

INTERNATIONAL JUDICIAL ASSISTANCE: PROCEDURAL
CHAOS AND A PROGRAM FOR REFORM

HARRY LEROY JONES†

IN its increasing attempt to establish economic, military, and cultural cooperation with other nations of the free world, the United States has overlooked one area in which absence of international collaboration imposes hardships on lawyers and litigants both at home and abroad. This is the area of international judicial assistance: aid rendered by one nation to another in support of judicial or quasi-judicial proceedings in the recipient country's tribunals.¹ Where it is forthcoming, this assistance may be rendered in several ways. The judicial and executive branches of one country, for example, may aid the courts or the litigants of another country in their attempts to secure extradition of a fugitive from justice or to gain recognition and execution in foreign courts of a home-country judgment. While the existence of many treaties reduces confusion in the law of extradition, the subject of foreign

†Chief Hearing Examiner, Office of Alien Property, Department of Justice.

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1. "International Judicial Assistance" is the title by which the subject is usually known in foreign legal systems: *entraide* or *assistance judiciaire internationale* in French, *zwischenstaatliche* or *internationale Rechtshilfe* in German, and *assistenza giudiziaria internazionale* in Italian. "Judicial assistance," the title selected by the Harvard Research in International Law, *infra* note 6, is not satisfactory, however, because of confusion with legal assistance to indigent aliens. Nor is "International Judicial Cooperation" satisfactory, in spite of the semantic appeal of the word "cooperation," because it inaccurately implies the functioning of two courts—one of the state of the forum and one of the foreign state of execution. Ideal procedures, as common law lawyers view them, would avoid, as far as possible, applications to a foreign court.

The functionally descriptive title of "International Procedures in Civil and Criminal Matters" is apt, but too long. It accords with the treatment of the subject in The Hague Convention of 1905 "on Civil Procedure," the twenty-two United Kingdom treaties "On Legal Proceedings In Civil and Commercial Matters," the Bustamante Code of 1928, which contains provisions on "International Law of Procedure," and the Montevideo Convention of 1940 on "International Procedural Law." See pages 553-6 *infra*.

However, since any procedural treaty would supplement the Federal Rules of Civil and Criminal Procedure, the Admiralty Rules, and the state practice acts, its provisions would most appropriately be designated "International Rules of Judicial Procedure."

judgments is sufficiently tangled to merit further study. Yet these pages will be concerned with three other and somewhat interrelated problems which confront the litigant whose cause embraces persons or events beyond the forum country's borders.² These are the problems which arise when the litigant wishes to procure testimony of witnesses not resident in the forum country, to serve judicial documents on non-residents, or to obtain information on foreign law.

Demand for these three kinds of judicial assistance is reciprocal. American courts need assistance from other nations in order to find facts, seek out absent parties and witnesses, and learn about relevant foreign law. And for the same reasons, other countries call upon the United States to assist foreign tribunals. Yet United States courts neither receive adequate assistance from, nor dispense adequate aid to other nations, and this reciprocal inadequacy is particularly severe with respect to countries where civil law prevails. These countries, on the other hand, have covered the globe with a network of treaties to assure judicial assistance *among* "civilian" courts, a fact which may interest common law practitioners who suppose that the common law system is more interested in fact-finding than is the civilian system.³

American courts are deprived of adequate overseas assistance at a time when our tribunals hear an unprecedented volume of litigation involving international complications. War-caused dislocation of persons and property and America's post-war position as the leading industrial and creditor nation of the world combine to confront the bar with unexpected and sometimes insoluble problems of international practice. Suits for return of property seized by the United States under the Trading with the Enemy Act, actions concerning international transportation and trade, and problems connected with the administration of estates are especially productive of procedural difficulties. Research in comparative law, long viewed as an academic pursuit unrelated to bread-and-butter aspects of practice, has now become a crucial

2. The Harvard Research in International Law, *infra* note 6, found that the difficulty of the subject of foreign judgments rendered advisable the consideration of this subject as a separate undertaking. Since publication of the Harvard Draft Convention in 1939, some sentiment has arisen for the inclusion in any procedural treaty of provisions regulating the recognition and enforcement of foreign judgments. The Seventh Session of The Hague Conference on International Private Law recommended to the Netherlands State Commission (the permanent organ constituted in 1897) consideration of whether steps should be taken relative to the draft convention on the recognition and execution of foreign judgments prepared in 1925. FINAL ACT, Oct. 31, 1951, p. 13. See note 131 *infra*. For some recent developments in this field, see Nadelmann, *Reprisals Against American Judgments?*, 65 HARV. L. REV. 1184 (1952).

3. The greatest difference between the civil law system established by Justinian and the common law, it has been said, is the method of approach. "Lord MacMillan has said that it is the difference between the library and the laboratory, between Aristotle and Bacon." WAR DEP'T, MODERN CIVIL LAW 3 (Civ. Aff. Inf. Guide, Pamph. No. 31-102, 1945).

part of the routine of many lawyers.⁴ Increased resort to foreign procedure by American courts—and an increase in foreign court requests for American aid—only make more apparent the need for adequate international judicial assistance.

The United States has moved to end its long history of juridical isolationism. Last September Attorney General McGranery announced to the Judicial Conference that President Truman had approved a recommendation for the establishment of a governmental commission to study "existing international practices of judicial assistance available to state and federal courts and admini-

4. In the first number of the new *AMERICAN JOURNAL OF COMPARATIVE LAW*, the editor, Hessel E. Yntema, writes:

"[O]n the practical side, the massive evolution of the domestic economy and, during the twentieth century, the enormous extension of the foreign interests of the United States, concomitant with the increasingly significant role which the country, despite prior isolationist preconceptions, has had to assume in world affairs since the first World War, has imposed upon the legal profession of the United States widely enlarged responsibilities. It is no longer feasible for those who are concerned with the complex problems of private as well as public law that inevitably arise not merely in connection with the foreign commerce of the United States and the effort to establish an international legal community, but also in considering proposed legislation and legal reform in the domestic scene, to ignore or misestimate what is happening in other parts of the world." 1. *AM. J. COMP. L.* 11 (1952).

Even before World War II, lawyers were beginning to take note of the importance to them of foreign law. Fritz Moses, a former Judge of the Landgericht at Berlin, has written:

"[T]he tremendous technical progress in our means of communication and transportation cannot but result in a steady increase and intensification in personal relations between nationals of different countries. What does that mean to the lawyer? . . . it means that he is apt in his practice to be concerned to an ever-widening extent with foreign interests of his clients. Today any lawyer may be called upon—to mention only a few examples—to advise his clients on the drafting of a sales contract, an agency contract with a foreign merchant; to draw up a will with foreign beneficiaries with foreign property to dispose of; to settle a dispute with a foreign party or simply to collect a claim from a foreign debtor. . . .

"
"But little, if any, thought has been given to the eminently practical, eminently pressing problem of how to handle cases of foreign law or—rather—cases with a foreign aspect: cases which may be pending in our courts, but where one or the other party is a foreigner or where the transaction or part of it took place abroad or where actual questions of foreign law arise; cases which may be pending in foreign courts, but where proper preparation must be made in this country and correspondence carried on with foreign attorneys; cases where disputes with foreigners are to be settled without litigation or—prophylactic work—where a contract is to be drawn adapted to all the laws which may govern part or all of it and providing for the peculiar contingencies which may arise due to its international character. . . ." *International Legal Practice*, 4 *FORD. L. REV.* 244 (1935).

strative tribunals."⁵ The commission will draft international agreements and recommend necessary legislation and other action to improve and codify international practice. It is contemplated that the commission will consist of representatives of the Departments of Justice and State and of the federal judiciary. It will be aided by a larger advisory committee, selected from the bench, the bar, and law school faculties.⁶

The problems with which the commission must deal will be considered in this article under three categories: foreign assistance to American courts, American assistance to foreign courts, and ascertainment in American courts of relevant foreign law. Emphasis here will be on the major problems arising in federal practice; but the problems of state courts, with their wider jurisdiction over common law matters, are essentially the same.

FOREIGN ASSISTANCE TO AMERICAN COURTS

Taking Testimony Abroad

A leading Anglo-American contribution to the world's judicature is the adversary oral examination—direct and cross—of witnesses. Yet the neglected condition of American procedure for "importing" testimony from abroad has caused commentators to characterize this procedure as "a judicial stepchild,"⁷ and it is in the examination of witnesses in foreign countries that our international practice is most chaotic, inadequate, and exasperating.⁸

The Federal Rules

The provisions for foreign testimony in the Federal Rules of Civil Procedure seem simple enough. These rules, which closely resemble the practice of most states,⁹ provide that evidence may be taken abroad either by

5. Report to the Judicial Conference of the United States, Sept. 22, 1952.

6. The Commission will have as a starting point for its study and recommendations an excellent Draft Convention on Judicial Assistance published by the Harvard Research in International Law in 1939, 33 AM. J. INT'L L. (Supp. 1939) (hereinafter cited as Harvard Draft). The comment of the reporters, the bibliography, and appendices of pertinent legislation, treaties, conventions, and draft conventions, which accompany the Draft, constitute the only reservoir of authority on the subject available in American libraries.

7. Note, *Foreign Depositions Practice in American Civil Suits—A Judicial Stepchild*, 96 U. OF PA. L. REV. 241 (1947).

8. "The difficulties surrounding the securing of evidence abroad are such as to confound any general practitioner not experienced in such matters. Even to one who has the necessary experience, the delays and red tape involved in an effort to secure such evidence create a formidable psychological barrier in the prosecution of a litigation." Heilpern, *Procuring Evidence Abroad*, 14 TULANE L. REV. 29 (1939). See also Schein, *Inter-American Judicial Cooperation in Practice*, 18 D.C.B.J. 446 (1951).

9. For a collection of state statutes relating to the taking of depositions, see 45 HARV. L. REV. 176 n.3 (1932). However, only a few states have statutes providing for the issuance of letters rogatory *eo nomine*. See Reporters' Comment, Harvard Draft, at 68. The prevailing federal method of taking depositions "on notice" was borrowed from the states. See Advisory Committee's note to Fed. R. Civ. P. 26(a).

deposition or by *letter rogatory*.¹⁰ Under the Rules, a *deposition* may be taken in three ways: (1) "On notice." Here one party merely serves written notice on the other that at a given time and place, before a specified United States consular or foreign service officer, he will orally examine a specified witness. No order of court is necessary. (2) "By commission." Here a party requests the court to authorize a foreign service officer, or any other person designated as commissioner, to take a deposition. Issued only when "necessary or convenient," the court's commission will contain such special directions governing the mode of taking the deposition as the circumstances may require. A party upon whom a notice is served to take a deposition orally before a consul, may object and ask that a commission be issued to examine the witness on written interrogatories, if he thinks that the importance of the case or the nature of the expected testimony does not justify the expense and time of oral examination. (3) "By stipulation." Here the parties stipulate in writing to have the deposition taken before any person and at any time or place suitable to both parties. Under Rule 15 of the Federal Rules of Criminal Procedure, a deposition in a criminal case may be taken in the same manner as in civil cases but only on order of court.

In contrast to a deposition, which may be taken without asking the assistance of courts in the country where the designated witness resides, a *letter rogatory* is the request by a domestic court to a foreign court to take evidence from a certain witness.¹¹ A letter rogatory is customarily accompanied by the domestic court's own written interrogatories, which the foreign court is asked to put to the witnesses. However, the procedure followed in examining witnesses and documents is that of the foreign court. Because of this fact and because the interposition of a foreign court is required, United States lawyers consider the letter rogatory the less desirable of the two methods, and they commonly turn first to depositions.

What the Rules Do Not Say

Unfortunately, neither the Federal Rules nor similar state statutes warn American lawyers and judges that a deposition or letter rogatory can be used only "if and as foreign law permits." As a result, some lawyers and judges

10. Rules 26-31 relate to the taking of depositions on oral or written interrogatories generally. Rule 28(b) prescribes the officers before whom foreign depositions may be taken. An executed letter rogatory is often referred to as a deposition, but for convenience of treatment and to avoid confusion, depositions and letters rogatory will be distinguished in these pages.

11. See WEEKS, LAW OF DEPOSITIONS § 143 (1880). For a form of letter rogatory, see 4 MOORE, FEDERAL PRACTICE § 23.05 (2d ed. 1950), and 3 BENEDICT, ADMIRALTY § 400 (6th ed. 1940). There appears to be considerable general ignorance of letters rogatory. The writer is advised by those in the Department of State who answer inquiries about obtaining evidence abroad that often lawyers and courts submit requests to foreign courts on commission forms, and that sometimes it is necessary to return them two or three times for correction. Occasionally the Department has been able to make itself understood only by submitting a specimen form of letter rogatory. In one case at least, the Depart-

naively assume that foreign countries will respect and tolerate the procedural techniques permitted by the American rules. A recent incident in Switzerland illustrates what can happen to lawyers who attempt to take evidence in a foreign country when ignorant of local laws and governmental attitudes. In October, 1949, three attorneys of the Netherlands Ministry of Finance appeared in Lucerne to put some questions to a Dutch citizen living in Switzerland who had filed suit against the Netherlands government for redetermination of his tax liability; after interrogation, the plaintiff signed a written copy of his answers. To an American observer, the procedure would appear routine. The Dutch lawyers were arrested and jailed, however, charged with usurping the sovereign functions of the Swiss government¹² and accused of "economic espionage"¹³ on behalf of a foreign agency. The Federal Council, supreme Swiss executive authority, assumed jurisdiction under the Swiss Code of Criminal Procedure. The Netherlands legation at Berne then presented apologies on behalf of Her Majesty's government and promised that the three miscreants would be disciplined. Appeased, the Federal Council dismissed the criminal case. The Council announced that although the Swiss Confederation viewed the incident as one of international gravity, the Dutch officials would merely suffer expulsion and confiscation of certain papers, rather than prosecution. Despite the attitude of the Swiss govern-

ment despaired of educating a particular state court on the distinction between a letter rogatory and a commission, redrafted the instrument itself, and returned it to the court for reissuance.

12. Art. 271 of the Swiss Penal Code, as translated, reads in part:

"Whoever, on Swiss territory, without being authorized so to do, takes on behalf of a foreign government any action which is solely within the province of a [Swiss] government authority or a [Swiss] government official, whoever does anything to encourage such action, . . . shall be punished by imprisonment, in serious cases in the penitentiary."

13. Art. 273 of the Swiss Penal Code, as translated, reads in part:

"A person who, through spying, secures a manufacturing or business secret, in order to make it accessible to a foreign official agency, or to a foreign organization, or to a private business enterprise, or to their agents, a person who makes accessible a manufacturing or business secret to a foreign official agency, or to a foreign organization, or to a private business enterprise, or to their agents, shall be punished by imprisonment, in serious cases in the penitentiary. In addition a fine may be imposed."

The Swiss Federal Tribunal has interpreted this article very broadly: "The term 'business secret' . . . comprises all facts concerning the economic life of any legal entity or person, where there exists a legally recognized interest to keep such facts secret. Therefore situations and transactions concerning private property and income may be embraced by this concept." *Bundesanwaltseft gegen Bodmer*, 65 (pt. I) B.G.E. 330, 333 (1939).

Art. 162 of the Swiss Penal Code protects secrets "relating to production or to business," particularly in unfair trade practices, without reference to foreign governments and agencies. The Swiss Banking Law protects banking secrets. See *Société Internationale, etc. v. McGranery*, *infra* note 38.

ment, American courts have ordered issuance of commissions to take depositions in Switzerland, apparently without realizing the threat posed to both the designated commissioner and the parties' attorneys.¹⁴ United States courts and litigants are often unaware that their twin assumptions—that testimony may be taken at will and that specific American procedures can be projected into foreign territory—are generally erroneous and possibly dangerous.¹⁵

Only in the British family of nations are these assumptions valid; the United Kingdom and the Commonwealth neither limit nor object to American fact-finding methods. But when the prospective witness inhabits a civil or Islamic law country, the American practitioner who would interrogate the witness may face restrictions or complete frustration. Switzerland is only one of the many countries which forbid foreigners to take depositions of some, or all, residents. And if depositions are barred or if the witness is unwilling to depose, then resort to a letter rogatory may not prove much more satisfactory. For example, despite their prior consent to execute a letter rogatory, courts in some lands will not compel an unwilling witness to testify.

14. A short time ago in New York, Justice Pecora of the Supreme Court granted an order for the issuance of a commission to take depositions on oral interrogatories in Budapest. Upon representations that it would be dangerous for the plaintiff, a refugee, to re-enter Hungary for the purpose of the depositions, the court modified the order by directing that the depositions be taken before an American consular officer in Geneva, Switzerland. The order was appealed and modified by the Appellate Division, with the result that the commission was not issued; but, apparently, neither counsel nor the two courts ever realized that the depositions could not have been taken in Geneva without endangering the liberty not only of the plaintiff but of the attorneys and the commissioner as well. *Bator v. Hungarian Commercial Bank of Pest*, 194 Misc. 232, 87 N.Y.S.2d 700, modified on reargument, 196 Misc. 157, 90 N.Y.S.2d 34 (Sup. Ct.), modified on appeal, 275 App. Div. 981, 90 N.Y.S.2d 35 (1st Dep't 1949). In *Goffin v. Esquire, Inc.*, 271 App. Div. 955, 67 N.Y.S.2d 639 (1st Dep't 1947), the Appellate Division authorized the issuance of an open commission to take a deposition before the United States consul in Geneva. See also *U.S. Neckwear Corp. v. Sinaco, Inc.*, 176 Misc. 51, 52, 26 N.Y.S.2d 546 (Sup. Ct. 1941), where the court refused to issue a commission "to the consular representative" at Berne and Zurich because the witnesses could not "be compelled to attend before a consular officer" and "the Courts of the Confederation of Switzerland will not execute the usual commission to examine witnesses but will recognize and execute letters rogatory."

15. For an example of the second of these assumptions, see *Grossman v. Young*, 13 Fed. Rules Serv. 30 b. 41 (S.D.N.Y. June 28, 1949), where the court issued a commission to take the deposition of a resident—and presumably a citizen—of Ontario. The commission contained a "direction" to the witness "to produce" certain books and records. Although it could be inferred that the court thought such a "direction" necessary to enable the commissioner to apply to a court in Ontario for aid (under the Ontario Evidence Act, ONT. REV. STAT. 1950, c. 119, § 57) in case the witness refused to produce the documents voluntarily, the "direction" was made without apparent concern for Canadian procedures, and its language was of the kind which Wigmore has characterized as "a breach of international courtesy." 8 WIGMORE, EVIDENCE 93 n.2 (3d ed. 1940).

American lawyers who desire to anticipate these restrictions will not find enlightenment easy. Great Britain and other foreign common law jurisdictions pose no research difficulties. The vagaries of the civil and Islamic law, however, often are almost impossible to discern. Consular treaties may contain provisions governing deposition practice, but these agreements do not cover proceedings where non-American citizens depose. Aside from consular treaties, only usage and custom govern the practice of non-common law countries with respect to the taking of testimony for United States courts; unlike British and civil law governments, the United States has entered into no general treaty or convention codifying international procedures.¹⁶ And to the mystified American lawyer, standard reference works may not prove very helpful. Digests of foreign law generally are silent on the question, and Dyer-Smith's compilation, the only generally available volume supplying practical information on foreign procedure,¹⁷ is now fourteen years old and partially obsolete. Foreign courts do not supply information, and a foreign attorney may charge heavily for his advice. A lawyer may find that the only remaining route to knowledge lies in correspondence with the State Department, which may have at hand little or no relevant advice from the appropriate foreign mission.

The difficulties involved in foreign assistance may be more clearly observed by an examination of the specific problems connected with the two basic techniques for securing foreign testimony.

Depositions

Obtaining evidence in countries where no consular treaty governs deposition practice is a process beset with obscurity. Unless the litigant is able to incur the expense of retaining foreign counsel, the only way to find out which, if any, of our deposition procedures are permitted may be to ask

16. In addition to the consular treaties listed in note 18 *infra*, we have only four specialized international agreements containing provisions relating to judicial assistance:

a. Agreement with Spain exempting from authentication signatures attached to letters rogatory exchanged between Puerto Rico, the Philippine Islands, and Spain, effected by exchange of notes on August 7, 1901, and by a declaration by the Secretary of State and the Spanish Minister at Washington on November 7, 1901. U.S. TREATY SER. No. 395 (Dep't State 1901); 2 TREATIES, ETC. 1697 (Malloy Comp., 1910).

b. Art. V, convention with Canada for the suppression of smuggling, signed June 6, 1924. U.S. TREATY SER. No. 718 (Dep't State 1924); 44 STAT. 2098 (1925).

c. Art. VII, convention with Cuba for the suppression of smuggling, signed March 11, 1926. U.S. TREATY SER. No. 739 (Dep't State 1926); 44 STAT. 2402 (1926).

d. Agreement with the Union of Soviet Socialist Republics relating to the execution of letters rogatory, effected by exchange of notes, signed November 22, 1935. Exec. Agreement Ser. No. 83; 49 STAT. 3840 (1935). This last "agreement" is merely a statement of what existing law and practice are.

17. Another treatise, STERN, GETTING THE EVIDENCE (1936), contains information on twenty-three countries. It is not as detailed nor as complete as DYER-SMITH, FEDERAL EXAMINATIONS BEFORE TRIAL AND DEPOSITIONS PRACTICE (1939). The two authors do not always agree in their statements of foreign practice.

the Office of Protective Services of the State Department. Since precise information is not always available, a reply may wait while the State Department questions the foreign government. Moreover, foreign offices and ministries of justice abroad are generally uninformed about American procedures. Thus, their answers are sometimes unresponsive, ambiguous, or in apparent conflict with known practice. For example, answers by foreign governments often relate to the status and function of consuls rather than to legal procedure. Or the response may refer to local positive law and not touch the separate and often imperative question of whether or not official policy tolerates a specified American procedure as a matter of comity. The process of double translation by non-lawyer translators may further muddle an already unsatisfying response. As an illustration of this delay and confusion, a New York firm in March, 1949, asked the State Department if a deposition could be taken before an American consul in Liechtenstein in connection with pending litigation in New York. One year later the Department replied, quoting a communication from the Consulate General in Zurich, Switzerland, which contained a report from the government of Liechtenstein. This report was cryptically couched in terms of the Liechtenstein Code of Civil Procedure, was of no particular relevance, and raised other questions which further correspondence would have to solve before the firm could proceed. Even where consular treaties purport to cover depositions practice, these treaties may say nothing about the exact procedures permitted by the foreign government, nor about the status of certain categories of potential deponents, such as aliens or nationals of the country to which the consul is accredited. Treaty silence may thus force resort to inter-governmental correspondence concerning the foreign country's policy.

Practice of treaty and non-treaty countries. While consular treaties are far from encyclopedic and other sources may also prove uninformative, it is possible to outline roughly the status of depositions practice both in countries with which the United States has consular treaties and in those not covered by treaty. Consular treaties with twenty-three countries expressly permit United States consular officers to take depositions of *American citizens* in certain cases.¹⁸ Among these treaties, the older ones permit only depositions

18. Belgium: Consular Convention, art. X. U.S. Treaty Ser. No. 29 (Dep't State 1880); 21 STAT. 776 (1881).

Colombia: Consular Convention (signed with New Granada), art. III, § 5. U.S. Treaty Ser. No. 55 (Dep't State 1850); 10 STAT. 900 (1851).

Costa Rica: Consular Convention, art. VIII. U.S. Treaties & Other Int'l Acts Ser. No. 2045 (Dep't State 1948).

Cuba: Consular Convention, art. XI. U.S. Treaty Ser. No. 750 (Dep't State 1926); 44 STAT. 2471 (1926).

El Salvador: Treaty of Friendship, Commerce and Consular Rights, art. XX. U.S. Treaty Ser. No. 827 (Dep't State 1926); 46 STAT. 2817 (1930).

Estonia: Treaty of Friendship, Commerce and Consular Rights, art. XXI. U.S.

concerning maritime disputes, and only the master, crew, and passengers of American vessels may depose; treaties made after 1853, however, are shorn of these special limitations. Yet none of these twenty-three treaties expressly authorizes an American consul to take testimony from deponents who are *nationals of the foreign country* to which the consul is accredited or of a third country. Although language is similar, actual governmental practice under

Treaty Ser. No. 736 (Dep't State 1925); 44 STAT. 2379 (1926). (The United States has at present no consular representation in Estonia.)

Finland: Treaty of Friendship, Commerce and Consular Rights, art. XXIV. U.S. Treaty Ser. No. 868 (Dep't State 1934); 49 STAT. 2659 (1934).

France: Consular Convention, art. VI. U.S. Treaty Ser. No. 92 (Dep't State 1853); 10 STAT. 992 (1853).

Germany: Treaty of Friendship, Commerce and Consular Rights, art. XXII. U.S. Treaty Ser. No. 725 (Dep't State 1923); 44 STAT. 2132 (1925).

Greece: Consular Convention, art. X. U.S. Treaty Ser. No. 424 (Dep't State 1902); 33 STAT. 2122 (1903).

Honduras: Treaty of Friendship, Commerce and Consular Rights, art. XXI. U.S. Treaty Ser. No. 764 (Dep't State 1927); 45 STAT. 2618 (1928).

Ireland: Consular Convention, SEN. EXEC. P. 81st Cong., 2d Sess. (1950); unperfected.

Italy: Consular Convention, art. X. U.S. Treaty Ser. No. 178 (Dep't State 1878); 20 STAT. 725 (1878).

Latvia: Treaty of Friendship, Commerce and Consular Rights, art. XXII. U.S. Treaty Ser. No. 765 (Dep't State 1928); 45 STAT. 2641 (1928). (The United States has at present no consular representation in Latvia.)

Liberia: Consular Convention, art. VII. U.S. Treaty Ser. No. 957 (Dep't State 1938); 54 STAT. 1751 (1939).

Mexico: Consular Convention, art. VII. U.S. Treaty Ser. No. 985 (Dep't State 1942); 57 STAT. 800 (1943).

Norway: Treaty of Friendship, Commerce and Consular Rights, art. XXI. U.S. Treaty Ser. No. 852 (Dep't State 1928, 1929); 47 STAT. 2135 (1932).

Philippines: Consular Convention, art. VIII. U.S. Treaties & Other Int'l Acts Ser. No. 1741 (Dep't State 1947); 62 STAT. 1593 (1947).

Rumania: Consular Convention, art. X. U.S. Treaty Ser. No. 297 (Dep't State 1881); 23 STAT. 711 (1883).

Spain: Treaty of Friendship and General Relations, art. XXII. U.S. Treaty Ser. No. 422 (Dep't State 1902); 33 STAT. 2105 (1903).

Sweden: Consular Convention, art. X. U.S. Treaty Ser. No. 557 (Dep't State 1910); 37 STAT. 1479 (1911).

United Kingdom: Consular Convention, art. XVII, § (1)(g). U.S. Treaties and Other Int'l Acts Ser. No. 2494 (Dep't State 1950); unperfected.

Yugoslavia: Consular Convention (signed with Serbia), art. X. U.S. Treaty Ser. No. 320 (Dep't State 1881); 22 STAT. 968 (1882).

The following treaties have been terminated recently:

Hungary: Treaty of Friendship, Commerce and Consular Rights, art. XIX. U.S. Treaty Ser. No. 748 (Dep't State 1925); 44 STAT. 2441 (1926). Terminated, effective July 5, 1952, by United States note of July 5, 1951.

Poland: Treaty of Friendship, Commerce and Consular Rights, art. XXI. U.S. Treaty Ser. No. 862 (Dep't State 1931); 48 STAT. 1507 (1933). Terminated, effective January 5, 1952, by United States note of July 5, 1951.

these treaties varies greatly.¹⁹ For example, some countries permit consuls to take depositions of any willing witness—including nationals of these countries—while other nations allow only American citizens to depose, as required by the treaty. None of these treaties explicitly forbids consuls to take depositions of non-American aliens; in practice, some countries forbid it, while other do not object. And Hungary insisted at one time that the express right of our consuls to take depositions of American citizens did not include the right to administer oaths to witnesses.

In the case of countries with which the United States has no consular treaty provision covering depositions, the disparity in practice is similar: there may be some countries in which it is possible to take depositions of any witness; in several other countries, government policy forbids our consuls from taking depositions of any resident, an American citizen included²⁰; while other non-treaty countries prohibit our consuls only from taking the depositions of nationals of the country concerned. In a pre-World War II count of both treaty and non-treaty countries, the State Department found that a total of twenty-three countries—or approximately half of those responding to a general inquiry—imposed a prohibition on depositions secured from nationals, although the interdict was then limited to depositions “by commission.”²¹ Presumably, the prohibition extended to depositions “on notice” after the Federal Rules took effect in 1938.

Post-war developments. A number of new sovereign states have come into being since the war, and the Department of State is gradually ascertaining the policies of these nations. So far, reports on these policies indicate no liberalization of foreign practice. Nor have new consular treaties substantially improved our relationships with other countries in connection with depositions practice. It is true that recently negotiated consular conventions with the United Kingdom and with Ireland each contain a liberal provision empowering consular officers to “take evidence on behalf of courts of the sending states in a manner permitted by special arrangements . . . or otherwise not inconsistent with the laws of the territory.”²² Unless future treaties with civil law countries are patterned on this provision, however, its practical effect will be

19. For a discussion of practice under these treaties, see § WIGMORE, EVIDENCE § 2195b (3d ed. 1940), and DYER-SMITH, FEDERAL EXAMINATIONS BEFORE TRIAL AND DEPOSITIONS PRACTICE 602-810 (1939).

20. Following World War II, Japanese restrictions on the taking of depositions were removed by the occupation authorities. These were reimposed when the treaty of peace became effective.

21. Bolivia, Bulgaria, Danzig, Dominican Republic, El Salvador, Germany, Greece, Haiti, Honduras, Hungary, Iraq, Japan, Latvia, Liberia, Nicaragua, Peru, Persia, Poland, Spain, Switzerland, Turkey, Uruguay, and Yugoslavia. Letter to the Attorney General from Department of State, dated May 27, 1938, in Department of Justice files.

22. United Kingdom: Consular Convention. U.S. Treaties and Other Int'l Acts Ser. No. 2494 (Dep't State 1950); unperfected.

Ireland: Consular Convention. SEN. EXEC. P., 81st Cong., 2d Sess. (1950); unperfected.

limited to a codification of previously satisfactory juridical relations with these common law countries. The recent consular convention with Costa Rica²³ was expected to serve as a model for agreements with civil law countries, but it fails to include a comprehensive provision defining the authority of consuls to take evidence. It merely provides, in effect, that a consul may receive and certify depositions, without specifying that he may take the testimony of Costa Rican nationals and non-American aliens; presumably, the convention permits depositions of United States citizens. Moreover, consular agreements with Hungary and Poland were terminated as of 1952.²⁴ Juridical relations with a third communist country, Yugoslavia, seem to have followed the trend of fluctuating diplomatic relations between that country and the United States; Yugoslavia in 1947 banned the taking of depositions by our consuls but recently has agreed to reinstate the practice provided by the old Serbian consular treaty.²⁵

To avoid diplomatic embroilment with countries which bar the taking of any depositions, our consular officers in these countries have been instructed to return unexecuted all commissions they receive and to refuse to act where depositions are "noticed" before them.²⁶ And recent protests by foreign governments have caused the State Department to request the governors of the several states to revoke outstanding commissions authorizing state officials abroad, such as the Commissioner of Deeds of New York, to perform notarial acts, including execution of depositions in foreign countries.²⁷

Reasons for hostility. Why do civil law countries restrict or prohibit the taking of depositions for use in United States Courts? A clue to the reason may be found in the responses of foreign governments to State Department inquiries concerning the extent to which our consular officers are permitted to execute commissions.²⁸ These responses indicate ignorance of American depositions practice and misunderstanding of the inquiries. The misunderstanding probably stems from serious semantic confusion. The responses confused the word "commission" with "letter rogatory"; the French translation of "letter rogatory" is "*commission rogatoire*," the Spanish is "*comision rogatoria*," and the Italian is "*commissione rogatoria*." Some replies actually used "*commission rogatoire*" to mean a commission from an American court to a consular officer. Thus, foreign governments probably construe deposition "by commission" as a letter rogatory. The confusion may be enhanced by the fact

23. Cited note 18 *supra*.

24. See note 18 *supra*.

25. Cited note 18 *supra*.

26. 2 FOR. SERV. MAN. 842.1 (1952).

27. Eder, *Powers of Attorney in International Practice*, 98 U. OF PA. L. REV. 840, 854 (1950). This action has apparently had some adverse effect on activities other than the taking of testimony. *Ibid*.

28. These responses, which have never been published, were made available to the Reporters and Advisers of the Harvard Research in International Law for their work on the Draft Convention.

that the French word "*déposition*" means the testimony of a witness interrogated in court by a judge. Since civilians probably do not distinguish between a deposition by commission and a deposition on notice, even the deposition on notice is probably confused with a letter rogatory.²⁹

The assumption to which this verbal confusion³⁰ leads may provide a basic reason for civilian hostility to American depositions practice. While mindful of Judge Charles E. Clark's admonition that "American lawyers must necessarily walk gingerly in the glades of the civil law,"³¹ the writer suggests that the semantic mix-up may create a belief that an American consul or commissioner who officiates at the taking of a deposition in a foreign country exercises American judicial power there in derogation of the foreign sovereignty. Civil law recognizes the principle, originating in Roman law, that judicial power may be delegated,³² and a letter rogatory involves such a delegation.³³ Since certain civil law countries utilize their consuls for executing letters rogatory³⁴ and since they tend to equate the American commission with a letter rogatory, they may well assume that when an American consul executes a commission, he also exercises judicial power.

The actual functioning of a deposition proceeding may supply a separate and possibly more direct cause for this assumption and the hostility which it may provoke. What takes place in the execution of an American deposition would, in civil law countries, take place only in the courtroom. In these countries, evidence is taken only when directed by the court, and witnesses are interrogated by the judge, not by counsel; oaths are administered, if at all,

29. This misconception of our practice is deeply imbedded in the civil law literature of private international law. The error is strikingly illustrated by the definition of "deposition" in AGLION, *DICTIONNAIRE JURIDIQUE, ANGLAIS-FRANCAIS* 86 (1947). French lawyers are told that a deposition is a: "Déposition d'un témoin faite devant un juge commissaire et envoyée au tribunal qui a émis la commission rogatoire." Translated, this says that a deposition is: "The testimony of a witness taken before a *judge* especially delegated for the examination and returned to the court which issued the *letter rogatory*." This confusion is no doubt due in some measure to the lack of clear distinction between a commission and a letter rogatory in some American writing, e.g., 2 WHEATON, *CONFLICT OF LAWS* §§ 722, 723 (3d ed. 1905). And see 28 U.S.C. § 1782 (Supp. 1952), and note 84 *infra*.

30. In comparative law it is impossible to overemphasize the danger of words which sound alike but which have different meanings in different languages. As to the treachery of words in dealing with foreign law in a foreign language, see Moses, *International Legal Practice*, 4 *FORD. L. REV.* 244, 248 (1935), quoted in SCHLESINGER, *COMPARATIVE LAW, CASES AND MATERIALS* 15 (1950).

31. *Conway v. Silesian-American Corp.*, 186 F.2d 201, 214 (2d Cir. 1950).

32. E.g., *CODE DE PROCÉDURE CIVILE* art. 1035 (France).

33. BILLECARD, *LES COMMISSIONS ROGATOIRES* 6, 7, 14, 15, 26, 27 (1902).

34. MONIER, *DES COMMISSIONS ROGATOIRES EN DROIT INTERNATIONAL* 190 (1909). Bilateral arrangements for this practice are permitted by Article 15 of The Hague Convention on Civil Procedure of 1905. See also provisions of the consular regulations of Bolivia, Germany, Latvia, the Netherlands, and Poland, in 1 & 2 FELLER & HUDSON, *DIPLOMATIC AND CONSULAR LAWS AND REGULATIONS* (1935).

only in judicial proceedings; the practice of taking testimony on the parties' initiative before a private lay individual is unknown. Civil law depositions taken before an examining magistrate (*juge commissaire*) automatically become part of the *dossier*, or record, in the case;³⁵ continental systems do not share the Anglo-American notion of a trial as a separate, isolated episode.³⁶ Thus civilians have difficulty recognizing an American deposition proceeding as something preliminary to, but not necessarily part of, a judicial proceeding. They may thus construe the deposition as an integral stage in the judicial process and may thus believe that the consul who presides at the execution of a deposition in fact plays the part of a judge.

Other restraints. Unsympathetic attitudes of foreign states toward American deposition proceedings result in other restrictions distinct from the ban on the proceeding itself. The execution of depositions may be frustrated by the failure of civil law countries to provide for compulsory process to assist in a foreign deposition. Only in common law jurisdictions can an American commissioner or litigant secure process to cope effectively with refusals of witnesses to appear and testify, or with refusals to produce books and records for examination.³⁷ Moreover, local law may prohibit a witness under certain circumstances from testifying before other than a domestic court.³⁸ In Switzer-

35. SCHLESINGER, *op. cit. supra* note 30, at 209 n.

36. Millar, *The Mechanism of Fact-Discovery: A Study in Comparative Civil Procedure*, 32 ILL. L. REV. 424, 455 (1937). And see Hamson, *Civil Procedure in France and England*, 10 CAMB. L.J. 411, 417 (1950).

37. *E.g.*, the British Foreign Tribunals Evidence Act, 1856, 19 & 20 Vict., c. 113, § 1, and the Canada Evidence Act, CAN. REV. STAT., c. 59, § 41. The latter act applies only to criminal matters. In Canada, civil procedure is a matter of provincial law, while criminal procedure is governed by federal law. The provinces have similar provisions governing judicial assistance in civil cases, *e.g.*, CODE OF CIVIL PROCEDURE art. 1445 (Que.).

38. It would probably not be a violation of art. 273 of the Swiss Penal Code, *supra* note 13, for a witness to disclose a "manufacturing or business secret" under interrogation by a Swiss judge; but a witness would probably not be protected were he to testify voluntarily in Switzerland by deposition for use in an American court without permission of the Swiss government. The effect of this and similar provisions of Swiss law has even been felt in our own courts. Swiss citizens have been known to object to testifying on the ground of privilege under Swiss law. In *Bank Waedenswil v. McGrath*, and *Thiesing v. McGrath*, Civ. Nos. 1902 and 3-49, D.D.C., the plaintiff, a Swiss Bank, objected to answering interrogatories (served under FED. R. CIV. P. 33), calling for a disclosure of the nationality and residence of its stockholders and the amount of their ownership. The ground for objection was that Swiss law forbade disclosure of such information. By order of June 1, 1951, Judge Letts ordered the plaintiff to produce documents; by orders of June 28, 1952, and October 23, 1952, Judge Letts ordered that interrogatories be answered and documents be produced, notwithstanding plaintiff's plea that it was unable to comply because of the Swiss secrecy law. In *Société Internationale, etc. v. McGranery*, Civ. No. 4360-48, D.D.C., an order, under FED. R. CIV. P. 34, was entered on June 23, 1949, requiring the Swiss plaintiff to produce thousands of documents of its own and of the Swiss banking firm with which it was affiliated and which managed its investments. Disclosure of the documents was forbidden by the Swiss Federal attorney on the ground that their

land, for example, this prohibition may result in the imposition of criminal sanctions on the witness, in addition to the criminal liability which attaches to those taking his deposition. Thus, counsel who seek to ignore a foreign government's adverse attitude toward depositions by taking surreptitiously a deposition "by stipulation" before a private individual (without informing the consulate or the local government) should first check to find out if either the taking of the deposition or the giving of the testimony would be considered a criminal offense.

Letters Rogatory

Where the taking of a certain witness' deposition is prohibited, or where the witness is unwilling or legally unable to depose, then a litigant seeking foreign testimony must resort to the letter rogatory. An application to a federal court for the issuance of a letter rogatory must disclose the facts relied upon to show that recourse to a foreign court is "necessary or convenient," as required by Federal Rule 28(b).³⁹ If, for example, the foreign country prohibits the taking of depositions, or there is no diplomatic or consular officer near the place of residence of the witness, a letter from the Department of State so stating should be appended to the application. Usually the court will require that the application be accompanied by written interrogatories to be propounded to the witness by the foreign court, but occasionally a letter rogatory for an oral examination will be issued.⁴⁰

The long journey. Court approval of an application for a letter rogatory, however, does not guarantee that the letter's round-trip mission will be speedy enough to meet the litigant's needs. Letters rogatory are forwarded through diplomatic channels; they may pass through a dozen or more offices on their voyage to the foreign court and home again, with an opportunity for delay or loss at each stop.⁴¹ Moreover, no two countries impose the same requirements for authentication, and the same country may demand different authentication procedures at different times. Litigants encounter formidable, if not prohibitive, delay and expense in translating the letter, interrogatories, and

production in the American court would violate Swiss secrecy laws. On February 19, 1953, Chief Judge Laws ordered the suit dismissed, under Rule 37, because of failure to produce, but stayed the dismissal for three months to give the plaintiff another opportunity to comply.

39. See sources cited note 11 *supra*.

40. See note 52 *infra*.

41. An observant civilian, indulging, perhaps, in some gentle spoofing, has described our excess of zeal in authenticating letters rogatory:

"American letters rogatory are issued in the name of the President of the United States by the presiding justice of the court and are signed by the clerk. One of the judges of the court signs and certifies that the clerk is really the clerk of the court; the Attorney General of the United States certifies that the judge belongs to the court issuing the letters; the Secretary of State legalizes the signature of the Attorney General; and finally, the Secretary of the legation of the United States in the country of the court of execution authenticates the signature of the Secretary of State . . ." (writer's translation from the

annexed papers into the foreign language and then translating the foreign court's record of execution back into English. As a result of these difficulties, execution and return of a letter rogatory may require many months.⁴² Where the issuing tribunal is a federal court, the tempo of litigation under the Federal Rules and the vigilance of the Administrative Office of the United States Courts may mean that the case will have been tried and will be lodged in the appellate court before the letter rogatory returns to the trial court.⁴³

Civil law procedural problems. Even more severe difficulties, however, result from the fact that execution of a letter rogatory is controlled by foreign procedural law; in civil law countries, procedural requirements, far different from those of the common law, may hamper the litigant's quest for important evidence.⁴⁴ First, it is often impossible to secure the testimony of key witnesses. Most civil law countries do not permit a party to the litigation to be examined as a witness.⁴⁵ It may also be impossible to examine certain officers or members of the board of a corporate party. Furthermore, foreign courts are sometimes disinclined to provide compulsory process to summon unwilling witnesses, despite the fact that compulsory process is one supposed advantage which the letter rogatory provides. Some years ago, for example, the Depart-

French). Nekam, *L'Entr'aide judiciaire internationale aux Etats-Unis*, 3 NOUVELLE REVUE DE DROIT INTERNATIONALE PRIVÉ 36 and 236, at 72 (1936).

It is to be noted that Mr. Nekam neglected to mention that the clerk, in turn, repays the compliment by certifying that "the judge is really the judge." Our proliferated authentications might lead civil law officials to suspect that forgery of letters rogatory had once been a favorite indoor sport of the American bar.

In contrast, there are *no* formal provisions of law or practice which guarantee the genuineness of foreign letters rogatory presented to our federal courts for execution.

42. In one case a request to a court in Paris was two years in its peregrination through channels.

43. This happened in a case in which the writer was counsel. *United States v. Rodiek*, Civ. No. E-82-373, S.D.N.Y., 1939, *aff'd*, 117 F.2d 588 (2d Cir. 1941), *aff'd per curiam* (equally divided court), 315 U.S. 783 (1942).

44. Civil law practice varies from jurisdiction to jurisdiction, just as common law practice, and it is sought in this and following paragraphs merely to indicate a general over-all picture without reference to any particular jurisdiction. On the "myth" of the uniformity of the civil law, see Moses, *supra* note 30, at 253, quoted in SCHLESINGER, *op. cit. supra* note 30, at 18-19. See, in general, Tyndale, *The Organization and Administration of Justice in France, with an Outline of French Procedure with Respect to the Production of Evidence*, 13 CAN. B. REV. 567 and 655 (1935); Amos, *A Day in Court at Home and Abroad*, 2 C.A.M.B. L.J. 340 (1926); Schopflocher, *Civil Procedure, A Comparative Study of Some Principal Features under German and American Law*, [1940] WIS. L. REV. 234. In Germany and Austria there is a single code of civil procedure for all jurisdictions. In Switzerland there is a different code for each canton.

45. This is the rule in so many civil law jurisdictions that Article 11 of The Hague Convention of 1905, *infra* note 124, contains a provision making issuance of compulsory process to a party optional rather than compulsory. ACTES DE LA QUATRIÈME CONFÉRENCE DE LA HAYE 70, 93. In France a party may be examined, but technically not as a witness. CODE DE PROCÉDURE CIVILE art. 324.

ment of Justice sought the testimony of unwilling witnesses in the Netherlands. The Dutch Foreign Office advised that Dutch courts would *invite* the witnesses to appear and testify but could not compel their appearance because of the absence of a treaty between the two countries. The same attitude is taken by Germany⁴⁶ and possibly other countries, an attitude which may prevent the securing of testimony from unwilling witnesses by any means.

Even where a witness is available for examination at trial, other civil law practices restrict his usefulness to the litigant. By forbidding litigants to interview or take a statement from the witness prior to his appearance in court, certain countries prevent thorough pre-trial preparation.⁴⁷ In some countries, witnesses are not sworn, while in other countries they may be sworn after their testimony and perhaps then only if they consent; not having been given under oath, the testimony may be inadmissible when later introduced in the American courtroom. Furthermore, there may be no opportunity to expose, through adversary examination, a specious claim of privilege, and witnesses are often left to decide for themselves whether to comply with orders to produce documents in their custody.

It is the "inquisitorial" nature of the civil law trial—in sharp contrast to the common law "adversary" proceeding—which most severely restricts the usefulness of a letter rogatory addressed to a civilian court: under civil law, witnesses are examined by the judge, not by counsel. The supreme handicap imposed by the "inquisitorial" system is the denial to counsel of any opportunity for cross-examination. And since the judge's knowledge of the case may be confined to what appears in the letter rogatory, his examination—if it goes beyond written interrogatories—may seem vague and perfunctory when issues are complicated or the witness hostile or reluctant. Even if the judge should accept counsel's suggestions for questions, the preciseness of these questions may be lost in translation, where necessary, and in the court's rephrasing of the question. Occasionally the court may permit examination by counsel, but this opportunity can rarely be relied on as a matter of right.

Aside from the restrictions on examination, an additional difficulty inherent in the civil law proceeding is the lack of a verbatim transcript of the hearing. The judge may select the portions of the testimony he thinks material and dictate his narrative version to a clerk or assistant, who perhaps takes dictation in long hand.⁴⁸ Anglo-American lawyers dislike having to offer in evidence a third party's summary of a witness' testimony in lieu of the questions and answers themselves.

46. See page 532 *infra*.

47. In several civil law countries it is considered unethical for an attorney to discuss the facts of a case with a prospective witness. See SCHLESINGER, *op. cit. supra* note 30, at 203n. In some, a person who has given a written statement may not subsequently testify in court as a witness.

48. Schopflocher, *supra* note 44, at 254. The testimony as taken down is read to the witness for approval. CODE OF CIVIL PROCEDURE § 160 (Germany).

When American lawyers argue over whether or not letters rogatory shall issue, however, they rarely refer to the procedural obstacles which the foreign court may pose; argument more often is phrased exclusively in terms of the power and discretion of the court of the forum. Or even when the question of foreign restrictions is raised and these obstacles seem overwhelming, the American court sometimes issues the letter anyway. Surprisingly enough, there have been occasions when a letter issued under such circumstances has succeeded. Early in 1950, for example, a motion was filed in an alien property case for the issuance of a letter rogatory to a court in Wurttemberg-Baden to take the testimony of a witness who had refused to depose before a consular officer.⁴⁹ The application asked that the district court request the German court to compel the witness to appear and submit to oral examination and cross-examination by counsel. The party opposing the motion correctly pointed out that a German court could not issue compulsory process in execution of a letter rogatory from the United States, a country with which Germany has no procedural treaty,⁵⁰ and that under German practice witnesses are questioned by the judge, not by counsel.⁵¹ Nevertheless, the district court issued the letter as requested.⁵² As it turned out, the witness appeared voluntarily, and the German court, undoubtedly deferring to the occupying authority, did permit direct and cross-examination by counsel. Now that West Germany has regained control over the conduct of her foreign affairs, however, American courts can no longer rely on the moral suasion of an army of occupation to secure German judicial assistance ordinarily accorded only on the basis of treaty.

The reciprocity question. A final limitation of the letter rogatory is that a foreign ministry of justice or court may reject it if it has been issued by an American court of specialized limited jurisdiction or by an administrative agency exercising quasi-judicial powers. A letter rogatory, by common usage, is properly issuable by a court of record and of such general jurisdiction that it can reciprocate the favor for the foreign court; the traditional form of letter

49. *Aktiebolaget Vargos v. McGrath*, Civ. No. 35347, D.D.C., Feb. 21, 1950.

50. 1 STEIN-JONAS, KOMMENTAR ZUR ZIVILPROZESSORDNUNG, Note VIII D before § 1 (17th ed. 1949). The United States, of course, has no treaty with any country governing the execution of letters rogatory. Germany is a party to The Hague Convention on Civil Procedure of 1905, of which Articles 8-16 provide for the issuance, transmittal, and execution of letters rogatory. See note 124 *infra*.

51. ZIVILPROZESSORDNUNG §§ 396, 397. After the interrogation by the judge, counsel may address questions to the witness. *Id.* § 397(2).

52. The principal authority relied on by the movant for the oral examination of the witness in Germany was an opinion of a district judge granting a *dedimus potestatem* for the examination of certain witnesses in Mexico on written interrogatories, wherein it appeared that previously, in the same case, letters rogatory had been issued for the examination of witnesses in Brazil on oral interrogatories. *In re Companhia de Navegacao Lloyd Brasileiro*, 7 F.2d 235 (E.D. La. 1925).

promises this reciprocity.⁵³ It is a guarantee, however, which a court of specialized jurisdiction or an administrative agency cannot provide. Thus, letters issued by such tribunals have been returned unexecuted by the ministries of justice of foreign countries. Yet the practice of foreign countries varies. In some cases, such letters rogatory have been honored. The United States Court of Claims, for example, has issued letters with the customary promise of reciprocity omitted, and the letters have been executed.⁵⁴ State workmen's compensation commissions have sometimes succeeded in having foreign courts honor requests for assistance.⁵⁵ And Germany has honored so-called letters rogatory issued by the Commissioner of Patents.⁵⁶ Pre-war Germany, however, refused to execute a letter rogatory from the Customs Court because of that tribunal's specialized jurisdiction.⁵⁷ It would be unwise, therefore, to assume that foreign courts will always respect letters issued by American tribunals without the power to reciprocate.⁵⁸ Where a foreign court hesitates to cooperate, it

53. *In re Pacific Ry. Comm.*, 32 Fed. 241, 256-7 (C.C.N.D. Cal. 1887); *Nelson v. United States*, 17 Fed. Cas. 1340, No. 10,116 (C.C.D. Pa. 1816); HUDSON, *CASES ON INTERNATIONAL LAW* 973 (1936); Note, *Letters Rogatory*, 23 IOWA L. REV. 92, 93 (1937); FOELIX, 1 *TRAITÉ DU DROIT INTERNATIONAL PRIVÉ* 463 (4th ed. 1865); SAUERHALL, *Les Commissions rogatoires dans les relations entre la Suisse et les Etrangers*, 47 JOURNAL DU DROIT INTERNATIONALE 53, 56 (France 1920); note 11 *supra*.

54. *E.g.*, *Berliner Handels-Gesellschaft v. United States*, 30 F. Supp. 490 (Ct. Cl. 1939).

55. But some state courts have refused to sanction the issuance of "letters rogatory" by such an agency. In *Carvalho v. Cass Putnam Hotel Co.*, 239 Mich. 508, 215 N.W. 21 (1927), where the commission had issued a "letter rogatory" to the American consul general at Lisbon, Portugal, the court set aside the award on the ground that the commission, not being a court, could not issue letters rogatory. Since the request involved was directed not to a foreign court but to a consular officer, the request was clearly *not* a letter rogatory, but only a commission to take a deposition. In *in re Martinelli*, 219 Mass. 58, 106 N.E. 557 (1914), the Supreme Judicial Court went so far as to hold that a superior court had no power to issue a letter rogatory in aid of proceedings pending before the state Industrial Accident Board.

56. In *Potter v. Ochs*, 97 O.G. Pat. Off. 1835 (1901), the Commissioner of Patents issued a letter rogatory to a German court in an interference proceeding, it appearing that the testimony of the witness in Germany could not be obtained by commission. The Commissioner predicated his authority to issue the letter upon the ground that although an officer of an administrative agency, he exercised judicial authority, and that, although he could not offer reciprocity to the German court, "the courts of this country would comply with such a request issued by the German Patent Office under similar circumstances." The Commissioner was wrong in his assumption that our federal courts would comply with any such request; but even if he had been correct, the issuance of a letter rogatory by an administrative agency in the absence of a treaty or statute stipulating some measure of judicial reciprocity would be improper. Apparently this practice persists. 2 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 100 (1941); Dyer-Smith, *Taking Depositions Abroad in Patent Office Proceedings*, 21 J. PAT. OFF. Soc'y 523, 531 (1939).

57. 2 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 103 (1941).

58. A provision in the recently enacted International Claims Act, 64 STAT. 12 (1950), 22 U.S.C. § 1621 (Supp. 1952), authorizes issuance of letters rogatory by the Inter-

might read into letters rogatory issued by the Court of Claims and other specialized federal courts an implied promise that reciprocity will be granted by other courts in the federal system. Section 1782 of the Federal Judicial Code provides that the "deposition" of a witness within the United States for use in foreign judicial proceedings may be taken before a person designated by a district court.⁵⁹ Yet whatever affinity exists in the relationship of the federal district court to other, specialized federal courts does not extend to the relationship of district courts to administrative agencies: our courts would not honor letters from foreign agencies, whose proceedings are not "judicial"; thus, it seems doubtful that Section 1782's implication of "reciprocity" would assist an American agency's attempt to have its letters rogatory honored.

Service of Judicial Documents Abroad

Parties and persons interested in litigation who must be served with process or given notice of proceedings—like witnesses whose testimony must be taken—are often scattered far from the forum. And a lawyer who wishes to secure personal service in a foreign country of a summons and complaint, subpoena, citation, order, notice of judgment, or other document faces almost as many difficulties as the lawyer who wishes to secure testimony abroad.

The Need for Personal Service

The Federal Judicial Code requires personal service in a foreign country in only a few situations. But these situations frequently arise in litigation, and inability to effect personal service can result in failure of, or injury to, a litigant's cause. Section 1783 covers one such situation. It provides for personal service by a United States consul of a subpoena issued by a district court to compel the appearance before it of a citizen or resident⁶⁰ who:

"(1) has been personally notified in a foreign country to appear before a court of the foreign country to testify pursuant to letters rogatory from the district court, and has failed to appear or to testify; or

"(2) is now in foreign territory and his testimony in a criminal proceeding is desired by the Attorney General."⁶¹

national Claims Commission established within the Department of State. It is quite possible that some foreign governments would refuse to execute the Commission's letters.

59. 28 U.S.C. § 1782 (Supp. 1952). See Note, *Reciprocity in Execution of Letters Rogatory*, 58 YALE L.J. 1193 (1949).

60. The word "resident" was substituted in the new Judicial Code for "domiciled therein," the language of the original statute, 28 U.S.C. § 711 (1946). In *United States v. Best*, 76 F. Supp. 138, 139 (D. Mass. 1948), on a motion for the issuance of subpoenas for witnesses, most of whom were aliens residing in a foreign country, the court said: "Aliens who are inhabitants of a foreign country cannot be compelled to respond to a subpoena. They owe no allegiance to the United States."

61. 28 U.S.C. § 1783 (Supp. 1952). Fed. R. Crim. P. 17(e) (2) reflects § 1783, which derives from the Act of July 3, 1926, 28 U.S.C. § 711 (1946), enacted to reach absconding witnesses in the naval oil reserve prosecutions. The constitutionality of the act, as applied

Section 1784 provides that where a witness in a foreign country has failed to respond to a subpoena issued by a federal court, the court may order the witness to show cause why he should not be punished for contempt and his property levied upon or seized and held to satisfy any judgment rendered against him. If the witness should be found guilty of recusancy, the district court may fine him not more than \$100,000 and order his property sold to satisfy the fine and costs. But if the order to show cause is not served personally by a consul and judgment is rendered only upon service by publication, judgment may be opened up for answer within a year. And Section 1655 provides for personal service upon defendants "if practicable, wherever found" in suits to enforce liens on, or claims to, property within the district or to remove encumbrances or clouds upon title to such property.⁶² Any judgment entered in such a *quasi-in-rem* suit may be set aside within a year if the defendant is not personally notified of the action.

Because state courts possess broader jurisdiction than federal courts over private controversies, there are probably more occasions in state litigation where documents must be served outside the court's territory. Personal extra-territorial service on persons in interest is often required in equitable proceedings, in connection with the administration of estates and trusts, and especially in divorce proceedings. Recent decisions of the United States Supreme Court may lead cautious counsel to attempt personal extraterritorial service in cases where service by publication has hitherto been considered sufficient.⁶³ Counsel may thus wish to utilize state statutory provisions such as Section 233 of the New York Civil Practice Act, which provides, in effect,

to an American citizen witness, was upheld in *Blackmer v. United States*, 284 U.S. 421 (1932). For a criticism of § 711, see 8 WIGMORE, EVIDENCE § 2195c n.2: "The persons aimed at are 'a witness being a citizen of the United States or domiciled therein' . . . but a mere domiciliary is no longer subject to this State when he leaves its territory. . . . The process . . . is the usual subpoena 'commanding such witness to appear.' But this State cannot issue a 'command' to any person who is within . . . another State."

62. See Blume, *Actions Quasi In Rem under Section 1655, Title 28 U.S.C.*, 50 MICH. L. REV. 1 (1951).

63. Foreign personal service of process has recently become of greater importance as a result of the Supreme Court's decisions in *Milliken v. Meyer*, 311 U.S. 457 (1940), and *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950). In the former case, a Wyoming judgment *in personam* against an individual who was domiciled in Wyoming but who had been served personally in Colorado, was sustained under the due process and full faith and credit clauses of the Constitution. In the latter case, which arose in the New York courts, the Supreme Court held that publication of notice prior to the judicial settlement of accounts by the corporate trustee of a common trust fund does not afford due process of law to those beneficiaries with present interests whose addresses are known to the trustee. The similarity of the procedure involved in the *Mullane* case to that of the administration of decedent's estates, and the Court's rejection of the *in rem* classification of the action as making unnecessary the most reasonable type of notice available, has caused considerable speculation as to the scope and effect of the decision. Comment, 50 MICH. L. REV. 124 (1951); Fraser, *Jurisdiction by Necessity—An Analysis of the Mullane Case*, 100 U. OF PA. L. REV. 305 (1951).

that personal service of a summons "without the state" shall be the equivalent of service by publication. Under Section 235, service "without the state" upon a resident defendant, without an order, may be made in matrimonial actions, in actions *in rem*, and in actions to recover a sum of money only, where there has been a prior attachment of the defendant's property within the state—*i.e.*, in proceedings *quasi-in-rem*.⁶⁴ "Without the state" apparently includes foreign territory, because among the persons authorized by statute to make service are "an attorney and/or counsellor at law, solicitor, advocate or barrister duly qualified to practice in the state or country where such service is made. . . ."⁶⁵

Obstacles to Personal Service

Despite the frequent need or desirability of personal service in foreign countries, no publication giving information on how to secure such service is known to be generally available in our libraries. Department of State files contain almost no information describing the attitudes or practices of foreign governments. And it may be impossible to await the result of a special inquiry directed to the foreign government. The only speedy way to receive guidance is to engage counsel in the country where service is to be made, but foreign counsel fees may greatly exceed amounts usually allowed by American courts for costs of service.⁶⁶

Perhaps the only fact which is clear is that litigants cannot usually rely on United States consular officers to execute service. Regulations of our Foreign Service prevent officers from executing service except (1) in special cases provided by federal statute⁶⁷ and (2) where a state statute requires personal service in foreign service and allows only a consular officer to execute it—and even here special State Department authorization is necessary.⁶⁸ Moreover, even where United States government regulations do not forbid, the foreign country may bar consular officers from making service. Aside from two recently ratified consular conventions, one with Ireland and the other with the United Kingdom,⁶⁹ the United States has entered into no treaty

64. See Lagarenne "Service of Process upon a Resident Defendant Without an Order," 32 CORN. L. Q. 600 (1947); Notes, 22 N.Y.U.L.Q. REV. 321 (1947), 23 N.Y. U.L.Q. REV. 340 (1948).

65. N.Y. Civ. Prac. Act § 233.

66. Some years ago, the writer was informed by a member of the New York Bar that he had received a bill for a fee of several hundred dollars from a German lawyer for making service of a citation upon a party in Germany. Instead of estimating his fee as that of a process server, the German *Rechtsanwalt* computed his fee according to the value of the amount in controversy in the New York court. The *Gebuehrenordnungen* of the Reich and the German states, which regulate the fees of the German bar, stress the amount in controversy in the computation.

67. 2 FOR. SERV. MAN. 874.2 (1952).

68. 2 *id.* at 874.6. For an instance of service under such a statute, see 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 121 (1941).

69. Cited note 18 *supra*.

which permits American consuls to serve documents. And it is probable that countries which forbid our consuls to take depositions would also prohibit consular service of documents, particularly those documents which are of a compulsive nature or which are served on nationals of the foreign country. Similarly, countries (such as Switzerland) which penalize the performance of judicial or other official acts in their country by persons other than their own officers would probably object to a foreigner's attempt to serve documents on behalf of a foreign court.

As a result of these possible restrictions, the federal statutes requiring and providing for service abroad may thus remain more or less illusory until consent of foreign governments to service of documents as a recognized consular function can be secured by treaty. State statutes, such as Sections 233 and 235 of the New York Civil Practice Act, must be utilized with caution, and only after ensuring that the attitude of the foreign government concerned is favorable. However, pending the negotiation of treaties, American lawyers might achieve success through a technique they apparently have never tried: service through letter rogatory. This is the usual civil law method, and foreign countries, if satisfied on the issue of reciprocity, might accept its use by American courts, since the letter rogatory does not bring the American consul into the picture, but leaves the task of service to the foreign country's own judicial officers.

No matter who makes service, however, the method of service prescribed by local law will probably have to be utilized. And this method may be poorly suited to requirements of American practice acts. For example, our law generally requires verification of proof of service, a requirement unknown to the civil law. Officials in civilian countries look askance at swearing an oath in connection with such a routine matter; foreign process servers may refuse—as have Danish process servers⁷⁰—to do more than "subscribe" their proof of service. This abridged proof of service apparently has been considered insufficient by some of our courts,⁷¹ even though no other proof was possible under foreign law.

If it is contemplated that it may become necessary to seek recognition or enforcement of the American judgment in the country where a party is sought to be served, then the method of service becomes crucial. Many civil law countries will not recognize as valid an American judgment which is entered upon service on a party within their territories, unless service has been made by their own officials as required by their own law.^{71a}

70. Report, American Consul General at Copenhagen to Secretary of State, November 23, 1933, in Department of State files.

71. See Report, *supra* note 70.

71a. This appears to be true of all Latin American countries. REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE ON UNIFORMITY OF LEGISLATION IN INTERNATIONAL CO-OPERATION IN JUDICIAL PROCEDURES 20 (Mimeo. 1951).

Consequences of Foreign Non-Cooperation

No generalization can be made concerning the extent of injury to litigation caused by failure to receive adequate cooperation abroad. Where formidable obstacles in obtaining evidence are encountered, a party may be able to obtain a delay of trial, if he can convince the American court that his case depends upon the particular evidence desired and that there is a probability that he will obtain the evidence within a reasonable time. But, generally, the consequences of failure to obtain evidence from abroad are much the same—and quite as devastating—as those of failure to secure domestic evidence. Some recent decisions show an awareness of the vagaries of foreign law and its impact upon production of evidence in American courts; these decisions indicate a desire to avoid conflict with restrictive foreign law if possible but a resolve not to permit these restrictions to interfere with our established procedures for discovery and examination before trial.^{71b} Foreign prohibitions and restrictions upon service of judicial documents do not have consequences as direct and disastrous as those resulting from barriers to the securing of evidence. Since failure to obtain personal service abroad usually does not affect jurisdiction, the worst consequence is the possibility of having a judgment set aside within the statutory period. Complete frustration will not result from failure to effect personal service, but only from a foreign country's objection to American methods of service and the resulting refusal to enforce an American judgment.

AMERICAN ASSISTANCE TO FOREIGN COURTS

American judicial assistance has not in recent years come under the scrutiny of civil law commentators. No civil law treatise on private international law is sufficiently analytical and critical to provide American lawyers with adequate appraisal of our own procedures. And in all the periodical literature of the civil law there appears to be only one notable article on the subject. Yet this one article, written seventeen years ago by Alexander Nekam, then a Budapest lawyer, tells a compelling—and somewhat discomfiting—story of the insularities and deficiencies of American practice from the civilian point of view.⁷² From Mr. Nekam's comprehensive article, from the fact of disparate common and civil law procedures, and from the several reported instances of American non-cooperation, it becomes clear that foreign governments must be less than satisfied with American assistance. In fact, it is probable that no other government permits such widespread confusion and such profound disregard for the concept of comity or international obligation in connection with judicial assistance between nations.

71b. See cases cited note 38 *supra*.

72. Nekam, *supra* note 41. An earlier article is descriptive and limited in its scope. Perera, *Exhortos o Comisiones Rogatorias de y para los Estados Unidos de Norte América, desde el punto de vista de su forma y tramitación en Material Civil*, 1 REVISTA TRIMESTRAL DE DERECHO PRIVADO 179 (Cuba 1924).

Assistance from the Executive Branch

In most foreign countries, the foreign office and ministry of justice receive, transmit, and even supervise compliance with requests for judicial assistance. Foreign government officials are surprised* when our equivalent executive departments refuse to provide these services. Foreign officials, for example, are disappointed when they are told—as they have been in the past—that they must employ private counsel to present a letter rogatory to a state court for execution. This refusal by our executive departments to transmit foreign letters rogatory has been termed a breach of obligation under international law by some civilian jurists. Non-American lawyers are also plagued by inability to secure authoritative information on American procedures from our executive departments. Two brief narratives may illustrate the plight of the foreign litigant.

Shortly before the war, the Belgian consul in New York City forwarded a letter rogatory to the local United States Attorney stating: "I am informed that you are the proper official to see to the execution of this request." The United States Attorney sent the letter to the Department of Justice in Washington for instructions. The Department concluded that the Belgian consul's direct approach had violated protocol, and thereupon sent the letter to the Department of State. The latter returned it with the information that Justice was wrong in its assumption that the consul should have first approached State but that, in any event, "the law imposes no duty on the Executive Branch" to have foreign letters rogatory executed. The Department of Justice then returned the letter to the consul with the suggestion that he employ private counsel to present the request to an appropriate state court.

And the attorney for the New York consulate of one of the western European countries has written that:

"The . . . Embassy unsuccessfully attempted to have our State Department, our Attorney General's Office and all other officials of the United States take jurisdiction of the matter to complete the letters rogatory. For almost six months this matter was juggled around the various departments until it was forwarded to the Consul General in New York. He, in turn, attempted to interest the District Attorney's office in New York in this matter and they, of course, pleaded no jurisdiction. Finally, they requested me to take care of the matter. I did successfully complete the letters rogatory in our New York State Supreme Court without any difficulties whatsoever. However, it did take almost seven months to complete the letters rogatory. . . ."⁷³

Assistance from the Courts

The record of American courts in rendering assistance to foreign tribunals is a mixed one. The extent of American judicial cooperation has depended

73. Letter to the writer, dated April 6, 1950.

upon the nature of the foreign request (whether for securing testimony in civil cases, for securing testimony in criminal cases, or for service of documents) and upon the nature of the American court (whether it is a federal or state tribunal). In addition, the cooperation of *federal* courts in both civil and criminal cases has depended on the period in which assistance was asked (whether before or after the 1948 enactment of the Federal Judicial Code).

Requests for Taking Testimony in Civil and Criminal Cases

Federal court response. The year 1854 may be taken as the beginning of the vexed story of the pre-1948 failure of federal judicial assistance. In that year, the French government, on behalf of a French court, sent to the Department of State a request for the examination of a witness in New York State. Chagrined, the Secretary of State told the French Ambassador that the Attorney General had advised him that there was no statute which authorized a federal court to compel the attendance of a witness for the execution of a letter rogatory from a French court. The Attorney General's conclusion that a statute or treaty was necessary may have been erroneous,⁷⁴ but he nevertheless secured congressional enactment of the Act of March 2, 1855,⁷⁵ which he described as "a general and complete remedy" for executing foreign letters rogatory,⁷⁶ the civil law's only method for requesting judicial assistance. By a succession of errors in indexing and revising the statutes, this act was buried in oblivion. Moreover, legislation which frustrated the Act's effect was improvidently enacted in 1863; the effect of this later legislation was to limit district court execution of letters rogatory to those issued in suits for money judgments in which a foreign government had an interest.⁷⁷ As a result, our district courts lost sight of the Act of 1855 and severely restricted the use of foreign letters rogatory.⁷⁸ For almost a century, requests for assistance in

74. "That any domestic court has inherent power at common law to honor a letter rogatory should not be doubted." 8 WIGMORE, EVIDENCE § 2195a n.2 (3d ed. 1940). De Villeneuve v. Morning Journal Ass'n, 206 Fed. 70 (S.D.N.Y. 1913); *Ex parte* Taylor, 110 Tex. 331, 220 S.E. 74 (1920). *Quaere*, assuming the power of a domestic court to execute a foreign letter rogatory in the absence of statutory authority if the witness appeared voluntarily, could it properly issue and enforce a subpoena to compel him to do so? The latter court says yes.

75. 10 STAT. 630 (1855).

76. 7 OPS. ATT'Y GEN. 56 (1855).

77. 12 STAT. 769 (1863). This measure was proposed by the Treasury Department in apparent ignorance of the existence of the Act of March 2, 1855, which had been indexed in the Statutes at Large only under the heading "Mistrials."

78. *In re* Spanish Consul's petition, 22 Fed. Cas. 854, No. 13,202 (S.D.N.Y. 1867); *in re* Letters Rogatory from the First District Judge of Vera Cruz, 36 Fed. 306 (C.C. S.D.N.Y. 1888); *in re* Letters Rogatory of the Republic of Colombia, 4 F. Supp. 165 (S.D.N.Y. 1933). *Cf.* Janssen v. Belding-Corticelli, Ltd., 84 F.2d 577 (3d Cir. 1936), where it was held that a district court had no power, statutory or otherwise, to issue subpoenas to compel witnesses to appear and produce documents before a commissioner appointed by the Exchequer Court of Canada. The court held its authority to be circumscribed by 28 U.S.C. § 653, which was the Act of 1863, *supra* note 77, plus the Act of 1855, *supra* note 75.

foreign private litigation were denied hospitality in our federal courts. And for almost a century, our national government remained unperturbed by this judicial antipathy.

Throughout the pre-1948 period, federal courts were especially hostile to requests from foreign criminal courts. This attitude was particularly unfortunate, because the immediate purpose of the 1855 Act was to enable a federal circuit court to examine a witness on behalf of a French *juge d'instruction*, a magistrate sitting in a preliminary criminal proceeding.⁷⁹ Federal court refusals to execute letters rogatory in criminal matters⁸⁰ resulted not only from confusion created by the Act of 1863 but also from an unwarranted extension of the Sixth Amendment's confrontation rule to criminal prosecutions in foreign states.⁸¹

Passage of Section 1782 of the new Judicial Code,⁸² however, may largely have overcome the uncooperative attitude of our federal courts. As originally enacted, this section bestowed on district courts statutory jurisdiction to take testimony for use in foreign civil proceedings, and a recent amendment makes it clear that criminal cases are also included.⁸³ The section now reads:

"The deposition of any witness within the United States to be used in any judicial proceeding pending in any court in a foreign

79. Letters of French Ambassador Sartiges of February 2, 1854, to Secretary of State Marcy, requesting execution of the letter; of Secretary of State Marcy to Attorney General Cushing of February 4, 1854; and of Secretary of State Marcy to the French Ambassador of March 10, 1855, informing him of the enactment of the Act of March 2, 1855; on file in National Archives.

80. *In re* Letters Rogatory from Examining Magistrate of Tribunal of Versailles, 26 F. Supp. 852 (D. Md. 1939); Letter of Circuit Judge Morrow to the Mexican Consul General, April 9, 1909, 3 AM. J. INT'L L. 1011 (1909).

81. Nekam, *supra* note 41, at 237-9, writes of the application by our courts of the limitations of the Sixth Amendment to the execution of foreign letters rogatory:

"This principle has become so well incorporated, little by little, in Anglo-Saxon juridical ideas that judges as well as the public have come to regard it instinctively as an institution of natural law and as an eternal requisite of equity. Instead of seeing in it only an accidental juridical institution developed in a given system, both jurisprudence and public opinion have accepted it as a fundamental right of man, always and everywhere valid."

"To this procedural principle, or rather to its extension by American juridical opinion to a principle of natural law, is largely due the near impossibility of obtaining in that country depositions for use abroad in criminal cases."

"It seems evident that the American Constitution did not intend to prescribe rules of procedure for foreign courts. But nevertheless the court of execution, seeing instinctively in this constitutional principle the incarnation of a universal thesis of natural law, has not hesitated to extend its validity to even these cases" (writer's translation from the French).

82. 62 STAT. 949 (1948), as amended, 63 STAT. 103 (1949), 28 U.S.C. § 1782 (Supp. 1952).

83. 63 STAT. 103 (1949), 28 U.S.C. § 1782 (Supp. 1952). See Note, *Reciprocity in Execution of Letters Rogatory*, 58 YALE L.J. 1193 (1949).

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."

Although there are no reported cases construing the amended section, it is known to the writer that some letters rogatory in criminal, as well as civil, matters have been executed under it, no question having arisen from the substitution of the word "deposition" for "letter rogatory."⁸⁴

It appears, however, that Section 1782 may still fall short of offering wholly satisfactory aid to foreign courts. The section makes no provision for compulsory process to assist a commissioner appointed by a foreign court. And it is inflexible in its mandate that all testimony be taken according to the procedure governing domestic depositions even though that procedure may have no significance for the foreign court where the testimony is to be used. The section's failure to make specific mention of letters rogatory could also cause trouble in the future. Finally, the section makes no provision for the mechanical problems posed by incoming requests for examination of witnesses in connection with preliminary investigations before committing magistrates (such as the French *juges d'instruction*) and in connection with other foreign criminal proceedings. These requests are sometimes directed to the Department of Justice (from the foreign missions in Washington) and to the United States Attorneys (from the foreign consulates). The requests do not provide for representation either of the accused (or the suspect) or of the foreign prosecutor at the examination; the assumption of the requesting government is that the examination will be conducted by the American court, or perhaps by the United States Attorney. But no machinery exists in our federal courts or in the executive branch for conducting such examinations. Thus, despite a desire to extend as much cooperation as is permitted by Section 1782, each request of this nature creates a quandary.

State court response. State courts have been more conscious of, and obedient to, their international obligations than have federal courts. In fact, the comparative ease of securing state court assistance has become so widely known that judicial assistance in the United States has occasionally been described as a matter for state courts only.⁸⁵ Many states grant judicial aid under the

84. The use of the lone word "deposition" is unfortunate, as it will add to the confusion abroad between a deposition and a letter rogatory. The latter term should have been retained as it appeared in that part of § 653 of old Title 28 which was derived from the original Letters Rogatory Act, 10 STAT. 630 (1855).

85. Nekam, *supra* note 41, at 70. This view has been so pronounced that a recent writer goes so far as to state flatly: "In the United States as well as Switzerland, such judicial assistance [deposition of testimony abroad] is a matter for State and cantonal

authority of statutory enactments resembling the sections of the New York Civil Practice Act; these sections provide for the taking of depositions to be used in foreign courts.⁸⁶ However, only eleven states have adopted the Uniform Foreign Deposition Act,⁸⁷ which was proposed over thirty years ago; this Act provides that compulsory process, used in connection with domestic depositions, shall also be available to secure depositions for use in courts of sister states, the territories, and foreign jurisdictions.

State court cooperation in criminal cases has been far less satisfactory than cooperation in civil matters, except in those few states (such as New York) whose statutes expressly provide for assistance in criminal proceedings. Almost all states without such provisions operate under constitutional or statutory rules similar to that of the Sixth Amendment of the Federal Constitution,⁸⁸ and state courts have been disposed to adopt the view of the federal courts that the confrontation rule prevents cooperation in criminal cases. As a result of combined state and federal court hostility prior to 1948, civil law writers came to regard it as impossible to obtain the assistance of American courts in criminal matters.⁸⁹ It does not appear that state court assistance in criminal proceedings has improved since 1948.

Requests for Service of Documents

Our courts conceive of letters rogatory solely as a means of procuring testimony,⁹⁰ but civil law gives them a much broader utility. A civil law court, it seems, may request a foreign court to perform almost any kind of judicial act known to the internal law of the forum,⁹¹ including serving a summons or a subpoena or a copy of a complaint; conducting an investigation;

courts respectively, rather than for federal authorities. . . ." NUSSBAUM, *AMERICAN-SWISS PRIVATE INTERNATIONAL LAW* 37 (Columbia Univ. Bilateral Studies in Private Int'l Law, No. 1, 1951). The statement is, of course, in error insofar as it refers to the period subsequent to the enactment of the new Federal Judicial Code in 1948.

86. N.Y. CIV. PRAC. ACT §§ 309-12; N.Y. RULES OF CIVIL PRACTICE 136, 137. For a practical explanation of how to go about securing the examination of a witness by a state court in New York for a Paraguayan court, see Schein, *supra* note 8. For other state court provisions, see 8 WIGMORE, *EVIDENCE* § 2195*d* n.1.

87. 9 UNIFORM LAWS ANN. 323 (1942).

88. 5 WIGMORE, *EVIDENCE* § 1397.

89. *E.g.*, Nekam, *supra* note 41, at 238; Editorial Note, *Commission Rogatoire (Matière Répressive)*, in 4 *RÉPERTOIRE DE DROIT INTERNATIONAL PRIVÉ* 139 (de Lapradelle et Niboyet eds. 1929).

90. *In re* Letters Rogatory out of the First Civil Court of City of Mexico, 261 Fed. 652 (S.D.N.Y. 1919); *Matter of Romero*, 56 Misc. 319, 107 N.Y. Supp. 621 (Sup. Ct. 1907).

91. Japiot, *Commission Rogatoire (Matière Civile)*, in 4 *RÉPERTOIRE DE DROIT INTERNATIONAL* 69 (de Lapradelle et Niboyet eds. 1929); FOELIX, 1 *TRAITÉ DU DROIT INTERNATIONAL PRIVÉ* 462 (4th ed. 1866); EVERETT, *LA CARTA ROGATORIA O ENHORO INTERNACIONAL ANTE LAS CORTES NORTE AMERICANAS* c. III (1935).

examining premises involved in litigation; taking extracts of books of account; or appointing a temporary administrator of the estate of an alien.

Federal and state court response. Execution of letters rogatory from foreign courts requesting service of summons and complaint upon residents of New York have been refused by the New York Supreme Court and the United States District Court for the Southern District of New York. The New York court, in *Matter of Romero*,⁹² thought it had no power to order such service but said that, even if it had, it would not exercise the power because the Mexican court which issued the letter rogatory "has not and cannot obtain jurisdiction over the defendant," a New York bank with no office in Mexico.⁹³ The court said finally that it would not enforce the laws of a foreign country if they contravene the policy of the forum or are prejudicial to the interests of the citizens of the forum.

In the district court case, *In re Letters Rogatory out of First Civil Court of City of Mexico*,⁹⁴ Judge Augustus Hand reached a similar conclusion in vacating an order directing service of summons in an action on a lease of property in Mexico City. After referring to Articles 25 and 26 of the Civil Code of Mexico, stating that non-resident foreigners may be sued in Mexican courts on obligations contracted in or to be performed in Mexico, Judge Hand noted that it was apparently possible "through the aid of this court" to render the United States resident subject to a personal judgment in Mexico. The judge asserted that it was undesirable to require residents of New York to defend foreign suits brought in distant countries where the defendants had no property. He added that he could discover no reported decision of an English or American court which, by ordering service of process, had "aided a foreign tribunal to acquire jurisdiction over a party in the United States."⁹⁵ The court thus refused service on the ground that the judicial aid requested was without precedent and contrary to traditional American limitations on judicial jurisdiction. As far as the reports indicate, these decisions represent American practice today.

The basic assumption. Underlying these two American decisions is an assumption about the jurisdiction of civil law courts which must strike civilian jurists as extraordinary. Both American courts assumed that the Mexican courts would acquire personal jurisdiction over the defendants by personal service of the summons, as requested by the letters rogatory—or, more accurately, that the Mexican courts would not acquire personal jurisdiction *unless* the summons and complaint were served personally, pursuant to court order; substituted service would not suffice.

92. 56 Misc. 319, 107 N.Y. Supp. 621 (Sup. Ct. 1907).

93. *Id.* at 320, 107 N.Y. Supp. at 622; citing *Pennoyer v. Neff*, 95 U.S. 714 (1878).

94. 261 Fed. 652 (S.D.N.Y. 1919). For comment on these cases, see Everett, *Letters Rogatory—Service of Summons in Foreign Actions*, 44 Col. L. Rev. 72 (1944); Schein, *supra* note 8.

95. *In re Letters Rogatory, etc.*, *supra* note 94, at 653.

Yet it is doubtful that our distinction between the legal consequences of personal and substituted service would make sense to civilians, for it appears to have no counterpart in their law. Civil courts, it seems, gain jurisdiction when suit is filed by virtue of some "contact" point—such as domicile or place of performance of a contract—which is common to the defendant (or the subject matter of the litigation) and the forum; jurisdiction does not depend on the fact that copies of the summons and complaint have been handed, physically and in person, to the defendant.⁹⁶ Personal service, then, seems to be nothing more than *notice* to a defendant over whom the forum already has jurisdiction. Civil law courts probably send letters rogatory to our courts because this seems to be the only way to effect this kind of notice in the absence of a treaty. But, if provision were made in civilian codes of procedure, notice could probably be given just as effectively by the forum country's consul in the United States; or notice could even be sent by air mail. Both methods of extraterritorial notice are common within civil law countries. At present, however, the failure of our government to supply some facility other than the post office in compliance with foreign requests for service of documents is hardly conducive to promotion of American interests in courts abroad.

Because an order of court is not ordinarily necessary in American law to procure service of an initial summons and complaint, and if, as it seems, extraterritorial personal service by order of a foreign court is not required for civil law jurisdiction over defendants, there appears to be no fundamental conflict between the common and the civil law which will prevent international agreement upon a method of serving such documents.

Other documents. There are no reported cases involving requests for service of documents other than those in the nature of summons and complaint. But in view of the judicial attitudes described in these pages it is scarcely likely that American courts have been receptive to requests for other kinds of service, or that our judiciary has been receptive to requests for other procedural actions known to civil law.

ASCERTAINMENT OF FOREIGN LAW

In recent years, the increase in the number of cases in which foreign law governs some aspect of the litigation has been accompanied by a change in the evidential principle controlling proof of foreign law—a transfer from the common law "proof-of-foreign-law-as-a-fact-for-the-jury" rule to the "judicial notice" theory.⁹⁷ These two factors render our methods of ascertaining the law of foreign countries—especially countries of the civil law system—particu-

96. NUSSBAUM, *op. cit. supra* note 85, at 30; Schoch, Book Review, 1 AM. J. COMP. L. 296 (1952); Schopflocher, *supra* note 44, at 241; Le Paulte, *Study in Comparative Civil Procedure*, 12 CORNELL L.Q. 24, 30 (1926).

97. See Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018 (1941); Kuhn, *Judicial Notice of Foreign Law*, 39 AM. J. INT'L L. 86 (1945).

larly ripe for reconsideration. The transition to the "judicial notice" theory has meant that the judges themselves now have greater responsibility for procuring evidence of foreign law. And as the foreign implications of litigation multiply, judges may be increasingly sensitive to the fact that collection and presentation of foreign law materials suffer from serious shortcomings: cost and difficulty of finding competent expert witnesses; lack of adequate foreign law materials in all but a few libraries; and the general impossibility of obtaining testimony on foreign law by letter rogatory.⁹⁸ In addition to these shortcomings, present procedural requirements for proving foreign law in American courtrooms further impair the ascertainment process; the following discussion deals with these proof requirements.

Proof of Foreign Law

Experienced trial lawyers appear to believe that the courtroom testimony of foreign law experts will never be dispensed with where it is necessary to prove more than formal matters. The examination of expert witnesses, however, is complicated by many technical requirements for the proof of the foreign law materials utilized by the expert in his testimony. Civil law experts and examining counsel are often baffled by some of the objections raised at trial. Opposing counsel, for example, may complain that the particular edition of a code commonly used in the every day practice of the expert in his own courts and relied upon by him as witness is "not shown to have been published by official authority," even where no one has the slightest suspicion that the witness himself may have fabricated the volume in question.

Because of the fundamental differences between civil and common law, the trial practitioner should be freed from procedural difficulties in the presentation of foreign law so that he may concentrate on substance. There appears to be no way to remove from procedural controversy commentaries or treatises, which often supply "doctrine" necessary to supplement the particular statutory provision involved.⁹⁹ In civil law, however, the statute (or the code) is the important thing—the starting point. The provisions of codes, decrees, ordinances, rules and regulations, and other written law, as well as reports of judicial decisions, should, by pre-trial certification and agreement, be placed beyond the field of controversy as to their authenticity and competency. To effect this result, courts could ask for and accept an official certificate from a foreign governmental authority stating that the foreign legal material is what it purports to be. Evidence of foreign law by official certificate would be particularly desirable in non-contested and in non-contentious cases and in cases calling for proof of foreign administrative practice.

98. Foreign courts do not regard their domestic law as the proper subject of testimony by a witness. See Nussbaum, *supra* note 97, at 1029 n.69.

99. See 6 WIGMORE, EVIDENCE 12: "Goldsmith's Chinese traveller would smile to see the judge refuse to listen to a foreign treatise while on the bench and then retire to his chambers and take the same book from the shelves to refresh his judicial memory."

Certainly there is international precedent for a certification procedure. Courts of civil law countries have long been accustomed to obtaining information on the law of another country through requests to the foreign government forwarded through the diplomatic channel. The information is supplied by a designated agency, such as the highest court or the ministry of justice. International agreements among civilian countries codify this cooperation, sometimes requiring signatory states to provide facts or interpretations as well as authentication of written law. A number of bilateral treaties oblige the requested governments to furnish the text of its laws. Others provide that the requested state shall supply, in addition to the text of laws, "the necessary information, if any, as to the point of law in dispute."¹⁰⁰ Outstanding among international agreements is the Bustamante Code, which obligates a requested state to furnish a report "on the text, force and sense of the applicable law."¹⁰¹ Early British precedents are the British Law Ascertainment Act, 1859,¹⁰² and the British Foreign Law Ascertainment Act, 1861.¹⁰³ The former authorizes British courts to direct inquiries concerning the law of other jurisdictions to courts in other parts of the Empire; and the latter authorizes inquiries to a foreign court, if a convention has been entered into.¹⁰⁴ The Harvard Draft Convention contains a provision whereby a court may request "information on any question concerning the law of another state"; no obligation is imposed upon a state to respond to such a request, however, and it is provided in effect that a court may give to such a certificate whatever weight, if any, it deems appropriate.¹⁰⁵

Unfortunately, the Supreme Court's decision in *United States v. Pink*,¹⁰⁶ has caused some members of the bar to view with mixed feelings a rule according conclusive effect to an official certificate stating foreign law. In that case, the Court, relying on Section 391 of the New York Civil Practice Act, accepted a certificate of the Soviet Commissariat for Justice (an official authorized to interpret existing Russian law) as conclusive of the intended extraterritorial effect of a Russian nationalization decree. However, the fact that in recent years we have learned to distrust almost everything emanating from the Kremlin is no reason to deprive ourselves of a useful device which could serve merely as machinery for obtaining information, but would not purport to evaluate it.

100. *E.g.*, art. 18, Treaty of April 16, 1922, between Czechoslovakia and Italy, 55 LEAGUE OF NATIONS TREATY SERIES 189, 196 (1926).

101. Arts. 409-11. SCOTT, *THE INTERNATIONAL CONFERENCE OF AMERICAN STATES, 1889-1923*, pp. 325-76 (1931). An English translation of the relevant provisions appears in Appendix VI accompanying the Harvard Draft.

102. 22 & 23 Vict., c. 63.

103. 24 & 25 Vict., c. 11.

104. For reasons undisclosed, it appears that no convention has ever been entered into.

105. Pt. VII, art. 12 and pt. VIII, art. 14.

106. 315 U.S. 203 (1942).

Proof of Foreign Official Records and Documents Located Abroad

A related problem which presents increasing difficulties is that of proof of foreign official records and documents on file in foreign public offices.¹⁰⁷ Although these documents are not strictly "foreign law," the difficulties involved in their proof are similar to problems involved in proof of foreign law proper. Rule 44 of the Federal Rules of Civil Procedure and Rule 27 of the Criminal Rules, which reflect Section 1741 of the Judicial Code, provide that a foreign official record, or an entry in it, may be evidenced by a copy of the document. The copy must be attested by the officer having its legal custody and must be accompanied by a certificate by "any officer in the foreign service stationed in the foreign state . . . in which the record is kept . . .," stating that the attesting officer does have legal custody. A number of states have adopted statutes substantially similar to Rule 44.¹⁰⁸

In many parts of the world today, particularly behind the Iron Curtain, there are no United States diplomatic or consular officers who can make the certification required by Rule 44. Even in those countries where we have

107. The Report of the Committee on Comparative Procedure and Practice of the Section of International and Comparative Law of the American Bar Association (soon to be published) made at the San Francisco meeting of the Association in September, 1952, contains a valuable treatment of the problem by Professor Rudolph B. Schlesinger. It says in part:

"The confusion which permeates the applicable statutory and decisional law is particularly painful in view of the great importance of the subject in the everyday administration of justice. Nobody who will cast even the most perfunctory glance at the footnote citations continued page after page in the relevant chapters of Wigmore on Evidence can doubt that the outcome of innumerable cases hinges on the ability of the parties to introduce certificates of birth, marriage or death, and many other types of official documents. They may be decisive, to mention only a few examples, in matrimonial litigation, in reference to decedents' estates, in immigration and naturalization matters, and in all other cases in which the civil status or the age of a person may be in issue, as for instance in insurance or rape cases.

"Where the record involved is a foreign one, the problem is even more poignant. In the first place, since the fact to be proved occurred abroad, no evidence may be available outside of the official record. Moreover, if the foreign country in question is a civil law country, many more types of facts can be proved through public registers and records than could be proved with respect to comparable facts happening in this country. In most civil law countries there exist many official registers unknown to us, such as the commercial register, the land register (in the sense of the Torrens system of land registration) and the register of matrimonial property regimes. Even where the fact to be proved is not one appearing in a public register, it may often be provable by the type of official records which abounds in civil law countries, i.e. the notarial *acte authentique*. Differing in this as in many other respects from the kind of notarized document known to us, the civil law notarial act is in terms a protocol in which the notary attests the fact that certain things have been said or done in his presence by the parties."

108. See list in 5 WIGMORE, EVIDENCE § 1680b (Supp. 1951).

representation, the record office may be too far removed from the office of the mission to permit the certifying officer to verify personally either the authenticity of the signature or the incumbency of the person signing as custodian. Moreover, consuls are sometimes reluctant to certify that the person attesting has legal custody of the record, as this certification presupposes a knowledge of foreign law which few possess;¹⁰⁹ consuls are not authorized to retain local counsel to advise them on such problems.

In criminal cases in the federal courts, proof of foreign records involves additional problems. Although Criminal Rule 27 provides that *official* records shall be proved in the same manner as in civil cases, Section 3491 of the Criminal Code provides that *non-official* foreign records and other foreign writings "of whatever character" shall be admissible by certification, as in the case of official records, but only if there is proof that they were made in regular course of business and that they are genuine.¹¹⁰ The court secures proof of genuineness by issuing a commission directed to a consular officer, who is to hear testimony on oral or written interrogatories; if the consular officer is satisfied that the writing is genuine, he shall so certify to the court.¹¹¹ There is no provision in the Code for obtaining the necessary proof by letter rogatory in case the records are located in one of the many countries where consuls are forbidden to execute commissions. Thus, in the case of proof of private records in criminal cases, the uncertainties and hazards of taking depositions by commission are added to the difficulties of procuring consular authentication of certificates made by the legal custodians of the record. This double requirement does not apply to proof of non-official records in civil cases.

109. SCHLESINGER, *COMPARATIVE LAW, CASES AND MATERIALS* 54 (1950).

110. 18 U.S.C. § 3491 (Supp. 1952). This provides:

"Any book, paper, statement, record, account, writing, or other document, or any portion thereof, of whatever character and in whatever form, as well as any copy thereof equally with the original which is not in the United States shall, when duly certified as provided in section 3494 of this title, and section 1741 of Title 28, be admissible in evidence in any criminal action or proceeding in any court of the United States if the court shall find, from all the testimony taken with respect to such foreign document pursuant to a commission executed under section 3492 of this title, that such document (or the original thereof in case such document is a copy) satisfies the requirements of section 1732 of Title 28, unless in the event that the genuineness of such document is denied, any party to such criminal action or proceeding making such denial shall establish to the satisfaction of the court that such document is not genuine. Nothing contained herein shall be deemed to require authentication under the provisions of section 3494 of this title and section 1741 of Title 28 of any such foreign documents which may otherwise be properly authenticated by law."

Failure to understand the legal jargon in which some of our statutes are couched may not be the least of impediments to an efficient international practice. One of the delights of research in foreign law is the discovery that statutes can be drafted in short, simple sentences. Indeed, the civil law finds no incompatibility between legal and literary merit. See Moses, *supra* note 30, at 258.

111. 18 U.S.C. §§ 3492-4 (Supp. 1952).

PROVISIONS WHICH SHOULD BE INCLUDED IN TREATIES

Treaty-making provides the only practicable method of improving our international practice. What is needed in all branches of practice considered in the foregoing pages is the assurance of active cooperation of foreign governments, and this cooperation can be secured only by international agreement. Upon the consummation of inter-government agreements, variable usage, doubtful custom, and elastic comity would give way to legislation and codification. Trial lawyers have no interest in initiating pre-trial procedures by diplomatic correspondence. They wish to find answers to questions of practice in a practice act or rules of court on their library shelves. Treaties would serve that purpose. And treaty-making would present a fresh opportunity to bring about substantive changes which could make international procedures not only codified and clear, but effective and speedy.

The Harvard Draft Convention on Judicial Assistance was approaching completion before the Federal Rules of Civil Procedure became effective. The intervening years have pointed up difficulties in extraterritorial procedures which were not previously evident. Even our own law has since undergone some change. The Harvard Draft will serve as an excellent starting point, however, for the drafting of agreements by the proposed governmental commission announced last September, and many of the following suggestions are based on that Draft.

*Taking of Testimony**Depositions*

A procedural treaty should, first of all, provide for the free use within foreign territory of the three methods of taking depositions now common in our state and federal courts: on notice, by stipulation, and by commission. These techniques should be available regardless of the witness' nationality. In order that the advantages of depositions may be retained even where unwilling or recalcitrant witnesses are involved, we should attempt to persuade governments of civil law countries to accept a provision which would make the compulsory process of the local courts available. An ideal arrangement might provide that if a commissioner receives a federal or state court commission authorizing and directing him to apply for compulsory process where process is necessary, the commissioner shall be able to petition the appropriate local tribunal for an order to compel witnesses both to testify and to produce books and records for examination. It might be considered unreasonable to expect that a foreign government would agree to make such process available unless its use is requested by the American court itself. Limiting the application of such a treaty provision to cases where the commission is directed to a consular officer might render the provision easier of acceptance; for reasons previously stated, however, such a limitation would circumscribe the provision's utility, unless consular officers were given greater means and wider

latitude of travel. The Harvard Draft Convention,¹¹² our Uniform Foreign Deposition Act,¹¹³ and the British Foreign Tribunals Evidence Act¹¹⁴ furnish models of acceptable provisions.

It should be provided, if agreement can be reached, that in a proceeding by deposition before a consular officer or a commissioner, a witness should be as free from local prohibitions and limitations on testimony as he would be in a proceeding before a court of the foreign country. Depositions would thus offer a benefit currently provided by letters rogatory.

Letters Rogatory

Letters rogatory can be made much more expeditious and efficient by treaty. The red tape and delay of transmission of letters rogatory through diplomatic channels could be minimized by providing for direct court-to-court correspondence. In view of the unfamiliarity of foreign courts with the territorial jurisdictions of our many state and federal courts, it would be advisable to have all foreign letters rogatory coming into this country cleared through some central agency (such as the Administrative Office of United States Courts) to ensure that they reach the appropriate destination. A treaty could minimize uncertainties and deficiencies in the execution of letters rogatory by providing that the court of execution, if not restrained by its own law, should follow any particular method of execution requested by the court of origin.¹¹⁵ An express assurance of adversary examination and cross-examination of witnesses should be stipulated. Provision should be made for stenographic transcripts of proceedings where requested.

Complete reciprocity could be provided so that American specialized courts and administrative agencies could issue letters rogatory without fearing failure of execution because of inability to perform a similar service for the foreign court.

Service of Documents

A simple, expeditious, and inexpensive method of service of judicial documents by consuls, private agents, and the appropriate officials of foreign governments could be assured by treaty. The Harvard Draft Convention provides for personal service in one of several ways: by one court at the request of another court; by a diplomatic or consular officer, where the person to be served is a national of the state of origin; and by a private agent either

112. Pt. III, art. 5. This provision does not require authorization by the court of the forum to a commissioner as a condition precedent to petitioning for compulsory process. Nor does the commission need be directed to a consular officer.

113. 9 UNIFORM LAWS ANN. 323 (1942).

114. 19 & 20 Vict., c. 113 (1856). The Act provides for issuance of compulsory process upon a showing that the foreign court (the court of the forum) is "desirous" of obtaining the testimony.

115. Pt. III, art. 4, § 10 of the Harvard Draft so provides. Civil law precedent for this essential provision is found in art. 14 of The Hague Convention on Civil Procedure of 1896 and 1905.

of the forum's tribunal or of a party to the litigation.¹¹⁶ These provisions do not exhaust possible modes of service. Article 13 of the Draft permits service by any other method, including mail and wire, which is not forbidden by law in the state of service, or which may be specially agreed upon by the governments concerned. Some of the methods of personal service provided in the Draft are also found in existing regional agreements. The Hague Convention of 1905 provides that requests for service of documents shall be made by the consul of the requesting state "to the authority designated by the state requested."¹¹⁷ The Bustamante Code¹¹⁸ and the Montevideo Convention on Civil Procedure of 1940¹¹⁹ provide that service of documents, like other procedural steps, shall be requested by letter rogatory. If other techniques of service were made available by treaty, however, this method would not be needed to assist American judicial proceedings, because the validity of foreign service of process in our law does not depend upon the intervention of a foreign court, nor upon the official status, under foreign law, of the process server; and, as indicated above, the civil law courts could probably be satisfied by other methods of service if provided by treaty or their codes of procedure.

In the absence of any difference in legal effect between the several methods of personal service provided by existing treaties, conventions, and draft conventions, possibly some simplification of the provisions of the Harvard Draft should be attempted. An essential provision, however, would be one similar to Section 7 of Article 2 of the Draft, providing that service made by an authority of the requested state shall be effected as nearly as practicable in the manner prescribed by local law for analogous documents, but that suggestions by the requesting state for a particular manner of service shall be followed unless forbidden by local law. As in the case of letters rogatory, requests for service should be transmitted directly to the person or the authority designated to make service.

Ascertainment of Foreign Law

The Harvard Draft Convention approaches the problem of ascertainment of foreign law by seeking a middle ground between such provisions as the British Foreign Law Ascertainment Act, 1861,¹²⁰ and the several bilateral treaties.¹²¹ The British Act, if implemented by treaty, would permit British courts to call upon foreign courts for an opinion on the law applicable to the facts of a case. The treaties impose obligations only to furnish texts of laws in force in the jurisdiction of the requested state. The Harvard Draft provides that a tribunal may address to the government of another state a request

116. Pt. II, art. 2.

117. See note 124 *infra*.

118. See note 128 *infra*.

119. See note 129 *infra*.

120. 24 & 25 Vict., c. 113.

121. Listed in Reporter's Comment to pt. VII, art. 12 of the Harvard Draft Convention, 33 AM. J. INT'L L. 113 (Supp. 1939).

"for information on any question concerning the law" of that state.¹²² This provision is broad enough to include almost anything, from texts of laws to opinions on the law as applied to given facts. But the requested government is not *obligated* to furnish the solicited information. This escape provision was thought necessary because of the reluctance of American courts to render advisory opinions.

It should be considered whether present practice is not so unsatisfactory as to justify the imposition of an obligation to comply with such requests. The constitutional objection to advisory opinions would not apply to a provision that responses to questions of law shall be made by one of the non-Article III federal courts, including those of the District of Columbia (which occupy a dual status); the constitutional restriction of judicial power to "cases or controversies" applies only to courts created under the authority of Article III of the Constitution. Following the practice in civil law countries, the Department of Justice would be regarded internationally as the proper recipient and conduit of requests for information on American law.

TREATY-MAKING: PAST ABSTENTIONS AND FUTURE TECHNIQUES

Agreements by Civil Law Countries and Great Britain

Prior to World War II, almost the entire world, excepting the United States, was interlaced by a network of treaties and conventions which codified the practice and procedure of civil, commercial, and (to a lesser extent) criminal judicial assistance. The Harvard Draft lists 123 of these agreements, but these are only the "more important instruments" on the subject.¹²³ A short history of the development of this international legislation will provide a background for examination of American attitudes.

Civil Law Agreements

A movement for reform of international procedures arose in Latin America and Europe during the last quarter of the Nineteenth Century. The First South American Congress on Private International Law was held by the Latin-American states at Montevideo in 1889. A Convention on Procedural Law was signed by Argentina, Bolivia, Brazil, Chile, Paraguay, Peru, and Uruguay. The First Hague Conference on Private International Law met in 1893. In 1904 the Fourth Conference on Private International Law at The Hague produced an agreement which replaced one adopted at the Second Conference in 1896. It became The Hague Convention on Civil Procedure of July 17, 1905, and bound Germany, Austria, Belgium, Denmark, Spain, France, Hungary, Italy, Norway, the Netherlands, Portugal, Rumania, Russia, Sweden, Switzerland, and Luxemburg.¹²⁴ After a protocol concluded

122. Pt. VII, art. 12.

123. Appendix I.

124. The French text of the Convention of 1905, 2 MARTENS-TRIEPEL, NOUVEAU RECEUIL GÉNÉRAL DE TRAITÉS 243-64 (3d Ser. 1909), appears in Appendix VI accom-

in 1924, Danzig, Estonia, Finland, Latvia, Poland, Czechoslovakia, and Yugoslavia adhered to the convention. The Convention contains provisions, applicable in civil and commercial matters, for extraterritorial service of documents; examination of witnesses and the performance of "other judicial acts" by foreign courts when requested by letters rogatory; non-discriminatory treatment of nationals of the signatory states with respect to security for costs and damages, legal aid for the indigent, and imprisonment for indebtedness.

The Assembly of the League of Nations in 1924 requested the Council to name a committee of experts to consider those subjects of international law whose regulation "by international agreement would seem to be most desirable and realisable. . . ."¹²⁵ This Committee of Experts for the Progressive Codification of International Law chose as one title "Communication of Judicial and Extra-Judicial Acts in Penal Matters and Letters Rogatory in Penal Matters." In 1927 a subcommittee, headed by Professor Schücking of the University of Kiel, Germany, issued a report, which was forwarded to the various governments along with a draft convention and a questionnaire asking whether it was possible "to establish by means of general convention provisions concerning the communication of judicial and extra-judicial acts in penal matters and letters rogatory in penal matters." Eighteen governments replied affirmatively that codification was desirable and realizable.¹²⁶ Six governments replied in the negative. One was the United States.¹²⁷ The other five—Great Britain and other members of the British Commonwealth—answered in the negative only because they preferred bilateral agreements to a general convention.

panying the Harvard Draft, *supra* note 121, at 148. See the comprehensive treatise on the Convention: MEILI & MAMELOK, *DAS INTERNATIONALE PRIVAT UND ZIVILPROZESSRECHT AUF GRUND DER HAAGER KONVENTIONEN* 327-48 (1911).

125. LEAGUE OF NATIONS DOCUMENT A.15 (4) 1927) V, in 22 AM. J. INT'L L. 1 (Supp. 1928).

126. Austria, Brazil, Denmark, Egypt, El Salvador, Estonia, Finland, France, Germany, Hungary, Japan, Latvia, the Netherlands, Norway, Poland, Rumania, Sweden, and Switzerland.

127. By letter of December 16, 1927, the Secretary of State advised the Secretary General of the League as follows:

"[T]he taking of testimony relating to criminal cases in foreign countries by the use of letters rogatory, with which Article I of the amended draft deals, is a process for which no provision has been made by the legislation of the Federal Government, and one which, under the system prevailing in the United States, can be employed, if at all, only pursuant to the laws of the several States. It is not deemed advisable to make commitments by international convention to change the existing practice in this regard prevailing in the United States. Moreover, evidence obtained in foreign countries through letters rogatory could not be used in criminal cases in the United States, since, under the Constitution, the accused must be confronted by witnesses against him.

"With respect to the second article of the revised draft, it may be stated that the Government of the United States is not prepared to commit itself to serve

At Havana in 1928 the Sixth International Conference of American states adopted the Bustamante Code of Private International Law¹²⁸ with provisions relating to judicial assistance. This Code has been ratified by fifteen states: Bolivia, Brazil, Costa Rica, Cuba, Chile, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, and Venezuela.

After a lapse of fifty years since the First Congress, a Second South American Congress on Private International Law was held in Montevideo in 1940. A convention on International Procedural Law was signed by seven states.¹²⁹

At the May, 1950, meeting of the Inter-American Council of Jurists in Rio de Janeiro, the topic of "International cooperation in judicial actions" was referred for exploration to its permanent working organization, the Inter-American Juridical Committee, which has its permanent seat in that city.¹³⁰

In October, 1951, came the Seventh Conference on Private International Law held at The Hague. It adopted for submission to the member governments a draft convention on civil procedure, which is a revision of the 1905 convention with "improvements suggested by experience."¹³¹

Participation by the British Commonwealth

As we have seen, the states of the common law jurisdictions did not adhere to The Hague Convention of 1905 on Civil Procedure, and they rejected a proposal for a convention on international assistance in penal matters. But many years ago Great Britain recognized the necessity of judicial cooperation with foreign countries and the necessity of procedural simplification and codification.

summonses emanating from foreign courts on witnesses or experts resident in the United States, or to surrender persons in custody except through the process of extradition.

"...

"While conventions on the subject of judicial cooperation doubtless serve a useful purpose among countries in close geographic proximity to each other, it is not apparent that uniform application of such agreements is necessary." League of Nations Document, *supra* note 125, at 88.

128. For the text, see SCOTT, *THE INTERNATIONAL CONFERENCE OF AMERICAN STATES, 1889-1928*, pp. 325-76 (1931). The provisions on procedure are included in Appendix VI accompanying the Harvard Draft, *supra* note 121, at 152. For comment on the Code, see 3 BUSTAMANTE, *DERECHO INTERNACIONAL PRIVADO* 231-45 (2d ed. 1934).

129. An English translation appears in 37 *AM. J. INT'L L.* 116-122 (1943).

130. The first report of the Committee, dealing with the Performance of International Procedural Measures (more particularly, with Service of Process and Obtaining Evidence), was rendered on September 23, 1952, *supra* note 71a. This report will be the subject of comment by the writer in a forthcoming issue of the *AMERICAN JOURNAL OF COMPARATIVE LAW*.

131. See editorial note by Nadelmann, *The United States and the Hague Conferences on Private International Law*, 1 *AM. J. COMP. L.* 268 (1952). An English translation of the draft convention appears *id.* at 282-8. For the French version, see 40 *REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ* 732 (1951).

Before the First World War, the question of adhering to The Hague Convention on Civil Procedure was under consideration in Great Britain. In 1918 the Lord Chancellor appointed a committee to report recommendations for facilitating the conduct of legal proceedings, including arbitrations, between parties at home and abroad, and for enforcing foreign judgments, decrees, and awards. The committee favored the adoption of such provisions of The Hague Convention as were acceptable, but recommended the negotiation with selected states of independent agreements embodying simpler and less formal methods for service of documents and the taking of testimony.¹³² The committee also prepared a draft convention on the enforcement of judgments and another on civil procedure.¹³³ In 1922 Great Britain entered into its first treaty on civil procedure with France and prior to the outbreak of the Second World War entered into similar but not identical bi-partite conventions with twenty-one other states.¹³⁴

United States Policy

No Entangling Alliances

Starting at least as early as 1854, when France suggested an agreement for the reciprocal execution of letters rogatory, the United States has been approached time and again by other governments with proposals for treaties or other agreements on international procedures. All suggestions for such cooperation have been rebuffed. In 1879 the United States curtly informed the Brazilian Government of its unwillingness to conclude a treaty on judicial assistance for the reason that execution of letters rogatory was not considered a proper subject for a treaty.¹³⁵ After the Spanish-American War,

132. BRITISH AND FOREIGN LEGAL PROCEDURE 1918 (Report of the Committee appointed by the Lord Chancellor, CMD. No. 251), in 24 (17) HOUSE OF COMMONS, SESSIONAL PAPERS (1919). The Committee stated:

"We think that the legal profession in this country would welcome any arrangements under which legal documents and notices could be served in foreign countries, as they are here, without any obligatory intervention and by which witnesses could be examined and cross-examined by the advocates of the parties in accordance with the principles of English procedure without its being necessary to take their evidence before or through a local court or in the form peculiar to the country in which they are examined. They would be willing to accept all reasonable safeguards, both for the sovereignty and the dignity of the foreign country and its institutions, and for the protection of witnesses from undesirable questions and harassing conditions of attendance and examination but they desire to have at least the option to take the evidence which is required for use in English courts in the English way."

133. For the text of the draft convention on civil procedure, see Appendix V of the Harvard Draft, *supra* note 121, at 140.

134. The treaties are listed in 67 THE ANNUAL PRACTICE (The White Book) 125, 649 (1950). The treaty with Yugoslavia of 1936, BRIT. TREATY SER. No. 28 (1937), appears in Appendix VII accompanying the Harvard Draft, *supra* note 121, at 153.

135. BRIGGS, CARTAS ROGATORIAS INTERNACIONALES 307 (1913). One is not surprised at the reaction of the Brazilian Government: "The peremptory terms of this memoran-

Spain approached us with a request for simplification of procedure in the execution of letters rogatory by dispensing with the authentication of signatures. We took the position that the suggestion could be accepted only with respect to letters for execution in Cuba, the Philippines, and Puerto Rico, the requirement of authentication otherwise being a matter of state procedure, federal statutes, and rules of court.¹³⁶ Similar considerations caused the United States to withhold its adherence to The Hague Convention on Civil Procedure of 1905.¹³⁷

The American reply to the inquiry of the League of Nations Committee in 1927 indicated that no agreement would have been possible with our government because criminal procedure was regarded as committed to the jurisdiction of the several states and because restraints were thought to be imposed by the Sixth Amendment of the Federal Constitution.¹³⁸ A proposal by the Polish government in the same year for a reciprocal agreement covering service of documents was refused on the familiar ground that diverse procedures of the various states rendered impossible any assurance by the federal government that state court judges would facilitate the transmission of legal instruments from Poland.¹³⁹

It was the Havana Conference in 1928 which produced the last and clearest public exposition of the traditional American aloofness from international agreements in private international law matters. The American delegation at the Sixth Conference of American States was led by the late Chief Justice Hughes, then Secretary of State. Our government was unable to adhere to the Bustamante Code, our delegation stated, "in view of the Constitution, . . . the relation of the States, members of the Union and the powers and functions of the Federal Government."¹⁴⁰ Official reasons for our reiterated isolationism have always been variations on this same theme or on the constitutional principle expressed in 1929, when our government indicated to the American representative at the Geneva Conference on Counterfeiting an unwillingness to make any treaty commitments relating to the execution of letters rogatory. The instruction was supported on the grounds that it was not clear that our statutes made any provision for the execution of letters rogatory in criminal matters, and that the Sixth Amendment prevented their use in criminal proceedings pending in our courts.¹⁴¹

dum induced the Brazilian Government to abandon the idea of concluding an agreement with this country." *Ibid.*

136. 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 101 (1940-41). Negotiations resulted in the agreements listed 2 *id.* at 101 n.8(1).

137. The reasons appear in an instruction of April 28, 1922, from the Assistant Secretary of State to the Charge d'Affaires at The Hague. 2 *id.* at 110, 111.

138. See note 127 *supra*.

139. 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 118 (1940-41).

140. SCOTT, *op. cit. supra* note 128, at 371. See also Nadelmann, *supra* note 131, at 270, 271.

141. 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 110 (1940-41).

In 1932 the United States took a negative attitude on two more offers of agreement. An attempt by the Uruguayan government to negotiate a treaty on legal procedure was met with the response that several of the matters covered by the proposal were largely regulated by state rules of procedure, and that possible resulting complications would probably outweigh any benefit to be derived from such a treaty.¹⁴² The second approach was that of the Iranian government. Desiring to serve a "notification" upon an American company, Iran proposed a reciprocal arrangement for the service of judicial and extra-judicial documents. Our Department of State regretted that our government "was not in a position to insure the delivery of foreign judicial documents in the United States."¹⁴³

The persistent isolationism of the United States in private law matters has become well known abroad. Our government was not even extended an invitation to the Seventh Hague Conference in 1951.¹⁴⁴ With the exception of certain specialized activities, the cooperation of the United States in the field of private international procedural law is now limited to participation in the Inter-American Juridical Council and its committee.

Emergence from Isolationism

Seventeen years ago, as a consequence of difficulties in obtaining evidence abroad, the Department of Justice initiated a study of international practice. At about the same time, the Harvard Research in International Law commenced work on its model Draft Convention. These studies were commended by the American Bar Association in 1938.¹⁴⁵ After the publication of the Harvard Draft Convention and while war was engulfing Europe, the Secretary of State and the Attorney General agreed that such a convention, if negotiated between the states of the Pan-American system, would be helpful in the administration of justice. The project was endorsed by the Inter-American Bar Association at its first meeting in Havana in 1941. Our entry into the war blocked further progress.

At the end of hostilities, the surge of "international" litigation again pointed up the critical inadequacy of our extraterritorial procedures. The American Bar Association once more turned its attention to the need for reform, and several other bar organizations followed. After the United States had become involved in the Inter-American Juridical Council's exploratory work in 1950, it became clear that we must mend our juridical relations with countries other than those of Latin America. The American Bar Association at its annual meeting in Washington in 1950 recommended that the President appoint a governmental committee on international procedures to draft treaties

142. Instruction of the Department of State to the United States Legation at Montevideo, April 7, 1932, in Department of State files.

143. 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 117 (1940-41).

144. See Nadelmann, *supra* note 131, at 268.

145. 63 A.B.A. REP. 178 (1938).

and take other steps to improve existing practice.¹⁴⁶ The Attorney General's announcement to the Judicial Conference on September 22, 1952, is the sequel to the Bar Association's action.

Techniques of Reform

At first blush, the prospect of writing and negotiating, in the form of treaties, rules of procedure for the extraterritorial needs of all federal and state jurisdictions in civil, criminal, admiralty, and quasi-judicial matters, appears overwhelming. Many other countries besides the United States are federal states with dual systems of courts. As stated by a recent writer on conflicts problems in international transportation law:

"The problem of determining the applicable law involves not merely the 58 United Nations, nor only the 82 States in the Postal and Telecommunications Unions, for many of these nations are themselves federal unions of states or sovereign units whose legislatures and courts control the local law of private relations. Great Britain comprises 76 sovereign units, each with its legislature, governor and courts. Canada is a federation of nine provinces (about to be ten) and two territories; Australia of six, plus a territory, mandates and trusteeships. The United States speaks for 48 States, the District of Columbia, two territories, four pre-war possessions, and a new group of mandated Pacific Islands—at least 55 governments. Switzerland is a federation of 22 cantons, the U.S.S.R. of 34 states, and Mexico of 28. Altogether there are today at least 350 sovereign states."¹⁴⁷

There are, however, some precedents which can guide our new commission in its choice of a program; and there are some postulates which should be stated and adhered to.

First of all, it must constantly be remembered that what is proposed is the drafting and promulgation of *rules of court* or *codes of procedure*; all aspects of the program, including negotiation with foreign governments, must accord with that fact. The Committee on International Judicial Cooperation of the American Bar Association's Section of International and Comparative Law

146. The resolution reads as follows:

"Resolved, That the American Bar Association recommends the appointment by the President of a governmental committee consisting of representatives of the Department of State, the Department of Justice, the Administrative Office of United States Courts and other interested agencies, for the purpose of drafting treaties and taking such other action as may appear advisable to codify and improve international procedures in civil and criminal matters, especially the practice of procuring evidence abroad, serving judicial documents abroad, and obtaining information on foreign law from foreign official sources; and

"That the American Bar Association offers its full cooperation with any governmental committee appointed to codify and improve international procedures in civil and criminal matters." 75 A.B.A. REP. 120 (1950).

147. Knauth, *Renvoi and Other Conflicts Problems in Transportation Law*, 49 COL. L. REV. 1 (1949).

has emphasized that treaties on judicial assistance can be successful only if they are democratically drafted, as our Federal Rules have been. Writing of our system of judicial rule making, former Attorney General Homer Cummings recently stated:

"Nor should we overlook the democratic methods by which these measures were translated into practical rules. The bench, the bar and the public cooperated in bringing about the final result. It is a lesson in technique which should never be forgotten."¹⁴⁸

This technique must be extended into the international area. Any governmental commission will require the full cooperation of bar associations and other legal organizations. Responsibility for submitting information on foreign procedure and suggestions for reform must be accepted by trial lawyers who have acquired practical experience by the trial and error method in the uncharted field of present day international practice.

A major problem of international public relations looms. The actual negotiation of treaties must be preceded by a campaign of reciprocal education by our bar and those of the civil law countries.¹⁴⁹ We must first explain our American depositions practice to the civilians, to convince them that it does not involve an exertion of American judicial power within their territory in derogation of their sovereignty. We must learn from the civilians the nature of their procedures which they desire us to accept. This exchange of information can be facilitated by cooperation of the bar associations of all countries. For this, the International Bar Association, the Inter-American Bar Association, institutes of comparative law, and other international legal organizations can play an effective role.

It is possible that a vast improvement in our juridical relations with the civil law countries can be brought about without the formality of a treaty. We do not know now how difficult it will prove to be to persuade civil law governments to accept our depositions procedures.¹⁵⁰ In the course of gathering information on foreign practice and ascertaining from foreign bars and ministries of justice their reasons for prior opposition to the use of our procedures, representatives of the commission will be able to explain our procedures to them. It is not unlikely that, even before a draft of a treaty is formally pro-

148. Cummings, *The Functioning of Judicial Machinery—A Problem and a Program*, 33 J. AM. JUD. Soc'y 175, 176 (1950).

149. See Jones, *International Procedures in Civil and Criminal Matters: Recent Developments in the United States* in THIRD INTERNATIONAL CONFERENCE REPORT 251 (Int'l Bar Ass'n 1952); Jones, "American Proposals for Reform of International Judicial Procedure—A Preliminary Program of Reciprocal Information," paper read at Fourth Conference, Int'l Bar Ass'n, Madrid, 1952.

150. While it appears that some Latin-American countries resent our methods of taking testimony within their borders, see 2 RESTREPO HERNANDEZ, *DERECHO INTERNACIONAL PRIVADO* 227 (2d ed. 1928), our depositions practice has received the enthusiastic endorsement of a distinguished Argentine authority, the late Estanislao Zeballos, in WEISS-ZEBALLOS, *MANUAL DE DERECHO INTERNACIONAL PRIVADO* 581, 594 (2d ed. 1928).

posed for negotiation, some governments will then withdraw their present objections to the use of our depositions procedures. The task of drafting treaties cannot be completely separated from the task of negotiating them.

Secondly, it would not be advisable to seek codification and uniformity of procedural law through the same techniques applied to substantive private international law. It may be feasible for the civil law countries, as it would be for the common law countries alone, to approach procedural as well as substantive private law subjects by the uniform law method.¹⁵¹ And it appears that this is the language of the Inter-American Juridical Council's instructions to its committee. Yet whatever hope may exist that all the states of the Western Hemisphere will enact identical codes of Conflict of Laws,¹⁵² it is unreasonable to expect that all the jurisdictions of the civil law countries and the common law countries could enact uniform laws of procedure which would be satisfactory to both systems.

On the other hand, to bring substantial improvement to international practice by inserting procedural provisions in consular treaties appears impracticable. These agreements treat many diverse aspects of the status and functions of consuls, but a code of international practice must embody provisions which do not necessarily relate to consuls. Moreover, the necessary drafting techniques for rules of court and codes of procedure could hardly be applied in the field of consular conventions.

This brings us to the problem of whether bi-partite treaties or a multilateral convention should be adopted. Theoretically, a single universal code of international practice, rather than a large number of codes, would be preferable. But experienced international practitioners think it will not be possible to come to terms with the civil law governments except upon a country by country basis. In support of the bi-partite treaty approach we have the persuasive precedent of Great Britain's experience. The only examples of the procedural coordination of the common and civil law are the twenty-two bilateral treaties which the United Kingdom has entered into. But there seems to be no reason why a multilateral convention limited to the states of the British Commonwealth and the United States should not be considered.

Finally, there appears to be no sufficient reason to anticipate difficulties from our federal-state relationships, which have heretofore been thought to make judicial procedure an inappropriate subject for international agreement. When these objections were put forward, procedure was *in fact* almost entirely a matter of state law. Even the federal courts, except in equity and admiralty cases, borrowed their procedure from the states; this, of course, is no longer

151. See Schmitthof, *The Science of Comparative Law*, 7 *CAMB. L.J.* 94, 96 (1939), reprinted in SCHLESINGER, *op. cit. supra* note 109, at 1, 3.

152. See Nadelmann, *supra* note 131, at 271. But see Lorenzen, *The Pan-American Code of Private International Law*, 4 *TULANE L. REV.* 498 (1930), pointing out that the continental system of conflict of laws, adopted in the Bustamante Code, is unacceptable to our common law jurisdictions.

true. The national government has created its own procedures for both civil and criminal proceedings in the federal district courts. Moreover, international practice cannot be dealt with satisfactorily except by international agreements; yet Section 10 of Article I of the Constitution, which forbids the states to enter into treaties, renders them helpless to take any steps on their own behalf. It is doubtful that it would be argued today that the benefits of procedural reform must be denied the state courts in the international field, where the states themselves are powerless to act.¹⁵³

The appointment of the governmental commission and the advisory committee will launch the first general effort in our history to improve the position of the American litigant in foreign countries. It means that we are preparing to enter upon a new era of international judicature.

153. The statement of the writer of Note, 96 U. OF PA. L. REV. 241, 255 (1947), that a convention "could bind only the federal courts to reciprocity" is without foundation. A treaty would be law in the state courts under Article VI of the Constitution.