Cod. de Enjuiciamento; likewise as to decisions of the Dirección dos Registros (Dec. 26, 1891).

have permitted appellate courts to take judicial notice.[51]

The principal question, in the general opinion, concerns supervision by the highest tribunal.

(b) *Review of written conflicts law.* The French Court of Cassation, following its charter of 1796, reviews judicial errors only in the application of "la loi," the written legal rules.[52] Hence, all the conflicts rules, ingeniously developed on the scanty ground of article 3 of the Code Civil, would fall outside the scope of *révision.* This limitation was observed for a long time and is still respected in Belgium and the Netherlands.[53] The French Court, however, usually circumvents the obstacle by citing article 3 or some substantive code provision as violated, and thereby virtually has passed into the following group.[54]

(c) *Violation of conflicts law.* The system reached by the French highest court is that most used in civil law countries. In Germany it was predicated by Waechter in 1841 and adopted by the Commercial Court of Appeals in 1875.[55] The list of the jurisdictions in the note [56] is not exhaustive.

[51] E.g., New York, Civ. Prac. Act, sec. 244 a, D.

[52] Decree of Nov. 27, 1790.

[53] Belgium: Cass. (Feb. 21, 1907) and (March 19, 1931) Clunet 1931, 735 and constant practice; POULLET § 339; Cass. (March 26, 1953) Clunet 1954, 421.

Netherlands: H.R. (June 2, 1937) W. 1938 No. 1; (Jan. 8, 1943) W. 1943, No. 202; KOSTERS 125, constant practice. GARDE CASTILLO, "Los problemas del recurso de casacion en D.I.P.," 4 Rev. esp. D. Int. (1951) 409, 453, 447, and RESTREPO HERNANDEZ § 1977 advocate the same principle for Spain and Colombia respectively.

[54] France: Cass. civ. (April 13, 1932) D. 1932.1.89, S. 1932.1.361; Cass. req. (March 15, 1933) S. 1934.1.393; Cass. Civ. (March 22, 1944) D.C. 1944 J. 166; LEREBOURS-PIGEONNIÈRE (ed. 6) § 212.

[55] WÄCHTER, 21 Arch. Civ. Prax. (1841) 310; ROHG. (March 2, 1875) 17 ROHGE. 167.

[56] Austria: ZPO. § 503; OGH. constant practice, WALKER 244.

Germany: ZPO. § 549 par. 1; RG. (Oct. 30, 1907) 19 Z. int. R. (1909) 838; (June 26, 1919) Jur. Woch. 1920, 40, 51; (May 13, 1929) IPRspr. 1929 No. 3; MELCHIOR 425 §§ 286 f.

Greece: STREIT, Recueil 1927 V 71.

Italy: Cass. (June 8, 1931) Rivista 1931, 280; (Aug. 12, 1946) Foro

The effect of this system is to control the application of the entire set of domestic rules of conflict. The supreme court watches how "the principle of the connection with foreign law" [57] operates, without touching the use made by the lower court of a foreign law. What does this mean?

The court does examine whether domestic substantive law ought to apply instead of foreign law, or the latter instead of the former. The Reichsgericht also usually criticizes a judgment not precisely stating which law applies, even though the end result seems to be the same whatever contact of the case is held decisive.[58]

Whether, however, the subordinate court erred in admitting the existence or nonexistence of a specific foreign rule, be it substantive or conflictual, is not reviewed. The question has arisen whether an exception should be made when the application of the domestic law depends on renvoi from a foreign conflicts rule. The German court answers in the affirmative.[59] In a 1932 case, an American couple had married in Chicago, established their first domicil in St. Louis, and later transferred their residence to Hamburg, where the husband sued for divorce. The proceedings

Padovano 1947 I 285; MORELLI, Lezioni § 18; DE NOVA, Rev. crit. 1951, 170. *Cf., infra* n. 70.

Netherlands: expressly excluding review of foreign law: H.R. (June 22, 1928) W. 11857, N.J. 1928, 1486; (May 29, 1933) W. 12661, N.J. 1934, 529; (June 26, 1937) W. 938 No. 1; (April 12, 1942) W. 1942 No. 48; VAN DER FLIER, Clunet 1936, 116.

Rumania: Cass. (March 21, 1932) Revue 1935, 56; PLASTARA, 7 Répert., Roumanie No. 139.

Spain: ORÚE, Manual § 363; but *contra* GARDE CASTILLO (*supra* n. 51).

Switzerland: BG. (Feb. 18, 1910) 36 BGE. II 35; (March 17, 1926) 52 BGE. II 97.

Chile: divided authority; to the effect described above Trib. Sup. (Sept. 7, 1923) Rev. Der. 1923.1.398; ALBONICO, esp. p. 22 and n. 47, against others.

Colombia: 2 RESTREPO HERNANDEZ § 1974.

[57] LEREBOURS-PIGEONNIÈRE (ed. 6) 231 § 211.

[58] RG. from (Oct. 30, 1907) 19 Z. int. R. 338 constant practice, MELCHIOR § 283; (July 7, 1933) IPRspr. 1933, No. 15, Revue crit. 1935, 447, Clunet 1935, 1190.

[59] 55 RGZ. 248; 59 *id.* 26; 78 *id.* 234; 91 *id.* 41; (June 2, 1932) 136 RGZ. 361; (July 7, 1934) *supra* n. 56; RAAPE, Komm. 47; *id.* D.I.P.R.

turned on the question of renvoi effect which should be ascribed to American conflicts law on the law governing divorce of American spouses domiciled in Germany. The Reichsgericht explained that here the content of the American law is only an incident to the problem whether German divorce law is applicable. From the formulation in the decided cases, it has been concluded that this exception is not allowed when the reference goes to a third law.[60] But since not only the substantive law of the forum but also its conflicts law is controlled, this limitation is unfounded.

Switzerland accepts the same exception;[61] other countries reject it,[62] doubtless contrary to the purpose of conflicts law.

Analogous exceptional appraisal of foreign laws has been justly urged in certain other situations.[63]

(d) *Indirect review of foreign law.* Strangely enough, in the same breath in which foreign law is branded as an intolerable burden on appellate courts, "indirect," irregular control is admitted in France[64] as well as in Germany,[65] while the highest court of the Netherlands allows review in cases of public policy,[66] probably everywhere an official concern. The particulars are of slight interest, except that the breach of allegedly necessary restrictions in the

[60] LEWALD, Recueil 1936 III 255.

[61] Switzerland: BG. (Nov. 27, 1918) 44 BGE. II 453.

[62] Belgium: Cass. (March 9, 1882) Pas. Belg. 1882.1.62.

France: Cass. civ. (March 7, 1938) Revue crit. 1938, 472; for many other cases see MAURY, Recueil 1936 III 405.

Netherlands: H.R. (Jan. 8, 1943) W. 1943 no. 202; VAN PRAAG, Rechterliche Organisatie 583, 907; VAN BRAKEL 50-52 § 30.

[63] DÖLLE, "Betrachtungen zum ausländischen, internationalen und interlokalen Privatrecht," Festschrift für Leo Raape (1948) 149, 153.

[64] BATIFFOL 363 § 343 discusses the control of qualifications, notably in the matter of registration and (§ 344) the "contrôle des motifs" and the theory of "dénaturation."

[65] MELCHIOR 432 § 295, *cf.*, 513 f. § 373.

[66] H.R. (March 13, 1936) W. 280, 281; (April 28, 1939) W. 895; VAN BRAKEL 50 n. 3.

leading countries demonstrates the shortcomings of the principle.

2. Review of Foreign Law

In the doctrine just described, the ultimate review refrains from any opinion on the correctness of lower court findings on what the foreign law is. The Swiss Federal Tribunal, which at the same time must abstain from cantonal law, has been forced to set up an entire jurisdictional system, full of hedges.[67]

Authors of many nations are dissatisfied with the prevailing usage,[68] which has been abandoned in a number of jurisdictions,[69] including most Italian decisions.[70]

No equivalent difficulty has ever been felt in common law courts. In the framework of access permitted to the highest state courts, no difference is made between domestic and foreign law. The federal Supreme Court, on appeal from the federal courts, takes judicial notice of the law of all American states, and on appeal from a state court "of

[67] See the complications in BG. (Sept. 20, 1950) 76 BGE. II 247, Praxis 1950 No. 146, Schw. Jahrb. Int. R. 1951, 310. The Court recalls that even though Swiss law was applied as foreign law against the construction of the Federal Tribunal by a Swiss court, review is excluded.

[68] See in particular 1 BAR 143; ZITELMANN 288; 1 FRANKENSTEIN 293 and NEUBECKER 369 (both for the present law); 1 PONTES DE MIRANDA 369; GARDE CASTILLO 460; DÖLLE, in Festschrift für Raape (*supra* n. 63) 153.

[69] Austria: ZPO. § 503; WALKER 244; POLLACK, 2 Ziv. Proz. Recht. (ed. 2) 608.

Belgium: Cass. (July 4, 1949) Pas. 1949 I 522; (March 26, 1953) Clunet 1954, 421.

Czechoslovakia, Poland, Yugoslavia: see LEWALD, Recueil 8936 III 288.

Finland: Int. Family L. § 56.

Greece: divided authority; see MARIDAKIS, P.I.L. 276.

Portugal: Trib. Sup. (Feb. 4, 1918) cited by MACHADO VILLELA, 2 Trat. D.I.P. (1922) 264.

Siam: P.I.L. art. 8.

Soviet Russia: MAKAROV, Précis 103; MAURACH, 47 Z. int. R. (1932) 19.

[70] Italy: Cass. Roma (Nov. 10, 1917) Giur. Ital. 1918 I 1, 24; Cass. (July 8, 1931) Rivista 1931, 280 (with history); (Dec. 29, 1937) Foro Ital. 1938 II 158, 12 Rivista 1938, 289; (June 12, 1938) 7 Giur. Comp. D.I.P. 331; (Aug. 12, 1946) Foro Padovano 1947 I 285, 22 Giur. Cass. Sez. Civ. 1946 II 619; DE NOVA, Rev. crit. 1951, 170.

all law of which the state court takes judicial notice." [71]

Theoretically, not a shred of an argument can be made for the exclusion of foreign law from review. The authors justly regard the assimilation of foreign and domestic law in the courts of appeal as a simple consequence of a true law of conflicts. The only real issue is procurement of the means for easy and practical perusal of foreign documentation. On this point, the idea to entrust only the lower tribunals with the final decision on the entire law of the world has been rightly ridiculed.

III. Methods of Proof

Since the Sussex Peerage Case of 1844,[72] it has become the English rule that foreign law is proved by expert witnesses.[73] The particulars constitute a complicated network, especially in the United States.[74] Statutes and decisions are normally offered but commented upon by experts. The usual American rule calls for such documents or experts or both.[75] Also the English Court of Appeal does not require the latter without exception; if statutes are presented and sufficient experts are not available, the court must "apply its own mind." [76] American practice is "more liberal" [77] also in other respects, and the New York legislation has perfected development by allowing the courts to "consider any testimony, document, information or argu-

[71] Restatement § 625, comment a.

[72] Sommerich and Busch, "The Expert Witness and the Proof of Foreign Law," 38 Corn. L.Q. (1951) 125; Melchior 431.

[73] 7 Wigmore, Evidence § 2090a.

[74] See 2 Wigmore, Evidence §§ 566, 664; 3 *id.* § 690 and §§ 1217, 1697, 1953.

[75] Where nevertheless the evidence of an English rule left doubt, the ascertainment was left to the jury; Electric Welding Co. v. Prince (1909) 200 Mass. 386, 86 N.E. 947.

[76] Rouger Guillet & Cie. v. Rouger Guillet & Co. Ltd. [1948] 1949 All E.R. 244; Clunet 1950, 642.

[77] 2 Wigmore § 664.

ment on the subject."[78] A recent English statute on a special matter is similarly broad.[79]

Although in Continental procedure all means of evidence allowed by the court are admitted,[80] proposals to alleviate the perplexity concerning foreign law that often exists, have been devised in literature, congresses, and some treaties; it is recommended that information be made available by diplomatic correspondence, authentic opinion of foreign courts, or domestic or foreign Justice Departments.[81] In fact, most courts and administrative agencies for good reasons refuse to give advice. What comes forth through consulates is frequently of no use. All available and reliable channels of information are certainly worth cultivating. Experience, however, shows the pitfalls in the testimony of witnesses unilaterally appointed by one party, and those not infrequently occurring in official communications concerning particular litigious points.[82] Judges, parties, and experts must fully cooperate. But it is not least in the interest of a trustworthy source of information for the courts that I have not ceased to demand the creation of fully adapted independent research institutes for foreign and international private law. Where they do exist, in very few cases will the search end in the vacuum presently to be discussed.

[78] Civ. Prac. Act § 344a-C.

[79] Foreign Compensation Act 1950, 14 Geo. VI c. 12, rule 4, see Int. L.Q. 1951, 361, 364.

[80] E.g., Argentina: Cam. Fed. la, Jur. Arg. 1944 IV 211, 8 Rev. Arg. Der. Int. (1945) 378.

[81] For an admirable report on the entire question see HARRY LEROY JONES, "International Judicial Assistance, Procedural Chaos and a Program for Reform," 62 Yale, L.J. (1953) 515-562.

[82] Example: the Kammergericht of Berlin (June 24, 1937) Jur. Woch. 1937, 2827. H.R.R. 1937, 1376, had to refute with the help of the Kaiser Wilhelm Institute for Foreign and Internat. Priv. Law official documents issued by a probate court in New Jersey, which asserted that the N.J. statute of March 17, 1926, concerning intestate succession by a surviving spouse referred also to foreign immovables. The statute, of course, laid down internal and not conflicts law.

It is the scientific approach that is generally missing, supplanted by a mechanical routine operation. If Lord Dennan in the Sussex Peerage Case and Coleridge in Baron de Bode's Case are still rigorously followed and the court is admonished not to construe the foreign code but "make the best of the witnesses," a sterility, long forgotten in other legal operations, is prescribed. Words neither of statutes nor of decisions are a gospel. Foreign law is not a fact. Its spirit and appraisal of values and interests must decide.

IV. Absence of Proof

1. Rejection of the Claim

Taking conflicts law seriously and having determined in a particular case that a foreign law governs a claim or a defense, a court may feel impelled by logical considerations to hold that the issue depends exclusively on the commands of that law. Nothing entitles a judge to exchange the governing law against any other. If then the contents of the foreign law cannot be ascertained, eminent authority believes it to be unavoidable that the claim or defense should fail.[83]

Thus, Mr. Justice Holmes speaking for the Supreme Court of the United States, held in *Cuba Railroad Co.* v. *Crosby*[84] that Cuban law concerning the liability of employers for accidental injury of the employees not having been evidenced, the suit was to be dismissed. Against the objection that this involved a hardship on the plaintiff he stated: "The only just ground for complaint would be

[83] 1 Zitelmann 289, 293; Niemeyer, Vorschläge 77; Hellwig, 1 Zivilproz. R. 577; Anzilotti, Rivista 1906, 271; Morelli, D. Proc. Civ. Int. (1938) 50 ff.; De Nova, Rev. crit. 1951, 125 n. 4; Balmaceda Cardoso 186; Restrepo Hernandez 237 § 1944 ("just and logical," citing Machado Villela).

[84] Cuba RR. Co. v. Crosby (1912) 222 U.S. 473.

if rights and liabilities, when enforced by our courts should be measured by a different rule from that under which the parties dealt." [85] Similar views have been taken in other American [86] and foreign cases.[87] Whether the individual issues justified these results, is a separate question.[88]

Nevertheless, as a logical conclusion of general validity, the proposition is convincing only so long as foreign law is thought to be an ordinary element of the cause of action. Uncertainty of an essential fact must be fatal in a law suit; normally it leads to dismissal not only without prejudice *(ab instantia)* but with full force of *res judicata.*

Foreign law, however, is not a fact. Neither is it entirely equal to domestic law whose incertitude is not allowed to prevent a positive holding, because otherwise the court would commit a denial of justice. Failure to know a foreign law creates a particular problem, not necessarily subject to the treatment either of facts or of the municipal law of the forum.

Indeed, the courts have in most cases found both conceptions unsatisfactory. But expediency has suggested experimental rather than methodical rulings.

2. Presumptions for Similarity

The great majority of American authorities have resorted to the law of the forum by presuming that the

[85] *Id.,* 480.

[86] Christie v. Cerro de Pasco Copper Corp. (1926) 214 App. Div. 220, 211 N.Y.S. 143 and cited cases; Riley v. Pierce Oil Corp. (1927) 245 N.Y. 152, 156 N.E. 617; Arams v. Arams (1943) 182 Misc. 328, 45 N.Y.S. (2d) 251.

[87] Germany: ROHG. (April 20) 25 ROHGE. 53; RG. 51 Seuff. A. No. 85 Reichsober. HG. (April 28, 1879) 25 ROHGE. 13, 53.

[88] NUSSBAUM, 50 Yale L. Jour. at 1042 criticizes the Cuba R.R. decision because the railroad would certainly have been able to produce evidence of the Cuban law if it had been favorable.

foreign law is the same as the law of the court.[89] This device was also once traditional in Europe [90] but has almost vanished there.

(a) Common law courts have presumed that the common law of another state is identical with their own.[91] Yet, whereas European analogous assumptions were less scrupulous, American courts since the *Cuba Railroad Case* have become conscious that rules of civil law cannot be submitted to such identification.[92]

(b) The presumption has been extended by special provisions to the statutory law of the forum.[93]

(c) German courts, failing to verify American law, have resorted to English decisions [94] or substituted French law for that of Belgium or Luxemburg.[95] Such replacements within a close family of laws are better than to introduce the municipal law of the court, but advisable only if the foreign court itself, as in less developed countries, may be supposed to look to another authoritative system.

[89] 3 BEALE 1680; 15 C.J.S. 847; Peterson v. Chicago Great Western Ry. Co. (1943) 138 F. (2d) 804; the domestic law determines also the burden of proof, Menard v. Goltra (1931) 328 Mo 368., 383, 40 S.W. (2d) 1053, 1058.

[90] Germany: ROHGE. II 39; II 44: VII 61; VIII 12; 1 BAR 133 n. 4, 136f. Italy: App. Venezia (July 31, 1906) Rivista 1906, 271; (March 8, 1932) Riv. Italiana (FEDOZZI) 1932, 170. *Contra* FEDOZZI, D.I.P. 482; MORELLI *l.c.*

[91] Restatement § 622; 34 L.R.A. (N.S.) (1911) 261; KALES, "Presumption of Foreign Law," 19 Harv. L. Rev. (1906) 40; STORY § 272; WESTLAKE § 353; e.g., Read v. Lehigh Valley R.T. (1940) 284 N.H. 435, 31 N.E. (2d) 891; Miller v. Vanderlip (1941) 285 N.Y. 116, 33 N.E. (2d) 51; Smith v. Kent Oil Co. (1953, Colo.) 261 P. (2d) 149 (no presumption for Colorado statutory law); Associates Discount Corp. v. Main St. Motors Inc. (1953) 157 Ohio St. 488, 105 N.E. (2d) 878; Michigan law not evidenced, presumed similar to Ohio law concerning the question whether a chattel mortgage creates a legal or an equitable title.

[92] *Supra* n. 80 ad 82 and older cases.

[93] Long list of cases in 31 C.J.S., Evidence § 133 and Supp. 1954 also covering this extension; GOODRICH § 83 n. 31 names four statutes. To the same effect, the procedural codes of Zurich § 100 and of some other Swiss Cantons.

[94] OLG. Hamburg (April 4, 1929) IPRspr. 1929 No. 63.

[95] KG. (March 3, 1922) Jur. Woch. 1922, 1122.

How defectively the use of presumptions works is a known topic of criticism. Workable where similarity is probable, they have been used far beyond this limit.[96]

3. Subsidiary Law

(a) Without employing presumptions of similarity or at least without taking them seriously, the law of the forum has been applied, sometimes by contending that the parties tacitly submit to the local law or that the local law is the only one at the judge's elbow.[97]

That *lex fori* should be an auxiliary source of decision has also been explained on the theory of a vast function of the municipal law of the court.[98] It is described as an all comprehensive, fully potent order, which automatically presents itself when the conflicts law is frustrated. Some present writers assert that foreign law is an exceptional source; the normal rule is exclusively the domestic law, to which the court for many reasons resorts. Or the reference to foreign law is conceived as conditional, one condition being that it can be proved.[99]

Such nostalgic reminiscences of comity ideas and territorialism can be avoided. The law of the forum enters, if at all, as an emergency substitute rather than as an

[96] BIGELOW in STORY (ed. 8) § 853a; VON MOSCHZISKER, "Presumptions as to Foreign Law," 11 Minn. L. Rev. 1 (1926).

[97] See KALES, "Presumption of Foreign Law," 19 Harv. L. Rev. (1906) 401; GOODRICH 234; MORELLI, 1 D. Proc. Civ. Int. 57 § 36 and cit.

Finland: Int. Fam. L. § 56.

Germany: ROHG. (June 28, 1872) 7 ROHGE. 16; 1 BAR 137; RAAPE, D.IPR. 82, III.

Greece: MARIDAKIS PIL. 275.

Hungary: Draft I.P.L. § 17.

Poland: I.P.L. art. 39 par. 2.

Portugal: Draft C.C. 1951, art. 5.

Switzerland: BG. (June 20, 1914) 40 BGE. 480; (Sept. 23, 1941) 67 BGE. 215; (June 15, 1943) 69 BGE. II 309, 311.

[98] Most efficiently presented by BATIFFOL, Traité 368 ff.

[99] FIORE §§ 270, 272; ROLIN § 520.

ubiquitous force happily released from its odious chains. This role is necessitated by the present defective international order. But it is not true that if the foreign law is not provable the domestic law has a natural vocation to govern.

(b) Another line has been taken by some European writers and followed by the German Reichsgericht since 1885 [100] and identically by a Massachusetts decision of 1911.[101] In 1912 Mr. Justice Holmes directed attention to it by an obiter remark that,

"in dealing with rudimentary contracts or torts made or committed abroad, such as promises to pay money for goods or services, or battery of the person or conversion of goods, courts would assume a liability to exist if nothing to the contrary appeared." [102]

A few remarkable decisions have heeded this suggestion.[103]

Some scholars have advocated this approach, because no one national law in reality is available under the premises.[104] *Contra,* it has been urged that a law exists and is merely of unknown content.[105] The leading idea still seems to be that the law of the forum is employed as representing fundamental principles of civilized nations.

The vagueness of this idea, however, is illustrated by the observation that Holmes used conversion as an obvious example of this kind of *jus gentium,* while the New York

[100] Germany: RG. (Sept. 28, 1885) 16 RGZ. 337; (March 24, 1909) 71 RGZ. 9; (July 11, 1919) 96 RGZ. 230.

[101] Parrot v. Mexican Central Railway Co. (1911) 207 Mass. 184, 192, 93 N.E. 590, citing older Mass. decisions (p. 194).

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

[103] Esp. Arams v. Arams, *infra* n. 104; trial court in Riley v. Pierce Oil Co., *supra* n. 85; Crane, J., dissenting vote; trial court in Leary v. Gledhill, *infra* n. 108; Industrial Export and Import Corp. v. Hongkong & Shanghai Banking Corp (1947) 191 Misc. 493, 77 N.Y.S. (2d) 541, aff'd. 302 N.Y. 342, 96 N.E. (2d) 466 (ban on repayment by the Chinese Central Bank under the laws of China).

[104] FIORE § 272; ALCORTA 145.

[105] RESTREPO HERNANDEZ § 1965.

Court of Appeals has ruled out its application in the case of a conversion allegedly committed in Mexico,[106] although more recently a lower court has applied it to conversion committed in Switzerland and other places.[107] In one case, the same court reversed itself on the question whether a seaman injured in the course of his duty on a Panamanian ship and claiming damages for failure of the ship's officers to furnish prompt and proper medical care, could be heard under the presumption of the law of civilized countries.[108] Nevertheless there is a future in a device emphasizing international thought in international relations.

4. Distinction of Situations

Recent writers have hinted at the differences of the cases in which the search for a foreign rule lacks success.[109] The foreign law may be more or less alien or exotic; the procedural matter may be more or less closely tied to the foreign origin; and the just result of the conflicts problem may be more or less securely felt. Assuming such circumstances, a choice is open among several methods. Their number, however, does not include the usual presumptions of similarity. Whatever reasons once supported them have lost their usefulness. Not even the former community of common law has retained significance beyond elementary truth.

(a) *Acquiescence in the law of the forum.* Courts readily accept an agreement of counsel either on the contents of a foreign law or on application of the domestic

[106] Riley v. Pierce Oil Corp., *supra* n. 85.

[107] Arams v. Arams (1943) 45 N.Y.S. (2d) 251 attempts to distinguish the Riley case by distinctions not made in that case.

[108] Sonneson v. Panama Transport Co. (1947) 272 App. Div. 948, 72 N.Y.S. (2d) 153, ending after complicated proceedings, 278 N.Y. 262, 82 N.E. (2d) 569, cert. den. 337 U.S. 919, 961.

[109] NUSSBAUM, 50 Yale L.J. at 1041; GOODRICH (ed. 3) 236.

law.[110] The individual procedural law of the court must decide whether such agreement is acceptable; generally, it does not seem to be contrary. Yet the conditions for a true agreement on the applicable law often are not given and such agreements are totally excluded in suits on family and status matters. Nevertheless, they have been recently recommended [111] and in a recent case preferred by Chief Justice Vanderbilt to the presumption of civilized laws.[112] Their nature should be defined. A contract, although not a contract of international private law, is required in my opinion, viz. a procedural contract, valid on the basis of procedural authorization and only for the purpose of the law suit. Hence, the court should not be satisfied with silence on the foreign law, possibly due to ignorance of the conflicts problem, but inquire whether there is a binding understanding.

(b) *Dismissal.* Complaints have been rightly dismissed when a claim was brought by an alleged beneficiary in an estate or his creditor, annulment of a marriage was sought, or damages for wrongful death depended, on statutes not proved.[113] This group is very much larger. It needs examination to state exactly the individual causes of action which cannot be separated from their accrual under a foreign law.

(c) *"Civilized Laws."* The resort to the law of civilized nations is known as vague and uncertain and scarcely able to support more than elementary principles. But it has

[110] *Supra* Vol. II, p. 386. The Swiss Federal Tribunal (August 31, 1953) 79 BGE. II 295, applied in 80 BGE. II 51, has overruled its practice (referred to in my cited note and still professed in 77 BGE. II 87); the court now simply recognizes an agreement expressed by counsel of the parties on the law applicable to the litigious contract.

[111] NUSSBAUM, 50 Yale L.J. at 1040.

[112] Leary v. Gledhill (1951) 8 N.J. 260, 269, 84 Atl. (2d) 725; SOMMERICH AND BUSCH, *supra* n. 72 at 143.

[113] NUSSBAUM, 50 Yale L.J. at 1041.

some features of the "general principles," which in one sense or another are considered the subsidiary source of public international law. Also this approach may gain a firmer shape by closer analysis. Comparative research teaches us what is common in closer and wider families of legal systems. There is no need to guess that a loan must be repayable under French law, as being a civilized law.[114] If a glimpse into any French textbook is really too much to ask, even half-civilized peoples do not deny the rule; it is a notorious fact. With progressive knowledge much more than platitudes did and will result. For instance, the dissident vote in *Riley* v. *Pierce Oil Corporation* inferred from the facts that the defendent company must be liable for the contract of its dummy (the Mexican subsidiary company) "and pay for the oil taken." [115] But if the case was not to be decided under American law (because both parties were American corporations, a questionable ground), it could not be based without evidence, as the dissenting vote implied, on a nonexistent universal rule of piercing the corporate veil nor on a universal liability of an undisclosed principal. The claim, however, probably could well be justified on the ground of unjust enrichment, a doctrine of Romanistic heritage, at least now slowly being rediscovered also in Latin-American countries.[116]

(d) *Lex fori.* Application of the municipal law of the forum apart from similarity presumptions ought not to appear so satisfactory to the courts as they believe it to be. At best, the results are approximately correct. As an unavoidable last resort, it must be accepted.

[114] Trial court in Leary v. Gledhill, *supra* n. 111.

[115] Crane, J., dissenting in the Riley case, *supra* n. 85; "Against Holmes and Crane," RUSSELL, "Presumption of Similarity," 5 N.Y.U.L.Q. Rev. (1928) 29, 34.

[116] DAWSON, Unjust Enrichment 107.

Had the trial court in the *Cuba Railroad Case* investigated Mexican law, or had the Supreme Court remanded the case for such examination, the decision would have done justice to the claim, instead of dismissing it without knowing the merits and probably with prejudice.