

absent voter when the election official in the absentee's precinct is about to deposit the mailed-in ballot in the ballot box.²⁶ Other statutes merely provide that the general election laws which "are in their nature applicable shall apply to all transactions under the act."²⁷ This phrase may be construed as allowing the challenge provisions of the general election law²⁸ to apply to absent voters. But the court in the present case refused to make such a construction. Instead it held that the marking of the ballot by the absent voter was equivalent to casting, and that after casting the vote could not be challenged.²⁹ Furthermore, it argued that challenge could not be made after the absentee had "offered to vote" by signing his application affidavit two to thirty days before the election.³⁰ The court was therefore in the anomalous position of saying that the absent voter's qualifications are to be determined from two to thirty days before the election rather than at the date of the election. The court's construction of the absent voter statute makes possible the argument that the act is unconstitutional because it makes an arbitrary and unreasonable classification by giving only to the absent voter the right to vote free from challenge of his qualifications on election day. A preferable result would appear to be to allow the plaintiff to examine the absentees' affidavits and challenge their qualifications as electors.³¹

Evidence—Constitutional Law—Validity of Act Requiring Attendance of Non-Resident Witnesses in Grand Jury Proceedings—[Pennsylvania].—The Attorney General of the State of New York petitioned a Pennsylvania lower court for subpoenas ordering two residents of Pennsylvania to go into New York to testify before a grand jury. The application was made under the provisions of a uniform act entitled "an act providing for the securing of attendance of witnesses from without the state in criminal cases."³² The act is designed to enable the prosecuting authorities of a state which has passed it to secure the attendance at either criminal or grand jury proceedings of witnesses who are within other states which have also adopted the act. In denying the subpoenas the court held, that the statute is unconstitutional because (1) it

²⁶ Cal. Elec. Code (Deering, 1939) §§ 7842-7844; Ill. Rev. Stat. (1939) c. 46, § 471; N.Y. Cons. Laws (McKinney, 1922) c. 17, § 210(2); Mo. Rev. Stat. (Gillespie, Supp. 1937) § 10188.

²⁷ Kan. Gen. Stat. Ann. (Corrick, 1935) § 25-1113.

²⁸ *Ibid.*, at §§ 25-407, 25-408, 25-411.

²⁹ 152 Kan. 826, 107 P. (2d) 773, 777-78 (1940). Cf. Ala. Code Ann. (Michie, 1928) § 406 (entitled, "How ballot cast by absent voter."); Colo. Stat. Ann. (Michie, 1935) c. 59, § 216 (introduced by the words, "In casting such absent voter's ballot. . . ."); Neb. Comp. Stat. (1929) §§ 32-805 (entitled, ". . . Ballot, How Cast."). Italics added.

³⁰ 152 Kan. 826, 107 P. (2d) 773, 778 (1940).

³¹ In order to justify the result reached in the instant case, the court found it necessary to strike from their opinion in *Hansen v. Lindley*, 152 Kan. 63, 102 P. (2d) 1058 (1940) the italicized words in the following passage which had already appeared in the advance sheets: "*The first opportunity a candidate has to challenge a mailed-in vote, however, is when the board of canvassers is considering it.* Hence, there is no reason why the above section (Kan. Rev. Stat. Ann. (Corrick, 1935) § 25-407) should not be a guide to the board of canvassers, to the contest court, and on appeal to the district court and to this court." 152 Kan. 826, 107 P. (2d) 773, 779 (1940). (Italics by the court.)

³² Pa. Stat. Ann. (Purdon, Supp. 1940) tit. 19, §§ 616-22, 9 Unif. L. Ann. 9 (Supp. 1940).

does not meet the requirement of the Pennsylvania Constitution² that the title of a statute must clearly state its content, since the title does not indicate that residents of Pennsylvania may be compelled to testify in another state; (2) it violates the clause of the Pennsylvania Constitution³ guaranteeing freedom from unreasonable seizures; (3) it violates the privileges and immunities clause of the Fourteenth Amendment of the Federal Constitution; and (4) it deprives the witnesses of their liberty without due process of law. Petition dismissed and subpoenas refused. *In re the People of the State of New York*.⁴

In its earliest stages, the duty incumbent upon members of society to give testimony applied only to witnesses for the Crown in criminal cases.⁵ Despite its later extension to witnesses in civil proceedings and witnesses for the defense in criminal cases, the duty remains one primarily due the state.⁶ It is a social obligation and exists even though it may involve the sacrifice of time, labor, or privacy. Such sacrifice is regarded as part of the necessary contribution of the individual to the public welfare, for testimony of witnesses is one of the instruments adopted by organized society to enforce the law which gives every citizen the security and protection he enjoys.⁷ The duty of the citizen to aid the law consists in appearance and testimony before either the petit or grand jury and is enforced by citation for contempt.⁸ The demand upon the witness does not come from any one person or the residents of any one community, but from society as a whole.

It has long been recognized that the obligation of the witness is not limited to testimony to be used or given in a court of his own state.⁹ By virtue of the state legislation or decision of court, he may be compelled to make a deposition for use in another state,¹⁰ and by a federal law of 1793 by which process runs throughout the country,¹¹ a witness for the prosecution in a criminal case can be compelled to attend proceedings in any federal court, regardless of the district, and a witness in a civil case is required

² Pa. Const. art. 3, § 3.

³ Pa. Const. art. 1, § 8.

⁴ Court of Quarter Sessions, Philadelphia County (Pa. Dec. 6, 1940).

⁵ 8 Wigmore, Evidence 60 (3d ed. 1940).

⁶ The duty to testify in civil proceedings first appeared in 5 Eliz., c. 9 (1563) when provision was made for the service of process out of any court of record, requiring the person served to testify concerning any matter pending in the court. If he refused, he was fined £100 and forced to pay damages to the party aggrieved. Prior to this date, except in criminal cases, witnesses often had been regarded as unwelcome meddlers and were required to show an interest in the cause or be denied the privilege of testifying. Not until the Restoration, however, was a criminal defendant permitted to have the sworn testimony of any witness, as was the Crown privileged. It was not until 1 Anne, c. 9, § 3 (1701) in cases of felonies that the criminal defendant was guaranteed compulsory process and the correlative obligation to appear and testify devolved upon the witness for the defense as well as for the prosecution. 2 Bl. Comm. * 369; 2 Watson, Constitution of the United States 1485 (1910).

⁷ West v. State, 1 Wis. 186, 206 (1853). See Blair v. United States, 250 U.S. 273 (1919); 8 Wigmore, Evidence 66 (3d ed. 1940).

⁸ 4 Bl. Comm. * 284; Rapalje, Contempt 74, 83 (1884).

⁹ Ex parte Taylor, 110 Tex. 331, 333, 220 S.W. 74, 75 (1920).

¹⁰ 8 Wigmore, Evidence 94 (3d ed. 1940); 25 Harv. L. Rev. 188 (1911).

¹¹ 1 Stat. 335 (1793), 28 U.S.C.A. §§ 654-55 (1928).

to travel as far as 100 miles. Indeed, the obligation upon the witness to aid in the enforcement of the criminal law demands that a United States citizen in a foreign country return home to testify when summoned through a consul.¹²

The need for the testimony of a non-resident witness has been heightened by the advent of modern transportation and the resultant increase in the number of crimes involving the residents of more than one state either as participants or witnesses. Presence of the former can be secured by extradition proceedings, but successful prosecution very often depends upon the testimony of a non-resident witness who will not voluntarily attend.¹³ Because of the constitutional requirement that the defendant in a criminal proceeding be allowed to "confront" the witnesses testifying against him, depositions taken in the foreign state will not suffice. Even without any constitutional objection, they would not be as desirable as *viva voce* testimony given before the forum.¹⁴ The desirability of such evidence and the need for it in the execution of the laws of the state is exhibited by the adoption of the uniform act by thirty-four states.¹⁵

As a necessary adjunct to the proper administration of the criminal law of the state, it would seem that the uniform act is but an extension of the duty to the state to give testimony. The inadequacy of the title of the statute is a defect which can easily be rectified by amendment.¹⁶ The other constitutional objections, however, if valid, are not so easily remedied.

The court felt that the provisions of the statute "for taking a witness into custody and delivering him bodily to authorities for a foreign jurisdiction" was so "unreasonable and unwarranted" as to be violative of the provision of the Pennsylvania Constitution that "the people shall be secure in their persons . . . from unreasonable . . . seizures. . . ." The constitutional guarantee, however, does not prevent the

¹² 44 Stat. 835 (1926), 28 U.S.C.A. §§ 711-18 (Supp. 1940); *Blackmer v. United States*, 284 U.S. 421 (1932).

¹³ Dean, *Interstate Compacts for Crime Control in Proceedings of the Attorney General's Conference on Crime* 64 (1934); *Medalie, Interstate Exchange of Witnesses in Criminal Cases*, 7 Panel, No. 2, at 1 (March, 1929). Congress has made it a criminal offense to leave the state to avoid testifying in criminal proceedings. 48 Stat. 782 (1934), 18 U.S.C.A. § 480e (Supp. 1940); *United States v. Miller*, 17 F. Supp. 65 (Ky. 1936).

¹⁴ See 5 Wigmore, *Evidence* 127, 143 (3d ed. 1940).

¹⁵ 9 Unif. L. Ann. 9 (Supp. 1940).

The compulsory attendance of non-resident witnesses has been advocated for international use as well as for domestic use. *Communication of Judicial and Extra-Judicial acts in Penal Matters and Letters Rogatory in Penal Matters*, 22 Am. J. of Int'l L. 46, 66 (special number, 1928). Wisconsin has a reciprocal statute similar to the uniform act for use in civil cases. Wis. Stat. (1939) § 326.25.

¹⁶ The uniform act, as enacted in New Jersey, was declared unconstitutional for the same reason. *New York v. Parker*, 16 N.J. Misc. 471 (Cir. Ct. 1936). But, the title of the act was amended, for it now reads, "Compelling appearance of resident witnesses in criminal prosecutions in other states and non-resident witnesses in criminal prosecutions in this state." N.J. Rev. Stat. (1937) tit. 2, c. 97, §§ 2:97-19 to 26. The validity of an earlier New York statute, very similar to the uniform act, has been contested twice. In a cursory opinion in *In re Commonwealth of Pennsylvania*, 45 Misc. 46, 90 N.Y. Supp. 808 (S. Ct. 1904), the act was held unconstitutional as a denial of due process. In a more fully considered opinion in *Massachusetts v. Klaus*, 145 App. Div. 798, 130 N.Y. Supp. 713 (1911), the statute was sustained, Laughlin, J., dissenting.

issuance of process to require the attendance of witnesses within the state.¹⁷ It is therefore difficult to see why it should invalidate the provision of the uniform act. The activities condemned as "unreasonable searches and seizures" are usually those which compel a person to give evidence against himself.¹⁸ Compulsory testimony which, when given before a court which has jurisdiction of the witness, is not for any reason an "unreasonable search and seizure" should not be deemed such when the witness is compelled to testify outside the state.

Another ground assigned for the invalidity of the statute is the violation of the right to free ingress and egress to and from the several states guaranteed by the privileges and immunities clause of the Fourteenth Amendment of the Federal Constitution.¹⁹ The witness is made to leave the state against his will and to go into another state when he does not wish to. His privilege of going into any other state he desires is denied him. If compulsory egress in the interest of the administration of justice does deny the witness free egress and ingress into the state of his choice, it nevertheless is not an unjustifiable restraint. Every citizen attending a trial within the state is, to the same extent, temporarily deprived of his right to leave the state at his will. The right of free egress is suspended in favor of the paramount obligation of the individual to contribute to the administration of justice.

The last objection made is that the act deprives the witness of his liberty without due process of law. The witness here, however, is afforded the protection of due process to a greater extent than he would be if he were forced to testify within the state.²⁰ He is given an opportunity to be heard as to the materiality of his testimony and as to his objections to the compulsory order before the subpoena issues. He will be compelled to attend only if it will not cause undue hardship and if the laws of the state in which the prosecution or inquiry is pending and the states through which he must pass in traveling will protect him from service of civil or criminal process. Finally, he is fully reimbursed²¹ and need travel no more than 1000 miles.

Evidence—Hearsay—Admissibility of Docket of Justice of Peace—[Idaho].—The defendant was charged with violating an Idaho statute¹ by writing a check with intent to defraud. At the hearing before a justice of the peace, the defendant admitted writing the check. The justice thereupon entered a plea of guilty and sentenced the defendant to ninety days in jail. Upon appeal to the district court under a statute² au-

¹⁷ *Flint v. Stone-Tracy Co.*, 220 U.S. 107 (1911).

¹⁸ *Boyd v. United States*, 116 U.S. 616, 633 (1886); *Rottschaefer*, *Constitutional Law* 743, 746 (1939).

¹⁹ *William v. Fears*, 179 U.S. 270 (1900); *Slaughter-House Cases*, 16 Wall. (U.S.) 36, 75 (1872); see *Hague v. CIO*, 307 U.S. 496, 521 n. 1 (1938); cf. *Crandall v. Nevada*, 6 Wall. (U.S.) 35 (1867). *Lien, Privileges and Immunities of Citizens of the United States* 80 (1913).

²⁰ Cf. *Rest., Conflict of Laws* § 94 (1934); 4 *Pomeroy, Equity Jurisprudence* § 1437 (4th ed. 1919).

²¹ Compare the ten cents per mile and five dollars a day provided by the uniform act with the five cents per mile and one dollar a day provided for witnesses within the state by Ill. Rev. Stat. (1939) c. 53, § 65.

¹ *Idaho Code Ann.* (1932) § 17-3908.

² *Ibid.*, § 19-4042.