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COMPULSORY ATTENDANCE OF NONRESIDENT WITNESSES

The legislature of West Virginia enacted the revised form of the Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings¹ in 1937.² This type of legislation, with its reciprocal features, has long been recognized as a necessary prerequisite for a more complete and efficient administration of criminal justice by the individual states.³ Syndication of crime and the availability of rapid means of transportation have greatly reduced the likelihood that any major criminal undertaking has been planned and executed by purely local talent. That there was a need for such legislation and that the uniform act provided an acceptable means is well demonstrated by its adoption by a vast majority of the states.⁴

In substance, the uniform act provides that if a judge of a court of record in state A certifies under seal that in a pending criminal prosecution or grand jury investigation that a person in state B, which has adopted the act, is a material witness in such prosecution or investigation, whose presence is required for a specified number of days, a hearing upon the certificate shall be held in state B. If at the hearing the judge determines that the witness is material and necessary, that no undue hardship is worked by compelling the witness to attend and testify in state A, and that the laws of the requesting state and any other state through which the witness must pass will give him protection from arrest and the service of civil and criminal process, he will issue a summons directing the witness to attend and testify. A witness who fails to obey the order and remains in state B will be punished through the contempt power of that state. If the witness goes to the requesting state (A) and there fails to

¹ Hereinafter referred to as the uniform act.

² W. Va. Acts, 1937, ch. 41. The uniform act was first enacted in 1935. W. Va. Acts, 1935, ch. 86. The 1937 enactment was made in order to incorporate the changes made by the National Conference of Commissioners on Uniform State Law by its 1936 revision of the uniform act. See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAW AND HANDBOOK 122, 417-423 (1931); *National Conference id.* at 333 (1936). The revised form of the uniform act made two important changes by (1) providing for the compulsory attendance of witnesses for a grand jury hearing, whereas the original act necessitated that a criminal action be pending, and (2) providing for the arrest, custody and delivery of the witness to an officer of the requesting state. 9 U.L.A. 87-88 (1957). The present form of the statute may be found in W. VA. CODE ch. 62, art. 6A, §§ 1-6 (Michie 1955).

³ See Medalie, *Inter-State Exchange of Witnesses in Criminal Cases*, 33 LAW NOTES 166 (1929); Harker, *Compulsory Attendance of Non-Resident Witnesses in Criminal Cases*, 23 ILL. L. REV. 195 (1928).

⁴ The uniform act has been adopted by forty-two states and Puerto Rico. 9 U.L.A. 86 (1957).

testify he will be subject to punishment through the contempt power of that state. There is an additional provision that a witness shall not be subject to contempt proceedings unless he has been tendered his travel expenses.

If the certificate so recommends, the witness may be taken into immediate custody and delivered to an officer of the requesting state after a hearing at which the judge is satisfied of the desirability of such custody and delivery. The certificate is *prima facie* proof of such desirability.

A recent decision by the Florida Court,⁵ which declared Florida's statute⁶ enacting the uniform act to be unconstitutional on its face, threatened to annul all of the efforts expended in drafting the act and in procuring its adoption by a majority of the states. The basis upon which the court decided the statute's invalidity was that it constituted a violation of one's right of free ingress and egress among the states—a right protected under the privileges and immunities clauses of the fourteenth amendment and of article IV, section 2 of the Constitution of the United States.⁷ While it was not necessary to the decision of the case, the court also stated "that the courts of this state are without power to issue process effective beyond the borders of this state."⁸

The principal case arose as a result of a summons issued by the judge of a circuit court of Florida, in response to a certificate executed by the judge of a court of general sessions of New York,⁹ for O'Neill to appear before it to determine if he should be given into the custody of New York authorities to be transported to New York to testify in grand jury proceedings. O'Neill, a citizen of Illinois,¹⁰ had come to Florida to attend a convention.

⁵ Application of New York, 100 So. 2d 149 (Fla. 1958).

⁶ FLA. STAT. ANN. §§ 942.01-.06 (1944).

⁷ U.S. CONST. amend. XIV, § 1 provides: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

U.S. CONST. art. IV, § 2 provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

"A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

⁸ Application of New York, 100 So. 2d 149, 155 (Fla. 1958).

⁹ New York enacted the uniform act in 1936. N.Y. CODE CRIM. PROC. § 618-a (1958).

¹⁰ Illinois has not enacted the uniform act. If O'Neill had chosen to remain in Illinois he could not be reached by the New York authorities.

The United States Supreme Court granted certiorari¹¹ and, upon hearing, reversed the Florida court by holding that the Florida statute was not violative of any constitutional guarantees.¹²

The Court, in speaking of the extradition clause of the Constitution,¹³ rejects the argument that there is an implied denial of the states' right to adopt other joint and uniform measures to secure the administration of justice from the express inclusion of that clause relating to delivery of fugitives from justice. The privileges and immunities clauses of the fourteenth amendment and of the Constitution, given their broadest interpretation, would not be violated by the Florida statute. Florida could have held O'Neill within its confines if he had been a material witness in a criminal proceeding there. This would be as much a restriction upon his right of ingress and egress as the order to attend in New York. At most there is only a temporary restriction on O'Neill's freedom to travel.

In regard to the Florida court's power to order a witness to appear in another state, the Court states that so long as the court has personal jurisdiction over the individual he could be ordered to perform an act outside of that jurisdiction.

The Court did not consider the question of the violation of the fourteenth amendment by the statute's silence on bail provisions, since the Florida court expressly refrained from a ruling on the matter. The Court intimated that the statute's silence on bail provisions, since not tantamount to proscription of bail, would not violate the fourteenth amendment.

Justice Douglas, with whom Justice Black concurred, dissented;¹⁴ for he felt that the effect of the majority's opinion was to allow judicial legislation of the word "witness" into the extradition clause of the Constitution. Freedom to travel is a right inherent in national citizenship. So it is also true that one is free not to travel. Congress may, through the regulation of interstate commerce, limit rights of national citizenship. The provision providing for the extradition of criminals in the Constitution is a limitation placed upon a citizen's right of ingress and egress. But in absence of such express limitations a citizen's right of ingress and egress may not be arbitrarily limited by any state's action.

¹¹ *New York v. O'Neill*, 356 U.S. 972 (1958).

¹² *New York v. O'Neill*, 79 Sup. Ct. 564 (1959).

¹³ See note 7, *supra*.

¹⁴ *New York v. O'Neill*, 356 U.S. 564, 571 (1959).

While freedom of movement is not absolute and the state may in some instances halt a migrant at its borders for health inspection, the state has not more power to forcibly remove a citizen from its boundaries, where there is no basis for extradition, than it does to halt a person at its border. If one state could not enact legislation restricting the movements of citizens, then the fact that states bind together through reciprocal and uniform laws does not in any way generate powers that they lack acting separately.

Though there is some evidence that the majority of the Court was influenced by the fact that it was dealing with a statute patterned after a uniform act which had been adopted by a large number of states, it is submitted that the Court stood upon firm ground in rendering its decision.

There seems to be little validity in an argument that though a state may, for the purpose of compelling a witness to appear at a judicial proceeding conducted therein, compel one to remain in that state or travel to various points in that state; yet may not compel one to travel to another state for a like purpose. Why is such premium to be placed upon crossing the boundaries of a given state, as compared to travel within a state, when the requirements and burdens placed upon such a witness, in either case, in all probability will differ but little? The witness is compensated for his expenses and is guaranteed freedom from service of process while traveling to and from such other state.¹⁵ The availability of rapid means of transportation negatives any argument that there is an additional burden placed upon such witness from the loss of time.

Though the Florida court felt that it was without power to compel one to do an act outside of its jurisdictional boundaries,¹⁶ it seems to be a well recognized principle of the court of equity that one may be ordered to do or refrain from doing an act outside the jurisdictional limitations of that court when the court feels the exigencies of the case require it.¹⁷ It is not a question of power, once

¹⁵ Under the provisions of the statute in West Virginia a witness is paid ten cents per each mile he is required to travel to and from the proceedings and is paid an additional five dollars for each day spent in traveling and testifying. W. VA. CODE ch. 62, art. 6A, §§ 2, 3 (Michie 1955).

¹⁶ Application of New York, 100 So. 2d 149, 155 (1958).

¹⁷ See *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952); *Consolidated Rendering Co. v. Vermont*, 207 U.S. 541 (1908); *Dubinsky v. Blue Dale Dress Co.*, 162 Misc. 177, 292 N.Y. Supp. 898 (Sup. Ct. 1936). For a general discussion see Messner, *The Jurisdiction of a Court of Equity Over Persons to Compel the Doing of Acts Outside the Territorial Limits of the State*, 14 MINN. L. REV. 494 (1930).

personal jurisdiction has been obtained, but one of practical consideration of the court's ability to enforce its order.

If it be granted that through the contempt process of one state a person may be ordered to do an act in another state, is a state to be denied the power to order a witness to appear in another state simply because the order is at the request of another state? There would seem to be no valid distinction possible upon this ground. The fact that the witness may be given into the custody of officers of the requesting state would not seem to affect the court's power to issue its order. Though it may be that the officers of the requesting state can act in no official capacity outside of the state of their appointment,¹⁸ this would seem to be a question of enforcement of the order.

Though it be admitted that a state may not halt a citizen of another state at its border for other than limited health, safety and welfare measures,¹⁹ it is suggested that legislation such as the uniform act, which requires personal jurisdiction over the individual before the state may act, stands on a different footing. It is one thing to say that one may not enter a state; it is quite another to say that one may enter a state but if he does he will be subject to the laws of that state. If the state were in the proper exercise of its police powers in subjecting the citizens of that state to certain regulations, then one, though not a citizen of that state, who enters that state and who has the same advantages as a citizen of that state should also be subject to the same regulations.²⁰

While it has been stated that a witness is compensated for his expenses involved in traveling to the requesting state to testify, it is felt that the present provisions²¹ for his compensation are inadequate. An amendment of the statute to reflect the increased cost of living would seem to be in order. It is also suggested that an

¹⁸ See *Matter of Maney*, 20 Wash. 509, 55 Pac. 930 (1899). The Washington court recognized the authority of an Idaho sheriff traveling with convicts through Washington.

¹⁹ *Butchers' Union Slaughter-House & Live Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746 (1884). See *Edwards v. California*, 314 U.S. 160 (1941). (California statute making it a misdemeanor to assist or bring indigent persons into the state held to be unconstitutional).

²⁰ A citizen of one state doesn't carry with him all those privileges and immunities given him by virtue of his citizenship of that state when he enters another state; but he is entitled to the same privileges and immunities afforded citizens of the other state. *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939).

²¹ See note 15 *supra*.

amendment which would permit the witness to post bail would avoid any future question of the statute's constitutionality for silence upon that matter.²²

While the Supreme Court of Appeals of West Virginia has not had occasion to pass upon our statute and it is unknown to what extent our prosecutors have used it to expedite criminal proceedings, it is felt that this legislation will not only be of direct aid to this state in its law enforcement but will also provide indirect benefits through its uniform and reciprocal features by curbing syndicated crime whose operations reach into every state in the union.

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²² Several states have amended their versions of the uniform act to allow the witness to post bail. See e.g., PA. STAT. ANN. tit. 19, § 622.3 (Purdon 1958 Supp.).