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# Comments

## JUDICIAL NOTICE OF FOREIGN LAW AS DEVELOPED IN MISSOURI TORT LAW

Apart from choice of law considerations, if the court is to apply foreign law, it must be aware of it. In its simplest terms the problem is what constitutes sufficient awareness. This Comment develops the problem from its common law inception as a strict pleading requirement, later relaxed by court rule, possibly abrogated by the liberal judicial notice of foreign law statutes and perhaps re-incarnated by the new court rule, thus completing the cycle.

The black-letter common law of yesterday required that foreign law be pleaded and proved as any other fact. The problem arose before the courts most commonly either on sufficiency of pleading or failure to plead the foreign law. Dissatisfied with this stringent pleading requirement, the legislature and courts endeavored to relax it. But this is the narrative, climaxed as it were by the liberal judicial notice laws. The denouement remains to be seen.

However, it must be acknowledged that under today's liberal judicial notice provisions it would be difficult to plead outside the court rule and statutes. In *Donahoo v. Illinois Terminal R.R.*,<sup>1</sup> the supreme court asserted, almost as an afterthought:

Incidentally, plaintiff stated in his petition that he was relying for the establishment of his claim upon the substantive law of Illinois, thereby requiring the local courts to take judicial notice of the public statutes and judicial decisions of such state.<sup>2</sup>

The full significance of the above will not be appreciated without an inspection of what went before.

### INSUFFICIENT PLEADING

In 1910 a pleading which stated a cause of action "under and by virtue of section 3447 of the Code of Iowa" was held insufficient, merely stating a conclusion of law.<sup>3</sup> Blanket all-inclusive allegations that one's right to recover was under the laws of a particular state or statute or section were insufficient. "[W]here

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1. 275 S.W.2d 244 (Mo. 1955).

2. *Id.* at 249.

3. *Gibson v. Chicago Great Western Ry.*, 225 Mo. 473, 481, 125 S.W. 453, 456 (1910). See also BEALE, *CONFLICT OF LAWS* § 621.4 (1935).

a foreign statute . . . is relied upon . . . it must be substantially stated with such distinctness that the court may judge its effect."<sup>4</sup>

Courts did not take judicial notice of foreign law; they required it be pleaded and proved like any other fact.<sup>5</sup> In 1918 it was held that foreign laws "'must be pleaded with the same certainty . . . [as] any other extrinsic fact' . . . and such pleadings should 'not merely state conclusions of what counsel think they [foreign laws] mean.'"<sup>6</sup> However, a petition which set out Lord Campbell's Act as it appeared by statute was held good.<sup>7</sup>

Failure to plead foreign law properly could be cured if evidence of said law was introduced without objection.<sup>8</sup> An insufficient pleading could also be cured by proper amendment. In *Malott v. Harvey*<sup>9</sup> the court quoted with approval the following language in *Miller v. Chinn*:<sup>10</sup> "[on remand] plaintiff should amend his pleading as to the foreign decisions, by alleging *literally pertinent parts of those decisions*, and thus avoid all question whether a mere conclusion has been stated."<sup>11</sup> (Emphasis added.) And where an original petition was erroneously brought under the Missouri wrongful death statute the court, while refusing to apply Kansas law because it was not pleaded, permitted plaintiff on remand to amend his petition to bring his cause of action under the Kansas statute.<sup>12</sup>

Although plaintiff failed to plead and prove applicable Illinois statutes or decisions, a city ordinance properly pleaded and proved was held to impose a duty upon defendant.<sup>13</sup> In *Corbett v. Terminal R.R. Ass'n of St. Louis*,<sup>14</sup> defendant properly pleaded the statute creating the Illinois Commerce Commission and specifically General Order 106, which required that crossing gates be operated at all times. However the court refused to take judicial notice of other general orders of the Commerce Commission not specifically pleaded.

Perhaps the harshest application was reached in *Scott v. Vincennes Bridge Co.*,<sup>15</sup> where defendant set up a defense based on the Indiana Workman's Compensation Act. The Act was further incorporated by reference and attached to the answer marked defendant's exhibit "A." The court held the Act attached as exhibit to the petition was not a part of the petition to save it from demurrer, even

4. *Id.* at 483, 125 S.W. at 456.

5. *Gersman v. Atchison, T. & S.F. Ry.*, 229 S.W. 167 (Mo. 1921); *Gibson v. Chicago Great Western Ry.*, *supra* note 3.

6. *Malott v. Harvey*, 199 Mo. App. 615, 617, 204 S.W. 940, 941 (K.C. Ct. App. 1918).

7. *Darks v. Scudders-Gale Grocer Co.*, 146 Mo. App. 246, 130 S.W. 430 (Spr. Ct. App. 1910).

8. *Gersman v. Atchison, T. & S.F. Ry.*, *supra* note 5; *Mitchell v. St. Louis Smelting & Ref. Co.*, 202 Mo. App. 251, 215 S.W. 506 (St. L. Ct. App. 1919).

9. 199 Mo. App. 615, 204 S.W. 940 (K.C. Ct. App. 1918).

10. 195 S.W. 552 (K.C. Ct. App. 1917).

11. *Id.* at 554.

12. *Montague v. Missouri & Kan. Interurban Ry.*, 289 Mo. 288, 233 S.W. 189 (1921).

13. *Otto v. Pryor*, 193 S.W. 28 (St. L. Ct. App. 1917).

14. 336 Mo. 972, 82 S.W.2d 97 (1935).

15. 220 Mo. App. 1213, 299 S.W. 145 (St. L. Ct. App. 1927).

though, had the contents of the Act been a part of the petition, it would have saved the pleading.

#### FAILURE TO PLEAD

Failure to plead the foreign law was not fatal; to the contrary, the courts evolved several theories by which they applied the law of Missouri.

The local court first determined whether the state or territory where the cause of action arose was acquired from Great Britain or rather from some other sovereign where the common law never prevailed. In the former case the court would *presume*, in absence of proof otherwise, that the common law of England, as expounded in Missouri, obtained.<sup>16</sup> As to the latter, there was no such presumption.<sup>17</sup>

The Missouri courts have applied the forum law upon two other theories. The language of one group of cases is to the effect that the laws of a sister state will be *presumed to be the same* as the laws of the forum in absence of a showing to the contrary.<sup>18</sup> Another line of cases found it unnecessary to indulge in either of the above presumptions, but simply state, that in absence of foreign law being pleaded, the law of the forum will be applied.<sup>19</sup>

As to those states where the historic common law presumption is applicable, the courts have refused to apply a presumption that the statutory law of the *lex loci* is the same as that of the *lex fori*.<sup>20</sup> However the courts have applied a presumption to statutes of non-common law heritage states.<sup>21</sup>

16. *Rositsky v. Rositsky*, 329 Mo. 662, 46 S.W.2d 591 (1931). The court explained its distinction: "While we do not take judicial notice of the statutes of these states, we do take judicial knowledge of important historical events, the acts of Congress and laws enacted by the sovereign authority over our own territory. Thus we know that Iowa, as well as Missouri, was part of the Louisiana Purchase from France and thus was subject to French law, rather than the common law of England, before and at the time of such purchase. But we also take judicial knowledge that after such territory became part of the United States, the territory of Missouri was formed by successive acts of Congress, including what is now both Missouri and Iowa, and that the common law was put in force. Also the territorial Legislature of the Missouri territory, by act of January, 1816, put in force in all this territory the common law of England. . . . so that unquestionably Iowa was common-law territory at and before its admission as a state." 329 Mo. at 679, 46 S.W.2d at 599.

17. *Madden v. Missouri Pac. Ry.*, 192 S.W. 455 (Mo. 1917) (en banc).

18. *Biggie v. Chicago, B. & Q. R.R.*, 159 Mo. App. 350, 140 S.W. 602 (K.C. Ct. App. 1911).

19. *E.g.*, *Thompson v. St. Louis Southwestern Ry.*, 243 Mo. 336, 148 S.W. 484 (1912).

20. *Rositsky v. Rositsky*, *supra* note 16; *Boyer v. North End Drayage Co.*, 67 S.W.2d 769 (St. L. Ct. App. 1934). In *Morrissey v. Wiggins Ferry Co.*, 47 Mo. 521, 525-26 (1871), the supreme court explained: "There is no presumption indulged that the statutory law of New York is the same as ours. As a general rule, courts do not take notice of the laws of a foreign country except so far as they are made to appear by proof. Where the condition of the law of another State becomes material, and no evidence has been offered concerning it, our courts will presume that the general principles of the common law, which we always consider to be consonant to reason and natural justice, prevail there. But no such presumption obtains respecting the positive statute law of the State. There is generally

Thus when a cause of action accrued in a common law heritage state, the courts have applied the forum law under three theories: (1) the presumption of common law jurisprudence; (2) the presumption that the law of the sister state is the same as that of the forum; and (3) by positive application of the forum law. And when the tort was committed in a non-common law state, there were three theories applied by the courts: (1) the presumption that the law of the sister state is the same as that of the forum; (2) the unqualified application of the forum law; and (3) the presumption that the statutory law of the sister state is the same as that of the forum.

These presumptions were not mutually self exclusive. Though seemingly ensnared amidst conflicting presumptions, justice prevailed over logic in *Burdick v. Missouri Pac. Ry.*<sup>22</sup> Although Kansas, a non-common law heritage state, could not be presumed to have common law jurisprudence, the plaintiff prevailed in his common law cause, as the Missouri court presumed the law of this sister state to be the same as its [common law] own.

A petition which failed to plead the foreign law was not subject to demurrer.<sup>23</sup> The courts applied the law of the forum under one of the above theories. In *Biggie v. Chicago, B. & Q. R.R.*,<sup>24</sup> the court held the petition would not have been subject to demurrer, and the plaintiff need not "affirmatively" show a cause of action under the laws of Iowa. However, in *Shelton v. Metropolitan St. Ry.*,<sup>25</sup> the court by way of dictum stated that the petition would have been subject to demurrer for not setting out the applicable Kansas law. Continuing, the court held the defect cured when the defendant answered over on the merits. The Missouri court then applied its humanitarian rule on the presumption that the law of the sister state was the same as its own. The court in the *Shelton* case cited as its sole authority

no probability in point of fact, and there is never any presumption of law that other States or countries have established precisely or substantially the same arbitrary rules which the domestic Legislature has seen fit to enact."

21. *Madden v. Missouri Pac. Ry.*, *supra* note 17; *Roy v. Kansas City*, 204 Mo. App. 332, 224 S.W. 132 (K.C. Ct. App. 1920); *Lillard v. Lierley*, 200 Mo. App. 140, 202 S.W. 1057 (Spr. Ct. App. 1918).

22. 123 Mo. 221, 27 S.W. 453 (1894).

23. *Lyons v. Metropolitan St. Ry.*, 253 Mo. 143, 161 S.W. 726 (1913); *Burdick v. Missouri Pac. Ry.*, *supra* note 22; *Baker v. St. Louis & S.F. Ry.*, 187 Mo. App. 157, 172 S.W. 1185 (K.C. Ct. App. 1915); *Biggie v. Chicago, B. & Q. R.R.*, *supra* note 18. *But see Connole v. Floyd Plant Food Co.*, 96 S.W.2d 655 (St. L. Ct. App. 1936) where the court stated at 657, "Since under the common law no action lies for damages growing out of the death of persons caused by the wrongful or negligent act of the one causing such death, the conceded failure to plead any statute of the state of Illinois, where the alleged accident took place, creating such cause of action, the petition must be held not to state facts sufficient to constitute a cause of action." Note that the cause failed not because no law was pleaded but rather because under the circumstances common law was presumed to exist and plaintiff had no common law cause of action.

24. *Biggie v. Chicago, B. & Q. R.R.*, 159 Mo. App. 350, 140 S.W. 602 (K.C. Ct. App. 1911).

25. 167 Mo. App. 404, 151 S.W. 493 (K.C. Ct. App. 1912).

(ignoring precedents to the contrary) *Mathieson v. St. Louis & S.F. Ry.*<sup>26</sup> Later the supreme court in *Lyons v. Metropolitan St. Ry.*<sup>27</sup> cleared up the *Shelton* misapplication of the *Mathieson* case by stating:

[T]hat decision is no authority for saying that a plaintiff . . . will . . . be turned out of court because he does not plead and prove the laws of Kansas applicable to the facts. In such case, unless defendant properly invokes the laws of the sister state, the law of Missouri is to be applied.<sup>28</sup>

At first glance it seems incongruous that a party who pleads no law is in a better position than one who pleads insufficiently. It was justified on the basis that when a party based his cause of action on foreign law he then had the burden of proving that foreign law as any other fact alleged in his petition.<sup>29</sup> But when circumstances gave rise either to a presumption that the common law was the jurisprudence of the foreign state<sup>30</sup> or that the law of the sister state was the same as that of the forum,<sup>31</sup> then it was unnecessary to prove the law. The courts applied their own law and there was no special duty on the plaintiff to assert such law.<sup>32</sup> The courts often used language to the effect that under the laws of Missouri the petition had stated a cause of action.<sup>33</sup> This evidences a basic choice of laws policy consideration. Although Missouri has walked the traditional conflict of laws chalk-line (consistently applying the substantive law of the place of the wrong), it is submitted that in these cases where there is total failure to plead the foreign law, the Missouri courts have exercised their sovereign power by arbitrary application of forum law in lieu of more logically sustaining the demurrer.

The defendant may bring the foreign law before the court. By proper pleading and proof he may rebut the presumption of similarity;<sup>34</sup> then with the *lex loci* before it, the court will follow the traditional chalk-line application. In *Madden v. Missouri Pac. Ry.*,<sup>35</sup> plaintiff did not plead the law of the place of wrong, but defendant by answer put in bar a Kansas fellow servant statute. The court though recognizing that Kansas was of non-common law origin held there could be no presumption that the statutory law of Kansas was the same as that of Missouri.

[U]ntil that statute appeared in evidence, there was nothing which forbade the indulgence of a presumption by which plaintiff's case could be sustained under the fellow-servant act of Missouri. It is, however, a rule,

26. 219 Mo. 542, 118 S.W. 9 (1909). The issue before the court was not failure to plead the foreign law; to the contrary, plaintiff based his cause of action on a statute which he set out in the pleading.

27. 253 Mo. 143, 161 S.W. 726 (1913).

28. *Id.* at 151, 161 S.W. at 727. See also *Hill v. Illinois Terminal Co.*, 100 S.W.2d 40 (St. L. Ct. App. 1937).

29. Cases cited note 5 *supra*.

30. *Rositsky v. Rositsky*, *supra* note 16.

31. *Biggie v. Chicago, B. & O. R.R.*, *supra* note 24.

32. *Baker v. St. Louis & S.F. Ry.*, *supra* note 23.

33. *Thompson v. St. Louis Southwestern Ry.*, *supra* note 19.

34. See Note, 2 VA. L. REV. 612, 615 (1915) where, speaking of this presumption of similarity, it is stated: "It rightfully denies them the protection of any law whose aid they are too indolent or too negligent to invoke; and yet grants them the privilege of its protection if they so desire."

35. 192 S.W. 455 (Mo. 1917) (en banc).

to which this court is thoroughly committed, that presumptions of fact which may be indulged in cases where there is a complete dearth of evidence vanish when any evidence touching the fact in controversy is brought to light.<sup>36</sup>

An insufficient pleading, at times, may give notice to the court that it could not indulge in certain presumptions. In the *Malott* case, for example, plaintiff did not allege the foreign law, but defendant pleaded Kansas case law as to the duty of lookout imposed on a motorman. The court while recognizing defendant's pleading stated conclusions of law did not pass on its sufficiency, but did "dispose of the case upon the theory that the answer was sufficient to bring to the court's attention the alleged rule in force in the jurisdiction where plaintiff's cause of action arose."<sup>37</sup> Here an insufficient pleading was notice to the court that it could not indulge in certain presumptions. The court, after reversing on other grounds, suggested defendant amend his answer on remand and avoid all question of insufficient pleading. In *Ham v. St. Louis & S.F. R.R.*,<sup>38</sup> plaintiff was denied recovery under a common law theory when he introduced into evidence a statute of the *lex loci* (Arkansas) to the effect that the common law had been abolished. In the *Mathieson* case when the petition stated a cause of action under a foreign statute, the court held the reply could not depart from that theory to one of common law. And further, in the *Ham* case, when the petition stated a cause of action at common law, the court held the reply could not set up a cause under a statute of the *lex loci*, holding, "this cannot be done by the reply and he could not in this manner amend his petition."<sup>39</sup> As has already been pointed out, the courts have been liberal in allowing parties to amend their pleadings, even on remand.<sup>40</sup>

Rebelling against the strict pleading requirement, the courts conceived diverse distinctions. In *Mitchell v. St. Louis Smelting & Ref. Co.*,<sup>41</sup> the court suggested that "while the law of Illinois was not very fully or accurately pleaded, it is pleaded with sufficient certainty to authorize its introduction in evidence."<sup>42</sup> The supreme court speaking in *Rashall v. St. Louis I.M. & S. Ry.*<sup>43</sup> asserted: "if a foreign law is the foundation of a cause of action or a defense thereto, it must be both pleaded and proven. On the other hand, if such law is only evidentiary, it may be proven though not pleaded . . ."<sup>44</sup> These facts presented the unique situation wherein neither party pleaded nor proved Illinois law other than by a stipulation that there was no fellow servant statute. With this stipulation before it, the court applied the forum common law as it existed before its statute abrogated the fellow servant rule.

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36. *Id.* at 457.

37. 199 Mo. App. at 618, 204 S.W. at 941.

38. 149 Mo. App. 200, 130 S.W. 407 (Spr. Ct. App. 1910).

39. *Id.* at 208-09, 130 S.W. at 410.

40. *Montague v. Missouri & Kan. Interurban Ry.*, 289 Mo. 288, 233 S.W. 189 (1921).

41. 202 Mo. App. 251, 215 S.W. 506 (St. L. Ct. App. 1919).

42. *Id.* at 268, 215 S.W. at 511.

43. 249 Mo. 509, 155 S.W. 426 (1913).

44. *Id.* at 516, 155 S.W. at 427.

For failure to plead and prove foreign law as to a specific rule or duty imposed by the substantive law, the court of the forum will fill that omission with local law. The courts have not taken the position that it must be all *lex loci* or all *lex fori*. The courts have intermixed the two under the circumstances and pleadings of the particular case before the court. In *McManus v. Oregon Short Line R.R.*,<sup>45</sup> where there was an insufficient allegation to warrant applying the Idaho law to duty to block guard rails, the court applied the rule of the forum though otherwise applying Idaho law. Under a Kansas statute in the *Shelton* case, the widow had a right of action and was held to be a proper party; however for failure to allege the substantive law of Kansas, defendant was held liable under the Missouri humanitarian doctrine. In cases otherwise applying foreign law, failure to plead specific rules rendered the Missouri law applicable to the master-servant relation,<sup>46</sup> the fellow servant doctrine,<sup>47</sup> the measure of damages,<sup>48</sup> and the burden of proof of contributory negligence.<sup>49</sup>

#### JUDICIAL NOTICE

The year 1927 saw Missouri's first effort with judicial notice of foreign law.<sup>50</sup> Incorporated as Sec. 806, RSMo 1929 it was labeled, "Judicial notice of statutes and decisions of other states" and read: "In every action or proceeding wherein the law of another state of the United States of America *is pleaded*, the courts of this state shall take judicial notice of the public statutes and judicial decisions of said state." (Emphasis added.)

Construing the above statute, the supreme court in the *Corbett* case stated:

Our present statute . . . in no way dispenses with the necessity of pleading such foreign statute or law, but merely dispenses with the necessity of making formal proof of same at the trial. . . . It is only when such law is pleaded that our statute requires the court to take judicial notice of such foreign law.<sup>51</sup>

Thus this statute had no effect on the requirements of what constituted a sufficient pleading. However when properly pleaded, foreign law was no longer treated as a fact requiring proof. In *Ramey v. Missouri Pac. Ry.*,<sup>52</sup> the court defined the scope of judicial notice under this statute:

45. 118 Mo. App. 152, 94 S.W. 743 (St. L. Ct. App. 1906).

46. *Sterling v. Parker-Washington Co.*, 185 Mo. App. 192, 170 S.W. 1156 (St. L. Ct. App. 1914); *Ginnochio v. Illinois Cent. R.R.*, 155 Mo. App. 163, 134 S.W. 129 (St. L. Ct. App. 1911).

47. *Rashall v. St. Louis, I.M. & S. Ry.*, *supra* note 43.

48. *Witascheck v. Glass*, 46 Mo. App. 209 (K.C. Ct. App. 1891).

49. *Gorman v. St. Louis Merchants' Bridge Terminal Ry.*, 325 Mo. 326, 28 S.W.2d 1023 (1930).

50. Mo. Laws 1927, at 156, as amended, § 509.220(2), RSMo 1949.

51. 336 Mo. at 979, 82 S.W.2d at 101. See also *Rositsky v. Rositsky*, 329 Mo. 662, 46 S.W.2d 591 (1931); *Menard v. Goltra*, 328 Mo. 368, 40 S.W.2d 1053 (1931); *Ramey v. Missouri Pac. Ry.*, 323 Mo. 662, 21 S.W.2d 873 (1929).

52. 323 Mo. 662, 21 S.W.2d 873 (1929). See also *Barnes v. St. Louis-San Francisco Ry.*, 338 Mo. 497, 92 S.W.2d 164 (1936); *Kirkdoffer v. St. Louis-San Francisco Ry.*, 327 Mo. 166, 37 S.W.2d 569 (1931).



By providing that when the *law* of another state is pleaded our courts shall take judicial notice of the law *and judicial decisions* of such state, we think the Legislature meant that pleading the statute should bring before the court the judicial construction of that statute as interpreted by the courts of the state in which it was enacted.<sup>53</sup>

The supreme court early expressed its displeasure of the pleading requirement set out in this statute, referring to it as an "archaic" doctrine. With reference to the foreign law, the court in *Gorman v. St. Louis Merchants' Bridge Terminal Ry.*<sup>54</sup> elaborated:

It was neither pleaded nor proven, and we cannot take judicial notice of it. This last seems an absurd thing to say when it is considered that the official reports of the courts of last resort of our sister state are lying here before us and that we frequently cite cases reported in them as persuasive authority in support of our own rulings. But, until the Legislature sees fit to fully release us from this archaic rule . . . we are supposed to abide by it.<sup>55</sup>

However, the requirement of pleading the foreign law or some satisfactory substitute which will provide the other party with reasonable notice is not without merit. As evidenced by Wigmore: "Judicial notice being a dispensation of one party from producing evidence, it would seem that the party must, in point of form, make a request for it."<sup>56</sup>

Taking another stab at it, the legislature in its 1943 code amended the above judicial notice statute to read: "In every action or proceeding wherein the pleading states that the law of another state *is relied upon*, the courts of this state shall take judicial notice of the public statutes and judicial decisions of said state."<sup>57</sup> (Emphasis added.)

The supreme court, not risking the adequacy of this—the legislature's second effort to supply a modern rule of judicial notice—supplemented this statute one year later with Missouri Supreme Court Rule 3.14 which reads:

A pleading shall be considered sufficient to authorize the court to take judicial notice of the law of another state if it either alleges that the party filing it relies upon the law of another state or contains allegations which show that the law of another state must be applied. The court may inform itself of such laws in such manner as it may deem proper, and may call upon counsel to aid it in obtaining such information.

Construing the 1943 judicial notice statute with the 1944 court rule, the supreme court held that the mere allegation in the pleadings that the collision

53. 323 Mo. at 675, 21 S.W.2d at 877.

54. 325 Mo. 326, 28 S.W.2d 1023 (1930).

55. *Id.* at 332-33, 28 S.W.2d at 1024.

56. WIGMORE, EVIDENCE § 2568(a) (3d ed. 1940). Subsection (b) continues, "When a judge, pending a decision as to taking judicial notice seeks information . . . and a party cites in his brief or brings into court for that purpose certain sources of information, the party so providing them should *notify the opponent*, in fairness, so as to give him an opportunity of consulting the same sources or of producing others."

57. Mo. Laws 1943, § 54(b), at 373, now § 509.220(2), RSMo 1949.

occurred in Kansas was sufficient to allow the court to take judicial notice of the applicable Kansas law on the issues.<sup>58</sup>

Although court rule 3.14 has broadly defined what constitutes a sufficient pleading of foreign law, it is submitted that Missouri—two statutes and one court rule later—has remained a “pleading” state.<sup>59</sup>

It is interesting to observe that the supreme court in the *Gorman* case, after expressing its dissatisfaction with the existing statutory pleading requirement, stated: “But, until the *Legislature* sees fit to fully release us from this archaic rule . . . we are supposed to abide by it.”<sup>60</sup> (Emphasis added.) This was in 1930. In 1944 the supreme court, by court rule 3.14, did something about it. *Quaere?*

This statement by the court in the *Gorman* case suggests the question whether or not by court rule the court has power to enlarge a statute. Rule making power was conferred upon the court by a 1943 act<sup>61</sup> labeled “Supreme court to promulgate general rules for all courts of the state.” It reads as follows:

The supreme court shall have the power to direct the form of writs and process; and to promulgate general rules for all courts of the state. No such forms or rules shall abridge, enlarge or modify the substantive rights of any litigant nor be contrary to or inconsistent with the laws in force for the time being.<sup>62</sup>

There can be little serious question that court rule 3.14 does enlarge the 1943 statute, which provides, “In every action or proceeding *wherein the pleading states that the law of another state is relied upon*, the courts of this state shall take judicial notice. . . .” (Emphasis added.) This is repeated in the court rule, and the extension involved is added in the correlative as follows: “*or contains allegations which show that the law of another state must be applied.*” (Emphasis added.)

It is submitted that the court rule is merely a judicial construction of what would constitute a sufficient allegation or pleading of the foreign law in order that the court could take judicial notice of it. It would seem that apart from this court rule, the court could have applied in a judicial determination the same construction to the language of the 1943 statute, but preferred by court rule to “clear the air.”

Apart from the possible power question, the combination of the 1943 statute and the court rule provided the Missouri courts with a workable and liberal judicial notice rule requiring only that a pleading allegation of some sort bring home notice to the adverse party.

Then in 1949 came the Uniform Judicial Notice of Foreign Law Act.<sup>63</sup> It

58. *Hall Motor Freight v. Montgomery*, 357 Mo. 1188, 212 S.W.2d 748 (1948).

59. In that the 1943 act is prefaced by the requirement “wherein the pleading states” and the court rule only defines what shall constitute a sufficient pleading under the judicial notice statute, implicit in both is that pleading is requisite.

60. 325 Mo. at 333, 28 S.W.2d at 1024.

61. Mo. Laws 1943, § 10, at 353, now § 477.010, RSMo 1949.

62. § 477.010, RSMo 1949.

63. Mo. Laws 1949, §§ 1-6, at 318, 319, now §§ 490.070-.120, RSMo 1949: 490.070. Short title

Sections 490.070 to 490.120 may be cited as “The Uniform Judicial Notice

purports a more liberal rule. Section 490.110 asserts that "reasonable notice shall be given to the adverse parties *either in the pleadings or otherwise.*"<sup>64</sup> (Emphasis added.) The "or otherwise" has yet to be construed by the Missouri courts, although it clearly appears that it is an extension beyond the "pleading" limitation. It should be noted that the Uniform Act did not expressly repeal the 1943 act. Then in 1954 in *Redick v. M.B. Thomas Auto. Sales*,<sup>65</sup> the supreme court with

of Foreign Law Act."

490.080. Judicial notice to be taken

Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States.

490.090. Court may inform itself of laws

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

490.100. Determination of laws

The determination of such laws shall be made by the court and not by the jury, and shall be reviewable.

490.110. Presentation of laws to trial court

Any party may also present to the trial court any admissible evidence of such laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise.

490.120. What law to be issue for the court

The law of a jurisdiction other than those referred to in § 490.080 shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice.

The following two sections of the Uniform Act were not incorporated into Missouri law:

§ 6. Interpretation

This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

§ 8. Repeal

All acts or parts of acts inconsistent with the provisions of this act, are hereby repealed.

See also, Botkin, *Judicial Notice in Missouri*, 24 Mo. L. REV. 75 (1959).

64. UNIFORM JUDICIAL NOTICE OF FOREIGN LAW ACT § 4. The notice concept is further developed in the Commissioners' Notes following § 4, 9A ULA 326.

It is here provided that the party invoking the foreign law must give reasonable notice.

There are strong reasons for it:

In the first place, it is in analogy to the rule of pleading that if a foreign law is relied upon, it must be pleaded. This is now the law of several States. In such States the other party gets notice from the pleadings. But in the States where the pleading rule does not obtain, then if the Court may take judicial notice of such law, fairness requires that the opponent should be warned beforehand, so that he may prepare on that law. . . . This point is illustrated in the recent [Missouri] case of *Corbett v. Terminal Ass'n*, 1935 [note 51 *supra*] . . . where the Supreme Court was interpreting their statute of 1927 (corresponding to Sec. 1 of the present Draft Act), and held that the defendant, relying upon an Illinois law, could not on appeal ask that judicial notice be taken because he had neither pleaded it, nor asked the Court below to notice it.

65. 364 Mo. 1174, 273 S.W.2d 228 (1954).

reference to the common law and prior Missouri rule requiring that foreign law be pleaded, emphatically asserted: "That is not the law of this State now."<sup>66</sup>

Perhaps, at long last, the stringent pleading rule of yesteryear has met its doom—perhaps, that is.

#### RULE 55.23(b) AND NOW WHAT

The new Missouri Supreme Court Rule 55.23(b), entitled "Judicial Notice—Law of other State," reads as follows:

In every action or proceeding wherein the pleading states that the law of another state is relied upon or contains allegations which show that the law of another state must be applied, the courts of this state shall take judicial notice of the public statutes and judicial decisions of said state. The court may inform itself of such laws in such manner as it may deem proper, and may call upon counsel to aid it in obtaining such information.<sup>67</sup>

Prior to this new court rule, the Missouri courts already had two statutes and a court rule to apply. They had (1) the legislature's first efforts, (2) court rule 3.14 and (3) the uniform act. The courts cited various combinations of the above with no apparent logical purpose. They have not as yet needed the "or otherwise" as contributed by the uniform act, for all the recent cases have on their facts had sufficient allegations in the pleadings to satisfy the 1943 act as enlarged by the old court rule. In some of those cases the pleadings have stated that the party or parties were relying on the foreign law,<sup>68</sup> while others merely stated facts that the tort occurred in the foreign state.<sup>69</sup>

Although the issue has not been thrust upon the court, the dictum in the *Redick* case that Missouri was no longer a pleading state presupposes that the judicial notice act superseded the 1943 act and its old court rule counterpart. The most interesting question now arises—where do we go from here with court rule 55.23(b)? The new rule is merely a fusion of the old 1943 act and court rule 3.14; and its language remains bottomed on a pleading requirement.<sup>70</sup>

Has court rule 55.23(b) superseded the Uniform Judicial Notice of Foreign

66. *Id.* at 1187, 273 S.W.2d at 234.

67. Effective April 1, 1960.

68. *Wilson v. Kansas City Pub. Serv. Co.*, 291 S.W.2d 110 (Mo. 1956); *Donahoo v. Illinois Terminal R.R.*, 275 S.W.2d 244 (Mo. 1955); *Woodworth v. Kansas City Pub. Serv. Co.*, 274 S.W.2d 264 (Mo. 1955).

69. *Hall Motor Freight v. Montgomery*, 357 Mo. 1188, 212 S.W.2d 748 (1948); *Bartling v. Firestone Tire & Rubber Co.*, 275 S.W.2d 618 (K.C. Ct. App. 1955); *Graham v. Illinois Terminal R.R.*, 260 S.W.2d 846 (St. L. Ct. App. 1953); *Hughes Provision Co. v. La Mear Poultry & Egg Co.*, 242 S.W.2d 285 (St. L. Ct. App. 1951).

70. Today, there are two statutes and two court rules in the books relating to pleading and judicial notice of foreign law. (1) The 1943 act, currently § 509.220(2), RSMo 1949, has not been repealed unless it has been superseded by the Uniform Act. This is doubtful. It should be remembered that the legislature did not adopt the "repeal" section of the uniform act. (2) Court rule 3.14 apparently remains in force. Section 41.04 of the new rule states: "Supreme Court Rules 1, 2, and 3, and existing court rules and statutes *in conflict with* these Rules of Civil Procedure are superseded by these Rules of Civil Procedure." (Emphasis added.)

Law Act? It would seem not. Although the 1945 Missouri Constitution gave a greater rule making power to the supreme court, it contains a specific limitation which answers this question. The Missouri Constitution provides in Article V, Section 5: "The supreme court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights, or the law relating to evidence . . ." (Emphasis added.) It is submitted that the uniform act is an evidence statute and the supreme court is without power to change it by court rule. But has the supreme court by including within its new court rule an existing statute (the 1943 act) side-stepped the constitutional limitation and in this way effectively superseded the evidence statute? At any rate the courts have before them two theories of what is required in order that they may take judicial notice of the foreign law. The new court rule has a pleading requirement, although liberal in its application. Whereas the uniform act goes farther and negates a pleading requirement. If the eventual dove-tailing of the new court rule is held superior, then the new Missouri Rules of Civil Procedure have reincarnated the "archaic" pleading requirement. It seems unlikely that this was the intent of the supreme court, had it considered the problem. The court may well hold that all pertinent statutes and rules are valid and in force; and when the pleadings are sufficient to show that the law of another state should be applied, the party would come within any of the existing statutes or court rules; whereas when he failed to plead sufficiently, then he would be protected by the Uniform Judicial Notice of Foreign Law Act. There is a recognized rule of statutory construction that related statutes will be construed so as to give meaning to all of them.

Granted the question would not arise in the vast majority of cases for it would be difficult to omit from one's pleading all reference to the foreign state or law, but surely someone will find the necessary inspiration. At that time the court may have the opportunity to exercise its judicial ingenuity.

In conclusion, the prudent drafter of pleadings would do well not to rely upon what the "or otherwise" as added by the uniform act may be construed to include, but rather state his reliance on the foreign law or at least allege facts showing the activity to have occurred in such foreign state. Then under existing Missouri law, and as it has been since 1944, the court will take judicial notice of the foreign law.

No matter how you slice this "pleading" parfait, there is a combination of too many cooks and too many recipes. And the supreme court by adding another has simply compounded the confusion.

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Although narrower in scope, rule 3.14 is not in conflict with the pertinent new rule. (3) The Uniform Judicial Notice of Foreign Law Act is certainly on the books. However, the Note following Rule 41.04 explains that its adoption "constitutes a determination by the Supreme Court that it has the power to supersede existing statutes by rule, except where prohibited by the Constitution because of subject matter." (4) Court rule 55.23(b) is new upon the scene. It would seem that the new court rule arrives as an unwelcome fourth man on a life-raft built for one.

71. See Hyde, *Reasons for Adopting a Complete Code of Civil Procedure by the Missouri Supreme Court Under Its Constitutional Rule Making Authority*, 3 St. Louis U.L.R. 378 (1955).