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EVIDENCE - CONSTITUTIONAL PROBLEMS IN COMPELLING THE ATTENDANCE OF WITNESSES OUTSIDE THE STATE

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EVIDENCE — CONSTITUTIONAL PROBLEMS IN COMPELLING THE ATTENDANCE OF WITNESSES OUTSIDE THE STATE — Cooper, a citizen of New Jersey, was sought as a witness by a defendant in a criminal prosecution in a New York court in accordance with a New Jersey statute, which allowed such a procedure upon certain conditions. The conditions included a hearing in New Jersey on the summons and provisions for compensation and immunity from service of process while acting on the writ outside the state. At the New Jersey hearing on the summons Cooper objected on the ground that the statute was an unconstitutional deprivation of his liberty. *Held*, that the statute is constitutional. *In re Cooper*, 127 N. J. 312, 22 A. (2d) 532 (1941).

The statute of New Jersey is an enactment of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings.[1] The decision in the principal case is the first ruling by the highest court of any state on the statute's construction and its constitutional problems,[2] although a similar conclusion was reached when the Appellate Division of the Supreme Court of New York held that the statute did not deny due process of law,

[1] N. J. Laws (1941), c. 88, N. J. Stat. Ann. (Supp. 1941), § 2:97-27 et seq. The original statute was declared unconstitutional on the ground that the title did not sufficiently state the object of the act. New York v. Parker, (N. J. Cir. Ct. 1936) 1 A. (2d) 54. The present New Jersey statute includes the 1936 amendment of the uniform law, 9 U. L. A. (1942), p. 31, and extends the scope by including testimony for grand jury investigations and making no geographical limitation within the United States.

This type of statute has been enacted in one form or another in thirty-six states. 8 WIGMORE, EVIDENCE, 3d ed. § 2195e, note 3 (1940). Depositions were not available in most states because of the state constitutional provision requiring the accused's presence at the time the witness testifies. Some states have gotten around this provision by amendment to their constitutions. See 5 id., § 1398, note 6. The same procedure is provided for compelling attendance of witnesses among the federal districts. 42 Stat. L. 848 (1922), as amended 28 U. S. C. (1940), § 654. Only Wisconsin applies the uniform law to civil cases. 85 UNIV. PA. L. REV. 717 (1937). For the attitude of the Commissioners on Uniform Laws at the time of the drafting of the Uniform Act, see 1922 PROCEEDINGS NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 358, "Report of Committee on Securing Compulsory Attendance of Non-Resident Witnesses."

[2] 10 GEO. WASH. L. REV. 345 (1942).

abridge privileges and immunities, constitute an agreement or treaty between states,[3] or extend jurisdiction of the courts beyond the boundaries of the state.[4] The most serious point of doubt arises on the alleged extraterritorial effect of the subpoena. Most authorities adopt the analogy of equity's "in personam" power to support the view that there is no valid constitutional objection on this ground.[5] Since a court can compel attendance of a witness, over which it has jurisdiction, at a trial in a court within the state,[6] the question is one of power of a court to compel a person to travel beyond the territorial limits of the state for purposes of giving testimony.[7] The objection cannot be sustained on the ground that evidence may not be used beyond the borders of the state, for it has long been held that depositions are not limited to use within the boundaries of a state.[8] Power to compel testimony arises from the duty of the witness to give testimony, and any exercise of this power necessarily circumscribes the liberty of the person.[9] The only broad limitation included in the due process clause on the exercise of this power within a state is that the procedure be reasonable, and even this requirement does not necessitate a hearing on the summons.[10] The uniform law is not open to the objection of unreasonableness, for the witness is provided with what would be considered adequate compensation, an immunity from process in the foreign state as guaranteed by the reciprocal provisions of the statute, and a hearing upon the summons, except as otherwise set forth in the amendment of 1936.[11] The uniform law commissioners' amendment of 1936 provides for the immediate custody of the witness,[12] but even here the mere fact that a hearing is dispensed with does not render the statute unreason-

[3] The objection on this ground is no longer valid since Congress has enacted a permissive statute for this type of legislation. 48 Stat. L. 909 (1934), 18 U. S. C. (1940), § 420.

[4] Massachusetts v. Klaus, 145 App. Div. 798, 130 N. Y. S. 713 (1911). The statute of New York was not the uniform act but is the statute on which the uniform act is based and raises the important constitutional issues.

[5] Massachusetts v. Klaus, 145 App. Div. 798, 130 N. Y. S. 713 (1911); 85 UNIV. PA. L. REV. 717 (1937), where it is pointed out that though the numerical weight of authority in equity cases deny the existence of such power, the tendency is to recognize it; GOODRICH, CONFLICT OF LAWS 156-158 (1938).

[6] In 32 LAW NOTES 62 (1928) the criticism was made that the analogy to compelling attendance of witnesses within a state was not valid because within the state the people have an interest in such testimony whereas they do not in foreign prosecutions. This objection overlooks the comity feature of the statute and upon this basis it cannot be criticized as not being in the interest of the people.

[7] 11 COL. L. REV. 786 (1911).

[8] 25 HARV. L. REV. 188 (1911).

[9] 8 WIGMORE, EVIDENCE, 3d ed., §§ 2190-2195g (1940).

[10] Id., § 2199.

[11] 85 UNIV. PA. L. REV. 717 (1937). The dissent in Massachusetts v. Klaus, 145 App. Div. 798, 130 N. Y. S. 713 (1911), on which the Pennsylvania court in In re People of New York, 103 Leg. Intell. 1055 (1940), relied, apparently misconstrued the statute so far as a hearing and grounds for objection, but any doubts as to construction of the statute have been remedied by the uniform act, which sets forth the ground of hardship.

[12] 9 U. L. A. (1942), p. 34, § 3.

able since in place of a hearing the requesting judge is required to make a strong showing of necessity for immediate custody.[13] A hearing in this connection only relates to the question of reasonableness of procedure, and probably is not per se necessary to satisfy the due process clause.[14] Because the decisions of the courts upholding the constitutionality of this statute rest purely on the analogy to the "in personam" power of equity, a number of courts are going to encounter difficulty if they adopt this approach, for such power is not recognized in some jurisdictions where the performance of an act outside the state is concerned. No such difficulty is encountered if a court, as does the court in the principal case, upholds the statute as a reasonable method of enforcing a person's duty to give testimony, since there is no reason why the performance of the duty should be confined within state boundaries.

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[13] In re Application of the People of New York, 103 Leg. Intell. (Pa.) 1055 (1940), was decided on the ground that since the hearing was dispensed with the provisions were then unreasonable. This court also had before it the ground of unconstitutionality under the state constitution, the same objection found in New York v. Parker, (N. J. Cir. Ct. 1936) 1 A. (2d) 54; i.e., the title did not sufficiently set forth the object of the statute. It is the express holding of the principal case that the terms of the statute are entirely reasonable.

[14] 85 UNIV. PA. L. REV. 717 (1937).