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International Judicial Assistance and Utah Practice

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INTERNATIONAL JUDICIAL ASSISTANCE AND UTAH PRACTICE

By GORDON A. CHRISTENSON *

I. INTRODUCTION

International judicial assistance is aid rendered by one nation or its courts to another nation or its courts in support of judicial proceedings in the nation or court requesting assistance.[1] In addition to extradition and criminal proceedings, it has three main aspects: obtaining testimony of witnesses who are abroad, serving judicial documents on persons in foreign countries who are not residents of the country of the forum, and procuring information regarding foreign law. International judicial assistance also covers recognition and enforcement of foreign judgments and arbitral awards, and certain criminal aspects, which will not here be considered.

The need for judicial assistance is not unique to practice in the United States, nor is it limited to major commercial states.[2] However, the United States has not entered into any comprehensive treaties regarding international judicial assistance,[3] while, by contrast, nearly all other important countries have in some measure codified by treaty existing international practice on this subject.[4] As Harry LeRoy Jones[5] has written:

> Practically all the principal countries of the world, except the United States, have entered into treaties codifying the practice of international judicial assistance. But our federal and state courts must rely for their extraterritorial procedures on usage and custom which are difficult of ascertainment, inefficient, outmoded, and generally unsatisfactory.[6]

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[1] See Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515 (1953), which defines international judicial assistance as "aid rendered by one nation to another in support of judicial or quasi-judicial proceedings in the recipient country's tribunals." That definition excludes court-to-court assistance and implies that assistance is rendered solely by nations, which does not encompass common law procedures of self-help. Compare McCusker, *Some United States Practices in International Judicial Assistance*, 37 DEP'T STATE BULL. 808 (1957): "Judicial assistance is the aid rendered by the courts of one country to the courts of another country in support of judicial proceedings taking place in the country which requests the foreign court's cooperation." McCusker's definition unduly stresses the court-to-court assistance.

[2] For example, a letter rogatory issued by the United States District Court for Wyoming gave rise to what is now a classic case involving the question of judicial assistance. United States v. Mammoth Oil Co., 5 F.2d 330, 342 (D.C. Wyo. 1925), *rev'd*, 14 F.2d 705, 726 (8th Cir. 1926).

[3] The United States and the Soviet Union exchanged views on letters rogatory in 1935. Agreement with the Union of Soviet Socialist Republics relating to the execution of letters rogatory was effected by exchange of notes signed November 22, 1935. 49 Stat. 3840, E.A.S. No. 83. More recently other commercial treaties have provided procedures for taking depositions, although they are infrequently used. Before the Second World War both the United States Department of Justice and the Harvard Law School engaged in research with a view to providing the necessary background to enable the United States to enter into comprehensive negotiations regarding international judicial assistance. *Research in International Law, Draft Convention on Judicial Assistance*, 33 AM. J. INT'L L. 15 (Supp. 1939). The Harvard Draft Convention and the Department of Justice study were commended by the American Bar Association in 1938. 63 A.B.A. REP. 178 (1938). The war interrupted further progress, although the first meeting of the Inter-American Bar Association in 1941 endorsed the projects.

[4] See The Hague Convention on Civil Procedure of July 17, 1905. 2 Martens N.R.G. (3° Ser.) 243; 33 AM. J. INT'L L., *supra* note 3, at 148. Signatory parties were: Germany, Austria, Belgium, Denmark, Spain, France, Hungary, Italy, Norway, the Netherlands, Portugal, Ru-

This article will undertake to consider the present framework of Utah procedural law in relation to international judicial assistance. It will endeavor to suggest methods of handling problems of personal service, evidence, and proof of foreign law and will seek to point out some dangers along the way.

Whether the basis for judicial assistance rests on a quest for universality of justice[7] or simply on the need for some convenient and practical method for reducing chaos, most courts of civilized countries do not hesitate giving aid on request by foreign courts. Some writers have said that judicial assistance is, indeed, an international duty imposed by the law of nations to aid in the administration of justice.[8] Others take issue with this characterization and regard judicial assistance as comity among nations rather than the law of nations.[9]

Whether the characterization is law or comity, the broad powers of the President to conduct the foreign affairs of the United States, as stated in the *Curtiss-Wright Export* case,[10] and his constitutional treaty-making powers,[11]

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mania, Russia, Sweden, Switzerland, and Luxembourg. In 1924, Danzig, Estonia, Finland, Latvia, Poland, Czechoslovakia, and Yugoslavia adhered to the convention. The Bustamante Code of Private International Law of 1928, signed at Havana, contained provisions on "International Law of Procedure." 33 AM. J. INT'L L., *supra* note 3, at 152. The Bustamante Code was ratified by 15 states: Bolivia, Brazil, Costa Rica, Cuba, Chile, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, and Venezuela. The Montevideo Convention of 1940 contained provisions on "International Procedural Law" and was drawn up at the Second South American Congress on Private International Law. 37 AM. J. INT'L L. 116 (Supp. 1943). The United Kingdom has 22 treaties with provisions on international procedures. Jones, *Service and Evidence Abroad Under English Civil Procedure*, 29 GEO. WASH. L. REV. 495, 517 (1961). Table B, *id.* at 518, lists procedures available in countries with which the United Kingdom has no convention. Typical of the British-type bilateral agreement is the agreement with Yugoslavia of 1936. 1937 Brit. T. S. No. 28; 33 AM. J. INT'L L., *supra* note 3, at 153. The Seventh Conference on Private International Law at The Hague, October 1951, adopted a draft convention on civil procedures, revising the 1905 convention. See editorial note, Nadelmann, *The United States and The Hague Conferences on Private International Law*, 1 AM. J. COMP. L. 268 (1952). The United States was not invited to the conference because of the traditional policy of the United States against entering into international agreements on judicial procedure.

[5] Director of the Commission on International Rules of Judicial Procedure, established by the Act of September 2, 1958, 72 Stat. 1743. The Commission is charged with studying existing practices of judicial assistance and cooperation between the United States and foreign countries. See 1959 COMM'N ON INT'L RULES OF JUDICIAL PROCEDURE ANN. REP. 1. See also *Hearings on H.R. 4642 Before a Subcommittee of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess. 1 (1958).

[6] Jones, *International Judicial Assistance, Report of the Inter-American Juridical Committee*, 2 AM. J. COMP. L. 365 (1953).

[7] McCusker, *supra* note 1, at 808.

[8] 1 GREENLEAF, EVIDENCE § 320 (1st ed. 1842):

"[B]y the law of Nations, Courts of Justice, of different countries, are bound mutually to aid and assist each other, for the furtherance of justice; and hence, when the testimony of a foreign witness is necessary, the Court before which the action is pending, may send to the Court, within whose jurisdiction the witness resides, a writ, either patent or close, usually termed a letter rogatory . . . ." See also State *ex rel.* Everett v. Bourne, 21 Ore. 218, 27 Pac. 1048 (1891), holding that courts have jurisdiction to execute letters rogatory issued by a court of another *state* even if unauthorized by statute. "[T]he matter under consideration is one of judicial cognizance. It appertains to the administration of justice in its best sense, and its exercise is now common and unquestioned among civilized nations." *Id.* at 228, 27 Pac. at 1051.

[9] *Ex parte* Taylor, 110 Tex. 331, 220 S.W. 74 (1920); Kuehling v. Liebman, 9 Phila. 160 (Phila. Dist. Ct. 1873), in which the court said: "We cannot execute our own laws in a foreign country, nor can we prescribe conditions for the performance of a request which is based entirely upon the comity of nations and which, if granted, is altogether *ex gratia*." *Id.* at 163.

[10] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

[11] U.S. CONST. art. II § 2. "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. . . ." But

are given wide respect by federal and state courts,[12] which traditionally have deferred to the Executive in these matters. This respect tends to add to the passive attitude of many courts so that they become uncertain whether giving judicial assistance without a basis in treaty is desirable or necessary. However, a progressive judiciary, such as in Utah, need not be overly concerned about impinging on the powers of the President when it uses inherent judicial powers to seek or give international judicial assistance.

Natural suspicions about foreign systems of law also lead to a misunderstanding of the nature of judicial assistance. Merely because the method and procedure of the common law are not so deductively or philosophically oriented as that of the civil law does not mean either that foreign systems of civil law are ungrounded in empirical experience or that we of the common law cannot learn from the experience of our civil law brothers. The traditional difference in method between the inductive, empirical common law, which emphasizes the particular judicial decision reasoned from established fact, and the deductive, *a priori* civil law emphasizing universal principles of justice recorded in the codes, does not produce drastic differences in results as many lawyers believed before the comparative method shed light on these alleged differences.[13] Even in Soviet[14] or in Islamic society[15] it is not unusual to find concepts of justice which are familiar both to the civil law and the common law. We are not startled by the similarity of principles of justice in different societies, but at the same time we fully appreciate those differences on which our American system rests.

For a jurisdiction such as Utah, which traditionally has not been concerned with the problem of international judicial assistance, there are few established guides in approaching the problems of administration of justice involving many nations. In one sense this is fortunate, for it stimulates a reappraisal of some past mistakes in considering ways of approaching new methods of international assistance. An enlightened bar and judiciary must chart ways of answering such questions as: How do I serve a judicial document in France? How does one go about procuring testimony or depositions from witnesses in South America? How may one obtain information about German law? Consider also the following questions in reverse: How can a foreign court have judicial documents served in Utah? Are there any

such power is not unlimited. Missouri v. Holland, 252 U.S. 416, 433–34 (1920), said through Justice Holmes, in upholding a treaty between the United States and Great Britain providing protection for migratory birds: "We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. . . . The treaty in question does not contravene any prohibitory words to be found in the Constitution." Reid v. Covert, 354 U.S. 1 (1957), did limit the treaty-making power by denying the military jurisdiction over civilians accompanying forces stationed abroad under treaty arrangements. In treaties for judicial assistance such constitutional limitation might pose problems regarding procedures which must satisfy developed concepts of procedural due process.

[12] United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

[13] See SCHLESINGER, COMPARATIVE LAW, 1–31 (1st ed. 1950).

[14] HAZARD, SETTLING DISPUTES IN SOVIET SOCIETY (1960).

[15] JENKS, THE COMMON LAW OF MANKIND 142 (1958); *Schacht, Islamic Law in Contemporary States*, 8 AM. J. COMP. L. 133 (1959); Anderson, *The Significance of Islamic Law in the World Today*, 9 AM. J. COMP. L. 187 (1960).

problems in obtaining testimony or depositions from witnesses in Utah for use in foreign courts? Suppose the witness is unwilling to testify?

II. Serving Judicial Documents

Judicial realism in the United States views with annoyance the bases for jurisdiction resting on the fictions of presence and consent.[16] In questioning the function of personal service in relation to jurisdiction, recent decisions place great significance on whether a party has received adequate notice and whether it is more convenient for a nonresident to defend in a particular forum than for a resident plaintiff to bring a suit in a foreign jurisdiction where the defendant resides.[17] It has been suggested that a national jurisdiction based on a national service of process is growing near.[18]

But if modern American jurisprudence is skeptical of fictions, it might glance again at such legal necessities as constructive notice based on publication of notice or the idea of constructive presence based on "doing business" within a state or the designation by statute of an agent to receive service. It appears that by operation of law in some of these situations jurisdiction is nearing the civil law idea that it is conferred solely by the code. By fiction, service in such cases is becoming unnecessary to jurisdiction and notice is given only out a sense of fairness.

However, service of process among the states of the Union and service among sovereign nations, while similar in some respects, are not the same. It is true that traditionally American states have regarded their dealings with sister states as a kind of law of nations,[19] and the Supreme Court of the United States has occasionally acceded to this view.[20] But in the realm of obtaining judicial jurisdiction, the full faith and credit clause organically resolves interstate conflicts, especially those regarding fundamental concepts of due process. Principles of international law and comity do not achieve anything like the same degree of unity when conflict arises between foreign nations and the states of the Union. For this reason, service of process among states of the Union and service among foreign nations, while similar in many respects, are not identical for the purpose of comparative studies or in international legal practice. The standards for completion of jurisdiction by personal service so that it satisfies the requirements of full faith and credit may

[16] Ehrenzweig, Conflict of Laws 79–80 (1959).

[17] Pennoyer v. Neff, 95 U.S. 714, 733 (1877) (dictum), stated that a court's jurisdiction could only be exercised in personam after the defendant is "brought within its jurisdiction by service of process within the State, or his voluntary appearance." International Shoe Co. v. Washington, 326 U.S. 310 (1945), recognized a need for changing the "fictive" rules developing from Pennoyer v. Neff. In McGee v. International Life Ins. Co., 355 U.S. 220 (1957), extraterritorial service was deemed sufficient for jurisdiction over corporations in actions arising from transactions having a substantial connection with the state. Hanson v. Denckla, 357 U.S. 235 (1958), said that states were not authorized to exercise nation-wide in personam jurisdiction. An excellent review of in personam jurisdiction in state courts is Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts — From Pennoyer to Denckla: A Review*, 25 U. Chi. L. Rev. 569 (1958).

[18] See 6 Utah L. Rev. 131, 134 (1958). But see Hanson v. Denckla, 357 U.S. 235, 251 (1958), wherein Chief Justice Warren said that "it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts."

[19] City of Detroit v. Proctor, 44 Del. 193, 202, 61 A.2d 412, 416 (1948): "Michigan's sovereignity [sic] is as foreign to Delaware as Russia's."

[20] As in interstate disputes such as Kansas v. Colorado, 206 U.S. 46 (1906).

differ from the standards applicable to completing service under foreign law. Thus, the giving of notice and considerations of convenience of forum are sometimes key factors in judging United States jurisdiction,[21] while other countries might be unconcerned with such matters because jurisdiction over persons may be acquired by means other than personal service.

Therefore, any judicial assistance furnished between the courts of two nations must be given with a clear understanding of when service is required as a condition to jurisdiction and when service is required for the purpose of giving notice of an action but not as a necessary condition to jurisdiction over such action. Understanding this difference at the outset will make very clear the nature of a request for assistance in serving judicial documents of a court of another country or of our own courts.

A. *Service Abroad When Required by Utah Law*

The recent extension of personal jurisdiction beyond state boundaries increases the importance of service abroad. Utah cases and law suggest two types of situations requiring service abroad. First, Utah law might require service abroad in order to perfect jurisdiction to render an enforceable in personam judgment[22] when the Utah court already has jurisdiction over the subject matter.[23] Secondly, there is a requirement in a proceeding in rem or quasi in rem that either personal service or service by publication be made, such as in a foreclosure action where the owner is a nonresident or in a divorce action where one spouse is abroad. In the American concept of jurisdictional due process as influenced by *McGee v. International Life Ins. Co.*,[24] decided by the United States Supreme Court, the test for a state's exercising in personam jurisdiction over nonresident corporations is whether the corporation had a "substantial connection" with the state.[25] The contact theory is based on convenience and social policy. As formulated in *McGee*, the test suggests that a corporation doing business which impinges sufficiently on a jurisdiction, such as Utah, may be in a better position to come to that jurisdiction to defend an action than it is for a resident of the jurisdiction to travel to another jurisdiction to sue.[26] Such reasoning could easily be extended in Utah decisions to persons other than corporations,[27] although the Supreme Court has refused to sustain personal judgments based on extraterritorial service on a defendant

[21] Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956).

[22] See generally Address by Henry N. Longley Before the Section of International and Comparative Law, American Bar Association, Aug. 24, 1959, in 1959 Proceedings A.B.A. Sec. Int. & Comp. L. 34. But see Dykes v. Reliable Furniture & Carpet, 3 Utah 2d 34, 277 P.2d 969 (1954).

[23] Wein v. Crockett, 113 Utah 301, 195 P.2d 222 (1948).

[24] 355 U.S. 220 (1957).

[25] *Id.* at 223. See Kurland, *supra* note 17, at 607.

[26] Balancing of conveniences and fair play underlies Utah cases on jurisdiction. Western Gas Appliances, Inc. v. Servel, Inc., 123 Utah 229, 257 P.2d 950 (1953); McGraiff v. Charles Antell, Inc., 123 Utah 167, 256 P.2d 703 (1953); Wein v. Crockett, 113 Utah 301, 195 P.2d 222 (1948). See Huntington, *"Doing Business" in Utah*, 4 UTAH L. REV. 518 (1955).

[27] Dykes v. Reliable Furniture & Carpet, 3 Utah 2d 34, 277 P.2d 969 (1954); Huntington, *supra* note 26; Ehrenzweig, *supra* note 21; Dambach, *Personal Jurisdiction: Some Current Problems and Modern Trends*, 5 U.C.L.A.L. REV. 198 (1958).

wife in a domestic relations suit.[28] In addition to a jurisdictional basis, notice of the pending action must be made in a manner satisfying due process when nonresident persons are served outside the state.[29] Foreign jurisdictions, particularly of the civil law, regard notice as a courtesy more than as a condition for exercising jurisdiction.[30] It appears that Utah law regarding service of process on nonresidents residing in other states controls cases concerning service of process on persons in foreign countries even though the two situations are identified in separate subsections of Utah rule 4(d).[31]

The service of summons and complaint in foreign countries either by personal service or by publication poses immediate obstacles. If the defendant evades personal service, the only other method by which service can be obtained is by publication.[32] In actions involving unknown defendants, service by publication is permitted by the Utah rules. Supreme Court decisions as well as Utah procedure require better notice than mere publication if defendants are involved whose addresses are known.[33] In foreign jurisdictions service by publication, proper under Utah law, may be as invalid as personal service since foreign law may not permit either personal extraterritorial service or service by publication when it entails mailing a copy of the service by registered mail inside the foreign jurisdiction.

Rule 4(d) of the Utah Rules of Civil Procedure indicates the manner of personal service abroad which is sufficient in Utah practice to complete personal jurisdiction: "The summons, and a copy of the complaint, if any, may be served: . . . .(3) "In a foreign country, by a United States consul, or by some person over the age of 21 years appointed by such consul."

The Federal Rules of Civil Procedure have no comparable section, although the Federal Judicial Code mentions personal service abroad in a few instances.[34] While personal jurisdiction is complete under Utah procedure if a

[28] Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957), where the Supreme Court held Nevada without authority to enter a personal judgment against a wife served in New York, which cut off rights to alimony in addition to ending the marital status of the parties based on situs of the marital contract. Little difference is perceived in the fictitious "situs" of the marital contract and of a commercial contract. See Justice Frankfurter's dissent at 424.

[29] Due process requires better notice than mere publication where addresses of defendants or nonresidents in quasi in rem actions are known. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Walker v. City of Hutchinson, 352 U.S. 112 (1956).

[30] Jones, *supra* note 1, at 545. See also Le Paulle, *Study in Comparative Civil Procedure*, 12 CORNELL L.Q. 24, 30 (1926).

[31] UTAH R. CIV. P. 4(d) distinguishes between service domestically and service in a foreign country.

[32] UTAH R. CIV. P. 4(f)(1) permits service by publication "where the person upon whom service is sought resides outside of the state, or has departed from the state . . . or where in an action in rem some or all of the defendants are unknown . . . ."

[33] See note 29 *supra*.

[34] Section 1783 of the Federal Judicial Code provides for personal service of a subpoena by a United States consul for the purpose of compelling the appearance of an American citizen or resident who fails to appear before a foreign court after due notice or who, while in a foreign country, is sought as a witness in a criminal proceeding by the Attorney General. 28 U.S.C. § 1783 (1958). The criminal part was derived from the Act of July 3, 1926, 28 U.S.C. § 711 (1958) as incorporated in FED. R. CRIM. P. 17(e)(2), enacted to aid in the naval oil reserve prosecutions, and its constitutionality was upheld in Blackmer v. United States, 284 U.S. 421 (1932). 28 U.S.C. § 1784 (1958) permits personal service of an order to show cause regarding execution of property to satisfy any judgment rendered against a witness abroad who is fined for contempt for failure to respond to a subpoena. 28 U.S.C. § 1655 (1958) provides for personal service or service by publication on defendants in actions for enforcement of certain liens. However, a judgment entered in such a suit may be set aside within

United States consul makes personal service or even if he appoints a person over twenty-one years of age who makes the service, applicable foreign law itself may prohibit judicial service of a foreign document within the foreign territory if it is not served through the government or the courts of the country.[35]

There is a basic difference in attitude and underlying philosophy which causes misunderstanding between the civil law and the common law as to service of process. The common law relies upon self-help and adversary procedures, including examination and cross-examination of witnesses by parties, while the civil law is predicated on a more deductive, universal approach in which all juridical procedures emanate from the state and the judicial officers of the courts. The latter procedure mirrors, at least in relation to American law, a system where the judge and officers of court take charge of all judicial functions which include serving documents, taking depositions, interrogating witnesses, and arranging for oral testimony. With the common law adversary procedure, disputants obtain their own depositions and service of their own documents. It is of no concern to the court whether or not personal service is made by a private individual or by an officer of the executive branch of the government so long as proper return of service is made.

Thus, if a Utah attorney in a private law suit involving a corporation whose situs is Geneva flew to Geneva with a copy of summons and complaint and obtained permission from the United States consul there to serve the documents and in fact made service,[36] possibly there would be grounds for diplomatic protest by the Government of Switzerland to the United States because the service of the document in Switzerland would constitute a judicial act under the Utah rules which according to Swiss law would be in derrogation of Swiss sovereignty.[37] In addition criminal charges might be brought against the attorney since the service of a foreign judicial document without proper authority from Swiss officials would be a violation of Swiss law. Moreover, in the event a judgment was obtained in Utah and sought to be enforced in Switzerland, it would be subject to collateral attack for procedural deficiency, and Swiss courts might very well refuse to honor it. This is wholly unlike the question of honoring the judgment of a sister state.[38] International comity does not require giving similar full faith and credit to a foreign judgment. The only international compulsion for enforcing a foreign judgment

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one year if the defendant has not received personal notice. 28 U.S.C. § 1656 (1958). See also 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 121 (1941). A recommended revision in the federal rules would add a section on service abroad which is broader than the comparable Utah rule. See proposed Rule 4 (i), Prelim. Draft of Proposed Amendments to R. Civ. Proc. for U.S. Dist. Courts 3 (1961). For criticism of some aspects of the federal rules, see Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031 (1961).

[35] Jones, *supra* note 1, at 536–37. For an excellent discussion of problems of service abroad under federal rules, see Smit, *supra* note 34, at 1032–53.

[36] CODE PÉNAL SUISSE art. 271 (Du 21 décembre 1937), provides punishment for any person who without authority performs on Swiss territory an act on behalf of a foreign government which is exclusively within the province of the Swiss Government. For general insight into the difference between the civil law and common law practices, see Amos, *A Day in Court at Home and Abroad*, 2 CAMBRIDGE L. J. 340 (1926).

[37] Jones, *supra* note 1, at 520.

[38] The question of jurisdiction is tested best under the full faith and credit clause when a state refuses to recognize a judgment of a sister state. See, *e.g.*, Hanson v. Denckla, 357 U.S. 235 (1958).

is in the advantage to be gained from reciprocal treatment, absent any treaty on the enforcement of foreign judgments.[39]

A second major pitfall is that United States Foreign Service regulations prohibit United States diplomatic and consular officers abroad from delivering civil process issued in the name of American courts to individuals abroad even if they are American nationals.[40] Although this is subject to an exception,[41] where under statute foreign service officers may be required to make service of process,[42] in practice it is nearly an absolute injunction.

Utah rule 4(d) states that the summons and a copy of the complaint *may be* served in a foreign country by a consular official. It is improbable that a deviation from the Foreign Service regulations would be authorized by the Department of State to permit this rule to be used for purposes of completing service under Utah practice by a consular officer. As a consular officer cannot serve a judicial document abroad, he likewise cannot empower another person to serve it. Consequently, the present meaning of the rule is not clear. A litigant now cannot rely on the rule for service abroad. But is his choice of a process server limited exclusively to a consular officer or his designee? If so, the rule is unduly restrictive. This follows since it is not mandatory for a consular officer or his designee to serve process abroad under Utah rules. If process is to be served at all, it is necessary to imply that other private persons may also serve the process.

The United States has only two treaties, one with the United Kingdom[43] and one with Ireland,[44] specifically authorizing American consuls or other persons to serve judicial documents abroad. Even in those countries, however, it is not the practice for American consuls to serve any judicial documents.

One method of handling personal or other service abroad is for a local court to address itself to a foreign court requesting the judicial service of a document. In civil law countries this is done usually under authority of treaty by *commission rogatoire* or letters rogatory.[45] In the common law, however, the term "letters rogatory" (or "letters of request") has been identified exclusively with the practice of requesting evidence abroad, not with service of judicial documents.[46] Consequently, American courts do not issue letters rogatory for the service of judicial documents through a foreign government.[47]

[39] Many foreign jurisdictions are as perplexed by American judicial passivity in procedures for service of process as American courts are by the "strange" conduct of foreign governments. The problem in relying on reciprocity is that underlying judicial philosophies may be ill-adaptable to each other. American jurisdictions may remain suspicious of ordering service of foreign judicial documents, while some foreign jurisdictions probably will sigh equally long at American insistence on self-help abroad in serving documents.

[40] 22 C.F.R. §§ 92.85, 92.92 (1958).

[41] See statutes cited note 34 *supra*; 22 C.F.R. §§ 92.86–.91 (1958).

[42] It may be construed that personal service abroad, when required by federal statute, necessitates action by foreign service officers. See statutes cited note 34 *supra*.

[43] Consular Convention with the United Kingdom, June 6, 1951, art. 17g, 3 U.S.T. & O.I.A. 3426, T.I.A.S. No. 2494 (effective Sept. 8, 1952).

[44] Consular Convention with Ireland, May 1, 1950, art. 17g, 5 U.S.T. & O.I.A. 949, T.I.A.S. No. 2984 (effective June 12, 1954).

[45] Everett, *Letters Rogatory — Service of Summons in Foreign Actions — American and Brazilian Doctrines*, 44 COLUM. L. REV. 72 (1944).

[46] Jones, *supra* note 1, at 526–27; 22 C.F.R. § 92.54 (1958).

[47] Jones, *supra* note 1, at 537.

Assuming the assistance of a foreign government is obtained by other means, there still are dangers. For example, the return of service of a judical document by a foreign court or official is necessary in most jurisdictions of the United States, as it is in Utah.[48] It may violate foreign law for a foreign official to swear to the validity of proof of service for a Utah court, although such a certificate is essential to the validity of the proof of service. Moreover, some foreign jurisdictions will not enforce an American judgment based on personal service unless the service has been made strictly in accordance with the law of the country in which it was made.

Because of the unknown number of countries which are extremely sensitive to extraterritorial service unauthorized by treaty, there are two cautions to observe under Utah procedures: First, private parties attempting service may violate foreign law and incur penalties, even though Utah rules apparently permit persons other than American consuls to complete such service.[49] Second, if service abroad runs afoul of foreign law, it may lay any judgment bare for collateral attack or lay any personal service open to a plea to the jurisdiction on grounds of violating foreign law in the service.

Under Utah rules personal service on nonresidents abroad may be used in the place of service by publication, which has as its purpose adequate notice to nonresidents or unknown defendants. So long as a foreign resident receives adequate notice or is given opportunity deemed in law sufficient to enable him to find out about the pendency of a law suit, the jurisdiction of a Utah court to decide the case would not seem vulnerable to a motion to dismiss for lack of due process.[50]

If any treaties are negotiated in the future codifying international judicial assistance, provision could be made for the personal service of judicial documents.[51] In the absence of treaties Utah lawyers and courts might possibly consider a technique utilized by the civil law and mentioned earlier, the use of letters rogatory. However, at the present time in American practice, letters rogatory are not considered applicable to service of documents abroad,[52] and foreign courts might refuse to assist a Utah court on grounds of reciprocity since American courts traditionally refuse to honor civil law requests for service of process.

Consequently, the less vulnerable procedure is to obtain service by publication in an action against a foreign resident brought in Utah courts, assuming that other jurisdictional requisites are satisfied, since the Utah rules require the clerk of the court to mail a copy of the summons and complaint to parties

[48] UTAH R. CIV. P. 4(g)(2). See Smit, *supra* note 34, at 1043.

[49] UTAH R. CIV. P. 4(d)(3).

[50] UTAH R. CIV. P. 4(f)(1), which sets forth in detail the requisites for service by publication, reflects an active endeavor to satisfy due process requirements of adequate notice. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

[51] Article 2 of the Harvard Draft Convention on Judicial Assistance provides in section 1: "When for the purpose of a civil proceeding a tribunal of a State (State of origin) requires service of a document on a person in the territory of another State (State of execution), a request for the service of the document may be addressed by the tribunal to a particular tribunal or generally 'to any competent tribunal' of the State of execution." 33 AM. J. INT'L L. 45 (Supp. 1939). The Hague Conventions of 1896 and 1905 provide similar assistance for the signatories. See note 4 *supra*.

[52] See *In re* Romero, 56 Misc. 319, 107 N.Y. Supp. 621 (Sup. Ct. 1907).

residing outside Utah if their addresses are known. However, there is a question whether a country such as Switzerland would consider the act of mailing notice of the summons and complaint as an infringement of sovereignty. Since recent Supreme Court decisions require more notice than publication to defendants in actions in rem and quasi in rem whose addresses are known,[53] cautious attorneys in other states may prefer personal service to service by publication in suits where service abroad is required. In Utah it is not necessary to be so careful, because the Rules set forth in detail requirements for actual notice, in so far as possible, prior to publication.[54] That practice appears to satisfy completely the due process requirements imposed by the fourteenth amendment. Consequently, service by publication pursuant to Utah procedure is less risky than personal extraterritorial service.

B. *Service in Utah for Foreign Courts*

It is open to speculation whether Utah courts would be correct if they refused to aid courts of foreign countries in serving judicial documents such as foreign summons on persons present in Utah. Possibly in light of the recent tendency in American courts to treat service more as notice and convenience or fair play than as a formal prerequisite to jurisdiction, Utah courts would order the service and give minimum weight to several cases which declined ordering service when requested by foreign courts.

In *In re Romero*[55] the New York Supreme Court reasoned that it had no power to order service in aid of a Mexican court and said that, even if it had the power, it would not issue an order directing service since the Mexican court could not acquire jurisdiction over the defendant who was a New York bank with no office in Mexico. Furthermore, the court said that foreign laws could not be enforced when they violated public policy or prejudiced interests of citizens.

In a similar case in the Federal District Court for the Southern District of New York, Judge Augustus Hand refused to order service of a summons requested by another Mexican court through letters rogatory "both on the ground that [it] . . . is without precedent, and also because it is contrary to the ideas of American courts as to the limits of judicial juridiction." [56] The action in Mexico was brought for rent and redelivery of certain property under the terms of a lease. The Civil Code of Mexico provided that both

[53] Cases cited note 29 *supra*.

[54] UTAH R. CIV. P. 4(f)(1):

"The party desiring service of process by publication shall file a motion verified by the oath of such party or of someone in his behalf for an order of publication. It shall state the facts authorizing such service and shall show the efforts that have been made to obtain personal service within this state, and shall give the address, or last known address, of each person to be served or shall state that the same is unknown. The court shall hear the motion ex parte and, if satisfied that due diligence has been used to obtain personal service within this state, or that efforts to obtain the same would have been of no avail, shall order publication of the summons in a newspaper having general circulation in the county in which the action is pending. Such publication shall be made at least once a week for four successive weeks. Within ten days after the order is entered, the clerk shall mail a copy of the summons and complaint to each person whose address has been stated in the motion. Service shall be complete on the day of the last publication."

[55] 56 Misc. 319, 107 N.Y. Supp. 621 (Sup. Ct. 1907).

[56] *In re* Letters Rogatory out of First Civil Court of City of Mexico, 261 Fed. 652, 654 (1919).

Mexicans and foreigners may be sued in Mexican courts on obligations contracted within Mexico "even though they do not reside in said places, if they have property which is affected by any obligations contracted or if the same are to be performed in said places." [57] Judge Hand relied on *Pennoyer v. Neff*[58] in refusing to assist the Mexican court in rendering the person sought to be served subject to a personal judgment in Mexico when the only tie to that country was that the contract was to be performed there. He said: "Such a result is contrary to our own system of jurisprudence, which treats the legal jurisdiction of a court as limited to persons and property within its territorial jurisdiction." [59]

However, *Pennoyer v. Neff* has undergone profound change since it first enunciated the doctrine that jurisdiction is based on territorial presence. First by fiction and then more openly have the underlying reasons for jurisdiction been severed from the view that the power of a state can extend only to persons and property within its territorial boundaries.[60] Judge Augustus Hand in his decision denying judicial aid to Mexico enunciated a perfectly logical doctrine equating jurisdiction with power and power with territorial sovereignty. But the decision does not reflect the rapid growth of modern jurisdiction by the process of undercutting the old base of territorial sovereignty as a result of expanding ideas of justice and fair play. It is no longer against "ideas of American courts as to the limits of juridical jurisdiction," to aid in the service of process aimed more at giving notice of jurisdiction already acquired than somehow formalistically completing the act of serving process.

In light of the recent decisions broadening the scope of personal jurisdiction, there are few valid reasons preventing the Utah Supreme Court or any of the district courts from honoring requests for service of judicial documents for foreign courts since *Pennoyer v. Neff* is now the exception rather than the rule.[61]

If foreign courts are concerned mainly with notice type service, why should a Utah lawyer or judge become disturbed about whether a court order is required for service as long as there are no due process objections? When the formal requirements of a foreign court necessitate official rather than private service, then judicial assistance is needed even though the common law might smile at the act of formalism. However, when service is merely a gesture clothed with official sanctity and required only for notice, then no reason is

[57] *Id.* at 653.

[58] 95 U.S. 714 (1877).

[59] *In re* Letters Rogatory out of First Civil Court of City of Mexico, 261 Fed. 652, 653 (1919).

[60] See note 17 *supra.*

[61] McCusker, *Some United States Practices in International Judicial Assistance,* 37 DEP'T STATE BULL. 808, 812 (1957). Judge Albert B. Maris of the United States Court of Appeals, Third Circuit, who is a member of the Advisory Committee on International Rules of Judicial Procedure has said: "Our courts still decline to honor letters rogatory requesting the service of process upon the theory that the foreign court cannot acquire jurisdiction over a resident in this country, wholly ignoring the fact that there may be other bases of jurisdiction which we would recognize ourselves and which that other country is entitled to recognize." *Service and Evidence Abroad under English Civil Procedure,* 29 GEO. WASH. L. REV. 495, 529 (1961). See also remarks of Professor Rudolf B. Schlesinger, *id.* at 533–34.

perceived why the nearest foreign consul could not himself serve the process and save the fuss.[62]

The United States view reflected in the practice of the Department of State is that no objection exists if foreign consular officers serve foreign judicial documents on persons residing in the United States if there is some form of reciprocity.[63] While this view is decidedly liberal, it may not be shared with enthusiasm or fully understood by countries such as Switzerland, Japan and Denmark[64] which have slightly different systems and philosophies. Reciprocity is not workable in those situations. Nor is reciprocity possible where it concerns United States consular officers abroad, since they are prohibited from delivering civil process abroad even to American citizens.[65] Presumably, the regulations are cognizant of the possible impairment of international relations which could justifiably arise if United States consuls were at liberty to serve judicial documents in a jurisdiction in which that function was within the exclusive province of domestic sovereignty.

What are the implications for a Utah lawyer or judge confronted with a request for service of a foreign judicial document on a resident of Utah? The paramount problem facing a judge has been pointed out by the foregoing. He must decide whether to abide by early decisions of other jurisdictions or whether to base his decision upon the present posture of the nature of personal jurisdiction in the United States. A practitioner may encounter two situations. In one, he may be asked by foreign attorneys to complete service on a person within Utah so that the foreign judgment would stand if sued on in Utah courts. In the other, his advice may be requested by a resident of Utah on whom service of a foreign judicial document is being attempted.

A lawyer completing service for parties abroad or for a foreign court would be safe in complying with Utah procedural law so as to meet any possible collateral attack on a judgment if it is sued on in Utah courts at a later time. The only problem is whether this type of service is permitted under the foreign law, which is of no concern to the Utah practitioner. Thus, he may attempt either private service or petition for an order directing service by the sheriff.

If a resident of Utah asks whether to accept or refuse service of a foreign summons by a foreign consular official or his agent, a lawyer should ascertain whether service is required to complete personal jurisdiction in the foreign court or whether the foreign court already has jurisdiction and is merely giving notice. His advice regarding the former will then depend on whether a Utah court will order service by the sheriff and whether other service valid under Utah concepts of fair play could be made. Requirements of foreign courts vary, and in an important case the investigation of foreign law may

[62] British practice in serving judicial documents in the United States is governed by similar thinking. Thus, British courts effect service in the United States "by an agent appointed by the applicant or . . . by a British Consular Officer." *Id.* at 513.

[63] McCusker, *supra* note 61, at 809.

[64] *Ibid.*

[65] 22 C.F.R. § 92.85 (1958): "The service of legal process is not normally a Foreign Service function. Except as specifically provided by federal statute or regulation (see §§ 92.86 to 92.91), officers of the Foreign Service are prohibited from serving legal process or appointing other persons to do so."

take lengthy correspondence. Any attempt to play hide-and-seek with a process server might be simply a stimulating game if the foreign court already has jurisdiction.

Before treaties are negotiated, assuming there will be some movement in this direction, state courts will surely wish to begin re-examining the reasons behind the traditional hesitancy to assist foreign courts in the service of process.

III. Obtaining Evidence

A. *Procuring Evidence Abroad for Use in Utah Courts*

Three types of evidence or information obtained abroad are mentioned in the Utah rules: public or official documentary evidence, affidavits, and depositions.

1. *Public Documents*

Public documents or official documents are admissible as evidence if they are found in an official publication or if a copy is issued by an officer having custody of the documents and if the copy so issued is certified by a judge or other officer.[66] Utah rule 44(a) states that if the office holding the record is in a foreign state or country a certificate that the custodial officier has custody may be made by an officer of the American embassy or legation in the country in which the record is kept. This is similar to federal rule 44(a). But these rules leave unanswered the question how one might obtain a copy of the foreign document by assuming that arrangements for copying have been made. If the custodial officer refuses to give a copy attested by his signature, the foreign service officer is helpless and may not himself certify as to the authenticity of the copy. A certificate of the foreign service officer is merely an authentication of the fact that the custodial officer has attested to the correctness of the copy. If copies of public documents cannot be obtained as a result of private efforts in the foreign country in which they are located, the Department of State or the American embassy in the country may be of possible help or may have current information about obtaining the documents needed.

2. *Affidavits*

Affidavits made abroad may be useful in Utah courts. While an affidavit is usually inadmissible since its contents are not subject to cross-examination, if it falls within an exception to the hearsay rule or is to be used under rule 43(e),[67] it is good evidence and is by far the easiest to procure.

The Utah Code states: "An affidavit taken in a foreign country, to be used in this state, may be taken before an ambassador, minister, consul, vice

[66] Utah R. Civ. P. 44(a). See also Rule 68, *Preliminary Draft of Rules of Evidence*, 27 Utah B. Bull. 9, 48 (1957); 22 C.F.R. § 92.39 (1958). Smit, *supra* note 34, at 1059–71, criticizes federal rule 44 which is similar.

[67] Utah R. Civ. P. 43(e) provides: "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions." Compare Robles v. Industrial Comm'n, 77 Utah 408, 296 Pac. 600 (1931). Rule 63(2), *Preliminary Draft of Rules of Evidence, supra* note 66, at 36, recognizes the admissibility of affidavits to the extent provided by statutes and rules of procedure. See 22 C.F.R. § 92.22–.29 (1958).

consul or consular agent of the United States, or before any judge of a court of record having a seal, in such foreign country." [68] The following section of the Code states: "When an affidavit is taken before a judge or court in another state or territory, or in a foreign country, the genuineness of the signature of the judge, the existence of the court, and the fact that such judge is a member thereof, must be certified by the clerk of the court under the seal thereof." [69]

If the taking of an affidavit is considered an exclusive judicial function under the law of a foreign jurisdiction and if it is taken before an American foreign service officer not otherwise authorized by treaty to do so, a violation of foreign sovereignty could be charged. Furthermore, if an affidavit is taken before a judge in a foreign country, the judge, particularly in civil law jurisdictions, frequently paraphrases the statement of the affiant so that the final form of the affidavit is a statement of the judge recording what the affiant says. To an American court that kind of an affidavit would be double hearsay, even though in practice the same kind of writing may result from the pen of an American lawyer who merely has the client sign the prepared statement. Although an affidavit might otherwise be admissible as an admission against interest or under some other exception to the hearsay rule, the affidavit would not be competent if it is double hearsay.

The most frequent use of affidavits is in ex parte proceedings.[70] There, affidavits are taken for what they are worth by the judge who acts in a capacity not unlike that of his civil law colleagues.

3. *Testimony*

The third and by far the most important method for obtaining evidence abroad is by the use of depositions, either oral or written. Under Utah rules depositions may be taken abroad by giving notice to appear before some American foreign service officer or by commission before a person who is appointed by a Utah court to take a deposition. Testimony may also be obtained on notice without judicial assistance. A commission according to Utah practice is issued by a court in assisting a party only when "necessary or convenient," [71] that is, when giving notice is not permitted by local law or when witnesses refuse to volunteer testimony.

Utah rules regarding depositions differ slightly from the federal rules. Rule 28(b)[72] is similar in each, except that the Utah rule omits reference to letters rogatory. Whether letters rogatory may be issued by a Utah court under its

[68] UTAH CODE ANN. § 78-26-7 (1953).

[69] UTAH CODE ANN. § 78-26-8 (1953).

[70] See note 67 *supra*.

[71] UTAH R. CIV. P. 28(b). Rule 26(d)(3) permits the use for any purpose of a deposition of a witness who is out of the country.

[72] FED. R. CIV. P. 28(b) reads:

"In a foreign state or country depositions shall be taken (1) on notice before a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or (2) before such person or officer as may be appointed by commission or *under letters rogatory*. A commission or *letters rogatory* shall be issued only when necessary or convenient, on application and notice, and on such terms and with such directions as are just and appropriate. Officers may be designated in notices or commissions either by name or descriptive title and *letters rogatory* may be addressed 'To the Appropriate Judicial Authority in [here name the country].'" (Emphasis added.)

inherent procedural power to administer justice is not answered in any discovered cases which were reported after the rules were promulgated. The federal rules restate federal practice reflected by cases to the effect that letters rogatory are only a last resort.[73] They are issued by a federal court in a request addressed to the appropriate judicial authority in a foreign country only if attempts to obtain depositions by notice or commission have been unsuccessful or if an attempt would be futile.[74] The Utah deposition procedures expressed in the rules apparently do not recognize that letters rogatory might be a final recourse for assistance.[75] This omission eventually may cause inconvenience to Utah practitioners and judges, since if there is no inherent procedural power of Utah courts, apart from the rules, to issue letters rogatory, recourse to depositions by commission is the final method in Utah practice for obtaining testimony abroad.

Civil law courts are particularly hesitant, in the absence of treaty provisions, to accept the commission of a foreign court because the taking of testimony may be considered a judicial function which infringes on their own judicial jurisdiction. However, a commission is often desirable since the party requesting it may accommodate himself. It should be used in foreign non-common law countries only with adequate knowledge of whether the person commissioned to take a deposition is violating any law when he takes testimony in compliance with the terms of his commission.[76]

It has been suggested that a semantic mix-up in the usage of the terms "*commission rogatoire*," "commission," and "letters rogatory" has led to the misconception that a person officiating at the taking of a deposition by commission in a foreign country for use in American courts exercises American judicial power delegated for the purpose of obtaining testimony in derogation of foreign sovereignty.[77] While it is untrue that a commissioner in taking evidence exercises delegated judicial authority under common law rules of procedure, it may be true in the civil law in which system it is possible to delegate judicial functions. But a difference in concepts of delegation of judicial power does not itself give rise to a violation of sovereignty when the

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This rule is discussed critically in Smit, *supra* note 34, at 1056–59. See also the proposed revision of federal rule 28(b) in Prelim. Draft of Proposed Amendments to R. Civ. Proc. for U.S. Dist. Courts 26 (1961).

[73] Danisch v. The Guardian Life Ins. Co. of America, 19 F.R.D. 235 (S.D.N.Y. 1956), where letters rogatory to Poland were issued because they were deemed "necessary or convenient" to provide evidence of a power of attorney to represent Polish beneficiaries on an insurance policy of a person dying in the United States. Branyan v. Koninklijke Luchtvaart Naatschappij N.V. Royal Dutch Airlines Holland, 13 F.R.D. 334, 335 (S.D.N.Y. 1952) held that "it must clearly appear that letters rogatory are necessary or more convenient than the taking of depositions by the notice procedure or by commission . . . ." For a statement of the federal practice, see 4 MOORE, FEDERAL PRACTICE §§ 28.05–.07 (2d ed. 1950).

[74] *Id.* § 28.07.

[75] The omission in Utah rule 28(b) of reference to letters rogatory when the remaining language is identical to that of the comparable federal rule infers that letters rogatory were not considered essential to Utah practice.

[76] Doyle, *Taking Evidence by Deposition and Letters Rogatory and Obtaining Documents in Foreign Territory*, 1959 A.B.A. SEC. INT. & COMP. L. 37; Evans, *Oral Depositions in Foreign Countries*, 4 FED. B. NEWS 157 (1957). See 22 C.F.R. § 92.55(c) (1958), for procedure where foreign laws do not permit the taking of depositions.

[77] Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 526–27 (1953).

person taking evidence is not an official of a state. The real problem is the possible misunderstandings that may occur when one judicial system assesses another judicial system in its own idiom and by its own assumptions.

The United States has many commercial treaties with foreign countries concerning the taking of depositions abroad.[78] More numerous are the countries with which the United States has no treaties containing deposition provisions. However, if a consular treaty does contain provisions of that type, the problem is not automatically resolved, for with few exceptions[79] consular treaties do not permit depositions to be taken by commission from non-American citizens. Also, if compulsory attendance at a deposition proceeding is necessary because a witness is unwilling to testify voluntarily, a foreign procedure to compel appearance before a commissioner or court is not likely to be available except in some common law jurisdictions.[80] If there is no consular treaty permitting the taking of depositions, the foreign country, nevertheless, might permit a commissioner appointed by a Utah court to take a deposition, although there is certainly no uniformity of practice even among the legal systems we know something about.

Obviously a Utah practitioner seeking documents, affidavits, or testimony abroad should observe the provisions of any treaties in force as well as foreign law in order to avoid unfavorable results.[81] In order to conform with foreign law, the most valuable suggestion is to seek counsel of a good foreign lawyer. Law lists such as the International Law Directory or those available on request from the Department of State usually give a short statement of qualifications and experience of the lawyers listed so that a fairly good choice may be made if no better method exists for obtaining foreign counsel.

The first step in obtaining testimony abroad by the use of notice or commission is to ascertain whether the particular foreign law prohibits the taking of depositions within its territory by private parties or refuses to recognize a foreign judgment obtained principally on the basis of evidence acquired at such a deposition proceeding. The Office of Special Consular Services of the Department of State may be able to supply this information. If both types of depositions are allowed, then the Utah rules require the proceeding to carry forth on notice, since a Utah court would not issue a commission unless "convenient and necessary." Assistance of foreign lawyers is of great practical importance for depositions taken on notice. If private procedures for taking depositions are not permitted in the foreign country, or if a party by his own efforts is unsuccessful in arranging the appearance of a witness, it might be ap-

[78] *Id.* at 523–24, n. 18.

[79] See authorities cited notes 43 and 44 *supra.*

[80] Canada Evidence Act, CAN. REV. STAT. c. 307 (1952), and various provinces empower courts to order appearance to give testimony or produce documents in aid of foreign tribunals. Re Radio Corp. of America v. Rauland Corp. [1956] Ont. 630, [1956] 5 D.L.R.2d 424 (1956). See Sischy, *Evidence in Aid of Foreign Tribunals,* 1 Osgoode Hall L. S. J., April 1959, p. 49. British practice also permits similar assistance. See Harwood, *Service and Evidence Abroad Under English Civil Procedure,* 29 GEO. WASH. L. REV. 495, 506 (1961). Both countries require an appropriate request through letters rogatory or, as they are called in British practice, letters of request.

[81] Imperfections of existing practice are summarized succinctly in the 1959 COMM'N ON INT'L RULES OF JUDICIAL PROCEDURE ANN. REP. 1, 7, 11, 12. See also Note, *Foreign Depositions Practice in American Civil Suits — A Judicial Stepchild,* 96 U. PA. L. REV. 241 (1947); Heilpern, *Procuring Evidence Abroad,* 14 TUL. L. REV. 29 (1939).

propriate to write the Department of State or the American embassy abroad regarding possible assistance either by commission or by letters rogatory, if they would be issued by a Utah court. Simultaneously, full disclosure should be given to the Utah court having jurisdiction over the matter so that the case will not proceed to trial without adequate opportunity to obtain foreign evidence. Whether a petition for the issuance of a commission should be made to the Utah court would depend on the nature of the information received from abroad or from the Department of State.

A commission differs from a letter rogatory in that the former is a deposition procedure addressed to a particular person who may be an American foreign service officer or some other party, whereas a letter rogatory is sent by diplomatic channels from a court in the United States "to the appropriate judicial authority" [82] in the foreign jurisdiction requesting it to examine a witness. Testimony in a deposition by commission may be taken in English according to American practice, depending on arrangements. If letters rogatory are issued, testimony usually is taken in the foreign language according to foreign practice, thereby requiring the expense of translation. Testimony taken under letters rogatory might not be transcribed verbatim and often is forwarded as a summary of the proceeding written by the judicial officer of the appropriate judicial authority.[83]

To a common law practitioner it is obvious that a deposition by commission is the superior method for his purposes; yet, a deposition by commission may not be possible under foreign law because it would be an act impinging on foreign jurisdiction or because there would be no way of compelling a witness to appear before a commissioner to give testimony in the absence of comprehensive treaty provisions. In such event if a Utah lawyer could not resort to letters rogatory he may be precluded from obtaining the needed evidence.

This brings the discussion to letters rogatory, which, as noted, are not mentioned in the Utah rules even though they are permitted under the federal rules.[84] It is possible to consider that the need for letters rogatory in Utah is satisfied by the provision for taking commissions abroad since a commission could be sent through diplomatic channels if necessary. However, such an interpretation assumes that a foreign court would accept the commission of a Utah court to do what might be considered a judicial act on behalf of a foreign government. Not all countries adhere to the common law notion that the onus for obtaining evidence including testimony is on the parties in litigation. A misunderstanding of this very important difference inherent in civil law and other systems of law could easily lead to the conclusion that letters rogatory are an outmoded and meaningless practice, particularly when one considers that the time and expense involved in that procedure is obviated by the commission procedure. But while a commission is authority to take a deposition to be used in the court issuing it, the foreign government may prefer to have the testimony given under its law and practice and would

[82] 22 C.F.R. § 92.66 (1958). See also Grossman (ed.), *Letters Rogatory* (1956), a symposium before the Consular Law Society in New York.

[83] *Id.* at 62, 80.

[84] See note 72 *supra.*

not recognize a request by commission while it would recognize a request by letter rogatory. The diplomatic practice involving letters rogatory is quite substantial as evidenced by the requests received by the Department of State.

The obvious questions concerning letters rogatory in Utah are whether a Utah court has inherent power to issue them and whether the term "commission" would be construed broadly enough to include issuance of letters rogatory, even in the face of the apparent intentional deletion. In the case of *Ex parte Taylor*,[85] a Texas court was held to have inherent discretionary power to honor a request of a foreign court by letters rogatory, and in *In re Garrett's Estate*,[86] a Pennsylvania court was held to have discretionary power to issue letters rogatory to a foreign court.[87] Also in a request of the Supreme Court of Ontario, Canada, to a Mississippi court to appoint a commissioner to examine a witness under letters rogatory or to punish a witness for contempt for failure to respond, Justice Kyle of the Mississippi Supreme Court said: "We have no statute in Mississippi which expressly confers jurisdiction on the circuit court, or any other court to issue letters rogatory." It was, nevertheless, held that the local court had power to honor the request of a foreign court.[88]

It is possible that like the inherent contempt powers a Utah court has, it would also consider itself inherently robed with procedural powers to issue letters rogatory. This appears to be a sound conclusion, for letters rogatory are only judicial requests for help within a court's power to administer justice.

Even if the obstacle of the power of a court is overcome, however, substantive shortcomings in the procedure of letters rogatory may dissuade a lawyer from attempting to see the process through to the finish. By custom and comity letters rogatory are sent through diplomatic channels, which is both time consuming and expensive in view of translations required and fees which must be paid. The usual fee required by the Department of State to defray expenses is $60.00. In addition, some countries do not issue compulsory process to compel a witness to appear to testify pursuant to a request by letters rogatory unless authority is expressly granted by the law of the place[89] or by treaty.[90] Foreign law may even forbid some witnesses to testify, as in civil law countries which do not allow a party to litigation to be examined as a witness.[91] Usual common law privileges and immunities as well as adversary examination and cross-examination also may not be possible in foreign courts because the judge or the judicial officer interrogates witnesses and summarizes in a *dossier* the testimony received. These differences from common law procedure may result in the sustaining of an objection to the introduction of evidence.[92]

[85] 110 Tex. 331, 220 S.W. 74 (1920).

[86] 335 Pa. 287, 6 A.2d 858 (1939).

[87] See Annots., 9 A.L.R. 966 (1920), and 108 A.L.R. 384 (1937).

[88] Electric Reduction Co. of Canada v. Crane, 239 Miss. 18, 120 So. 2d 765, 769 (1960). See also State *ex rel.* Everett v. Bourne, 21 Ore. 218, 27 Pac. 1048 (1891), quoted note 8 *supra*.

[89] See authorities cited note 80 *supra*.

[90] 1959 COMM'N ON INT'L RULES OF JUDICIAL PROCEDURE ANN. REP. 1, 12–14.

[91] *Ibid.*

[92] Robles v. Industrial Comm'n, 77 Utah 408, 296 Pac. 600 (1931).

There is no one answer to the problem of obtaining international assistance; there is no easy method of obtaining assistance from a foreign court when it is needed in Utah practice. Traditional American skepticism of foreign systems has created many devils now being exorcised. It is small wonder that some foreign jurisdictions have become exasperated and irritated with American practice. Americans, too, have become annoyed with it. Too much time has been wasted in writing letters to foreign offices, the Department of State, embassies, consulates, foreign lawyers, foreign associations of lawyers, parties and witnesses abroad only to find that there is no handy way of ascertaining the rule to be followed and that the only way is the way that has been undertaken. The Department of State is still the best single source of information and may be able to provide very helpful facts about particular countries.

Comprehensive treaties are one solution. The compilation of a volume on available international judicial procedures by country to accompany state and federal rules of procedure might be another. But until some manual of procedures is available, the Utah bench and bar are bound to be as baffled as those in any other state or in any other country when they have occasion, which will not become less frequent, to turn abroad for evidence.

B. *Procuring Evidence in Utah for Use in Foreign Courts*

Although the Department of State observes practices which are prescribed by foreign countries and also forwards to its diplomatic missions abroad letters rogatory which American courts issue for transmisson abroad, it does not transmit letters rogatory sent by foreign governments or foreign courts through diplomatic channels to be executed in the United States.[93] Unlike some civil law countries, the United States Government has no objection if a foreign court makes its request directly to the appropriate American court, nor in the past has the Government desired to become involved in requests for assistance from foreign governments or courts.[94] The preferred way of handling the requests for assistance is through private agents of one of the foreign parties or through foreign diplomatic or consular representatives in the United States directly to the American court involved.[95] Under this practice there is an occasional request for American lawyers to act in behalf of the foreign authorities in presenting a letter rogatory to an American court. This happens most frequently when the consular representative himself can not make the request directly to the court.

When letters rogatory are transmitted by foreign diplomatic missions in Washington to the Department of State for execution, the documents usually are returned with a polite note stating the position of the United States Government and expressing regret. The diplomatic missions might think it a bit strange that American authorities would decline to assist in the administration of justice when requested through diplomatic channels, particularly when their own foreign offices and ministries of justice would unhesitatingly trans-

[93] McCusker, *supra* note 61, at 810.
[94] *Ibid*; 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 99 (1941).
[95] *Ibid*; Grossman, *op. cit. supra* note 82, at 13.

mit the same requests received from the Department of State and in a few cases might even supervise the execution of the request.[96]

Apart from basic philosophical differences in method and procedure, the Department of State has usually advanced other reasons for its refusal to become involved in a request by a foreign government for execution of letters rogatory. Foremost is the absence of authority either by treaty or under domestic law giving the executive branch of the Federal Government power to assist foreign governments by executing letters rogatory and forwarding them to the appropriate courts.[97] Expressed in different words, this is the fundamental conception that the federal government has only limited, express powers. The traditional structure of the American political system divides federal express powers from inherent state powers, the latter including the basic administration of justice. The power of the President to conduct foreign affairs has never been asserted for the purpose of changing this policy. Other reasons underlying the Department's traditional views are, first, a reflection of the American way of gathering evidence, which is considered a responsibility of the parties, and, second, the reluctance to use diplomatic channels when, as a practical matter, the international postman serves equally well.

In Utah the adversary methods of gathering evidence are available to all persons, including foreign persons who are in litigation in foreign courts. While this procedure or method is certainly liberal, it may not be of any use to persons seeking evidence a foreign court will accept. If the foreign law requires that a deposition taken in Utah for use in the courts of the foreign country should be taken in accordance with the law of the foreign country, testimony might not be useful if it is not obtained by a procedure which resembles the foreign practice. Just as a Utah court would hesitate admitting summarized testimony extracted by a foreign judicial authority, so also a foreign court, especially one whose method is inquisitory, might object to testimony not given through an American judge.

More problems stand out when testimony sought by a private party for use in a foreign court is unobtainable because the witness refuses to cooperate with the private party or his attorney. In such a case would a Utah court subpeona the witness under normal Utah deposition practice? The Utah rules on depositions conceivably could be extended to permit this practice. If the purpose for depositions is to assist in the administration of justice by encouraging full knowledge of the facts both before and during trial, then it should make no great difference that the facts are to be used abroad rather than in courts of a sister state.

A letter rogatory addressed directly to a Utah court from abroad requesting assistance in obtaining testimony again raises the question whether Utah courts have inherent power to honor the request. Other state courts have held that the power to honor letters rogatory is inherent and discretionary.[98] It is interesting to note that some provinces of Canada by statute authorize

[96] McCusker, *supra* note 61, at 810.

[97] 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 99–100 (1941).

[98] See authorities cited notes 87 and 88 *supra*.

assistance to foreign courts in obtaining evidence.[99] While statutory authority, such as in Canada or Great Britain, or amendments to rules of procedure might be desirable, the Utah rules could be construed to permit compulsory process in assisting a foreign jurisdiction in the production of evidence.[100] However, a party to a foreign action might be safer in requesting assistance from the United States District Court for Utah rather than from a Utah state court when a subpoena is needed.

Regarding federal courts, section 1782 of the United States Judicial Code provides that the practice and procedure for taking depositions for use in foreign courts, which procedure includes depositions taken by letters rogatory, shall conform to the practice and procedure for taking depositions for use in the United States courts.[101]

Consequently, assistance undoubtedly could be obtained under federal practice in Utah, and possibly even under Utah rules, in the form of compulsory process for the purpose of taking depositions for use abroad. Even if testimony were obtained under either of those procedures, however, there is no assurance that the results would be satisfactory to the procedures in existence in many countries.

IV. Proving Foreign Law

Literature is ample on the substantive problems of proving foreign law in American courts.[102] Whether foreign law is characterized as law or fact and whether it is to be pleaded and proved by utilizing foreign law experts are questions many writers have sought to clarify.[103] Problems also arise when foreign law cannot be proved because no experts are available or because libraries are inadequate.

[99] Sischy, *supra* note 80 and statute cited in that note.

[100] Utah R. Civ. P. 26(g) states: "Any party to an action or proceeding pending in *another state,* may take the deposition of any person within *this state,* in the same manner and subject to the same conditions and limitations as if such action or proceeding were pending in this state. . . ." (Emphasis added.) A subpoena may also be obtained to compel appearance. If a sister state is a jurisdiction as foreign to Utah as a foreign country is, it could be argued that "state" is used here in the larger sense of "jurisdiction" which would include foreign states as well as sister states.

[101] 28 U.S.C. § 1782 (1958):

> "The deposition of any witness within the United States to be used in any judicial proceeding pending in any court in a foreign country with which the United States is at peace may be taken before a person authorized to administer oaths designated by the district court of any district where the witness resides or may be found.
>
> "The practice and procedure in taking such depositions shall conform generally to the practice and procedure for taking depositions to be used in courts of the United States."

[102] Busch, *Pleading and Proving Foreign Law,* 6 Prac. Law. 31 (1960); Busch, *When Law Is Fact,* 24 Fordham L. Rev. 646 (1956); Nussbaum, *The Problem of Proving Foreign Law,* 50 Yale L.J. 1018 (1941); Nussbaum, *Proof of Foreign Law in New York: A Proposed Amendment,* 57 Colum. L. Rev. 348 (1957); Nussbaum, *Proving the Law of Foreign Countries,* 3 Am. J. Comp. L. 60 (1954); Stern, *Foreign Law in the Courts: Judicial Notice and Proof,* 45 Calif. L. Rev. 23 (1957).

[103] *Ibid.* Kuhn, *Judicial Notice of Foreign Law,* 39 Am. J. Int'l L. 86 (1945); Note, *Proof of the Law of Foreign Countries: Appellate Review and Subsequent Litigation,* 72 Harv. L. Rev. 318 (1958); Comment, *State Court Interpretation of Foreign Law: A Guide for the Federal Courts,* 26 U. Chi. L. Rev. 653 (1959).

While there was some confusion and difficulty in proving foreign law in earlier Utah practice,[104] the promulgation of rule 44(f) has greatly reduced the confusion and has attempted to introduce a realistic ring to the problem of foreign law in Utah courts:

> A printed copy of a statute, or other written law of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree or ordinance by the executive power thereof, contained in a book or publication purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law of the judicial tribunals thereof, is presumptive evidence of the statute, law, proclamation, edict, decree or ordinance. The unwritten or common law of another state, or of a territory, or of a foreign country, may be proved as a fact by oral evidence. The books of reports of cases adjudged in the courts thereof must also be admitted as presumptive evidence of the unwritten or common law thereof. The law of such state or territory or foreign country is to be determined by the court or master and included in the findings of the court or master or instructions to the jury, as the case may be. Such finding or instruction is subject to review. In determining such law, neither the trial court nor the Supreme Court shall be limited to the evidence produced on the trial by the parties, but may consult any of the written authorities above named in this subdivision, with the same force and effect as if the same had been admitted in evidence.[105]

As helpful as the foregoing rule is, one cannot escape the burden of ascertaining what the foreign law is in a given case, although the process is eased considerably by the rule that a printed copy of a statute or written law or decree of a foreign country is presumptive evidence of that law or decree.[106] Moreover, a Utah court is not limited to evidence of written or unwritten law produced by parties and may rely on its own investigations of written authorities declared presumptive of foreign law. Also, on appeal the Utah Supreme Court may review findings of a district court regarding foreign law. In general, however, ascertaining foreign law under rule 44(f) is somewhat of an amphibious operation, being neither on the land of fact nor on the sea of law.[107]

The assistance required in Utah practice in order to put the statement of foreign law beyond the realm of controversy is twofold: Private assistance of foreign lawyers to a Utah lawyer is helpful and is an excellent channel for obtaining all publications containing the necessary laws with any variations in interpretation due to custom and practice. The other type of assistance is

[104] Under previous statutes Utah courts would not take judicial notice of laws or statutes of sister states. Whitmore Oxygen Co. v. Utah State Tax Comm'n, 114 Utah 1, 196 P.2d 976 (1948); Dickson v. Mullings, 66 Utah 282, 241 Pac. 840 (1925); Shurtliff v. Oregon Short Line R.R., 66 Utah 161, 241 Pac. 1058 (1925); Home Brewing Co. v. American Chemical & Ozokerite Co., 58 Utah 219, 198 Pac. 170 (1921); Hunt v. Monroe, 32 Utah 428, 91 Pac. 269 (1907).

[105] UTAH R. CIV. P. 44(f). There is no comparable federal rule on this subject. See also UTAH CODE ANN. §78-25-1 (1953), dealing with facts about which courts shall take judicial notice.

[106] While termed "presumptive evidence," a published, authorized foreign law appears to be closer to a question of law to be determined by the court than it is to a question of fact to be proved by the parties.

[107] See Stern, *Foreign Law in the Courts: Judicial Notice and Proof*, 45 CALIF. L. REV. 23 (1957).

a request for a certificate from a foreign authority stating accurately the relevant text of the foreign law applicable with any cases of interpretation.[108] It is difficult to say what credit would be given under rule 44(f) to the latter type of certificate. Furthermore, the Utah procedure specifically states that printed laws when properly meeting the test of authenticity are only presumptive evidence. Thus, a litigant opposing the statement of law would have opportunity to rebut the presumption by obtaining additional authentic laws or regulations clarifying or altering the initial presumption.

Although printed texts of foreign law are accorded the weight of a presumption, thereby simplifying the task of proving foreign law, establishing the finer points of law might entail great expense in procuring adequate information from foreign counsel or from distant libraries such as the New York City Public Library or the Foreign Law Section of the Library of Congress. A cheaper method is to obtain certified copies of texts of codes, decrees, regulations, interpretations, or decisions from foreign lawyers.

The problems of international judicial assistance to Utah courts in proving foreign law are not so great in light of rule 44(f), despite its ambiguities. That rule removed obstacles created by treating foreign law as fact, thereby requiring proof by testimony of experts.[109] The more fruitful concern may now rest with investigation, research, and communications with private sources abroad. It is now unnecessary to consider asking for assistance through intergovernmental channels.

V. Conclusion

The most indefatigable and vocal critics of foreign law and procedure are usually the most ignorant of how best to use international judicial assistance for their own benefit in time of need. A practical way of giving and obtaining judicial assistance at the present time must be given more thought as Americans have more to do abroad. Skepticism heretofore has impeded a more definite and helpful approach to judicial assistance.[110] Until the studies of the Commission on International Rules of Judicial Procedure, established in 1958 by Act of Congress, and of the Columbia University Project on International Procedure, under grant from the Carnegie Foundation, are completed and recommendations made, there will not be much chance of any reform in international judicial procedures in the United States.

With the ingenuity of individual practitioners and judges, a strong impetus for reform, either by comprehensive treaties or by greater education explaining procedures now available, should continue and receive encouragement in this country and state.[111] The movement for procedural reform will sup-

[108] Unless such a statement cannot be obtained from private sources, the Department of State will not request assistance through diplomatic channels.

[109] See Busch, *When Law Is Fact*, 24 Fordham L. Rev. 646 (1956).

[110] Ledermann, *Psychological Impediments to Effective International Co-operation*, 48 Am. J. Int'l L. 304 (1954).

[111] See also Uniform Foreign Depositions Act, § 1, 9B Uniform Laws Ann. 41 (1957), proposing compulsory process in domestic depositions to secure testimony for use in courts of sister states, territories and foreign jurisdictions. Recommendations have recently been made in the Prelim. Draft of Proposed Amendments to R. Civ. Pro. for U.S. Dist. Courts 3, 26 (1961) for revision of federal rules 4 and 28(b), and in 1960 Comm'n on Int'l Rules of Judicial Procedure Ann. Rep. for the enactment of a federal statute.

port the start which was inspired by the Harvard Draft Convention on Judicial Assistance in 1939 and later extended by the articles and work of Harry LeRoy Jones and others.

If parties in litigation can serve process abroad, obtain evidence abroad, and freely obtain foreign law materials and if foreign litigants can have the same assistance in this country, misunderstandings in legal systems of substantive law can be lessened and apparent differences overcome with a resulting increase in a sharing of principles of law common to civilized countries, which is necessary to public order.

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