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# Judicial Notice of Foreign Law

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leave in good financial circumstances as residuary beneficiaries have often been left, after payment of taxes, in circumstances quite the opposite of those he intended. Even when the decedent knew the law, he may well have over-estimated his residuary assets in allowing the burden of taxes to fall thereon. Furthermore, a change in the tide of fortune, reducing his assets, coupled with the normal human tendency to put off until tomorrow the testamentary redrafting that should be done today, has often resulted in inadequate provisions for those whom the testator held nearest his heart. Under our new statute specific affirmative direction is required if the normal wish of the average decedent is to be disregarded; the law now prescribes apportionment of the estate taxes among all the beneficiaries in proportion to the interest each has in the estate.

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## JUDICIAL NOTICE OF FOREIGN LAW

### *Florida Laws 1949, c. 25110*

Florida has adopted the Uniform Judicial Notice of Foreign Law Act.[1] Its avowed general purpose is to make uniform the laws of those

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[1] "Section 1. Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States.

Section 2. The court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information.

Section 3. The determination of such laws shall be made by the court and not by the jury, and shall be reviewable.

Section 4. Any party may also present to the trial court any admissible evidence of such laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise.

Section 5. The law of a jurisdiction other than those referred to in Section 1 shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice.

states that adopt it.[2] Specifically, it provides that the Florida courts shall take judicial notice of the laws of sister states and of other jurisdictions of the United States.

Prior to the passage of this act, Florida courts followed two common-law rules regarding judicial notice.[3] First, the common law and statutes of sister states were not judicially noticed; they were treated as facts to be pleaded and proved.[4] Second, in the absence of any plea and proof of the foreign law involved, the court did not dismiss the case but presumed such foreign law to be the same as the law of the forum.[5]

These common-law rules are to be criticized from two standpoints. Under the second rule, the presumption that the law of the state in question is the same as the law of the forum is without satisfactory basis, not only because judicial formulation of much of the common law itself has differed from state to state, but also because in many instances both the law of the sister state and the law of the forum have undergone changes by way of statutory enactments.[6] As a consequence, there never was any reasonable assurance that in making such a presumption justice was being done to the parties involved.

The reasons for the existence of this common-law rule stemmed from the handicaps under which the early courts of England labored in this respect. Foreign law to those early courts was foreign indeed,

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Section 6. This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it.

Section 7. This Act may be cited as the Uniform Judicial Notice of Foreign Law Act.

Section 8. This Act shall be deemed cumulative and in addition to all other laws governing proof or judicial notice of the laws of other jurisdictions."

[2]*Id.* §6.

[3]Collins v. Collins, 160 Fla. 732, 36 So.2d 417 (1948); United Mercantile Agencies v. Bissonnette, 155 Fla. 22, 19 So.2d 466 (1944); Columbian Nat. Life Ins. Co. v. Lanigan, 154 Fla. 760, 19 So.2d 67 (1944); Barnes v. Liebig, 146 Fla. 219, 1 So.2d 247 (1941); Sammis v. Wightman, 31 Fla. 10, 12 So. 526 (1893); Tuten v. Gazan, 18 Fla. 751 (1882).

[4]See note 3 *supra*. As a matter of comity, the Supreme Court of Florida generally did not, however, require strict proof of the law of Alabama, Georgia, Mississippi or Louisiana, provided it was pleaded.

[5]Collins v. Collins, 160 Fla. 732, 36 So.2d 417 (1948); Barnes v. Liebig, 146 Fla. 219, 1 So.2d 247 (1941).

[6]Indeed, this very discrepancy prompted the United States Supreme Court to declare at last that there is no federal common law, Erie R. R. v. Tompkins, 304 U. S. 64 (1938).

being written in a strange language, which had to undergo the grave danger of misinterpretation through translation. Furthermore, the law of foreign countries was not readily accessible, because of the inadequacy both of reporting systems and of the dissemination of the few existing reports. Within the United States, however, there is no problem of translating a foreign tongue; the court procedures among the various states are roughly similar; and to a great extent the laws of the sister states can readily be made available to every court in the nation.

The basis for criticism of the first common-law rule lies in putting a question of law to the jury; once it is made a question of fact, it falls within the province of the jury. Such a procedure promotes faulty interpretation of the law because of the lack of legal perspicacity in the average juror. He is not expected to be able to interpret his own law, yet under this common law rule he is assumed to be fully qualified to perform the at least equally difficult task of construing foreign law. More nearly accurate determination of the foreign law will inevitably result from interpretation thereof by the court, which is specifically trained for work of this type.

The Uniform Judicial Notice of Foreign Law Act is the culmination of a legislative movement, prevalent in the past decade, to change these two functionally obsolete rules of the common law. Florida is the twenty-third jurisdiction of the United States to adopt this act.[7]

Section 1 of the act requires that "Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States." It is designed to do away with the common-law presumption that the law of sister states, in the absence of proof to the contrary, is the same as the law of the forum.

Section 3 provides that "The determination of such foreign law shall be made by the court and not by the jury, and shall be reviewable." This provision is obviously intended to remedy the first of the two objectionable common-law rules, which allowed the jury to pass on matters of foreign law.

Sections 2, 5, 6, 7 and 8 of the act present no serious problems, and are largely self-explanatory.[8]

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[7]9 U. L. A. 109 (Supp. 1948) enumerates these jurisdictions.
[8]See note 1 *supra*.

Section 4, however, has required interpretation in many of the states adopting this act.[9] It provides that "Any party may also present to the trial court any admissible evidence of such foreign laws, but to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise." This language has been interpreted to mean that, if there is a failure to plead or otherwise give reasonable notice to the adverse party that foreign law is to be relied upon, the court will not take judicial notice of the foreign law or admit evidence thereof but will apply the law of the forum.[10] At common law a court need not take judicial notice of an applicable foreign law unless it is so requested;[11] and it may be assumed that this rule has not been changed, for under such an interpretation no effect could be given to the reasonable notice requirement of Section 4. This same rule is applied in the federal courts, which in many instances are required to take judicial notice of state statutes.[12] The reason for this judicially imposed limitation is readily apparent; no judge can possibly be expected to know the laws of all American jurisdictions—much less their applicability in any given case.

If Florida follows the pattern of the other states that have enacted this law, Section 1 will be construed in the light of Section 4, with the result that the courts of Florida must take judicial notice of the common law and statutes of other jurisdictions of the United States if they are specifically requested to do so and if reasonable notice is given to the adverse litigant. It should be noted, however, that Section 2 permits the court to inform itself of foreign law in such manner as it may deem proper, while Section 4 deals only with the right of a party to request that judicial notice thereof be taken. Read together, the two sections indicate that, even in the absence of a request by a party, the court may, if it chooses, take such notice. In other words,

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[9]*E.g.*, see note 10 *infra.*

[10]Fardy v. Mayerstein, 221 Ind. 339, 47 N. E.2d 966 (1943); Maccabees v. Lipps, 182 Md. 190, 34 A.2d 424 (1943); Prudential Ins. Co. v. Shumaker, 178 Md. 189, 12 A.2d 618 (1940); Cliff v. Pinto, 60 A.2d 704 (R. I. 1948).

[11]South Ottawa v. Perkins, 94 U. S. 260 (1876); Amundson v. Wilson, 11 N. D. 193, 91 N. W. 37 (1902).

[12]Ginsberg v. Thomas, 170 F.2d 1 (C. C. A. 10th 1948); Great Am. Ins. Co. v. Glenwood Irr. Co., 265 Fed. 594 (C. C. A. 8th 1920).

if requested by a party in accordance with Section 4, the court must take judicial notice of foreign law; if not so requested, the court may or may not do so, at its option.

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## TORTS: DOG OWNER'S LIABILITY IN FLORIDA

*Florida Laws 1949, c. 25109*

In 1892 Florida enacted its first statute relative to the liability of dog owners.[1] This remained in force as the only legislative enactment on the subject until the present law was passed.[2] Some difficulties are always encountered in the construction of new statutes modifying or abrogating the common law; but this one in particular presents a knotty problem in that it is subject to several conflicting interpretations, yet these could not all have been within the legislative intent. Unfortunately the new statute contains none of the repealing provisions employed by skilled draftsmen.

### I. LIABILITY AT COMMON LAW

In the common law of England as adopted by Florida, the liability of dog owners had become relatively well settled. In 1747, in

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[1]FLA. REV. GEN. STAT. §2341 (1892).

[2]"The owners of any dog which shall bite any person, while such person is on or in a public place, or lawfully on or in a private place, including the property of the owner of such dogs, shall be liable for such damages as may be suffered by persons bitten, regardless of the former viciousness of such dog or the owners' knowledge of such viciousness. A person is lawfully upon private property of such owner within the meaning of this act when he is on such property in the performance of any duty imposed upon him by the laws of this State or by the laws or postal regulations of the United States of America, or when he is on such property upon invitation, expressed or implied, of the owner thereof; 'Provided, however, no owner of any dog shall be liable for any damages to any person or his property when such person shall mischievously or carelessly provoke or aggravate the dog inflicting such damage; nor shall any such owner be so liable if at the time of any such injury he had displayed in a prominent place on his premises a sign easily readable including the words "Bad Dog".'"