#63(L) 5/12/66

Fourth Supplement to Memorandum 66-21

Subject: Study 63(L) - Evidence Code (Judicial Notice of Foreign Law)

Attached as Exhibit I is a letter the Chairman received from Dr. William B. Stern, Los Angeles foreign law expert. You will recall that we have had prior correspondence from Dr. Stern concerning the same objections.

The Evidence Code made no great change in the prior law respecting judicial notice of foreign law. We attach the text of Code of Civil Procedure, Section 1875 as Exhibit II. Foreign law is covered by the underlined portions of the section. Under Section 452(f) of the Evidence Code, judicial notice may be taken of foreign law. Judicial notice must be taken of foreign law if a party requests it and (1) gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request, and (2) furnishes the court with sufficient information to enable it to take judicial notice of the matter. Evidence Code Section 453. The information that may be used in taking judicial notice is specified in Section 454 of the Evidence Code. Moreover, with respect to foreign law that is of substantial consequence to the determination of the action, each party must be afforded a reasonable opportunity to present information to the court and, if the court resorts to any source of information not received in open court, including the advice of persons learned in the subject matter, such information and its source shall be made a part of the record in the action and the court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken. See Evidence Code Section 455. Finally, Evidence Code Section 460 permits the court to appoint a disinterested witness on foreign law to provide advice as to what the foreign law is.

Dr. Stern has two objections:

First, he objects that the new law by inference does away with the prior practice that foreign law is determined before the facts at issue are tried. We find nothing in the Evidence Code that so indicates. Compare Evidence Code Section 453 with Code of Civil Procedure Section 1875(4). The time for determination of foreign law is a matter of judicial administration that is not determined by the Evidence Code.

Second, he objects that almost "anything goes" under the new law concerning the nature of the production of foreign law. The sources of information that may be consulted under the Evidence Code are specified in Evidence Code Section 454 which provides:

> 454. (a) In determining the propriety of taking judicial notice of a matter, or the tenor thereof:
>
> (1) Any source of pertinent information, including the advice of persons learned in the subject matter, may be consulted or used, whether or not furnished by a party.
>
> (2) Exclusionary rules of evidence do not apply except for Section 352 and the rules of privilege.
>
> (b) Where the subject of judicial notice is the law of an organization of nations, a foreign nation, or a public entity in a foreign nation and the court resorts to the advice of persons learned in the subject matter, such advice, if not received in open court, shall be in writing.

This is not materially different from Code of Civil Procedure Section 187[illegible] which, after listing the matters to be judicially noticed, provides:

> In all these cases the court may resort for its aid to appropriate books or documents of reference. In cases arising under subdivision 4 [foreign law] of this section, 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.

Protection against the court's use of unreliable information is provided by Section 455.

The staff suggests that no change be made in the Evidence Code on the matter of judicial notice of foreign law.

Respectfully submitted,

John H. DeMoully
Executive Secretary

WILLIAM B. STERN
3030 FERNWOOD AVENUE
LOS ANGELES, CALIFORNIA 90039, U.S.A.

April 29, 1966

RECEIVED
MAY 2 1966
KEATINGE & STERLING

Richard H. Keatinge, Esq.
458 South Spring Street
Los Angeles, California 90013

Dear Mr. Keatinge:

In accordance with our conversation of last Saturday, I enclose a copy of the circular which I am using in my foreign law work.

One of the principal points is that the new law does by inference away with the prior practice that foreign law is determined before the facts at issue are tried. This consequence results from the rule that foreign law is like domestic law and therefore is an issue before the court at all times during the trial. That I am not exaggerating or overly fearful has already been shown in a case in which, in reliance upon the spirit of the new enactment, the German law relating to negligence in a personal injury matter was shown in the trial on and off over a period of several days and in between evidence. Orderly procedure would have required that the foreign law should have been determined first on the basis of the issues of fact as stated in the pleadings and determined in the pretrial order.

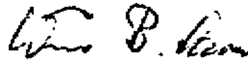
Other objections result from the fact that almost "anything goes" under the new law concerning the nature of the production of foreign law. In the above case, counsel of the defendant produced what was obviously a canned brief on foreign law; it was signed by defense counsel who was not familiar with German law or the German language but was apparently written in Germany to cover a multitude of situations. In addition, it was written without taking well-known changes in German law of recent years into consideration, and some of the citations were wrong. Counsel had not even checked the citations. This brief was admitted and, of course, there was no cross-examination and could not have been any. I refused to testify in the case. I do not consider it the duty of an expert to fight shadows, and plaintiff's counsel was obviously in no position to provide financially for an expert to sit around in the lengthy trial for the case that his opponent might spring a new surprise concerning the foreign law in question; also, in this case, under the new law, the court could well have stated at any time of the trial that he read some secondary English language material (of doubtful validity) concerning the foreign law and required the expert to be prepared to testify concerning the errors in such material.

While I consider that the Commission's objection to the submission of foreign law under oath is based on the distrust of oaths (as vividly described in the current issue of Time, referring to "the battle of oaths"), I believe that oaths are a necessary tool of court procedure. Of course, substitutes to oaths, such as declarations, solemn declarations, statements as if given under

oath, have been tried out in many jurisdictions. In some jurisdictions, the importance of the oath is emphasized by precluding parties from taking it or by taking the evidence of parties first and leave it in the hands of the court whether a confirming oath should be taken thereafter. I believe that all this emphasizes the importance of requiring those concerned to adhere to the truth. The fact that perjury or similar prosecutions may not be possible or are unlikely does not affect the validity of the above statement; there are many persons, including lawyers, who are impressed by the solemnity required of their statements.

The argument that the lack of identification or of an oath may go to the weight of the foreign law communication, is an impractical argument. Courts may not be informed about the ethical standards of the legal profession in a foreign country, one of whose members writes a letter, and the court may, in fact, be highly impressed by a letter which a foreign lawyer may have written pro arguendo. The lack of oath or similar device might even give a foreign lawyer the idea that he is supposed to argue rather than be objective. Examples in practical life are numerous; I hate to mention them. But if I have to, I might refer to certain Mexican lawyers who, prior to making a statement not under oath, inquire "What do you want me to say?". Or, in a recent case, to a letter of a Jordanian lawyer who referred to a statute which quite obviously did not bear out the lawyer's contention. I have a distinct feeling that he would not have sworn to Allah that he stated the truth. Facilities for the taking of oaths are readily available in foreign countries, at least before an American Consul.

Sincerely yours,



William B. Stern

WBS:sl

Enclosure

January 1966

Memorandum to Counsel Handling California Cases Involving Foreign Law

Under the present law, I have frequently suggested to counsel to present the law of foreign countries to the courts by way of affidavit or declaration, prepared and executed by a foreign law expert. Under Sec.1875 of the Code of Civil Procedure, second last paragraph, a "writing" suffices, but it appears to be more in keeping with due process that the writing is under oath or otherwise subject to the rules concerning perjury. Affidavits and declarations have sufficed in most cases, including contested cases, and the instances in which a foreign law expert was required to appear in court in person, was reduced to an almost unnoticeable minimum.

This situation is likely to change under the Evidence Code. Courts will have the widest latitude in finding and accepting information on foreign law. Information on foreign law need not be submitted under oath or under penalty of perjury or even on the basis of a statement of qualifications of the writer, and counsel may produce anonymous opinions on foreign law. The court may itself research the foreign law, and contrary to the New York rule may use any source of information, including, e.g., an unsigned student note in a periodical. Writers of statements on foreign law need not be available for additional questioning or for cross-examination. While the constitutionality of some of these rules may be questionable, the fact remains that the Evidence Code will presumably provide less restraint on the production of foreign law information than is the case in any other State of the United States or in any other common law jurisdiction or in most civil law jurisdictions.

The immediate result of the Evidence Code will be that counsel will have to be prepared more thoroughly concerning foreign law problems, that he will have to be prepared to counteract surprise information produced at any stage of the trial, and that reliance on affidavits and declarations may no longer suffice. In turn, foreign law experts will be confronted with a great increase of work, particularly in answering unexpected questions on quick notice. They will be unable to respond to requests by counsel to appear in court on short notice, and to appear in person as frequently as they furnish affidavits and declarations. I regret the inconvenience, work and expense caused by the new enactment and have striven hard to obtain modifications of the drafts of the Evidence Code. I can merely hope that the new enactment will work better than I fear it will.

However, I feel it my duty to inform counsel that willingness to submit a memorandum, affidavit or declaration on foreign law cannot be deemed tantamount to a promise to appear in court in each case. The anticipated rapid increase of desired court appearances makes this impossible. It will be necessary to reserve time for court appearances. I suggest that counsel determines in his discretion whether he desires to conclude a retainer agreement with the expert to appear in court in a given case. Because of the anticipated pressure of work, I suggest that such agreements be concluded as far in advance as feasible. Cases in which there is a retainer, will be given preference in the order of time of the retainer and over cases in which there is no retainer. Judging from present circumstances, counsel who does not conclude a retainer agreement, takes the chance that the expert will not have time for oral testimony.

William B. Stern

§ 1875. Judicial notice

Text of section until Jan. 1, 1967

Courts to take judicial notice of the following:

1. The true signification of all English words and phrases, and of all legal expressions;

2. Whatever is established by law;

3. Public and private official acts of the legislative, executive and judicial departments of this State and of the United States, and the laws of the several states of the United States and the interpretation thereof by the highest courts of appellate jurisdiction of such states;

4. The law and statutes of foreign countries and of political subdivisions of foreign countries; provided, however, that to enable a party to ask that judicial notice thereof be taken, reasonable notice shall be given to the other parties to the action in the pleadings or otherwise;

5. The seals of all the courts of this State and of the United States;

6. The accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive, and judicial departments of this State and of the United States;

7. The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States;

8. The seals of courts of admiralty and maritime jurisdiction, and of notaries public;

9. The laws of nature, the measure of time, and the geographical divisions and political history of the world.

In all these cases the court may resort for its aid to appropriate books or documents of reference. In cases arising under subdivision 4 of this section, 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.

If a court is unable to determine what the law of a foreign country or a political subdivision of a foreign country is, the court may, as the ends of justice require, either apply the law of this State if it can do so consistently with the Constitutions of this State and of the United States or dismiss the action without prejudice. (As amended Stats.1957, c. 249, p. 902, § 1.)

Repeal

This section was repealed by Stats.1965, c. 299, p. —, § 61, operative Jan. 1, 1967.

Stats.1965, c. 299, p. —, operative Jan. 1, 1967, repealing this section, enacted the Evidence Code. For provisions relating to the applicability of the Evidence Code to proceedings brought on or after Jan. 1, 1967, to further proceedings pending on that date, and to claims of privilege made after Dec. 31, 1966, see Evidence Code § 12.

The subject matter of the repealed section is covered by Evidence Code §§ 311, 451–456, 1452–1454.