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C. IVES WALDO, JR., Case Editor.

COMMENT BY JUDGE ON FAILURE OF ACCUSED TO GIVE NOTICE OF ALIBI DEFENSE.—[England] When formally charged in the police court of carnal knowledge of a girl between the ages of sixteen and thirteen defendant had said, "I am not guilty. I reserve my defense." At the trial he raised the defense of alibi. The trial judge commented to the jury on the fact that the defendant's silence had deprived the prosecution of an opportunity to make adequate inquiry into the truth of the defense. The verdict was "guilty." Defendant was convicted. *Held:* on appeal affirmed. The comment did not constitute a misdirection. The silence of the accused, while not evidence against him, could be considered in reference to the weight of the alibi defense: *Rex* v. *Littleboy* [1934] 2 K. B. 408, 151 L. T. 412.

It seems well established that a mere failure on the part of a defendant to raise his alibi defense when formally charged before a magistrate cannot be considered as substantive evidence corroborating the testimony of the prosecution's witnesses: *Rex* v. *Tate* [1908] 2 K. B. 683, 99 L. T. 620; *Rex* v. *Whitehead* [1929] 1 K. B. 99. However authorities are divided as to whether a comment by the judge on defendant's failure is unduly prejudicial. The holding in the instant case that it is not is well supported by precedent: *Rex* v. *McNair* [1909] 2 C. A. R. 2; *Rex* v. *Moran* [1909] 3 C. A. R. 25; *Rex* v. *Parker* [1933] 1 K. B. 850; *Rex* v. *Humphries* [1903] 67 J. P. 396. In *Rex* v. *McNair, supra,* the court succinctly said, "If a prisoner is ill-advised enough to say at the police court that he will reserve his defense, thereby making it impossible for his story to be investigated before the trial, it is no ground on which we can interfere with the verdict. For an innocent man the sooner his defense is raised the better." On the other hand *Rex* v. *Naylor* [1933] 1 K. B. 685, 23 C. A. R. 177, is a strong authority holding that such a comment by the trial judge is unfair and constitutes reversible error. It is there pointed out that the Criminal Justice Act (1925) §12-2 prescribes that a prisoner before the magistrate shall be cautioned in these words, "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say may be taken down in writing and may be given in evidence upon your trial." Also the fact is emphasized that a defendant at such times usually acts on advice of counsel. The court says, "It would be strange if a point could properly be made against a prisoner because, acting on the advice of a solicitor

and following the very words of an Act of Parliament, he says that he does not desire to say anything at that stage." Accord: *Rex* v. *Tate, supra; Rex* v. *Whitehead, supra.* But see Note (1932) 6 Aust. L. J. 175 criticizing *Rex* v. *Naylor, supra,* on the ground that since the object of a trial is to ascertain the truth, and since every care is taken to give the accused full information as to the evidence upon which the prosecution will rely, it is only fair and proper that he make a seasonable disclosure of the nature of his defense.

While the precise problem presented by the instant case has not been discussed in American decisions, the weight of authority in this country seems to be that, since alibi is a perfectly legitimate defense, and the only one which may be open to an innocent person accused of crime, any instruction which tends to belittle or disparage this defense is erroneous and constitutes prejudicial error: *Albin* v. *State* (1878) 63 Ind. 598; *Sheehan* v. *People* (1889) 131 Ill. 22, 22 N. E. 818; *Henry* v. *State* (1897) 51 Neb. 149, 70 N. W. 924; *State* v. *Crowell* (1899) 149 Mo. 391, 505 S. W. 893; *State* v. *Donelly* (1921) 116 S. C. 113, 107 S. E. 149, 14 A. L. R. 1420 (judge told jury that alibi was a rogue's defense); *People* v. *Barr* (1922) 55 Cal. App. 321, 203 Pac. 828; *State* v. *Molay* (1932) 174 La. 63, 139 So. 759; *People* v. *Russell* (1935) 266 N. Y. 147, 194 N. E. 65; *People* v. *Robbins* (1935) 275 N. Y. S. 940, 242 App. Div. 516. Some courts, however, hold that where a defendant relies on an alibi, a cautionary instruction to the effect that the defense is easily manufactured and that proof thereof should be scanned with care is proper: *People* v. *Tice* (1897) 115 Mich. 219, 73 N. W. 108; *People* v. *Wudarski* (1931) 253 Mich. 83, 234 N. W. 157; *People* v. *Marcus* (1931) 253 Mich. 410, 235 N. W. 402; *Shea* v. *U. S.* (1918) 251 Fed. 433; *State* v. *Leet* (1919) 187 Iowa 385, 174 N. W. 253; *State* v. *Cartwright* (1919) 188 Iowa 579, 174 N. W. 586; *State* v. *Wrenn* (1922) 194 Iowa 552, 188 N. W. 697; *People* v. *Sharp* (1922) 58 Cal. 637, 209 Pac. 266. Such instructions are more apt to meet with approval if the jury is also told that the defense of alibi is legitimate and entitled to full weight: *People* v. *Carson* (1920) 49 Cal. App. 12, 192 Pac. 318; *State* v. *Banoch* (1922) 193 Iowa 851, 186 N. W. 436.

The tendency of the courts to view the defense of alibi with suspicion has its root in the fact that this defense lends itself more easily than others to fabricated and perjured evidence, and in the fact that by concealing his intention until the time of trial the accused may deprive the state of an opportunity to adequately investigate the truth or falsity of the testimony offered and the credibility of the witnesses. If the ability of the accused to take advantage of the prosecution by unfair surprise were removed, much of the popularity of the alibi defense would be obviated, for the state would have a chance to expose false evidence. The Scottish law has a remedy for this evil. It provides that alibi, insanity and certain other defenses cannot be raised unless tendered to the court at the first diet, or at the latest two days before the trial, as a plea of special defense: *Renton* and *Brown,* "Criminal Procedure According to the Law of Scotland" (2nd ed. 1928) p. 68. While many of the United States have laws requiring a notice of insanity defense, *Dean,* "Advance

Specifications of Defense in Criminal Cases" (1934) 20 A. B. A. J. 435, 437, only two at the present time have laws requiring alibi notice. Michigan and Ohio adopted such laws in 1929: Mich Comp. Laws (1929) §§17313, 17314; Ohio Code Ann. (Throckmorton 1934) §13444-20. The Ohio statute is as follows: "Whenever a defendant in a criminal cause shall propose to offer in his defense, testimony to establish an alibi in his behalf, such defendant shall, not less than three days before trial of such cause, file and serve upon the prosecuting attorney, a notice in writing of his intention to claim such alibi; which notice shall include specific information as to the place at which the accused claims to have been at the time of the alleged offense; in the event of failure of a defendant to file the written notice in this section prescribed the court may, in its discretion, exclude evidence offered by the defendant for the purpose of proving such alibi." There has been considerable agitation for such a law in New York although none has yet been passed: See *Millar,* "The Statutory Notice of Alibi" (1934) 24 J. Crim. Law 849. "The Draft Code of Criminal Law and Procedure" proposed by the Committee on Revision of the Illinois State Bar Association in co-operation with the Judicial Advisory Council of Cook County contained such a provision: Draft Code 408. The need for such legislation and the value of that already enacted has been emphasized by the authorities: *Millar, op. cit. supra; Millar,* "The Modernization of Criminal Procedure" (1920) 11 J. Crim. Law 344; *Dean, op. cit. supra,* p. 436; *Burdick,* "Criminal Justice in America" (1925) 11 A. B. A. J. 510, 512. In *State* v. *Thayer* (1931) 124 Ohio S. 1, 176 N. E. 656, the trial court refused to admit alibi evidence because the defendant had not given the statutory notice. The appellate court in affirming asserted the desirability of the law and upheld its constitutionality. Accord: *State* v. *Nooks* (1930) 123 Ohio S. 190, 174 N. E. 743. See also *Woodruff* v. *State* (1930) 360 Ohio App. 287, 173 N. E. 206 (where notice is given evidence of alibi should be admitted); *McGoon* v. *State* (1931) 390 Ohio App. 212, 177 N. E. 238; *People* v. *Miller* (1930) 250 Mich. 721, 229 N. W. 475 (state waived failure to give notice by not objecting to alibi testimony at the trial); *People* v. *Wudarski, supra.*

In both Michigan and Ohio these laws have proved a definite aid in the administration of justice. After the law was passed in Ohio, "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 notice)...robbed this mode of defense of its most valuable quality, i. e., the surprise element": *Esch,* "Ohio's New Alibi Defense Law" (1931) 9 Panel 42. Similarly in Michigan the percentage of convictions in cases where alibis were offered increased. The opportunity for inquiry afforded police officials resulted not only in the refutation of false alibis but also in a number of perjury convictions of alibi witnesses: *Toy,* "Michigan Law on Alibi and Insanity Reduces Perjury" (1931) 9 Panel 52.

The fact that such legislation was in force would afford a strong additional argument to those courts

which hold it erroneous for the trial judge to instruct the jury that the alibi defense, as one especially difficult to disprove, should be carefully scrutinized. The Michigan court, however, since the passage of the law has held that such an instruction is still proper in that state: *People* v. *Wudarski, supra; People* v. *Marcus, supra.* It certainly would dispense with the necessity for any comment, like that in the instant case, on the fact that defendant unfairly surprised the prosecution by remaining silent as to his defense until the day of trial.

C. I. WALDO, JR.

WITHDRAWAL OF PLEA OF GUILTY. —[California] Defendant, an illiterate Mexican unable to speak English, pleaded guilty to a charge of murder and was sentenced to death. He then applied for a writ of error *coram nobis* and moved to vacate the judgment and sentence, expressing a desire to change his plea, and asserting that he had been induced to enter it on the assurance of his counsel that the district attorney had discussed the case with the trial judge and that a life sentence would be imposed should he plead guilty, while hanging would be asked if he did not. The state not being represented at the hearing below, no contradictory evidence was presented, but the application was denied. *Held:* on appeal, reversed. The asserted unfair treatment of defendant not being denied, he should be allowed to withdraw his plea: *People* v. *Campos* (Cal. 1935) 43 Pac. (2d) 274.

Motions looking to the withdrawal of a plea of guilty are addressed to the discretion of the trial court, usually subject to review on appeal if denied: *Fogus* v. *United States* (C. C. A., 4th, 1929) 34 F. (2d) 97; *People* v. *Lavendowski* (1927) 326 Ill. 173, 157 N. E. 193; *Cassidy* v. *State* (1929) 201 Ind. 311, 168 N. E. 18, 66 A. L. R. 622; *State* v. *Hare* (1932) 331 Mo. 707, 56 S. W. (2d) 141. *Contra,* as to any right to appeal: *Billingsley* v. *United States* (C. C. A., 9th, 1918) 249 Fed. 331; *Clark* v. *State* (1896) 58 N. J. L. 383, 34 Atl. 3. The conditions under which a change of plea should be permitted vary widely, but the principal case presents the typical combination of an ignorant defendant, official pressure, and a severe sentence, which probably warranted the granting of the appeal. Wherever the plea of guilty is made by a defendant who is ignorant of its effect or of the extent of punishment which might be imposed, withdrawal should be allowed. Frequently when this rule is involved he is a foreigner, a negro, or a stranger under such handicaps as inexperience, illiteracy or feeblemindedness: *People* v. *Lavendowski, supra; Harris* v. *State* (1932) 203 Ind. 505, 181 N. E. 33; *East* v. *State* (1929) 89 Ind. App. 701, 168 N. E. 28; *Cassidy* v. *State, supra; Corlise* v. *State* (1928) 94 Fla. 1192, 115 So. 528. When the prisoner was not told before his plea that he could have counsel, and was repeatedly denied communication with attorneys thereafter, the appellate court may properly reverse the judgment: *People* v. *Pisoni* (1926) 233 Mich. 462, 206 N. W. 986. And appointment by the court of an inexperienced or indifferent attorney may not remedy the failure of the judge to inform the defendant of his rights: *State* v. *Poglianich* (1927) 43 Ida. 409, 252 Pac. 177; *Rhodes* v. *State* (1927) 199 Ind. 183, 156 N. E. 389. Extreme haste in proceedings by which a

young negro was sentenced to the penitentiary within four hours after the offense, without any advice as to his right to counsel, has also been held sufficient grounds for withdrawal: *Tipton* v. *State* (1925) 30 Okla. Crim. Rep. 56, 235 Pac. 259. On the other hand, if the defendant was fully informed of his rights the fact that he had no attorney does not in itself warrant a withdrawal: *People* v. *Wheeler* (1932) 349 Ill. 230, 181 N. E. 623; and an affidavit that the court had not advised him of his rights has been held insufficient when it did not specifically allege his ignorance: *Farnsley* v. *State* (1925) 196 Ind. 722; 149 N. E. 436. Should it feel that justice has been done the appellate court can hold that the bare recital in the record that the defendant was fully advised by the trial judge is sufficient: *People* v. *Walker* (1911) 250 Ill. 427, 95 N. E. 475; but this is rightly a form which a court must sometimes feel free to ignore.

However well the defendant may understand the significance of a plea of guilty it ought not to be final when popular prejudice or threats of mob violence would make the alternative of jury trial a fruitless one: *Sanders* v. *State* (1882) 85 Ind. 318; *Little* v. *Commonwealth* (1911) 142 Ky. 92, 133 S. W. 1149; *State* v. *Poglianich, supra; State* v. *Harvey* (1924) 128 S. C. 447, 123 S. E. 201. Threats by prosecutors of additional charges or trouble may add reasons for permitting withdrawal: *Fromcke* v. *State* (1927) 37 Okla. Crim. Rep. 421, 258 Pac. 927; *State* v. *Harris, supra.*

As in the principal case, the contention is often made that the plea was secured by a promise of leniency. The form of this promise might establish a prosecutor's agreement, and be binding in some states even without the approval of the judge: *People v. Bogolowski* (1925) 317 Ill. 460, 148 N. E. 260; same case, 326 Ill. 253, 157 N. E. 181; and see Note (1933) 24 J. C. L. 600. A promise merely to recommend a lighter sentence to the judge can be overcome by the use of a legal presumption that defendant knew that the judge was not bound to follow any recommendation: *Camarota* v. *United States* (C. C. A., 3rd, 1924) 2 F. (2d) 650; *State* v. *Lewis* (1924) 113 Ore. 359, 230 Pac. 543; *Mahoney* v. *State* (1925) 197 Ind. 335, 149 N. E. 444; *People* v. *Ensor* (1925) 319 Ill. 255, 149 N. E. 737. *Cf. People* v. *Clavey* (1934) 355 Ill. 358, 189 N. E. 364. The evidence presented in all such cases is usually in great conflict, the extent of the inducement may vary widely, and the confusion of the precedents and formulas gives the greatest possible leeway to the courts. It would seem desirable, ordinarily, to ignore statements by policemen and jailers: but see as exceptions *People* v. *Byron* (1915) 267 Ill. 498, 108 N. E. 685 (arresting officer told boy he would get probation, but the judge said nothing about it while explaining his rights to him); *Cassidy* v. *State, supra* (feebleminded boy advised to plead guilty by his employer and one of the arresting officers, but no specific promises made). At the other extreme should fall the principal case, with both the prosecutor and judge said to have agreed on a lighter sentence to the knowledge of the defendant, and withdrawal should be allowed when the bargain is not kept: *Morgan* v. *State* (1926) 33 Okla. Crim. Rep. 277, 243 Pac. 993; *State* v. *Kring* (1880) 71 Mo.

551. The intervening possibilities must of necessity be left to the discretion of the courts.

Withdrawal of the plea of guilty will seldom be allowed in order to permit the defendant to raise a purely technical defense: *Carr* v. *State* (1924) 194 Ind. 162, 142 N. E. 378 (illegal search); *People* v. *Chesnas* (1927) 325 Ill. 361, 156 N. E. 372 (confession possibly inadmissible); *Bartczek* v. *State* (1925) 186 Wis. 644, 203 N. W. 374 (illegal arrest); *People* v. *Murphy* (1923) 62 Cal. App. 709, 217 Pac. 810 (appellant admits the same crime against one not named in the indictment); *Mack* v. *State* (1932) 203 Ind. 355, 180 N. E. 279, 83 A. L. R. 1349 (attempt to change "not guilty" to plea in abatement on alleged prejudice of one grand juror). This result is a logical one, since appellant's guilt is no longer the principal issue, although it may suggest that the prisoner was not fully informed at the time of his plea as to just how strong a defense could be made in his behalf. Since an indictment which does not charge a crime cannot be the basis of a conviction under any plea, withdrawal should be allowed in such cases as a formality aiding in the subsequent treatment of the case: *State* v. *Hare, supra; People* v. *Rosenkrantz* (1924) 123 Misc. 335, 205 N. Y. S. 861; and when all his alleged coconspirators were acquitted, a defendant is entitled to withdraw his plea: *Rex* v. *Plummer* [1902] 2 K. B. 339, 4 B. R. C. 917. *Cf. United States* v. *Lieberman* (D. C. N. Y., 1925) 8 F. (2d) 318 (withdrawal denied where indictment mentioned "other persons unknown"). The failure of the appellant to contend that he is in fact innocent of the crime charged is frequently given as one reason for denying his request: *State* v. *Finney* (1934) 139 Kan. 578, 32 Pac. (2d) 517; *Capps* v. *State* (1928) 200 Ind. 4, 161 N. E. 6; and the general allegation that he has a "good defense" may not take its place, being a "mere conclusion" of the pleader: *State* v. *Peterson* (1926) 42 Ida. 785, 248 Pac. 12 However, no such claim of innocense is made in the principal case.

The mere fact that the defendant expected a lighter sentence, though often urged, is said to be no ground for withdrawal: *People* v. *Blumen* (1927) 87 Cal. App. 236, 261 Pac. 1103; *Mastronada* v. *State* (1882) 60 Miss. 86; even though the punishment be death: *People* v. *Chesnas, supra; People* v. *Dabner* (1908) 153 Cal. 398, 95 Pac. 880. It is inevitable, however, that the severity of the sentence, the nature of the act done, the previous record of the defendant, and the treatment accorded his probable confederates should all influence the decision: *cf. Baker,* "Reversible Error in Homicide Cases" (1932) 23 J. C. L. 28. For example, on the unchallenged facts in both *People* v. *Chesnas* and *People* v. *Dabner, supra,* the murders were of the most brutal sort, while Chesnas had an extensive, though minor, criminal record. A few cases may typify the other side of the judicial process: *State* v. *Harris, supra; Harris* v. *State, supra; People* v. *Rucker* (1931) 254 Mich. 342, 236 N. W. 801; *State* v. *Harvey, supra; People* v. *Schwarz* (1927) 201 Cal. 309, 257 Pac. 71. In four of these appeals guilt was not denied; with one exception, each apparently knew what he was doing when he pleaded guilty; and only one could show any sort of agreement with the prosecu-

tion. In each case leave to change the plea was given, and the real grounds of injustice appear to be the heavy sentences imposed. In one the punishment was 250 years for five petty holdups, in another life for a $2 robbery, in another all the defendant's companions had been acquitted, and in the other two their confederates had paid small fines while appellants were sentenced to the penitentiary; only in the first-mentioned case did the defendant have any previous record. *Cf.* also *State* v. *Manager* (1922) 149 La. 1083, 90 So. 412.

So long as a criminal trial remains the capricious thing that it is, a defendant loses a potential advantage in waiving it, and if he has money or influence, it may be assumed that he rarely will. Whether the courts ought to return that advantage to those who do admit a crime, for less than the strongest of reasons, must remain a matter for argument; and with the different combinations of ignorance and trickery which the cases may produce it becomes impossible to generalize. The trial court, having the facts before it, is obviously in the best position to judge; yet the gross abuses of that discretion which some of the appeals expose demonstrate the justice of permitting an occasional withdrawal.

GORDON W. WINKS.

REVOCATION OF PAROLE — GOOD TIME ALLOWANCE.—[Federal] Petitioner was sentenced to serve a term of eighteen months' imprisonment in a federal reformatory. He was paroled after serving about seven and one-half months of his term. If the petitioner had not been paroled and his conduct in prison had been satisfactory, he would have been entitled to a good behavior allowance which would have reduced his term of imprisonment to about fourteen and one-half months: 18 U. S. C. A. §710. Shortly after his release on parole petitioner violated his parole. The violation was not discovered until after the minimum sentence with good time allowance had expired, but before the expiration of his maximum sentence. As soon as it was discovered, the United States Board of Parole issued a warrant for petitioner's arrest, the intent being to revoke the parole and remand the petitioner to prison. He was arrested within a few days and applied for his release under writ of *habeas corpus,* claiming that the Board of Parole had no authority to have him arrested after the expiration of his minimum term of sentence. The District Court directed that he be retained in custody under the warrant of arrest. *Held:* on appeal, affirmed. Parole board was authorized to revoke parole of one violating parole, notwithstanding that period of minimum sentence with good conduct allowance had expired, where term of imprisonment as fixed by sentence had not expired: *United States* v. *Anderson* (C. C. A. 8th, 1935) 76 F. (2d) 375.

The problem involved in this case is one of statutory construction. It is to decide whether or not the petitioner's term automatically ended while he was out on parole on the date of the expiration of his minimum term of sentence, giving him time allowance for good behavior, which would have been mandatory had he been confined in the reformatory during his entire sentence: (1909) 28 Op. Atty. Gen. 109.

In the absence of the good behavior statute, the normal result would be for the period of parole of a prisoner to last at least as long as the total original term of sentence, and there would be no question but that the prisoner could be returned to prison to complete the serving of his sentence if the parole was revoked seasonably: Ex parte *Taylor* (1932) 216 Cal. 113, 13 Pac. (2d) 906; *People* v. *Hill* (1932) 348 Ill. 441, 181 N. E. 295; *People* v. *Barr* (1932) 257 N. Y. S. 395. The rule is even more strict in some jurisdictions, for it has been held that parole is a status that continues with the prisoner even after the expiration of his original term of sentence, and its breach at any time will subject him to rearrest: *Fuller* v. *State* (1898) 122 Ala. 32, 26 S. 146; *Comm.* v. *Minor* (1922) 195 Ky. 103, 241 S. W. 856; *State* v. *Yates* (1922) 183 N. C. 753, 111 S. E. 337; Ex parte *Ridley* (1910) 3 Ok. Cr. 350, 106 Pac. 549. This severe view was justified in the *Minor* case, *supra,* on the grounds that the punishment provided by law could be inflicted only in prison, and until it was completed any release from prison on parole could be on the condition that a breach of parole would subject the offender to a return to prison to complete the sentence. Similarly, in the *Yates* case, *supra,* it was said that the essential part of the sentence for the violation of the criminal law is the punishment, not the time that punishment shall begin and end. A similarly strict view is that the parolee is subject to re-arrest for a breach of parole at any time until he is actually discharged from parole: In re *Millert* (1923) 114 Kan. 745, 220 Pac. 509. A very sensible decision is that of *Kirkpatrick* v. *Hollowell* (1924) 197 Ia. 927, 196 N. W. 98 where it was held that if a violation of parole occurred before the expiration of the term of sentence, the parole could be revoked after the date on which the term would normally end where such revocation was seasonably had. There are some cases holding that parole cannot be revoked after the expiration of the term of sentence: *Crooks* v. *Sanders* (1922) 123 S. C. 28, 115 S. E. 760; *Anderson* v. *Wirkman* (1923) 67 Mont. 176, 215 Pac. 224. The explanation offered in the *Crooks* case, *supra,* is that parole should be liberally construed in favor of the prisoner. Despite the difference in the severity of their rules, all these cases sustain the view that parole is not an absolute pardon, and in accepting it the prisoner is subject to return to prison for breach of parole during the period he is deemed to be on parole.

The principal case is not as simple as this, for the federal statute under which the petitioner was paroled provides that such paroled person while on parole, shall remain "under the control of the warden of such prison from which paroled, . . . until the expiration of the term or terms specified in his sentence, less such good time allowance as is . . . provided by law": 18 U. S. C. A. §716. By its terms this statute limits the period of the warden's dominion over the parolee to the time of his minimum term, and the petitioner contends that under this statute he became a free man upon the expiration of his minimum term. However, it should be noted that this section of the statute does not deal with the question of the revocation of parole, but merely with the period during which he shall be in

the custody of the warden. The section of the statute dealing with violation of parole provides that if the warden or the parole board has reliable information that the prisoner has violated his parole, "then said warden, at any time within the term or terms of the prisoner's sentence, may issue his warrant . . . for the retaking of such prisoner": 18 U. S. C. A. §717. The court reasons that the difference in wording between these two sections of the statute must be deemed intentional, and that for this reason the revocation of parole was seasonable, and the prisoner was lawfully arrested. As further evidence of the intent of the legislature to have parole continue until the expiration of the full sentence, if there has been a breach prior to the minimum period of sentence, the court suggests the absurdities that might result from charging the warden with immediate knowledge of any acts of breach by the parolee, at the risk of allowing the parolee to become a free man by not acting on such constructive knowledge before the expiration of the minimum sentence. It would be requiring the warden to regulate the conduct of a man whom he actually could not control because of his physical absence.

The court here decided, through the process of statutory construction, that a federal prisoner who has been paroled will be deemed on parole and subject to return to prison for a breach of parole at any time within the term of imprisonment, as fixed by the sentence. Although the decision is unquestionably sound, it would have been possible to rest it on positive authority rather than mere statutory construction. It has been held that when a paroled convict breaches his parole, his status immediately becomes that of an escaped prisoner, and he becomes a fugitive from justice: *Platek* v. *Aderhold* (C. C. A. 5th, 1934) 73 F. (2d) 173; *Biddle* v. *Asher* (C. C. A. 8th, 1924) 295 F. 670; Ex parte *Daniels* (Cal. App., 1930) 294 Pac. 735. In the *Platek* case, *supra,* the paroled convict committed another crime and was sent to prison elsewhere for a term of sufficient duration that when he was released, his parole would have been ended if time were the only consideration. The court said that the breach acted to suspend the running of sentence until such time as he could be returned, his status becoming that of an escaped convict. Another authority to the same effect is *Anderson* v. *Corall* (1923) 263 U. S. 193, 44 S. C. 43, where it was said that "mere lapse of time, without imprisonment, is not service of sentence . . . (and) if a federal convict breaks parole and is retaken under a warden's warrant, the Board of Parole may revoke the parole any time prior to full service of sentence and require its completion without time off for good behavior." In the case of *Moore* v. *White* (C. C. A. 8th, 1927) 23 F. (2d) 467, it was intimated that for parole to be revoked, the paroled prisoner must first be re-arrested under a warden's warrant. Assuming this to be true, the *Moore* case, *supra,* is controlled by the Supreme Court case of *Anderson* v. *Corall, supra,* and since the warden's warrant was issued before the expiration of the sentence, it is valid, and the arrest legal. It is clear that, although the court avoided giving a direct answer to petitioner's claim that his parole ended by the passage of the date of his minimum term,

the *Platek* and *Biddle* cases, *supra,* afford ample authority for saying that where he has previously breached his parole he does not automatically become a free man with the passage of his minimum term, but is rather a fugitive from justice. The source of difficulty in the principal case is the fact that under the federal statutes there are two ways, aside from an absolute pardon from the executive, in which a prisoner may obtain his release from prison at a date earlier than the expiration date of his sentence. If the prisoner's conduct in prison is satisfactory, it is mandatory that he be credited with a good time allowance, and that he be freed from prison on the expiration of such minimum sentence: 28 Op. Atty. Gen. 109. On the other hand, parole is entirely discretionary with the Parole Board: *Redman* v. *Duehay* (C. C. A. 9th, 1917) 246 F. 283. As already indicated, the statutes regulating parole, if construed technically, might support the claim of the petitioner that he automatically became a free man upon the expiration of his minimum sentence. For this reason, it would seem preferable to rest the decision on the grounds that the petitioner was lawfully arrested as a fugitive from justice.

It is interesting to note that the federal statutes regulating parole have been modified, subsequent to the sentence of the petitioner in the principal case, in such a way that as to any prisoner sentenced after the effective date of the modifications, if he is paroled, he "shall continue on parole until the expiration of the maximum term or terms specified in his sentence without deduction of such allowance for good conduct as is . . . provided for by law": 18 U. S. C. A. §716a. If this statute had been in effect defendant's claim for release would have been clearly without foundation.

E. V. MOORE.

RAPE—CORROBORATION OF PROSECUTRIX.—[Illinois] Defendant was convicted on a charge of statutory rape of a twelve year old girl and sentenced to the penitentiary. The testimony of the prosecutrix was uncorroborated and was squarely contradicted by the defendant. *Held:* on appeal, reversed. Where a conviction in a rape case depends on the testimony of the prosecuting witness and the defendant denies the charge, the evidence of the prosecuting witness should be corroborated by other testimonial or circumstantial evidence: *People* v. *Nelson* (Ill. 1935) 196 N. E. 726.

Scarcely a week before the decision of the *Nelson* case, the court finally disposed of the case of *People* v. *Polak* (Ill. 1935) 196 N. E. 513. Two defendants had been convicted of the rape of Sylvia Drank; both denied categorically her charges, though intercourse was admitted. A physician who examined the prosecutrix immediately after the commission of the alleged crime found internal injuries tending to substantiate her claim. In its opinion affirming the conviction, the court said, "If the testimony of the prosecutrix is clear and convincing, it is not necessary that she be corroborated in order to sustain a conviction."

At common law corroboration of the testimony of the prosecutrix was unnecessary to sustain a conviction of rape. Nevertheless, many states, for the purpose of protecting against false accusations, have passed statutes requiring cor-

roboration. In absence of statute the rule is generally in accordance with common law: *Wigmore,* "Evidence" (2d ed. 1923) §2061; *Wharton,* "Criminal Law" (12th ed. 1932 §724. Illinois has no statute, and the common law rule enunciated in the *Polak* case, *supra, viz.,* that the uncorroborated testimony of the prosecutrix is sufficient if clear and convincing, was also laid down in *People* v. *Sciales* (1931) 345 Ill. 118, 117 N. E. 689. In other cases no rule of thumb was laid down although generally where there was a reversal the testimony of the prosecuting witness was weak and there was little or no corroborating evidence: *People* v. *Nemes* (1932) 347 Ill. 268, 179 N. E. 868; *People* v. *Dameron* (1932) 346 Ill. 408, 179 N. E. 95. Where the conviction was affirmed, as in the *Sciales* case, *supra,* the prosecutrix told a very credible story or was corroborated.

The inconsistency between the rules of law laid down in the *Nelson* and *Polak* cases, the one requiring, the other dispensing with corroboration, becomes explicable after an inspection of the facts involved. In the *Nelson* case the court reviewed the fantastic tale of a witness who failed entirely to inspire credence; the conviction was reversed. In the *Polak* case the circumstances (such as the doctor's examination) seemed to bear out the story of the prosecutrix and otherwise comported with human experience; therefore, the conviction was sustained. In each of these cases the appellate court obviously weighs the evidence and the credibility of the witnesses as a second jury, and does not wish to be hampered by any iron clad rule of law. The court, in such cases, considers questions of both law and fact as on an appeal, disregarding the nature of the writ of error before it which, strictly speaking should allow an inspection of errors of law only. While it is perhaps inevitable that the appellate court should re-try the case, such contradictory language as appears in the *Nelson* and *Polak* cases is certainly undesirable. A rule should be adopted which allows flexibility of judgment and at the same time uniformity and consistency of decisions.

As was pointed out in *People* v. *Sciales, supra,* "in nearly every case of this nature the amount of direct testimony is bound to be meager in so far as proof of the charge is concerned and equally so in matters of defense." A statute or rule of law requiring corroboration in every case would be unnecessarily binding on the court. Where a straightforward and consistent story has been told by a credible complaining witness the court should be free to affirm a finding of guilty although there is no supporting evidence: See *Wigmore, loc. cit. supra.* The rule stated in the *Polak* case and *People* v. *Sciales* permits the court to affirm or reverse as the circumstances require and is in accord with the common law. Employment of this rule in the instant case would not have necessitated a different result. A reversal could have been based on the ground that the testimony of the prosecutrix was neither convincing nor supported by other evidence. It is submitted that the court, in laying down the inflexible rule that a prosecutrix must be corroborated if a conviction for rape is to be affirmed, not only set an undesirable precedent but also created an unnecessary inconsistency among its decisions.

ROBERT N. BURCHMORE.