St. John's Law Review

Volume 18, November 1943, Number 1 Article 11

Civil Practice Act § 344-a--Judicial Notice Extended

Robert Nelson Shiverts

John A. Demkowick

CURRENT LEGISLATION

CIVIL PRACTICE ACT § 344-A—JUDICIAL NOTICE EXTENDED.—Upon recommendation of the Judicial Council, the legislature enacted Section 344-a of the New York Civil Practice Act [1] which extends the scope of judicial notice in regard to matters of law, both domestic and foreign. The statute gives any trial or appellate court the right, in its discretion, to take judicial notice of the laws of sister states and foreign countries,[2] private acts of the legislatures of this state or of the Congress of the United States,[3] ordinances of local governments and regulations of administrative boards [4] of this state and of the United States.[5] When a matter of law is judicially noticed, it

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[1] N. Y. Laws 1943, c. 536, § 1, effective September 1, 1943.

§ 344-a. *Judicial notice of matter of law.*

A. Except as otherwise expressly required by law, any trial or appellate court, in its discretion, may take judicial notice of the following matters of law.

1. A law, statute, proclamation, edict, decree, ordinance, or the unwritten or common law of a sister state, a territory or other jurisdiction of the United States, or of a foreign country or political subdivision thereof.

2. A private act, or resolve of the legislature of this state, or of the congress of the United States.

3. An ordinance, resolution, by-law, rule or proceeding of the appropriate governing body of any city, county, town or village within this state.

4. A rule or regulation of an executive department, public board, agency or officer of this state, or of a city, county, town or village thereof.

5. A rule or regulation of an executive department of the government of the United States, or a public board, agency or officer created by law thereof.

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

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

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

[2] N. Y. CIVIL PRACTICE ACT § 344-a, subd. A, 1.

[3] *Id.* subd. A, 2.

[4] *Id.* subd. A, 3 and 4.

[5] *Id.* subd. A, 5.

is to be treated as a matter of law on appeal, and not as a question of fact.[6] To determine the law, the court may use any of the methods previously used to prove matters of law which were not judicially noticed, or may determine the law through its own research.[7] It is not necessary for the matter of law to be pleaded and proved.[8] In fact, the lack of a requirement for notice to the opposing party is conspicuous by its absence.

There is no doubt that our present system of pleading and proving foreign law as a matter of fact is antiquated. For the statutes and case law of sister states and foreign countries are no longer matters of conjecture. Today, except for the slight danger of a typographical error, the court can easily and surely determine the fact of what the foreign law is of most jurisdictions.

I

In discussing a new statute the question always arises as to whether it is constitutional. In other words, has the legislature the right under the New York Constitution to extend the scope of judicial notice to matters of foreign law? It is true that the courts are, as a rule, slightly behind the times in recognizing those facts which are apparent and are "known to every man". However, in the course of time, the courts, with not too great a lag, have judicially noticed our modern inventions and ways of life. But, nevertheless, in taking judicial notice of any fact the courts have bound themselves to those spheres which were within the scope of judicial notice at

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[6] *Id.* subd. B. This subdivision takes the place of matter which was deleted from N. Y. Civil Practice § 391, which, as amended by N. Y. Laws 1943, c. 536, § 2 reads as follows (the bracketed matter was deleted):

Proof of statutes, decrees and decisions of another state or country. A printed copy of a statute, or other written law, of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree or ordinance, by the executive power thereof, contained in a book or publication purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law of the judicial tribunals thereof, is presumptive evidence of the statute, law, proclamation, edict, decree or ordinance. The unwritten or common law of another state, or of a territory, or of a foreign country, may be proved as a fact by oral evidence. The books of reports of cases adjudged in the courts thereof must also be admitted as presumptive evidence of the unwritten common law thereof. [The law of such state or territory or foreign country is to be determined by the court or referee and included in the findings of the court or referee or charged to the jury, as the case may be. Such finding or charge is subject to review on appeal. In determining such law, neither the trial court nor any appellate court shall be limited to the evidence produced on the trial by the parties, but may consult any of the written authorities above named in this section, with the same force and effect as if the same had been admitted in evidence.]

[7] *Id.* subd. C.

[8] *Id.* subd. D.

common law, such as: history, science, facts of nature, etc. The courts at common law never judicially noticed foreign law, but always required that it be pleaded and proved even as any other fact.[9]

Of course it might be said that the doctrine of judicial notice is a branch of the law of evidence, and that evidence is adjective law, and since it is within the province of the legislature to regulate our procedural law, the state constitution cannot bar this enactment.[10] But it must be remembered that the doctrine of judicial notice does not belong to the law of evidence alone. It is a part and process of judicial reasoning—of the judicial function itself.[11] It is substantive in its properties and effect.[12]

Therefore, it would seem that this statute violates our constitutional guaranty of trial by jury.

> Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever. . . .[13]

If we take the Court of Appeals at its word, foreign law is a question of fact.[14] The Judicial Council, despite the direct and unequivocal statement of the court in *Read v. Lehigh Valley R. R.*,[15] takes the view that there is much confusion "as to the exact *nature* of foreign law".[16]

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[9] Read v. Lehigh Valley R. R., 284 N. Y. 435, 444, 31 N. E. (2d) 891 (1940); Croker v. Croker, 252 N. Y. 24, 168 N. E. 450 (1929); Hanna v. Lichtenhein, 225 N. Y. 579, 122 N. E. 625 (1919).

[10] "The general power of the legislature to prescribe rules of evidence and methods of proof is undoubted . . . . so long as the legislature, in prescribing rules of evidence, in either civil or criminal cases, leaves a party a fair opportunity to make his defense and to submit all the facts to the jury to be weighed by them, upon evidence legitimately bearing upon them, it is difficult to perceive how its acts can be assailed upon constitutional grounds." Board of Excise Commissioners v. Merchant, 103 N. Y. 143, 148, 8 N. E. 484 (1886).

[11] Thayer, *Judicial Notice and the Law of Evidence* (1890) 3 HARV. L. REV. 285, 287. Thayer states: "The subject of judicial notice, then, belongs where the general topic of legal or judicial reasoning belongs,—to that part of the law which defines among other things, the nature and limitations of the judicial function. It is, indeed, woven into the very texture of this function. In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuring something which has not been proved." Thayer supports this statement by tracing the doctrine of judicial notice back to the maxim of civil and canon law, *Non refert quid notum sit judici, si notum non sit in fomma judici* (It matters not what is known to the judge if it is not known to him judicially), and to the maxim of common law, *Manifesta probatione non indigent* (Manifest things require no proof), and also the pertinent fact that judicial notice was not mentioned as a part of the law of evidence until 1824 in Starkie's book.

[12] Although twenty-six states have enacted statutes requiring or permitting their courts to take judicial notice of the laws of sister states or foreign countries, or both, in no case that the authors have been able to find had the constitutionality of these statutes been attacked.

[13] N. Y. CONST. Art. I, § 2.

[14] See note 9 *supra*.

[15] 284 N. Y. 435, 444, 31 N. E. (2d) 891 (1940).

[16] NINTH REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK, p. 283: "Another aspect of the present rule which would seem to be in need of

Taking a statement from a case which the court decided thirty-six years ago that foreign law is essentially a question of law, the Judicial Council builds up its state of "confusion".[17]

That statement by the court is no more than a mere observation. It states the obvious, *i.e.*, although foreign law should be a question of law, we of New York still treat it as a question of fact. And, even if one takes the view that the Court of Appeals was undecided as to the nature of foreign law thirty-six years ago, certainly the unequivocal statement in the *Read* case[18] should settle the question.

But since foreign law is a question of fact, can we, by legislative fiat, turn it into a question of law? The danger of allowing a legislature to change questions of facts into questions of law is apparent. Questions of fact are for the jury. Since foreign law was treated as a question of fact at common law, we cannot now deprive parties of their constitutional right of having the jury decide what the foreign law is.

There is no doubt that the reasons offered by the common law courts for not judicially noticing foreign law now seem weak and unconvincing.[19] Most certainly judicial notice of foreign law is a goal toward which we must strive not by statute, but by constitutional amendment.

II

As a concomitant to its theory that foreign law is, in reality, a matter of law to be decided by the court, the Judicial Council recommended subdivision D of the statute, which states that foreign law

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clarification is the confusion as to the exact *nature* of foreign law. To state the question, 'Does foreign law present a question of fact or a question [of] law?' Thirty-six years ago, the Court of Appeals apparently answered the question when it said, 'It is true the foreign law is ordinarily proved as a fact, still it is not in its essential nature a fact any more than domestic law is a fact.' Yet as recently as 1940, the Court of Appeals declared that 'The question of what *is* the law of the foreign jurisdiction is one of fact', notwithstanding the intervening amendment of 1933 . . . decreeing that 'The law of such [other] state or territory or foreign country is to be determined by the court. . . .'" (For the amendment of 1933, mentioned above, see the bracketed matter in N. Y. Civil Practice Act § 391, *supra* note 6. This matter was deleted by N. Y. Laws 1943, c. 536, § 2.)

[17] Ibid.

[18] See note 9 *supra*.

[19] 1 JONES, EVIDENCE (2d ed. 1926) § 402 at p. 708: "As to refusal of judicial notice of the law of foreign nations, the reasons for the rule are too obvious to warrant discussion. So great is the variety and so wide the differentiation in the laws governing in various countries that it would be practically impossible for the courts to bear the burden which notice of such matters would impose. The situation with regard to notice of the statute law of sister states is not greatly different. The relationship of the several states, each to the other, is, in the last analysis, only that of foreign sovereignties in close friendship. Courts of many jurisdictions, it is true, indulge a presumption in the absence of proof of the law of a sister state applicable to a case at bar that such law is the common, or that it is the same as the law of the jurisdic-

need not be pleaded.[20] The reasoning seems to be that since in pleadings we only allege the ultimate facts, and since allegations of law are mere surplusage to be disregarded by the court, there is, then, no need to allege the foreign law. Even if the theory of the Judicial Council is accepted, it must be admitted that the statute is most unfair in the respect that it completely fails to provide for notice to the opposing party that foreign law is to be relied upon. This lack of notice may lead to some anomalous situations, two examples of which follow:

A

P's complaint alleges that *P* sustained personal injuries and suffered damage therefrom because of *D*'s negligent operation of an automobile in Ontario, Canada. However, *P*'s complaint also alleges facts which show him to have been guilty of some contributory negligence.

In New York contributory negligence is a complete bar to *P's* recovery. Almost as a matter of course *D* will move to dismiss the complaint upon the ground that it does not state facts sufficient to constitute a cause of action on the face thereof. The court has its choice of two decisions: (1) It may dismiss the complaint on the basis of New York law, or (2) under the conflict of laws rule that in tort the law of the place where the wrong occurred governs, the court may take judicial notice that Ontario recognizes the doctrine of comparative negligence, that this is a substantive doctrine; and, therefore, the court may sustain the complaint on the basis of the Ontario law.

There is no doubt that the court would be correct in handing down the first decision; and appeal would be futile. But, under Section 344-a the second decision is also correct. The court had the right to take judicial notice of the Ontario law. Up to this point, seemingly no great injustice has been done. However, there is no answer to the question as to why the court decided to notice the foreign law. It must be remembered that on this demurrer there was only one pleading before the court. There were no affidavits, no bills of particulars; there was only the complaint. Nowhere was the court informed that *P* had decided to rely on the foreign law. The anomalous aspect of it all is that even though the complaint was sustained on the basis of Ontario law, *P* may still come into trial and try his case on the basis of common law; and after picking a

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tion, which presumption, if not rebutted by proof to the contrary, controls. But such presumptions have no relation to judicial notice. They do not pretend to amount to cognizance of the actual law of the sister state in question, but only to substitute a presumption which, on the general average, may serve to prevent injustice from being done to him who fails to sustain his burden of proof."

[20] See note 1 *supra.*

jury, and wasting the state's time and money, be thrown out of court at this late time for the insufficiency of his complaint.

B

Let us assume one more example. Under the same set of facts as above, *D* fails to move for a dismissal of the complaint. Instead *D* appears at trial, ready to proceed on the basis of New York law. *P*, at trial, asks the court to take judicial notice of Ontario's comparative negligence doctrine, and the court accedes. Here *D* is surprised at trial, for he had expected to try his case under the New York law.

Of course it might be argued that New York Civil Practice Act § 242 renders surprise at trial impossible.[21] But if that section is examined, it will be seen that those matters which must be pleaded are all factual, *e.g.*, statute of frauds, release, or statute of limitations. Although the last sentence of the section gives the court the power to extend its operation to matters which are not specifically enumerated therein, nevertheless, it does not seem that this section could logically be extended to foreign law, which is now a matter of law.

It is possible that the surprise which *D* suffered was so important to his defense that he could claim that he was not given a fair hearing, and that, therefore, the "due process" clause of the XIV Amendment of the United States Constitution was violated.

It might be argued that since the statute is discretionary, there is little chance that it will be used so arbitrarily. However, in testing the constitutionality of a statute, the courts look at what may be done, and not at what probably will be done.[22]

Every state which has adopted the Uniform Judicial Notice of Foreign Law Act provides for notice to the opposing party either in the pleadings or otherwise. All of the eleven other states with independent judicial notice statutes require notice to the opposing party either in the statutes themselves or by judicial construction.

ROBERT NELSON SHIVERTS,
JOHN A. DEMKOWICK.

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[21] *Certain facts to be pleaded.* The defendant or plaintiff, as the case may be, shall raise by his pleading all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defense or reply, as the case may be, which if not raised would be likely to take the opposite party by surprise or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, statute of limitations, release, payment, facts showing illegality either by statute, common law or statute of frauds. The application of this section shall not be confined to the instances enumerated.

[22] "We measure the validity of statutes, not by what has actually been done under cover of their provision, but by what with reason may be done." Rosalsky v. State of New York, 254 N. Y. 117, 172 N. E. 261 (1930).