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THE STATUTORY NOTICE OF ALIBI

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In 1920 appeared in these pages the suggestion, derived from the practice in the Scottish criminal courts, that the defendant in a criminal case should be required to furnish advance notice of his intention to rely upon the defense of alibi.[1] Since then the idea has been given the force of law in two jurisdictions, Michigan and Ohio, and there has been a determined effort to effect its legislative adoption in New York.

The Michigan statute, which was passed in 1927,[2] requires notice of both the defenses of alibi and of insanity at the time of the act alleged. So far as relates to alibi, it provided as follows:

"Sec. 20. Whenever a defendant in a criminal case not cognizable by a justice of the peace shall propose to offer in his defense testimony to establish an alibi on behalf of the defendant . . . such defendant shall not less than four days before the trial of such cause file and serve upon the prosecuting attorney in such cause a notice in writing of his intention to claim such defense and in cases of a claimed alibi such notice shall include specific information as to the place at which the defendant claims to have been at the time of the alleged offense.

"Sec. 21. In the event of the failure of a defendant to file the written notice prescribed in the preceding section, the court may in its discretion exclude evidence offered by such defendant for the purpose of establishing an alibi . . . as set forth in the preceding section."

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[1]Millar, *The Modernization of Criminal Procedure* (1920), 11 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, 350: "Why should we not . . . require reasonable notice to the state of the character of the defense in all cases. A chief need in this regard concerns the defense of alibi. That the manufactured alibi is one of the main avenues for escape of the guilty requires no demonstration. Moreover, the amount of perjury that is annually committed in this connection forms a most considerable item in the mass of unpunished crime. This would be checked and the fabricated alibi rendered most difficult, if the accused were to be required to give the prosecution such notice of the intended defense as would enable it to confirm or refute the accused's assertion. Such is the practice in Scotland, where a defendant is not permitted to prove an alibi unless he pleads it as a special defense. In doing so he must specify the place where he intends to show he was at the time in question."

[2]Code of Criminal Procedure 1927, c. VIII, §20: Public Acts, 1927, p. 320.

Two years later came an amendment in respect of the time of notice. Under this the notice is to be given "at the time of the arraignment or within ten days thereafter but not less than four days before the trial of such cause."[3]

Ohio's statute dates from 1929.[4] It consists of a single section, relating to alibi alone, but is otherwise in all essentials the same as the Michigan act, except that the time of notice is specified "as not less than three days before the trial of such cause."

The only decisions of the Michigan Supreme Court in which the statutory notice has come even incidentally in question are *People* v. *Miller* (1930)[5] and *People* v. *Wudarski* (1931).[6] In the former case error was assigned on the ground that the court below, although requested by the defendant, had refused to charge the jury as to the defense of alibi. The People sought to meet this contention by reliance on the fact that no notice of alibi had been given pursuant to the statute. Since, however, evidence of alibi had been received without objection, the entirely proper conclusion of the Supreme Court was that the lack of notice did not relieve the trial judge from the duty of giving the requested charge. In the second case, complaint was made of the court below charging the jury that the defense of alibi was one difficult to disprove. It was conceded that this had been previously recognized by the Supreme Court as a proper charge, but it was argued that the existence of the statute had so changed the situation that such a charge was no longer correct. The court, however, thought otherwise, dismissing the contention with the remark that "in spite of the statute, the defense remains difficult to disprove." As appears from an article on the statute by the prosecuting attorney of Wayne County,[7] the point has been repeatedly made in Michigan that the act is unconstitutional as requiring the defendant to be a witness against himself. So far, however, this question has not been presented to the Supreme Court. The same writer refers to another question to which the act has given rise: "In one case," he says, "notice of intention to prove an alibi was given but at the trial the defense failed to put in an alibi. The prosecuting attorney referred to

[3]Public Acts, 1929, p. 52. As amended the statute appears in Comp. Stat. 1929, §§17313, 17314.

[4]Throckmorton's Ann. Cod. 1930, §§13444-20.

[5]250 Mich. 72; 229 N. W. 475.

[6]253 Mich. 83; 234 N. W. 157. In *People* v. *Marcus*, 253 Mich. 410; 235 N. W. 202 (1931), where notice was given, a charge of a similar character was approved.

[7]Toy, *Michigan Law on Alibi and Insanity Reduces Perjury* (1931), 9 Panel 52.

that failure in his address to the jury. He also called specific attention to the defense's notice to produce an alibi. The trial court permitted him to do so over strenuous objection by defense counsel. Although a verdict of guilty was returned in the particular case, no appeal was taken."

In Ohio, the reported cases in which the statutory notice has so far come under discussion are *Woodruff* v. *State* (1931)[8] and *Balzhiser* v. *State* (1931),[9] in the Court of Appeals, and *State* v. *Nooks* (1930)[10] and *State* v. *Thayer* (1931)[11] in the Supreme Court. In the *Woodruff* case, a notice of the defense had been given, but the trial judge, on the ground of the supposed insufficiency of the notice, declined to admit the alibi testimony when it was first offered. Later in the trial he came to a different view and received the testimony in question. It was held—and could hardly have been held otherwise—that if the exclusion in the first instance was erroneous, the error had been cured by the subsequent reception of the evidence. The *Balzhiser* case simply decides that the giving of an oral notice was not a compliance with the statute and that it was not error for the court to exclude evidence of alibi where the notice given was oral and not in writing. The *Nooks* case was one in which no notice was given and on that ground alibi testimony was excluded. The defendant contended that this was error, inasmuch as the rejected testimony tended to disprove the testimony of the State's chief witness. It was pointed out by the court that the testimony in question dealt only with the question of alibi. Resultingly, the fact that it contradicted the testimony of the witness for the State could not avail to render it admissible in the absence of notice, if the court below chose to exclude it. "To hold that there was an abuse of discretion under this record," said the court, "is to deprive section 13444-20 of any force or effect, as it is difficult to conceive how any alibi testimony in a criminal case would not tend to disprove the testimony offered by the state upon the point of the whereabouts of the accused at the time and place of the commission of the offense." The same contention was urged and the same answer returned in the *Thayer* case, the court saying even more emphatically that "any alibi testimony must in the very nature of things contradict the evidence offered by the state."[12] But two other aspects of the

[8]36 Ohio App. 287; 173 N. E. 206. In *McGoon* v. *State,* 39 Ohio App. 212; 177 N. E. 238 (1931), it was held error for the court to refuse to charge specifically as to alibi, where there was notice and some evidence in its support.
[9]35 Ohio Law Bulletin & Reporter, 120.
[10]123 Ohio St. 190; 174 N. E. 743.
[11]124 Ohio St. 1; 176 N. E. 656.
[12]See, however, *Reed* v. *State,* 44 Ohio App. 318; 185 N. E. 558 (1933),

Thayer case must be noted. The case was before the Supreme Court on error to the Court of Appeals. The latter court (opinion not reported) had advanced the view that the statute was unconstitutional, but on what ground is not disclosed. Without discussion the Supreme Court expressed its disagreement with that view and added: "This law pertains to a very important feature of the criminal law. It gives the state some protection against false and fraudulent claims of alibi often presented by the accused so near the close of the trial as to make it quite impossible for the state to ascertain any facts as to the credibility of the witnesses called by the accused who may reside at some distance from the place of trial." The judgment of the Court of Appeals, however, was affirmed on another ground, that of improper argument to the jury on the part of special counsel for the State. But a further question involved in the case appears from the concurring opinion of Matthias, J., adhered to by Robinson and Allen, JJ. The indictment charged that the offense, that of soliciting a bribe, was committed "on or about the 15th day of August." On the trial one witness for the state fixed the time as from the 10th to the 20th day of August and others referred it to the period from the 10th to the 28th. The defendant himself was permitted to testify "as to his whereabouts at the time covered by the indictment" (to use the words of the principal opinion), but corroborating evidence as to his whereabouts from August 10 to August 20 was rejected for lack of the statutory notice. Matthias, J. was of opinion that under the circumstances "the defendant could not have given such three days advance notice." Thus the case leaves us with the question as to the duty of the defendant in respect of notice as specifically related to the manner of stating time in the indictment—a question not adverted to in the principal opinion.

It thus appears that, down to the present time, there have arisen at least four questions relating to the statute under consideration. The first is that of its constitutionality. The only ground of objection in this regard which has come to our attention is that mentioned in the article above cited relating to the Michigan practice, namely, the suggestion that the provision makes the defendant a witness against himself. A sufficient answer would seem to be that we are not here in the realm of evidence but of pleading. For the notice manifestly falls in the latter category. The law is simply saying to the defend-

where in holding admissible certain testimony in impeachment of a witness for the prosecution, the court draws a narrow line between alibi and non-alibi evidence.

ant: "It is entirely competent for you to show that you were elsewhere at the time alleged, but you must tell the prosecution that you are going to do so, as a foundation for your subsequent showing." As well it might be contended that the common law requirement of a special plea in order to show former conviction, former acquittal or pardon was asking the defendant to be a witness against himself. But quite apart from this consideration, the requirement involves nothing in the nature of self-crimination. If the defendant avails himself of the notice, he is stating facts which if true will exculpate him; if he declines to avail himself of the notice, he does not in any sense confess his presence at the time alleged: this must still be proved by the prosecution. That in the absence of notice he is not allowed to contradict the witnesses of the state as to his presence at the time is an effect which only by the most nebulous of reasoning can be associated with the idea of self-crimination. The truth is that we are dealing here with something that has not the remotest connection with that idea.

The second question is also one chronicled in the article last cited. If the defendant puts in a notice of alibi and fails to introduce evidence of alibi, may the prosecution comment to the jury on this fact? A Michigan trial court, as above indicated, answered this question in the affirmative. Obviously, if no notice of alibi has been given it would be open to the prosecution to comment on the fact that its evidence as to the presence of the accused stands uncontradicted. The giving of notice cannot take away this right. But in our judgment it cannot enlarge the right. The prosecution should be permitted to refer to the failure of the accused to deny his presence at the time alleged, but not to refer to the fact that he has given the notice and failed to substantiate it. It may well be that the defense hopes to prove an alibi by witnesses other than the accused, but in advance of the trial is not certain of its ability to do so. Assuredly, in such a case, to be in a position to use the potential defense, the accused should and would give the statutory notice. If, on the trial the witnesses fail him, he is obliged either to take the stand himself or else offer no evidence at all of the alibi. Certainly, he should not be penalized if he prefers to take the latter course. In such a case to allow the prosecution to comment on the failure to produce evidence pursuant to the notice would almost amount to comment—forbidden in most jurisdictions including Michigan[13]—on the failure of the defendant to testify. In any event comment upon the giving of the

[13]Not, however, in Ohio. Const. Art. 1, §10 (Sept. 3, 1912).

notice is something to which a defendant acting in good faith should not be subjected. And while, if acting in bad faith, he would deserve this subjection, the practicalities of criminal procedure will not allow us here to discriminate. Moreover, the object of the notice is to apprise the prosecution that it may expect evidence of alibi on the part of the defendant and to confine the defendant's proof of such alibi to the indicated limits. To that object it should be restricted. It should not be capable of being perverted to the end under discussion. Any other solution of the present question would be most unfortunate. It would mean that the accused in filing the notice does so at peril. For if he fails to prove it, regardless of how confidently he had expected to be able to do so, he has laid himself open to an argument, which addressed to the jury may prejudice his case in general, and has thus placed in the hands of the prosecution a weapon which may be used against him with telling effect. The best interests of the statute require that such an extension of the right to comment should be emphatically discountenanced.

The third question is that dealt with by the Ohio Supreme Court in the *Nooks* and *Thayer* cases, that is to say, whether, despite the lack of notice, the evidence of alibi should be received on the ground that it tends to disprove the evidence offered by the state. There can be little doubt that the answer given by the court is the correct one. For, as it recognizes, alibi is in essence a negative defense. If we were to apply to it the elementary canons of common law pleading it would be deemed a matter not in confession and avoidance but of traverse. If negative it must of necessity contradict the indictment and by consequence the evidence of it must necessarily contradict the evidence in support of the indictment.

The fourth question is that raised by the concurring opinion of Matthias, J., in the *Thayer* case. There the indictment having alleged the crime to have been committed "on or about the 15th day of August," Mr. Justice Matthias in effect holds, in view of the divergencies as to the statement of time in the testimony of the prosecution's witnesses, that the defendant was under no duty at all to give notice. This reasoning is difficult to follow. For one thing, the defendant's duty to give notice is surely not to be measured or affected by what appears in the prosecution's evidence at the trial, as distinguished from what appears in the indictment; we can hardly suppose that the learned judge meant to advance anything so Gilbertian as the opposite suggestion. But this apart, there was a date stated in the indictment, namely, the 15th of August, and while its statement was preceded,

according to the Ohio practice, with the words "on or about," this had little if any difference in effect from the ordinary statement, under the common law practice, of a specific date under a videlicet, both permitting latitude of proof as to time. Certainly, the defendant could have been required, at least, to give notice that he was elsewhere on the particular day thus stated.

In its larger implications, however, the question thus arising comes to this: how is the statute to be administered with reference to the statement of time in the notice, in view of the rule that the prosecution is not confined to the exact proof of the time as laid in the indictment? If the indictment states a particular day or days with or without a videlicet, the defendant's notice cannot well be required to do more than attach his alibi to the day or days thus named. Should the evidence of the prosecution point to a different time, then the defendant should be free to establish his alibi as to this different time, despite the fact that it is not the time covered by his notice. We think that the same rule should be applied where the time is stated as "on or about" a day named. The defendant cannot in fairness be required to specify where the prosecution has failed to do so, or to meet something that is not alleged. This view is reinforced by recurrence to the practice in Scotland. There the prosecution is not confined in its proof to the date stated in the indictment, but under the ordinary rule may prove a time within three months of that alleged, although in exceptional cases even further latitude may be permitted.[14] What then as to the time to be stated in the notice of alibi? We are told that "if the accused pleads an alibi on the date charged, the alibi, if proved, will generally free him from the charge."[15] Such is the rule that ought basically to obtain under our statutes.

But this rule would seem to require some supplementation. There are many cases where the circumstances are such that the prosecution cannot know the exact time of the commission of the offense until it comes to trial, many cases where the acts of commission extend over a period of days, many cases where the evidence of the prosecution can only fix the time as an uncertain point within a certain period of days, many cases where proof of time for other reasons cannot be annexed to a particular day. In such cases the operation of the suggested rule might operate to deprive the prosecution of the benefit of the statute. Hence it should be open to the prosecu-

[14]Macdonald, *Criminal Law of Scotland* (4th ed. by Mitchell, 1929), p. 329 *sqq.*

[15]Roberton Christie, *Criminal Procedure (Solemn) s. v. Crime,* 5 Encyclopaedia of the Laws of Scotland (1928), p. 227.

tion in such cases to apply to the court for an order regulating the statement of time to be covered by the defendant's notice of alibi. The court, taking into consideration all the circumstances of the case, may then make such order in the premises as may be just to both parties. For example, supposing the allegation in the indictment to be that the offense was committed "on or about" a certain day, the court on application of the prosecution might well require the defendant in his notice to account for his whereabouts, say five days in advance and five days subsequent to the day named, if on hearing both sides this seemed to be fair under the circumstances of the case. Such an order in certain cases might properly come on motion of the defendant. If the statement of time in the indictment was in such terms that the basic rule above suggested would be difficult of application, we can think of the court, on such a motion, narrowing the time as to which the defendant must account in his notice. And it would assuredly be wise to give the court power to enter such an order on its own motion. The result thus contemplated might be accomplished by the addition to the statute of a provision phrased somewhat as follows:

"Unless otherwise ordered, the defendant by such notice shall be required to claim the defense of alibi only for the particular day or days specified in the indictment or information, or count thereof, notwithstanding that the time thus specified is laid under a videlicet or is preceded by the words "on or about" or is otherwise accompanied by words of extension. But the court, on motion of the prosecuting attorney or on its own motion, may in any case, and either before or after the filing of a notice of alibi, make such order as to the statement of time to be required in the defendant's notice of alibi as under all the circumstances of the case may be just, and, where notice of alibi has already been filed, thereby direct the filing and serving of an amended notice of alibi. The court may also on motion of the defendant, made before the filing of any notice of alibi, enter an order similarly regulating the statement of time to be made in such notice. Where on the trial the time of the offense is proved otherwise than as accounted for in the notice pursuant to the provisions of this section, evidence of alibi in respect of the time thus proved shall be admissible to the same extent as if such time had been specifically accounted for in the notice."

Even without such an additional provision, it would usually be within the power of the court to accomplish a result just to both sides, since the statute both in Michigan and Ohio provides for exclusion

of alibi evidence unsupported by notice not absolutely but in the discretion of the court. If, however, other courts were to share the view taken by Matthias, J., in the *Thayer* case, such an addition would be imperative to prevent the frustration of the statute.

Before adoption of the statute in Michigan, Professor Burdick had emphasized the possibilities of such a measure as a corrective of a common abuse.[16] Later, Professor Willoughby in his book on the *Principles of Judicial Administration* lent it his support.[17] Experience in the two jurisdictions which now have the statute has demonstrated the correctness of their appraisal. As to Michigan we find it said:

"It has been noted in the courts of Detroit since the passage of this act that alibi defenses are becoming less. Those offered almost always prove faulty and convictions follow. The great increase in convictions where alibis have been offered since the passage of the act is attributed by police and prosecuting officials to the statutory notice given them, which permits an inquiry into the alleged facts of the alibi prior to trial and the refutation and destruction of a false alibi. Instances have arisen where an alibi has been offered as a defense after notice given under the Alibi act and the police and prosecuting officials have been able to prove that the alibi witnesses committed perjury. Several perjury convictions have resulted on that score in Detroit."[18]

With reference to the situation in Ohio, where the statute went into force on July 21, 1929, we read that:

"When the September Term of court opened two months later, the effect of Ohio's new alibi defense law was noticed almost immediately. The number of alibi defenses was reduced to a minimum and in a very short time the popularity of this mode of defense waned. Criminals as well as their lawyers seemed impressed with the fact that an alibi defense refuted in open court is worse than no defense at all. Moreover, the provision requiring that the prosecutor be served with notice 'not less than three days before the trial' of the intention of the defense to claim an alibi, robbed this mode of defense of its most valuable quality, i. e., the surprise element."[19]

As before noted, attempt has been made to obtain adoption of a similar statute in New York. A bill to this end was introduced

[16]Charles Kellogg Burdick, *Criminal Justice in America* (1925), 11 Am. Bar Assn. Journ. 512.
[17](1929) pp. 450-451.
[18]Toy, *op. cit.* supra note 7, at p. 52.
[19]Leona Marie Esch, *Ohio's New Alibi Defense Law* (1931), 9 Panel 42.

in 1931 and passed the Senate, but was rejected by the House. Reintroduced in 1932 it failed to obtain the recommendation of the Codes Committee. It was introduced for the third time in 1933, but was again defeated. The bill in question differs in certain respects from the statute obtaining in Michigan and Ohio. It provides that—

"At least five days prior to the date set for his trial, if the defense of the defendant is to be or may be based totally or partially upon the presence of the defendant elsewhere than at the scene of the crime at the time of its commission, the defendant shall furnish the district attorney or other prosecuting officer with a bill of particulars stating the names and post office addresses or residences of the witnesses upon whom the defendant intends to rely to establish his said presence elsewhere than at the scene of the crime and at the time of its commission. Unless the defendant shall furnish such bill of particulars, the court, in the event such defense is interposed upon the trial, may exclude such testimony or witnesses or may impose such conditions and grant such adjournment as may be deemed necessary to enable the prosecution to meet such defense and/or investigate the facts so testified to."[20]

The active protagonist of the measure, it is encouraging to observe, has been the Attorney General of the State. It has been enthusiastically advocated by the *Panel,* the journal published by the Association of Grand Jurors of New York County, in whose pages for the last two years are to be found numerous articles and editorials[21] pointing to the improvement of criminal procedure which it would entail and vigorously urging its passage. None of these writings, however, lays any stress upon the principal feature wherein it differs from the statute above discussed. It seems to us that the bill would have had a much better chance of success if it had not gone so far as to insist that the defendant state the names and addresses of the witnesses proposed to be called in support of the alibi. Ideally the defendant ought to be under the same duty as is the prosecution in most jurisdictions in respect of giving advance notice of the names of witnesses;[22] and, indeed, the State of Washington, by a statute of 1925, has laid just this duty upon the defendant.[23] But the traditions

[20]Senate Bill No. 569, Int. 559, February 1, 1933. We are indebted to the New York Attorney General's Office for a copy of this bill.

[21]Especially C. C. Nott, Jr., in 9 Panel, p. 58; T. S. Rice in 9 Panel, p. 37 and 10 Panel, p. 55; J. J. Bennett, Jr., in 10 Panel, p. 46: see also 9 Panel, p. 38; 10 Panel, p. 14, and 11 Panel, p. 12.

[22]See Millar, *The Function of Criminal Pleading* (1921), 12 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, pp. 504-505.

[23]Remington's Comp. Stat. Supplement 1927, §2050.

of criminal justice are such that professional opinion is still generally reluctant to accept this mutuality of advance information. We think that Washington has set an example that is bound to be followed, but, until there is readiness to admit a general measure of the kind, it seems a mistake to insist upon any special application of the same idea. The information in question, no doubt, would render the notice more effective, but, without specification of the witnesses, the requirement of notice has satisfactorily accomplished its purpose in Michigan and Ohio, as well as in Scotland. In our judgment, the additional advantage to the State accruing from such specification is not sufficient to warrant exposing the measure to the opposition which this more radical requirement invites.

It may be, therefore, that the failure of the New York measure is to be accounted for because of this departure from the general lines of the statutes already adopted. At any rate we prefer to think so, and to entertain undiminished the hope that the future may see this requirement of notice of alibi a recognized rule of criminal procedure throughout the American jurisdictions.