

1958

## Cessante Ratione Legis Cessat Ipsa Lex (The Plight of the Detained Material Witness)

Joseph Casula

Morgan Dowd

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

---

### Recommended Citation

Joseph Casula & Morgan Dowd, *Cessante Ratione Legis Cessat Ipsa Lex (The Plight of the Detained Material Witness)*, 7 Cath. U. L. Rev. 37 (1958).

Available at: <https://scholarship.law.edu/lawreview/vol7/iss1/5>

This Comments is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact [edinger@law.edu](mailto:edinger@law.edu).

## COMMENTS

### CESSANTE RATIONE LEGIS CESSAT IPSA LEX\*

#### (THE PLIGHT OF THE DETAINED MATERIAL WITNESS)

Until recently the material witness who had been detained in jail awaiting trial has received little or no consideration. The effect of the material witness' testimony in proving or substantiating the prosecution's case in a criminal proceeding is always of paramount importance. The inability of the state to produce a material witness at the trial to determine the guilt or innocence of an accused may often be fatal to the case. To ensure the presence of the witness, states have adopted severe measures in dealing with the situation, viz. some form of recognizance, mandatory or otherwise and detention until trial if the recognizance cannot be met. Thus, there has developed in our law a serious evil of detaining the innocent witness. While the primary interest of the state lies in maintaining the due administration of law, the personal liberty of the innocent witness is sometimes sacrificed on the high altar of Justice. Consequently the detention and possible confinement upon the witness' inability to post bond would almost seem to point up to imprisonment without due process of law. It is the intent of the authors of this note to explore the background of material witnesses and to examine meticulously their duties and rights with suggestions of reformation concerning various inequities in the present system.

#### *History of Compelling the Attendance of Witnesses and Their Recognizances*

Just as it is highly undesirable that an accused be incarcerated pending trial so it is even more undesirable that a material witness be thus imprisoned.<sup>1</sup> Although Elizabeth's statute in 1563<sup>2</sup> is sometimes cited as authority for the law compelling the attendance of witnesses for the prosecution, the correct interpretation seems to indicate that this Act applied only to civil proceedings.<sup>3</sup> It was by

---

\* Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself. Quoted in Broom's Legal Maxims, 159 (8th ed. 1882), cited in Davis v. Powell, 87 Eng. Rep. 1221 (1709).

<sup>1</sup> ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 128-129, § 17 (1947).

<sup>2</sup> 5 ELIZ., c. 9 § 12 (1563). This act is considered to be a great landmark in English law. The act reads as follows: "If any person or persons upon whom any process out of any of the courts of record within this realm or Wales shall be served to testify or depose concerning any cause matter depending in any of the same courts, and having tendered unto him or them, according to his or their costs or charges as having regard to the distance of the places is necessary to be allowed in that behalf, do not appear according to the tenor of said process, having not a lawful and reasonable let or impediment to the contrary, that then the party making default" shall forfeit £10 and give further recompense for the harm suffered by the party aggrieved.

<sup>3</sup> WIGMORE, EVIDENCE § 2190 (3rd ed. 1940).

the second Act of Philip and Mary in 1555<sup>4</sup> that the Crown could bind over witnesses to appear and compel them to testify against the accused. This statute also realized the necessity of securing a person's attendance at trial without subjecting him to confinement by allowing the magistrate to require a recognizance. Lord Hale felt that this was a more effective way to secure attendance than by subpoena.<sup>5</sup> The exact date when the Crown began to issue such process for the witness is unknown. It is to be noted that witnesses were used, however, only for the benefit of the prosecution. The accused at common law was not allowed witnesses until a much later date in English legal history.<sup>6</sup>

Today by statute every jurisdiction in the United States provides for recognizances either by permitting or requiring the magistrate to call for such an undertaking. These statutes can be broken down into mandatory and discretionary statutes.<sup>7</sup> Some states limit the amount at which the recognizance can be

---

<sup>4</sup> 2 & 3 PHIL. & MAR., c. 10 (1555). "And be it further enacted, That the said Justices shall have Authority by this Act, to bind all such be Recognizance or Obligation, as do declare any Thing material to prove the said Manslaughter or Felony against such Prisoner as shall be so committed to Ward, to appear at the next general Gaol-delivery to be holden within the County, City or Town Corporate where the Trial of the Said Manslaughter or Felony shall be, then and there to give Evidence against the Party."

<sup>5</sup> 2 HALE'S P.C. 282 (1800).

<sup>6</sup> By the 1600's certain inroads had been allowed. The English legislature extended the privilege of witnesses for the defense in both cases of treason and felony in ST. 7 & 8 W. III, c. 3 § 7 (1695-6). The ST. 1 ANNE, c. 9 § 3 (1702) recognizes that witnesses produced for the accused shall be sworn.

<sup>7</sup> Mandatory: Alabama, ALA. CODE tit. 4 § 456 (1955), Arkansas, ARK. STAT. §§ 43-63 (1955), California, WEST'S PENAL CODE ANN. §§ 878-879 (1956), Colorado, COLO. REV. STAT. § 39-6-9 (1955), Delaware, 10 DEL. CODE § 5708 (1957), Illinois, ILL. ANN. STAT. c. 38, § 683 (Smith-Hurd 1956), BURN'S ANN. STAT. § 9-1601 (Supp. 1957), Kansas, GEN. STAT. ANN. § 62-623 (1955), Kentucky, KY. REV. STAT. ANN. c. 421.270 (Baldwin 1955), Maryland, MD. CODE ANN. art. 35 § 19 (Cum.Supp. 1957), Massachusetts, ANN. LAWS OF MASS. c. 276 § 45 (Supp. 1956), Minnesota, MINN. STAT. ANN. § 629.54 (1956), Missouri, MO. STAT. ANN. tit. 38 § 544.420 (1956), New Hampshire, N.H. REV. STAT. tit. 5 § 597.22 (1955), New Mexico, N.M. STAT. ANN. c. 41 § 41-12-10 (Supp. 1957), North Carolina, GEN. STAT. OF N.C. §§ 15-96, 97 (Supp. 1955), Ohio, OHIO REV. STAT. ANN. tit. 29 § 2937.16 (Page 1956), Pennsylvania, PURDON'S PA. STAT. ANN. tit. 19 § 651 (1957), South Carolina, CODE OF LAWS OF S.C. §§ 17-108, 115 (Supp. 1956), Tennessee, TENN. CODE ANN. § 40-1122 (1957), Virginia, CODE OF VA. § 19-84 (1956), West Virginia, W.VA. CODE ANN. § 6237 (1955), Washington, REV. CODE OF WASH. tit. 10, § 16.140 (1956).

Discretionary: Arizona, ARIZ. REV. STAT. § 13-1841 (1956), Connecticut, GEN. STAT. OF CONN. § 8761 (1949), District of Columbia, D.C. CODE tit. 4 § 144 (1956), Florida, FLA. STAT. ANN. tit. 45 § 902.15 (1956), Georgia, GA. CODE ANN. tit. 27 § 27-410 (Supp. 1955), Idaho, IDAHO CODE § 19-820 (Supp. 1957), Iowa, IOWA CODE ANN. § 761.21 (1956), Louisiana, LA. ANN. REV. STAT. § 15-157 (Supp. 1956), Maine, REV. STAT. OF ME. c. 148 § 18 (Supp. 1955), Michigan, MICH. STAT. ANN. § 28.975 (Supp. 1955), Mississippi, MISS. CODE ANN. c. 11 § 1889 (1942), Montana, REV. CODE OF MONT. §§ 94-6119, 6120, 6122 (Supp. 1957), Nebraska, REV. STAT. OF NEB. § 29-507 (Supp. 1955), Nevada, NEV. REV. STAT. §§ 171.485 to 171.490 (1957), New Jersey, N.J. REV. STAT. c. 162 § 2A: 162-2 (Supp. 1956), New York, MCKINNEY'S CONSL. LAWS OF N.Y. CR. CODE § 618-b (1957), North Dakota, N.D. REV. CODE § 31-0319 (1943), Oklahoma, OKLA. STAT. ANN. § 22-270 (1956), Oregon, ORE. COMP. LAWS ANN. § 26-1576 (1943), Rhode Island, R.I. GEN. LAWS § 501-23 (1938), South Dakota, S.D. CODE § 34-1410 (Supp. 1952), Texas, TEX. STAT. ANN. tit. 5 §§ 300 to 301 (Supp. 1956),

kept<sup>8</sup> and in some states there is no statutory requirement to require sureties whereupon a personal recognizance is taken by the court.<sup>9</sup> This system of bonding would at first blush seem to be lenient with the material witness but on closer scrutiny one finds that the greater part of the jurisdictions can require additional security if it is felt that the witness will not remain within the state.<sup>10</sup> It seems to be the law in England that a witness need only give his personal recognizance, but of course they are not beset by jurisdictional and sovereignty problems as in this country.<sup>11</sup>

The duty of a citizen to appear as a witness in judicial proceedings and the correlative right to compel him to attend appears settled beyond question in this country.<sup>12</sup> And upon refusal by the witness the magistrate is given the power in his discretion to commit him. A Connecticut court succinctly put the matter:

"Our state has followed a policy different from that of England in the investigation of crimes. From a very early period in our history we have charged public officers with the duty of investigating as to the commission of offenses and have invested them with the power of compelling witnesses to give the evidence necessary to discover the crime and the criminal."<sup>13</sup>

Since the court possesses inherent power to commit a recalcitrant witness who refuses to testify so do they carry the power to commit a material witness who refuses to recognize.<sup>14</sup> It has been said that this is but a concomitant to the

---

Utah, UTAH CODE ANN. § 77-15-25 (Supp. 1957), Vermont, VT. CODE tit. 9 c. 112 § 2415 (1947), Wisconsin, WIS. STAT. ANN. § 354.20 (1957), Wyoming, WYO. COMP. STAT. § 10-317 (Supp. 1955).

<sup>8</sup> California (\$500), Colorado (\$500), Iowa (\$500), Montana (\$500), Utah (\$200).

<sup>9</sup> California, WEST'S PEN. CODE ANN. § 878 (1956), Illinois, ILL. REV. STAT. c. 38 § 683 (Smith-Hurd 1956), Indiana, BURN'S ANN. IND. STAT. § 9-720 (Supp. 1957), Kentucky, KY. REV. STAT. ANN. § 69 (Baldwin 1955), Massachusetts, ANN. LAWS OF MASS. § 215 (Supp. 1956), New York, MCKINNEY'S CONSL. LAWS CR. CODE § 215 (1957), Tennessee, TENN. CODE ANN. § 11566 (1957), Texas, TEX. ANN. STAT. art. 303 (Supp. 1956).

<sup>10</sup> California, Florida, Idaho, Iowa, Kansas, Louisiana, Nebraska, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Washington.

<sup>11</sup> KENNY, OUTLINES OF CRIMINAL LAW 540 (15th ed. 1942).

<sup>12</sup> Quoting Justice Pitney in the Blair case . . . "It is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned . . . The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. The duty, so onerous at times, yet so necessary to the administration of justice according to the forms and modes established in our system of government . . ." Blair v. United States, 250 U.S. 273, 281 (1919).

<sup>13</sup> *In re* Clark, 65 Conn. 17, 19, 31 Atl. 522, 524 (1894).

<sup>14</sup> BISHOP, NEW CRIMINAL PROCEDURE § 34 at 15, 16 (1913). "Sometimes the purposes of justice require that these recognizances be with sureties and occasionally the unpleasant result follows that a witness cannot obtain sureties and he is detained in prison." Federal Courts derive their power to commit from the Judiciary Act, 1 STAT. 91 (1789), REV. 5 STAT. 517 (1842), 9 STAT. 73 (1846), R.S. § 879, 1014 (1896) 18 U.S.C. § 3041 (1952).

early statute of Philip and Mary.<sup>15</sup> But upon a careful reading of the various statutes very few states draw the distinction between refusal to comply and inability to comply. In point of fact an overwhelming number of our state statutes affirmatively declare that inability to find a surety demands commitment to prison.<sup>16</sup> Lord Ellenborough in *Evans v. Rees* thought this to be a most reprehensible treatment of witnesses when he said,

"The practice of committing witnesses unable to find sureties for their appearance is clearly repugnant to the very principle of the English law."<sup>17</sup>

Our purpose then is to look behind the scene and find what reasoning lies in back of this summary procedure.

*The Problem of Involuntary Detention of Witnesses and Their Compensation*

The problem of involuntary detention of witnesses has not gone without criticism in this country. In 1912 the committee on Jurisprudence and Law Reform of the American Bar Association suggested that under no circumstances should a witness have to undergo such treatment for the inability to post bond. The reform was rejected, the Bar reporting:

"While personal liberty is a sacred right and should not be restrained except by due course of law, yet we are of opinion that sometimes the purposes of justice require the involuntary detention of a witness, and when such rare occasions arise, the witness should be detained, due regard being had for his comfort, his personal liberty being protected by every reasonable safeguard, and just compensation being paid him for his detention."<sup>18</sup>

Despite what the Bar advocated the opposite result has occurred. State thinking has accepted an ancient rule of nearly four hundred years vintage which reasoning has merely entrenched itself in our Anglo-American Jurisprudence.<sup>19</sup> A very

<sup>15</sup> It has been argued that a commitment could be upheld though not technically a contempt. *In re Clark*, 65 Conn. 17, 31 Atl. 522 (1894). Lord Hale commenting on the subject said, "Now as touching the compulsory means to bring in witnesses they are of two kinds. 1. By process of subpoena issued in the King's name by the justices of the peace, oyer and terminer gaol-delivery, or King's Bench where the plea of not guilty is to be tried. 2. Which is the more ordinary and more effectual means, the justices or coroner that take the examination of the person accused, and the information of the witnesses, may at that time, or at any time after, their refusal either to come or to be bound over, may commit them for their contempt in such refusal and this is virtually included within their commission and by necessary consequences upon the statute of 1 & 2 Phil. & Mar., c. 13."

<sup>16</sup> *op. cit. supra* note 7. The right to commit a witness at common law who was willing to enter into a recognizance but being unable to furnish surety was denied in England. See WELSBY'S NOTE to IV BL. COMM. 296 (1859).

<sup>17</sup> *Evans v. Rees*, 12 AD. & E. 57, 113 Eng. Rep. 732 (1840).

<sup>18</sup> 37 A.B.A. REP. 32, 431-433 (1912).

<sup>19</sup> *Wilson v. United States*, 221 U.S. 361, 372 (1910), quoting Lord Ellenborough's opinion in *Amey v. Long*, 9 East 473, 485, 103 Eng. Rep. 653, 658 (1808). "The right to resort to means competent to compel . . . testimony seems essential to the very existence and constitution of a Court of common law . . . and could not possibly proceed with due effect without them."

few states have come to grips with the situation. Those who have seem to recognize that justice and society will profit if due regard is given to individual liberty. Massachusetts, for instance gives the witness solicitous treatment over common felons.<sup>20</sup> The statute provides that separate facilities, privileges and liberty as far as it is necessary shall be afforded to the witness. New Jersey statutes state that detained witnesses shall be comfortably housed and their liberty is to be restrained no further than may be necessary.<sup>21</sup> Connecticut also distinguishes between criminals and witnesses by stating "no person so committed shall be confined or associated in jail with persons confined therein."<sup>22</sup> And the District of Columbia affords similar privileges to the same effect.<sup>23</sup>

There have been a limited number of jurisdictions which allow the release of the witness if he is held an unreasonable length of time whereupon his deposition is taken.<sup>24</sup> The federal rule is substantially the same.<sup>25</sup> As we have previously said, there is also a minority of states which allow the witness to be freed on his personal recognizance.<sup>26</sup> It is to be conjectured then that in the remaining states the witness is placed in the jail and treated just as any other common felon.

The gross injustices done to innocent detained witnesses in this country are too numerous to belabor the point. Take the example of John Doe, witness for the prosecution. Doe is a middle class American laborer travelling from state X to state Y. He is possessed of no real property and supports a family of three children and a wife. While in state X Doe is an eye witness to a bank robbery and positively can identify the conspirators. Upon being presented before a

<sup>20</sup> ANN. LAWS OF MASS. § 52 (Supp. 1956). § 54 of the statute also demands that the witness shall not be handcuffed.

<sup>21</sup> N.J. STAT. ANN. § 2: 187-21 (Supp. 1956).

<sup>22</sup> GEN. STAT. OF CONN. § 8761 (1949).

<sup>23</sup> D.C. CODE tit. 4, § 144 (1956). The District of Columbia presents an anomalous situation. While felonies are considered to be federal crimes the statute reads for the District Commissioners to arrange suitable accommodations. The authors of this note were unable to find such suitable places of detention for witnesses in the District. Hence it appears that in most instances the witness is according to his monetary circumstances and character either freed on bond or goes to jail. This is but one instance of inadequate provisions made for the material witness.

<sup>24</sup> Arkansas, ARK. STAT. § 43-626 (1955), Colorado, COLO. REV. STAT. § 37-6-10 (Supp. 1955); see *Haynes v. People*, 128 Colo. Rep. 565, 265 P.2d 995 (1954), Florida, FLA. STAT. § 902.17 *et seq.* (1956), Louisiana, LA. REV. STAT. §§ 15-158, 15-159 (Supp. 1956), Nevada, NEV. REV. STAT. § 171.505 (1957).

<sup>25</sup> TITLE 18 CRIMINAL CODE AND CRIMINAL PROCEDURE, CRIMINAL RULE 15. Depositions, 18 U.S.C. § 3771 (1952). "If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a defendant and notice to the parties . . . If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness."

<sup>26</sup> *op. cit. supra* note 9.

magistrate his testimony determines him to be a material witness. The magistrate feels that if Doe is not available the prosecution's case is weak and so places a \$10,000 bond upon him. Doe replies that he could never cover such a recognizance. The magistrate hears his supplications, that his family needs his support and that his absence will work a hardship and that he suffers from infirm health. The court then concludes that for the good of society Doe should be committed until trial with the court's apologies for any inconvenience. Doe remains in jail for four months due to a clogged criminal calendar and when the case is disposed of he petitions the court for witness fees both prior to the trial and for the time spent in court. The court informs the witness, Doe, that his fees will consist of a ridiculous figure of \$.75 for each day spent in court but that the proper judicial function is to interpret strictly the statutes of the state and upon the reading of the phrase "attendance in court" the words mean only those days actually spent in the court room. Thus, Doe must look elsewhere for redress as to his time spent in the jail house.

While the example may be stretched to include a potpourri of far fetched instances, concrete cases may now be applied to fill out a complete picture of the all too material, material witness. The case of *United States v. Lloyd* is a first rate example.<sup>27</sup> There a sailor who had been jailed as a material witness for failure to post bond remained in prison nine months. The judge who wrote the opinion reflected his own and other judges' Machiavellian machinations when he said,

"This case illustrates some of the manifold hardships and inequities to which witnesses are liable . . . to be imprisoned in close confinement . . . These laws afford no exemption for the aged or the feeble . . . None but those who can furnish competent bail, that is, who can exonerate themselves from instantaneous incarceration and for an indeterminate period of time, and, from being imprisoned no less absolutely . . . than if abandoned culprits."<sup>28</sup>

Luckily for the sailor the judge's benevolent nature overcame him and the witness was released on his own personal bond to return to his family. Another case on point is *Hall v. Commissioners of Somerset County*.<sup>29</sup> There a minor was committed to jail for failure to give security and was held 242 days. The lower court refused him compensation for the time spent in prison. Upon granting the petitioner his freedom the appellate court adopted the theory that inability to secure a bondsman resulted from the witness' misfortune rather than his fault. In fact the court was quite vehement in its opinion saying that,

"If he be poor, a stranger without acquaintances in the community where by accident he happens to witness a violation of the law, and because of being so circumstanced he finds himself unable to furnish the security required of

---

<sup>27</sup> *United States v. Lloyd*, 26 Fed. Cas. No. 15614 at 984 (S.D.N.Y. 1860).

<sup>28</sup> *Id.* at 984, 985.

<sup>29</sup> *Hall v. Commissioners of Somerset County*, 82 Md. 618, 34 Atl. 770 (1896).

him, and is thereupon detained in custody as a witness for the state, the gravest injury might be inflicted upon him, and upon those who are dependent on his toil and labor for their sustenance, if he were denied compensation for the period while involuntarily restrained of his liberty for the benefit of the public, but for no crime or misprison of his own. For an honest, law-abiding but poor and friendless individual to be confined in a common jail, and there forcibly made the companion of criminals and of the depraved, merely because he is unable, through no fault of his own, to find security for his appearance as a witness in behalf of the commonwealth, is bad enough, but when in addition to this . . . He is subjected to the same treatment that a criminal is, though confessedly not guilty, or even accused, of crime; and he is deprived of his liberty and his means of livelihood, and denied compensation as a witness, though charged with no transgression of the law."<sup>30</sup>

*Ex Parte Grzeskowiak* was a case involving a material witness to a murder who was committed upon failure to give security.<sup>31</sup> The court indicated that there was imminent danger of the testimony being lost because the witness' attitude implied his leaving the jurisdiction. As the witness languished in jail the accused was still at large. After four months of confinement the court agreed to release the witness on his personal bond. The continual use of this type of procedure would hardly express the American concept of fair play and justice, and most certainly "shocks the conscience"<sup>32</sup> of the court. The hardships of the detained witness are not limited solely to confinement. To add salt to the open wound the court has denied the witness compensation for time spent in prison.<sup>33</sup> The case of *Barber v.*

<sup>30</sup> *Id.* at 773. In Tennessee it is provided by statute that a minor who is committed as a witness shall be committed to a reformatory but is not to be placed in the county jail. This seems to be fallacious reasoning. TENN. CODE ANN. § 37-430 (1957). In New York the children's court has jurisdiction to commit a minor under 16 years although the child is neither delinquent or neglected. *Gise v. Brooklyn Soc. for Prevention of Cruelty to Children*, 236 App. Div. 800, 259 N.Y. Supp. 562 (1932), *reargument denied and amended* 236 App. Div. 852, 260 N.Y. Supp. (1933), *appeal dismissed* 262 N.Y. 664, 186 N.E. 412 (1933); *cf. Ex Parte Proll*, 89 Okla. Cr. 413, 208 P.2d 960 (1949) (a minor who was a material witness to an act of sodomy and upon being found to be transient and unemployed was held in \$5000 bond and committed. Bond later reduced to \$3000 and then to \$250.) *Contra, Ex Parte Singer*, 134 Cal. App.2d 547, 285 P.2d 955 (1955) where the court held no one had authority to seize a minor and incarcerate and detain same for the sole purpose of availability as a material witness in a criminal proceeding. In England a *feme covert* who being a material witness was committed by a justice of the peace upon refusing to appear and give evidence at the sessions or to post surety. (Upon refusing she was forthwith conveyed to Newhall by coach where she soon gave evidence). The court declared a justice might commit her or an infant not finding sureties. It was also argued that the party's own personal recognizance was all that should be required and therefore a justice was not authorized to so commit. *Bennett v. Watson*, 3 M 7 S.1 105 Eng. Rep. 512 (1814); See also *Ashton's Case*, 7 Q.B. 169, 115 Eng. Rep. 452 (1845); *Evans v. Rees*, 12 AD & E 57, 113 Eng. Rep. 732 (1840); *Ex Parte Williams*, 13 Price 673, 147 Eng. Rep. 1118 (1824).

<sup>31</sup> *Ex Parte Grzeskowiak*, 267 Mich. 697, 255 N.W. 359 (1934). A New York court ruled that a person can at the same time be held as a defendant in a criminal prosecution and as a necessary and material witness in another criminal case or proceeding. *People ex rel. Gross v. Sheriff of City of New York*, 277 App. Div. 546, 101 N.Y.S.2d 271 (1951) *aff'd*, 302 N.Y. 173, 96 N.E.2d 763 (1951).

<sup>32</sup> Words used by Mr. Justice Frankfurter in *Rochin v. California*, 342 U.S. 165, 172 (1951).

<sup>33</sup> At common law no witness fees were allowed. *Dixon v. People*, 168 Ill. 179, 48 N.E. 108 (1897).



*Moss* illustrates the judicial attitude in analytically interpreting a statute permitting the payment of fees.<sup>34</sup> In that case the witness was detained 178 days. Upon petitioning the court for compensation under the Utah statute the court strained itself to adopt what it called the majority view:

"We feel constrained to espouse the majority rule, expressed in the language of Sec. 885, 58 Am.Jur. 506 (Witnesses) as follows, In the majority of jurisdictions wherein the question has arisen, it has been held that there can be no recovery even though the failure to furnish bail results from no fault of the witness, the courts holding that statutes authorizing payment of a witness *while attending court* (italics supplied) do not extend to a time while the witness is forcibly detained waiting for the trial to take place."<sup>35</sup>

After stating the above proposition that fees were not allowable the court then proceeded to direct the petitioner to redress the legislature for relief. Judge Henriod was of the opinion that the witness' duty was analogous to an attorney's obligation to defend an indigent person. This cryptic statement of the court is the penultimate of judicial ratiocination. It borders on the realm of Alice in Wonderland. The attorney's privileges of practicing law carries with it the annexed burden (in addition to his many obligations) to defend the poor without compensation.<sup>36</sup> But for the indigent witness to go to jail being innocent of any crime and to be refused compensation can hardly be said to be the exercising of a privilege with an added burden.<sup>37</sup>

Furthermore the court in citing the majority rule failed to employ due diligence, for an analysis of the cases clearly reveals that no such rule exists.<sup>38</sup> The states have capriciously arrived at different conclusions in construing statutes of such a nature. Those states allowing recovery of fees do so on the ground of inequities suffered by the detained witness.<sup>39</sup> But even in most of the states where compensation is allowed the amount is practically negligible.<sup>40</sup> By and large the

<sup>34</sup> *Barber v. Ross*, 3 Utah 2d 268, 282 P.2d 838 (1955).

<sup>35</sup> *Id.* at 839.

<sup>36</sup> The theory is that attorneys are officers of the court. Cardozo, in his discussion of their duties, remarked that "membership in the bar is a privilege burdened with conditions" *Matter of Rouss*, 221 N.Y. 811, 812, 116 N.E. 782, 783 (1917) *cited with approval* in *People v. Culkun*, 248 N.Y. 465, 466, 162 N.E. 487, 489 (1928).

<sup>37</sup> Although the state has the power to impose the restrictions on one's personal liberty these restrictions cannot transgress the constitutional rights of the individual. *Ruckenbrod v. Mullins*, 102 Utah 548, 133 P.2d 325 (1943), *Pardee v. Salt Lake County*, 39 Utah 482, 118 Pac. 122 (1911). See *Annot.*, 144 A.L.R. 839 (1943) and *Annot.*, 1913E L.R.A. 377.

<sup>38</sup> *Annot.*, 50 A.L.R.2d 1439 *et seq.* (1956).

<sup>39</sup> *Commonwealth v. Butler*, 27 Del. Co. 386 (1937), *Commonwealth v. Yankowski*, 31 Luzerne Leg. Reg. 327 (1934), *Linsky v. Luzerne County*, 101 Pa. Super. 42 (1930), *Kirke v. Strafford County*, 76 N.H. 181, 80 Atl. 1046 (1911), *Hall v. Commissioners of Somerset County*, 82 Md. 618, 34 Atl. 771 (1896), *Robinson v. Chambers*, 94 Mich. 471, 54 N.W. 171 (1893), *Higginson's Case*, 12 Fed. Cas. No. 6472 at 132 (C.C.D.C. 1802). See *Annot.* 1912C, L.R.A. 809.

<sup>40</sup> See Alabama, ALA. CODE tit. 4 § 456 *et seq.* (1955) (§ .75), Arkansas, ARK. STAT. § 28-524 (1955) (\$1.50), Delaware, 10 DEL. CODE ANN. § 8903 (1956) (one committed will receive as much as the Court allows). In many states the compensation paid for attendance in court is very low. See Colorado, COLO. REV. STAT. § 56-6-2 (Supp. 1955)

majority of jurisdictions provide a fee scale between \$.75 and \$1.50 per diem plus the witnesses subsistence. The federal provision for such fees has reached a standstill of \$1.00 for a period of 100 years.<sup>41</sup> The economizing practiced by the states and federal government at the expense of the witness smacks of ultra-conservatism at its zenith. It is submitted that if it becomes necessary to employ such outmoded methods in the confinement of witness' the states could at least provide for an escalator type fee. The allowing of attendance fees based on a standard of living a century ago reeks of inefficient economic planning.

Juxtaposed to this are the states which deny recovery and fail to give an adequate reason for denial or claim it is beyond the pale of judicial prerogative and leave such matters to legislative inquiry.<sup>42</sup> The words of Judge McSherry in *Hall v. Commissioners of Somerset County*,<sup>43</sup> *supra* concurred in by Judge Wade in his dissent in *Barber v. Ross*,<sup>44</sup> *supra*, destroy this type of reasoning with the exemplary statement:

" . . . when, in addition to this, by that very confinement, he is deprived of pursuing his avocation, and then is refused compensation as a witness except for the few days he may be actually within the court room while the trial is in progress, his situation is made immeasurably worse."<sup>45</sup>

The wisdom expressed above would in our opinion overwhelmingly state the only realistic approach to the situation. And the only humane rule to be espoused is that a detained witness in all fairness should be compensated for the time spent in jail as "attendance in court". To hold otherwise would be to flout the very logic of a well ordered society.

One final example of the witnesses dilemma remains to be shown. That is the setting of exorbitant bail by the committing magistrate. A classic situation is presented in *People ex rel. Rao v. Adams*.<sup>46</sup> A material witness of dubious character was held in \$250,000 bond and the court found it not to be excessive as a matter of law.<sup>47</sup> The irony of the matter is that in the same term within

---

(varies from \$1.50 to \$2.50), Delaware, 10 DEL. CODE ANN. § 8903 (1956) (\$2.00), Illinois, ILL. STAT. ANN. § 65 (1956) (\$1.00).

<sup>41</sup> In 1853 the federal provision was \$1.00 per diem and subsistence for time spent in jail. 10 STAT. 167, R.S. § 877 (1853). Today the act reads the same. 28 U.S.C. § 1821 (Supp. II 1952).

<sup>42</sup> There are eight cases which have denied the witness fees for time spent in prison. *Barber v. Ross*, 3 Utah2d 268, 282 P.2d 383 (1955), *People v. Sharp*, 78 Misc. 528, 139 N.Y.Supp. 995 (1912), *People ex rel. Troy v. Pettit*, 19 Misc. 280, 44 N.Y.Supp. 256 (1897), *Marshall County v. Tidmore*, 74 Miss. 317, 21 So. 51 (1896), *State ex rel. Sawyer v. Greene*, 91 Wis. 500, 65 N.W. 181 (1895), *Howard v. Beaver County*, 6 Pa. Co. 397, 23 W.N.C. 574 (1889), *Morin v. Multnomah County*, 18 Or. 163, 22 Pac. 490 (1889), *State v. Walsh*, 44 N.J.L. 470 (1882).

<sup>43</sup> *Hall v. Commissioners of Somerset County*, 82 Md. 618, 34 Atl. 770 (1896).

<sup>44</sup> *Barber v. Ross*, 3 Utah2d 268, 282 P.2d 838 (1955).

<sup>45</sup> *op. cit. supra* note 43.

<sup>46</sup> *People ex rel. Rao et al. Adams*, 296 N.Y. 231, 71 N.E.2d 170 (1947).

<sup>47</sup> *Accord*, *People ex rel. Gross v. Sheriff of the City of New York*, 302 N.Y. 173, 96 N.E.2d 763 (1951) (bail not excessive at \$250,000), *People v. Doe*, 283 App. Div. 988,

the same court an accused who had been indicted for forgery and other crimes sued out a writ of habeas corpus on the grounds that the bail was excessive at \$250,000.<sup>48</sup> And the court in this instance found the amount to be unreasonable. The opinion stated that the amount should be no more than is necessary to guarantee the presence of the accused at trial. The two cases looked at in retrospect seem to stagger the imagination. Here is presented then, the ludicrous position where the material witness is deemed to be of more importance to the state than an accused himself. The anomaly of the whole affair finally expends itself when the witness is sitting behind the bars unable to meet excessive bail while the accused is at liberty providing a smaller undertaking for securing his appearance.

The often stated principle that for every wrong there is a remedy is apropos to the cases at bar. There is little room for doubt that such a wrong presently exists. Where then lies the remedy to alleviate the ostensible wrong? The authors are inclined to think that the Uniform Act of Compelling the Attendance of Witnesses is a step in the right direction as far as the out of state witness is concerned. The difficulty is that even the states which have adopted the Act fail to entertain fastidiously any regard of state comity. Of course the condition of the witness who is within the jurisdiction of the court and cannot afford bail leaves much to be desired. A discussion then of the Act and certain proposed remedies for in-state witnesses are now submitted in order to give a full comprehension of the inherent complexities facing the states.

#### *The Uniform Act*

In 1931 the Uniform Act to Secure the Attendance of Witnesses was approved by the National Conference of Commissioners on Uniform State Laws and was ratified by the American Bar.<sup>49</sup> The Act underwent a slight revision in 1936 but has remained relatively unaltered since that time.<sup>50</sup> Although some forty-two<sup>51</sup> states have adopted the Act this does not mean that all the states are in harmony upon the subject matter.<sup>52</sup>

---

131 N.Y.S.2d 7 (1954) (bail not excessive at \$150,000), *People ex rel. Fusco (Galgano) v. Ryan*, 204 Misc. 861, 124 N.Y.S.2d 690 (1954) (bail not per se unreasonable at \$50,000). *But see*, *People ex rel. Richards v. Warden of City Prison*, 277 App. Div. 87, 98 N.Y.S.2d 173 (1950) (bail held to be excessive at \$100,000).

<sup>48</sup> *People ex rel. Lobell v. McDonnell*, 296 N.Y. 109, 71 N.E.2d 423 (1947).

<sup>49</sup> 9 U.L.A. 1951, p. 37 *et seq.* The major provisions of the Uniform Act are as follows: 1. The procedure whereby a witness is summoned by a state that has adopted the Uniform Act to testify in another state. 2. Procuring a witness from another state which has enacted into the law the Uniform Act to testify in some other state where the Act has also been enacted. 3. Exempting from arrest or service of process any witness while within the state acting in accordance with the provisions of the Uniform Act.

<sup>50</sup> 9 U.L.A., 1951, p. 38-39 (Historical note).

<sup>51</sup> 9 U.L.A., 1951, p. 38. The following states are without any provision to secure witnesses from without the state; Alabama, Georgia, Illinois, Iowa, Michigan, and Missouri.

<sup>52</sup> See 85 U. of PA. L. REV. 717 (1937).

Only five cases have come down from the courts on the Act's constitutionality as to State and Federal Constitutions. *In re Cooper*<sup>53</sup> and *Commonwealth of Mass. v. Klaus*<sup>54</sup> upheld the Act while *People of New York v. Parker*,<sup>55</sup> *In re People of New York*<sup>56</sup> and *Matter of Commonwealth of Pa.*<sup>57</sup> denied the constitutionality. The decisions are actually on par, however, because *People of New York v. Parker*, *supra*, limited itself to a defect in title which the legislature of New Jersey later remedied. *In re People of New York*, *supra*, was the first time that an Act modelled on the Uniform Act was tested. The important case in the field is *Commonwealth of Mass. v. Klaus*.<sup>58</sup> Here the court upheld a New York act requiring a witness within the state to give evidence for use in courts of another state.<sup>59</sup> The argument of the majority was based on the familiar Wigmorean concept of man's duty to society to give evidence.<sup>60</sup> The *Klaus* case is important because nearly all the arguments that have been voiced by the critics are found in the opinion. With rapier strokes the court cut away the overhanging judicial gloss which encumbered the issues. One of the questions raised is this: If the Fathers of the Constitution saw fit to place in Article IV § 2 a specific provision which allows accused persons to be taken from one state to another, then the Act to bring innocent persons from state to state for oral testimony should have express constitutional sanction.<sup>61</sup> The court answered this class of queries by remarking,

"Unless, therefore, there is power somewhere to compel a witness to proceed from one state to another to testify, many guilty persons must necessarily escape due punishment for their crimes, and it is manifest that if the power exists anywhere it must be in the state within which the witness is . . . The question then resolves itself into one of power, and the only question is as to the power of the state to compel a witness to cross its boundaries and proceed into another state to perform there his plain duty to society . . . It is a proposition not to be questioned that, except as limited by constitutional restrictions, state or federal, the state acting through the Legislature has

<sup>53</sup> *In re Cooper*, 127 N.J.L. 312, 22 A.2d 532 (1941).

<sup>54</sup> *Commonwealth of Mass. v. Klaus*, 145 App. Div. 798, 130 N.Y.Supp. 713 (1st Dep't 1911).

<sup>55</sup> *People of New York v. Parker*, 16 N.J. Misc. 411, 1 A.2d 54 (1936).

<sup>56</sup> *In re People of New York*, 103 Leg. Intell. 1055 (Ct. of Quarter Sessions, County of Phila., Pa. 1940).

<sup>57</sup> *Matter of Commonwealth of Penn.*, 45 Misc. Rep. 46, 90 N.Y.Supp. 808 (1904).

<sup>58</sup> *Commonwealth of Mass. v. Klaus*, 145 App. Div. 798, 130 N.Y.Supp. 713 (1st Dep't 1911).

<sup>59</sup> At common law no state court could compel a witness who was within another state to testify. *State v. Razor*, 168 S.C. 221, 167 S.E. 396 (1933), *Baker v. People*, 72 Colo. 68, 209 Pac. 791 (1922).

<sup>60</sup> 3 WIGMORE, EVIDENCE § 2192 *et seq.* (3rd ed. 1940).

<sup>61</sup> U.S. CONST. art. IV, § 2 cl. 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."

absolute and unrestrained power over its own citizens and those who may be within its borders."<sup>62</sup>

Another argument propounded is that the Act violates the privileges and immunities clause of the Federal Constitution.<sup>63</sup> To this the court directed its words when they said,

"... that the right of free ingress and egress was never intended to enable a citizen of the United States to interfere with the orderly administration of justice within the territorial boundaries of the state, and that, as has been repeatedly held, when a citizen of the United States is within the boundaries of a state he is amenable to the constitutional laws of that state, and that the only protection which the privileges and immunities clause of the federal Constitution affords him there is that no state Legislature shall discriminate between him and the citizens of the State proper."<sup>64</sup>

Perhaps the most difficult point raised is the extra-territorial effect of the Act. There is a strong argument made that the state is compelling a person over whom it has no jurisdiction to do a positive act beyond the state's borders and is using the impending threat of punishment for failure to obey.<sup>65</sup> The view accepted by the New York court and held by other writers is that once the court obtained jurisdiction over the person the jurisdiction exists for all intents and purposes and includes the power of the state to order an act done beyond the states border. There is quite a bit of authority upholding the position.<sup>66</sup> One of the main contentions in the dissent of the *Klauss* decision was that an unsigned treaty had been effectuated between states which was violative of § 1 and 3 of Article I of the Constitution.<sup>67</sup> This argument has been emasculated, in that Congress in 1934 gave its consent for the states to enter into agreements or compacts to facilitate more states into adopting the Model Act.<sup>68</sup>

<sup>62</sup> Commonwealth of Mass. v. *Klauss*, 145 App. Div. 798, 800-801, 130 N.Y.Supp. 713, 715-716 (1st Dep't 1911).

<sup>63</sup> U.S. CONST. art. IV § 2 cl. 1. "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

<sup>64</sup> *Id.* at 717. See *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1872).

<sup>65</sup> Judge Laughlin dissenting in the *Klauss* case, "... it is quite plain, I think, that no state can exercise such jurisdiction with respect to residents of another state, and that is recognized in all of the decisions . . ." citing *Pennoyer v. Neff*, 95 U.S. 714-723 (1878). Commonwealth of Mass. v. *Klauss*, 145 App. Div. 798, 806, 130 N.Y.Supp. 713, 721 (1st Dep't 1911).

<sup>66</sup> See REST. CONF. OF LAWS § 94 (1934). *Madden v. Rosseter*, 114 Misc. Rep. 416, 187 N.Y.Supp. 462 (Sup. Ct. 1921), *aff'd* 196 App. Div. 891, 187 N.Y.Supp. 943 (1st Dep't 1921), WALSH, EQUITY § 18, 79-80 (1930), *Salton Sea Cases*, 172 Fed. 792 (9th Cir. 1909). For law review comments, see 41 MICH. L. REV. 171 (1941), 19 N.C.L. REV. 391 (1941), 10 GEO. WASH. L. REV. 345 (1941), 18 MO. L. REV. 38 (1953), 85 U. OF PA. L. REV. 717 (1937), 31 MINN. L. REV. 699 (1946-47), 43 HARV. L. REV. 121 (1929), 23 ILL. L. REV. 195 (1928-29).

<sup>67</sup> U.S. CONST. art. I § 10 cl. 1 and 3. "No state shall enter into any treaty, alliance or confederation . . . No state shall, without the consent of Congress . . . enter into any Agreement or Compact with another State . . ."

<sup>68</sup> 48 STAT. 909, 4 U.S.C. § 111 (1952). "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

*Suggested Reforms*

One further solution can be tendered for the witness who is detained within the state due to his misfortune in not securing bail. This is by the use of depositions. A few states have provided for the taking of such depositions.<sup>69</sup> The American Law Institute substantially provides the same procedure.<sup>70</sup> The witness is not to be unduly detained, and the state has the evidence necessary for introduction at trial. There is an argument which the defense would most likely make. That is that a defendant has the right to be confronted by his accuser and is to be allowed to see the witness face to face and be near enough to watch the effect the witness has upon the jury.<sup>71</sup> To this proposition Wigmore blandly asserts that, "there never was at common law any recognized right to an indispensable thing called Confrontation as distinguished from Cross examination."<sup>72</sup> He further alleges,

" . . . the main idea in process of confrontation is that of the opponent's opportunity of cross-examination; the former is merely the dramatic feature, the preliminary measure, appurtenant to the latter."<sup>73</sup>

Irrespective of Wigmore's contention the Supreme Court has recognized that, "The right of confrontation did not originate with the provision in the Sixth Amendment,<sup>74</sup> but was a common law right . . ."<sup>75</sup> But it is also well settled that the right is not absolute and is subject to certain exceptions. Cooley in his work on Constitutional Limitations states that, "The exceptions to this rule are of cases which are excluded from its reasons by their peculiar circumstances."<sup>76</sup> Such exceptions are:

" . . . If the witness was sworn before the examining magistrate, or before a coroner, and the accused had an opportunity then to cross examine him, . . . if the witness has since deceased, or is insane, or sick and unable to testify, or has been summoned but appears to have been kept away by the opposite party."<sup>77</sup>

In conclusion then the exceptions to the confrontation rule are not im-

---

criminal laws and policies, and to establish such agencies, joint, or otherwise, as they may deem desirable for making effective such agreements and compacts."

<sup>69</sup> *op. cit. supra* note 24.

<sup>70</sup> See THE AMERICAN LAW INSTITUTE, CODE OF CRIMINAL PROCEDURE § 58 (March (1931) on "Procedure when witness does not give security" in the chapter on "Preliminary Examination."

<sup>71</sup> *State v. Martin*, 53 N.M. 413, 209 P.2d 525 (1949), *Snyder v. Mass.*, 291 U.S. 97, 132 (1934) (dissent), *Wray v. Smith*, 154 Ala. 36, 45 So. 697 (1908), *State v. King*, 24 Utah 482 (1902), 68 Pac. 419, *State v. Mannion*, 19 Utah 505, 57 Pac. 542 (1899).

<sup>72</sup> 5 WIGMORE, EVIDENCE § 1397, p. 128 (3rd ed. 1940).

<sup>73</sup> *Id.* at § 1395, p. 124.

<sup>74</sup> U.S. CONST. amend. VI "In all criminal prosecutions, the accused shall . . . be confronted with the witness against him . . ."

<sup>75</sup> *Salinger v. United States*, 272 U.S. 542, 548 (1926).

<sup>76</sup> COOLEY, CONSTITUTIONAL LIMITATIONS, 451 (7th ed. 1903).

<sup>77</sup> *Id.* at 451 n. 3 *et seq.*

mutable fixtures of the law but are rather subject to change as the necessities of society may demand. The words of Justice Brown in *Mattox v. United States* best describe the discussion:

" . . . general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case."<sup>78</sup>

It is the writer's view that the use of depositions is *ex necessitate*. While only a small number of states have recognized this expansion of the above stated exceptions by statute the suggestion is made that more states follow suit.

#### *Conclusion*

Failure of state and federal government to come up with a sound policy in dealing with the problem of material witnesses is manifestly a deplorable situation. Although the authors recognize the right of the state in a democracy to require each member to perform his duty in the administration of justice,<sup>79</sup> we do not believe that this axiom extends itself to the position of restraining a witness's personal liberty. Wigmore takes the position that,

" . . . if this duty exists for the individual to society, so also he may fairly demand that society, so far as the exaction of it is concerned, shall *make the duty as little onerous as possible*." (Emphasis supplied).<sup>80</sup>

When the power of a state deems it necessary to regulate the individual's freedom, the law should be framed in such a manner as to reduce to the narrowest limits the necessary sacrifices to be endured by the witness in the name of justice. The commitment of an innocent man who is honestly unable to secure surety is basically unfair.<sup>81</sup> We cannot subscribe to the deprivation of an individual's substantive rights nor condone the social denigration which will be the result of such confinement. The enactment of the Uniform Act by the majority of states is encouraging and should replace the outmoded procedure of confinement. The use of depositions by a few states also expresses progressive legislation. It was with a rebuke that Wigmore poignantly pierced the veil of the relationship of duty and society when he said,

"These just demands [society's] are too often as much ignored by the profession of the law as are the duties of witnesses by laymen. In the adjustment of the unquestioned duty of the latter to the correlative right of society, speaking through the law and its practitioners, much remains yet to be desired."<sup>82</sup>

JOSEPH CASULA

MORGAN DOWD

<sup>78</sup> *Mattox v. United States*, 156 U.S. 237, 243 (1894).

<sup>79</sup> "He who will live by society must let society live by him, when it requires to." 8 WIGMORE, EVIDENCE § 2192, p. 66 (3rd ed. 1940).

<sup>80</sup> *Id.* at 67.

<sup>81</sup> See MEDALIE, SYMPOSIUM ON NATIONAL WITNESSES (1930) 8 Panel 1.

<sup>82</sup> 8 WIGMORE, EVIDENCE § 2192, p. 67 (3rd ed. 1940).