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Attendance Of Out-Of-State Witnesses In Criminal Trials

The cases holding that a foreseeable intervening criminal act will not relieve a negligent party of liability are not always clear as to what conditions make a criminal act foreseeable. Terms such as "likely" and "probable" are frequently used. Perhaps the best guide is to be found in comment *b* of section 448 of the *Restatement of Torts,* which states that an intervening criminal act will be considered foreseeable and not a superseding cause if the defendant's negligent conduct creates: (1) a situation "affording temptations to which a recognizable percentage of humanity is likely to yield;" or (2) a situation where "persons of peculiarly vicious type are likely to be."

In the principal case the Alabama Supreme Court quoted this section and correctly applied it to the facts to find that the defendants' acts were the proximate cause of the plantiff's injury. "They created a situation of a kind which this court and others have consistently said affords a temptation to a recognizable percentage of humanity to commit murder."[30] The court then quoted an earlier Alabama case which had held that a wager policy is illegal because the holder has a pecuniary interest in the death of the insured which opens " *'a wide door by which a constant temptation is created to commit for profit the most atrocious of crimes.'* " (Emphasis added.)[31]

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ATTENDANCE OF OUT-OF-STATE WITNESSES IN CRIMINAL TRIALS*

The effort to compel the attendance of out-of-state witnesses in criminal proceedings received a serious set-back when the Supreme Court of Florida, in the case of *In re O'Neill,*[1] invalidated that state's act, which was the uniform act on the subject. The court based its decision primarily on the ground that the right of free ingress and egress between the states, as guaranteed by the privileges and immunities

[30]100 So. 2d at 711.

[31]Id. at 708, citing Helmetag's Adm'x v. Miller, 76 Ala. 183, 187 (1884). (Emphasis added.)

*Ed. Note: The following case comment discusses the decision of the Florida Supreme Court in the case of In re O'Neill, 100 So. 2d 149 (Fla. 1958). After this comment was written, the United States Supreme Court in the case of New York v. O'Neill, 27 U.S.L. Week 4189 (U.S. March 2, 1959), reversed the decision of the Florida Supreme Court. Justice Frankfurter delivered the majority opinion of the Court. Justices Douglas and Black dissented.

[1]100 So. 2d 149 (Fla. 1958), cert. granted, 358 U.S. 803 (1958).

clauses of the federal constitution, had been violated by the uniform act.[2] The court also discussed the possibility that the act gave extra-territorial jurisdiction to Florida's courts and questioned the power of a Florida court to enforce an order for a witness to appear before a court of another state.

In 1936 the National Conference of Commissioners on Uniform State Laws and the American Bar Association recommended to the states the adoption of a Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings.[3] A total of forty-three states and territories have adopted either the uniform act itself or similar legislation.[4] The uniform act, adopted by Florida in 1941,[5] provides that a judge of any state having a similar law may initiate a demand for a witness by filing a certificate under seal in any court of the state in which the witness is present.[6] The certificate must show that a criminal proceeding is pending in the demanding state, that the person sought is a material witness in such a proceeding, and that his presence is necessary for the furtherance of justice. A judge of the court in which the certificate has been filed holds a hearing at which the witness will be required to appear. At the hearing the judge will consider the following: (1) whether the witness is necessary to the out-of-state proceeding; (2) whether the witness will be caused undue hardship by appearing in the out-of-state court; and (3) whether the demanding state has laws that will protect the witness from arrest or service of process while attending the out-of-state proceeding. If the judge decides to compel the witness to testify in the demanding state, he may do so either by issuing a summons directing the witness to attend and testify in the demanding out-of-state court, or by placing the witness in the custody of an officer of the demanding state.

Recently, the State of New York, following the above-outlined procedure, filed a certificate in a Florida circuit court.[7] The certificate

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[2]U.S. Const. art. IV, § 2; U.S. Const. amend. XIV, § 1.

[3]9 U.L.A. 87 (1936).

[4]Id. at 86.

[5]Fla. Stat. Ann. § 942.02 (1955).

[6]Ibid.

[7]The certificate of the Honorable Mitchell D. Schweitzer, Judge of the Court of General Sessions of the State of New York, was filed in the Circuit Court of Dade County, Florida, on April 23, 1956. The certificate recited that Judge Schweitzer had read an affidavit of an Assistant District Attorney of the County of New York recommending that O'Neill be taken into custody and delivered to an officer of the State of New York to assure his attendance at a grand jury investigation. 100 So. 2d at 151.

requested Florida authorities to require one Joseph C. O'Neill to attend and testify in a grand jury proceeding in New York County. The judge's certificate stated that O'Neill was a material witness in the New York proceeding and recommended that he be taken into custody and delivered to an officer of the State of New York to assure his attendance before the grand jury. O'Neill was not a resident of Florida but was temporarily within the state for the purpose of presiding at a union convention.[8] He was apprehended by the Florida authorities, gave bond,[9] and a month later he filed a response. The circuit judge, at the hearing to determine the materiality of the witness, based his opinion upon the record of the case and held the uniform act unconstitutional.[10]

The decision of the circuit court in the *O'Neill* case was appealed[11] by the State of New York. Upon review, the Florida Supreme Court outlined the manner in which the uniform act would have been applied to O'Neill if the circuit court judge had found it desirable to send him to New York under custody. O'Neill, a citizen of Illinois which had passed no reciprocal witness statute, was in Florida for only a brief visit. He was brought into court and confronted with an order placing him in custody of an officer who was to have conducted him to New York. His privilege of staying or returning to his home in Illinois, or of going elsewhere, would have been terminated. This, in the language of the Florida court, was a harsh "infringement of the right a citizen has to go from place to place which is a privilege . . . secured to him under the Fourteenth Amendment."[12]

The uniform act has been judicially attacked on constitutional

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[8]The New York grand jury was investigating the use of funds in the Distillery, Rectifying, Wine and Allied Workers International Union of America of which O'Neill was General President, Chairman of the Executive Board, and Chairman of the Social Security Department. There is little doubt that O'Neill was a material and necessary witness in an investigation into the misuse of the funds of this union.

[9]It was noted by the court in the O'Neill case that there was no provision made for bail in the uniform act. Fla. Stat. Ann. § 942.02 (1955).

[10]The circuit judge said the statute was unconstitutional because it gave extra-territorial jurisdiction to the state, impaired the right of ingress and egress, and made no provision for bail. The judge also thought that O'Neill was not a material and necessary witness.

[11]The court held that the proceeding was not criminal and that appeal was the proper method of review as, Fla. Const. art. V, § 5, the Florida Supreme Court had appellate jurisdiction in all cases at law originating in circuit courts. 100 So. 2d at 152.

[12]Id. at 155.

grounds in other states,[13] but Florida is the only state in which the statute has been declared wholly unconstitutional by a state court of last resort.[14] A situation now exists in which the majority of decisions support the statute, but the most recent decision denounces it.

The court's contention, that O'Neill's right of free ingress and egress among the states had been impaired, was based upon an unusual interpretation of the privileges and immunities clause of the federal constitution.[15] The traditional interpretation of this clause is that the states are enjoined only from discriminating between a citizen of the United States and a citizen of a particular state.[16] When an individual is within the boundaries of a state, he is amenable to the laws of that state;[17] therefore, if a state can curtail the right of its own citizens to ingress and egress, it can curtail the same right of any person who is within its boundaries.

The Florida interpretation of the privileges and immunities clause seems to be that the citizens of each state, no matter in which state they may find themselves, are to be afforded all the privileges and immunities granted by every other state. "Not only are the privileges and immunities of citizens of the United States placed beyond the power of the state to impair but citizens of each state are vouchsafed the privileges and immunities of the citizens of all the states." Therefore, "O'Neill is entitled . . . to all the privileges and immunities of all the citizens of all the other states . . . ."[18] Expressed another way, the Florida court adopted the theory that a citizen takes with him when he goes into another state all of the privileges and immunities granted to him by his native state. Therefore, the court stressed the fact that O'Neill was a citizen of a state which had not passed a reciprocal witness statute and argued that his immunity from com-

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[13]Blair v. United States, 250 U.S. 273 (1919); State v. Fouquette, 67 Nev. 505, 221 P.2d 404 (1950); In re Saperstein, 30 N.J. Super. 373, 104 A.2d 842, cert. denied, 348 U.S. 874 (1954); In re Cooper, 127 N. J. L. 312, 22 A.2d 532 (1941); New York v. Parker, 16 N.J. Misc. 319, 1 A.2d 54 (1936); In re Costello, 279 App. Div. 908, 111 N.Y.S.2d 313 (1st Dep't 1952); Massachusetts v. Klaus, 145 App. Div. 798, 130 N.Y. Supp. 713 (1st Dep't 1911); State v. Blount, 200 Ore. 35, 264 P.2d 419 (1953). Some of these cases arose under state statutes prior to the enactment of the uniform act.

[14]In New York v. Parker, 16 N.J. Misc. 319, 1 A.2d 54 (1936), the statute was held inoperative because the objective was not expressed in the title.

[15]See note 18 infra and accompanying text.

[16]Madden v. Kentucky, 309 U.S. 83 (1940); Hague v. C.I.O., 307 U.S. 496 (1939); Blake v. McClung, 172 U.S. 239 (1898); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

[17]Douglas v. New York, New Haven and Hartford R.R., 279 U.S. 377 (1929); Blake v. McClung, 172 U.S. 239 (1898); Massachusetts v. Klaus, 145 App. Div. 798, 130 N.Y. Supp. 713 (1st Dep't 1911).

[18]100 So. 2d at 154.

pulsory attendance at an out-of-state proceeding was brought with him into Florida.[19] In other words, O'Neill was *especially privileged.* Extending this view of the privileges and immunities clause, if Illinois had not passed an act providing for the subpoenaing of witnesses to attend trial within Illinois, then Florida would have been powerless to compel O'Neill to attend a trial within Florida. If Florida's courts really adopted this view of the privileges and immunities clause, they would be discriminating against their own state citizens in favor of out-of-state visitors. It must be remembered that the enjoyment of this privilege of ingress and egress is coincident with the duty of a citizen to aid his government by giving evidence in court.[20] Every citizen who attends any trial as a witness or a juryman is deprived, in the same sense as he is deprived under the uniform act, of the privilege of leaving the state. The contention of the Florida court seems to be without merit.

Closely related to the privileges and immunities issue is the question of whether the uniform act may be so applied as to deprive a person of his liberty without due process of law. In the case of *In re Cooper,*[21] it was held that the uniform act was not unconstitutional as depriving an individual of his liberty without due process of law. In that case the court said the witness was guaranteed due process because prerequisite to the issuing of a summons was the requirement that a hearing be held to determine the witness' materiality and to insure no undue hardship. In *Massachusetts v. Klaus,*[22] the court said that the statute is no more in violation of the due process clause for depriving a proposed witness of his liberty without due process than is a statute providing for having a witness subpoenaed to attend a trial within the state; this law has never been questioned as being unconstitutional.[23] In both of these cases the courts emphasized that a hearing was guaranteed a witness before a subpoena could be issued and pointed out that this provision of the uniform act really gave the witness a better guarantee of due process of law than did the statutes providing that a witness be subpoenaed to attend a trial within the subpoenaing state. Other courts have recognized that

[19]The language of the court was as follows: "If . . . a citizen of a state having no such law, Illinois, travels to a state having it, Florida, and there is made subject to the law because another state, New York, thinks his presence there is 'desirable,' it cannot be true that the right of all the citizens of all the states to move among them has not been impaired." Id. at 156.

[20]Blair v. United States, 250 U.S. 273 (1919); 85 U. Pa. L. Rev. 717, 721 (1937).

[21]127 N.J.L. 312, 22 A.2d 532 (1941).

[22]145 App. Div. 798, 130 N.Y. Supp. 713 (1st Dep't 1911).

[23]130 N.Y. Supp. at 716.

the purpose of the statute is to aid, by means of comity between states, the orderly and effectual administration of justice and the prosecution of criminal conduct;[24] and implicit in their decisions is the principle that due process of law is an historical product and is not to be turned into a destructive dogma against the states in the administration of justice.[25]

The duty of a citizen to give evidence in court and the power of a state to compel evidence, subject to the right against self-incrimination, is a well-established proposition.[26] That this duty is not limited by state boundaries is manifested by the many acts of state legislation requiring persons to give evidence in the form of depositions for use in the courts of other states.[27] Such depositions suffice for civil suits, but in criminal prosecutions by any state which bases its jurisprudence on the common law, the defendant is entitled to be confronted with the witnesses against him.[28] Unless there is power somewhere to compel a witness to proceed from one state to another to testify, many guilty persons may escape punishment for their crimes. It is manifest that if this power of compulsion exists anywhere, it must exist in the state within which the witness is present and wherein he can be served with the necessary order or subpoena.

The Florida Supreme Court took a negative approach to the problem of whether a state legislature can constitutionally grant the power to state courts to require a person within the state to go into another state and testify. This approach struck at the fundamental idea and purpose of reciprocal legislation—i.e., what a state cannot accomplish acting alone it can accomplish acting in concert with other states. In invalidating so important an act of legislation, a court should base its decision firmly on constitutional law. In the *O'Neill* case

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[24]In re Saperstein, 30 N.J. Super. 373, 104 A.2d 842 (1954); State v. Blount, 200 Ore. 35, 264 P.2d 419 (1953).

[25]See Rochin v. California, 342 U.S. 165, 168 (1952) (dictum). See generally Irvine v. California, 347 U.S. 128 (1954).

[26]Blackmer v. United States, 284 U.S. 421 (1932); McGrain v. Daugherty, 273 U.S. 135 (1927); Blair v. United States, 250 U.S. 273 (1919).

[27]In considering virtually the same problem as that presented by the principal case, the court in Massachusetts v. Klaus, 145 App. Div. 798, 130 N.Y. Supp. 713, 715 (1st Dep't 1911), made the following observations in reference to the alleged unlawful extraterritorial effect of the statute: "Nor is the duty to give evidence, or the power to compel it to be given limited to causes pending in the courts of the state. Witness our statute under which persons within this state are required to give evidence in the form of depositions for use in other states." See generally 23 Ill. L. Rev. 195, 198 (1928).

[28]McCreight v. State, 45 Ariz. 269, 42 P.2d 1102 (1935); People v. Bromwich, 200 N.Y. 385, 93 N.E. 933 (1911).