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# Uniform Act to Secure the Attendance of out of State Witnesses in Criminal Cases-Process-Extradition-Privileges and Immunities-Due Process

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Such a formula would seem to combine the objective and subjective approaches to produce a result which is both reasonable and equitable.

A brief summary of the application of this analysis to several situations may be helpful in testing its validity. In the first situation to be considered, the crime is continuing on the basis of application of an objective standard, and the defendant enters with intent to aid in its completion. However, if intent is not clear, then the rebuttable presumption of intent is raised. This situation is, of course, the one involved in the *Zierlion* case, and the reader will recall that here the late joiner should be guilty as a principal.

The second illustration is the *Baker* case in which the defendant entered before the crime was completed but with intent only to aid the criminal to escape. An application of an objective analysis would raise a presumption of intent which could be rebutted. If rebutted, the joiner could be convicted neither as a principal nor as an accessory to the major crime. Prosecution as a principal would be ineffective because the necessary intent to aid the major crime is not present; and prosecution as an accessory would be equally ineffective since the activities of the defendant took place before the crime was consummated.[46]

[46] Of what crime, then, could Baker have been convicted? It has been suggested that conviction could be sought on the basis of the theory that this individual was an accessory to a lesser crime included in the greater crime of manslaughter, *i.e.*, accessory after the fact of assault with intent to murder. Comment, 32 MINN. L. REV. 502 (1948). Such a conviction was upheld in People v. Haskins, 337 Ill. 131, 169 N.E. 18 (1929). Thus, in the final analysis Baker would be punished to the same extent to which he would have been, had he been determined an accessory after the fact of murder. This suggests a question as to whether, contrary to present legislation, a different punishment should be statutorily prescribed for accessories after the fact of different crimes. Such a distinction would involve the problem of attempting to draw fine lines in relation to punishment. For example, the punishment in Illinois for an accessory after the fact is ". . . imprisonment in the penitentiary for a term of not less than one year and not exceeding two years, and fined not exceeding $500." ILL. REV. STAT. ch. 38, §584 (1959). The judge or jury could, as they now do, set the punishment within the statute to fit their concept of the seriousness of the offense. This would seem preferable to an inflexible statutory amendment.

An additional legislative solution has been advanced in relation to establishment of a new class of crime to cover situations such as the *Baker* case. Comment, 32 MINN. L. REV. 502 (1948). It would be more desirable, however, to convict as an accessory after the fact and set the punishment to suit the crime within the statutory limits. Possibly, the penalty for such a violation should be more severe than presently provided in accessory after the fact statutes, but this is a moral rather than a legal determination. In addition, such situations seem to arise so infrequently that additional legislation may not be justified.

The third example is a case in which the crime is found to have been completed on the basis of objective analysis, but the joiner enters with intent to aid in the major crime. Since the formula developed requires a concurrence of the objective and subjective factors, the defendant in this situation would be guilty as an accessory.[47]

The final possibility relates to a case in which the crime is complete and the intent of the joiner is to aid the principal in escape. Here, the presumption formula is inapplicable since it is clearly the situation contemplated by accessory after the fact statutes.

[47] As previously indicated this is consistent with the legal requirement of some participation in the major crime. Note 38, *supra*.

## CASE NOTE

### UNIFORM ACT TO SECURE THE ATTENDANCE OF OUT OF STATE WITNESSES IN CRIMINAL CASES—PROCESS—EXTRADITION—PRIVILEGES AND IMMUNITIES—DUE PROCESS. *New York v. O'Neil, 359 U.S. 1 (1959)*

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Forty-three states have adopted statutes which provide a procedure to secure the attendance at criminal proceedings of witnesses from without a state.[1] The purpose of these statutes is to promote enforcement of the criminal law by facilitating the administration of criminal proceedings.[2]

[1] ARIZ. REV. STAT. ANN. §13-1861 (1956); ARK. STAT. ANN. §43-2005 (1947); CAL. PEN. CODE. §1334 (1956); COL. REV. STAT. ANN. §39-6-1 (1953); CONN. GEN. STAT. REV. §54-22 (1958); DEL. CODE ANN. tit. 11, §3521 (1953); FLA. STAT. ANN. §942.01 (1944); IDAHO CODE ANN. §19-3005 (1948); ILL. REV. STAT. ch. 38

Generally, these statutes are patterned after the model act drafted by the National Conference of Commissioners on Uniform State Laws.[3]

The Uniform Act provides for the following procedure: A certificate is filed by a judge in the requesting state with a judge in the state where the witness may be found. The certificate must show that a criminal prosecution is pending in the requesting state or that a grand jury investigation has commenced, or is about to commence, and that the person sought is a material witness. In addition the certificate must state the number of days the witness' presence will be required. If the judge with whom the petition is filed finds that the certificate is proper, he may order the witness before him in one of two ways:

1.) He may set a time and a place for a hearing and order the witness to appear. After the hearing, a summons may be issued directing the witness to attend and testify in the out-of-state proceeding.

2.) He may direct that the witness be immediately brought before him for a hearing. After the hearing the judge may order that the witness be taken into custody and delivered to an officer of the requesting state.

This procedure is followed, when recommended by the requesting state, so as to assure the witness' attendance in that state.

Under either procedure, the hearing and issues to be determined are the same.

The judge must determine whether the witness is *material* and *necessary* to the criminal proceeding, whether his attendance will cause him *undue hardship*, and whether the requesting state, and any state through which the witness will travel, will grant him *immunity from arrest and the service of civil and criminal process*.[4]

In April of 1956, there was filed in the Circuit Court of Dade County, Florida, a certificate pursuant to the requirements of the Florida statute.[5] The requesting certificate was executed by a judge of the New York Court of General Sessions, seeking to require the attendance of one

§690.1 (1959); IND. ANN. STAT. §9–1626 (1956); KAN. GEN. STAT. ANN. §62–2801 (Supp. 1959); KY. REV. STAT. §421.230 (1959); LA. REV. STAT. §15.152.1 (1950); ME. REV. STAT. ANN. ch. 148, §24 (1954); MD. ANN. CODE. art. 27 §617 (1957); MASS. ANN. LAWS ch. 233 §13 (a) (1956); MINN. STAT. ANN. §634.06 (1947); MISS. CODE. ANN. §1892 (1942); MONT. REV. CODES ANN. §94–9001 (1947); NEB. REV. STAT. §29–1906 (1956); NEV. REV. STAT. §178.295 (1959); N. H. REV. STAT. ANN. §613.1 (1955); N. J. STAT. ANN §2A: 81–18 (1952); N. M. STAT. ANN. §41–12–13 (1953); N. Y. CODE CRIM. PROC. §618 (a) (1958); N. C. GEN. STAT. §8–65 (1953); N. D. REV. CODE §31–0325 (1943); OHIO REV. CODE ANN. §2939.26 (Baldwin 1959); OKLA. STAT. tit. 22, §721 (Supp. 1959); ORE. REV. STAT. §139.210 (1959); PA. STAT. ANN. tit. 19 §622.1 (Supp. 1958); P. R. LAWS ANN. tit. 34, §1471 (1956); R. I. GEN. LAWS ANN. §12–16–1 (1956); S. C. CODE §26–301 (1952); S. D. CODE § 34.2501 (1939); TENN. CODE. ANN. §40–2429 (1955); TEX. CODE CRIM. PROC. ANN. art. 486a (1954); UTAH CODE ANN. §77–45–11 (1953); VT. STAT. ANN tit. 13, §6641 (1958); VA. CODE ANN. §19–242 (1950); WASH. REV. CODE §10.55.010 (1956); W. VA. CODE ANN. §6246(1) (1955); WIS. STAT. ANN. §325.33 (1959); WYO. COMP. STAT. ANN. §7–250 (1957).

[2] Comment, 31 MINN. L. REV. 699 (1947); Comment, 8 U. CHI. L. REV. 567 (1941); Comment, 41 MICH. L. REV. 171 (1942); Comment, 10 W. RES. L. REV. 611 (1959); Comment 107 U. PA. L. REV. 275 (1958). Also, the Uniform Act may stop bribes by organized crime to potential witnesses, Comment 85 U. PA. L. REV. 717 (1937). Many guilty persons will escape unless there is power like that found in the Uniform Act. Comment, 10 GEO. WASH. L. REV. 345 (1942). Also see, Comment, 43 MINN. L. REV. 1005 (1959); Comment, 37 N.C.L. REV. 77 (1958); Comment, 33 TUL. L. REV. 874 (1959).

[3] UNIFORM LAW TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHOUT A STATE IN CRIMINAL PROCEEDINGS §§1–9.

[4] The state courts are not in agreement as to what standards should be employed to determine the materiality of any given witness. In *In re Cooper*, 127 N.J.L. 312, 22 A.2d 532 (1941), the court pointed out that under the Act, the certificate of a judge of the requesting state is "*prima facie* evidence of all facts stated therein." The court held that the question of materiality of the witness is largely a decision for the court in which the cause is being tried, since the determination depends somewhat upon the laws of that jurisdiction and the evidence adduced on the trial of the issue. Other courts have held that more is needed before a witness' testimony can be considered material. See State v. Fouquette, 67 Nev. 505, 221 P.2d 404 (1950), *cert. denied*, 341 U.S. 932 (1951); *In re* Mayers, 9 Misc. 2d 212, 169 N.Y.S.2d 839 (1957); Application of Stamler, 279 App. Div. 908, 111 N.Y.S.2d 313 (1952).

The provisions in most of the acts are identical although some now provide for bail. See 10 W. RES. L. REV. 611 (1959), 34 N.Y.U.L. REV. 175 (1957).

The statute also provides that the witness will be paid ten cents a mile to and from the court where the prosecution is pending, and five dollars a day for each day he is required to travel and serve as a witness. The requesting state is obligated to pay the witness, provided he is a witness for the state. This provision of the Uniform Act does not entitle a defendant to have witnesses brought into court at public expense. State v. Blount, 200 Or. 35, 264 P.2d 419 (1953), *cert. denied*, 347 U.S. 962 (1954); *State ex rel* Butler v. Swensen, 243 Minn. 24, 66 N.W.2d 1 (1954); Vore v. State, 158 Neb. 222, 63 N.W.2d 141 (1954); State v. Fouquette, 67 Nev. 505, 221 P.2d 404 (1950), *cert. denied*, 341 U.S. 932 (1951). See; State v. Bean, 181 Kan. 1044, 317 P.2d 480 (1957) in which the Supreme Court of Kansas held that the provisions of the Uniform Act are not mandatory and need not be followed where a witness who lives in another state agrees voluntarily to return to the place of trial, and where the county attorney arranged for the voluntary attendance of the witness by advancing necessary funds for his transportation and expenses in lieu of invoking provisions of the Uniform Act.

[5] FLA. STAT. ANN. §942.01 (1936).

O'Neill as a witness before a New York grand jury.

O'Neill, a resident of the State of Illinois, was attending a convention in the State of Florida.[6] The certificate recommended that O'Neill be taken into immediate custody and delivered to an officer of the State of New York. Upon hearing this petition, the Florida Circuit Court ruled that the Florida statute violated both the Florida and the United States Constitutions and refused to grant the New York request.[7]

The Supreme Court of Florida, affirming this decision,[8] relied upon the decision of the United States Supreme Court in *Pennoyer v. Neff*[9] and found that the effect of a Florida summons issued at the request of New York would be to extend New York's jurisdiction beyond its territorial limits. In the *Pennoyer* case, the Court held that the acquisition of personal jurisdiction through service of process outside of a state's borders is invalid.

On *certiorari*, the Supreme Court of the United States, with two justices dissenting, reversed the Florida Supreme Court, and granted New York's request.[10]

The Supreme Court, speaking through Mr. Justice Frankfurter, held that:

> "[T]he Florida courts had immediate personal jurisdiction over respondent by virtue of his presence within that State. Insofar as the Fourteenth Amendment is concerned, this gave the Florida courts constitutional jurisdiction to order an act *even though that act is to be performed outside of the State.*"[11] (Emphasis added).

The presence of O'Neill in Florida is all that the Court would require to give the Florida courts personal jurisdiction over O'Neill, which includes the power to compel him to appear as a witness in another state.

In *Pennoyer v. Neff*, a state court attempted to exercise personal jurisdiction over an out-of-state party. A different situation is presented by the Uniform Act than is found in *Pennoyer*. Under the Uniform Act, a state is requiring a party to perform acts outside of its boundaries only after the state has acquired personal jurisdiction of the party by reason of his presence within the state. The requesting state, New York, exercises no extra-territorial jurisdiction, for it only requests Florida's action. New York does not attempt to serve the witness with its own process.[12]

The majority and the dissenting opinions in the *O'Neill* case disagreed as to whether the states have the power to enact uniform legislation to secure the attendance of out of state witnesses. The majority opinion held that:

> "Unless there is some provision in the United States Constitution which clearly prevents States from accomplishing this end by the means chosen, this Court must sustain the Uniform Act. . . .It is within the unrestricted area of action left to the States by the Constitution."[13]

Thus, the majority opinion reasoned that silence in the Constitution does not preclude state action.

The dissenting opinion, however, bases its reasoning upon the Extradition Clause of the Constitution.[14] They claim that a state cannot expand its power of extradition to cover witnesses when the scope of such power is specifically limited to fugitives.[15]

The dissent further argues that Congress has preempted the area of extradition since it has enacted legislation making it a federal crime for a person to move in interstate commerce "to avoid giving testimony" in certain felony proceedings.[16] Basing their reasoning upon the supremacy clause they conclude that, should the power of extradition be expanded to include witnesses, additional Congressional action would be needed.

Congress, however, has not enacted a statute authorizing the extradition of a person charged

[6] O'Neill could not be reached in Illinois since at that time Illinois did not have an Act.

[7] 9 Fla. Supp. 153 (1956).

[8] 100 So. 2d 149 (Fla. 1958).

[9] 95 U.S. 714 (1877).

[10] 359 U.S. 1 (1959). Justices Douglas and Black dissented.

[11] See *supra* note 10, at 8.

[12] Restatement, Conflict of Laws, §94 (1934). "A state can exercise jurisdiction through its courts to make a decree directing a party subject to the jurisdiction of the court to do an act in another state, provided such act is not contrary to the law of the state in which it is to be performed." *Contra*, 72 C.J.S. *Process* §8 (1951), 4 AM. JUR. *Arrest* §19 (1936). Passet v. Chase, 91 Fla. 522, 107 So. 689 (1926).

[13] See *supra* note 10, at 5.

[14] See *supra* note 10, at 14.

[15] U.S. CONST. art. IV, §2. "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."

[16] Flight to Avoid Prosecution or Giving Testimony, 18 U.S.C. §1073 (1948). New York Central R.R. v. Winfield, 244 U.S 147 (1917); *In re* Rahrer, 140 U.S. 545 (1891).

with a crime who was not present in the charging state when the crime was committed. To cover this area, forty-one states have enacted the Uniform Criminal Extradition Act.[17] Various state courts have held the Act constitutional as within the reserved powers of the states and as an act of comity with sister states.[18]

Congress also has not provided a procedure whereby a state may request the attendance of an out-of-state witness. By analogy to the Uniform Criminal Extradition Act, the states through the exercise of their reserved powers may provide a procedure for the surrender of witnesses to other states whenever they are necessary for the successful enforcement of criminal law.

The apparent logic of this argument might fail when the soundness of comparing a witness with one charged with a crime is questioned. The Uniform Criminal Extradition Act merely expands the existing constitutional provision for the extradition of persons charged with a crime. The Uniform Act to Secure Attendance of Witnesses, however, expands the states' powers of extradition to include not only persons accused of a crime but also the witnesses needed to prosecute such accused persons. Where the Uniform Criminal Extradition Act is based upon the extradition clause of the constitution, there is no constitutional provision which provides for the extradition of witnesses. This dilemma is resolved in that the Uniform Act to Secure the Attendance of Witnesses is based on the reserved powers of the states rather than on the extradition clause of the constitution.

The interpretation of the "Privileges and Immunities" clause was also involved in the *O'Neill* case.[19] The privilege or immunity asserted by O'Neill was the right of free ingress and egress among the states. This clause was intended to prevent discrimination by a state against the constitutional rights of the citizens of other states.[20] The Court found that the Uniform Act does not discriminate between the citizens of one state and those of other states found within its borders, but applies to all persons alike.[21] Justices Black and Douglas, dissenting, claimed that the right of freedom of movement was violated by the statute. They fail, however, to explain how such freedom was violated.

Although the *O'Neill* case dealt primarily with the constitutionality of the Uniform Act, application of the Act also presents non-constitutional questions of policy and interpretation.

The advantages of the Act can only be maintained when its procedural requirements are strictly followed. The most important requirements of the Act are that the witness is material and necessary, that his attendance will not cause him undue hardship, and that states to which or through which he travels will grant him immunity from arrest or service of process. The immunity requirement does not raise severe problems. The other requirements, however, cause more difficulty. For example:

> (1) Suppose that a request is made by an Illinois court upon an Indiana court requesting the procurement of a key witness for an Illinois murder prosecution. *Provided that the court is satisfied with the requirements of materiality and necessity*,[22] it must also decide that the attendance of the witness will not cause him undue hardship. The court may satisfy this requirement by a careful examination of the nature of the pending prosecution and the amount of hardship placed on the individual witness. In a situation similar to the hypothetical, the court might find, and rightly so,

[17] UNIFORM CRIMINAL EXTRADITION ACT §§1–31.

[18] Ennist v. Baden, 6 Fla. Supp. 183, 28 So. 2d 160 (1946); State v. Kriss, 191 Md. 568, 62 A.2d 568 (1948); *Ex parte* Bledsoe, 93 Okla. Crim. 302, 227 P.2d 680 (1951). 22 AM. JUR. 250, *Extradition*, §9. *Accord*, UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT, §§1–33. Despite the fact that Section 5 of said Act authorizes the surrender of a non-fugitive, it has been upheld as an exercise of the States reserved sovereign powers and as an act of comity to a sister State. See, State v. Bennett, 90 So. 2d 43 (Fla. 1956); Harrison v. State, 262 Ala. 701, 77 So. 2d 387 (1955); *Ex parte* Coleman, 157 Tex. Crim. 37, 245 S.W.2d 712 (1951).

Each of the several states has the sovereign power to provide for their own internal safety and to promote concord and harmony among themselves by mutually supporting each other in bringing offenders to justice. Kentucky v. Dennison, 65 U.S. 66 (1860). See also: *In re* Saperstein, 30 N. J. Super. 373, 104 A.2d 842 (1959) where 4 U.S.C. §111 (1956) is cited which provides that "the consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts."

[19] U.S. CONST. art IV, §2. U.S. CONST. amend. XIV.

[20] Twining v. New Jersey, 211 U.S. 78 (1908); Hague v. C. I. O., 307 U.S. 496 (1939); *Cf.* Slaughter-House Cases, 83 U.S. 36 (1872); Paul v. Virginia, 75 U.S. 168 (1868); Ward v. Maryland, 79 U.S. 418 (1870); U.S. v. Wheeler, 254 U.S. 281 (1920).

[21] See *supra* note 10, at 6.

[22] See *supra* note 4 for discussion of problems involved in determining "materiality and necessity".