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Administrative Law—The Scope of Official Notice

The doctrine of judicial notice, or the right of the judge to go outside the record for information relevant to the solution of a controversy, developed from the realization that there must be some limitation to the facts required to be proved at trial.[1] The same practical consideration becomes more acute with respect to the problem of official notice by administrative agencies,[2] where the tribunal often grapples with extremely complex problems[3] with respect to which volumes of evidence and testimony[4] are often offered. As an adjudicator of disputes between adverse parties, the administrative tribunal performs a function similar to that of a court. Nonetheless, there are basic differences between courts and administrative agencies which render inadequate for administrative application the rules developed by the courts regarding the scope of judicial notice.

Administrative agencies are creatures of statute[5] some of which have a two-fold function of rule-making and adjudication.[6] While both agencies and courts have a responsibility to protect the public interest, the agency ordinarily is able to take a more active role in

1. "Its [judicial notice's] employment . . . at every stage of the judicial process will greatly further the accomplishment of a chief objective of all sound procedure: the elimination of issues as to which there is or can be no bona fide dispute." MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 69 (1956).

"The trial of an ordinary suit would in many instances be interminably protracted if every matter of fact were to be explored by customary methods. Fortunately . . . judges have developed . . . 'a simplifying process . . . [whose] aim is to assume for the purposes of the instant litigation certain elements which experience has shown to be safely assumable.'" Gellhorn, *Official Notice in Administrative Adjudication*, 20 TEXAS LAW REV. 131, 136 (1941). (Footnote omitted.)

2. See generally MORGAN, *op. cit. supra* note 1; Davis, *Judicial Notice*, 55 COLUM. L. REV. 945 (1955); Davis, *Official Notice*, 62 HARV. L. REV. 537 (1949); Gellhorn, *supra* note 1; McNaughton, *Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy*, 14 VAND. L. REV. 779 (1961); Morgan, *Judicial Notice*, 57 HARV. L. REV. 269 (1944); Note, 44 YALE L.J. 355 (1934).

3. See, *e.g.*, New York v. United States, 331 U.S. 284 (1947), where the Interstate Commerce Commission determined a coutroversy so complicated that the issues were simplified at a pre-trial hearing attended by more than 400 people.

4. See, *e.g.*, FTC v. Cement Institute, 333 U.S. 683 (1948), where the Federal Trade Commission dealt with a problem on which it took 49,000 pages of oral testimony and 50,000 pages of exhibits.

5. I DAVIS, ADMINISTRATIVE LAW TREATISE 4 (1958).

6. *Id.* at 1-6.

achieving the public good[7] than is the court, whose role is more often one of passive decision making.[8] In the administrative tribunal the trier of fact is a "specialist" in his field.[9] The extent to which the administrative agency should employ the doctrine of official notice in its adjudicative function to avail itself of expertise is one of the paramount problems of administrative law.[10] Primarily this problem involves the development of a rule or standard which will effectively recognize the need of the agency in performing its adjudicative function to take advantage of its experience without eliminating an essential ingredient of a fair hearing—the opportunity to offer rebuttal to those materials which bear directly on the decision.[11]

In dealing with this problem the Supreme Court has held that due process requires only that each party have an opportunity to know and meet in appropriate fashion the matter officially noticed.[12] The state court decisions do not declare such a coherent and unified principle. Indeed, support may be found for almost any position in the

7. "[T]he obligation on the agencies to develop all available facts in adjudications is probably greater than the comparable obligations of courts. . . . Congress has assigned to each regulatory agency the affirmative duty of securing all relevant information, whether produced by the parties or not." 2 DAVIS, *op. cit. supra* note 5, at 377-78.

8. "It is not the function of the trier of fact either to know or to discover the truth, or even to discover what the truth appears to be as disclosed by all available data, but merely to find, for the sole purpose of settling the dispute between the litigants, what the facts appear to be as disclosed by the materials submitted." Morgan, *supra* note 2, at 271-72.

9. Gellhorn, *supra* note 1, at 137.

10. "No other major problem of administrative law surpasses in practical importance the problem of use of extra-record information in an adjudication." 2 DAVIS, *op. cit. supra* note 5, at 338.

"The statement with which chapter 15 on official notice begins—that no other major problem of administrative law is so much misunderstood—continues to be true." 1 DAVIS, *op. cit. supra* note 5 (Supp. 1963, at 3).

Official notice by administrative agencies, in the sense in which it is used in this paper, concerns notice by the agency tribunal of all facets of its expertise, not just of the expertise accumulated in the course of the performance of its adjudicative function. Records, data, and information which are the work-product of the rule-making function are also included in the agency's expertise as that term is used herein.

11. 2 DAVIS, *op. cit. supra* note 5, at 344.

12. In NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953), the Court held that an administrative agency is not restricted to the record of the particular proceeding in devising a remedy. In American Trucking Ass'ns v. Frisco Transp. Co., 358 U.S. 133 (1958), the Court rejected the plaintiff's objections to the Interstate Commerce Commission's taking notice of its own interual administrative practices and procedures, stating that it failed to see what prejudices could have accrued thereby. Earlier the Court had upheld the right of an agency to rely upon its own special knowledge to draw inferences as to the possible effects of a given rate decrease. Market St. Ry. v. Railroad Comm'n, 324 U.S. 548 (1945).

"Supreme Court decisions on official notice, properly interpreted, form a highly satisfactory body of doctrine, perfectly consistent with the thesis that the sole test of the validity of administrative resort to extra-record materials is whether or not the parties have adeqnate opportunity to meet those materials in the appropriate fashion . . . ." 2 DAVIS, *op. cit. supra* note 5, at 411.

state court cases.[13]

ALI MODEL CODE OF EVIDENCE

One possible solution to the problem of defining the scope of official notice is that promulgated in rules 801, 802, and 803 of the American Law Institute's Model Code of Evidence;[14] these have been substantially adopted in the Uniform Rules of Evidence of the Commissioners on Uniform State Laws.[15] These rules provide for notice of three groups of items:[16] (1) the common law, public statutes, private acts and resolves of legislative bodies, duly enacted ordinances, and regulations of governmental agencies or divisions; (2) specific facts and general knowledge so notorious as not to be the subject of dispute; and (3) specific facts and general knowledge capable of "immediate

13. The decisions of courts in New York, New Jersey, Wisconsin and Connecticut, for example, have reflected a liberal attitude toward the use of extra-record material by an administrative agency, while decisions in Vermont, Pennsylvania and Illinois evidence the more restricted view. *Compare* Jaffe v. State Dept. of Health, 135 Conn. 339, 64 A.2d 330 (1949), *and* Elizabeth Fed. Sav. & Loan Ass'n v. Howell, 24 N.J. 488, 132 A.2d 779 (1957), *and* People *ex rel.* Fordham Manor Reformed Church v. Walsh, 244 N.Y. 280, 155 N.E. 575 (1927), *and* McCarty v. Industrial Comm'n, 194 Wis. 198, 215 N.W. 824 (1927), *with* Smith v. Department of Registration, 412 Ill. 332, 106 N.E.2d 722 (1952), *and In re* Shenandoah Suburban Bus Lines, Inc., 355 Pa. 521, 50 A.2d 301 (1947), *and* City of Newport v. Newport Elec. Div. of Citizens Util. Co., 116 Vt. 103, 70 A.2d 590 (1950).

14. "Rule 801

The judge shall of his own motion take judicial notice of the common law and public statutes in force in this State, and of such propositions of generalized knowledge as are so notorious as not to be the subject of reasonable dispute.

Rule 802

The judge may of his own motion take judicial notice of

(a) private acts and resolves of the Congress of the United States and of the legislature of this State and duly enacted ordinances and regulations of governmental divisions or agencies of this State, and

(b) specific facts so notorious as not to be the subject of reasonable dispute, and

(c) specific facts and propositions of generalized knowledge which are capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy, and

(d) the common law and public statutes of every other state, territory and jurisdiction of the United States.

Rule 803

The judge shall take judicial notice of each matter specified in Rule 802 if a party

(a) requests that judicial notice of it be taken, and

(b) furnishes the judge sufficient information to enable him properly to comply with the request, and

(c) has given each adverse party such notice, if any, as the judge deems necessary to enable the adverse party fairly to prepare to meet the request."

MODEL CODE OF EVIDENCE rules 801-03 (1942).

15. UNIFORM RULES OF EVIDENCE 9.

16. These three categories were originally so enumerated in 2 DAVIS, *op. cit. supra* note 5, § 15.07.

and accurate demonstration by resort to easily accessible sources of indisputable accuracy."[17] Although they are specifically directed to the courts, Professor Edmund M. Morgan, who served as reporter to the American Law Institute's Committee on Evidence, states that these same rules should apply to official notice by administrative agencies insofar as the agency is adjudicating a dispute between adverse parties.[18] Rule 804(3)[19] provides that unless the material in question falls squarely within one of the categories of rules 801, 802, or 803 the judge shall decline to take notice of it. This requirement bolsters the already restrictive nature of the specific enumerations in those provisions. The Model Code does not provide for the challenging of the truth of noticed facts after they have been noticed. However under rule 806(2) the decision as to the propriety of notice under rules 801-05 with respect to a given fact is subject to appellate review.[20]

Professor Kenneth Culp Davis criticizes the application of these provisions of the Model Code to administrative tribunals,[21] basing his objections on the premise that, literally interpreted, the Code prohibits the administrative tribunal from taking notice of many materials necessary to the formulation of a proper solution. For example, he asserts that under the Code an administrative agency is precluded from taking notice of prior administrative decisions having the force of law. "Surely the Institute could not have intended any such absurd result."[22] But the Institute did not in reality reach this result. Under a realistic analysis the legislature delegates to the agency the power to make the law,[23] outlining only the general policies to be followed. Some of this delegated power is exercised in the rule making process, and some of it is exercised in the course of deciding disputes between

17. MODEL CODE OF EVIDENCE rule 802(c) (1942).

18. "[A]n administrative tribunal may take official notice of any matter subject to judicial notice by the courts. In so far as the tribunal is performing a function identical with that of a court . . . there is no reason why it should treat as indisputable any matter that would be subject to dispute in court." MORGAN, BASIC PROBLEMS OF EVIDENCE 15 (1961).

19. "If the information possessed by the judge, whether or not furnished by the parties, fails to convince him that a matter falls clearly within Rules 801, 802 or 803, he shall decline to take judicial notice thereof." MODEL CODE OF EVIDENCE rule 804(3) (1942).

20. Review under rule 806(2) is concerned only with whether or not the material should have been noticed in the first place, that is, whether or not it fits within one of the enumerated categories. There is no review under the Model Code with respect to the *truth* of noticed material once it has been noticed.

21. See 2 DAVIS, *op. cit. supra* note 5, at 385-87.

22. *Id.* at 386.

23. "Congress may and does lawfully delegate legislative power to administrative agencies. Lawyers who try to win cases by arguing that congressional delegations are unconstitutional almost invariably do more harm than good to their clients' interests." 1 DAVIS, *op. cit. supra* note 5, at 75.

adverse parties.[24] Prior decisions of the agency ought therefore to be subject to notice under the "common law" provisions of rules 801 and 802.

Professor Davis further asserts that under the Model Code a state court would be precluded from noticing the regulations of federal administrative agencies, which have the force of law. Under the analysis above that the administrative agency performs its law making process by virtue of a direct grant of legislative power, it is arguable that a state court would be compelled to notice such federal regulations under the provision of rule 801 for the notice of the common law and public statutes in force in the state, which according to the comment following rule 801 includes acts of Congress.[25]

Finally, Professor Davis asserts that legislative history, committee reports and proceedings, historical facts, and other bodies of similarly recorded information can not be noticed because they do not fall within any of the enumerated categories and their sources "can hardly be regarded as 'of indisputable accuracy.' "[26] If by this Professor Davis means that a committee report, for example, does not accurately record what the committee says, he is obviously wrong.

Professor Davis seems to be correct in his conclusion as to the desirability of a definition of the scope of official notice tailored to the peculiar need of the administrative tribunal to take advantage of its expertness. Such a definition is not to be found in the provisions of the Model Code. The weakness of the Code's provisions when applied to administrative tribunals is that their precise meaning is not clear. Some stretching is required to achieve an intelligent application at all. The Code fails to set up a definition which clearly and affirmatively grants the agency permission to take notice of its prior experience and expertness. It is possible that the more important components of this expertise can be included within the Model Code's provisions by careful analysis. But the decision as to whether under the Code to allow official notice of the agency's expertise should not depend upon so variable a factor as the judgment of individual triers of fact, among whom divergent decisions are possible concerning notice of the same material.[27] The agency has a duty to examine

24. "Administrative law consists of constitutional law, statutory law, common law and agency-made law." *Id.* at 4.

25. MODEL CODE OF EVIDENCE rule 801 and comment (1942).

26. 2 DAVIS, *op. cit. supra* note 5, at 386.

27. Review in such a case would concern only the reasonableness of the judgment exercised by the trier of fact. The appellate court will not overturn such a judgment if there is a reasonable basis for upholding it, even though the appellate court itself might have reasoned differently. It can be argued that uniformity is *not* such a desirable factor, and that between agencies the scope of official notice *should* differ, bearing some kind of relationship to the degree of expertness of the agency relative to the particular problem.

all sources and formulate a ruling which will protect the interests of the public at large[28] as well as those of the parties to the action. In this respect the agency should be granted with preciseness and clarity the right to draw upon its own resources within the field of its expertness through the use of official notice.

DAVIS' PROPOSAL

Professor Davis proposes that there should be a much broader criterion for determining the propriety of taking official notice of extra-record material, basing his assertions on his narrow interpretation of the Model Code's provisions.[29] His position is basically this: there are two types of facts used in every adversary proceeding, legislative facts and adjudicative facts.[30] Adjudicative facts are facts about the parties, the facts to which law and policy are applied. Going outside the record for adjudicative facts is improper; they should be introduced at the first opportunity and every chance for attack and rebuttal should be afforded. Legislative facts are those general facts which help the tribunal decide issues of law and policy. Extra-record legislative facts may or may not properly be noticed, depending upon how important the facts are, how central they are to the issue being decided, and the degree of doubt attached to their truth. An essential requirement of Professor Davis' concept of official notice is that the parties be afforded an opportunity to challenge the noticed facts;[31] each party is entitled to the opportunity to meet in appropriate fashion the materials of the opposition. The "appropriate fashion" will in turn depend upon the nature of the fact, whether it is legislative or adjudicative, and the importance and uncertainty of

28. "The very reason for the creation of most regulatory agencies was the need for providing effective representation for a public interest not otherwise represented, a need which courts because of their passive character could not supply." 2 DAVIS, *op. cit. supra* note 5, at 378.

29. "Quite drastically out of line with (1) judicial practices, (2) administrative practices, (3) holdings of courts, and (4) the Administrative Procedure Act are the judicial notice provisions of the American Law Institute's Model Code of Evidence. . . ." DAVIS, ADMINISTRATIVE LAW TEXT 279 (1959).

30. "The cardinal distinction which more than any other governs the use of extra-record facts by courts and agencies is the distinction between legislative facts and adjudicative facts. When a court or an agency finds facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent—the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts. When a court or an agency develops law or policy, it is acting legislatively; the courts have created the common law through judicial legislation, and the facts which inform the tribunal's legislative judgment are called legislative facts." 2 DAVIS, *op. cit. supra* note 5, at 353.

31. "[T]he view of the American Law Institute to the contrary seems especially unfortunate." 2 DAVIS, *op. cit. supra* note 5, at 433.

it.[32] Based upon these considerations, the agency should make its own decision in each case, subject to appellate review.[33]

Such individual decision would not, however, promote uniformity. It is difficult to say that one commissioner's judgment is better than another's.[34] Perhaps a workable criterion upon which administrative tribunals might rely would eventually evolve from the maze of individual decisions which would surely result under the balancing-of-factors solution proposed by Professor Davis. However, in this problem area if a workable and effective guideline can be developed now without reliance on this time consuming process then it would be wise to do so; according to Professor Davis, "No single and simple answer can be satisfactory."[35]

FEDERAL ADMINISTRATIVE PROCEDURE ACT

The Federal Administrative Procedure Act[36] does not attempt to provide a solution to the problem of defining the scope of official notice. The only relevant provision of the APA states that any party can be afforded on request an opportunity to challenge noticed material.[37] No effort is made to formulate a workable rule or definition.

MODEL STATE ADMINISTRATIVE PROCEDURE ACT

Perhaps the best solution is set forth in the provisions on official notice in the 1961 draft of the Model State Administrative Procedure Act. Section 10(4) of the act, relating to contested cases, provides:

> [N]otice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise, of

32. "For the problem involves the reconciliation of the nced for full utilization of experience . . . with the most essential ingredient of fair hearing—opportunity to know and meet the materials on the other side. Our thesis is that the reconciliation can best be accomplished by recognizing that the cardinal principle of fair hearing is not that all facts should be in the record or that all facts should be subject to cross examination and rebuttal evidence, but rather that parties should have opportunity to meet in the appropriate fashion any materials that influence decision. What is the appropriate fashion for meeting the opposing materials depends upon the nature of the facts and the circumstances . . . ." 2 DAVIS, *op. cit. supra* note 5, at 344.

33. See note 27 *supra*.

34. See note 27 *supra*.

35. 2 DAVIS, *op. cit. supra* note 5, at 344.

36. 60 Stat. 237 (1946), as amended, 5 U.S.C. §§ 1001-11 (1958).

37. Section 7(d) of the APA reads in part: "Where any agency rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary." 60 Stat. 242 (1946), 5 U.S.C. § 1006 (1958).

> the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.[38]

This statute presupposes a delineation between taking notice of law and of fact and does not specifically provide for notice of law. Legal material is acquired in a different manner from "facts" and put to use at some time prior to or other than the time at which the problem of noticing extra-record material arises. No permission is given to notice law because no permission is needed; it is one of the essential tools of the administrative tribunal. The Model Code also recognizes this distinction between law and fact but enumerates specifically the categories of law which can be noticed. In this respect the Model Act provides for a broader inclusion of legal materials by purposely excluding law from the problem area of notice.

The Model Act specifically includes all judicially cognizable facts. Perhaps even this grant is not broad enough. The agency should be allowed to take notice of all judicially cognizable materials, not just facts. Legal materials may in effect be noticed through the Model Act's presupposition that no permission is needed to notice legal material. However, unless one reads into the act the broadest possible interpretation of the word "fact," some material which is not strictly either fact or law may be excluded from notice. The act also brings within the scope of notice the agency's expertise within its particular field. Here, too, more should be permitted than the notice of scientific and technical *facts*. The agency should be able to draw upon *all* of its resources in its field, including records of prior proceedings and other materials not strictly factual.[39]

Official notice, as defined by the Model Act, differs only in degree from the power of the trier of fact to call for argument on a question or issue. Danger of prejudice to the parties is reduced by adequate provisions for notification of the parties and by liberal opportunity to challenge both the propriety of notice and the truth of the noticed material, before or after notice has been taken. Such a flexible system protects the interests of all the parties. Trial process is expedited by allowing the agency to draw upon its resources, and fairness is upheld by allowing reasonable challenge to the material thus brought into play.

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38. REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 10(4) (1961).

39. Official notice as dealt with here involves not just the materials gathered and collected by the agency in the performance of the adjudicative aspect of its dual function, but includes all relevant materials available peculiarly to the agency concerning the particular subject, whether collected in the performance of its adjudicative or legislative functions.

Associations—Definition of Cooperative

The first cooperatives in the United States were agricultural marketing associations.[1] To aid the development of associations such as these, all states currently provide special statutory benefits for cooperatives.[2] Generally, these benefits include various reductions in filing and franchise fees for incorporated cooperatives,[3] exemption from the antitrust statutes of the state,[4] and less regulation than for ordinary profit-making associations.[5] Statutory definitions of a cooperative usually include two elements. First, the association must have an acceptable purpose; second, the association must possess certain organizational and operational characteristics. In a majority of states the definition of a cooperative has unfortunately been strongly influenced by the early marketing associations. These definitions often limit the acceptable purposes to agriculture,[6] rural electrification,[7] and a few others,[8] thereby preventing many suitable associations from organizing as cooperatives. Also, some of the organizational and operational characteristics of present day definitions are inconsonant with modern conditions and inapplicable to nonagricultural associations.[9]

1. Note, *Agricultural Cooperatives*, 27 IND. L.J. 353, 354 & nn.8&9 (1952).

2. These cooperative statutes have withstood various state constitutional attacks challenging them as special laws. *E.g., In re* Wyoming Valley Co-op. Ass'n, 198 Fed. 436 (M.D. Pa. 1912); Oregon Growers' Cooperative Ass'n. v. Lentz, 107 Ore. 561, 212 Pac. 811 (1923). See generally PACKEL, THE LAW OF THE ORGANIZATION AND OPERATION OF COOPERATIVES § 9(a), at 46-47 (2d ed. 1947) [hereinafter cited as PACKEL].

3. *E.g.*, ALA. CODE tit. 2, §§ 132-33 (1960); ILL. ANN. STAT. ch. 32, §§ 471-72 (Smith-Hurd 1954). See also PACKEL § 62(b).

4. This is normally true only for agricultural cooperatives, and is probably based on the federal policy as set out in the Clapper-Volstead Act, 42 Stat. 388 (1922), 7 U.S.C. §§ 291-92 (1958). For a discussion of this statute see Hanna, *Antitrust Immunities of Cooperative Associations*, 13 LAW & CONTEMP. PROB. 488 (1948). However, the state exemptions of cooperatives were thwarted temporarily by the United States Supreme Court in Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902). The reasonableness of such classification for antitrust purposes was ultimately upheld in Tigner v. Texas, 310 U.S. 141 (1940) (overruling Connolly v. Union Sewer Pipe Co., *supra*). Typical state statutes which provide that agricultural cooperatives are not in restraint of trade are: ALA. CODE tit. 2, §§ 69, 85 (1960) (see comments following these sections); GA. CODE ANN. § 65-220 (1937); ILL. ANN. STAT. ch. 32, § 468 (Smith-Hurd 1954); VA. CODE ANN. § 13.1-331 (1956). For a general discussion of state antitrust exemptions for cooperatives see Note, 27 VA. L. REV. 674 (1941).

5. PACKEL §§ 63(c)-(d).

6. Every state allows the formation of cooperatives for agricultural purposes. See UTAH CODE ANN. § 3-1-4 (1953); PACKEL § 9(b).

7. *E.g.*, ALA. CODE tit. 18, § 32 (1959); TENN. CODE ANN. § 65-2503 (1956). The Rural Electrification Administration has spearheaded the development of electric cooperatives. Rural Electrification Act of 1936, 49 Stat. 1363, 7 U.S.C. §§ 901-14 (1958).

8. Such as credit unions, see N.Y. COOP. CORP. LAW § 13, and mutual insurance, see TENN. CODE ANN. § 56-1601 (1956).

9. A typical example is the Pennsylvania statute, PA. STAT. ANN. tit. 14, § 41 (1958), which is discussed in Packel, *Fair Play for Cooperatives*, 17 PA. B.A.Q. 310 (1946).

PURPOSES

Most of the proposed definitional changes have dealt with the limitations on acceptable purposes. One response to the problem created by such limitations has been for an association seeking to operate as a cooperative, but unable to qualify under the cooperative statute, to organize under the regular business association statute.[10] However, this does not cure any of the defects in existing cooperative definitions nor does it provide the non-qualifying association with any of the statutory benefits available under the cooperative statute.

A second approach has been to attempt to organize such a non-qualifying association under the state's nonprofit association statute.[11] Since the statutory benefits given to nonprofit associations are often even more attractive than the benefits provided for cooperatives,[12] many associations have utilized this procedure regardless of their ability to qualify under the cooperative statute.[13] Although it has been argued that a cooperative makes no profit for itself,[14] a cooperative should not be treated in the same manner as a nonprofit association since pecuniary benefit through services at cost for the members is usually the paramount motive for its formation.[15] Thus the Model Nonprofit Corporation Act specifically excludes from its provisions

10. PACKEL § 9(d). A cooperative seeking to utilize the general business association statute may encounter certain problems, such as an inability to restrict the transfer of its shares, an inability to purchase its own shares, or an inability to restrict voting or capital return. *Ibid.* However, most states now allow a corporation to buy its own shares.

11. See PACKEL § 9(c); Miller & Grossman, *The Non-Profit Corporation or Association in the Non-Agricultural Field,* 13 LAW & CONTEMP. PROB. 463 (1948). *But see* Legislation, 17 VAND. L. REV. 336, 340 (1963).

12. Many states exempt nonprofit associations from ad valorem, franchise, and income taxes. Also, nonprofit associations are allowed a looser corporate structure than are cooperatives.

13. For a discussion of the various enterprises which have utilized nonprofit statutes, see Miller & Grossman, *supra* note 11.

14. PACKEL § 9(c), at 51. The exponents of cooperatives contend that since a cooperative is obligated to render its services at cost for the members, it necessarily makes no profit for itself. The debate concerning this feature of cooperatives has centered around the income tax laws rather than the non-profit statutes. At present, certain farmers' cooperatives are exempt from federal income taxes. INT. REV. CODE OF 1954, § 521. However, the Code does not provide complete exemption. For the exact tax treatment of these cooperatives and their patrons see INT. REV. CODE OF 1954, §§ 1381-88. See generally PATTERSON, THE TAX EXEMPTION OF COOPERATIVES (2d rev. ed. 1961); Jacobs, *Cooperatives and the Income Tax Law,* 31 TAXES 49 (1953); Magill & Merrill, *The Taxable Income of Cooperatives,* 49 MICH. L. REV. 167 (1950); Sowards, *Should Co-ops Pay Federal Income Tax?,* 19 TENN. L. REV. 908 (1947).

15. "Cooperatives are definitely a part of the business enterprise operations of their member-patrons." JENSEN, COOPERATIVE CORPORATE ASSOCIATION LAW AND ACCOUNTING 76 (1950).

any association capable of qualifying under the state's cooperative statute.[16]

The third approach, as exemplified by the New York statute,[17] is simply to increase the number of purposes for which a cooperative may be formed. This approach is unsatisfactory for several reasons. Enumerated purposes tend to become inadequate as social conditions change. The effort, time, and expense necessary to convince the legislature to approve a new purpose is often a prohibitive burden for a young association. Also, defining a cooperative according to specific purposes leads to uncertainty when associations try to squeeze their purposes into these small categories.

A better proposal for the solution of the purposes problem is to allow the formation of a cooperative for any lawful purpose.[18] This approach increases the availability of cooperative treatment without resorting to piecemeal legislative action, eliminating the confusion and inconvenience created by the New York type statutes. Constant revision of the definition to reflect changing social policies concerning the acceptability of certain purposes is no longer necessary. Since there appears to be no compelling reason to restrict the benefits of cooperative organization to groups organized for particular purposes, many states have amended their cooperative statutes in accordance with this proposal.[19]

ORGANIZATIONAL AND OPERATIONAL CHARACTERISTICS

Existing definitions of a cooperative usually contain four basic organizational and operational characteristics. To provide some guidelines for a modern definition these characteristics and the proposed alternatives to each should be critically examined.

(1) *The association must substantially return its annual earnings to its patrons in proportion to the value of the annual business done by each patron with the association.* This characteristic is essential to the definition since the primary purpose of a cooperative is to benefit members by providing services at cost rather than, as in ordinary

16. ABA-ALI MODEL NONPROFIT CORP. ACT § 4 (1957). However, a problem still exists in states which have restrictive cooperative statutes since only those associations able to qualify under the state cooperative statute are exempted from the Model Act. This presents an additional reason for expanding the definition of cooperative so as to include all the associations having the economic and organizational characteristics of a cooperative.

17. N.Y. COOP. CORP. LAW § 13.

18. See BOYER, NONPROFIT CORPORATION STATUTES 23-24 (1957); PACKEL § 9(a), at 47.

19. *E.g.*, CAL. CORP. CODE § 12201; FLA. STAT. ANN. § 619.01 (1956); OHIO REV. CODE ANN. § 1729.28 (Baldwin 1963).

business associations, to benefit capital investors.[20] Every state includes some form of this characteristic in its definition of a cooperative. Most states which allow a cooperative to deal with nonmembers will permit the cooperative to discriminate against nonmember patrons by restricting the distribution of patronage refunds to members,[21] reasoning that a cooperative is formed solely for the benefit of its members. In many situations lack of patronage refunds to nonmembers may conceivably allow the member-patrons to receive services at less than cost. Since nonmember business is a legislative benefit grafted onto the original theory of a cooperative,[22] it appears unfair to allow a cooperative to exploit this privilege by operating as an ordinary business association towards its nonmember patrons and thus achieving additional benefits for its members. Thus a cooperative should probably be required to distribute its patronage refunds equally to member and nonmember patrons.[23] A statute recently proposed for adoption in Michigan allows a cooperative to adopt either approach for the distribution of refunds.[24] However, a cooperative is classified for the purpose of taxes and fees according to its manner of refund distribution. If the cooperative distributes patronage refunds nondiscriminately, then it is classified as a nonprofit association,[25] while if nonmember patrons do not receive equal refunds then the cooperative is classified as a profit association.[26]

(2) *The association must not render more than a fixed percentage of the annual value of its economic services to nonmembers.* A "restriction on business activity with nonmembers is justified since the basic concept of a cooperative is the performance of service for members."[27] Generally the states require that a cooperative do at least fifty per cent of its annual business with members. The fifty per cent

20. "The most outstanding feature distinguishing cooperatives from other business units, and perhaps the only prerequisite of cooperative status, is the method of distributing 'earnings'." BOYER, *op. cit. supra* note 18, at 10-11.

21. Statutes which allow discrimination against nonmember patrons are common. *E.g.*, CAL. CORP. CODE § 12805. However, many cooperatives, particularly farmers' cooperatives, will attempt to show equal treatment in order to qualify for federal income tax exemption. See note 14 *supra*.

22. See Note, *Agricultural Cooperatives*, 27 IND. L.J. 353 n.7 (1952).

23. It is suggested that such a requirement is necessary to preserve the spirit of cooperatives. *Contra*, BOYER, *op. cit. supra* note 18, at 13.

24. *Id.* at 130.

25. *Ibid.* However, there is another requirement for nonprofit classification, namely, that there be no dividends or interest payments on capital. *Ibid.*

26. *Ibid.*

27. *Id.* at 131. However, cooperatives in Massachusetts are unrestricted as to the amount of nonmember business. MASS. ANN. LAWS ch. 157, § 1 (1959). This lack of restriction may be due to an inadvertent legislative omission. Iowa prohibits any nonmember business by livestock shipping cooperatives. IOWA CODE ANN. § 499.3 (1949).

limitation gives a cooperative both a certain degree of flexibility in its operations and a capacity to withstand periods of economic adversity among its members while still requiring it to fulfill the major purpose of a cooperative—service to its members. This limitation also prevents a small number of people from organizing as a cooperative and then doing a large volume of nonmember business. This would particularly be a problem in states which allow patronage refunds only to members, thereby adding to the incentive to operate in this manner.

(3) *The association must allow only a limited return on invested capital.* Apparently all states include some limitation on capital return in the definition of a cooperative, with the allowable returns ranging from five to eight per cent.[28] Cooperatives were conceived as associations for the benefit of consumer-members rather than investors.[29] A limitation on capital return, which deemphasizes the attractiveness of capital investment and channels the major pecuniary benefits to be gained from a cooperative enterprise to the patrons as refunds rather than to investors as dividends, is necessary to effectuate this aspect of cooperative theory. The exact rate of return embodied in a definition should envisage possible changes in the state of the economy and take into account the capital needs of cooperatives. This figure merely establishes the maximum return allowable for a cooperative; it should be high enough to enable a cooperative with capital needs to compete effectively in the money market, but should probably never exceed the legal rate of interest.[30] Considering these factors a return of eight per cent should be adequate and is also harmonious with several federal statutes concerning cooperatives.[31]

28. California allows a five per cent return by general cooperatives, but agricultural cooperatives are allowed an eight per cent return. CAL. CORP. CODE § 12805(a); CAL. AGRIC. CODE § 1200(i). This evidently shows a legislative intent to promote agricultural cooperatives more than other cooperatives. There appears to be no reason why the capital return should vary, unless the risks in agriculture are thought to be greater than in other areas. Massachusetts has a five per cent limit on all cooperatives. MASS. ANN. LAWS ch. 157, § 6(2) (1959). Some states allowing an eight per cent return are Florida, FLA. STAT. ANN. § 618.15 (1956); Iowa, IOWA CODE ANN. §§ 499.23-.24 (1949); New York, N.Y. COOP. CORP. LAW §§ 72,111; Ohio, OHIO REV. CODE ANN. § 1729.10(f) (Baldwin 1963).

29. For a discussion of this principle see generally JENSEN, *op. cit. supra* note 15, at 48; PACKEL § 1, at 3-5; Note, *Agricultural Cooperatives,* 27 IND. L.J. 353, 358-62 (1952); NOTE, *General Principles and Problems of Cooperatives: An Introduction,* 1954 WIS. L. REV. 533-35.

30. Bakken, *Principles and Their Role in the Statutes Relating to Cooperatives,* 1954 WIS. L. REV. 549, 563.

31. Section 1 of the Clapper-Volstead Act lists an eight per cent limitation on capital return as one of the alternative requirements for federal antitrust exemption. 42 Stat. 388 (1922), 7 U.S.C. § 292 (1958). Also the federal income tax allows an exempt

(4) *The association must limit each member to one vote, regardless of the number of shares held by the member.* The one-man, one-vote principle was a uniform feature of the first cooperatives. It represented a desire to introduce democratic procedure into the economic sphere of society.[32] This further deemphasized the role of capital investment in cooperatives.[33] More recent definitions of a cooperative tend to eliminate this characteristic as a required feature.[34] The tremendous growth of some cooperatives has made democratic control difficult because of the dispersal and apathy of members.[35] Some states allow a cooperative to adopt in either its charter or by-laws any method of voting.[36] Other states, in response to the desire of large patrons to have a larger voice in determining the policies of a cooperative, allow cooperatives to adopt either democratic voting or voting according to patronage.[37] The patronage method is probably fairer since the success of any cooperative depends to a great extent on member participation. The major patrons are probably more interested in the policies of a cooperative, and at least ostensibly will do nothing inimical to the interests of the cooperative. However, the major patrons should not be allowed to receive disproportionate refunds or to discriminate in any way against the other member-patrons.[38] An interesting compromise has been suggested by one writer whereby voting for managerial personnel would be on a one-man, one-vote basis, while voting on sales and fiscal policies would be on a patronage basis.[39] Theoretically this would retain democratic voting in the political area of the association while vesting economic control in the members who do the most business with the cooperative. However, this might not be palatable for many cooperatives since managerial

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farmers' cooperative to make a capital return equal to the greater of eight per cent or the legal rate of interest in the state. INT. REV. CODE OF 1954, § 521(b)(2).

32. Note, *Agricultural Cooperatives*, 27 IND. L.J. 353, 360 (1952). See generally BOYER, *op. cit. supra* note 18, at 16; PACKEL §§ 24(a)-(b); Bakken, *Principles and Their Role in the Statutes Relating to Cooperatives*, 1954 WIS. L. REV. 549, 555-57.

33. See Frost v. Corporation Comm'n, 278 U.S. 515, 536-50 (1929) (Brandeis, J., dissenting). See generally authorities cited note 32 *supra*.

34. See BOYER, *op. cit. supra* note 18, at 130; however, still "approximately three-fourths of the states restrict each member to one vote regardless of the amount of stock owned or the extent of patronage . . . ." Note, *Agricultural Cooperatives*, 27 IND. L.J. 353, 360 (1952).

35. See BOYER, *op. cit. supra* note 18, at 16; Bakken, *supra* note 32, at 555.

36. PACKEL § 24(a). In states having no statutory limitation on voting, cooperatives have adopted several different methods—voting according to capital investment, voting according to patronage, democratic voting, or various combinations of these methods. Approximately one-half of the states expressly limit, or empower the cooperative to limit, the number of shares which can be owned by each member. Note, *Agricultural Cooperatives*, 27 IND. L.J. 353, 360 (1952).

37. Bakken, *supra* note 32, at 556.

38. *Ibid.*

39. *Ibid.*

personnel normally run for office on fiscal policy platforms. Considering the history and philosophy of cooperatives, voting according to capital investment should probably not be allowed in a modern definition of a cooperative.[40] However, a definition should provide several alternative methods of voting (such as democratic, patronage, or a combination of these). Thus a cooperative would not be arbitrarily bound to one method of voting, but would be able to choose the method best suited for its individual needs.

Full Faith and Credit—Procedures for Enforcement of Foreign Money Judgments

The Constitution of the United States provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[1] As to judgments,[2] this clause is based upon the policy of promoting certainty and finality and bringing an end to litigation by preventing dissatisfied litigants from relitigating in one state issues previously litigated in another state.[3] But full faith and credit does not require that a money judgment in one state be a basis for execution in a second state.[4] The full faith and credit clause[5] requires only that such a foreign judgment be an indefeasible cause of action on which a new judgment shall be rendered in the second state.[6] Since there is no uniform system of enforcing foreign[7] money judgments in the United States, the question

40. Unless the state constitution requires voting by shares in all corporations. See PACKEL, §§ 24(a)-(b). For a discussion supporting this textual statement see generally authorities cited note 29 *supra.*

1. U. S. CONST. art. IV, § 1.

2. This discussion is confined to money judgments and leaves out of consideration all other judgments, such as judgments for the defendant.

3. Kovacs v. Brewer, 356 U.S. 604, 611 (1958) (dissenting opinion).

4. RESTATEMENT, CONFLICT OF LAWS § 433 (1934).

5. Pursuant to the full faith and credit clause, the first session of Congress enacted the following legislation cited in pertinent part: "And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." REV. STAT. § 905 (1875). This statute has not been modified in any material way in regard to judgments. Therefore, all decisions regarding the effect of full faith and credit are under the statute and not under the Constitution itself.

6. Broderick v. Rosner, 294 U.S. 629 (1935); see LEFLAR, CONFLICTS OF LAWS § 71 (1959).

7. In the United States, a judgment is considered foreign not only when rendered by a foreign nation, but also when rendered by a sister state. In this discussion, the term "foreign" will be restricted to those judgments arising in a sister state.

remains, given the constitutional mandate, as to the procedure for effectuating the required faith and credit. This problem is the basis of the instant discussion.

The traditional common law procedure for enforcing a foreign judgment requires that a new action upon the judgment be brought in the state in which enforcement is desired.[8] After a new judgment is rendered, execution or other enforcement procedure is issued upon it. The rationale for this is that the judgment constitutes a settlement of rights by private parties and "that execution will not issue immediately upon a foreign judgment in its character as a judgment, but the obligation which it is deemed to impose must be reduced to a judgment in the forum by a new action in order to be executed."[9] Such a procedure is unsatisfactory in that it results in unnecessary delay[10] and expense, and creates difficulties due to the necessity of securing jurisdiction over the person of the judgment debtor.[11] This discussion will consider two aspects of the problem: first, the appropriate procedure, whether summary judgment or direct registration in the second state; second, the source of any new procedure, whether state law or federal law.

Type of Procedure

Several alternatives have been proposed to alleviate the cumbersome formality of a new suit and new judgment. One alternative is a procedure whereby the judgment is registered in the state where execution is desired. Thereafter, the judgment has all the force and effect of a local judgment without the necessity of bringing a new action. Such a procedure has been adopted in the federal court system permitting registration of judgments of federal courts in all districts of the nation,[12] but no such provision exists for state judgments. England[13] and Australia[14] have substantially similar proce-

8. See Yntema, *The Enforcement of Foreign Judgments in Anglo-American Law*, 33 Mich. L. Rev. 1129, 1136 (1935).

9. *Id.* at 1144.

10. This was dramatically illustrated in Tolley v. Wilson, 212 Ark. 163, 205 S.W.2d 177 (1947), where a money judgment obtained in Kansas was sued upon in Arkansas for the purpose of reaching land in Arkansas which was owned by the judgment debtor. But before a new judgment was rendered in Arkansas in order that a judgment lien could arise, the judgment debtor sold the land to thwart reeovery on the judgment. This case is discussed in Paulsen, *Enforcing the Money Judgment of a Sister State*, 42 Iowa L. Rev. 202 (1957).

11. Yntema, *supra* note 8, at 1164-65. "The system may be good for the business of lawyers but little else can be said for it." Paulsen, *supra* note 10, at 202.

12. 28 U.S.C. § 1963 (1958).

13. Part II of the Administration of Justice Act, 1920, 10 & 11 Geo. 5, c. 81; see Dicey, Conflict of Laws 979-1055 (7th ed. 1958); Read, Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth 296-310 (1938).

14. "The Australian legislation for the enforcement of sister State judgments is the

dures. The registration procedure has speed, convenience, and other advantages. The judgment creditor can obtain the same judgment lien on real property that is available to holders of judgments of the court of registration, and the registering court's execution of process is immediately available to him.[15] The judgment creditor may also proceed by ancillary writ of garnishment provided by the registering state to its own judgment creditors.[16]

The Conference of Commissioners on Uniform State Laws became cognizant of the problems involved in the enforcement of foreign judgments and initially determined to propose a uniform law employing a registration procedure.[17] Although the Commissioners seem to have been of the opinion that the procedure would not violate due process, they recognized that doubt as to the constitutionality of the registration procedure might jeopardize its adoption by the states.[18] Therefore, a summary judgment procedure was approved in 1948.[19] The Uniform Act permits registration of the foreign judgment in any court having jurisdiction of such an action.[20] At any time after registration, the judgment creditor is entitled to have summons issued and served upon the judgment debtor as in an action brought upon the foreign judgment,[21] and a levy may be made upon any property of the judgment debtor which is subject to execution or other judicial process for satisfaction of judgments in that state.[22] If the judgment debtor

Commonwealth Service and Execution of Process Act. . . . [T]he Act provides . . . that a person in whose favor a judgment has been given in a State court, may obtain a certificate of the judgment from a proper officer of the court. He may then register that judgment by producing the certificate to a proper officer of a court of like jurisdiction in some other State or part of the Commonwealth. From the date of registration, the judgment has the same force and effect, and the same proceedings may be taken upon it, as if the judgment had originally been pronounced in that court." COWEN, BILATERAL STUDIES IN PRIVATE INTERNATIONAL LAW, No. 8, AMERICAN–AUSTRALIAN PRIVATE INTERNATIONAL LAW 79 (1957).

15. Paulsen, *supra* note 10, at 218.

16. Gullet v. Gullet, 188 F.2d 719 (5th Cir. 1951).

17. See Leflar, *The New Uniform Foreign Judgments Act*, 24 N.Y.U.L.Q. REV. 336 (1949) (Dean Leflar, the draftsman of the Uniform Act, sets forth the history of the Act and considerations entering its formulation).

18. "It was generally agreed that a judgment registration statute could be drafted for state enactment in a form that would almost surely withstand any attack upon its constitutionality which might reach the Supreme Court of the United States. Whether the highest courts of all the states would arrive at the same result was of course a more uncertain matter and the fact that some lawyer-legislators might have doubts as to the act's constitutionality, even though the Commissioners did not, was a fact not to be overlooked." *Id.* at 347.

19. UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT [hereinafter cited as UNIFORM ACT].

20. UNIFORM ACT § 2.

21. UNIFORM ACT § 4.

22. UNIFORM ACT § 6. "The right to levy on property of the judgment debtor at once after registration of the judgment, without waiting until the registered judgment becomes a final judgment of the state of registration, can operate to give to judgment

fails to plead within sixty days after personal jurisdiction has been obtained over him, or if the court after hearing has refused to set the registration aside, the registered judgment shall become a final personal judgment in the court of registration.[23] If personal jurisdiction of the judgment debtor is not secured within sixty days after levy and he has not acted to set aside the registration, the registered judgment shall be a final judgment *quasi in rem* of the court in which it is registered.[24] The Uniform Act is an improvement over the common law procedure of a separate action, but it is not as inexpensive and efficient as the registration procedure. In addition, the Uniform Act lacks some substantive advantages available under the registration procedure. For example, until levy upon a specific piece of property or the entry of a new personal judgment, the Uniform Act does not create a lien on real property as would be created by a registration procedure.[25]

Registration is the more advantageous method of enforcing foreign judgments, not only from the standpoint of lessened expense and greater protection afforded to the judgment creditor, but also from the consideration of administrative ease which might lessen some of the burden on already crowded court dockets. In addition, a registration procedure would perhaps solve the existing problem of non-final judgments. The Supreme Court has held that full faith and credit does not require enforcement of a "judgment for future alimony . . . [where] the right to demand and receive such future alimony is discretionary with the court which rendered the decree . . . ."[26] The underlying problem is the modifiable character of such a judgment. Thus if under the registration procedure F-2 is to treat a registered F-1 judgment in the same manner it would treat an F-2 judgment on a similar cause of action, then F-2 should enforce even a modifiable registered F-1 decree.[27]

Such a registration procedure would not seem to transgress due process prohibitions.[28] Due process requires only that the litigant have one opportunity for a fair hearing.[29] It does not require that he

creditors a type of relief almost as efficient as would be the case if execution could be issued directly on the foreign judgment." Commissioners' Note, 9A UNIFORM LAWS ANN. 292 (1957).

23. UNIFORM ACT § 7.

24. UNIFORM ACT § 12.

25. Paulsen, *supra* note 10, at 220.

26. Sistare v. Sistare, 218 U.S. 1, 17 (1910).

27. As to the scope of the problem and for remedies aimed at alleviating some of the hardships of enforcing a non-final judgment in a foreign jurisdiction, see Scoles, *Enforcement of Foreign "Non-Final" Alimony and Support Orders*, 53 COLUM. L. REV. 817 (1953).

28. LEFLAR, *supra* note 6. See Cook, *The Powers of Congress Under the Full Faith and Credit Clause*, 28 YALE L.J. 421 (1919).

29. "A hearing before judgment, with full opportunity to present all the evidence and

be permitted later to raise new defenses or to show that the judgment was based upon a mistake of law.[30] However, the defendant must be permitted to attack the validity of the judgment on such grounds as the lack of jurisdiction of the court rendering it[31] and failure of the trial court to meet requirements of proper judicial proceedings.[32] If the defendant is permitted to raise such defenses, then the registration procedure appears to satisfy due process.

SOURCE OF PROCEDURE

At least two courses of action are available to secure adoption of a registration procedure in the United States. One would be for the National Conference of Uniform Commissioners to reconsider the Uniform Act and adopt their original proposal for a registration of judgments. However, this has the inherent weakness of all uniform acts, that is, its adoption by all states is not assured.[33] A far preferable[34] method is a federal statute pursuant to the full faith and credit clause's provision that the "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[35] To permit the discretionary adoption of a procedure for enforcing foreign judgments pursuant to the mandate of the full faith and credit clause appears to be relegating to local discretion a subject of overriding national interest.

The very purpose of the full faith and credit clause was to alter the status

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the arguments which the party deems important, is all that can be adjudged vital. Rehearings, new trials, are not essential to due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment, satisfies the demand of the Constitution in this respect." Pittsburgh, C., C., & St. L. By. v. Backus, 154 U.S. 421, 426-27 (1894).

30. Milliken v. Myer, 311 U.S. 457 (1940); Fauntleroy v. Lum, 210 U.S. 230 (1908).

31. Pennoyer v. Neff, 95 U.S. 714 (1877).

32. "In order that the foreign proceedings be called judicial action and their results be given effect as a judgment, it seems necessary that the defendant in the litigation shall have been given reasonable notice and opportunity to be heard before an impartial tribunal designated to hear and decide such questions as were involved." GOODRICH, CONFLICTS OF LAWS § 205 (3d ed. 1949).

33. To date, only eight states have adopted the Uniform Act: Arkansas, Illinois, Missouri, Nebraska, Oregon, Washington, Wisconsin, and Wyoming. 9A UNIFORM LAWS ANN. 287 (1957).

34. Even though Congressional action is the preferable course, it is recognized that Congress might be reluctant to enact a form of legislation which may be deemed as transgressing upon the rights of the states. Therefore, adoption of a registration procedure by the National Conference of Commissioners is also urged.

35. U. S. CONST. art. IV, § 1. "From the history of the clause, as well as from its wording, it may be said to be clear that under any fair interpretation of the grant of power to Congress in the full faith and credit clause, that body can provide for the enforcement of state judgments in other states, without the wholly useless and unnecessary process of requiring a new suit on the same and the obtaining of a new judgment upon which execution can be had." Cook, *supra* note 28, at 430.

> of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin. That purpose ought not lightly to be set aside out of deference to a local policy which, if it exists, would seem to be too trivial to merit serious consideration when weighed against the policy of the constitutional provision and the interest of the state whose judgment is challenged.[36]

Federal rather than state law should prescribe the measure of credit which one state shall give to another's judgment.[37] Should Congress exercise its constitutional power by an enactment of a registration procedure applicable to states, the enforcement of foreign judgments would be simplified and greater safety afforded litigants in our mobile society.

PROPOSED STATUTE

The following statute is proposed:

(a) A judgment in an action for the recovery of money or property entered in the court of any state which has become final upon appeal or expiration of time for appeal or other condition precedent for finality may be registered in any other state by filing therein a certified copy of such judgment. A judgment so registered shall have the same effect as a judgment of a state court of the state where registered and may be enforced in like manner.[38]

(b) A notice summons clearly designating the foreign judgment and reciting the fact of registration, the court in which it is registered, and the time allowed for pleading, shall be sent by the clerk of the registering court by registered mail to the last known address of the judgment debtor. Proof of such mailing shall be made by certificate of the clerk.[39]

(c) Any defense which under the law of the state where registered may be asserted by the defendant in an action on the foreign judgment may be presented by appropriate pleadings and the issues raised thereby shall be tried and determined as in other civil actions.[40]

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36. Milwaukee County v. M. E. White Co., 296 U.S. 268, 276-77 (1935).

37. Reese & Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 161-62 (1949).

38. This is modeled substantially on the federal registration statute, 28 U.S.C. § 1963 (1958).

39. Notification by publication would not seem an adequate safeguard of the interest of the judgment debtor. On the other hand, to require personal service on a judgment debtor who may not be in the jurisdiction may defeat the registration procedure. Therefore, a compromise by means of notification by registered mail is suggested. This form of notification should adequately inform the judgment debtor of the registration of the judgment and at the same time prevent him from avoiding its effect by eluding personal service.

40. This is modeled substantially after § 8 of the Uniform Act. The Commissioners' note in regard to this section states: "Under the full faith and credit clause, there are certain defenses, particularly lack of jurisdiction in the court rendering the judgment,

(d) Judgment within the meaning of this statute shall include any decree or order for alimony or support which is enforceable in the state of rendition, even though modifiable in that state.

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payment of the judgment and fraud or collusion in its procurement, which the judgment drafted as to secure a judgment debtor the essentials of due process of law in minimum form, at the same time giving him reasonable opportunity to present every defense which debtor may properly raise in a later suit on the judgment. The uniform act is so under the law he is entitled to present." 9A UNIFORM LAWS ANN. 293 (1957).