

MAKING THE INDIGENT PAY TO OBTAIN OUT-OF-STATE WITNESSES

The indigent criminal defendant has always been faced with the problem of obtaining witnesses to testify in his behalf, particularly if his witnesses are not present in the state where he is being tried. The Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings¹ seemed to solve this problem for the indigent defendant after the great majority of states adopted it, and particularly after the Supreme Court upheld its constitutionality.² This Act provides that a witness may be subpoenaed to testify in a criminal case or grand jury proceeding from any other state having a reciprocal statute. The defendant must show that the witness is material, and the witness must be tendered five dollars for each day he is required to attend and ten cents for each mile he must travel to and from the court.³

¹ Hereinafter referred to as the Act. The Act has been adopted in 45 states and Puerto Rico; ALASKA STAT. tit. 12, §12.50.010; ARIZ. REV. STAT. ANN. §13-1861; ARK. STAT. ANN. §43-2005; CAL. PEN. CODE §1334; COL. REV. STAT. ANN. §39-6-1; CONN. GEN. STAT. REV. §54-22; DEL. CODE ANN. tit. 11, §3521; FLA. STAT. ANN. §942.01; IDAHO CODE ANN. §19-3005; ILL. REV. STAT. ch. 38, §690.1; IND. ANN. STAT. §9-1626; KAN. GEN. STAT. ANN. §62-2801; KY. REV. STAT. ANN. §421.230; LA. REV. STAT. §15.152.1; ME. REV. STAT. ANN. tit. 15, §1411; MD. ANN. CODE art. 27, §617; MASS. ANN. LAWS ch. 233, §13(a); MINN. STAT. ANN. §634.06; MISS. CODE ANN. §1892; MO. ANN. STAT. §491.400 (Cum Supp. 1959); MONT. REV. CODES ANN. §94-9001; NEB. REV. STAT. §29-1906; NEV. REV. STAT. §178.295; N. H. REV. STAT. ANN. §613.1; N. J. STAT. ANN. §2A: 81-18; N. M. STAT. ANN. §41-12-13; N. Y. CODE CRIM. PROC. §618(a); N. C. GEN. STAT. §8-65; N. D. CENT. CODE ANN. §31-03-25; OHIO REV. CODE ANN. §2939.26; OKLA. STAT. tit. 22, §721 (Supp. 1959); ORE. REV. STAT. §139.210; PA. STAT. ANN. tit. 19, §622.1; P. R. LAWS ANN. tit. 34, §1471; R. I. GEN. LAWS ANN. §12-16-1; S. C. CODE §26-301; S. D. CODE §34.2501; TENN. CODE ANN. §40-2429; TEX. CODE CRIM. PROC. ANN. art. 24.28; UTAH CODE ANN. §77-45-11; VT. STAT. ANN. tit. 13, §6641; VA. CODE ANN. §19-242; WASH. REV. CODE §10.55.010; W. VA. CODE ANN. §6246(1); WIS. STAT. ANN. §325.33; WYO. COMP. STAT. ANN. §7-250. For a comprehensive annotation on all phases of the Act, see 44 A.L.R.2d 732.

² *New York v. O'Neill*, 359 U.S. 1 (1958).

³ UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHOUT A STATE IN CRIMINAL PROCEEDINGS §3, 9 U.L.A. 91 (1957): "If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If the witness is summoned to attend and testify in this state he shall be tendered the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dollars for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period

However, because of the interpretations given the Act by the courts, the indigent defendant is still a long way from the protection the Act seemed to promise him. The basic problem is that the courts seem to require a defendant to pay the expenses of witnesses subpoenaed for him under the Act, even though he may be indigent.

I

JUDICIAL INTERPRETATIONS OF THE ACT

Nevada was the first jurisdiction to pass on the problem. In *State v. Fouquette*⁴ the court said in dictum that the Act conferred no authority to subpoena defense witnesses at public expense. There the court stated,

[I]t is clear that this statute, providing, as it does, that specified sums for fees and mileage shall be paid or tendered to non-resident witnesses summoned to attend and testify in criminal prosecutions in this state, but not providing, either expressly or by implication, that such witnesses summoned on behalf of the defendant shall be brought in without expense to him, does not confer upon the courts of this state authority to procure the attendance and testimony of witnesses from without the state for the defendant in any case at the expense of the public.⁵

Only a constitutional compulsory process question was raised by the defendant in this case, and the Act was not cited by him in his argument. The court ruled that the subpoena was properly denied because the testimony of the desired witnesses would have been incompetent and immaterial. Also, the trial court had allowed the defendant to subpoena four out-of-state witnesses at public expense; yet the *Fouquette* case has been heavily relied on by other courts which have considered the question.⁶

One such case was *State v. Blount*,⁷ where the defendant obtained an order to secure an out-of-state witness under the Act. However, he alleged that he could not compel the witness' attendance, because he was destitute and could not tender the necessary expenses. The trial court refused to order public funds for this purpose, and the Oregon Supreme Court upheld the ruling. Dismissing the defendant's claim of indigency by saying

mentioned in the certificate, unless ordered by the court. If such witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state."

There are some variations in the Act in different states. Some states, for example, allow a larger per diem amount for expenses than others.

⁴ 67 Nev. 505, 221 P.2d 404 (1950).

⁵ *Id.* 221 P.2d at 410.

⁶ *State v. Blount*, 200 Ore. 35, 264 P.2d 419 (1953); *Vore v. State*, 158 Neb. 222, 63 N.W.2d 141 (1954); *State ex rel. Butler v. Swenson*, 243 Minn. 24, 66 N.W.2d 1 (1954); *State v. Hemmenway*, 80 S.D. 153, 120 N.W.2d 561 (1963).

⁷ *State v. Blount*, *supra* note 6.

that there was no such showing when the order was made, the court held that there was no authority under the Act to secure defense witnesses at public expense because, although the Act requires that the witness be tendered mileage and expenses, it is silent as to the source of the money.⁸ The court also stated that there was no authority under the Act to expend any funds in advance,⁹ although it seems that a witness is not required to attend unless he is first tendered these fees. Finally, the court felt that Oregon law, which allowed defendants to have witnesses within the state subpoenaed at public expense, did not establish a public policy of using county funds to secure out-of-state defense witnesses.¹⁰

A similar decision in *Vore v. State*¹¹ declared that the authority to pay defendant's witness fees must arise from an express provision of a statute and not by implication.

The issue of an indigent defendant was squarely met in *State ex rel. Butler v. Swenson* and *State v. Hemmenway*,¹² where the defendants were represented by appointed counsel. In both cases it was decided that the court lacked authority under the Act to provide defendants with out-of-state witnesses at public expense, and no special consideration was given the defendants because of their indigency.

As an example of the extent to which courts have gone in misconstruing the statute, *State v. Lupino*¹³ held that the Act did not impose upon the state any obligation to procure for the defendant out-of-state witnesses because they are beyond the reach of the state's process. The court modified its statement somewhat by saying that it assumed that arrangements to secure vital defense witnesses from outside the state would be made if this could be done with "reasonable facility,"¹⁴ but this did not prevent the ruling from being clearly erroneous. The holding was based on the theory that the only purpose of the Act is to enable the prosecution to secure witnesses. The Act certainly has that effect, but there is no reason to deny its effect to defense witnesses as well. The Act makes no differentiation between prosecution and defense witnesses but applies to "any person . . . (who) is a material witness" and defines a witness as a "person whose testimony is desired in any proceeding or investigation by a Grand

⁸ *Id.* 264 P.2d at 424.

⁹ *Id.* 264 P.2d at 425. Note that the California judge refused to order the witness to attend in Oregon unless the expenses were forthcoming in advance.

¹⁰ *Id.* 264 P.2d at 424.

¹¹ 158 Neb. 222, 63 N.W.2d 141 (1954).

¹² *State ex rel. Butler v. Swenson*, 243 Minn. 24, 66 N.W.2d 1 (1954); *State v. Hemmenway*, 80 S.D. 153, 120 N.W.2d 561 (1963).

¹³ *State v. Lupino*, 268 Minn. 344, 129 N.W.2d 294 (1964). The defendant asked for the presence of two witnesses. One was an inmate of the federal prison at Alcatraz, California, and therefore would not seem subject to the Act. The other, however, was in South Carolina, which has passed the Act. S.C. CODE §26-301.

¹⁴ *Ibid.*

Jury or in a Criminal Action, Prosecution, or Proceeding.”¹⁵ The *Lupino* ruling flies directly in the face of the clear and obvious meaning of the statute, and other authority is contrary to its holding.¹⁶

II

CLEAR INTENT OF THE ACT

The mandate of the Act seems clear. It states that material witnesses in criminal proceedings can be compelled to attend from another state by court order and provides that they must be paid mileage and per diem expenses. No distinction is made between prosecution and defense witnesses. Therefore, the clear and reasonable interpretation of the statute is that the state or county will pay all necessary expenses under the Act, whether for the prosecution or defense, and whether the defendant is indigent or not.

There is some logic, however, in an argument that the Act should not require a state to bear witness expenses for a defendant who is fully able to pay them. But this logic fails in the case of the indigent accused. To say that the Act requires a defendant to pay the necessary expenses of securing absent witnesses is one thing; but to say that under it a defendant without any money can secure out-of-state witnesses only if he pays for them is to give the Act a cruelly absurd meaning. It should be obvious that this is not the intent of the statute.

The clearest reading of the statute, then, is that the Act provides for the summoning of absent witnesses for all defendants, with no distinction being made between those with adequate means and those without adequate means. Even if this proposition is denied by the courts, it is difficult to see how the Act does not provide for public funds in the case of the indigent defendant. The Act requires that the witnesses be paid; and if an accused is indigent, who but the state is to pay them? It is certainly attributing an unreasonable meaning to the statute to say that it requires the defendant to pay in such a situation.

In the *Blount* case, discussed *supra*,¹⁷ three justices, while concurring in the result, argued that the Act does confer authority on the court to use public funds to secure the presence of witnesses for the defense:

¹⁵ UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHOUT THE STATE IN CRIMINAL PROCEEDINGS §§1, 3, 9 U.L.A. 91 (1957).

¹⁶ WITKIN, CALIFORNIA EVIDENCE §752 at 704 (2d ed. 1966): “The statute, while doubtless intended chiefly for the use of prosecuting officials, seems clearly available to the defendant as well.” 44 A.L.R.2d 732, 733: “The act applies both to witnesses sought by the state and witnesses sought by the defendant in the criminal case.” In re Cooper, 127 N.J.L. 312, 33 A.2d 532 (1941).

¹⁷ State v. Blount, 200 Ore. 35, 264 P.2d 419 (1953).

A poor man, who was unable to advance his witness' expenses, might be convicted although innocent, or a guilty man might go free, and the Uniform Act would indeed be emasculated, if not totally destroyed.¹⁸

The same justices also pointed out that since a witness is not required to attend unless he has been tendered the statutory expenses, there must be authority to order these expenses in advance:

If there is no power vested in the court to order the payment of witnesses' expenses in advance in order to force the attendance of an unwilling witness— *then in the name of reason, what good is the act?*¹⁹

It should be mentioned here that because of the requirement of materiality there is very little danger that defendants will abuse the act by demanding that large numbers of unnecessary witnesses be secured at public expense. As long as the defendant is obliged to show that the testimony of his desired witnesses will be material, he cannot place an undue burden on the public treasury.

III

CALIFORNIA AND FEDERAL INTERPRETATIONS

The picture is not all black for the indigent criminal defendant, however. California, which has adopted the Act as part of its Penal Code,²⁰ solves the problem by declaring in another statute²¹ that sums required by law to be paid to witnesses in criminal cases are county charges. This would seem to be true whether or not the defendant could afford to pay.

The California case of *People v. Newville*²² supports this contention. Although the defendant's request for a subpoena to compel the attendance of witnesses absent from California was denied because there was no showing that the testimony of the witnesses was material, the court did not quarrel with the idea that the county would have to pay the expenses were the defendant's motion granted. Indeed, the trial court stated:

Certainly, before I would issue any order for the expenditure of county funds in the amount that is going to be necessary in this case, I would want to know definitely that the testimony would be material and forthcoming.²³

In the Federal courts an indigent defendant can also obtain necessary witnesses by subpoena at government expense, although the trial court has wide discretion in the matter. As in state tribunals, the accused must show

¹⁸ *Id.* at 431 (Latourette, C. J., specially concurring).

¹⁹ *Id.* at 430 (Latourette, C. J., specially concurring. Emphasis added).

²⁰ CAL. PEN CODE §§1334-1334.6.

²¹ CAL. GOVT. CODE §29603.

²² *People v. Newville*, 220 Cal.App.2d 267, 33 Cal.Rptr. 816 (1963).

²³ *Id.* at 275, 33 Cal.Rptr. at 821.

that the expected testimony is material and that he cannot go to trial safely without it.²⁴

IV

CONCLUSION

As a practical matter, it is possible that many jurisdictions do furnish the defense with out-of-state witnesses at the expense of the county or state and that no appellate decision has been necessary to rule on this issue. However, all reported judicial decisions, aside from those of California, have been against the accused in this respect. It seems that an indigent defendant will find the Act of little use until legislatures spell out for the courts the proposition that an indigent defendant cannot be expected to pay his witnesses' expenses.

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²⁴ FED. R. CRIM. P. 17(b).