Nebraska Law Review

Volume 40 | Issue 3 Article 7

1961

Witnesses—Imprisonment of the Material Witness for Failure to Give Bond

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WITNESSES – IMPRISONMENT OF THE MATERIAL WITNESS FOR FAILURE TO GIVE BOND*

I. INTRODUCTION

A defendant charged with highway robbery was released on bail in the usual manner pending trial. At the trial, six months later, it appeared that the complaining witness had throughout this period been incarcerated for his inability to post bond.[1] A second case involved a seven dollar robbery. The victim, who reported the robbery, was rewarded for his trouble by imprisonment for a considerable time because he lacked the money to procure a bond.[2] Such cases, unfortunately, while perhaps not usual, can hardly be regarded as atypical. The purpose here is to consider selected major problems in the law concerning imprisonment of material witnesses in criminal actions for failure to give recognizance as required. The state of the present law is considered, relevant constitutional problems are noted, and an effort is made in conclusion to consider the wisdom and desirability of present practices in the light of contemporary social conditions.

II. SURVEY OF PRESENT LAW

A. General

Most states by statute permit or require state witnesses in criminal cases to be imprisoned for failure to give recognizance as required.[3] Some, as in the case of the Federal and New York statutes, draw no distinction between felonies and misdemeanors, while

* Other closely related comments are: 7 CATHOLIC U.L. REV. 37 (1959); 5 SYRACUSE L. REV. 213 (1954); 18 MO. L. REV. 38 (1953). See also Bernstein, *The Crime of Being a Witness,* 3 J. MO. B. 223 (N.S. 1947); Annot., 50 A.L.R.2d 1439 (1955).

1 Bernstein, *The Crime of Being a Witness,* 3 J. MO. B. 223 (1947).

2 *In re* Petrie, 1 Kan. App. 184, 40 Pac. 118 (1895).

3 At least three states do not have statutes authorizing imprisonment of witnesses for failure to post bond: Arkansas, Indiana, and Kentucky. The statutes of the states authorizing imprisonment of material witnesses are collected in 7 CATHOLIC U.L. REV. 37, 38, n. 7 (1958).

others, such as Nebraska, are limited only to felonies. Still others apply only to the most serious felonies.[4] Data relating to frequency of use of such statutes is spotty. Generally, available evidence indicates that they are seldom employed in misdemeanor cases but that the frequency of their use in felony cases varies markedly from jurisdiction to jurisdiction. In New York, however, where most of the material witness litigation has arisen, prosecutors insist that they are seldom employed. Statistics supplied to the author by the District Attorney of Kings County, New York, for example, indicate that only seventeen persons were committed as material witnesses out of a total of 11,420 misdemeanor cases and 4,000 felony cases.[5]

One further preliminary point: There is a fundamental difficulty in stating even the broad outlines of the law governing commitment of material witnesses. Cases are few and far between and the decisions are scattered over nearly 100 years. Doubtless many of the old cases are of questionable value as precedent today. Furthermore, much of the case law deals with interpretation of statutes which by now have been amended in material respects. Indeed, the law of material witnesses, so far as their commitment for failure to recognize is concerned, is entirely the creature of statutes. At common law a magistrate had no authority to imprison a witness for failure to recognize.[6] However, it should be noted that

[4] *E.g.*, N.Y. CODE CRIM. PROC. § 618(b) (1957); FED. R. CRIM. P. 46(b) (no distinction between felonies and misdemeanors); NEB. REV. STAT. §§ 29-507 and 29-508 (Reissue 1956) (applicable only in felonies); FLA. STAT. §§ 902.15 to .17 (1941) (applicable only in murder, rape, robbery, arson, or kidnapping). As to Nebraska law—there are no reported cases or attorney general opinions relating to these sections. Data is generally unavailable as to the frequency of application of the statute by the various county prosecutors. The following statement, however, was received from the Douglas County Attorney's office: "Generally speaking, this office has had little or no need to request recognizance for a material witness in a criminal prosecution. The few times that such a procedure has been used, it has been on an informal basis wherein the witness was booked at the police station in the absence of a magistrate, and the notation was merely made that he was released on his own recognizance." Letter from John E. Clark, Deputy County Attorney, Douglas County, Nebraska, January 14, 1960, on file with the Nebraska Law Review.

[5] Letter from Edward S. Silver, District Attorney of Kings County, New York, January 11, 1960, on file with the Nebraska Law Review. In New York County, the statute has been used during the past three years as follows: "1957, 36 times; 1958, 39 times; 1959, 53 times." Letter from Allan A. Pines, Assistant District Attorney, New York County, February 9, 1960, on file with the Nebraska Law Review.

[6] *Ex parte* Riddle, 25 Okla. Crim. 25, 218 Pac. 894 (1923); *In re* Singer, 134 Cal. App. 2d 547, 285 P.2d 955 (1955); Little v. Territory, 28 Okla. 467,

the United States Supreme Court held on one occasion that the United States Senate had the right to confine a witness in jail while waiting to testify.[7] Momentarily putting to one side relevant constitutional questions, let us turn to certain basic questions in the law concerning material witnesses.

B. Who Are Material Witnesses and When do They Become Such

To become a material or necessary witness within the typical statute it must appear that the person has knowledge of facts closely connected to the crime,[8] or to the accused,[9] in a criminal action. A criminal action has been interpreted to include grand jury investigations,[10] where a warrant has been issued for the accused,[11] and even district attorney investigations, though as to the latter there has been vigorous dissent.[12] And, as previously mentioned, some statutes only apply when the defendant is in custody[13] and to particular types of crimes, *viz.*, felonies or serious felonies.

C. Right to Hearing

The early cases upheld material witness statutes providing for imprisonment of the witness even though no hearing was provided.[14] Currently some of the statutes require a hearing before a court of record to determine whether the witness is necessary and material, and an opportunity to be heard in opposition is provided.[15] Even

114 Pac. 699 (1911); Ljubisich v. Brown, 276 Ill. 186, 114 N.E. 583 (1916). Only one case has been found *contra,* Crosby v. Potts, 8 Ga. 463, 69 S.E. 582 (1910). For history and development of the witness' duty to testify see 8 WIGMORE, EVIDENCE § 2190 (1940).

[7] Barry v. United States *ex rel.* Cunningham, 279 U.S. 597 (1929).

[8] *Ex parte* Grzyeskowiak, 267 Mich. 697, 255 N.W. 359 (1934) (present at time of crime).

[9] *Ex parte* Rankin, 330 Mich. 94, 47 N.W.2d 29 (1951) (had given alibi for accused at time of crime).

[10] *E.g.,* O'Connell v. McElhiney, 138 N.Y.S.2d 138 (Sup. Ct. 1954). There are many New York cases where witnesses were held in jail for grand jury investigations.

[11] See *Ex parte* Grzyeskowiak, 267 Mich. 697, 255 N.W. 359 (1934) (dictum).

[12] See dissent in People v. Doe, 26 N.Y.S.2d 458 (App. Div. 1941).

[13] *E.g.,* FLA. STAT. § 902.15 (1941), "If defendant is held on charge . . . ."

[14] *E.g., In re* Petrie, 1 Kan. App. 184, 40 Pac. 118 (1895).

[15] *E.g.,* N.Y. CODE CRIM. PROC. § 618(b) (1957).

though the statute does not provide for a hearing, it has recently been held that a satisfactory hearing must be provided before a court of record to determine materiality.[16] Due process today should require at least this.

D. Right to Counsel

The statutes are silent as to any right to counsel. From the cases it appears that at times a lawyer representing the witness was present; at other times he has had no counsel.[17] It has been held that the witness was not deprived of his right where he did not request counsel, but where counsel was requested and refused that the witness was so deprived.[18]

E. Evidence Sufficient to Commit

Various factors are important in considering imprisonment or the amount of the bond. They are the seriousness of the crime, the character of the witness, the importance of his testimony, the relationship of the witness to the accused, the need for physical protection of the witness, the possibility of fleeing the jurisdiction,[19] and whether the witness has been difficult to locate or has given conflicting statements to police.[20] Whether the witness has an established residence in the state or is currently unemployed would likewise be considered.[21] Any one or more of the above factors may justify commitment of the witness for failure to post bond.

[16] Quince v. Langlois, ___ R.I. ___, 149 A.2d 349 (1959).

[17] *Id.*, (no lawyer present); *Ex parte* Rankin, 330 Mich. 94, 47 N.W.2d 29 (1951) (witness had a lawyer at hearing).

[18] People *ex rel.* Fusco v. Ryan, 124 N.Y.S.2d 690 (Sup. Ct. 1953).

[19] People *ex rel.* Rao v. Adams, 296 N.Y. 231, 72 N.E.2d 170 (1947); *Cf.*, People *ex rel.* Gross v. Sheriff of City of New York, 302 N.Y. 173, 96 N.E.2d 763 (1951).

[20] United States v. Von Bonim, 24 F. Supp. 867 (S.D.N.Y. 1938); People *ex rel.* Fusco v. Ryan, 124 N.Y.S.2d 690 (Sup. Ct. 1953) (conflicting statements); *Ex parte* Grzyeskowiak, 267 Mich. 697, 255 N.W. 359 (1934) (difficult to locate); *Ex parte* Rankin, 330 Mich. 94, 47 N.W.2d 29 (1951) (conflicting statements and difficult to locate).

[21] State v. Kemp, 124 La. 85, 49 So. 987 (1909) (non-resident); *Ex parte* Prall, 89 Okla. Crim. 413, 208 P.2d 960 (1949) (transient minor with no job or home in the state); *Ex parte* Sheppard, 43 Tex. Crim. 372, 66 S.W. 304 (1902) (reason to believe witness about to move from county); People

The prosecutor alleges on oath, usually by affidavit, facts and reasons why the recognizance or bond is required. Usually it must be alleged that the witness is material and will be unavailable at the time required. However, this varies somewhat with the particular statute. The New York statute, for example, requires an allegation that the witness is necessary as well as material. The statutes typically do not require allegations that the witness is evading or intending to evade judicial process. The prosecutor's affidavit is taken as prima facie proof[22] but the magistrate must make some inquiry of the witness to determine materiality.[23] If the witness challenges the prosecutor's allegations, it becomes a question of fact for the judge to determine whether the allegations as to materiality are true,[24] and where the statute requires, to find whether there is reasonable ground to believe that the witness will not appear at the trial. Very few cases have been found where the witness was subsequently released because of insufficient evidence after the questions of the amount of the bond or necessity of retaining the witness have once been determined by the magistrate. More often, the witness is released or the bond reduced for other reasons.

F. Imprisonment Distinctions

Usually the statutes do not provide whether the witness is entitled to fees while he is imprisoned. Where this is not made clear by statute, the question is whether the witness has been in attendance at court. The cases are divided.[25] Likewise, most statutes are silent as to a maximum time limit for imprisonment. Where the statutes provide no limit the courts have only allowed imprisonment for "a reasonable time." Courts have held four months to be both reasonable and unreasonable.[26] In a few cases witnesses have been held for as long as six to eight months.[27] The cases show that a person has

ex rel. Ditchik v. Sheriff of Kings County, 12 N.Y.S.2d 341 (Sup. Ct. 1939) (reason to believe witness would leave state or conceal himself).

[22] See People *ex rel.* Fusco v. Ryan, 124 N.Y.S.2d 690 (Sup. Ct. 1953).

[23] Quince v. Langlois, ___ R.I. ___, 149 A.2d 349 (1959).

[24] See generally *Ex parte* Sheppard, 43 Tex. Crim. 372, 66 S.W. 304 (1902).

[25] See Note, 5 UTAH L. REV. 119 (1956). The cases are collected in Annot., 50 A.L.R.2d 1439 (1955).

[26] People *ex rel.* Gross v. Sheriff of City of New York, 302 N.Y. 173, 96 N.E.2d 763 (1951) (four months reasonable); *Ex parte* Grzyeskowiak, 267 Mich. 697, 255 N.W. 359 (1934) (four months unreasonable).

[27] Barber v. Moss, 3 Utah 2d 268, 282 P.2d 838 (1955) (six months); People *ex rel.* Troy v. Pettit, 44 N.Y. Supp. 256 (Sup. Ct. 1897) (148 days); Hall

been held as a witness even though he was suspected or charged with a crime, and later proceeded against as a defendant.[28] A confession extracted from a person jailed as a witness has later been used, over strong dissent, to gain a conviction against him.[29]

G. Appeal and Habeas Corpus

The statutes are silent as to another important question—whether the witness has any right of appeal after the magistrate has set the amount of the bond. In the only case found where this was directly in question the court held, in the absence of statute, that the witness had no right of appeal.[30] Of course, once the witness is deprived of his liberty—imprisoned in default of the bond—habeas corpus and certiorari become available.[31] However, the issues examined in habeas corpus are limited and there is a presumption of regularity. Nevertheless, the court has jurisdiction in a habeas corpus action to review the reasonableness of the bond and the period of incarceration as well as the sufficiency of the evidence on the issues of materiality and probable non-availability.[32]

v. Commissioners of Somerset County, 82 Md. 618, 34 Atl. 771 (1896) (242 days).

[28] O'Connell v. McElhiney, 138 N.Y.S.2d 138 (Sup. Ct. 1954); People *ex rel.* Goodrich v. Warden of Civil City Prison, 137 N.Y.S.2d 437 (Sup. Ct. 1954); People *ex rel.* Gross v. Sheriff of City of New York, 302 N.Y. 173, 96 N.E.2d 763 (1951). *But cf. In re* Presligiacomo, 255 N.Y. Supp. 289 (App. Div. 1932); *In re* Mayers, 169 N.Y.S.2d 839 (N.Y. Co. Ct. Gen. Sess. 1957).

[29] People v. Perez, 300 N.Y. 208, 90 N.E.2d 40 (1949).

[30] People v. Doe, 26 N.Y.S.2d 458 (App. Div. 1941). The reasons given for denial of appeal were that it was not a criminal action, the statute did not provide for appeal, that appeal would be inadequate because of the time factor, and that *habeas corpus* was more effective. The dissenting judge pointed out the fact that because *habeas corpus* was available was no reason to deny appeal, that the witness must be imprisoned before *habeas corpus* becomes available, and that *habeas corpus* was inadequate as to the issues of materiality and availability of the witness.

[31] State v. McGouldrick, 169 La. 187, 124 So. 823 (1929).

[32] People *ex rel.* Weiner v. Collins, 22 N.Y.S.2d 775 (App. Div. 1940) (jurisdiction to review reasonableness of bond); *Ex parte* Grzyeskowiak, 267 Mich. 697, 255 N.W. 359 (1934) (reasonableness of time); Quince v. Langlois, ___ R.I. ___, 149 A.2d 349 (1959) (materiality); People *ex rel.* Richards v. Warden of City Prison, 98 N.Y.S.2d 173 (App. Div. 1950) (availability). A false imprisonment action has also been allowed where the witness was detained without authority in Gise v. Brooklyn Society for Prevention of Cruelty to Children, 259 N.Y. Supp. 562 (App. Div. 1932), *modified* 260 N.Y. Supp. 787 (App. Div. 1932); *cf.* Bates v. Kitchel, 160 Mich. 94, 125 N.W. 684 (1910).

III. CONSTITUTIONAL PROBLEMS

A. General

Witnesses jailed for failure or inability to post bond often allege that their constitutional rights have been violated—usually that they have been deprived of liberty without due process or denied equal protection of the law. As yet courts have seldom held the statutes unconstitutional on their face even though no hearing, lawyer, or maximum imprisonment is provided for.[33]

B. Equal Protection

The legislature may set up classifications and a statute will not be held unconstitutional just because it is harsh or unwise if it does not unreasonably invade private rights. However, assuming the classification is reasonable, the law must apply equally to those within the classifications.[34] There is an expanding doctrine in the judicial system that a poor person may not be discriminated against; and the United States Supreme Court held in *Griffin v. Illinois* that it is a violation of equal protection to deny a person a statutory right of appeal only because he was too poor to pay for printing of the transcript.[35]

It is obvious from a reading of the statutes and case law that material witnesses are not treated equally. First of all, many witnesses go free merely on their own personal recognizance. Secondly, some witnesses are required to supply personal appearance bonds which are requested by the prosecutor and set at the discretion of the magistrate. And thirdly, some witnesses who are unable to post bonds because of their poverty are jailed for relatively long periods until the state is ready to use their testimony. Furthermore, wit-

[33] Only one case has been found directly holding one of these statutes unconstitutional. People *ex rel.* Maloney v. Sheriff of Kings County, 192 N.Y. Supp. 553 (Sup. Ct. 1921), and it has not been followed. See People *ex rel.* Brano v. Maudlin, 123 Misc. 906, 206 N.Y. Supp. 523 (Sup. Ct. 1924). The United States Supreme Court in Barry v. United States *ex rel.* Cunningham, 279 U.S. 597 (1929), referring to the federal witness statute, stated: "The constitutionality of this statute apparently has never been doubted. Similar statutes exist in many of the states and have been enforced without question." *Id.* at 617.

[34] Skinner v. Oklahoma, 316 U.S. 535 (1942).

[35] Griffin v. Illinois, 351 U.S. 958 (1956); See also Marx & Haas Jean Clothing Co. v. Watson, 168 Mo. 133, 67 S.W. 391, 395 (1902).

nesses are jailed indiscriminately, generally without distinctions of extenuating circumstances being observed. For example, one witness is jailed, and probably rightly so, because he intentionally refuses to give his personal recognizance submitting to the jurisdiction of the court. Another witness, although he willingly gives his personal recognizance, is jailed because he intentionally refuses to supply the money to furnish the required bond. And another witness is likewise jailed although he is willing to personally recognize, and even though he has failed to post bond only because of his poverty.

C. Due Process

Where a state deprives a person of his liberty it must be done via due process of law. And where adversary proceedings are concerned it is well settled that two essential elements of due process are notice and the right to be heard in opposition; this is true whether or not the statute provides for such.[36] The right to a hearing may be waived[37] and the hearing need not be before a judgment if an appeal is afforded.[38] In the case of the witness it has been held there is no right of appeal.[39] Thus there must be an adequate hearing before the witness is committed if due process is to be observed.

Another question is whether the witness has the right to counsel and if so whether he must be advised of this right. Probably the most closely analogous situation here is the right of an accused to counsel in a preliminary hearing. Although the witness is not accused of a crime, the same results flow to him as to the defendant in the preliminary hearing, *i.e.*, bail or incarceration until trial. An accused may not be refused counsel in the preliminary hearing, but the states are split as to whether he must be advised of his right or furnished a lawyer at that stage.[40] The majority of the states advise the defendant of his right to counsel at all stages. In failing to advise of the right to counsel at the preliminary stage the minority

[36] A large number of cases are collected in 12 AM. JUR. *Constitutional Law* § 573 nn. 16, 17 (1938).

[37] Blackmer v. United States, 284 U.S. 421 (1932).

[38] American Surety Co. v. Baldwin, 287 U.S. 156 (1932).

[39] People v. Doe, 26 N.Y.S.2d 458 (App. Div. 1941). See Ohio *ex rel.* Bryant v. Akron Park Dist., 281 U.S. 74, 80 (1930), to the effect that the right of appeal is not essential for due process if observed in original proceedings. *But cf.* Findlay v. Board of Sup'rs. of County of Mohave, 72 Ariz. 58, 230 P.2d 526 (1951), where no due process in the original proceedings.

[40] The cases are collected in Annot., 3 A.L.R.2d 1003 (1949).

reason that it is not yet a criminal proceeding.[41] Similar reasoning was applied in the only case directly deciding this question in the case of the material witness. In *People v. Ryan*,[42] two witnesses were held in jail on default of bond. One asked for his lawyer—and was refused. He was released because of denial of counsel. The other witness did not request counsel, and it was held that as to him there was no denial of counsel although he had not been advised of his right. The witness, like the defendant, should be advised of his right to counsel at the hearing because incarceration for several months sometimes follows. Also, the statutes require that some sort of criminal proceedings must be in progress before the witnesses are recognized. If the proceedings have progressed sufficiently to require recognizance, bonding, and jailing of witnesses, it should be sufficient to require that they be advised of their right to counsel. The next question would then be whether the state would constitutionally be required to furnish an indigent witness with counsel. It is submitted that the answer should be in the affirmative.

D. Excessive Fines and Bail

The cases are divided as to whether constitutional prohibitions of excessive bail and fines are applicable to witnesses. Some courts have said the section is inapplicable because the witness is not accused of a crime.[43] However, assuming that the Eighth Amendment restricts state action or that the state has a comparable provision, it seems that excessive bail or fines would be prohibited in the case of the witness since the provision is not limited in terms to criminal prosecutions or to one accused of a crime. Particularly high bonds have been held to be excessive, and it has been argued that bonds set at a very high figure are, in effect, an exclusion of bail.[44] Seldom, however, have bonds been found to be excessive on appeal.

[41] *E.g.*, Roberts v. State, 145 Neb. 658, 17 N.W.2d 666 (1945); Lingo v. Hann, 161 Neb. 67, 71 N.W.2d 716 (1955).

[42] In People *ex rel.* Fusco v. Ryan, 124 N.Y.S.2d 690 (Sup. Ct. 1953), the court held the witness had not been denied counsel in absence of such request but the court said the witness should be advised of right to counsel. The present New York custom is that the magistrate advises the witness of his right to counsel, and if the witness cannot afford counsel the court assigns a lawyer to act without fee.

[43] People *ex rel.* Rao v. Adams, 296 N.Y. 231, 72 N.E.2d 170 (1947); State v. McGouldrick, 169 La. 187, 124 So. 823 (1929) (dictum).

[44] People *ex rel.* Richards v. Warden of City Prison, 98 N.Y.S.2d 173 (App. Div. 1950). Even if the cost of the bond can be paid the effect may be to

IV. WISDOM OF THE PRESENT LAW

Assuming the constitutionality of the statutes in terms and application, their social desirability and necessity is questionable. A distinction should first be drawn between the situation where the witness intentionally refuses to submit to the court's jurisdiction or is trying to evade service. Incarceration in that event may be desirable. Whether it is necessary for the state to require bail of an innocent witness "guilty" only of having knowledge of facts under inquiry, however, is a different matter. Even more questionable is the jailing of a witness unable to post bond because he is too poor.

The deprivation of the liberty of the individual witness must be weighed against the overall social justice to be gained. On one side, the prosecutor must have evidence if a conviction is to be gained, and the accused must be confronted by the witness if the conviction is to be upheld.[45] On the other side, the statutes are very harsh in method. The only reason for imprisonment of the witness is either that he is too poor to provide the bond, or it is *suspected* that he will not appear as ordered.

Courts have sought to justify commitment of material witnesses on several different grounds. In *People* ex rel. *Ditchik v. Sheriff of Kings County*,[46] for example, the court observed that the statute is "an effective instrument by which law enforcement agencies endeavor to cope with offenders against the penal law . . . ." Surely, holding the witness in jail until needed may be an effective method, but effectiveness alone cannot justify the undesirable method by which that end is attained.

impose a stiff penalty for having knowledge of facts under inquiry. According to the current standard cost of appearance bonds, it costs $20 per thousand with security, or $40 per thousand without security. Thus, it would cost $40 for a $1,000 bond without security. Even with security it would cost $200 for a $10,000 appearance bond.

[45] Imprisonment provisions of these witness statutes have been justified in terms of necessity. See Comfort v. Kittle, 81 Iowa 179, 46 N.W. 988 (1890). One prosecutor is of the following opinion: "The prosecutor will favor this type of statute, knowing full well that innocent people are to be deprived of their liberty. Such deprivation, however, flows naturally from the efforts of maintaining an organized and civilized society. The forces of evil will not hesitate to tamper with a witness, and sometimes the forces of fear are more potent. The prosecutor must preserve his evidence. If to do this an innocent person is to be jailed, it is the sacrifice he must make as his contribution to law and order." Letter from Edward S. Silver, *supra* note 5.

[46] 12 N.Y.S.2d 341, 344 (Sup. Ct. 1939).

For three centuries it has been recognized that a witness has a duty to come forward and give evidence[47] and a few courts have sought to use this duty as justification for jailing a material witness too poor to afford a bond. For example, in *Markwell v. Warren County*,[48] the court reasoned that because of this duty and doubt that it would be performed, imprisonment of the witness was not for his poverty but because he could not be trusted to perform his duty without compulsion. It should be made clear, however, that the duty owed is for the witness to come before the court and give evidence when it is required. In the above case the witness was not imprisoned for a violation of any legal duty. He was not even given an opportunity to perform or violate the duty which the law requires. The witness was jailed only on the suspicion that he would not perform when required. We might compare the divorced husband who is ordered to pay alimony. He may certainly be jailed for failing to perform that duty, but jailing him on the suspicion that he will default sometime in the future would be repugnant to our sense of justice.

Some courts have analogized the position of the witness to that of the juror. This was done, for example, in both the *Ditchik* and *Crosby* cases. Thus in the former case the court stated:[49] "That it [imprisonment of the material witness] is a restraint and interference upon liberty must be conceded; but so is serving on a jury which is locked up night after night and week after week for the duration of a long trial." It is submitted that this analogy is faulty. Although the witness and the juror have similar duties, *viz.*, to appear at the trial, and although both may be punished for a violation of that duty, it would be surprising to find a juror imprisoned because there was reason to suspect that he would not appear when required. Yet this is exactly what is done with the witness. Although the juror can be replaced and the witness cannot, it is certainly unfair to imprison the witness on the suspicion that he will not do something which is to be required of him in the future.

A closer analogy has been drawn by the Utah court in *Barber v. Moss*,[50] which was an action for witness fees. The court compared the witness to the accused who is kept in jail before the trial, but is later proven innocent. Although it may be undesirable to keep the

[47] 8 WIGMORE, EVIDENCE § 2192 (1940).

[48] 53 Iowa 442, 5 N.W. 570 (1880).

[49] People *ex rel.* Ditchik v. Sheriff of Kings County, 12 N.Y.S.2d 341, 344 (Sup. Ct. 1939); *cf.* Crosby v. Potts, 8 Ga. 463, 69 S.E. 582 (1910).

[50] 3 Utah 2d 268, 282 P.2d 838 (1955).

accused imprisoned in default of bond, there is evidence that he has previously committed a crime. Furthermore, the person accused of a crime has the right to a speedy trial, and other constitutional safeguards not available to the witness.

Courts generally have reasoned that if the witness without funds was exempt from imprisonment until trial there would be nothing to insure his attendance when required.[51] Certainly, this is a problem deserving attention.[52] It was more troublesome, however, before the widespread enactment of the reciprocal witness statutes,[53] and of the Federal statute making it a crime to travel in interstate commerce to avoid giving testimony.[54] To be sure, however, there is still the problem of locating the witness who absconds and doubtless there always will be. But a proper use of the above statutes in combination with other needed statutes enacting severe penal sanctions for violation of the witness' duty to testify would appear to be a more satisfactory answer than preventing a violation of that duty by jailing the witness beforehand.

In 1912 the Committee on Jurisprudence of the American Bar Association was asked to study and disapprove of material witness statutes. The committe, however, refused to do so:[55]

> . . . It matters not how atrocious the crime, and that the witness to be detained is the only witness, and that he has expressly declared that he will flee the country, so as to avoid testifying, yet, nevertheless, we are asked to say that he should not be detained. This your committee must decline to do, for, 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.

In 1930, however, the American Bar Association sponsored

[51] *E.g.*, Crosby v. Potts, 8 Ga. 463, 69 S.E. 582 (1910); Comfort v. Kittle, 81 Iowa 179, 46 N.W. 988 (1890) (dissent). See also Note, 43 HARV. L. REV. 121 (1930).

[52] *Compare* People *ex rel.* Gross v. Sheriff of City of New York, 302 N.Y. 173, 96 N.E.2d 763 (1951), *with* People v. Manufacturer's Cas. Ins. Co., 109 N.Y.S.2d 716 (Sup. Ct. 1951). These cases show an example of the prosecutor's problem. Gross was held as a witness in jail for four months in default of $250,000 bond. Later, the bond was reduced to $25,000 and he was released to the custody of the district attorney. After his release, he fled to another state even though he had previously submitted to the jurisdiction of the court.

[53] Constitutionality upheld in People v. O'Neill, 359 U.S. 1 (1959).

[54] 18 U.S.C. § 1073 (1958).

[55] 377 A.B.A. REP. 431-33 (1912).

Model Code of Criminal Procedure[56] drew an important distinction between the material witness unable to post bond for financial reasons and one who, though able to do so, was merely obstinate. In the former case the witness could only be detained for a maximum of three days or until his deposition was taken, whichever period was shorter. This would appear to be a reasonable compromise between the respective interests of the State and of the material witness.

It is not necessary, constitutionally speaking, for the witness actually to be present at the trial. The accused's constitutional right of confrontation is satisfied provided that the accused has at some point in the criminal proceedings been confronted by the witness and been afforded the right of cross-examination.[57] There was, to be sure, much doubt of this in earlier times and state legislatures, because of such doubt, generally did not provide for the introduction of depositions on behalf of the State in criminal cases. Nor have the courts allowed this independently of statute.[58] It is crystal clear, however, that there is today no constitutional objection to the admissibility of depositions by the State (assuming the defendant had an opportunity to cross-examine) and that material witness statutes can no longer be justified on the theory that the witness' presence in court is essential to satisfy the defendant's constitutional rights.

There is, furthermore, no compelling reason for not allowing the prosecutor, as well as the accused, to take the witness' deposition[59] for use at trial where there is good reason to believe that his testimony would otherwise be lost. And this should include the situation

[56] ABA-ALI CODE CRIM. PROC. §§ 56-58 (1930). "One of the evils in connection with the administration of the criminal law in most states is the practice of confining for long periods of time, generally in the county jail, witnesses who cannot give bail. The purpose of the above section is to remedy this situation." Note, (Apr. 1928 Draft). See also FLA. STAT. §§ 902.15 to .17 (1941).

[57] Some cases upholding convictions based on depositions are: People v. Hunley, 313 Mich. 688, 21 N.W.2d 923 (1946); State v. Kemp, 124 La. 85, 49 So. 987 (1909); People v. Day, 219 Cal. App. 562, 27 P.2d 909 (1933); State v. La Due, 164 Minn. 499, 205 N.W. 451 (1925). *But cf.* Haynes v. People, 128 Colo. 565, 265 P.2d 995 (1954) (where the prosecutor did not lay sufficient foundation).

[58] The rules relating to constitutionality and use of depositions at trial by the prosecutor may be found in 5 WIGMORE, EVIDENCE §§ 1397-98, 1401-05 (1940); 5 WHARTON, CRIMINAL LAW AND PROCEDURE §§ 2038-40 (1957); 1 WHARTON, CRIMINAL EVIDENCE § 259 (12th ed. 1955); 2 *Id.* §§ 470-78. For annotations see Annot., 90 A.L.R. 377 (1934) and Annot., 159 A.L.R. 1241 (1940).

[59] 5 WIGMORE, EVIDENCE § 1398 (1940).

where the prosecutor has reason to suspect that the witness will flee the jurisdiction or go into hiding. At the trial the deposition should be admitted for consideration by the jury against the accused if his constitutional rights were observed and the witness has actually fled and is not within the jurisdiction, or the prosecutor in good faith is unable to locate the witness, or is unable to have the witness returned to the jurisdiction.

One problem remains, that of jailing the witness where the defendant is unknown or not in custody. In this situation the deposition of the witness could not be used at the trial against the accused. It is submitted, however, that justice does not require that an innocent person be jailed as a witness where the accused is unknown or still at large. The danger of lengthy commitment is far too great.

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