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ON THE DISPLACEMENT OF THE LAW OF THE FORUM

BRAINERD CURRIE*

I. DISPOSITION OF A PROBLEM

On November 9, 1955, Civil Action No. 50-170 came on for trial before the Honorable Alexander Bicks in the United States District Court for the Southern District of New York. The pleadings and the testimony for the plaintiff, one Leo Walton, a citizen of Arkansas, tended to establish that on January 5, 1947, as he was driving to work, a head-on collision occurred between his vehicle and a truck owned by the defendant, a Delaware corporation; that at the time the plaintiff was in the exercise of due care for his own safety; that the defendant's truck was operated negligently, particularly in that it was entirely on the wrong side of the road and in that only one headlight was operating although there was a heavy fog; that this negligence was the proximate cause of the collision; that the driver of the truck was an employee of the defendant engaged in the defendant's business; and that as a result of the collision the plaintiff sustained permanent injuries which occasioned loss of wages at his usual vocation, which was that of an aircraft pilot. At the close of the plaintiff's case, on motion of the defendant, the court directed a verdict for the defendant on the ground that the plaintiff had failed to establish a cause of action. The consequent judgment was affirmed by the court of appeals.¹

The reader, challenged to guess the basis for this decision, might well have a difficult time of it. The facts stated would seem to give rise to a cause of action under the law of New York, or of Arkansas, or of Delaware, or of almost any jurisdiction with which most of us are familiar. A clue is provided in the title of this article, with its indication that the subject for discussion relates to the conflict of laws; and, indeed, the cause was lost because one additional fact was disclosed by the complaint and testimony: the collision occurred in Saudi Arabia. Given this information, the reader may perhaps feel that the guessing game was, after all, not a particularly interesting one; of course, the law of the place of injury determines liability in tort, and what doubtless happened was that inquiry into the law of Saudi Arabia revealed some provision which precluded recovery.

That, however, is not the way it happened. Neither the complaint nor the answer made any reference to the law of Saudi Arabia. The plaintiff

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¹ Walton v. Arabian Am. Oil Co., 233 F.2d 541 (2d Cir.), cert. denied, 352 U.S. 872 (1956). The statement of facts in the text is based in part on the record as contained in the appendix to appellant's brief in the court of appeals.

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introduced no evidence of that law. The defendant introduced no evidence at all. Neither in the briefs nor in the record nor in the opinion of the court of appeals is there identification of any aspect of Saudi Arabian law which would preclude recovery. Where, then, was the "conflict of laws"? Here the law of the forum—that is to say, the law of New York—was displaced not by a contrary foreign law, given preference by the system of conflict of laws, but by the mere logic of the system itself.

Such a result was not unprecedented. A similar one had been announced and its rationale expounded in all its conceptual rigor by Mr. Justice Holmes in the leading case of Cuba R.R. v. Crosby:

... when an action is brought upon a cause arising outside of the jurisdiction ... the duty of the court is not to administer its notion of justice but to enforce an obligation that has been created by a different law. ... The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there. With very rare exceptions the liabilities of parties to each

2. Since the district court's jurisdiction was invoked because of diversity of citizenship, it was assumed that the law of New York, as distinguished from some federal common law, constituted the "substantive" law of the forum, and furnished the choice-of-law rule under Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). That assumption will not be disputed here. It may not be unreasonable, however, to plant a seed of heretical doubt. It is clear that the scope of the Erie doctrine is not coterminous with diversity cases. Hart & Wechsler, The Federal Courts and the Federal System 697 (1953). The doctrine is applied in some nondiversity cases, see, e.g., Hill, The Erie Doctrine in Bankruptcy, 66 Harv. L. Rev. 1013, 1033-34 (1953); Note, 68 Harv. L. Rev. 1212 (1955), and is not applied in some diversity cases, see, e.g., Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953); Francis v. Southern Pac. Co., 333 U.S. 445 (1948). It has been suggested that the doctrine is properly applicable where "state-created" rights are in issue. Hart & Wechsler, op. cit. supra, at 610, 637-78. According to the territorialist theory which dictated the result in Walton, no American state had jurisdiction to create the right asserted; that right could be brought into being only by the law of a foreign country. Is the Erie doctrine applicable where foreign-created, as distinguished from state or federally created, rights are in issue? More realistically, the right in such a case is "created" by the state which supplies the choice-of-law rule. See Cook, The Logical and Legal Bases of the Conflict of Laws passim (1942). It has been suggested that the Erie doctrine should not have been extended to questions of the conflict of laws. See Currie, Change of Venue and the Conflict of Laws, 22 U. Chi. L. Rev. 405, 467-69, 502-03 (1955), and authorities cited therein. And, despite current unfavorable intimations, the idea persists that in international conflict-of-laws cases the choice of law should perhaps be made according to federal standards which would be binding on state courts as well. See Clark v. Allen, 331 U.S. 503 (1947); Cheatham, Goodrich, Grewald & Reese, Cases on Conflict of Laws 616-17 (4th ed. 1957); Cheatham, Federal Control of Conflict of Laws, 6 Vand. L. Rev. 581 (1953); Ehrenzweig, Interstate and International Conflicts Law: A Plea for Segregation, 41 Minn. L. Rev. 717, 723-29 (1957); Note, 41 Colum. L. Rev. 1403 (1941). For cases which suggest the need of federal rules for international conflicts see, e.g., Hilton v. Guyot, 159 U.S. 113 (1894); cf. Pasos v. Pan American Airways, Inc., 229 F.2d 271 (2d Cir. 1956); Bergman v. de Sietes, 170 F.2d 360 (2d Cir. 1948); Johnston v. Compagnie Generale Transatlantique, 242 N.Y. 381, 152 N.E. 121 (1926). See also Jessup, The Doctrine of Erie Railroad v. Tompkins Applied to International Law, 33 Am. J. Int'l L. 740 (1939); Note, 47 Colum. L. Rev. 629 (1947). Certainly the idea that Erie rests upon a constitutional principle, which denies to the federal courts power to supply the rule of decision for cases which are exclusively within the legislative competence of the states, becomes attenuated in application to international conflicts cases such as Walton. Cf. Sibbach v. Wilson & Co., 312 U.S. 1, 10, 11, 13 (1940).
other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. . . . That and that alone is the foundation of their rights.

. . . . the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well-founded belief that it was a cause of action in that place. The right to recover stands upon that as its necessary foundation. It is part of the plaintiff's case, and if there is reason for doubt he must allege and prove it.3

The court of appeals in the Walton case indicated no sympathy with this vested-rights philosophy. On the contrary, going well beyond any suggestion made in the brief of counsel for the appellant, the late Judge Frank industriously criticized the rule, established in New York, that the substantive law of the place of injury invariably governs tort liability, suggesting that its "unwise and unjust" operation should lead to its re-examination.4 In addition, he deplored the New York rule directing the disposition of cases in which the foreign law is not made to appear, finding that under that rule the burden of proof was placed upon the plaintiff.5 In announcing the conclusion to which he felt forced by New York law, Judge Frank, speaking for the court, bluntly declared that the result was "unjust,"6 for the reason that, as between the plaintiff, an ex-serviceman temporarily employed in Saudi Arabia at the time of the injury, and the defendant, a corporation engaged in extensive business operations there, the defendant was in a far better position to obtain information as to the law of that country.

It has now been some years since Walter Wheeler Cook discredited the vested-rights theory as thoroughly as the intellect of one man can ever discredit the intellectual product of another.7 A quarter of a century has elapsed since one of the most penetrating studies in our literature demonstrated that there can be no defense for a system of conflict of laws which ignores the content of the foreign law that is designated as controlling.8 Yet

4. 233 F.2d at 543.
5. Id. at 545. Assuming that under the Erie doctrine, as extended by Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941), and Griffin v. McCoach, 313 U.S. 498 (1941), the court was bound to follow the New York choice-of-law rule, there is still some room for doubt as to whether it was required to follow the New York practice with respect to the disposition of the case in which the foreign law is not made to appear. Cf. Peterson v. Chicago Great W. Ry., 138 F.2d 304 n.3 (8th Cir. 1943). The court of appeals itself treated this question as one to be decided with reference to Fed. R. Civ. P. 43(a), which treats the admissibility of evidence in a way which does not suggest the kind of uniformity contemplated by the Erie doctrine. This doubt will not be pursued here, first because the federal rule, as exemplified by the Crosby case, was to the same effect as the New York rule, and second because the problem to which this paper is addressed is not peculiar to the federal courts.
6. 233 F.2d at 545.
the spectacle with which we are confronted is that of the Court of Appeals
for the Second Circuit, constrained by the law of one of our more sophisti-
cated states, announcing a decision dictated by the vested-rights theory,
treating the law of the forum as displaced by a foreign law of (presumably)
unknown content—and publicly holding its nose in the act because of the
injustice of the result. Such a phenomenon warrants further investigation,
especially since, as the inquiry proceeds, one finds that what is involved is
one of the most fundamental and perplexing problems in the conflict of laws.

II. ENGLISH BACKGROUND

If a case roughly comparable to Walton had been brought in an English
common-law court in the early stages of the development of English law, the
result would have been similar to that in the Walton case: the action would
have been dismissed on the ground that the court lacked "cognizance" of
torts committed abroad.9 By the seventeenth century, however, the common-
law courts began to take jurisdiction of foreign causes, utilizing the quaint
device of permitting the pleader, after truly stating the foreign locality of
the event, to add a fictitious, nontraversable allegation that the foreign
locality was in England.10

The forbearance of the common-law courts to exercise jurisdiction over
foreign causes was fundamentally related to the character of the English
jury as a body which judged according to its own knowledge of the facts.11
In addition, however, as Sack has clearly shown, it was related to a feeling
that the common law of England—the only law administered in the common-
law courts—would not furnish the appropriate rule of decision, and that such
cases should be remitted either to the foreign court or to the admiralty, where
a different system of law would be applied.12 The first of these obstacles
disappeared as the jury was gradually transformed into a body which acted
on the basis of testimony instead of personal knowledge of the facts; and
the assumption of jurisdiction was thus made possible. The second obstacle
remained, confronting the courts with the problem of the law to be applied

9. See Sack, Conflicts of Laws in the History of the English Law, in 3 Law:
A Century of Progress 342, 344-45 (1937). The effect was to remit the complainant,
though a British subject, to the foreign court for his redress; but, if relief could not
be obtained abroad, the chancellor might, in appropriate cases, authorize extrajudicial
relief by way of reprisal or distraint. Id. at 352-53. Possibly some such cases might come
within the jurisdiction of the court of the lord constable and marshal—the so-called "court
of chivalry." Ibid. Later (in the sixteenth century) the admiralty assumed a broad
jurisdiction of matters arising beyond as well as upon the seas; the law applied in that
court being the "general" law of nations, the maritime law, the law merchant, and the
civil law. Id. at 355.
10. The leading case is Mostyn v. Fabrigas, 1 Cowp. 161, 98 Eng. Rep. 1021 (K.B.
11. See id. at 345.
12. Id. at 361-66.
in the adjudication of the foreign cause. In search of evidence of precocious sophistication, scholars have unearthed some strikingly early instances of willingness to receive and apply foreign law. In general, though, it seems a fair assumption that the common-law courts, habituated to the application of their own law and flush with victory over their civilian rivals in admiralty, proceeded for a while in the application of the common law as a matter of course. However this may be, it is clear that when the courts came to take cognizance of foreign law in tort cases, they did so by way of justification to the defendant alone. Indeed, the English rule to this day is that the plaintiff may recover in a tort action predicated on foreign facts if, and only if, the act would have been actionable as a tort if done in England, provided only that it was not “justifiable” under the law of the place where it was done. Moreover, it seems to be the settled practice in England in all cases that a party wishing to rely on foreign law has the burden of establishing that law to the satisfaction of the court. Otherwise the court will simply apply English law. We may be reasonably sure, therefore, that if a case similar to Walton had been brought in an English common-law court at any time after those courts assumed jurisdiction over foreign torts, the

13. See id. at 379-80.
16. The Halley, L.R. 2 P.C. 193 (1868); Machado v. Fontes, [1897] 2 Q.B. 231; Dicey, Conflict of Laws 940-78 (7th ed. 1958); Hancock, Torts in the Conflict of Laws 5-12 (1942).
17. So, at least, say the leading text-writers. See, e.g., Cheshire, Private International Law 129-32 (5th ed. 1957); Dicey, Conflict of Laws 1107-16 (7th ed. 1958); gravelson, The Conflict of Laws 347 (3d ed. 1955). For rhetorical purposes I am inclined to accept their conclusion although the supporting cases are far from satisfactory. The earliest clear reference to the problem appears to have been in Male v. Roberts, 3 Esp. 163, 170 Eng. Rep. 574 (C.P. 1800). In Mure v. Kaye, 4 Taunt. 34, 128 Eng. Rep. 239 (C.P. 1811), an action for false imprisonment based on an arrest in Scotland, Lord Mansfield and his brethren indicated considerable uncertainty as to whether it was incumbent on either party, or both parties, to plead the foreign law. In the end, without resolving that question, the court disposed of the case according to the law of England. The principle declared in the texts was squarely affirmed in an obscure nisi prius decision. Brown v. Gracey, reported in Note (a) to Lacon v. Higgins, Dowl. & Ry. N.P. 38, 41, 171 Eng. Rep. 910, 911 (1822). In King of Spain v. Machado, 4 Russ. 225, 239, 38 Eng. Rep. 790, 795 (Ch. 1827), a Spanish document, in the absence of evidence of Spanish law, was construed “according to the natural import of its terms.” The principle was reaffirmed, on the authority of Brown v. Gracey, supra, in Lloyd v. Guibert, L.R. 1 Q.B. 115, 129 (Ex. Ch. 1865); but this was the cheerest dictum: the law which the court held applicable was pleaded, and taken to be as alleged. Nouvelle Banque de l’Union v. Ayton, 7 T.L.R. 377 (C.A. 1891), is an unsatisfactorily reported case in which the court approved the application of English law on an issue of negotiability upon an unsuccessful effort to establish the foreign law. At most it affirms a presumption of identity between the law of the forum and the foreign law in matters relating to common types of
action would not have been dismissed because the foreign law did not appear. The case would simply have been adjudicated according to the law of England.

The English practice, whereby the law of the forum furnishes the rule of decision until it is displaced by a different law with a greater claim to recognition, brought forward by a party wishing to take advantage of the difference, seems normal and natural. It has something of the quality of soundness which one associates with a house which has been designed skillfully in terms of its relationship to the physical characteristics of its site. This is a rule of law admirably adapted to the facts of its environment. Lawyers and judges are ordinarily schooled in their own domestic law. Day in and day out they think, advise, and argue and dispose of cases in terms of that law. They develop familiarity with its provisions and sometimes expertness and even insights concerning it. They are prone, at least according to a widely held belief, to overlook the significance of foreign facts and to proceed in accordance with local law in many instances in which attention to the foreign law would have produced a different result. The intrusion of foreign law is an unsettling departure from routine, involving even under ideal conditions some encounter with the unfamiliar, some departure from usual procedures, some additional burden; and there are situations in which the degree of unfamiliarity and the burden of understanding can become oppressive. To say that there is a strong presumption favoring the application of the law of the forum until good cause is shown why it should not be applied is to give prescriptive form to an observation of behavior which has something in common with Newton's laws of inertia.

There is a wide gulf between the English position and that of New York as interpreted by the court of appeals in the Walton case. In contrast to the English practice, that of New York appears quite artificial. It requires lawyers and judges to think and act in ways different from those to which they are disposed by training, habit, and inclination. A New York lawyer may commercial instruments. In The Parchim, [1918] A.C. 157, English sales law was applied to determine ownership of cargo in a prize case in the absence of proof of foreign law, on the ground that there was no reasonable alternative; but the court also noted that the law applied was based "on mercantile usages common in their general substance and operation to the merchants of all nations." Id. at 160. Dynamit Actien-Gesellschaft v. Rio Tinto Co., [1918] A.C. 260, 292, contains expressions supporting the principle, id. at 295, 301; but it is difficult to believe that the court would have applied German law, even if proved, to determine the validity of a contract under the Trading With the Enemy Act. Finally, in an annulment proceeding, in the absence of proof of French law, it was assumed that the grounds for annulment had the effect of rendering the marriage voidable only, as in English law, with the result that the plaintiff wife was held domiciled in France and the court had no jurisdiction. De Reneville v. de Reneville, [1948] 1 All E.R. 56 (C.A. 1947).

The Scottish practice appears to be the same. See M'Elroy v. M'Allister, 1949 S.L.T. 139, discussed in Ehrenzweig, Alternative Actionability in the Conflict of Laws of Enterprise Liability, 63 JURID. REV. 39 (1951). For a comment by Professor T. B. Smith see id. at 49 n.36.

18. See Kales, Presumption of the Foreign Law, 19 HAV. L. REV. 401 (1906). For an illustration of this point see In re Estate of Daniel, 208 Minn. 420, 294 N.W. 465 (1940).
know his law of torts quite thoroughly, but the knowledge will not avail him if he does not also know that in an obscure section of the digest entitled "What Law Governs," or in a subject called "conflict of laws" which he may not have studied in law school, there is a rule which refers questions of liability in tort to the law of the place of the wrong. Whereas in the English practice the choice-of-law rule is permissive and calculated to further the ends of justice by allowing the interested party to invoke the protection of foreign law, in New York the choice-of-law rule has attained the status of a categorical imperative: the foreign law is an essential ingredient of the cause of action or defense, without which there is nothing on which the court can act. Whereas the English lawyer may safely assume that he may rely on the ordinary law of the land until he is notified to the contrary, the New York lawyer is expected to be constantly alert to the significance of foreign facts, expert in his knowledge of those rules which designate (with a precision to which students of conflict of laws can testify) the appropriate foreign law, and endowed with either omniscience or unlimited enterprise with respect to knowledge or ascertainment of the proper foreign law. In England, I suppose, the lawyer who puts forward the suggestion that a consideration of foreign law would be advantageous to his client is entitled to be regarded as a rather ingenious fellow who has accomplished something of a coup; in New York the lawyer who fails to note the importance of foreign law is entitled to be regarded as a blunderhead. As one indication of how far the New York conception of the choice-of-law rule can be carried, it may be noted that the fact that courts frequently decide cases involving foreign facts according to local law, in the absence of any suggestion to the contrary by either party, has been viewed with alarm—almost as if the courts were in the habit of deciding cases without reference to a controlling local statute. How did such an attitude come about, and how have other courts dealt with the problem?

III. THE PROBLEM FURTHER CONSIDERED

A major source of the difficulty and confusion attending the problem in this country is the notion, inherited from the English practice, that foreign law must be treated as fact for all purposes. In due course we shall note the familiar procedural difficulties which have resulted from that notion. The point to be made here is more basic. By virtue of the notion that foreign law is fact, the whole problem of pleading and proving foreign law, including the problem of what is to be done when the law of the state referred to by the choice-of-law rule is not invoked, has in effect been ceded by the domain of conflict of laws to the domain of evidence. Writers on conflict of laws

19. See Kales, supra note 18, at 401. See also notes 123-24 infra.
have concentrated their attention upon the rules for choice of law and, on the basis that foreign law is to be treated as fact, have in the main left questions relating to pleading and proof of that law to the experts on evidence. Those questions are of such obvious interest, however, to students of conflict of laws that most writers on that subject have been impelled to include some treatment of them, if only for informational purposes. They have been hard pressed to find place for this treatment in the organization of their works. Story solved the problem by the rather crude expedient of including the subject in a chapter entitled "Evidence and Proofs," thereby setting a precedent from which there have been few departures. The chapter was basically concerned with the dichotomy between "substance" and "procedure"—that is, with the distinction between those matters which are governed by the proper foreign law and those which are governed by the procedural law of the forum. Questions relating to pleading and proving foreign law had no very logical relation to that distinction; but the arrangement was justified by the superficial fact that questions of pleading and proving foreign law also concerned "procedure," or "evidence and proof."

The relinquishment of jurisdiction over these questions by writers on conflict of laws has had an unfortunate effect. The problem has been defined as one of pleading and proof alone. The conditions upon which a solution is to be worked out have been given. The resources to be employed in working out a solution are those available to experts in evidence, as such. No question is to be raised concerning the theoretical basis for the invocation of foreign law, nor the function of a choice-of-law rule; all such questions have presumably been settled by the experts on conflicts. Nothing remains but for the experts on evidence to bring their distinctive resources to bear. This artificial and unduly confining definition of the problem has hampered efforts to find a satisfactory solution and has subtly misdirected many a critical

20. See Thayer, A Preliminary Treatise on Evidence at the Common Law 257 (1898); McCormick, Judicial Notice, 5 Vand. L. Rev. 296 (1952). One of the more extensive treatments is to be found in 2 Wigmore, Evidence §§ 564, 566 (3d ed. 1940); 3 id. § 690; 4 id. § 1271; 5 id. §§ 1633, 1674, 1684; 7 id. § 1953; 9 id. §§ 2536, 2558, 2573. The Uniform Judicial Notice of Foreign Law Act is classified as an "Evidence Act," and its general adoption was urged by the American Bar Association's Committee on the Improvement of the Law of Evidence. See 9 Wigmore, Evidence § 2573 (3d ed. 1940). The problem is also treated in Model Code of Evidence rules 801-06 (1942), and in Uniform Rules of Evidence 9-12. See also note 27 infra.


22. Restatement, Conflict of Laws §§ 584-625 (1934); Beale, Conflict of Laws §§ 621.1-625.2 (1935); Chatham, Goodrich, Griswold & Reese, Cases on Conflict of Laws 351-417 (4th ed. 1957); Dicey, Conflict of Laws 1107-16 (7th ed. 1958); Goodrich, Conflict of Laws 226-59 (3d ed. 1949); Harper, Tainter, Carnahan & Brown, Cases on Conflict of Laws ch. 2 (1950); Lorenzen, Cases on Conflict of Laws 263-500 (6th ed. 1951); Stumberg, Cases on Conflict of Laws 171 (1956); Stumberg, Conflict of Laws 134-78 (2d ed. 1951). An exception is Johnson, Conflict of Laws (1933), in which the phenomenon of foreign law in local courts is given extended treatment in the first chapter. Association of American Law Schools, Selected Readings on Conflict of Laws (1956), contains no readings, but only a list of references, on invocation and ascertainment of the foreign law. Id. at 228.
effort. Even Professor Nussbaum, who has contributed perhaps the most enlightened and helpful discussion of the problem, felt constrained to accept the existing system of conflict of laws as a limiting datum: "To the extent that Conflicts rules have evolved judicially or otherwise they must be obeyed in the same way as other rules of law."

Only in a final footnote did he remark that his proposed solution "furnishes another point against the vested right doctrine." Thus, almost involuntarily, he achieved a nearly unique distinction in venturing to suggest a doubt as to the conditions upon which the problem is stated; but he did not develop the point, and none of the great modern critics of traditional conflict-of-laws theory has addressed himself to the fundamental theoretical problems involved.

The problem, as it has been developed in this context, has been found to consist of several more or less distinct components: (1) Must foreign

23. Recently a bold bid has been made for jurisdiction of the problem by the domain of comparative law. The pioneer casebook in this field contains a far more extensive coverage than any casebook on conflict of laws. Schlesinger, Cases on Comparative Law 32-139 (1950). Whatever advantages such an arrangement might have, there seems no reason to expect that the experts in this field will be better able than those in evidence to find a satisfactory solution, nor any more free from the doctrinal presuppositions in the context of which the problem is presented. On the contrary, whereas the evidence experts may be presumed to be neutral in such matters, the comparativists, by virtue of their special competence in and familiarity with foreign legal systems, may bring to the task a bias in favor of foreign law which will not necessarily be conducive to a sound solution.


25. Id. at 1044 n.141. At the same time he disclaimed sympathy with the local-law theory, which he interpreted in a way which would doubtless give offense to the founders of that theory.


27. In the following brief discussion of the development of the problem in this country, detailed documentation of familiar propositions would serve no useful purpose. Instead, I list here some of the sources which, in addition to those cited in notes 20 and 22 supra, have been particularly useful.

28. Early cases are helpfully assembled and analyzed in Annots., 34 L.R.A. (n.s.) 261 (1911), 67 L.R.A. 33 (1904). An influential early analysis is Kales, supra note 18. Another early treatment, perhaps the most extensive in a treatise on conflict of laws, is in 2 WHARTON, CONFLICT OF LAWS §§771-82(b) (3d ed. 1905).

Between World War I and the approval of the Uniform Act in 1936 the following discussions appeared: Field, Judicial Notice of Public Acts Under the Full Faith and Credit Clause, 12 Minn. L. Rev. 439 (1928); von Moschzisker, Presumptions as to Foreign Law, 11 Minn. L. Rev. 1 (1926); Wachtell, The Proof of Foreign Law in American Courts, 69 U.S.L. Rev. 527, 589 (1935); Comment, 17 Calif. L. Rev. 417 (1929); Notes, 46 Harv. L. Rev. 1019 (1933), 39 Harv. L. Rev. 378 (1926); Comment, 30 Mich. L. Rev. 747 (1932); 20 Colum. L. Rev. 476 (1920).

law be pleaded, and, if so, with what particularity? (2) Must foreign law be proved, and, if so, in what manner? (3) Who is to decide the issue as to the tenor of the foreign law? (4) Is the determination of the issue as to foreign law reviewable on appeal?

The basic answers to those questions followed inexorably from the postulate that foreign law is fact: (1) Foreign law must be pleaded like other facts. (2) Foreign law must be proved in conformity with the law of evidence. (3) The issue as to foreign law is to be decided by the trier of fact. (4) The determination of an issue as to foreign law is not reviewable by a court having jurisdiction to review questions of law only.

These answers, particularly the second and third, proved troublesome from the standpoint of the fair and efficient administration of justice. The requirement that the jury must determine any issue as to the rule of decision provided by the foreign law, though a manifest absurdity, may not have been so troublesome in actual practice as might be supposed, since the courts, acting on their own initiative, early devised some limitations for the jury’s function. There can be no doubt, however, that the requirement that foreign law be proved in conformity with all the technical rules of evidence was generally a burdensome, expensive, time-consuming, and pointless annoyance. For such ills a remedy was found in the pharmacopoeia of evidence: foreign law might be fact, but it was fact susceptible of judicial notice. While the courts had with near unanimity refused to take judicial notice of foreign law on their own initiative, they could be authorized or required to do so by statute. Accordingly, attention was concentrated on the formulation of judicial notice statutes, which were widely enacted. In general, the effect of such statutes has surely been salutary.

In order to clear the way for consideration of the more difficult problems,


28. See STORY, CONFLICT OF LAWS §§ 638, 638a (6th ed. 1865); 2 WHARTON, CONFLICT OF LAWS §§ 773, 773a (3d ed. 1905). A particularly objectionable aspect of this requirement was that the judge was obliged to hold the foreign law controlling even though he did not know what the finding as to its tenor would be. See Cavers, A Critique of the Choice-of-Law Problem, 47 HARV. L. REV. 173 (1933).

29. See McCormick, supra note 20, at 308-09; note 32 infra. The suggestion that cross-examination of expert witnesses is often indispensable to the ascertainment of foreign-country law, see Sommerich & Busch, supra note 27, at 158 n.137; Stern, supra note 27, at 44, can be met by giving the judge discretion to require formal proof when he is not satisfied as to the reliability or authenticity of the information made available.

30. Some early statutes are referred to in 2 WHARTON, CONFLICT OF LAWS § 781a (3d ed. 1905). See also 9 WIGMORE, EVIDENCE § 2573 (3d ed. 1940). The Uniform Judicial Notice of Foreign Law Act, approved in 1936, has been adopted in twenty-six states. Outstanding among modern statutes not modeled closely on the Uniform Act are CAL. CODE CIV. PROC. § 1875; MASS. GEN. LAWS ch. 233, § 70 (1932); N.Y. CIV. PRAC. ACT § 944-a.
let us state, and then put aside, certain propositions concerning which little controversy can be anticipated:

1. When, for the purpose of finding a rule of decision, a court turns its attention to foreign law, it is desirable to have the inquiry proceed free from any restriction imposed by the formalities or the exclusionary rules of the law of evidence. Indeed, so clear is this proposition, and so general its applicability, that one wonders why the framers of the Uniform Judicial Notice of Foreign Law Act limited their corrective measure to the laws of other states of the Union, withholding it from application to the laws of foreign countries. The same arguments which justify informal access to all available sources of information where the laws of a sister state are concerned at least equally justify the same procedure with respect to the laws of foreign countries.

2. When, for the purpose of finding a rule of decision, it becomes necessary to resolve an issue as to the content, tenor, or construction of foreign law, the issue should be determined by the court rather than by the jury. Again, this is a proposition which is applicable equally to the laws of sister states and to the laws of foreign countries. One might even suggest that where the foreign legal system is alien to the common law there are additional reasons why the issue should be determined by the court.

3. Probably, it is also desirable that the determination of an issue as to the rule of decision provided by the foreign law should be reviewable by appellate courts; but this is in part a question of appellate policy which should not depend upon characterization of the question as one of law or of fact and which ought not to be casually disposed of in the context of a discussion of the conflict of laws.31

It was primarily for the purpose of conforming the law to these propositions, and thus changing the original answers to the second, third, and fourth questions, that the judicial notice statutes were passed.32 But these proposi-


32. According to the Commissioners' Prefatory Note, the Uniform Act was proposed in order... to correct two outworn rules of the common law. The first was the rule forbidding judicial notice of American law in sister states of the United States. The second was the rule that the decision upon such laws should be a question of fact for the jury, not of law for the judge." 9A U.L.A. 318 (1957). The objective on the first score is somewhat clarified by the provisions of the act and the section-by-section notes of the commissioners. Section 2 provides that the court may inform itself of the laws to be noticed in such manner as it may deem proper. Section 3 provides that the determination of foreign law shall be made by the court and not the jury, and shall be reviewable. Although the act does not otherwise extend to laws of foreign countries, § 5 provides that the issue as to such laws is for the court. See also Wachtell, supra note 27, at 580.

The reason for the New York Judicial Council's recommendation of § 344-a of the Civil Practice Act was primarily the expense and burden of complying with the rules of evidence. N.Y. JUDICIAL COUNCIL, NINTH ANN. REP. 271 (1943); see Saxe, supra note 27, at 87. The Massachusetts act "did away with 'the time-honored farce of submitting questions of foreign law to the jury as questions of fact.'" Note, 32 Mass. L.Q. May 1947, p. 20 (1947). See also McCormick, supra note 20.

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tions do not resolve all the problems that are subsumed under the general head of pleading and proof of foreign law. The draftsmen were confronted with a series of practical questions. They might have dealt with each one separately on the merits, stating their conclusions as we have done in our three propositions, without appealing to any general principle. Instead, they found in judicial notice a concept which conveniently rationalized the desired result with respect to the more pressing questions, and adopted that rationale although it implied answers to other questions which had not weighed heavily in their deliberations and which had certainly not been analyzed adequately and considered on their merits.

The partially hidden questions begin to come to light when we recognize that in discussing the requirement that foreign law be proved we have thus far discussed only the procedure whereby information as to the foreign law is brought to the attention of the court. We have agreed that this procedure should be informal and unencumbered by the rules of evidence. We have not discussed the question: when and for what purpose is it necessary to bring information as to the foreign law to the attention of the court? We have considered the manner in which foreign law is to be established; we have not considered the consequences of failure (by a party not yet identified) to establish it.

The point will become clearer when we recognize that thus far we have not discussed at all the first of the four questions: must foreign law be pleaded? There is little to indicate that the formal requirement of pleading, like the formal requirement of proof, gave rise to material difficulties and hence motivated the enactment of the judicial notice statutes. Yet, just as the treatment of foreign law as fact had dictated the conclusion that it must be pleaded like other facts, so the principle of judicial notice, by which "sister state law is put upon the same footing as the forum law," tends to require the conclusion that there is no more necessity for pleading foreign law than there is for pleading domestic law.

But such an answer fails to provide a complete, or workable, or acceptable solution to the problem. The rule that foreign law must be pleaded is a deceptively complex and incomplete statement. It says that in a certain type of situation somebody is expected to take a certain procedural step. It is reasonably clear that one kind of situation (among others) calls for this step: the facts disclose a connection with a foreign state such that, according to a choice-of-law rule of the forum, the foreign law is the source of the rule of decision. The rule says something about the manner in which the action is to be taken: it is to be relatively formal, a statement in the pleadings of

at least the substance of the foreign law. Something is said, also, about the appropriate time for this action: it is to be taken, normally, at the outset of the proceedings, at the time when the issues for trial are defined, although under modern systems of pleading the possibility of curing the omission by amendment at a later time is not excluded. It is not at all clear, however, who is expected to take this action. We may, of course, infer that it is one of the parties, rather than the court, since it is the parties who are responsible for the contents of the pleadings. But we cannot be sure which of the parties is meant. What amounts, perhaps, to the same thing, the rule does not reveal the consequences of noncompliance. Possibly what is meant is that the obligation may rest upon the one party or the other as the occasion may require; but this still falls short of answering our question. Without attempting at this point to state all the consequences of failure to plead the applicable foreign law, let us simply note the most important ambiguity in the rule.

The failure of the plaintiff to plead the applicable foreign law, if challenged by the defendant, might mean: (1) that the sufficiency of the complaint as stating a cause of action is to be determined by the law of the forum, and that the plaintiff will not be permitted to rely on any advantage which the foreign law might afford; or (2) that the complaint fails to state a cause of action and should be dismissed, since the foreign law is an essential ingredient of the cause of action.

Assuming that the question as to the failure of the defendant to plead the foreign law is reached, a similar pair of alternatives can be constructed with respect to the consequences of his failure to comply with the rule. The requirement that foreign law be proved shares the same ambiguity. This ambiguity cannot be resolved by reference to the requirement that foreign law be pleaded and proved, nor by the underlying premise that foreign law is fact. Nor is it obviated by the new doctrine that the court will take judicial notice of foreign law. Finally, it is not one which can be resolved by a mere allocation of the burden of proceeding to the one party or the other. Its resolution tends to rest upon preconceptions concerning the function of the choice-of-law rule; hence any adequate discussion of the problem must be concerned with fundamental questions of conflict-of-laws theory which have been decidedly neglected in this context.

It is not at all clear what change, if any, was intended to be effected by the substitution of the concept of judicial notice for the requirement that foreign law be pleaded. In the discussion of the question of proof, it was possible for us to set down, as a matter not likely to be seriously disputed, the proposition that judicial inquiry into the content and tenor of foreign law should not be fettered by the rules of evidence. There is temptation to make a similar statement about the formality of pleading foreign law. Al-
though there is little evidence that this formal requirement led to substantial injustice and it is unlikely that it would do so under modern systems of pleading, we might say that there is no point in insisting on formality for its own sake, that there may be latent possibilities of injustice in any rigid requirement, and that informal methods of attaining the ends sought would be preferable. Immediately, however, we encounter difficulties. It is not clear what the functions of the requirement were. In discussing the manner in which foreign law is invoked in the first instance, as distinguished from the manner in which its tenor is to be established, we are squarely confronted with the question of the consequences of failure by the proper party to make his move at the proper time.

Treatments of this subject tend to gloss over the ambiguity as to the consequences of failure to plead and prove foreign law by prefacing the requirement with an equally ambiguous indication that it is operative when foreign law becomes "material," or "relevant." But when does foreign law become material? When a party invokes it in aid of a cause of action or a defense, or whenever a foreign factor in the case brings the matter within the purview of a choice-of-law rule? What are the consequences of failure to plead and prove the foreign law, and what change in those consequences, if any, is contemplated by the substitution of the concept of judicial notice for the requirement of pleading and proof? We shall be in a better position to consider these questions when we have examined the judicial notice statutes in some detail.

IV. ALTERNATIVE DISPOSITIONS: THE PRESUMPTIONS

The trial of Walton v. Arabian Amer. Oil Co. opened with the following remarks by the presiding judge:

Gentlemen, in examining the pleadings, I note that this is a claim based on negligence which arose in Saudi Arabia. Will there be any conflict between you as to what the law of Saudi Arabia is?

There had been no reference to the law of Saudi Arabia in either the complaint or the answer. But for this remark by Judge Bicks, it is conceivable that the case might have gone to trial on the tacit assumption that New York law governed (though that seems hardly likely with so exotic a locus delicti as Saudi Arabia). Had that been the case and had a final


35. Brief for Appellant, app. p. 10.
judgment been entered for the plaintiff without appeal, the legal consequences of the failure to plead and prove, or otherwise take account of, the law of the place of injury would have been nil. The losing party would not be in a position to take advantage of the oversight. Students of conflict of laws might observe that counsel for the defendant had missed a singularly good opportunity to achieve a different result. They might even go so far as to feel that the defendant had been inadequately represented. It would be rather extreme of them, however, to feel that the case had been "wrongly" decided, or to deplore, with Kales, the disregard of the "controlling" law.38

On the other hand, the oversight might have been discovered by the defendant before the case had been finally closed. Thus he might attempt to raise the question of the applicability of the foreign law for the first time on appeal, or in a motion for new trial; or he might simply have waited until the close of the plaintiff’s evidence, and then moved for dismissal or for a directed verdict on the ground that the plaintiff had failed to establish the foreign law.

These speculations raise the question: in what manner, at what time, and by whom is the point to be made that the case is one involving a foreign factor sufficient to raise a question as to what law governs? Whose responsibility is it to notice the fact that the case is a conflict-of-laws case, to be handled in a special manner—a case in which foreign law may be material? Judge Bicks’s remark, which was not criticized by either party or by the court of appeals, furnishes at least a partial answer. Provided the suggestion is timely, it may be made informally, even by the court on its own motion.37 Judge Bicks assumed, since the complaint disclosed that the accident had happened in Saudi Arabia and since the familiar choice-of-law rule points to the law of the place of injury as controlling, that Saudi Arabian law would be material. He assumed, further, that the parties had inquired into the Saudi Arabian law and were prepared either to agree on its tenor or to litigate the question in some appropriate manner. He assumed, also, that it was a good idea to settle at the outset of the litigation any question as to what the relevant law of Saudi Arabia was.

Thus the suggestion that foreign law was material came in such a way as to cause the plaintiff no prejudice or surprise. In reply to the court’s opening remarks, counsel for the plaintiff stated that he was prepared to proceed on the basis of common-law negligence, on the theory that if liability could be established according to "rudimentary principles" of tort law he

36. Kales, supra note 18, at 401.
37. Judge Bicks’s ruling that the foreign law need not be pleaded, Brief for Appellant, app. p. 12, is at variance with other statements as to the law in the federal courts. See Empresa Agricola Chimada Ltda. v. Amtorg Trading Corp., 57 F. Supp. 649 (S.D.N.Y. 1944); Busch, supra note 27, at 655. But see Siegelman v. Cunard White Star, Ltd., 221 F.2d 189, 196 (2d Cir. 1955).
was entitled to recover without reference to the law of the place of injury. Judge Bicks, without the aid of memoranda from counsel for either side, ruled that “the burden will be upon the plaintiff to establish as a fact the law of Saudi Arabia and absent such proof the plaintiff will not make out a case, and will require the complaint to be dismissed.” Counsel for the plaintiff reiterated his contention that it was not necessary for him to prove the Saudi Arabian law, adding that in his opinion there was no law or legal system in that country. Thereupon the court and the parties proceeded to make a pro forma record, for the purpose of appeal, and the preordained directed verdict for the defendant followed.

The polar alternative to the course followed by the court would have been to rule that the law of the forum was to be applied as the only law before the court until such time as some party, wishing to rely on a differing provision of the foreign law, should invoke the foreign law. The choice between these two courses is basic to our discussion. Before we consider it, however, we may give some attention to other alternatives which were available, according to at least some authorities, in the generalized situation. Three have been recognized:

(1) The court might, because of the “inherent justice” of the claim asserted, presume that the rudimentary principles of law necessary to support it obtain in all civilized countries, and act upon the assumption that it would be enforced in the foreign country in question;

(2) The court might presume that the law of the foreign country in question is the same as the law of the forum, whether the relevant law of the forum is found in the common law or in statutes;

(3) The court might presume that the law of the foreign country is the same as the common law (but not the statutes) of the forum; but this presumption is usually indulged only where the foreign country’s legal system is based on the English common law.

These three alternatives rest on a common theoretical basis. Like the course followed by the court in Walton, they are based on the assumption that the foreign law, whether or not invoked by one of the parties as a basis for his claim or defense, becomes material as soon as it is apparent that the foreign factor which is the fulcrum of the choice-of-law rule is present. Under each of these three, the consequence of failure to plead and prove the foreign law is not that the case will be determined by the law of the forum (as such), but that it will be determined by a quite possibly fictitious construct of the designated foreign law. At the same time, all three as a practical matter tend to produce the same result that would be reached if the rule were simply that the law of the forum applies until the proper foreign law is established by the interested party.
The first presumption, judging by experience as reflected in the cases, does not commend itself as a particularly comprehensive or workable solution of the problem. Mr. Justice Holmes did not think that the right of the employee to recover in the *Crosby* case was made clear by any "rudimentary" principles; nor did the court of appeals think that such principles could sustain the plaintiff in the *Walton* case. The line dividing those things which are rudimentary from those which are not seems entirely subjective.

In the two leading cases on the defense of infancy in actions on foreign contracts, the presumption concerning rudimentary principles common to civilized countries was not mentioned. But the glaring inconsistency in each of those decisions, in requiring the defendant to establish the foreign law in order to make his defense while not requiring the plaintiff to refer to foreign law in order to make out a prima facie case, is explainable only on the basis of such a presumption—and then only if it is understood that the difference between rudimentary principles and subtle refinements is quite arbitrary.

The third presumption, that the foreign law is the same as the common law of the forum, produced bizarre results in those cases where the common law of the forum had been changed by statute. By a type of coincidence which became more and more improbable as time went on, it might happen that this device resulted in the application of what in truth was the law of the foreign state. At times, however, the presumption resulted in the application of a law which was in force in no state having any connection with the problem.

39. See notes 104-37 infra and accompanying text.
40. 222 U.S. at 480.
41. 233 F.2d at 545. A half century earlier Kales had assumed that a court would not require proof that the foreign law provides a remedy for personal injuries caused by negligence. Kales, *supra* note 18, at 409. And in 1914 the same court of appeals had allowed recovery by a passenger on a French vessel for an assault committed by an employee of the defendant, without proof of French law, remarking that it would be almost an insult to a civilized country to assume that its law does not allow recovery in such a situation. Compagnie Generale Transatlantique v. Rivers, 211 Fed. 294, 298 (2d Cir.), *cert. denied*, 232 U.S. 727 (1914). Such a case would seem to present at least as much doubt as *Walton* concerning the universality of the measure of damages and the doctrine of *respondeat superior*.
42. Thus, in one case the plaintiff declared upon an insurance contract made and to be performed in Russia, setting forth two causes of action: (1) for the sum agreed to be paid, and (2) for restitution of premiums on the theory that the defendant had repudiated. Because the plaintiff did not plead the Russian law, the defendant moved for dismissal of the complaint for insufficiency. The motion was granted as to the second cause of action, but denied as to the first. Sliosberg v. New York Life Ins. Co., 125 Misc. 417, 211 N.Y. Supp. 270 (Sup. Ct. 1925), 39 Harv. L. Rev. 378 (1926); cf. Lichovitzky v. New York Life Ins. Co., 126 Misc. 109, 212 N.Y. Supp. 722 (Sup. Ct. 1925).
It may be that the result on occasion was to preserve to the plaintiff who had neglected to establish the foreign law some remedy, in contrast to the complete loss of remedy he would have suffered if the rule of dismissal applied in the Walton case had been employed; and so there may have been some apparent pragmatic justification for the presumption. There is no basis, however, for assuming that the "just" results reached by it outweighed the capriciously unjust. In any event, there can be no theoretical justification for such a presumption in this context. When a system for determining which law furnishes the appropriate rule of decision points to a phantom law which is not in force in any interested jurisdiction, and perhaps nowhere on earth, the mechanism is simply running wild.

For the foregoing reasons, it would not be constructive to suggest that the court in the Walton case might have resorted to one of the three presumptions. The court did not regard the claim of the plaintiff as supported by rudimentary principles entitled to universal recognition; and, if it had, that concept is not one which can be objectively applied. The presumption that foreign law is identical with that of the forum is not an improvement on the application of the law of the forum merely as such. The presumption that the foreign law coincides with the common law of the forum was not available, since it is not usually invoked where the foreign system is known to be alien to the common law; and, in any event, unless the common law applied happens to be the living law of some interested state, there is nothing to be said in defense of the third presumption.

V. ALTERNATIVE DISPOSITIONS: JUDICIAL NOTICE

There is also the modern possibility that the court might have taken judicial notice of the foreign law. At the time the Walton case was tried there was in force in New York a statute not only authorizing the courts, in their discretion, to take judicial notice of the law of a foreign country, but specifically providing that the failure of either party to plead foreign law should not preclude either the trial or appellate court from taking notice of it. At no time did the plaintiff suggest such a procedure. The possibility was men-

45. Recognizing the subjectivity of the rudimentary-principles presumption, Professor Schlesinger has suggested that research in comparative law may provide the basis for determining whether a rule or principle is in fact recognized by civilized nations generally. Schlesinger, Research on the General Principles of Law Recognised by Civilized Nations, 51 AM. J. INT'L L. 734, 748-49 (1957). This, I suggest, does not promise a satisfactory solution of our problem. According to Professor Schlesinger's estimate, the project would require many years, assuming that it is practicable at all. In the end, a compilation of those principles which are held in common by all civilized countries will bear little resemblance to the developed law of any modern state; and there is no justification in the field of conflict of laws for applying a law which is not that of a state interested in the matter. Having divested ourselves of the general federal common law, we may be wise not to create, for cases such as these, a general international common law.

46. N.Y. CIV. PRAC. ACT § 344-a.
tioned only when the judge, in the course of delivering his final ruling against the plaintiff, remarked that he would not take judicial notice of the law of Saudi Arabia. The court of appeals, raising the question apparently on its own motion, held (1) that on this record it was precluded by New York law from taking notice of the Saudi Arabian law on appeal, and (2) that there should not be a remand to permit the parties to assist the court in taking notice of the foreign law, because the plaintiff had deliberately refrained from establishing an essential element of his case. All this raises a puzzling question: to what extent, and in what manner, have the judicial notice statutes been intended to affect the consequences of failure to bring the applicable foreign law to the attention of the court?

Dean Wigmore, discussing with approval the Uniform Judicial Notice of Foreign Law Act, said in 1940: “No one would demand that a Court take judicial notice of foreign systems of law in foreign languages.” Why not? As we have seen, the primary reasons for the enactment of the judicial notice statutes apply to the laws of foreign countries as well as to the laws of sister states. Indeed, the Uniform Act itself expressly provides that the law of a foreign country shall be an issue for the court. Why, then, the persistent reluctance—which runs throughout the literature—to extend the principle of judicial notice fully to the law of foreign countries?

The answer must be that the doctrine was thought to perform some function in addition to those which have been enumerated—some function which would be unwelcome in the context of foreign-country law. Probably Dean Wigmore assumed that to apply the doctrine is to impose a duty upon the court to ascertain the foreign law for itself—a duty which would be particularly onerous in the context of alien legal systems and unfamiliar languages. Just why this obligation should follow is not clear. Judicial notice extends to many matters of fact—some of them quite abstruse—without imposing on the courts the unrealistic burden of informing themselves, without the aid of counsel, of the matters to be noticed. Perhaps it is the assimilation of foreign law to domestic law which is responsible for the assumption that the obligation follows. By the device of judicial notice foreign

47. Brief for Appellant, app. p. 46.
48. 233 F.2d at 546.
49. 9 WIGMORE, EVIDENCE § 2573 (3d ed. 1940); cf. note, 32 Mass. L.Q., May 1947, p. 20 (1947). Seven states now provide for judicial notice of the law of foreign countries. CAL. CODE CIV. PROC. § 1875; MASS. ANN. LAWS ch. 233, § 70 (1956); MISS. CODE ANN. § 1761 (1956); N.Y. CIV. PRAC. ACT § 344-a; N.C. GEN. STAT. § 8-4 (1953); VA. CODE ANN. §§ 8-273 (1957); W. VA. CODE ANN. § 5711 (1955). In addition, the American Law Institute and the National Conference of Commissioners on Uniform State Laws now recommend judicial notice of the law of foreign countries. UNIFORM RULE OF EVIDENCE 9(2).
50. See notes 20-34 supra and accompanying text.
51. UNIFORM JUDICIAL NOTICE OF FOREIGN LAW ACT § 5.
52. See, e.g., 9 WIGMORE, EVIDENCE § 2590 (3d ed. 1940).
law "is put upon the same footing as the forum law"; the judge knows, or has a duty to know, the law of the forum; hence he also has a duty to know the foreign law. Indeed, in some European countries (though by no means all) the position seems to be that the judges are under a duty to ascertain and apply the applicable foreign law on their own initiative and by means of their own research.

This assumption of a judicial duty to ascertain the foreign law when the doctrine of judicial notice applies is rather obscurely related to a tacit assumption concerning the consequences of failure by the appropriate party to establish the foreign law. The reasoning seems to be: the choice-of-law rule commands the application of the foreign law; the judicial notice doctrine commands the judge to determine the foreign law without proof by the parties, just as he would determine domestic law; hence, if the parties fail to come forward with information as to the foreign law, the consequence is that the court will determine what it is and decide the case accordingly. Thus, failure by the plaintiff to establish the foreign law which is an essential element of his case will no longer result either in dismissal or in the application of some part or all of the law of the forum by way of a presumption that the foreign law is the same. The court will determine and apply the actual foreign law.

We do not have to depend entirely on inference to establish that judicial notice statutes proceed on this assumption as to the consequence of failure to plead and prove the foreign law, and are designed to change that consequence. The setting in which the judicial notice statutes were introduced may be recalled. When the Uniform Act was approved in 1936, it was widely taken for granted that the choice-of-law rule was an ineluctable mandate. The Restatement and Beale's treatise had pronounced that only the state referred to by the choice-of-law rule had "jurisdiction" to create the rights and duties in question. Failure on the part of the plaintiff to establish the foreign law was failure to establish an essential element of his claim, leading to dismissal, unless he could be saved by a presumption. Even then, it was the "foreign law" which was applied, in theory, by way of the various "presumptions" as to the tenor of the foreign law. It seems clear that in some degree the judicial notice statutes were motivated by revolt against the artificiality of the presumptions as presumptions of fact.

54. See 1 JOHNSON, CONFLICT OF LAWS 59 n.1 (1933); Nussbaum, supra note 44, at 1019-20, 1043.
55. See, e.g., RESTATEMENT, CONFLICT OF LAWS § 384 (1934).
56. See 3 BEALE, CONFLICT OF LAWS § 73, at 1969 (1935). Professor Beale was an advocate of "broad and comprehensive" powers of judicial notice, plainly for the purpose of insuring the application of the foreign law. 3 id. § 623.1, at 1685.
57. See Gorman v. St. Louis Merchants' Bridge Terminal Ry., 325 Mo. 326, 332-33, 28 S.W.2d 1023, 1024 (1930); Wachtell, supra note 27, at 580, 586-87.
On rare occasions this purpose of the judicial notice statutes has been made explicit. Thus the Judicial Council of New York, in proposing the measure which is now section 344-a of the Civil Practice Act, suggested that one effect would be to eliminate "injustices" such as the outcome in *Cuba R.R. v. Crosby*. More specifically, the executive secretary of the Judicial Council wrote:

Thus, where the plaintiff's cause of action is found to depend wholly upon the law of a foreign country and counsel has inadvertently failed to prove such law at the trial, the appellate court is now permitted to take judicial notice of the law of the foreign country and dispose of the controversy on its merits.

If [the *Crosby*] situation should arise in New York, under the new statute the New York Court of Appeals may now merely ask counsel to brief the law of Cuba on the particular point in question or ascertain such law itself, rendering judgment for the plaintiff if it is found that the law of Cuba was sufficiently clear. Analysis and experience suggest doubts as to the practicability and acceptability of such a solution to the problem. The *Crosby* case was tried in its entirety without any reference to the law of the place of injury. Only after losing on a plea of the general issue did the defendant invoke the principles of conflict of laws, moving for a new trial on the ground that the plaintiff had failed to establish an essential element of his claim. The trial court, adopting what we have called the "polar alternative" to dismissal, denied the motion, holding that in the absence of proof that the foreign law was different the law of the forum would be applied. The court of appeals affirmed.

We are now to suppose that the case comes before the highest appellate court in this posture, with the difference that there is in force a statute authorizing the court to take judicial notice of the law of Cuba. We are told that, instead of reversing, the court can ascertain the law of Cuba for itself. It seems highly unlikely that a busy appellate court would do so, and unreasonable to expect it to do so. Even on questions of domestic law, American courts justifiably expect counsel to undertake at least the basic responsibility for research, and to present arguments and authorities. Moreover, the ascertainment even of domestic law is a forensic affair, carried on in the spirit of the adversary system: each side knows the contentions of the other and each would be surprised if the court, going outside the range of the matters argued by counsel, were to announce, without recourse, a decision based on its private researches. These difficulties, despite the image of continental practice to the contrary, probably account for the alternative sug-

59. Saxe, supra note 27, at 88-89.
gestion: the appellate court may ask counsel to brief the law of Cuba. Let us suppose that this is done and a reasonably clear picture of the Cuban law is obtained. What then? The entire case was tried on the theory that the law of the forum governed. If it develops that the plaintiff's evidence falls short in some way of meeting the requirements of the Cuban law, presumably the judgment will be reversed and a new trial granted at which the plaintiff will have the opportunity to present additional evidence. But that is substantially the same result which was reached in the Crosby case itself, and which was denounced by the New York Judicial Council as a "gross miscarriage of justice." In both situations, the verdict which the plaintiff won is set aside and he is required to undergo the delay, expense, and risk of a new trial because of the defendant's belated invocation of conflict-of-laws rules. The only difference is that in Crosby he would have been required to prove the foreign law on the retrial, while under the judicial notice statute, according to this interpretation, he would establish it less formally in the appellate court. If the question were raised on appeal from the denial of a motion for directed verdict, reversal would not mean a new trial as a matter of course, and the plaintiff's cause might be irrevocably lost unless the appellate court, in the interests of justice, should order a new trial. On the other hand, if the investigation of foreign law in the appellate court discloses that the plaintiff has proved a cause of action under that law, is the judgment in his favor thereupon to be affirmed without an opportunity to the defendant to adjust his defense to the provisions of the foreign law, or is there to be a reopening of the proceedings for this purpose?

Manifestly, there are involved here questions of fairness and efficiency in procedure which cannot properly be answered by deduction from the concept of judicial notice. Writers and draftsmen have dealt glancingly with these questions by asking whether foreign law should be pleaded; whether the party wishing the court to take judicial notice of foreign law should give notice to his opponent; whether judicial notice should extend to alien systems of law as well as to the law of sister states; whether the taking of judicial notice should be mandatory or discretionary; and what procedural safeguards should surround the process of judicial notice. In such approaches to the problem the influence of deductions from the concept of judicial notice is never wholly absent, and the precise questions to be answered are seldom, if ever, dealt with consistently in a pragmatic and functional way. The method is not conducive to clarity.

We have seen that, in their treatment of foreign-country law, the advo-

63. See cases cited in Walton, 233 F.2d at 546 n.15. Similar relief was withheld in the Walton case because of the plaintiff's deliberate rejection at the trial of an opportunity to prove the Saudi Arabian law.
cates of judicial notice have assumed that the extension of that doctrine to foreign law imposes on the court the obligation to ascertain the foreign law on its own motion and by its own researches. There is no other explanation for the omission of the law of foreign countries from the Uniform Act. The draftsmen of later statutes, extending the doctrine to foreign-country law, have not thought otherwise; they have welcomed that obligation with respect to sister-state law, and have only modified it with respect to foreign-country law. The early advocates, however, were unwilling to accept the consequences of this position even with respect to the sister-state law which they made the subject of judicial notice. Section 4 of the Uniform Act provides:

... 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.

This, of course, is avowedly directed only to the problem of procedural fairness; but to provide that a court may ascertain foreign law for itself is to raise simultaneously a problem of procedural fairness and a problem of burdening the court, and to deal with one is to deal with the other. The notice requirement makes it reasonably clear that the court is not expected to act on its own initiative, as well as that the opposing party is entitled to notice. So far as the court's obligation is concerned, the point is emphasized by one of the cases cited by the commissioners.\textsuperscript{64} This was an action in Missouri for injuries sustained in a grade-crossing collision in Illinois, Missouri having a judicial notice statute similar to the Uniform Act. The plaintiff relied upon, and pleaded, an order of the Illinois Commerce Commission requiring the maintenance of safety gates. The case was twice tried on the theory that this order was controlling. On the second appeal the defendant, for the first time, suggested that the order had been superseded by a later one. Despite the judicial notice statute, the court refused to take the superseding order into account because it had not been pleaded—in other words, it had not been called to the attention of the court in timely fashion. Thus, even where the foreign law has been invoked and some of its provisions have been called to the attention of the court, there is no judicial obligation to perfect the inquiry; much less is there such an obligation in the absence of notice or assistance from counsel.

There is a strange paradox here. The framers of the Uniform Act declined to extend it to foreign-country law because they felt that to do so would be to impose an undue burden on the court. At the same time, they must have recognized that the application of the doctrine even to sister-state law would, by the same reasoning, impose an undue burden on the court.

\textsuperscript{64} Corbett v. Terminal R.R. Ass'n, 336 Mo. 972, 82 S.W.2d 97 (1935).
At any rate, they recognized that fairness to the opponent required that the party invoking the foreign law give notice; and, accordingly, they inserted a provision which meant that there should be no such burden on the court in the case of sister-state law; the burden must continue to rest with the parties.\textsuperscript{65} Having made this provision, they might well have extended the doctrine of judicial notice to foreign-country law. They did not do so.\textsuperscript{66} Later, the draftsmen of section 344-a of the New York Civil Practice Act, moved by the annoyances of the rule requiring proof, resolved to extend judicial notice to foreign-country law in spite of the heavy burden that would be imposed on the court, and with little attention to the problem of procedural fairness. Did they take the step taken by the draftsmen of the Uniform Act to shield the court from that burden? In spite of the fact that the burden is greater where the law is that of a foreign country, in a foreign language, they did not. On the contrary, they expressly provided that “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.”\textsuperscript{67} Instead, they relied on the discretionary character of the statute to provide a way of escape where foreign languages and legal systems pose too great a burden.\textsuperscript{68}

\textsuperscript{65} Notwithstanding the notice provision, commentators continued to assert that the Uniform Act had the effect of shifting the duty of ascertaining foreign law from counsel to the court. See Hartwig, supra note 27, at 176, 177 n.14 (1941); cf. Revlett v. Louisville & N.R.R., 114 Ind. App. 187, 51 N.E.2d 95 (1943). But the notice provision clearly relieved the judge of any duty to perceive the “materiality” of the foreign law under the choice-of-law rule; § 2 of the act authorized the court to call upon counsel for aid in obtaining information as to the foreign law; and it is unlikely that counsel would request judicial notice of foreign law if he were not prepared to suggest the tenor of that law. The commissioners were familiar with experience in Massachusetts regarding the dual problem of fairness to the opponent and burden on the court. In their note to § 4 they quoted with approval the Massachusetts rule of court providing that “it shall be the duty of counsel to call to the attention of the Court such authorities as they wish the Court to consider.” 9A U.L.A. 326 (1957).

\textsuperscript{66} It is not easy to guess the nature of the assumption underlying § 4 with respect to the consequences of failure to give notice. The statement that “the party invoking the foreign law must give reasonable notice” seems to suggest that, if he fails to do so, the case will be disposed of by reference to the law of the forum. So does the hypothetical illustrative case in the Commissioners’ Note. Yet the pitfalls of expression in the discussion of this problem are such that no very sure inference can be drawn on a merely literal basis. “Invoking” is an ambiguous word. The commissioners may have thought that a party asserting a claim founded (according to the choice-of-law rule) on foreign law “invokes” that law, though he is content to rely on the law of the forum, as much as does a party who can succeed only if he takes advantage of a distinctive provision of foreign law. If we wished to pursue the inquiry into intention to an unrealistic extreme, it might be noted that the Missouri case cited in note 64 supra was decided on the authority of a leading case, Rositzky v. Rositzky, 329 Mo. 662, 46 S.W.2d 591 (1932), which rather strongly suggests that the failure of the plaintiff to plead (or give timely notice of intention to rely on) the wrongful death statute of the state of injury means that a constitutive element of the cause of action is missing.

\textsuperscript{67} N.Y. Civ. Prac. Act § 344-a. A spokesman for the Judicial Council explained, not very helpfully, that the purpose of this provision was not to remove the “general” requirement that foreign law be pleaded, but to permit justice despite harmless error. Saxe, supra note 27, at 89.

\textsuperscript{68} N.Y. JUDICIAL COUNCIL, NINTH ANN. REP. 271, 284 (1943).
When the California Law Revision Commission recommended the extension of judicial notice to foreign-country law, it also approached the question of the burden on the court in terms of discretionary versus mandatory provisions. After reviewing the judicial experience with statutes of both types, it reached the conclusion—a surprising one, in view of the seeming importance of the discretionary provision in the New York act—that "the distinction which language seems to require between the Massachusetts statute and the New York statute as to mandatory and permissive application of judicial notice does not in fact exist to any substantial degree." This is equivalent to saying that it makes no difference whether the statute is mandatory or discretionary in terms; either way, the courts will work out a method of protecting themselves against an undue burden in the ascerta-

ment of foreign law, regardless of what the legislature says. We shall have occasion later to consider some of the cases which lead to this conclusion. Here it is instructive to observe that nowhere in the discussion is there any clear recognition of the fact that the question whether judicial notice should be mandatory or discretionary is a multifarious one: If we say that the court shall take judicial notice of foreign law, do we mean only that it must do so without regard to the formalities of evidence law? That it must do so whether or not one of the parties requests that it do so? That it must do so by means of its own resources, without assistance from counsel? That it must do so at any stage of the proceeding? That it must do so without regard to pleading or other notice?

The California commission likewise dealt with the problem of notice (or pleading), thereby dealing implicitly, like the Commissioners on Uniform State Laws, with the problem of the judicial burden as well as explicitly with the problem of fairness in procedure. Following the example of the Uniform Act, it recognized the importance of notice even where sister-state law is involved, and concluded that "when the law of a foreign country, rather than the law of a sister state, is involved, it is even more necessary that both court and counsel . . . give reasonable notice that such law will be relied upon." Taking its cue from the Model Code of Evidence, it went even further in providing procedural safeguards in the interest of fairness. Strangely, however—perhaps by inadvertence abetted by the economy of the amendatory scheme—the notice provisions and the additional safeguards were restricted to foreign-country law and do not apply to the laws of sister states.


71. Id. at I-8, I-21. See Model Code of Evidence rule 804(1) (1942).

The confusion in these judicial notice statutes is bewildering. Before proceeding further, let me venture two observations about judicial notice which may help to clarify the analysis:

First: The ascertainment of information relevant to the disposition of a litigated case requires work. This is true of information as to law no less than of factual information. It is true of domestic law and of sister-state law as well as of the laws of foreign countries. There is no significant truth in the statement that courts "know" their own domestic law. No prudent advocate assumes that they do. There may be, from time to time, cases in which the sole issue is factual and the controlling domestic law is undisputed. In such cases, the work necessary to ascertain the rule of decision has simply been done earlier, by the court and by counsel, in their studies and in the activities in which they acquired their experience. In any case in which the shadow of a doubt exists or can be generated, however, the court must pro hac vice inform itself, or be informed, as to the domestic law. In a significantly large number of cases a very real doubt exists. Search must be made of the precedents and other authoritative sources, and the skills of the advocate must be marshalled in the evaluation of this information and in its presentation to the court. Not only must the court be informed; it must be persuaded.

It goes without saying that responsibility in our system for the preliminary work of ascertaining the applicable domestic law rests upon counsel rather than the court. For counsel to impose this task on the court, or for the court to assume it, would be as unnatural as for the court to assume, or have imposed upon it, the task of gathering evidence. If I may say so without stirring a metaphysical argument, the search for domestic law in our system is significantly like the search for facts. Have the courts in the past rendered decisions touching this or similar questions? Has the legislature, or some regulatory agency, acted on the matter? If so, what is the history and present status of the enactment? The question whether an order of the Illinois Commerce Commission has been superseded by a subsequent order of the same agency poses the same kind of task for an Illinois lawyer or court that it does for a Missouri lawyer or court.

Thus, ascertaining or establishing the applicable domestic law is an integral part of the adversary process. Accordingly, some of the basic procedural principles which are required to assure that that process is due process are required, and are in fact observed, in the ascertainment and

73. See, e.g., Saloshin v. Houle, 85 N.H. 126, 132, 155 Atl. 47, 51 (1931); Glebe Sugar Ref. Co. v. Trustees of the Port and Harbours, [1921] Weekly N. 85, 86. But cf. MODEL CODE OF EVIDENCE 65 (1942): "In our system of litigation the functions assigned to the judge make necessary the assumption that he knows and will apply the law as embodied in the pertinent public statutes and judicial decisions."
establishment of the applicable domestic law. By a sense of fitness which is almost instinctive, by habit and tradition, by ethical considerations, and by positive rules of court the practice is shaped so that each party is enabled to know the contentions of the other as to the bearing of domestic law, and to meet them. Although the danger of surprise is theoretically minimized by the understanding that any relevant provision of domestic law may be invoked, there are rules limiting the time and manner of invoking even the prior decisions of the court in which the action is pending. The principal risk of surprise lies in the fact that no clear precept denies to our courts, if they are so disposed, the general privilege of making independent investigations into the tenor of domestic law and deciding accordingly. Even so, when a court, on its own initiative, decides a case entirely upon the basis of a question of domestic law which was not argued at all by counsel—as the Supreme Court did in *Erie R.R. v. Tompkins*—it exposes itself to well-founded criticism.

What we have said of domestic law applies also to the laws of sister states and of foreign countries. The work required to ascertain the law of a sister state is somewhat greater, and the task of ascertaining the law of a foreign country, in a foreign language, greater still. But in each case the court must inform itself, or be informed; and it must be persuaded. In each case, also, our institutions have something to say about how the burden of the required work is to be allocated as between counsel and court, and about the decencies of procedure.

All this seems painfully obvious. Yet much of the confusion in the judicial notice statutes can be accounted for only on the assumption that the obvious has been neglected. How else can we explain the fact that the Commissioners on Uniform State Laws refrained from extending judicial notice to foreign-country law (as distinguished from sister-state law) on the apparent ground that to do so would impose an undue responsibility on the court? How else explain the New York Judicial Council's plan whereby the highest appellate court, in a case like *Crosby*, would ascertain the foreign-country law for itself and decide accordingly; or the same Council's discretionary provision designed to allow the court to escape that responsibility when it encountered difficulty with a foreign language?

Judicial notice is a convenient rhetorical device for rationalizing—as we seem to have a compulsion to rationalize—the phenomenon of a court's taking account of matters not formally introduced in evidence. It cannot

74. See, e.g., REVIS ED RULE OF THE SUPREME COURT OF THE UNITED STATES 41(5); STERN & GRESSMAN, SUPREME COURT PRACTICE 294-95 (2d ed. 1954).
75. 304 U.S. 64 (1938).
76. See Kurland, supra note 31, at 188-89 & n.10.
77. Similarly, the Model Code of Evidence did not extend judicial notice to foreign-country law. Cf. note 73 supra.
perform magic, and it can easily get out of hand. Judicial notice cannot dis-
pense with the necessity of work to find the rule of decision. It is unrealistic
and probably unwise to expect judicial notice to change the relative roles of
court and counsel by shifting the burden of that work to the court. It is
positively dangerous to entertain the notion that judicial notice can dispense
with procedures which safeguard the fairness of the adversary process.\textsuperscript{78}

Second: Judicial notice, I submit, is a device which can be understood
only if it is regarded functionally, \textit{i.e.}, in terms of the precise consequences
of the court's decision to employ the concept, or not to employ it, in a specific
situation. Treatments of the subject commonly give us either a collection of
isolated instances in which courts have decided whether to take account,
without proof, of various bits of information ranging from the banal to the
bizarre and the abstruse; or they generalize about the criteria, in terms of
the character of the information in question, which determine when judicial
notice is appropriate.\textsuperscript{79} All this tells us little of how the doctrine is used
in practice. We learn, essentially, that there are some types of information
with respect to which judicial notice is never appropriate. We may well sus-
pect, however, that within the remaining categories courts do not always
exercise the prerogative. The consequences of doing so, or of not doing so,
are too diverse. The laws of the states of the Union constitute a reasonably
homogeneous category. They have generally been declared by statute to be
information of a character susceptible of judicial notice. Yet courts do not
always take judicial notice of the laws of sister states, nor should they do so.

Suppose, first, a pretrial conference in state \textit{F}. Counsel for the plaintiff
speaks: "If your Honor please, this is an action for wrongful death resulting
from an automobile collision in state \textit{X}. We are, of course, aware of the rule
that the substantive law of the place of injury is controlling, and we have
prepared a memorandum setting forth the wrongful death statute of state \textit{X},
together with decisions of the courts of state \textit{X} construing the statute. We ask
that the court take judicial notice of the relevant law of state \textit{X}.” Assuming
that the court subscribes to the theory that the foreign law is a constitutive
element of the cause of action,\textsuperscript{80} then if the court refuses to take judicial
notice of the foreign law the consequence is that the plaintiff must be prepared
to establish it by formal proof.\textsuperscript{81} This will needlessly increase the trouble

\textsuperscript{78} See Arams v. Arams, 182 Misc. 328, 45 N.Y.S.2d 251 (Sup. Ct. 1943); Busch,
\textit{supra} note 27; Sommerich & Busch, \textit{supra} note 27; Stern, \textit{supra} note 27.
\textsuperscript{79} See, \textit{e.g.}, \textit{Uniform Rule of Evidence} 9. There has been no systematic
functional analysis of judicial notice, though such an approach has been approximated
\textsuperscript{80} This assumption will be continued throughout the discussion immediately follow-
ing. We shall also assume that the consequence of the plaintiff's failure to get the
foreign law before the court in some manner will not be mitigated by any presumption
as to the tenor of the foreign law.
\textsuperscript{81} For present purposes we may leave aside other possible consequences, such as the
submission of the issue to the jury or the unappealability of the determination.
and expense to which the plaintiff must go to establish the foreign law, but it is by no means fatal to his claim. If, instead, the court decides that it will judicially notice the law of state $X$, the plaintiff is saved that additional trouble and expense. He is not, however, relieved of the necessity of persuading the court that his contentions as to the tenor of the foreign law are sound.

Suppose, secondly, that the same action goes to trial and is conducted by the plaintiff as if it were a purely domestic case. The plaintiff makes no reference to the law of state $X$. He apparently assumes that the law of state $F$ governs, and he succeeds in making a prima facie case under that law. At the close of the plaintiff's case, the defendant asserts for the first time the relevance of foreign law and moves for a directed verdict or for dismissal on the ground that an essential element of the cause of action has not been made to appear. If the court refuses to take judicial notice, the consequences to the plaintiff will depend upon other rules of trial practice. Thus, if the plaintiff is not permitted to reopen his case and introduce evidence of the foreign law, the refusal is fatal to his cause of action.\textsuperscript{82} If he is permitted to reopen his case for this purpose, the refusal will not be fatal—provided he is also permitted to introduce additional factual evidence, if necessary, to show fulfillment of the requirements of the foreign statute. If the court does take judicial notice, the consequence will depend both upon the tenor of the foreign law and upon other rules of practice. Thus, if the foreign statute is identical with that of the forum, the plaintiff's case will be saved. If the foreign statute is different and requires a showing of facts not shown in the plaintiff's evidence, noticing the foreign statute will be fatal, unless the plaintiff is permitted to reopen in order to introduce additional evidence.

Suppose, finally, that the entire case is tried as if it were a domestic one, neither party referring at the trial to the foreign law. At appropriate times the defendant moves for a directed verdict on the general ground that the evidence is insufficient to establish a right to recover, but the motions are denied and the plaintiff obtains verdict and judgment. On appeal, defendant asserts for the first time the relevance of foreign law and contends that there should be a reversal since that law was not made to appear. Assuming that the court will entertain such a suggestion at this stage,\textsuperscript{83} its refusal to take judicial notice of the foreign law will be quite serious in its consequences for

\textsuperscript{82} Whether his claim is irrevocably lost depends upon whether the judgment is regarded as one on the merits and whether a new action can be commenced before the period of limitations expires. See note 150 infra.

\textsuperscript{83} Such a practice is contemplated by the proposed \textit{Uniform Rule of Evidence} 12. See note 90 infra. On one occasion the Massachusetts court construed its judicial notice statute as permitting this practice, reaching a highly dubious result, Walker v. Lloyd, 295 Mass. 507, 4 N.E.2d 306 (1936); but both before and after this decision, the court condemned the practice. In Lennon v. Cohen, 264 Mass. 414, 421-22, 163 N.E. 63, 67 (1928), the court said, by way of dictum: "An important question of foreign law, even under said
the plaintiff. Conceivably, the judgment below might be reversed with directions to grant the motion for directed verdict, in which case the plaintiff would be out of court. At best there would be a reversal with directions to grant a new trial, the plaintiff being permitted to introduce evidence of the foreign law and such additional factual evidence as might be necessary to meet the requirements of the foreign statute. If the court does take judicial notice and the foreign law is identical with that of the forum, the defendant might as well have spared himself the trouble of making the point; the judgment will be affirmed. But if the foreign law is different and the evidence in the record fails to make a case under the foreign law, the consequence will be reversal—meaning that the plaintiff is either out of court or must undertake a new trial.

In the first case, taking judicial notice has the salutary (but relatively minor) effect of saving needless trouble and expense. In the third case, taking judicial notice may very well have the effect of forcing the successful plaintiff

c. 168, cannot be raised as of right at the argument in this court for the first time: and this court cannot thus be required to make a decision about it by taking judicial notice of it. In any event, there can be no review by this court unless a ruling of law is made by the trial court, to which exception is taken, or unless by some other recognized method enough is put upon the record so that the foreign law rightly can be considered by this court.” And in Donahue v. Dal, Inc., 314 Mass. 460, 463, 50 N.E. 2d 207, 209 (1943), the court said: “The case was tried without any reference whatever to the law of New York as far as the record discloses.... But now for the first time, for all that appears, the defendant contends that the contract, having been made in New York, is governed by its law and it cites cases as to that law.... In the circumstances we do not consider them. The defendant is seeking here to raise an issue for the first time. It is too late. It would be a manifest injustice to allow it to do so.” See Note, 32 Mass. L.Q. May 1947, p. 20: “[The judicial notice statute] was not intended to relieve counsel of their obligation to assist the courts—still less, was it intended to provide a trap.” Comment, 42 Mich. L. Rev. 509 (1943), though recognizing that “the weight of judicial authority would seem committed to the view that the statutory or common-law rule must be properly brought to the attention of the trial court if counsel desires notice by the appellate court,” id. at 517-18, nevertheless argues that “there would seem to be little reason for an appellate court's refusal to use all available legal materials in repairing and correcting the judgment of the trial court.”

84. See note 63 supra.

83. This has been a sampling, not an exhaustive enumeration, of the situations in which the demand for judicial notice of foreign law may arise. Suppose that the case is tried on the tacit assumption that domestic law governs, and the plaintiff fails to establish a claim under that law. Should he be saved by a belated invocation of foreign law, and, if so, under what procedural conditions?

Imagination is no match for the cases themselves in providing variations. In Petersen v. Chicago Great W. Ry., 138 F.2d 304 (8th Cir. 1943), the action, in Nebraska, was tried throughout on the assumption that the law of Iowa, the place of injury, was controlling, although that law was neither pleaded nor proved. Iowa law required a showing of negligence; Nebraska law did not. At the last minute, when the case was ready for argument, the plaintiff asked the court to charge that, since the foreign law had not been pleaded and proved, it must be presumed to be the same as the law of the forum. The request was refused. On appeal from an adverse verdict and judgment, the plaintiff contended that the refusal was a violation of the rule that a court may not take judicial notice of foreign law. The judgment was affirmed, the court of appeals holding that the plaintiff was estopped to complain of the determination of the case in accordance with the foreign law. See also Annot., 149 A.L.R. 759 (1944). Of course, a judicial notice statute is not necessary in order to deal properly with such situations, as the Petersen case demonstrates. Indeed, the problem may still arise under judicial notice statutes which require that a finding as to the foreign law be made a part of the record. Cf. Uniform Rule of Evidence 11.

The presence of a foreign factor may not be discovered until after the issues have been framed. See Hammond Motor Co. v. Warren, 113 Kan. 44, 45, 213 Pac. 810, 811 (1923).
to a new trial for no better reason than that the defendant belatedly made a point which he should have been required to make in the beginning. The justification for judicial notice is not the same in the two cases, in spite of the fact that the character of the information noticed is identical. Yet an unqualified provision for judicial notice of foreign law calls for the invocation of that doctrine irrespective of the procedural consequences.

A provision that a party who wishes the court to take judicial notice of foreign law shall give reasonable notice to his adversary serves, as we have seen, the purpose of avoiding surprise and other procedural injustices and also places responsibility for invoking foreign law upon the parties as distinguished from the court. Yet section 4 of the Uniform Act, providing for such notice, has been criticized as an "Achilles' heel," derogating from the mandatory character of the act. It is said that such a requirement "preserves a link with the past," i.e., with the old requirement that foreign law be pleaded. So it does. But the requirement of pleading is not to be dismissed merely because it was a part of the old scheme of things, or because, as a matter of formal logic, matters judicially noticed need not be pleaded. The question to be asked is what purposes were served by the requirement.

To the extent that the requirement was not observed and the omission was not curable by amendment, its effect was determined by the court's basic philosophy of conflict of laws. In courts committed to the vested-rights theory of the Crosby case, the pleading which set forth a cause of action or a defense governed by foreign law would fail if the foreign law was not alleged and if no presumption as to the foreign law was available. On the other hand, in courts adhering to the older (or English) view, the consequence of failure to invoke foreign law in the approved manner was simply that the claim or defense would be tested by the law of the forum.

To the extent that the requirement was observed, it operated to: (1) place upon the parties responsibility for invoking foreign law; (2) give the adversary timely notice of the contention that foreign law governs, enabling him to meet that contention; (3) give the adversary timely notice of the contention as to the tenor of the foreign law, enabling him to meet that contention; and (4) give the adversary adequate opportunity to prepare his case to meet the requirements of foreign law if it should be held controlling. In short, the pleading requirement meant that, subject to the curative possibilities of amendment, foreign law must be invoked, if at all, at such a time and in such a way that it could be taken into account in the formulation of the issues for trial. On the whole, the requirement seems to have served a useful purpose. The issues for trial cannot be formulated without reference to the

86. HARPER, TAITTON, CARNAHAN & BROWN, CASES ON CONFLICT OF LAWS 114-17 (1950).
87. Id. at 116.
rule of decision. Perhaps the requirement was unnecessarily formal; certainly, the informality of the pretrial conference could be substituted for the formality of pleading. But enthusiasts for judicial notice, and especially those who regret the persistence of the requirement of pleading or its equivalent, should specify just which functions or aspects of such a requirement they wish to abrogate.\(^8^0\)

With these observations in mind, let us consider the provisions for judicial notice of foreign law found in the proposed Uniform Rules of Evidence.\(^9^0\) These were formulated so recently that the draftsmen had the benefit of nearly all the experience accumulated under similar statutory provisions. They are based upon the American Law Institute's Model Code of Evidence\(^9^1\) and carry the stamp of approval of the American Bar Association.\(^9^2\) They may therefore be regarded as probably the most sophisticated and best informed provisions for judicial notice yet drafted.

The first provision, found in rule 9(1), is that "judicial notice shall be taken without request by a party, of the common law, constitutions and public statutes in force in every state . . . of the United States . . . ." (Emphasis added.) Paragraph (2) of rule 9 provides that "judicial notice may be taken without request by a party, of . . . the laws of foreign countries . . . ." (Emphasis added.) Paragraph (3) provides:

Judicial notice shall be taken of . . . [the laws of foreign countries] if a party requests it and (a) furnishes the judge sufficient information to enable him properly to comply with the request and (b) has given each adverse party such notice as the judge may require to enable the adverse party to prepare to meet the request. (Emphasis added.)

Later sections must be consulted before we can judge the precise effect of rule 9. At this point we may note, however, that sister-state law and

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88. One aspect of the requirement of pleading and proof was the possibility that the evidence might fail to sustain the allegations as to foreign law. That situation should be avoided in a modern, less formal system, especially since a court should ordinarily not hold that foreign law is controlling until it has determined the tenor of that law. Even so, a comparable situation could arise where a party elects to stake his claim or defense on the foreign law, and the applicability of that law is not contested. If, having done this, the party fails to satisfy the court as to the provisions of the foreign law, I do not suggest that he should be saved by application of the law of the forum, though he may have made out a claim or defense thereunder.

89. The authors of the "Achilles' heel" stricture in the end moderated their criticism: "It does not seem unreasonable to require a party to a suit with foreign elements to indicate to his adversary approximately where in the territorial-legal chain he will strike, so long as this desire to avoid surprise does not develop into a conspicuous loophole in a statute which is essentially simple, has been widely enacted as the result of a long-felt need, and promises to be effective." Harper, Taintor, Carnahan & Brown, op. cit. supra note 86, at 117. It seems to me nevertheless that the emphasis is inverted.

91. Uniform Rules of Evidence at 3.
foreign-country law are treated differently, and we may wonder why, since our discussion has not disclosed a valid reason for differential treatment.\footnote{93} The difference is by no means as radical as that in the Uniform Judicial Notice of Foreign Law Act, which did not provide at all for judicial notice of foreign-country law.\footnote{94} It is only that judicial notice of sister-state law is mandatory, while notice of foreign-country law is discretionary in the absence of request by a party; and notice of foreign-country law becomes mandatory when a party makes the request, furnishes adequate information, and gives the adversary notice.

If rule 9(1) means what it says, it places an extraordinary responsibility upon the court—and sets extraordinary traps for the litigants. The court is to act upon its own initiative. Without request by a party, the court is to be alert to the significance of foreign factors, quick in its characterization of the problem, and ready with the appropriate rule for choice of law. Thereafter, it is to ascertain the applicable law of the sister state, presumably through its own research. The rule contains no limitation as to the stage of the proceeding at which such action by the court is required.

Do subsequent rules modify this responsibility and its apparent departure from the ordinary procedures of the adversary system? Rule 10(1) provides that “the judge shall afford each party reasonable opportunity to present to him information relevant to the propriety of taking judicial notice of a matter or to the tenor of the matter to be noticed.” This is some help. At least the parties are not to be confronted with a \textit{fait accompli} in the determination of the tenor of the foreign law; they will be given a chance to litigate that question. Thus the elementary necessity for notice is to some extent observed. Adequate notice in this context requires, however, not merely an opportunity to argue about the tenor of the foreign law, but also an opportunity to present a case which meets the requirements of the foreign law, if that is to furnish the rule of decision. Rule 10(1) apparently affords no help on this score. The opportunity to present information relevant to the propriety of taking judicial notice apparently relates to the propriety of classifying the matter to be noticed within the categories enumerated in rule 9; but there can be little doubt that the law of a sister state is the law

\footnote{93} See note 77 \textit{supra}. It is interesting that rule 9 groups sister-state law with “such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute,” while grouping foreign-country law with “specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy.”

\footnote{94} Neither did \textit{Model Code of Evidence} rules 801-06 (1942), although the commissioners state that the “principal difference” between the Uniform Rules and the Model Code is that by the Uniform Rules judicial notice of the public law of sister states is made “mandatory.” \textit{Uniform Rule of Evidence} 9, comment.
of a sister state. The parties could, of course, argue about the appropriateness of the choice-of-law rule invoked by the court; but if that is clear, the "propriety" of taking judicial notice of sister-state law would appear to be a foregone conclusion. So far, nothing prevents the judge from announcing at any stage of the proceeding his intention to take notice of the law of a sister state as the rule of decision.

Rule 10(1) may also tend to mitigate the burden apparently cast upon the court by rule 9(1). If the judge announces to the parties his intention to notice the law of a sister state and invites them to submit information as to its tenor, it may be assumed that they will ordinarily do so. He is not confined to the information provided by their assistance; however, rule 10(2) states that he "may consult and use any source of pertinent information, whether or not furnished by a party." Indeed, rule 10(3) provides: "If the information possessed by or readily available to the judge, whether or not furnished by the parties, fails to convince him that a matter falls clearly within Rule 9, or if it is insufficient to enable him to notice the matter judicially, he shall decline to take judicial notice thereof." If this means what it says, the "mandatory" provision of rule 9(1) would appear to be rendered nugatory. The principal difference in treatment between sister-state law and foreign-country law in the Uniform Rules is that judicial notice of foreign-country law is discretionary unless the interested party gives the judge sufficient information to enable him to determine what the foreign law is. If rule 10(3) applies to sister-state law, this difference disappears; judicial notice is "discretionary" in either case. The destruction of the distinction so carefully made in rule 9 may constitute an argument against construing rule 10 as applying to the matters covered in rule 9(1); perhaps it should be construed as applying only to those covered in rule 9(2). It

95. Though this provision is basically sound, it involves a substantial problem of fairness. A virtue of the old system of proving foreign law was that each party knew the sources which were relied upon to establish its tenor, so that the adversary process could function fully in its determination. Rule 10(1) of the Uniform Rules omits the provision of rule 804(1) of the Model Code which requires the judge to "inform the parties of the tenor of any matter to be judicially noticed by him." This provision may have been thought redundant; but it was clearly not so if it meant that the judge should also indicate to the parties his sources of information. The California statute, Cal. Code Civ. Proc. § 1875(9), is specific in providing a partial safeguard: "[I]n taking judicial notice of foreign-country law] the court may also resort to the advice of persons learned in the subject matter, which advice, if not received in open court, shall be in writing and made a part of the record in the action or proceeding." Draftsmen of judicial notice statutes would do well to heed the admonition of Judge Wyzanski: "[a] judge, before deriving any conclusions from any such extra-judicial document or information, should lay it before the parties for their criticism. . . . [B]efore a judge acts upon a consideration of any kind, he ought to give the parties a chance to meet it. This opportunity is owed as a matter of fairness and also to prevent egregious error." A Trial Judge's Freedom and Responsibility 18-19 (1952). See also Arams v. Arams, 182 Misc. 328, 330-31, 45 N.Y.S.2d 251, 253 (Sup. Ct. 1943); Sommerich & Busch, supra note 27, at 156-59.
is not by its terms so limited, however. Reading it as it stands would lead
to the result that there is no substantial difference, for purposes of judicial
notice, between sister-state law and foreign-country law; and, since there
still appears to be no valid reason for a difference, this is perhaps as it
should be.

Thus, the proposed rules do not impose an unreasonable burden on the
court. It need never act unless the parties are willing to give assistance.
And the parties are protected against surprise in the sense that the rules
provide for adequate opportunity to be heard on the question of the appli-
cability and tenor of the foreign law. There remains the very serious difficulty
that so far there has appeared no provision limiting the time at which the
foreign law may be invoked, whether by the court on its own initiative or
on the request of a party, so that there remains the danger of surprise in
the sense that a party may be confronted in most untimely fashion by a
change in the fundamental assumptions underlying the presentation of his case.

Subsequent provisions of the rules do not obviate this difficulty. On the
contrary, they confirm and aggravate it. Rule 12(1) provides that “the failure
or refusal of the judge to take judicial notice of a matter . . . shall not preclude
the judge from taking judicial notice of the matter in subsequent proceedings
in the action.” Presumably this includes the case in which the judge has
refused to take judicial notice under rule 10(3), where the interested party
has failed to furnish adequate information as to the foreign law; but it is bad
enough without that feature. This clearly means that the court may take
judicial notice of the foreign law on a motion for new trial, although no
mention has been made of the conflict-of-laws problem at the trial itself. In
some situations, at least—as, for example, in the hypothetical action for
wrongful death discussed above, and in the Crosby case96—this is so palpably
unjust as to require no comment. But even worse is in store. According to
rule 12(3), “the reviewing court in its discretion may take judicial notice
of any matter specified in Rule 9 whether or not judicially noticed by the judge.”
This means that the foreign law may be invoked for the first time on appeal,
even by the court on its own motion, notwithstanding the fact that the conflict-
of-laws aspects of the case have been totally ignored by both parties on the
trial. In short, the foreign law may be invoked at any stage of the proceeding.

Nowhere do the rules and their accompanying comments state what the
procedural consequence is to be when the foreign law referred to by the
choice-of-law rule is not made to appear by judicial notice or otherwise. It is
difficult to imagine, however, why one would provide for mandatory judicial
notice without request by a party if he were not assuming, as did Mr. Justice

96. See note 62 supra and accompanying text.
Holmes, that the rule of decision can be furnished only by the foreign law. Under the polar alternative, the law of the forum is applicable unless and until a party wishing the advantage of some distinctive provision of the foreign law invokes that law in some appropriate fashion. If that is the underlying philosophy, there is no need whatever to charge the court with responsibility to notice foreign law on its own motion.

The rules, then, apparently proceed on the basis of the same vested-rights theory which dictated the result in the Crosby and Walton cases. Against that background, the provisions which permit a party, or even the court on its own motion, to suggest the “materiality” of the foreign law at any stage of the litigation are most unfortunate and will certainly lead to injustice unless the courts find ways to avoid them (as the courts are quite likely to do). There may be some situations in which the ends of justice will be served by permitting the court at a late stage of the proceedings to supply an inadvertent omission by noticing foreign law. For example, when the plaintiff has deliberately staked his claim on the foreign law, but has failed to furnish the court with information regarding some detail of that law necessary to complete the logical chain, there seems no harm in allowing the court to fill the gap, even on appeal. There are ways of dealing with such problems without investing foreign law with the quality of information which is presumed to be so well known or accessible that it may fairly be invoked at any time. The far more significant body of cases consists of those in which the case is tried on the assumption that local law governs. In those cases, to allow the materiality of the foreign law to be suggested, or its content to be noticed, at a late stage of the proceedings will work injustice more often than not.

Finally, let it be noted that the doctrine of judicial notice would provide no real relief from the injustice of the result in cases like Walton. True, if the proposed Uniform Rules had been in effect, the court of appeals would have been authorized, in its discretion, without request by a party, to ascertain the law of Saudi Arabia for itself, consulting “any source of pertinent information.” It is inconceivable that it would have done this. True, if the rules had been in effect the plaintiff would have been permitted to present informally to the court sufficient information to enable it to ascertain the tenor of that

97. See notes 78, 83 supra.
98. See Hopkins v. Amtorg Trading Corp., 265 App. Div. 278, 38 N.Y.S.2d 788 (1st Dep’t 1942), which may present such a situation, though I would prefer to deal with that case in terms of the analysis suggested in notes 138-70 infra and accompanying text. Matter of Peart, 277 App. Div. 61, 97 N.Y.S.2d 879 (1st Dep’t 1950), is not in point here. The case is one in which, in the absence of a showing of the foreign (Maryland) law, the court simply applied the law of the forum. What is even more important, the case was not one in which the foreign law was referred to as the source of the rule of decision. Cf. Matter of Masocco v. Schaaf, 234 App. Div. 181, 254 N.Y. Supp. 439 (3d Dep’t 1931); Sommerich & Busch, supra note 27, at 159; note 166 infra and accompanying text.
law. It seems unlikely that this opportunity would have been of much practical value. As we have observed, the plaintiff was not taken by surprise by the suggestion that Saudi Arabian law governed. The case had been pending for some six years before it was brought to trial.99 The record is replete with intimations that an attempt to ascertain the Saudi Arabian law would be frustrating, to say the least.100 In the course of preparing this article I have made some effort to determine what the Saudi Arabian law might have to say on the subject. These efforts have had little success. One learns that the law of Saudi Arabia is the pure Islamic law of the Hanbali school, almost untouched by Western influences, but supplemented to some extent by royal decrees. Islamic law is integrally related to the Islamic religion.101 While there is a modern code of traffic regulations,102 one is left with the distinct impression that counsel for the plaintiff probably concluded that any adequate investigation of the relevant Saudi Arabian law would be very expensive in relation to the probable verdict, and that in the end such an investigation would be unlikely to disclose any settled provisions clearly applicable to injuries inflicted upon foreigners by motor vehicles operated by corporate employees. The burden placed upon the plaintiff was one that he could hardly be expected to bear, even with the aid of judicial notice. One cannot comfortably accede to Judge Frank's intimation that the burden of establishing foreign law should be placed on the party who happens to be in the best position to obtain the information;103 that would seem to be a criterion too elusive and variable from case to case. It does seem unfair, however, to require

100. The court intimated that the measure of damages might be different under Saudi Arabian law. Id. at 13. The defendant rather strongly intimated that Saudi Arabia might not recognize the doctrine of respondeat superior. Id. at 17, 24-25.

Of special interest is the possibility that if the Walton case had been brought before a Muslim qadi, he might have refused to assume jurisdiction over two non-believers, or would have attempted to apply the national law of the litigants. 1 KHAD-DURI & LIEBENSY, LAW IN THE MIDDLE EAST 338 (1955).

In an address entitled "Doctrines Peculiar to Islamic Law," delivered March 18, 1958 at a meeting of the American Foreign Law Association, Professor Joseph H. Schacht indicated that (1) the measure of damages under Saudi Arabian law would be highly restrictive, as compared with the common-law measure; and (2) that, without recourse to anything resembling the common-law doctrine of respondeat superior, Saudi Arabian law would fix responsibility upon the corporate employer for injuries accidentally inflicted by the employee, by analogy to an established practice of fixing such responsibility upon the members of the culprit's tribe.

103. 233 F.2d at 545.
the plaintiff in effect to establish the general theory of Saudi Arabian law with respect to personal injuries negligently inflicted by servants, when the defendant might with relative ease have established any specific feature of that law which might have precluded recovery—such as nonrecognition of the doctrine of respondeat superior.

Judicial notice, then, turns out to be something less than an ideal solution of our problem. The conviction grows that we would have been better off if that concept had not been employed at all. The inquiry into the tenor of foreign law could have been freed from the exclusionary rules of evidence, the responsibility for the determination could have been transferred from the jury to the judge, and the determination could have been made reviewable on appeal, all without any resort to the concept of judicial notice. So could any other purpose we might wish to accomplish. The employment of the concept has led to undesirable collateral consequences and has tended to create a deceptive illusion of freedom from the inescapable fact that a great deal of effort may be required in order to ascertain the foreign law. A satisfactory way out of the difficulty can be found only if we address ourselves directly to the underlying question of conflict of laws, the answer to which tends to be taken for granted by those who draft judicial notice statutes.

VI. ALTERNATIVE DISPOSITIONS: THE LAW OF THE FORUM

There was a time when a court's application of foreign law was a phenomenon so remarkable that its explanation constituted the central problem of conflict-of-laws theory. The theoretical explanation which became dominant in the twentieth century—the vested-rights theory of Beale, Holmes, and the Restatement—has exerted a powerful influence. Nowhere is the power of that influence more graphically illustrated than in Holmes' decision in the Crosby case. This theory underlies most of the modern efforts to find a just solution to the procedural difficulties relating to foreign law—efforts to devise saving presumptions, or to interpose the doctrine of judicial notice, where otherwise the theory would dictate the collapse of a claim or defense as the consequence of a party's failure to establish the foreign law on which it depends. According to this theory, a choice-of-law rule, as we have said before, is a categorical imperative; it commands the court to apply the law of a designated foreign state, and no other. If the foreign law is not made to appear, by proof or by judicial notice, and if some not-very-reasonable facsimile cannot be substituted by way of presumption, the claim

104. See Cavers, The Two "Local Law" Theories, 63 Harv. L. Rev. 822 (1950); Cheatham, American Theories of Conflict of Laws: Their Role and Utility, 58 Harv. L. Rev. 361 (1945).
105. See text at note 3 supra.
or defense must fail. The foreign law becomes "material" as soon as it is disclosed that there is a foreign factor in the case—a factor which is mentioned in some appropriate choice-of-law rule referring to the law of a foreign state as controlling.

Very different was the attitude toward foreign law and choice-of-law rules which prevailed earlier in this country. More than a century ago, the New York Court of Appeals expressed it as follows:

... the laws of the country to whose courts a party appeals for redress, furnish, in all cases, prima facie, the rule of decision; and if either party wishes the benefit of a different rule or law ... he must aver and prove it.106

This was the "polar alternative" available to the court in the Walton case. This was the basis on which the lower federal courts had disposed of the problem in Crosby.107 This is also the rule in England even today.108 As we have noted, it has the virtue of adaptation to the habits and inclinations of judges and lawyers, and is far less likely to lead to surprise, hardship, and injustice than the contrary rule. In those cases in which a party has in truth acted in reliance upon some provision of foreign law—and these are the cases in which the strongest argument for application of foreign law can be made—it is surely no hardship to require him to invoke it and inform the court of its tenor.109 It is obvious that this rule would liberate us from the sophistries110 of the various presumptions as to the content of the foreign law. We are now in position to state, in addition, that it would free us from all the perplexities which beset the effort to deal with the problem of foreign law, under the opposite rule, by means of judicial notice. If this rule were accepted, we could still free the inquiry into foreign law from the formal requirement of pleading and the formalities and exclusionary rules of the law of evidence, and we could still transfer responsibility for the determination

106. Monroe v. Douglas, 5 N.Y. 447, 452 (1851). Although it sets forth the classic formulation of the rule, the case is not a square authority because Scottish law was in fact considered by the court.
107. Cuba R.R. v. Crosby, 170 Fed. 369, 370 (3d Cir. 1909). The court added: "As we regard [the authorities] ... they are all one way, without a variant note, the contrary rule, which we are asked to lay down, whatever be said of its logic, having nothing by way of authority on which to stand." Id. at 379.
108. See note 17 supra.
109. It may be added that a court is in a better position to do justice with insight when it is applying its own law. "Every time judges are called upon to apply the law of a foreign jurisdiction are they not inclined to give undue weight to the recorded landmarks and to underestimate the mobile qualities and thrusts of principle we discern in our domestic law?" Wyzanski, A Trial Judge's Freedom and Responsibility 23 (1952). This is an argument to be used with caution, however. It has validity only where there is reason to regard the "mobile qualities and thrusts of principle" of domestic law as appropriate to the case in hand. A thesis of this article is that the number of cases in which the law of the forum is appropriate is far greater than present conflict-of-laws doctrine allows. Nevertheless, not all cases are in this category.
110. See Kales, supra note 18; Nussbaum, supra note 44, at 1035.
from the jury to the court, and make it reviewable. It would be clear, how-
ever, that the party wishing to rely on the foreign law must invoke it, and the consequence of his failure to do so would be the application of domestic law. It would be clear that he would be required to invoke it in such manner and at such time as to give the opposing party not only an opportunity to be heard as to its applicability and tenor, but an opportunity to prepare his case to meet the requirements of the foreign law if it is applicable. The invocation would have to be timely; the ground rules for the litigation would be settled at the outset. There would be no question of the foreign law hanging nimbus-like over the litigation, all-powerful in spite of ignorant neglect, ready to take over the moment anyone happens to notice it. It would be clear that there is no question of transferring from counsel to court the responsibility for ascertaining foreign law: the job of persuasion must be done by the party invoking that law. Moreover, it would be clear that for the purposes under discussion there is no difference between the law of a sister state and that of a foreign country, no matter how exotic.

Of special importance is the fact that this rule would enable any court, before holding foreign law controlling, to know the content or tenor of that law. The most shocking aspect of the Walton decision is the holding that Saudi Arabian law displaced the law of the forum although the court presumably had no idea what the relevant provisions of that law—if any—were.111

The application of foreign law is justified when that law expresses a policy of the foreign state, when the connections of the case with the foreign state are such as to give it a legitimate interest in having its policy applied, and when there is no conflicting interest of the forum state.112 A court is not justified in holding that foreign law displaces local law as the rule of decision when it cannot make the determination that the interest of the foreign state is entitled to recognition, and it can seldom make that determination when it has no information concerning the foreign law and policy.

It is apparent, but it must be emphasized, that the rule under discussion is based upon an entirely different theory of conflict of laws from that which underlies the rule of Crosby and Walton. Those cases proceed on the basis of the obligatio theory, or the theory of vested rights: the foreign state is the only state having "jurisdiction" to create the right. The alternative view is that the law of the forum controls, though the relief afforded by that law will be shaped, at the instance of an affected party, to take account of the circumstance that foreign factors are involved. According to the vested-rights theory,

111. See notes 8, 28 supra.
the choice-of-law rule is an inexorable command to apply the foreign law or none. According to the alternative view, the law of the forum is prima facie applicable, but the choice-of-law rule permits a party, if it is to his advantage, to invoke the foreign law. What happens then is explained not by the vested-rights theory but by the local-law theory:

[T]he forum, when confronted by a case involving foreign elements, always applies its own law to the case, but in doing so adopts and enforces as its own law a rule of decision identical, or at least highly similar though not identical, in scope with a rule of decision found in the system of law in force in another state or country with which some or all of the foreign elements are connected. . . . The forum thus enforces not a foreign right but a right created by its own law.

Nussbaum recognized that the rule that the law of the forum governs until foreign law is appropriately invoked was an argument against the vested-rights theory. However, although he favored the adoption of that rule, he could not bring himself to break completely with the imperative concept of choice-of-law rules. For that reason, perhaps, he refrained from taking a position which seems tenable: that no one who is persuaded by Cook's local-law theory can consistently prefer the rule of the Crosby and Walton cases to its polar alternative. Theories of conflict of laws do affect both the course of judicial decision and the thinking of commentators. Nowhere is this more apparent

113. See Leary v. Gledhill, 8 N.J. 260, 267, 84 A.2d 725, 728 (1951). In this thorough and perceptive opinion, Judge Vanderbilt stopped just short of adopting in its entirety the rule under discussion, preferring to bolster the application of the law of the forum by the dubious "acquiescence" theory, as well as by some attention to the procedural situation. The defects of the acquiescence theory are perhaps best exhibited by one of its most careful statements. See The Scotland, 105 U.S. 24, 31-32 (1881).

114. Cook, op. cit. supra note 2, at 20-21; see Cavers, The Two "Local Law" Theories, 63 Harv. L. Rev. 822 (1950); cf. Yntema, The Hornbook Method and the Conflict of Laws, 37 Yale L.J. 468, 478 (1928): "And, in the last analysis, it is a simple question of convenience and equity, roughly controlled by the traditions of the forum, as to how far the court will, can, or should relax its domestic habits of decision to give a judgment more or less resembling that which might be secured in the court of another jurisdiction. The basis of departure is the practice of the forum and the equities of the instant case, and not universal principle or vested right. In the field of conflict of laws, as in other branches of the law, the problem is essentially one of adjustment of actual interests and not of formal logic."

115. Nussbaum, supra note 44, at 1042 n.141.

116. Id. at 1042.

117. Cf. Cavers, The Two "Local Law" Theories, 63 Harv. L. Rev. 822 (1950). Holmes was explicit as to the influence of theory: "... the disregard of the foreign law occasionally indicated by some English judges before the theory to be applied was quite worked out must be disregarded in its turn." Cuba R.R. v. Crosby, 222 U.S. 473, 478 (1912). (Emphasis added.) Beale declared that "it would seem to do complete violence to the rules of Conflict of Laws of the forum to say, as the New York court said in Savage v. O'Neil [44 N.Y. 298 (1871)]: '... and in the absence of proof our own law must of necessity furnish the rule for the guidance of our courts.'" 3 Beale, Conflict of Laws § 622A.2 (1935). Professor Beale's argument is reminiscent of the contention that acceptance of the renvoi is "subversive," that it "flouts the law," and that it "involves a conscious neglect of the rules that are binding upon the Court." Cheshire, Private International Law 57, 59 (2d ed. 1938). For a definitive answer to this contention see Griswold, Renvoi Revisited, 51 Harv. L. Rev. 1165 (1938).
than in the cases and commentaries dealing with what happens when the foreign law is not made to appear.

The powerful influence—even the hypnotic effect—which the vested-rights theory has had on legal thinking devoted to that question is easily traced. It is evident in attitudes toward the various presumptions as to the tenor of foreign law. A mind liberated from that influence can view the presumptions with detachment, recognizing that however artificial may be the reproductions they yield of the foreign law, their general tendency is to bring about the application of the law of the forum, which is as it should be in the absence of any appropriate showing of the foreign law. If a California court is under an absolute duty, by virtue of a choice-of-law rule, to apply the law of Mexico or no law at all, it is ridiculous for it to apply the common and statute law of California with the explanation that it “presumes” the law of Mexico to be identical in all respects, and is therefore applying the law of Mexico. But a mind free to doubt the imperative character of the choice-of-law rule may see in this strange behavior confirmation of the fact that courts are to a substantial degree unwilling to accept the consequences of the vested-rights theory and are in fact, though not in terms, following the alternative theory that the law of the forum is prima facie controlling. Such insight, however, has not been given to all, or even most, observers. Even Nussbaum, who recognized this significance of the presumptions, did not see that the point was a powerful argument in favor of his position, but felt constrained to speak of the strongest presumption with contempt:

One presumption used, mechanical in its application and sweeping in its scope, is that, in the absence of proof of the foreign law, the court must assume that the foreign law is the same as the law of the forum. The alleged presumption is an obvious non sequitur and nothing but a crude fiction disguising the substitution of the law of the forum for the unproved or unascertainable foreign law.

Holmes himself said:

Whatever presumption there is is purely one of fact, that may be corrected by proof. Therefore the presumption should be limited to cases in which it reasonably may be believed to express the fact.

The compulsive influence of the vested-rights theory is nowhere more dramatically illustrated than in the fact that the American Law Institute, the Conference of Commissioners on Uniform State Laws, and the American Bar Association unite in telling us that the law designated by the choice-of-law rule is so uncompromisingly indispensable that it may be invoked at any

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120. Nussbaum, supra note 44, at 1037.
stage of the litigation. And from time to time the philosophy is made explicit in an especially meaningful way:

... the use of presumptions sometimes results in the application of the “wrong” law or the “wrong” principles of law, and to the extent that the rules of choice of law are based upon sound policy this method of determining the applicable rule by presumption must be deprecated.

While this is a qualified statement, the author evidently assumes that choice-of-law rules are based on sound policy, so that the application of any law other than that designated by the rules is to be deprecated. But unqualified statements can also be found:

It would appear that the ultimate objective of the courts and the Legislature should be to assure to the greatest degree possible, that when the rules of conflict of laws indicate that a case is governed by the law of a foreign jurisdiction, that foreign law is actually applied to the case.

This is the ultimate. This gives the territorialist theory of vested rights even greater power and dignity than Holmes himself gave it. To Holmes, the theory and its consequences were no more than a logical necessity. According to this view, however, the application of the foreign law has become a matter of high policy. Effectuation of the goal that the designated foreign law shall be applied becomes nothing less than the “ultimate objective” of the courts and the legislature.

This is the place to join the critical issue. I categorically reject this imperative conception of the choice-of-law rule. Even without the aid of the local-law theory, it can be demonstrated that such a conception is false and dangerous.

122. UNIFORM RULE OF EVIDENCE 12; see authorities cited notes 91-92 supra.
123. Hartwig, supra note 27, at 180.
124. CAL. LAW REVISION COMM’N, op. cit. supra note 27, at I-19. However, probably because of the long-standing practice in California of following the presumption that foreign law is identical with the law of the forum, the Commission recommended legislation which provides that, if the court is unable to determine the law of a foreign country, it may either apply the law of the forum or dismiss without prejudice, as the ends of justice require. Id. at I-8; see CAL. CIV. PROC. CODE § 1875.
125. At the outset, three fairly obvious arguments may be made against the vested-rights theory in its application to the problem under discussion: (1) The theory is inconsistent with the fact, recognized by Holmes even as he gave the theory forceful statement, that the foreign law is ignored where the cause of action arises “in regions having no law that civilized countries would recognize as adequate.” Cuba R.R. v. Crosby, 222 U.S. 473, 478 (1912), citing American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). (2) The foreign conflict-of-laws rule may refer to the law of the forum, and in some cases even the Restatement tells us that the renvoi should be accepted. RESTATEMENT, CONFLICT OF LAW §§ 8 (1934); cf. Cook, op. cit. supra note 2, at 3-47. (3) Frequently, when the applicable foreign law has been determined, it is found contrary to the public policy of the forum and rejected. Union Trust Co. v. Grosman, 245 U.S. 412 (1918). When this happens, it is ordinarily the law of the forum
The imperative conception attributes to the choice-of-law rule a policy content of far greater importance than is normally attributed to the municipal laws of the forum. This is a strange inversion of values. A choice-of-law rule is an empty and bloodless thing. Actually, instead of declaring an overriding public policy, it proclaims the state's indifference to the result of the litigation. Let there be a domestic case of tort or contract, and the law of the state points to the result which alone can advance the social and economic policy embodied in that law. Let a conventionally suitable foreign factor be injected and the state immediately loses interest. Normal governmental policies are forgotten. In their place there is substituted a policy of a different kind. A choice-of-law rule does express a policy, but it is not of the same order as the social and economic policies which are normally developed by a state in the pursuit of its governmental interests and the interest of its people. Viewed in the most favorable light, the policy is that the state, as a member of the community of states, will join in a fairly general movement which imposes a degree of restraint upon its sovereignty and upon the pursuit of its selfish interests, to the end that the result of a case will not depend capriciously upon where it happens to be brought and that expectations founded upon one system of law will not be frustrated by the application of another. This is but a mild, tentative, and self-denying policy. It implies the yielding, from time to time, of specific governmental policies for the sake of a general legal order. The imperative conception of the choice-of-law rule leads to a quite unacceptable paradox: the highest priority is to be given to that rather general and diffident policy which requires that specific, carefully formulated social and economic policies be subordinated to the contrary policies of a foreign state.

I do not exaggerate when I say that the imperative concept, especially as it has been developed in the judicial notice statutes, gives the highest priority to that one class of laws which, of all classes, has least to do with furthering the governmental interests of the state. The applicability of the foreign law is unwaivable; indeed, it is inescapable except in the adventitious—or conspiratorial—event that all parties, the judge, and the appellate court concur in ignoring the choice-of-law rule and the foreign law, and persist

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that is applied. See Paulsen & Sovern, "Public Policy" in the Conflict of Laws, 56 Colum. L. Rev. 969 (1956). This third point in particular should emphasize the incongruity of the suggestion that application of the foreign law is a high policy goal of the forum.

126. See Harper, Policy Bases of the Conflict of Laws, 56 Yale L.J. 1155, 1159 (1947). In addition, I suppose, the policy can be viewed as one of economy in judicial administration. The choice-of-law rule provides a convenient rule of thumb for the expeditious disposition of perplexing cases. See Cardozo, THE PARADOXES OF LEGAL SCIENCE 67 (1928); Cavers, Book Review, 56 Harv. L. Rev. 1170 (1943).
in their blindness until the case has been irrevocably terminated. Few domestic laws, no matter how clear and important their policy content, have such ineluctable force.

A Statute of Frauds, or a statute of limitations, expresses a policy; yet the reader will hardly require a citation of authority for the familiar proposition that a party waives the protection of such statutes by failing to plead them. Through the centuries an important governmental policy has been thunderously reiterated: it is in the interest of the state that there be an end to litigation. Yet a party must invoke a former judgment and must sustain the burden of establishing that it is conclusive of the issues. The Uniform Rules of Evidence themselves provide that there shall be no relief against the erroneous admission or exclusion of evidence unless the aggrieved party takes timely steps at the trial to invoke the protection of the rules. If we are wise, we provide that even when a judge fails to instruct the jury with respect to applicable principles of domestic law, or gives an erroneous instruction, there must be a timely objection at the trial; when we fail so to provide, the results are chaotic. It is difficult to conceive how a state can have any more important interest than the effectuation of the provisions of its constitution; yet strict rules as to the time and manner in which constitutional questions must be raised have time after time precluded the disposition of cases in accordance with constitutional principles. Indeed, it is generally true that the policies embodied in "private" law are neither self-executing nor enforced by public functionaries. They must be invoked by private parties. A contract provision exonerating a party from liability for his own negligence may be contrary to public policy because the state wishes to "discourage negligence by making wrongdoers pay damages," but, if the injured person chooses

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127. I am referring here, of course, primarily to the judicial notice provisions of the Uniform Rules of Evidence, discussed at notes 46-103 supra and accompanying text.
128. Though it is difficult to say what the respective policies are for the purposes of conflict of laws.
129. See Restatement, Judgments §§ 49, comment c, 68, comments h, l (1942); Blume, American Civil Procedure 85-86 (1955); Clark, Code Pleading 611-12 (2d ed. 1947).
130. Uniform Rules of Evidence 4-5.
133. Although it has been said that constitutional doctrine requires the application of state law by federal courts under the Erie doctrine, and although there is no federal "law of the forum" which can logically be resorted to in default of a showing of state law, "Mr. Justice Brandeis himself indicated that the parties could, in effect, substitute federal 'general' law for the applicable law of the appropriate state simply by relying 'almost exclusively on federal precedents,'" Kurland, Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases, 67 Yale L.J. 187, 191 (1957), citing Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 113 n.1 (1938).
to honor his contract and suffer his loss, nothing is done about it. And it is
the general rule that a party ordinarily cannot complain of the judge’s failure
to apply domestic law—even domestic statutes—not called to his attention.\(^\text{134}\)

Of course, I do not mean that private law does not embody governmental
policies, or that the policies are unimportant. On the contrary. The point
is simply that we rely on the initiative and self-interest of litigants to invoke
the laws and thus effectuate the policies. Under our free enterprise system of
law, the party who wishes the benefit of a law or policy must invoke it; and
he must do so at such a time and in such a manner that his opponent has a
fair and full opportunity to meet the challenge in all its aspects. Such provi-
sions to insure fairness will sometimes result in the deflection or frustration
of the policy, but they are indispensable. Without them the competitive system
of free enterprise by which governmental policy is effectuated would break
down.

It is difficult to believe that a mere jurisprudential theory, devised to
explain the phenomenon of a court’s applying foreign law, could have been
responsible for such a revolutionary difference in the rule concerning the
occasion upon which foreign law becomes material, and for the extraordinary
status which has been accorded the choice-of-law rule and the foreign law.
 Probably there were a number of contributory causes, some of which may be
mentioned here.

First, it seems likely that the extraordinary status of foreign law has
resulted in part from the treatment of foreign law together with propositions
of fact which are susceptible of judicial notice. Rule 9 of the Uniform Rules of
Evidence covers not only judicial notice of foreign law but also, according
to the same scheme, other matters, such as “specific facts and propositions of
generalized knowledge . . . so universally known that they cannot reasonably
be the subject of dispute,” and facts “which are capable of immediate and
accurate determination by resort to easily accessible sources of indisputable
accuracy.” So far as I am able to judge, the rule that a court may take judicial
notice of such matters at any stage of the litigation is not likely to result in
procedural injustice so long as the parties are given the notice and opportunity
to be heard provided by rule 10. But the importation of foreign law into a

\(^{134}\) See McCormick, supra note 20, at 304. But see Comment, 30 Yale L.J. 855
(1921). Professor Morgan, Reporter for the Model Code of Evidence, has a different view,
or a different emphasis, which perhaps accounts for the wide latitude he would give to
judicial notice of sister-state law: “Hence, except where the prohibition against reversal
for invited error applies, it is usually held to be reversible error for the trial judge to over-
look or misapply an applicable statutory or common law rule, or to disregard or deny
accepted and well-known propositions of generalized knowledge.” Model Code of
Evidence at 65-66 (1942). It is not necessary, in this article, to determine the precise
extent to which domestic law overlooked at the trial may be invoked in later proceedings
in the case. Enough has been said to make it clear that the provisions of the Uniform
Rules of Evidence regarding judicial notice of foreign law would give foreign law in
general a more imperative quality than is ordinarily given to domestic law.
case at a late stage may have an effect which the importation of a fact is unlikely to produce: the rule of decision may be changed; the assumptions on which the case has been tried may be destroyed; new standards may be erected which may not be met by the case which has been made. Judicial notice of a fact tends to fill a gap in a chain of reasoning. Judicial notice of foreign law for the purpose of finding the rule of decision may substitute a wholly new frame of reference and destroy the chain of reasoning.

Second, it is very clear that the early view, according to which the law of the forum provided the rule of decision until it was displaced by an interested party's invocation of foreign law, suffered its first severe reverses because it would have resulted in a more extensive application of wrongful death statutes, toward which the courts exhibited undisguised hostility. Distaste for the law of the forum made the courts reluctant to apply that law to foreign incidents even when the foreign law had not been invoked; accordingly, they required the plaintiff to prove the foreign law as an essential element of his cause of action.135

Finally, the relinquishment of the problem to the domain of evidence led to its statement in terms of allocation of the burden of proof. In an early and very influential article, Kales criticized the rule that the law of the forum governs until the foreign law is made to appear:

From the point of certainty it may be admitted that it is a good rule. It is submitted, however, that it throws an unjust burden upon the one who has not naturally the burden of going forward with evidence. Thus, suppose the law of Chili governed in an action in Illinois against a surety, and the defendant claims a discharge because of the giving of time to the principal debtor. According to [this] view, although the burden of proof of the whole of the defense of the giving of time is upon the defendant, yet the plaintiff must go to the expense and trouble of going forward in the first instance with evidence tending to prove that by the law of Chili there is no such defense, when the probabilities are all in favor of the fact that that position is the correct one. The defendant who naturally has the burden of going forward with proof of the foreign law as part of his defense can rest without any expense or trouble, and if the plaintiff fails to

135. See Whitford v. Panama R.R., 23 N.Y. 465 (1861); Crowley v. Panama R.R., 30 Barb. 99 (N.Y. Sup. Ct. 1859); Vandeventer v. New York & N.H.R.R., 27 Barb. 244 (N.Y. Sup. Ct. 1857). The fact that the Panama Railroad was a New York corporation, and the deceased and the plaintiff apparently New York residents, made no difference to the courts in the cases brought against that railroad. In one case, however, the Supreme Court held that whether the New York wrongful death statute gave protection to citizens of New York for injuries inflicted beyond its territory was a question which depended upon the intention of the legislature. Beach v. Bay State Co., 27 Barb. 248 (N.Y. Sup. Ct. 1858); cf. Universal Credit Co. v. Marks, 164 Md. 130, 136, 163 Atl. 810, 812 (1933). And in a not very clear-cut decision the Supreme Court of Utah held the Utah wrongful death statute applicable to an injury in Idaho in the absence of a showing of Idaho law, indulging in the presumption that foreign law was the same as that of the forum. Grow v. Oregon Short Line R.R., 44 Utah 160, 138 Pac. 398 (1914).
produce evidence as to the law of Chili proving a negative, the defendant must prevail.\textsuperscript{136}

There are several difficulties in this argument. For example, one might ask why the plaintiff was not required in the first place to prove the Chilean law in order to make out a prima facie case.\textsuperscript{137} Again, although the passage refers twice to the party "naturally" having the burden of going forward, that burden is not assigned according to natural principles. Apart from the fact that we "naturally" require a plaintiff to make a certain minimum showing (the level of which is a matter of judgment) before calling upon the defendant to make a defense, we assign the burden either arbitrarily or in accordance with merely human considerations of convenience and fairness. Again, the intimation that it is unfair to impose on a party the burden of establishing a negative proposition, if it ever has any validity, is certainly a red herring where foreign law is concerned. The question is simply: what are the relevant provisions of the foreign law? Finally, and of most importance, the argument begs the question. The fundamental question is not a matter of burden of proof at all. Kales assumed, in line with the vested-rights theory, that the foreign law is an essential element of a cause of action or defense. Given that premise, there remains only a question of burden of proof, and of whether the presumptions improperly shift the burden. But the fundamental question concerns the function of a choice-of-law rule. If such a rule, instead of designating the law of the one state having jurisdiction to determine the legal consequences of a transaction, is regarded as permitting an interested party to invoke the foreign law as a guide to the court in shaping the remedy to the facts of the particular case, there is no question of burden of proof and no unfairness in requiring the interested party to invoke the foreign law which will prompt the court to depart from its usual and familiar practices.

The rule favoring the law of the forum until a different law is invoked by an interested party seems overwhelmingly preferable to the converse rule, applied in the *Crosby* and *Walton* cases, even when the converse rule is buffered with presumptions which partially avoid its harsh results.

\textsuperscript{136} Kales, \textit{supra} note 18, at 412-13. See also 3 Beale, \textit{Conflict of Laws} \textsection 622A.2, at 1681 (1935). A fourth contributing cause may have been the failure to distinguish between reference to the foreign law as the source of the rule of decision and references for other purposes. See notes \textsuperscript{138-70} \textit{infra} and accompanying text.

\textsuperscript{137} Kales's answer would be that the plaintiff was aided by the "rudimentary principles" presumption, Kales, \textit{supra} note 18, at 409, which some would regard as not different in effect from a presumption favoring the law of the forum, and that the burden which would otherwise have rested upon the plaintiff was thus shifted to the defendant. But the defendant could not be aided by a similar presumption, because the rule as to the effect of extending time to the principal debtor is "an illogical and irrational extreme." \textit{Id.} at 410. Kales himself recognized the limitations of the rudimentary-principle presumption. \textit{Id.} at 409.
VII. THE FUNCTIONS OF FOREIGN LAW

Unfortunately, although it is clearly preferable to the rule followed in *Crosby* and *Walton*, a simple rule that the law of the forum will be applied until foreign law is invoked and established by an interested party will not yield satisfactory results in all cases. This can be illustrated by *Walton* itself. That case, it will be remembered, grew out of a head-on collision. The plaintiff contended that the defendant's truck was on the wrong side of the road. How is the court to determine which is the wrong side? By reference to the rule of the road laid down by the law of New York? Conceivably, we might take the position, even here, that it is not unjust to proceed in accordance with the law of the forum until the defendant establishes that the law of the place of injury is different. If the defendant's employee was keeping to the left because that is the rule of the road in Saudi Arabia, the defendant should have little difficulty in establishing the law on which its employee relied. Nevertheless, there is something distasteful about such an attitude. We all know that the rule of the road varies from place to place. It is perfectly apparent that the rule in New York is not intended to have any application to Saudi Arabia, but is designed solely to regulate traffic on the streets and highways of New York. We instinctively recoil from even the prima facie application to foreign events of a rule so pointedly local in its purpose.

Consider the instructive case of *Hill v. Wilker*, an action in Georgia on a promissory note. The defendant pleaded that the note was made on Sunday. The evidence showed that the note had been given in Kansas; there was no evidence as to the law of Kansas, although there was some suggestion that there was no organized government there. The Georgia court, holding the note void, declared:

... in the absence of proof to the contrary, the legal presumption is, that the *lex loci* is the same as our own. We are sustained in this presumption by the fact that a contrary view would suppose the people of Kansas to have annulled the decalogue, and to have permitted by law the disregard of christian obligation, and not only forgotten but violated the injunction, "Remember the Sabbath day to keep it holy; on it thou shalt do no manner of work.""\[139\]

Perhaps the most understanding interpretation of this decision is that the Georgia court was applying divine law—a law which admits of no limitations of territory or governmental purpose, but applies to all men everywhere. The fact remains that the court was announcing the rule that the law of the forum applies until it is displaced by some interested party's timely invocation of a

138. 41 Ga. 449 (1871).
139. *Id.* at 453.
relevant foreign law (or, what amounts to the same thing for practical purposes, the presumption that the foreign law is identical with that of the forum). We, too, shall be forced to the same result if we adopt without qualification the view that the law of the forum governs until it is displaced by a showing of what the foreign law is.

But such a result is, of course, intolerable. The Georgia law which invalidates Sunday contracts has no rational application to transactions entered into in Kansas. This is true even though we are ignorant of the Kansas law. It is true even though we accept the suggestion that there was no organized government and no law on the mining frontier of Kansas — despite the fact that Holmes himself would have countenanced resort to "the law of the forum" in dealing with events in uncivilized territory.\textsuperscript{140} Georgia invalidates domestic Sunday contracts because (1) the criminal laws of the state prohibit the pursuit of one's ordinary calling on that day, and (2) the courts have decided that, in addition to the penal sanctions provided by statute, a contract made in violation of the prohibition should be made unenforceable.\textsuperscript{141} But the Georgia court would hardly have taken the position that the parties, in entering into this transaction in Kansas, had committed an offense against the criminal laws of Georgia.\textsuperscript{142} Other courts have also struggled with the problem of contracts made abroad on Sunday, where the foreign law is not made to appear. The Supreme Court of Vermont took a more sophisticated view of the scope of its Sunday laws than did the Georgia court.\textsuperscript{143} The Vermont court thought that their sole purpose was to protect the community in the quiet enjoyment of religious feelings and devotions; hence, a contract entered into in another state could not be a violation of the Vermont statute.

There is simply no excuse for applying the laws of the forum to invalidate a contract made on Sunday in another state, even though the foreign law is not brought to the attention of the court.

We are forced to the conclusion that some parts of the law of the forum may be displaced not only by a party's invocation of a foreign law which

\textsuperscript{140} Cuba R.R. v. Crosby, 222 U.S. 473, 478 (1912). Even if we knew that Kansas law also prohibited the transaction of business on Sunday, there would seem to be no reason why Georgia should impose the sanction of invalidity, thus "enforcing the penal laws" of another jurisdiction. See Cook, op. cit. supra note 2, at 428-29.

\textsuperscript{141} See id. at 427-28.

\textsuperscript{142} This is true even though it happens that both parties were Georgia residents at the time. The court gave that circumstance no weight and would doubtless have found uncongenial the "cosmopolitan principle" whereby a state may punish its citizens (or, for that matter, others) for acts abroad which, if committed within the state, would be punishable. See id. at 14-15; cf. id. at 430: "When we recall that the invalidity of Sunday contracts is a consequence attached by courts to criminal statutes, it is obvious that the notes in question could not be invalid under Massachusetts 'law,' since they were signed and delivered in New York, and the Massachusetts criminal statute did not and could not apply to them." (Emphasis added.)

\textsuperscript{143} Adams v. Gay, 19 Vt. 338 (1847). See also O'Rourke v. O'Rourke, 43 Mich. 58 (1880).
is entitled to preference, but also (tentatively, at least) by a demonstration that the forum’s law, properly construed in the light of the policy which that law embodies and the interest of the forum state in effectuating that policy, has no application to the case before the court. To return to the Walton case, whether or not the defendant establishes to the satisfaction of the court the rule of the road in Saudi Arabia, the rule of the road which is found in the law of New York should not be applied. It should be sufficient for the defendant simply to point out that the New York rule was not intended to apply, and cannot reasonably be applied, outside New York.

But if this is true of the rule of the road, is it not also true of the rest of the law of New York? Personal injuries, and in particular those arising from automobile accidents, give rise to social and economic problems. The law of New York, particularly the law of torts and of agency, expresses a governmental policy with respect to those problems. But New York has an interest in the application of this policy only where its relation to the event or to the parties is such as to bring the matter within the reach of the state’s legitimate governmental concerns. New York does not presume to make laws to bind the whole world. New York would be concerned, and would have an interest in applying its law and policy, if the injury had occurred in that state. It would likewise be concerned, and would have an interest in applying its law and policy, if the injured person were a resident of, or domiciled in, New York. It is difficult to perceive what interest it has in applying its social and economic policy where the injury occurred in Saudi Arabia, where the injured person was and is a resident of Arkansas, and where the defendant is a Delaware corporation.

The situation would be different if both parties—or even the plaintiff alone—were residents of, or domiciled in, New York. In that event, New

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146. The fact that the defendant was licensed to do business in New York does not seem sufficient basis for the assertion of an interest. The policy is probably not one of punishing wrongdoers, but of securing compensation for the victim; the imposition of liability (especially of vicarious liability) on the defendant seems but a corollary of the purpose to provide compensation.

The Erie doctrine apparently precludes treatment of the case on the basis that both parties are domiciliaries or nationals of the forum (the United States). See note 2 supra; note 149 infra.
York would have a definite and legitimate interest in the application of its policy. Failure of its courts to apply New York law will mean that the injured party may be unable to obtain compensation from the tort-feasor, with the result that he may become a burden upon other residents of New York, or upon the state itself. A strong case can be made for the proposition that the state which is the domicile of the parties (or of the plaintiff alone) should apply its own law of personal injuries, even where the law of the place of injury is established and does not provide for recovery. Surely it would be reasonable for the state in which the injured plaintiff resides to apply its own law, and hence further its own governmental policies, when no other law is established, and when, therefore, no conflict is made to appear.

If this view is accepted, there remains the question of how a New York court, or a federal court in New York, should dispose of cases in which it is clear that New York has no interest in applying its social and economic policy, i.e., those cases in which the injury occurred elsewhere and the plaintiff is neither domiciled in, nor a resident of, New York. In some of these, it would seem entirely reasonable for the court to entertain a motion to dismiss, without prejudice, on grounds substantially the same as those which underlie the doctrine of forum non conveniens. Thus, if both the plaintiff and the defendant are SaudiArabians, having no connection with New York, the customary grounds for invoking the doctrine of forum non conveniens exist, and there is the added ground that the parties have not made available to the court any body of law which seems particularly appropriate to the controversy. The same is true where, as in Walton, the plaintiff is domiciled in a third state and the defendant in a fourth. In this connection it must be emphasized that the choice-of-law rule which points to the state of injury as the only one having "jurisdiction" to determine the


An interesting parallel is furnished by the application of the Jones Act to American-owned vessels registered abroad, and to injuries to American seamen on foreign vessels. See Gilmore & Black, Admiralty § 6-64 (1957). In the federal realm of admiralty, of course, American citizenship or domicile carries a significance which it does not enjoy in the realm of Erie.

149. In the Crosby case the plaintiff was a resident of Tennessee and the defendant a New Jersey corporation. Since a general federal common law was recognized at that time, the case might well have been decided in accordance with the law of the common domicile of the parties.

150. See Nussbaum, supra note 44, at 1036 & n.108; cf. Restatement, Judgments §§ 49, 52-53 (1942). In Riley v. Pierce Oil Corp., 245 N.Y. 152, 154, 156 N.E. 647, 648 (1927), the dismissal was expressly made a final determination on the merits; and the parties to the Walton case seem to have gone out of their way to achieve that result by means of a directed verdict. Brief for Appellant, app. pp. 30, 47. See also Cal. Code Civ. Proc. § 1875(9).
legal consequences of the event is regrettably rigid and oversimplified. A
more rational system of conflict of laws would permit reference to the law
of any state having an interest in the matter. If this were possible, the
Walton case might have been tried under the laws of Arkansas or Delaware,
in the absence of information as to Saudi Arabian law, with the probability
that no provision of the law of either state would have precluded recovery.
Taking the choice-of-law rule as it stands, however, it would not be un-
reasonable for the court to consider dismissal on forum non conveniens
grounds.151

This, however, will not be an appropriate disposition in many instances,
and it probably would not have been so in Walton. The doctrine of forum
non conveniens is "an instrument of justice."152 It will ordinarily not be
applied where the effect will be to deprive the plaintiff of all remedy, or even
of some advantages not unfairly gained by the choice of forum.153 To dismiss
the action of an American citizen against an American corporation, when no
other available forum except possibly Saudi Arabia appears to be in any
better position to decide the case in accordance with an appropriate law, does
not appeal to the sense of justice.154 Moreover, there are certain cases which
are rather clearly not subject to dismissal on forum non conveniens grounds,
notwithstanding the fact that New York has no interest in the application of
its legal policy. These are the cases in which the defendant is domiciled in
New York and the plaintiff is either a resident of another American state
or of a foreign country. An action brought against the defendant at his own
domicile is not an appropriate, or at least not a typical, case for dismissal on
forum non conveniens grounds. Now, New York has no particular interest
in holding its own people liable for injuries to foreigners. On the contrary,
if it were to adopt an attitude of extreme selfishness, it might prefer not
to do so. But, as we have noted, if the action were brought by a resident of
New York, the court should, according to the argument in this article, apply
New York law in the absence of information as to foreign law. To do that,
and to refuse to do the same where the action is brought by a citizen of a
sister state, would be to raise a serious question under the privileges and

151. In the federal court, transfer, if possible, would be substituted for dismissal,
28 U.S.C. § 1404(a) (1952). Transfer of the Walton case to the district of the
plaintiff's residence in Arkansas would have been an ideal solution, since in that event
Arkansas law might have been applied as the law of the forum, relevant because of the
plaintiff's domicile there. Presumably, however, the defendant was not amenable to
process in Arkansas, so that that was not a district in which the action "might have
been brought," and so not a district to which the action could be transferred. Foster-
Milburn Co. v. Knight, 181 F.2d 949 (2d Cir. 1950).
152. See Rogers v. Guaranty Trust Co., 288 U.S. 123, 151 (1933) (Cardozo, J.,
dissenting); Note, 58 Colum. L. Rev. 234 (1958).
405, 433, 448 (1955), and authorities cited.
While the constitutional difficulty would not be present if the action were brought by an alien, American legal tradition has in general shunned such discrimination; and there is no reason, in fact, to imagine that New York, or any other American state, would desire to discriminate in such fashion against either an alien or a citizen of a sister state.

In short, there will be a number of cases which, for one reason or another, the court should not dismiss even though it recognizes that it has available no body of law which can be said to be appropriate in terms of the legal policy of any interested state. What should the court do with these cases? It should decide them in accordance with the law of the forum. But it should not apply mechanically all of that law. For example, New York should never apply the law of the forum to determine the rule of the road in Saudi Arabia. And a court should never apply the Sunday laws of the forum to invalidate a contract made abroad.

These declarations require an explanation. If we approach the problem of conflict of laws in terms of the social and economic policies of the states involved, and in terms of the interests of those states in having their policies applied in a particular case, how can we justify resort to the law of a state which admittedly has no interest in the application of its policy to the case at hand? And how do we distinguish between those portions of the law of the forum which are to be applied and those which are not? Thus far, we have suggested only that the process of construction—i.e., of inquiry into the extent to which a law is "intended" to apply to cases not wholly domestic—will reveal clearly that a particular rule, such as the rule of the road, has no application to the case at hand. But by the same process it becomes equally clear that the forum's rules of torts and agency have no application.

Law is an instrument of social control. Recognition of this fact, and emphasis on the economic and social policies expressed in laws, would lead to a fresh and constructive approach to conflict-of-laws problems. But law is not an instrument of social control alone. It retains something of the quality and function which were commonly attributed to it before we became so acutely conscious of its sociological role. It is an accumulated body of experience and principle which has served well, on the whole, as a guide to the

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155. Quong Ham Wah Co. v. Industrial Acc. Comm'n, 184 Cal. 26, 192 Pac. 1021 (1920), writ of error dismissed, 255 U.S. 445 (1921). While the reasoning of this decision is open to question, cf. Douglas v. New York, N.H. & H.R.R., 279 U.S. 377 (1929); La Tourette v. McMaster, 248 U.S. 465 (1919), it may have greater validity when the question relates to dismissal on grounds of forum non conveniens than when it relates to choice of the applicable law.

In this light, a transfer of the Walton case to Delaware, the domicile of the defendant, might have been an excellent disposition. On our hypothesis, Delaware would have applied its own law in an action by one of its citizens against the local corporation in the absence of a showing of the Saudi Arabian law, and it might be required to do the same in an action by a citizen of another state.
adjudication of disputes between parties in court. Grant that no governmental policy of New York respecting the problem of personal injuries will be advanced by the application of its law to a dispute between two foreigners arising out of a collision in Saudi Arabia; grant also that neither party regulated his conduct or planned his affairs with reference to New York law. The fact remains that there is a lawsuit pending in a New York court. The harsh alternative to deciding it according to New York law is to dismiss it. No conflict of interest among states being apparent, justice between the parties becomes the sole consideration. Justice between the parties requires a decision on the merits. And where should the New York court look for a rule of decision which will do justice between the parties but to the body of principle and experience which has served that purpose, as well as the ends of governmental policy, for the people of New York in their domestic affairs?

Few courts have ever been willing to apply every jot and tittle of the domestic law to a foreign case in the absence of any showing of the foreign law. Various attempts have been made to rationalize the distinction between those portions of domestic law which can be suitably applied in the adjudication of the dispute and those which are felt to be unsuitable. One way, which would surely not be satisfactory today, is to draw the line between common law and legislation. The courts which were willing to presume that the foreign law was the same as the common, but not the statutory, law of the forum were not merely expressing hostility toward legislation. They were expressing belief that that portion of the law of the forum which consisted of the product of judicial reasoning and experience in the adjudication of cases was a reservoir of wisdom and justice which could be fairly drawn upon in any case, at least in the absence of a showing of foreign law, whereas legislation was likely to be fraught with political considerations, and hence suitable for domestic application alone. We realize now, of course, that the common law itself is an instrument of social and economic policy; and few would contend now that abstract justice could be done between the parties to a case without recognizing a right of action for wrongful death, so widespread is the acceptance of what was once a most hateful and "local" intrusion upon the "natural justice" of the common law. Courts which have adopted the position that the law of the forum will be applied in the absence of a showing of foreign law have commonly modified the generality of that view by excluding local laws which provide for "penalties and forfeitures." Nussbaum, in his strong advocacy of that position, recognized that there must be a limit to such employment of the law of the forum. He suggested that, just as the doctrine of local public policy places a limit on the extent to which foreign law is applied, so a counterpart of that doctrine limits the extent to which

156. Nussbaum, supra note 44, at 1040.
local law is applied in the absence of information as to the foreign law.\footnote{156} He was particularly troubled by the application of local law in the context of "rights originating in foreign familial and inheritance relations."\footnote{157} In the end, he could offer nothing more precise than the suggestion that, in the absence of foreign law, "a court should apply its own law when substantial justice can thereby be attained."\footnote{158}

One could wish to improve upon the definiteness of this formulation, and I think there is one further suggestion of an analytical type which may be helpful. I do not offer it as a dramatic and sovereign solution to the problem of distinguishing between the local law that may appropriately be applied and that which may not, for I think that such a solution may prove to be unattainable. It does, however, account for the troublesome cases which have come to my attention, and it points to a consideration which should never be overlooked when the problem of recourse to foreign law is under discussion—especially when the doctrine of judicial notice is invoked in that connection.

For what purpose do we refer to the law of a foreign state? We do so for various different purposes, some of which have nothing to do with conflict of laws, and some of which have nothing to do with the central problem of conflict of laws. That problem is to find the appropriate rule of decision when the interests of two or more states are potentially involved. But on many occasions we refer to foreign law not to find a rule of decision, but for a quite different purpose. This is clearest when we do not make use of choice-of-law rules at all. For example, a case otherwise wholly domestic may involve mistake of foreign law. No choice-of-law rule refers the court to the law of a foreign state; all significant contacts are with the forum, and the law of the forum furnishes the rule of decision. There is no question of conflict of laws. The tenor of the foreign law must be ascertained, however, if the fact of mistake is to be established. To apply the law of the forum in the absence of a showing of foreign law would simply be irrational. But the purpose of the reference to the foreign law in this case has nothing to do with conflict of laws.\footnote{159} The devolution of land may depend upon whether the law

\footnotesize{\begin{itemize}
  \item 157. Id. at 1041.
  \item 158. Id. at 1042.
  \item 159. See Haven v. Foster, 26 Mass. (9 Pick.) 112 (1829). This old case was selected out of the large number of available illustrations because it is the first in a section entitled "The Nature of the Foreign Law," in 1 Beale, Cases on the Conflict of Laws 127 (1st ed. 1900). The failure to distinguish the different functions of references to foreign law has deep roots.
  
  On the other hand, Thayer seems to have appreciated the need for making the distinction: "[I]f the factum of domestic law is for the court, equally the factum of foreign law should be, — assuming it to be true that it is wanted, in order to determine the rule or law of the case." Thayer, A Preliminary Treatise on Evidence at the Common Law 258 (1898). (Emphasis added.) Observe also the use of the expression "rule of decision" in the quotations in the text at notes 106, 114 supra.
\end{itemize}}
of the alien heir's homeland would permit inheritance by Americans. Yet the "applicable law"—the law which furnishes the rule of decision—is of course the law of the forum and situs. The reference to the alien law has nothing to do with conflict of laws, but merely supplies a datum which is rendered material by the rule of decision which is found in the law of the forum. Cases such as these are frequently cited in discussions of the consequences of failure by the appropriate party to establish the foreign law, with no recognition of the fact that they are clearly distinguishable from cases presenting problems in the choice of law.

The thesis of this article has no relevance to the foreign law element in cases such as these. The problem under discussion here concerns the course of action to be taken by a court when, according to a domestic choice-of-law rule, the rule of decision is to be found in a foreign law which is not invoked in timely and appropriate fashion. The thesis that in these circumstances the court should employ the rule of decision found in the law of the forum is bottomed upon my interpretation of the typical function of a choice-of-law rule, and is not transferable to cases in which no choice-of-law rule is involved. The comments made on the utility of judicial notice in establishing foreign law are similarly limited. I am not at all sure that when a man is prosecuted as an habitual offender and prior convictions of felony in another state are charged, the prosecution should not be required to establish by formal proof, to the satisfaction of the jury, all provisions of foreign law necessary to sustain the charge. That is a question beyond the scope of an article on the conflict of laws. The point is that it is dangerous to lump together, without regard to the functional differences involved, all problems of pleading and

161. A much-cited decision, and one which may have had an appreciable effect on the development of the New York law which was decisive in Walton, is Crasheley v. Press Publishing Co., 179 N.Y. 27, 71 N.E. 258 (1904). This was an action for libel growing out of the publication in New York of an article charging that the plaintiff had participated in a revolutionary effort in Brazil. New York was treated as the "place of wrong," the New York law of libel furnished the rule of decision, and no problem of the conflict of laws was involved. New York law, however, required a showing of special damages if the published matter was not libelous per se, which it would be if it charged commission of a crime of a certain class. This raises, in the first place, a problem of interpretation of the New York law: a crime under the law of New York, or of the country in which the conduct occurred? Having decided, or assumed, that this meant the foreign law, the court concluded that it was incumbent upon the plaintiff to establish that the offense was a crime under the laws of Brazil, and rather naturally refused to assume for this purpose that the laws of Brazil were identical with those of New York. But the case has nothing to do with conflict of laws and has no relevance to the problem of what a court should do when the foreign law which theoretically should furnish the rule of decision is not made to appear. See Bradley v. Mutual Benefit Life Ins. Co., 3 Lans. 541 (N.Y. Sup. Ct. 1870); cf. Banco de Sonora v. Bankers' Mut. Cas. Co., 124 Iowa 576, 100 N.W. 532 (1903).
162. See People v. Morton, 41 Cal. 2d 536, 261 P.2d 523 (1953); cf. Smith v. Hays, 10 F.2d 145 (8th Cir. 1925); State v. Lawrence, 120 Utah 323, 234 P.2d 600 (1951).
proof of foreign law, of presumptions and judicial notice of foreign law, and of the consequences of failure of timely information concerning such law. I would earnestly commend this thought to the consideration, in particular, of those who draft statutes on judicial notice of foreign law.

In a typical conflict-of-laws case, such as Walton, when we are referred by a choice-of-law rule to the law of a foreign state, the purpose is to find the appropriate rule of decision. We are not seeking those provisions of foreign law which, given the appropriate rule of decision, may affect the outcome of the case, as in the purely domestic cases which we have just been discussing where foreign law may affect the outcome although the rule of decision is found in the law of the forum. And when, in default of information as to the foreign law, we resort to the law of the forum *faute de mieux*, it is for the same purpose: to find an appropriate rule of decision. In this light, it should be clear why the court, having failed to find the rule of decision in the law referred to by the choice-of-law rule and having decided to resort to the law of the forum, should not apply the forum's rule of the road or its Sunday laws. The rule of the road is not a rule of decision but a rule of conduct. There are rules of decision which say that negligence is the want of due care and that due care requires adherence to apposite rules of conduct. These rules of decision the law of the forum can supply, there being before the court no competing rule and no conflict with the interest of a foreign state. But the rule of conduct, at least when it is a rule of the road, can be found only in the law of the state where the conduct occurred. The rule which prohibits

163. I am not altogether happy with this terminology. The phrase, "rule of decision," is best known because of its employment in the Judiciary Act § 34, 1 Stat. 73 (1789), and the Judicial Code, 28 U.S.C. § 1652 (1952). In that context, it suggests a distinction between substantive rules and rules of procedure. Here, of course, I am primarily suggesting a distinction between kinds of substantive law, or between the different purposes for which substantive law is employed.

A helpful analogy may be found in cases on the problem of what constitutes a case "arising under" federal law for the purpose of determining the jurisdiction of federal district courts. A plaintiff bases his contention of negligence on the fact that the defendant railroad failed to comply with the Federal Safety Appliance Act. The case is not one "arising under" federal law. It is state law which gives the plaintiff a right of action for negligence and determines the extent of that right. Federal law furnishes a standard of conduct which may be relevant, or even decisive; but it is state law that furnishes the rule of decision. Jacobson v. New York, N.H. & H.R.R., 206 F.2d 153 (1st Cir. 1953); Andersen v. Bingham & G. Ry., 169 F.2d 328 (10th Cir. 1948); cf. note 159 supra.

164. Except that perhaps it may be ascertained without referring to any law at all. In Walton, counsel for the plaintiff was in the difficult position of having to avoid any reliance whatever on the law of Saudi Arabia and yet having to establish that it was not his client who was on the wrong side of the road. His solution was ingenious. With the plaintiff on the stand, he first elicited the fact that the vehicle the plaintiff was driving was an American model with a left-hand drive. Then plaintiff testified that he was driving on the right-hand side and that he had safely passed several vehicles. Brief for Appellant, app. pp. 35-36. Does not this testimony provide reasonable basis for an inference that the plaintiff was not violating the Saudi Arabian rule of the road?

the transaction of business on Sunday is likewise a rule of conduct and one which, by what appears to be the sounder construction, applies only to conduct within the territorial limits of the state. The forum's rule of decision, which says that contracts made in violation of its own Sunday laws will not be enforced, is therefore inoperative with respect to foreign transactions.

Moreover, even choice-of-law rules do not always refer us to the foreign law for the purpose of selecting among conflicting rules of decision which suggest competing interests of the states associated with the matter. Sometimes the reference is for the collateral purpose of ascertaining some datum which will be relevant in the application of the rule of decision which is unquestionably provided by the law of the forum. This is especially true of rules referring to the law governing personal status. Except in suits for declaratory judgments, the determination of status is almost never the ultimate object of an action. The question is seldom presented in the abstract, but almost always in the context of a primary question, such as the right to inherit or the right to letters of administration. In these cases it is often perfectly clear that the law of the forum supplies the rule of decision for determining the litigation between the parties; the "choice-of-law" rule, which seems inaptly named in this role, performs a different function.

Consider, for example, a workmen's compensation proceeding in New York following the death of an employee. The employer is a New York enterprise, the injury occurred in New York, the deceased employee and the claimant have lived in New York as man and wife for many years. This is a purely domestic case, in the sense that the workmen's compensation law of that state alone furnishes the rule of decision. The social and economic policies of New York with regard to industrial injuries are clearly relevant, and no other state can claim an interest in the application of its contrary policy. A question may be raised, however, regarding the claimant's status as widow. Clearly, this calls for interpretation of the New York law. Assuming that the law is tentatively interpreted to mean that in order to qualify as widow the claimant must have been validly married to the deceased, the court inquires into the fact of marriage. It appears that many years ago the parties, who were close relatives, participated in a religious ceremony in Italy, where both resided, and that thereafter they lived together as husband and wife. The court then inquires into the "validity" of the marriage. If such a marriage is in no way offensive to the laws of New York, probably that should be an end of the matter (though it usually is not). On the other hand, if, say, the relationship between the parties was such that New York law would discountenance a local marriage between local residents so related, the court may wish to inquire further, depending upon its interpretation of the word "widow" as used in the workmen's compensation statute. It may
be the policy of New York, for this purpose, to recognize as valid marriages which were valid when and where they were entered into, although they would not be regarded as valid if tested by local law. At this point (and also when it appears that the foreign marriage was inoffensive in terms of New York's marriage laws) the process of construction of the New York statute is interrupted by the intrusion of a "choice-of-law" rule pointing to the law of Italy—the place of celebration and the domicile of the parties at the time—as the law "governing" the validity of the marriage. This may give welcome support to the construction process if it turns out that the marriage was unobjectionable from the standpoint of Italian family law. But what if it appears that Italian law required a civil ceremony which was not performed, or that the parties were so related as to be unable to contract a valid marriage according to Italian law? Because of the fact that the choice-of-law rule purports to designate the law which "governs the validity" of the marriage, there may be a tendency to assume that this, too, is an end of the matter; the claimant cannot be the widow. But this may make little sense in terms of New York's social and economic policy. The New York statute might well be construed as including in the category of widows all those whose marriages were inoffensive to New York's family laws, and more besides—so that there would be no point in denying compensation to the claimant, whose marriage was in no way offensive to New York policies, simply because the union she contracted with the deceased was discontenanced by the Italian law. Moreover, for what purpose would Italy have considered the marriage invalid? Would it have jailed the parties for living in adultery? Would it have denied the woman the rights of a lawful wife in her husband's property? Would it have permitted her, without terminating the union by divorce, to marry another? And what do the answers to these questions have to do with the question whether she should receive compensation for the death of her helpmate in New York? Even if we find that Italy has a workmen's compensation law, and that a person in the claimant's position would not be entitled to compensation as a widow under that law, the question before the New York court is not answered. Italian law cannot supply the rule of decision; there is no Italian law on the question of the right of a resident of New York to recover compensation from a New York employer under the New York workmen's compensation statute. At best, Italian law can inform us that the Italian courts would have refused to recognize the marriage as valid for this purpose or that, or for all purposes. With this information in hand, to be evaluated for what it is worth, the New York court will proceed to determine whether the claimant is the "widow" within the meaning of the New York statute. It may be that according to the true construction of the New York statute the
term "widow" includes the claimant provided only that the couple maintained the relation of husband and wife in good faith.\textsuperscript{105} If so, the Italian law of marriage is quite irrelevant.\textsuperscript{106}

The point is made crystal clear by Sutton v. Lieb.\textsuperscript{167} The wife's Illinois divorce decree provided alimony so long as she did not remarry. She then married a divorced man in Nevada, but a New York court subsequently annulled the marriage on the ground that her second husband's divorce from his former wife was invalid. When she sought to enforce continued payment of alimony under the Illinois decree, a force far stronger than any choice-of-law rule—the constitutional requirement of full faith and credit to the judgments of sister states—compelled Illinois to recognize that her remarriage was "void." It did not, however, follow that she was entitled to continued payment of alimony. It was for Illinois to determine the effect of a void remarriage upon the obligation imposed by the decree. The case was a domestic case, and the rule of decision was supplied by domestic law. The invalidity of the foreign marriage, established beyond question by the foreign annulment decree, was merely a factor to be taken into account.

It will be observed that we have been discussing these cases on the assumption that the foreign law is made to appear, and so have ventured beyond the scope of the present problem. It is not my intention to develop this line of inquiry. The purpose has been only to establish that in this context the choice-of-law rule performs a function quite different from the typical function of choosing the rule of decision. In our New York workmen's compensation case the question of what the court should do if the Italian law of marriage is not established is one which I am not prepared to answer. The considerations involved are quite different from those involved in the question of what a New York court or a federal court in New York should do in a case like Walton. I am certainly not prepared to say that, in cases such as these, the New York court should simply apply the law of the forum in the absence of proof of the foreign law, id. at 185, 254 N.Y. Supp. at 444, is the court's treatment of the conflicting "expert" testimony, evincing a laudable determination to decide the case in accordance with New York policy notwithstanding the Italian law of marriage. Cf. Konieczny v. J. Kresse Co., 234 App. Div. 517, 256 N.Y. Supp. 275 (3d Dep't 1932). But cf. Vergnani v. Guidetti, 308 Mass. 450, 32 N.E.2d (1941).

\textsuperscript{165} Cf. Daniels v. Detroit, G.H. & M. Ry., 163 Mich. 468, 474, 128 N.W. 797, 800 (1910); 2 Larson, Workmen's Compensation Laws §§ 62.21, 62.22 (1932).


\textsuperscript{167} 342 U.S. 402 (1952).
problem, it would be rash to propose what the consequences of failure to establish the foreign law should be. It may be, with respect to all these cases in which foreign law is referred to, with or without the aid of a choice-of-law rule, for a purpose other than the typical one of finding the appropriate rule of decision, that there was wisdom in the old rule that foreign law must be pleaded and proved, and even that it must be proved to the satisfaction of the jury. Equally, it may be that some or all of the requirements of the old rule should be changed, and that the concept of judicial notice may be helpful for some purposes. I have not given these questions the consideration they require—and I am sure that the draftsmen of judicial notice statutes have not done so either, although those statutes in terms apply whenever resort to foreign law is indicated, irrespective of the purpose of the reference. The conclusions suggested in this article are applicable only where foreign law is referred to for the purpose of finding the appropriate rule of decision.

Recourse to the law of the forum in order to find the rule of decision where foreign law has not been invoked in timely and appropriate fashion by the party seeking its benefits involves no problem under the due process clause or the full faith and credit clause of the federal constitution. Constitutional doubts in this context have been suggested, so far as I know, only by the California Law Revision Commission, which appears to be particularly sensitive to the possible influence of the Constitution on choice of law. Such doubts stem, of course, from the fact that a state may violate one or both of these clauses by applying its own law when it has no substantial connection with, or interest in, the matter in litigation and when the effect is to subvert the interest of another state and deprive a party of rights secured by the foreign law. It seems clear, however, that before a party can successfully make the contention that he has been deprived of life, liberty, or property without due process of law, or that full faith and credit has been denied to the laws of another state, he must have brought to the attention of the court in timely and appropriate fashion the law which is the source of his rights, or to which he asks the court to give full faith and credit. It is hardly unconstitutional to deprive people of rights which they do not

168. Two cases prominent in the literature on this problem, In re Circle Trading Corp., 26 F.2d 193 (2d Cir. 1928), and Leach v. Pillsbury, 15 N.H. 137 (1844), present situations in which it would be difficult to advocate application of the law of the forum in default of a showing of the foreign law. In each the foreign law was wanted not to furnish the rule of decision but for a collateral purpose. In another leading case, Riley v. Pierce Oil Corp., 245 N.Y. 152, 156 N.E. 647 (1927), the foreign law appears to have been material, if at all, as the source of the rule of decision, and there seems to be no good reason why the court should not have applied the law of the forum in the absence of the defendant's invocation of Mexican law.


170. See id. at 237-39.
establish or to deny full faith and credit to laws which are not brought to the attention of the court.\textsuperscript{171}

\textbf{VIII. Conclusion}

Leo Walton's action against the Arabian American Oil Company was dismissed because the New York rule for choice of law was read as a mandate to the court to apply the law of Saudi Arabia or none at all. In the search for a more satisfactory solution we have encountered numerous difficulties. The problem has been traditionally treated as one of pleading and proof, and therefore one for experts in evidence, rather than as a fundamental problem of conflict of laws. The classic introduction to all prescriptions for dealing with the problem has been: "When foreign law becomes material . . . ." This introduction has proved to be fraught with ambiguity. When \textit{does} foreign law become material—whenever a choice-of-law rule points to the law of a foreign state, or only when it is invoked by a party seeking advantage in its provisions? Furthermore, we have found that foreign law may be material for quite different purposes, and that a solution which seems acceptable when foreign law is material for one purpose may not be so when it is material for another. In this century, the dominant philosophy has dictated the view that foreign law becomes material (as supplying the rule of decision, at least) merely because the choice-of-law rule refers to it, without more. This view, coupled with the original prescription that when foreign law becomes material it is to be pleaded and proved like any other "essential element" of a cause of action or defense, led to difficulties which the courts attempted to alleviate, in part, by indulging in presumptions as to the tenor of the foreign law. In revolt against the formalism of the requirement of pleading and proof, and some of its incidents, as well as against the artificiality of the presumptions, modern leaders in the field of evidence have employed the concept of judicial notice with results which in some respects have certainly been salutary. The judicial notice concept fails, however, to reach the heart of the problem. Moreover, this approach, even in its most sophisticated form, unrealistically minimizes the fact that a large expenditure of energy may be required to ascertain the foreign law; it gives inadequate consideration to important questions of procedural fairness; it attributes to foreign law an imperative force quite out of proportion to that possessed by domestic law generally; and it ignores the different purposes for which foreign law may be "material."

We have preferred the older view that foreign law becomes material as furnishing the rule of decision only when it is invoked by a party seeking

advantage from its provisions. In consequence, when the foreign law is not made to appear in timely and appropriate fashion by the interested party, the court will apply the law of the forum. We have recognized, however, that this procedure may not be appropriate in all cases, particularly where the foreign law is referred to not as the source of the rule of decision but for some collateral purpose.

The conclusions suggested may be summarized as follows:

1. The normal business of courts being the adjudication of domestic cases, and the normal tendency of lawyers and judges being to think in terms of domestic law, the normal expectation should be that the rule of decision will be supplied by the domestic law as a matter of course.

2. The court should ordinarily depart from this procedure only at the instance of a party wishing to obtain the advantage of a foreign law.

3. The law of the forum, as the source of the rule of decision, should normally be displaced only by the interested party's timely invocation of the foreign law. The interested party invokes the foreign law by calling attention to its relevance and its superior claim to be applied, and by informing the court of its tenor.

4. Since a rule of decision taken from foreign law may materially alter the issues and the evidence necessary to establish a claim or defense, an invocation of foreign law should ordinarily not be regarded as timely if it comes after the issues have been settled. While it is not vital that foreign law be invoked in the pleadings, it is necessary that it be invoked in the process by which the issues are settled, whether by pleading, pretrial conference, or otherwise. There may be circumstances in which a later invocation of foreign law may be permitted without procedural injustice to the opposing party. Rules as to the amendment of pleadings and of pretrial orders should furnish helpful analogies for dealing with such situations.

5. The foreign law should be invoked in such a way as to afford the opposing party full opportunity to (a) resist the contention that the foreign law is applicable, (b) present to the court his views as to the tenor of the foreign law, and (c) prepare his case in accordance with the requirements of the foreign law if it is found applicable.

6. No exclusionary rules of evidence should interfere with the process of establishing the tenor of the foreign law. The parties may bring to the attention of the court any pertinent information. Yet if the judge is not satisfied as to the reliability of the written opinion of an expert, or as to the

172. Whether or not the court will apply the foreign law so invoked will, of course, depend on conflict-of-laws principles. My somewhat unorthodox views on the methods to be employed have been suggested in Married Women’s Contracts: A Study in Conflict-of-Laws Method, 25 U. Chi. L. Rev. 227 (1958), and Survival of Actions: Adjudication Versus Automation in the Conflict of Laws, 10 Stan. L. Rev. 205 (1958).
authenticity of a publication purporting to state the foreign law, he should have discretion to require the party to produce the expert for cross-examination, under oath if that seems desirable, or to require documentary proof of the foreign law in accordance with the rules of evidence. The court should also be permitted, though not expected, to consult any pertinent source of information, though not furnished by the parties. In that event, however, the court should, by making tentative findings or otherwise, give the parties an opportunity to be heard with respect to the conclusion to be drawn from such sources.

7. The determination of the tenor of the foreign law should be made by the judge rather than the jury and should probably be subject to review on appeal.

8. The law of the forum may also be displaced, at least tentatively, as the source of the rule of decision, even without the invocation of a foreign law, by a party's timely demonstration that the governmental policy of the forum, as expressed in its rule of decision, has no relevance to the case before the court. The timeliness of such a demonstration should be determined in the same way as that of an invocation of foreign law. In such a case, the fact that there is before the court no law which is particularly appropriate to the disposition of the case is a factor which, in combination with other factors, may justify dismissal of the action without prejudice on forum non conveniens grounds. If, however, considerations of justice require that the action be retained and decided on the merits, the court should determine it in accordance with the rule of decision found in the law of the forum.