LEGISLATION

Compelling the Attendance of Witnesses From Without the State in Criminal Trials

The passage by New York in 1932,[1] Pennsylvania in 1935,[2] and New Jersey in 1936 [3] of the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases [4] is part of a recent legislative trend whereby a material witness for a prosecution in one state is prevented from placing himself beyond process by simply entering or remaining in another. Although the necessity of such a statute has been given wide publicity among crime commissions [5] and law advancement bodies [6] only in recent years, it in fact originated in the New England states in 1791,[7] all of which adopted statutes on the subject by 1907.[8] While these older and more experimental laws are naturally inferior to the Uniform Act, approved in 1931, one-half of the states, including the older group, now have acts pertaining to sending witnesses into, and procuring them from, other states.[9]

The necessity for statutes of this type has arisen from an increased desire for more stringent enforcement of the law,[10] combined with the defendant's constitutional right of confrontation which prevents the use of depositions against him in a criminal trial.[11] A series of statutes has been produced providing for extra-state depositions on application of the *defendant* in criminal trials,[12] but

1. N. Y. Laws 1932, c. 255.

2. PA. STAT. ANN. (Purdon, Supp. 1936) tit. 19, §§ 616-622.

3. N. J. Laws 1936, c. 40.

4. For the text of this Act as recommended to the states, see 9 U. L. A. (Supp. 1936) 7-10.

5. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON CRIMINAL PROCEDURE (1931) 35; PENNSYLVANIA CRIME COMMISSION, REPORT TO THE GENERAL ASSEMBLY (1929) 94; PROCEEDINGS OF THE INTERSTATE CONFERENCE ON CRIME (1935) 21-22; REPORT OF THE [California] COMMISSION FOR THE REFORM OF CRIMINAL PROCEDURE (1927) 30-31: REPORT OF THE CRIME COMMISSION OF MICHIGAN (1930) 15-17; REPORT OF THE MINNESOTA CRIME COMMISSION (1934) 43.

6. The text as adopted by the American Law Institute is identical with the approved Uniform Act except for a few unimportant particulars. AMERICAN LAW INSTITUTE, ADMISITRATION OF THE CRIMINAL LAW (Tent. Draft No. 1, 1931) 8-10. For the differences between the two proposed statutes before collaboration, see HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1931) *42 et seq.*

7. N. H. Laws (1792) pp. 251-252.

8. For the present statutes see *infra* note 37. In addition to New Hampshire, the original Acts are as follows: Conn. Acts 1903, c. 87; Me. Laws 1855, c. 184; Mass. Laws 1873, c. 319; R. I. Laws 1907, c. 1462; Vt. Acts 1878, no. 43, p. 51.

9. For the individual Acts, see *infra* notes 22-23, 25-26, 29-33, 37. Two-thirds of this legislation has originated in the last five years.

10. The Minnesota Crime Commission has recommended the Act ". . . to abrogate one of the most effective means used by the modern gangster to escape punishment, that of 'spiriting away', by intimidation or bribery, the witnesses for the state before trial." REPORT OF THE MINNESOTA CRIME COMMISSION (1934) 43.

11. U. S. CONST. Amend. VI. This right exists in every state but Idaho in either the state constitution or in statutory form. 3 WIGMORE, EVIDENCE (2d ed. 1923) § 1397, n. 1.

12. ALA. CODE (Michie, 1928) § 5624; ARIZ. REV. CODE (Struckmeyer, 1928) § 5191; ARK. DIG. STAT. (Crawford & Moses, 1921) § 3112; CAL. PEN. CODE (Deering, 1931) § 1349; 2 CONN. GEN. STAT. (1930) § 6482; 4 FLA. COMP. LAWS ANN. (Skillman, 1927) § 8390; 1 IDAHO CODE ANN. (1932) tit. 19, § 3101; KAN. REV. STAT. (1923) c. 62, § 1313; ME. REV. STAT. (1930) c. 146, § 19; 2 MASS. GEN. LAWS (1932) c. 277, § 76; 3 MICH. COMP. LAWS (1929) § 17291; 1 MO. REV. STAT. (1929) § 3621; 5 MONT. REV. CODE (1935) § 12199; NEB. COMP. STAT. (1929) c. 29, § 1904; 5 NEV. COMP. LAWS (Hillyer, 1929) c. 41; 2 N. J. COMP.

this form of producing evidence is not available to the prosecution. Add to this situation the fact that at common law no state court could compel a witness who was within another state to testify in any type of proceeding,[13] and it becomes evident that the only solution to the problem of obtaining evidence for the prosecution from beyond the state lies in action by the legislatures.[14]

The Uniform Act

The Uniform Act on the subject functions only between two states each of which has provided for sending witnesses into the other. The machinery is set in motion when the judge of a court of record in state *A* certifies under seal of the court that *X*, a person within the borders of state *B*, is needed for a given number of days as a material witness in a criminal prosecution then pending in the certifying court.[15] Upon receipt of this certificate by a judge of a court of record of that county of state *B* where *X* then is present, he is notified that a hearing has been fixed for him at a given time and place.[16] State *B* directs *X* by summons to appear and testify in the court of state *A* only if, upon the hearing, it develops that (a) there is no "undue hardship" involved in the trip, (b) *X* will not have to travel more than one thousand miles "by the ordinary traveled route" to the place of trial, and (c) the laws of state *A* and of all other states through which *X* must travel allow him protection from arrest and from the service of civil and criminal process while he is within their jurisdiction for the specified purpose.[17] If *X* fails "without good cause" to obey the summons after being tendered ten cents for each mile he must travel and five dollars for each day he is to spend in travel and attendance at the court, he is punished by state *B* according to the penalty there provided for disobeying a summons issued from a court of record.[18]

To facilitate the above procedure each state enacts provisions for the issuance of the certificate and the tender of the required sum,[19] as well as for the hearing and punishment of the witness when a reciprocating state initiates the process.[20] And it further grants protection from arrest and from civil and criminal process to any witness attending court on its request or passing through it on his way to or from a trial in a third state.[21]

Existent Statutes

The existence of the Uniform Act as above outlined by no means indicates uniformity in all the twenty-four statutes on the subject: some, being older, are

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STAT. (1910) p. 2230, § 36; N. Y. CODE CRIM. PRO. (Cahill, 1928) §§ 636-657; 2 N. D. COMP. LAWS (1913) c. 14, art. 3; OHIO CODE ANN. (Throckmorton's Baldwin, 1934) § 13444-11; 1 OKLA. STAT. (Harlow, 1931) art. 26; PA. STAT. ANN. (Purdon, 1930) tit. 19, § 611; 1 S. D. COMP. LAWS (1929) § 5016-A; TENN. CODE (1932) § 11960; TEX. STAT. (Code Crim. Pro. 1928) c. 8; VT. GEN. LAWS (1917) §§ 1930, 2562; W. VA. CODE (1932) § 6190; WYO. REV. STAT. ANN. (1931) c. 33, § 812.

13. See Baker v. People, 72 Colo. 68, 74, 209 Pac. 791, 794 (1922); State v. Rasor, 168 S. C. 221, 225, 167 S. E. 396, 398 (1933).

14. In fact there is one cumbersome statutory mode of securing the evidence of a witness for the prosecution who is in another state without compelling his attendance at the trial. This consists of taking the witness' deposition with the defendant and counsel also present. The disadvantages of such procedure are obvious. See OHIO CODE ANN. (Throckmorton's Baldwin, 1934) § 13444-14.

15. § 2, 9 U. L. A. (Supp. 1936) 9. There is nothing in the wording of the Act to prevent its being used for the defendant.

16. § 1, *id.* at 8.

17. § 3, *id.* at 9.

18. § 1, *id.* at 8.

19. § 2, *id.* at 9.

20. § 1, *id.* at 8.

21. § 3, *id.* at 9.

less complete than the Act, while other later ones are even more complete. A grouping of the existent statutes and an examination of their exact provisions is of primary importance in determining the extent to which the courts will go in deciding whether two given laws, perhaps in different groups, are sufficiently reciprocal to be applied in a given instance. The statutes fall principally into three groups: the first consists of those passed since the Uniform Act was recommended to the states, and embodies all its provisions. Twelve statutes in this first classification are couched in approximately the same wording as that of the Act,[22] while six others include further provision in the interest of protection to the witness or greater efficiency in administration. Thus a witness from Idaho need travel no more than the usual thousand miles to the court, but he may do so if he gives his written consent;[23] and a witness brought *to* Idaho may be required to remain in the state longer than his certificate specifies, upon compliance with a like condition.[24] A witness from Michigan need proceed to another state only if a felony is to be prosecuted there,[25] whereas one from New Jersey or New York must proceed even to a grand-jury investigation.[26] The New Jersey law interferes with the liberty of the witness more than any other, by further providing that at the termination of the hearing he can be taken into immediate custody and delivered to an officer of the requesting state, on receipt of such recommendation in the certificate, in lieu of being merely served with a subpœna,[27] and that a visiting witness may be forced to remain in New Jersey after the expiration of the time mentioned in the certificate without his consent.[28] The Minnesota law specifically states that the witness can be subpœnaed for either the prosecution or the defense in the pending "criminal action".[29] The law of Tennessee is the least effective and most carelessly phrased in the group, providing that no witness will be sent out of the state unless the trial of a felony is pending, and even in such case the person must be a resident of the state. But witnesses can be requested from other states "in felony cases" for "appearance before the grand jury or court".[30]

The second group is composed of the statutes of Iowa[31] and Louisiana,[32] and the earlier New York law,[33] which is of particular importance since it is the

22. Ark. Acts 1935, no. 65, p. 144; IND. STAT. (Supp. May, 1935) §§ 2257-1–2257-5; Me. Acts 1933, c. 152; 5 NEV. COMP. LAWS (Hillyer, Supp. 1934) §§ 11359-11359.06; N. D. Laws 1933, c. 217; Ore. Laws 1935, c. 114; PA. STAT. ANN. (Purdon, Supp. 1936) tit. 19, §§ 616-622; R. I. Laws 1936, c. 2382; S. D. Laws 1933, c. 205; W. Va. Acts 1935, c. 36; Wis. Laws 1933, c. 48; Wyo. Laws 1935, c. 120 (requires payment of only 8 cents per mile to witnesses sent from Wyoming, but authorizes tender of usual 10 cents per mile fee to those requested by it from other states).

23. Idaho Laws 1935, c. 10, § 19-2904-A (1) (15 cents per mile).

24. *Id.* § 19-2904-A (2).

25. Mich. Acts 1935, no. 246, p. 418.

26. N. J. Laws 1936, c. 40, § 2; N. Y. CODE CRIM. PRO. (Cahill, Supp. 1936) § 618a.

27. N. J. Laws 1936, c. 40, § 2. Further, in such case, the judge may direct that the witness be brought before him physically, instead of notifying him that a hearing has been set. Authority is also given in § 3 for a like procedure by other states at the request of New Jersey, and for the delivery of the visiting witness into custody of the proper New Jersey authority.

28. N. J. Laws 1936, c. 40, § 3.

29. 3 MINN. STAT. (Mason, Supp. 1936) §§ 9819-1, 2. The certificates must issue from, and be received by, and the action must be in the district courts of Minnesota.

30. TENN. CODE (1932) §§ 11976-11979. The authorized fee for those leaving and entering the state is only 5 cents per mile and 4 dollars per day.

31. IOWA CODE (1931) c. 646, §§ 13893-13896.

32. LA. CODE CRIM. PRO. (Dart, 1932) art. 673.

33. N. Y. CODE CRIM. PRO. (Cahill, 1928) § 618a. This section has now been repealed and a new statute passed which includes almost the exact wording of the Uniform Act. N. Y. CODE CRIM. PRO. (Cahill, Supp. 1936) § 618a. For an excellent criticism of the former act, see Medalie, *Inter-State Exchange of Witnesses in Criminal Cases* (1929) 33 LAW NOTES 166.

only act the constitutionality of which has been tested. These acts also demand, in the case of sending witnesses from their own state, that the requesting state shall have reciprocal legislation, but the New York and Louisiana statutes are limited to a bordering state and to a pending trial for a felony.[34] All provide for a hearing before sending the witness, as well as for punishment for disobeying the order, but none makes specific provision for requesting witnesses from any other state, nor does any accord protection from process and arrest to the visitor, although such protection is required in the case of witnesses sent to other states.[35] Except for the provision as to bordering states, these laws are almost identical with the second tentative draft of the Uniform Act.[36]

The third group includes the laws of all the New England states except Maine and Rhode Island,[37] and since they are the earliest and briefest on the subject, their inferiority is patent. As in the second group, provision is made only for sending the witness, not for requesting him, and there is no reciprocal clause. Connecticut, New Hampshire, and Vermont generously place no limitation on where the witness is to be sent, but Rhode Island stipulates only the New England states, and Massachusetts limits the privilege to an adjoining state or Maine. The witness, who must in all cases be a resident of the state, is accorded no hearing before being ordered to attend court in the summoning state, and again no provision is made for protecting visiting witnesses from process. These laws specify the punishment for failure to obey the order, which, in every case, is only a fine or forfeiture and not imprisonment.[38]

In addition to these state laws, Congress recently has made it unlawful for any person to travel in interstate or foreign commerce with intent to avoid giving testimony in criminal proceedings in any state wherein a felony is charged.[39] And though of course not analogous in any sense, a federal statute has long existed providing that subpœnas may be issued from a federal court in any judicial district to a witness in any other district in the United States, if such witness is desired for a criminal case.[40]

Constitutionality

The constitutionality of statutes of this type remains undecided by a court of last resort. None of the acts discussed in groups one and three above has ever been tested, and the decision on the former New York statute of the second group

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34. *Ibid.;* LA. CODE CRIM. PRO. (Dart, 1932) art. 673.

35. IOWA CODE (1931) c. 646, § 13896; LA. CODE CRIM. PRO. (Dart, 1932) art. 673; N. Y. CODE CRIM. PRO. (Cahill, 1928) § 618a.

36. This draft appears in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1928) 431-433.

37. 2 CONN. GEN. STAT. (1930) § 6429; 2 MASS. GEN. LAWS (1932) c. 233, §§ 12-13; 2 N. H. PUB. LAWS (1926) c. 336, §§ 16-17; VT. GEN. LAWS (1917) §§ 2558-2559. The former act of Maine, ME. REV. STAT. (1916) c. 134, § 12, was supplanted in 1933 by the Uniform Act. Me. Acts 1933, c. 152. That of Rhode Island, R. I. GEN. LAWS (1923) c. 342, §§ 16-17, was likewise replaced by R. I. Laws 1936, c. 2382.

38. Connecticut, fine up to $300; Massachusetts, forfeiture up to $300; New Hampshire, forfeiture up to $300; Rhode Island, fine up to $200; Vermont, fine up to $500. See *supra* note 37.

39. 48 STAT. 782 (1934), 18 U. S. C. A. § 408e (Supp. 1936). The act has been termed ". . . a temporary expedient to be used till such time as the states, by compact or uniform law, shall provide for the return of witnesses who have left the trial jurisdiction." Dean, *Interstate Compacts for Crime Control* in PROCEEDINGS OF THE ATTORNEY-GENERAL'S CONFERENCE ON CRIME (1934) 64, 68.

40. 42 STAT. 848 (1922), *as amended by* 43 STAT. 1265 (1925), 28 U. S. C. A. § 654 (1928). This law is based on one which originated in 1793. 1 STAT. 335 (1793).

was handed down by a divided court,[41] four justices upholding the validity of the law, while Justice Laughlin vigorously dissented. The disagreement centered about the relation of the statute to the questions of deprivation of liberty without due process of law,[42] the privilege of citizens of the United States freely to enter and leave any state,[43] the making by one state of an unsigned agreement with another without the consent of Congress,[44] and the power of a state to order an affirmative act to be done beyond its borders. Although the statute then under consideration was inferior to the Uniform Act as now commonly adopted, it involved the same constitutional questions, so that an examination of the problems discussed therein is applicable to the validity of the modern laws as well.

It would seem that the constitutional provision that no person shall be deprived of his liberty without due process of law has been fully complied with in the statutes of both groups one and two by the provision therein made for notice and a hearing before the issuance of the summons to attend court in the foreign state.[45] Even the older New England statutes would probably be held valid in this respect, since the witness is notified by receiving the summons to attend the requesting court, and can move to vacate it if he desires. By so acting he can secure a hearing for himself and show just cause why he should not be compelled to obey the order.

The ground on which the privileges and immunities clause of the Federal Constitution has been invoked against the New York statute is that by compelling a person within one state to proceed into another for a given time, the Act abridges the privilege of citizens of the United States of free ingress and egress from the states. This objection applies equally to all three groups of existent statutes. However, while such a privilege has been held to adhere to national, as well as to state, citizenship,[46] it is well settled that the enjoyment of any privilege by any citizen is coincident with the duty to aid the

41. Massachusetts v. Klaus, 145 App. Div. 798, 130 N. Y. Supp. 713 (1st Dep't, 1911), 11 COL. L. REV. 786, 25 HARV. L. REV. 188. This case overruled the only other existing one on the subject, *In re* Commonwealth of Pennsylvania, 45 Misc. 46, 90 N. Y. Supp. 808 (Sup. Ct. 1904), 18 HARV. L. REV. 466 (1905), in which an admittedly hurried decision, without citation of authority, pronounced the same New York statute invalid. The title of the case, together with the fact that the judge in the later New York case says Pennsylvania had such an act, would indicate that there was an earlier Pennsylvania statute on the subject which fulfilled the requirement of reciprocity in the New York law. But no such act existed.

42. Such deprivation is forbidden to the states in U. S. CONST. Amend. XIV. The various state constitutions also contain a guarantee of due process in their Bills of Rights. Except in this instance, the state constitutions do not contain provisions pertinent to the subject.

43. U. S. CONST. Amend. XIV prohibits any state from making or enforcing a law abridging the privileges and immunities of citizens of the United States.

44. This is prohibited in U. S. CONST. Art. I, § 10, cl. 3.

45. § 1, 9 U. L. A. (Supp. 1936) 8.

46. Crandall v. Nevada, 6 Wall. 35 (U. S. 1867); see Twining v. New Jersey, 211 U. S. 78, 97 (1908). The dissenting justice in *Massachusetts v. Klaus* seems to have failed to distinguish between the privileges of citizens of the several states and those of citizens of the United States, and likewise between the purposes of that clause of the Constitution granting the citizens of each state the privileges of those of the several states [U. S. CONST. Art. IV, § 2], and the clause of the Fourteenth Amendment guaranteeing the privileges of citizens of the United States against abridgment. See Massachusetts v. Klaus, 145 App. Div. 798, 809-810, 130 N. Y. Supp. 713, 721 (1st Dep't, 1911). But these sets of privileges differ. See Slaughter House Cases, 16 Wall. 36, 74 (U. S. 1872). Likewise the purposes of the clauses differ: the first merely declares that each state shall grant to the citizens of other states who are within its jurisdiction the same privileges which it accords its own citizens. See Slaughter House Cases, 16 Wall. 36, 77 (U. S. 1872); United States v. Wheeler, 254 U. S. 281, 298 (1920). The only possible basis of objection to the Act's constitutionality is Amendment XIV and not Art. IV, § 2.

government by giving evidence;[47] and that duty is not limited by state boundaries.[48] The Fourteenth Amendment was surely not intended to ban such a temporary interference with free movement, in the interest of the security of the state, for every citizen who attends any trial as witness or juryman is, in the same sense, deprived of the privilege of leaving the state.

The view is equally unsound that the legislature, agreeing in a statute to send witnesses to other states who have enacted like laws, has in effect made an unsigned agreement with those other states without the consent of Congress.[49] The basic difference between an "agreement", involving action by representatives of two or more states and approval by their legislatures, and reciprocal legislation is well recognized.[50] But even if it were to be conceded that such reciprocal legislation constitutes an "agreement", a Congressional enactment of 1934 has settled the question by providing that Congressional consent is given in advance to the states to enter into agreements or compacts for mutual assistance in " . . . the prevention of crime and in the enforcement of their respective criminal laws and policies . . ." [51]

One question of fundamental importance in determining the validity of all statutes for the exchange of witnesses lies in the fact that the state is compelling a person over whom it has jurisdiction to do an affirmative act beyond the state borders, and is punishing him for failure to obey. It is claimed that since the orders of the courts generally have no extraterritorial effect, such a one is beyond the power of the court to make, and need not be obeyed. The nearest analogy is the power of courts of equity to order acts done in another state, and although the weight of the older authority denies the existence of jurisdiction for such a purpose,[52] there has been a tendency to adopt the view that when a court obtains valid jurisdiction over any person, that jurisdiction exists for all purposes, and includes the power to order an act done beyond the state borders.[53] The question of whether or not such order should be given is only one of expediency in the particular case.

Two difficulties largely caused general adherence to the old view, and still loom large in the question of expediency today: these are (1) the possibility that

47. Blair v. United States, 250 U. S. 273 (1919). Of course the duty is subject to certain exceptions, e. g. self-incrimination.

48. Thus statutes providing for the giving of a deposition for use in civil cases in another state are found in every jurisdiction. Note (1929) 43 HARV. L. REV. 121, 123, n. 5. As to depositions for criminal cases to be taken in foreign states, see *supra* note 12.

49. This criticism, it should be noted, does not apply to the New England laws, since they contain no requirement of reciprocal action by other states.

50. Dean, *Interstate Compacts for Crime Control* in NEW JERSEY CONFERENCE ON CRIME (1935) 20; *Report to the Commissioners on Uniform State Laws on Interstate Compacts* in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1921) 299-300; Toll, *State Legislation in the Field of Criminal Law* in PROCEEDINGS OF THE ATTORNEY'S CONFERENCE ON CRIME (1934) 366, 375.

51. 48 STAT. 909 (1934), 18 U. S. C. A. § 420 (Supp. 1936). This statute has been characterized as "a direct challenge to the states" to assume their duties in non-local crime problems. Dean, *Interstate Compacts for Crime Control* in PROCEEDINGS OF THE ATTORNEY-GENERAL'S CONFERENCE ON CRIME (1934) 64, 66.

52. People *ex rel.* Van Dyke v. Colorado C. R. R., 42 Fed. 638 (C. C. D. Colo. 1890); Port Royal R. R. v. Hammond, 58 Ga. 523 (1877); People v. Central R. R. of N. J., 42 N. Y. 283 (1870). See also Beale, *The Jurisdiction of Courts over Foreigners* (1913) 26 HARV. L. REV. 283, 293.

53. Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co., 245 Fed. 9 (C. C. A. 9th, 1917); Madden v. Rosseter, 114 Misc. 416, 187 N. Y. Supp. 462 (Sup. Ct. 1921), *aff'd*, 196 App. Div. 891, 187 N. Y. Supp. 943 (1st Dep't, 1921). See also RESTATEMENT, CONFLICT OF LAWS (1934) § 94.

the other state would order the act not to be done, thus forcing the individual to disobey one of two authorities, and (2) the difficulty of enforcing the order after the person leaves the ordering state.[54] But in the situation under examination the state where the trial is to be held has already shown a willingness that the command should be given, thus disposing of the first matter. And as to the second, the same difficulty of enforcement exists to a slightly less degree in any case where affirmative action is required or forbidden: if the order is not to do an act in another state, the person may still proceed there and do it; if it is to do an act in the ordering state, the person may leave the state instead.

The statutes include other elements of expediency which must be satisfied before the order to summon the witness will be issued. Thus in group one they include the determination that the witness is material and necessary and that the trip will cause him no "undue hardship." In the second group they embrace the need to attend only the trial of a felony, in addition to the determination as to the materiality of the witness. In the third they are non-existent.

On the above grounds statutes on this subject are constitutionally valid at their present stage of development, and the case of *Massachusetts v. Klaus,* while not the decision of a court of last resort, can well be followed today.[55]

Efficacy

Although half the states have legislation of the general type, certain provisions in the most numerous and complete class of statutes minimize the chance of securing a witness in a specific instance. Seventeen states demand (a) that the laws of the requesting state provide for sending witnesses to them, (b) that the requesting state and all intervening ones grant immunity from arrest and the service of civil and criminal process to one within such state for the given purpose, and (c) that the requesting court be not more than one thousand miles away, before the witness can be sent.[56] And when these conditions are fulfilled there still remain the questions of expediency discussed above. Each of the conditions takes its toll: one who knows his presence will be desired can defeat the purpose of the statute and still both leave and enter states which have passed the Uniform Act, either by making certain that the county he enters is more than one thousand miles from the court which will send for him, or by placing between himself and that court a state which has not accorded him the required protection. He even more simply can accomplish his end by merely entering a state which has no law on the subject, though of course this is not a defect in the Act itself. Considering the scattered geographical position of those states which at present do have such laws, in a majority of instances the possibility of securing the witness is limited to bordering states.[57]

The passage of the Uniform Act by every state would remedy one of the above difficulties, namely, the requirement of immunity from process in all intervening states; but such a situation will not result for some years, and even then the thousand mile limit will remain. It thus becomes apparent that changes

54. GOODRICH, CONFLICT OF LAWS (1927) 154-156.

55. While the case was correctly decided as to the validity of the statute, the court should strictly have refused to allow the order to be issued, because the Massachusetts act did not fulfill the conditions demanded by that of New York, in that it did not exempt the visiting witness from the service of papers and from arrest as there required. However, the court preferred to rest the decision on constitutional grounds. For a general treatment following the holding, see Harker, *Compulsory Attendance of Non-Resident Witnesses in Criminal Cases* (1928) 23 ILL. L. REV. 195, which was partially criticized in (1928) 32 LAW NOTES 62.

56. § 1, 9 U. L. A. (Supp. 1936) 8.

57. It must be admitted that no matter how widely the Uniform Act is adopted, its use by bordering states will always surpass other uses made of it.

should be made in the Uniform Act if it is to have any real efficacy in other than border states. One of these should be the elimination of the mileage limit. The problem is complicated by the fact that one governor has already vetoed an act which lacked such a clause, on the ground of hardship to the witness,[58] but there is no reason why such a situation should recur. When transportation is quick and easy and payment ample, and when a judge of sound discretion may refuse to issue the order if an undue burden on the witness would result therefrom, it is difficult to see just how hardship enters the picture. No sound reason for a mileage limit exists, and a notable increase in the efficiency of the Act and of the present statutes would result from its removal.

The condition requiring immunity from arrest and from the service of civil and criminal process in all intervening states on the ordinary traveled route can and should be changed by the inclusion of a clause making it operative only in the event that the judge giving the hearing is convinced that the witness is liable to such process or arrest. Since a goodly portion of those who are sent probably will not be involved with the authorities of the intervening states, in this way the Act will be made operative in a large number of instances where it is now of necessity ineffective. In those cases where there is valid need for such protection, the clause is a useful one: by arrest, at least, the mission of the witness would be immediately defeated, and in some cases the service of process would probably have a like effect. It is to be noted, however, that section 3 of the Uniform Act which guarantees immunity to witnesses from other states who are visiting or passing through the enacting state should be retained in its entirety.

The scope of the Act should be broadened to include grand-jury proceedings.[59] Such a provision would not often be used, but when occasion should arise, the situation could be met. The hearing by the judge of the sending state would prevent abuse of such a clause.

Other salutary provisions are those for the amount and mode of payment, and for punishment. The stipulations of ten cents per mile by the ordinary traveled route, and five dollars for each day that the person is "required to travel and attend as a witness" [60] are ample, and so clearly phrased as to avoid ambiguity. It is to be hoped that each state adopting the Act in the future will provide for the tender of at least these amounts to those whom it requests to attend its courts, since provision for a lesser amount will not meet the condition imposed by the sending state on this matter.[61] The punishment provided in the Act is clear and definite, usually taking the form of constructive contempt of court, including liabil-

58. In 1929 the Pennsylvania legislature passed an act on the subject (Pa. Laws 1929, pp. 1827, 1847) which was recommended by the state Crime Commission and resembled the Uniform Act except in this provision as to distance. 3 PA. LEGIS. J. (1929) 4763-4764, 4939. For its text, see PENNSYLVANIA CRIME COMMISSION, REPORT TO THE GENERAL ASSEMBLY (1929) 94. But the bill was vetoed on the ground mentioned.

59. Such action has already been taken in the New Jersey Act, N. J. Laws 1936, c. 40, §§ 2, 3; New York Act, N. Y. CODE CRIM. PRO. (Cahill, Supp. 1936) § 618a. TENN. CODE (1932) §§ 11976-11979. The Idaho Act has also taken the step suggested as to sending witnesses *to* Idaho. Idaho laws 1935, c. 10, § 19-2904-A (2).

60. §§ 1 and 2 of the Act. This amount is large enough to prevent abuse of the Act, since the tender of it must precede the obtaining of the witness. The Pennsylvania statute is somewhat inferior in this respect, since it provides for the payment of the usual amount for the number of miles the witness "shall be required to travel", and does not say "by ordinary traveled route". This only places another burden of interpretation on the judge. PA. STAT. ANN. (Purdon, Supp. 1936) tit. 19, §§ 618, 620.

61. For example, the law of Nevada, which otherwise conforms to the Uniform Act, provides for the tender of only 7½ cents per mile and 4 dollars per day to the requested witness. NEV. STAT. 1933, c. 48, § 2. See also TENN. CODE (1932) §§ 11976-11979 (5 cents per mile and 4 dollars per day).

ity in a civil suit or payment of a sum to the aggrieved party, plus fine and/or imprisonment.[62] Some states do not include the civil liability.[63]

Statutes for the sending and securing of witnesses beyond state borders are not yet generally used. Although no figures are available in those states which have just recently adopted the idea, a series of returns to the American Law Institute in 1929 are valuable as indicating definite trends in those states which have had such statutes for the longest comparative time. The reports from the New England states indicated that the average use was once in three to once in five years or less. A questionnaire sent by the Iowa authorities to the 99 county attorneys of the state was returned by 68, of whom 64 reported no use of their statute, which was passed in 1913, while 2 reported sporadic, and 2 frequent use of it; 4 reported that they had sometimes sent witnesses to distant states, and 2 that they had used the law to obtain witnesses from outside the state. Some of them had never heard of the statute.[64]

Such figures as the above must be held against a background in which less than ten statutes on the subject existed, many of them faulty. But the present-day number of twenty-four states which have embraced the idea is sure to rise steadily. If the Commissioners on Uniform State Laws would increase the scope and effectiveness of their own model Act, and if those states now having inferior statutes would amend them by adopting the Uniform Act, it is believed that the ability of a prospective witness to thwart the administration of justice by moving beyond the state would be non-existent.

M. P. S.

62. Typical statutory provisions are found in 1 IDAHO CODE ANN. (1932) tit. 13, § 610, tit. 16, §§ 707-709; IOWA CODE (1931) §§ 11333-11336, 12543; 3 MICH. COMP. LAWS (1929) §§ 14228-14229; MINN. STAT. (1927) §§ 9802, 9803; N. Y. Cons. Laws (Cahill, 1930) c. 31, §§ 753 (5), 773-774; ORE. CODE (1930) tit. 9, §§ 1109, 1110.

63. IND. STAT. (1934) § 2652; ME. REV. STAT. (1930) c. 96, § 1220.

64. These figures are all obtained from private correspondence conducted by Professor Edwin R. Keedy as a member of the committee engaged in drafting a suitable statute for the American Law Institute. See *supra* note 6.