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The Expert on Foreign Law

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THE EXPERT ON FOREIGN LAW*

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Courts of one state do not, as a general rule, take judicial notice of the law of a foreign country. Ordinarily, when a litigant relies upon such foreign law as the basis of his claim or defense, he must plead and prove it.[1]

The methods of such proof are stated as follows in Rule 44, C (f), Colo. Rules of Civil Procedure.

> A printed copy of a statute, or other *written law*, . . . 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 in the judicial tribunals thereof, is presumptive evidence of the statute, law proclamation, edict, decree or ordinance. The *unwritten* or common *law* . . . of a foreign country, may be proved as a fact by oral evidence. The books of report of cases adjudged in the courts thereof must also be admitted as presumptive evidence of the unwritten or common law thereof. . . . (Italics supplied).

Thus Rule 44 (f) prescribes different methods of proof depending upon whether the law to be proven is written or unwritten. However, even as to the written law, the method prescribed is not the only one possible.

In *Mosko v. Matthews*,[2] the Colorado Supreme Court—construing Sec. 396 of the Code of Civil Procedure, predecessor of Rule 44C (f)—held that the provisions of the code relating to proof of foreign laws do not prescribe exclusive methods of such proof, at least in absence of seasonable objection, and that the statutes of a "foreign" state (Oklahoma) were sufficiently proven by the testimony of a duly licensed practicing attorney of that state when such testimony was uncontradicted.

But even when the text of the foreign statute is before the court, it must have help from expert witnesses. In the words of Dean Wigmore:[3]

> No one doubts that the aid of a mere translator is proper. But when a translation, if necessary, has been made, is anything further allowable in the way of comment

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* This article will be limited to the necessary qualifications of an expert witness, called to prove by oral testimony or by affidavit the existence or the meaning of a foreign law, i.e. the law of a foreign country, not that of a sister state.

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[1] 20 Am. Jur., Sec. 178.

[2] 87 Colo. 55, 284 Pac. 1021 (1930).

[3] 7 WIGMORE ON EVIDENCE, Sec. 1953 (3d ed. 1940).

> on the text? The answer has always and properly been that such aid may at any time be needed and may always be offered. (Citing cases).

Assuming then that expert witnesses are needed to prove both written and unwritten foreign law, we come to our problem: who can properly qualify as an expert on foreign law?

Having found no Colorado case directly in point, we shall have to consider the decisions of other jurisdictions.

As stated by Dean Wigmore,[4] "the main controversy is whether a witness to foreign law must be by profession an advocate, attorney, or judge, or whether a layman, if he claims the knowledge, may be trusted to speak as to the state of the law."

There is little doubt in our courts that a practicing attorney of a foreign jurisdiction (country) will qualify as an expert of the particular law.

FEDERAL COURTS:

In *Slater v. Mexican National Railroad Company*,[5] where the wife and children of a citizen of Texas fatally injured in Mexico through the negligence of a Colorado corporation brought suit based on the laws of Mexico, the Supreme Court of the United States held in effect that the admission in evidence of the statutes of a foreign country does not preclude the use, upon any matter open to reasonable doubt, of the deposition of a lawyer of that country, respecting the accepted and proper construction of such statutes. Said Mr. Justice Holmes:

> The defendant offered the deposition of a Mexican lawyer as to the Mexican law. This was rejected, subject to exception, seemingly on the ground that the agreed translation of the statute was the best evidence. So no doubt they were (sic), so far as they went, but the testimony of an expert as to the accepted or proper construction of them is admissible upon any matter open to reasonable doubt.

The Circuit Court of Appeals for the Second Circuit held[6] that the law of Cuba was not sufficiently proven by the introduction in evidence of excerpts from its written laws, and that its construction by the Cuban Courts should have been proved by the testimony of a lawyer of that country.

In *Hartzell v. United States*,[7] the testimony of a member of the London, England, bar was admitted to identify certain statutes of England.

The Circuit Court of Appeals for the Fifth Circuit held in *Shapleigh v. Mier*,[8] that the law of Mexico

[4] *op. cit.*, Sec. 564.
[5] 194 U.S. 120, (1904).
[6] In re International Mahogany Co., 147 Fed. 147, (1906).
[7] 72 F. 2d 569 (8th Cir., 1934) (cert. den. 293 U.S. 621).
[8] 83 F. 2d 673 (1936) (aff'd 299 U.S. 468).

> is foreign law to be proven as a fact when written by production of copies of the Constitution and statutes, and in other respects by the testimony of experts. The writing are to be construed by the judge as other writings in evidence, but if uncertain in meaning or application evidence of experts is again admissible to aid the construction.

The court however does not tell us what it means by "expert". But as the opinion cites, among other cases, *Slater v. Mexican Nat. R. Co., supra,* we assume that it had an attorney admitted to the Mexican Bar in mind.

In a fairly recent case [9] the United States Court of Appeals, Second Circuit seems to have been rather strict in its requirements concerning the qualifications of an expert witness. Said the Court:

> For us, Argentine law is a fact. With respect to that fact, defendant introduced the testimony of an expert witness. He is an American and a member of the New York Bar, and of the Bars of Cuba and Puerto Rico. He studied civil law for forty years. He has a degree of Doctor of Civil Laws from the University of Havana. He was a judge in Puerto Rico for seven years, and a member for two years of a commission that drafted new legislation for Cuba. He had studied Argentine law, and is the author of a digest of that law appearing in the Martindale-Hubbell Law Directory. . . . He is authorized to practice in no Latin-American countries except Cuba, but can give advice in other such countries . . . The judge is not bound to accept the testimony of a witness concerning the meaning of the laws of a foreign country, especially when, as here, the witness had never practiced in that country.

It is a little hard to see why the admission or the lack of admission to practice in the foreign country should make any difference as to the weight of the expert's testimony, where—as here—the expert seems to be better qualified than most members of the Bar of the particular foreign country. Unless the court only meant to say what is true, in general, as to all expert testimony, i.e. that it is just one kind of evidence and that the judge is not bound to follow it.

STATE COURTS:

Some state decisions throw even more light on our problem than the federal cases just cited.

Thus in an early case [10] a Spanish lawyer, who had practiced law in Cuba, and at the time of the trial was an attorney in New York, was allowed to testify as to the laws regulating partnership in Cuba.

The South Carolina Supreme Court, in an action in South

[9] Usatorre v. The Victoria, 172 F. 2d 434 (2nd Cir., 1949).
[10] Barrows v. Downs, 9 R.I. 446 (1870).

Carolina based upon a tort allegedly committed in Mexico, held a deposition of a Mexican lawyer, who had practiced law for 50 successive years in Mexico, construing sections of the Mexican Civil Code in evidence which the trial judge deemed applicable on question of liability, competent to prove Mexican law.[11]

In *Pringle v. Gibson*,[12] the Supreme Judicial Court of Maine said in a dictum that an expert is "a competent witness learned in the law of that jurisdiction." No mention of being a member of the Bar was made, and it does not appear from the opinion as reported whether the expert testifying in the case was a member of the Canadian Bar, the law of Canada having been in issue.

Two recent cases before the District Court of Appeals, Second District, Division 1, California, involved questions of proof of foreign law. In *People v. McGrath* (In re *Miller's Estate*),[13] three experts on German law were called. The first was a German national.

> He studied law in this country at Harvard and Columbia Law Schools and in 1907 was appointed a judge of the County Court at Berlin where he served for a year and a half. For the next 10 years he was an assistant in both the Prussian Department of Justice and the Federal Department of Justice and also a Justice of the Court of Appeals of Berlin . . . From 1932 he practiced law in Berlin until approximately the time of trial herein . . .

The second expert was

> since 1939 the Foreign Law Librarian of the Los Angeles County Law Library, who received a Doctor of Laws degree at the University of Wuerzburg in 1933, then entered the Bavarian State Preparatory Service for Jurists in 1933 . . .

The third expert

> had studied at the Universities of Berlin, Freiburg, and Breslau, had experience in law offices, with the public prosecutor, and then passed an examination which entitled him to become a judge or a practicing attorney . . . practiced law in Germany for many years . . .

No question was being raised, and none could have been, as to the qualification of these experts.

However, in the other case before the same court,[14] one of the above three experts testified as to Norwegian law. The foreign law librarian of the Los Angeles County Law Library

> testified that he was a graduate of the University of Wuerzburg, Germany, where he received his Doctor of

[11] Rauton v. Pullman Co., 191 S.E. 416, 183 S.C. 495 (1937).
[12] 195 A. 695, 135 Me. 297, reh. den. 197 A. 553, 135 Me. 512 (1937).
[13] 230 P. 2d 667 (1951).
[14] Comstock v. Johnson, 223 P. 2d 105 (1950).

> Laws and Referendar degrees covering German Law and Civil Law; that in his capacity as foreign law librarian he was asked questions concerning foreign law (in different courts) . . . that he was familiar in general with the law of Norway . . . He further testified that he had never lived in Norway; that he did not speak the Norwegian language . . . that he could read with the aid of a dictionary Norwegian . . .
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> The court held that
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> the qualification of a witness to testify as an expert is a matter within the sound discretion of the trial court, and where there is no showing of a clear abuse of that discretion, the ruling of that court will not be disturbed on appeal (citing cases), nor will the ruling be disturbed if there is any substantial evidence to support it (citing cases). In view of the qualifications of (the expert) as hereinabove set forth, this court cannot say as a matter of law that a clear abuse of discretion occured in the trial court. And *while residence within the jurisdiction* of Norway and firsthand observation of the customs of the country *might go to the weight of* (the expert's) *testimony, it does not go to its admissibility* and the position of appellant that the lack thereof disqualified (the witness) as expert witness is untenable. (Italics supplied.)

The Supreme Court, Special Term, New York County went rather far in 1939 [15] by accepting "an affidavit of an experienced German lawyer" as to the powers of a certain official in German-occupied Czechoslovakia. "In the absence of proof to controvert this statement of the law," said the court, "the Court will accept it as a fact." The great advantage of possible cross-examination of the expert does not exist, of course, when affidavits are used, but this question lies outside the limited scope of this article.

The Supreme Court of Onondoga County (New York), in a good orthodox case,[16] accepted the testimony of a "witness who had been admitted to and practiced as a barrister in the Kingdom of Italy . . . as to the meaning and import of (the) Italian Statute".

Some 20 years earlier, the Appellate Division of the New York Supreme Court held that an expert on foreign law need not necessarily be a lawyer. In *Masocco v. Schaaf*,[17] where the validity of an Italian religious marriage was in issue, one party introduced the testimony of a New York attorney who "stated that he has familiarized himself with the Italian law, but who apparently has not been admitted to practice in Italy"; the deposition of a solicitor and barrister in Italy; the deposition of another witness who

[15] Stern v. S. S. Steiner, Inc., 12 N.Y.S. 2d 44 (1939).
[16] Fusco v. Fusco, 107 N.Y.S. 2d 286 (1951).
[17] 254 N.Y.S. 439, 234 App. Div. 181 (1931).

had served as vice consul and holds the degree of doctor of law from the University of Milano, and the deposition of an Italian *avvocato*. The other party called the secretary of the Italian consulate of the city of Buffalo as a witness, who "testified that he knew the Italian law very well, but was not a lawyer; that he was familiar with the requirements of a legal marriage in Italy," etc.

The court said, inter alia:

> Whether, in any case a witness is qualified to speak as an expert is a fact to be determined by the courts upon the trial preliminary to his testifying, and ordinarily the decision of the trial court on this point, when there are any facts to support it, is not open to review in this court . . . The witness (the secretary of the consulate) in his official capacity, was competent to testify and express an opinion as to the validity of the marriage in question. His official duties naturally require considerable familiarity with Italian law affecting persons of Italian nationality and residence, rendering him peculiarly qualified to speak.

And the court further stated that the opinion of the first party's witnesses has no more weight than the opinion of the second party's witness, i.e. the secretary of the Consulate.

The Court of Appeals of Ohio, Cuyahoga County, made an interesting pronouncement as to the weight to be accorded to such expert testimony. In *Olijan v. Lublin*,[18] it said:

> Instead of producing printed copies of the particular (Yugoslav) statutes relied upon, she (plaintiff) called as a witness one X, a member of the Bar of Akron, Ohio, who has never been admitted to the practice of law in the Kingdom of Yugoslavia. This witness was permitted to testify as to his opinion of what the rules of law are in Yugoslavia as to the recording of vital statistics. This method of establishing the laws of a foreign country is permissible if the witnesses called are qualified. The testimony which was given to support the qualifications of Mr. X is, to say the least, meager. Having visited Yugoslavia for two short periods of time and having scanned a law book or two at the Yugoslav Embassy in Washington would hardly qualify even a practitioner at the Ohio Bar as an expert on the laws of such foreign country. The witness' testimony is therefore of little or no value whatever. Generally, one who is presented as an expert to testify as to the law of another state or foreign country, is a practitioner of that state or country or because of his position he has had a reasonable opportunity to acquaint himself with its provisions.

[18] 50 N.E. 2d 264, (1943).

There are a few other cases on the subject, but to cite them would not seem to add anything new to the picture.

In conclusion, it may be stated that (1) the qualifications of the expert on foreign law must be established to the satisfaction of the trial court, (2) a witness who is or has been a practicing attorney in the foreign jurisdiction, the law of which is to be proven, is generally competent, and (3) even a layman can testify if he appears to the satisfaction of the court to be well informed as to the foreign law in question.

LEGISLATION CAUSES CHANGES IN COUNTY COURT RULES

The Denver County Court, of its own motion, has made changes in its Rules which became effective on June 1, 1953. These amendments are set out below.

The amendment to Section 2 of Rule X, is a direct result of the passage of Senate Bill No. 221, amending Section 217 of Ch. 176 and the same sort of rule is expected to be adopted by other county courts throughout the state. As is apparent, both amendments were made in an effort to cooperate with the Attorney General's Office.

1. Section 2 of Rule X is amended by the addition of the following paragraph:

> Whenever in a decedent's estate it appears that there is an unknown heir, legatee or devisee, or that the whereabouts of any heir, legatee or devisee is unknown, or that there is no person qualified to receive a legacy, bequest or distributive share from the estate, then a copy of the final report of the fiduciary shall be served on the Attorney General of the State of Colorado, in person or by registered mail, and the Attorney General shall have ten days within which to file objections thereto.

2. The following rule is added:

> Rule XXIV. NOTICE REQUIRED WHERE NON-RESIDENCY ALLEGED.
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> Whenever a petition is filed requesting probate of an alleged foreign will, or whenever a petition is filed requesting transfer of a lodged will to another jurisdiction (or whenever in any other probate proceeding in this court an allegation of non-residency is material to the relief sought), a copy of such petition shall be served on the Attorney General of the State of Colorado by the petitioner, in person or by registered mail, and the Attorney General shall have ten days within which to file written objections.