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### The Application of Section 295(l) of the Code of Criminal Procedure to the Defendant's Testimony

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*Conclusion*

The position which the New York Court of Appeals will take if this question comes before it is highly speculative. True, the Appellate Division of the Third Department held in the *Martin* case that there could be no conviction, but the court did not write an opinion and rested its decision on three cases which do not even contain *dicta* on the point. The writer feels, however, that if the question does reach the Court of Appeals, that court should hold in favor of the spouse's immunity. This conclusion is not the result of a belief that such a holding would greatly aid in preserving the unity of the family, but is predicated upon the firm conviction that penal laws should be written so that the layman can fully understand them. They should be expressed in clear, unmistakable terms, and should not be implied from words of doubtful meaning. Personal liberty is too precious to be destroyed by subtleties of legal reasoning. Where the law has become obscure because of conflicting decisions it is the duty of the legislature to take the initiative and restate or clarify it.

ANDREW J. GRAHAM.

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THE APPLICATION OF SECTION 295(L) OF THE CODE OF CRIMINAL  
PROCEDURE TO THE DEFENDANT'S TESTIMONY

The defense of alibi is the defense<sup>1</sup> that at the time the crime charged was committed the accused was at another place.<sup>2</sup> The literal meaning of the term alibi being "elsewhere",<sup>3</sup> the potency of alibi as a defense is derived from the impossibility of the guilt of the accused, because of physical circumstances.<sup>4</sup> Impossibility of the defendant's presence in the place and at the time involved is the essential feature of this defense<sup>5</sup> and any proof whose tendency it is to show that it was reasonably impossible for the accused to have been present at the time and place of the commission of the offense charged, is sufficient

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<sup>1</sup> 1 WHARTON, CRIMINAL LAW (12th ed. 1932) 505 ("The defense of alibi is not, properly speaking, a defense within any accurate meaning of the word defense, but is a mere fact shown in rebuttal of the evidence introduced by the State. The *corpus delicti* is not denied by the claim of alibi, its only design is to prove that the defendant, being in another place at the time, could not have committed the offense charged").

<sup>2</sup> *Dees v. State*, 99 Fla. 1144, 128 So. 485 (1930); *Huckett v. State*, 121 Neb. 36, 237 N. W. 159 (1931).

<sup>3</sup> *Azbill v. State*, 19 Ariz. 499, 172 Pac. 658 (1918).

<sup>4</sup> *Singh v. State*, 35 Ariz. 432, 280 Pac. 672, 67 A. L. R. 129 (1929); *Harris v. State*, 120 Ga. 167, 47 S. E. 520 (1923).

<sup>5</sup> *Williams v. State*, 123 Ga. 138, 51 S. E. 322 (1905).

to establish the defense.<sup>6</sup> The rule is well settled that the defense of alibi, to be effective, must be proved by such evidence and to such a degree of certainty as will, when the whole evidence is considered, create and leave in the minds of the jury a reasonable doubt<sup>7</sup> of the guilt of the accused.<sup>8</sup> The accused is not required to prove impossibility of presence beyond a reasonable doubt,<sup>9</sup> or even in most jurisdictions by a preponderance of the evidence.<sup>10</sup> It is sufficient if established to the reasonable satisfaction of the jury.<sup>11</sup> It is not necessary that the jury should be absolutely convinced of the truth of the alibi<sup>12</sup> but it is enough to require an acquittal that the evidence taken as a whole, whether adduced by the prosecution or by accused is sufficient to raise a reasonable doubt as to his guilt generally.<sup>13</sup> Thus, if there is a reasonable doubt of the defendant's presence at the scene of the alleged crime at the time of its commission, arising upon all the evidence, the jury should acquit; and this reasonable doubt may arise

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<sup>6</sup> Blanchard, J. in *State v. Ardoin*, 49 La. Ann. 1145, 22 So. 620 (1897), said, "The rule of law, as applicable to the defense of alibi does not require the defendant to reasonably satisfy the jury of his exact whereabouts every moment of the time necessary to cover the period when the offense was committed, it is only necessary to show such a state of facts or circumstances as to reasonably satisfy the jury that the defendant was elsewhere than at the place where, and at the moment when, the offense was committed."; *Smith v. State*, 3 Ga. App. 803, 61 S. E. 737 (1907).

<sup>7</sup> "A reasonable doubt is such a doubt as would make a man of ordinary prudence, sensibility and decision, in determining an issue of like concern to himself, pause or hesitate in arriving at his conclusion." *United States v. McHugh*, 253 Fed. 224 (1917).

<sup>8</sup> *Blakes v. State*, 133 Fla. 12, 182 So. 447 (1938); *State v. Sheehan*, 33 Idaho 553, 196 Pac. 532 (1921); *People v. Le Mar*, 358 Ill. 58, 192 N. E. 703 (1934); *People v. Robinson*, 308 Ill. 398, 139 N. E. 599 (1923); *Draper v. Commonwealth*, 132 Va. 648, 111 S. E. 471 (1922).

<sup>9</sup> *People v. Fong*, 58 Cal. App. 675, 208 Pac. 1101 (1922); *Blakes v. State*, 133 Fla. 12, 182 So. 447 (1938); *Green v. State*, 154 Ga. 394, 114 S. E. 361 (1922); *People v. Oswald*, 340 Ill. 434, 172 N. E. 819 (1930); *State v. Hayes*, 301 Mo. 304, 256 S. W. 747 (1923); *People v. Elmore*, 277 N. Y. 397, 14 N. E. (2d) 451 (1938).

<sup>10</sup> *People v. Fong*, 58 Cal. App. 675, 208 Pac. 1101 (1922); *State v. Sheehan*, 33 Idaho 553, 196 Pac. 532 (1921); *Beck v. State*, 51 Neb. 106, 70 N. W. 498 (1897); *State v. Milosevich*, 119 Ore. 404, 249 Pac. 625 (1926); *Draper v. Commonwealth*, 132 Va. 648, 111 S. E. 471 (1922).

<sup>11</sup> *Dean v. State*, 154 Ga. 533, 114 S. E. 809 (1922); *Moss v. State*, 43 Ga. App. 109, 158 S. E. 461 (1931); 16 C. J. 777, n.89.

<sup>12</sup> *People v. Ahrling*, 279 Ill. 70, 116 N. E. 764 (1917). In *People v. Marvill*, 236 Mich. 595, 211 N. W. 23 (1926), Wiest, J. said, "Testimony in support of an alibi may accomplish no more than the raising of a reasonable doubt as to the sufficiency of the proofs connecting an accused with the crime alleged or render such proofs unsatisfactory. If the testimony relative to an alibi serves such purpose, it creates a reasonable doubt as to the guilt of an accused. In other words an alibi may fail as a substantive defense and yet serve to raise a reasonable doubt as to the guilt of an accused."

<sup>13</sup> *Williams v. State*, 21 Ala. App. 319, 108 So. 34 (1926); *People v. Quinn*, 111 Cal. App. 614, 295 Pac. 1042 (1931); *Green v. State*, 154 Ga. 394, 114 S. E. 361 (1922); *People v. Barbato*, 254 N. Y. 170, 172 N. E. 453 (1931); *People v. Elmore*, 277 N. Y. 397, 14 N. E. (2d) 451 (1938); *State v. Milosevich*, 119 Ore. 404, 249 Pac. 625 (1920).

from lack of evidence of the defendant's presence at the time and place in question<sup>14</sup> or from evidence offered by the defendant to prove that he was then at another place.<sup>15</sup> The defendant is entitled to have such defense fairly treated without disparagement<sup>16</sup> and the jury properly instructed as to the law thereof.<sup>17</sup>

The court has a right to look at the facts clearly shown in the case and to judge as to whether or not there is any likelihood or possibility of the truthfulness of the evidence of alibi.<sup>18</sup> As a general rule an instruction on the defense of alibi is proper and sufficient which states the elements constituting the defense<sup>19</sup> and also charges that if the evidence of an alibi in connection with all the other evidence raises a reasonable doubt of the presence of the accused at the time and place of the crime, he should be given the benefit of such doubt and be acquitted.<sup>20</sup> The instruction to the jury should contain a charge as to the burden of adducing the evidence to prove the defense of alibi being on the defendant.<sup>21</sup> Where the crime alleged involves the presence of the accused at the time of its commission, the burden of proof rests primarily on the prosecution to show the fact beyond a reasonable doubt.<sup>22</sup> But once the prosecution makes a *prima facie*

<sup>14</sup> Where evidence has been given on behalf of defendant to prove an alibi, the prosecution is entitled to offer rebutting evidence to prove his presence. *Smith v. People*, 39 Colo. 202, 88 Pac. 1072 (1907); *People v. Scott*, 261 Ill. 165, 103 N. E. 617 (1913); *State v. Gulliver*, 163 Iowa 123, 142 N. W. 948 (1913); *State v. Shuford*, 152 N. C. 809, 67 S. E. 923 (1910).

<sup>15</sup> *Falgout v. United States*, 279 Fed. 513 (C. C. A. 5th, 1923); *Graham v. State*, 153 Ala. 38, 45 So. 480 (1908); *People v. Fong*, 58 Cal. App. 675, 208 Pac. 1101 (1922); *State v. Sheehan*, 33 Idaho 553, 196 Pac. 532 (1921); *People v. Robinson*, 308 Ill. 398, 139 N. E. 599 (1923); *People v. Rush*, 107 Mich. 251, 65 N. W. 99 (1895); *People v. Stone*, 117 N. Y. 480, 23 N. E. 13 (1889); *State v. Latimer*, 88 S. C. 79, 70 S. E. 409 (1911); *People v. Kessler*, 13 Utah 69, 44 Pac. 97 (1896); *Draper v. Commonwealth*, 132 Va. 648, 111 S. E. 471 (1922).

<sup>16</sup> *People v. Lattimore*, 86 Cal. 403, 24 Pac. 1091 (1890); *Sheehan v. People*, 131 Ill. 22, 22 N. E. 818 (1889); *State v. Smalls*, 98 S. C. 297, 82 S. E. 421 (1914); *Lanphere v. State*, 114 Wis. 193, 89 N. W. 128 (1902).

<sup>17</sup> *State v. Standley*, 76 Iowa 215, 40 N. W. 815 (1888); *State v. Johnson*, 40 Kan. 266, 19 Pac. 749 (1888); *State v. Bruton*, 253 Mo. 361, 161 S. W. 751 (1913); *State v. King*, 50 Wash. 312, 97 Pac. 247 (1908).

<sup>18</sup> *Jones v. State*, 31 Tex. Cr. 177, 20 S. W. 354 (1892); *Shetters v. State*, 66 Tex. Cr. 478, 147 S. W. 582 (1912).

<sup>19</sup> *State v. Powers*, 72 Vt. 168, 47 Atl. 830 (1900). In *State v. Jones*, 153 Mo. 457, 55 S. W. 80 (1900), it was said that while it was better to use plain English words in an instruction instead of the word "alibi", yet, where it appears from the instruction as a whole that it was understood by the jury, the use of such word produces no injury.

<sup>20</sup> *State v. Johnson*, 40 Kan. 266, 19 Pac. 749 (1888); *State v. Jones*, 153 Mo. 457, 55 S. W. 80 (1900); *State v. Tapack*, 78 N. J. L. 208, 72 Atl. 962 (1909); *State v. Nelson*, 17 N. D. 13, 114 N. W. 478 (1908); *State v. Anderson*, 59 S. C. 229, 37 S. E. 820 (1901); *Legere v. State*, 111 Tenn. 368, 77 S. W. 1059 (1903).

<sup>21</sup> *Field v. State*, 126 Ga. 571, 55 S. E. 502 (1906); *State v. Thornton*, 10 S. D. 349, 73 N. W. 196 (1897); *State v. Hier*, 78 Vt. 488, 63 Atl. 877 (1906).

<sup>22</sup> *People v. Nelson*, 85 Cal. 421, 24 Pac. 1006 (1890); *State v. Bosworth*, 170 Iowa 329, 152 N. W. 581 (1915); *State v. Ward*, 61 Vt. 153, 17 Atl. 483

case of the accused's presence, the burden devolves on the accused, if he relies on an alibi, to adduce evidence to defeat the state's *prima facie* case or establish his defense.<sup>23</sup> It has been held that it is error to charge that the defense of alibi must be made out beyond a reasonable doubt,<sup>24</sup> or by a preponderance of the evidence,<sup>25</sup> or that evidence thereof must be of strong convincing character and must exclude every reasonable hypothesis except the non-presence of the defendant,<sup>26</sup> or that such defense must be fully and satisfactorily established to the satisfaction of the jury.<sup>27</sup>

With the law in this condition, the criminal courts were filled with cases in which there was a sudden appearance of witnesses to prove that the accused was not at the scene of the crime at the time of its commission and thus creating a reasonable doubt about the testimony of the state's witnesses.<sup>28</sup> Perjured "alibi" witnesses were brought into court at the eleventh hour and at a time which, in practice, affords the prosecution no opportunity to check either the credibility of the witnesses nor the accuracy of their statements.<sup>29</sup> To remedy this evil, the Committee on Criminal Courts and Procedure of the

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(1889). In *State v. Bosworth*, 170 Iowa 379, 152 N. W. 581 (1915), it was said, "The defense of alibi which casts certain burdens upon the defendant, is an affirmative defense which asserts that distance made it impossible to commit the crime. It is none too clear what is meant by the rule which puts the burden as to alibi on the defendant and makes his testimony on alibi available in aid of creating a reasonable doubt which if entertained effects a holding that the state has not met its burdens. A denial that defendant participated leaves the burden on the state. If coupled with the denial, there be a claim that the evidence shows defendant was too far away to have participated, an acquittal can be had upon that affirmative defense alone, but only if defendant proves such defense.

<sup>23</sup> *People v. Connors*, 253 Ill. 266, 97 N. E. 643 (1912); *State v. Flood*, 148 Iowa 146, 127 N. W. 48 (1910).

The credibility of testimony showing an alibi is for the jury. *Jordan v. State*, 18 Ga. A. 44, 88 S. E. 825 (1916). Accordingly where the evidence will sustain a verdict of guilty, the jury may disregard the alibi testimony although the latter is complete and covers the whole time during which the alleged crime was committed. *Droak v. State*, 43 S. W. 988 (1898). However, the defense of an alibi is as legitimate as any other and the witnesses who testify to it are entitled to like credit with others. *People v. Hare*, 57 Mich. 505, 24 N. W. 843 (1885).

<sup>24</sup> *State v. Hassan*, 149 Iowa 518, 128 N. W. 960 (1910); *State v. Taylor*, 118 Mo. 153, 24 S. W. 449 (1893); see also *People v. Fong Ah Sing*, 64 Cal. 253, 28 Pac. 233 (1883), where a charge in effect that defendant was not to have the benefit of any doubt in regard to the alleged alibi, unless the jury should find as a fact that he was at a place other than the place of shooting at the time of shooting, was held to be error.

<sup>25</sup> *State v. Taylor*, 118 Mo. 153, 24 S. W. 449 (1893); *Beck v. State*, 51 Neb. 106, 70 N. W. 498 (1897); *Burns v. State*, 75 Ohio St. 407, 79 N. E. 929 (1907).

<sup>26</sup> *State v. Nelson*, 17 N. D. 13, 114 N. W. 478 (1908).

<sup>27</sup> *People v. Stone*, 117 N. Y. 480, 23 N. E. 13 (1889); cf. *Pellum v. State*, 89 Ala. 28, 8 So. 83 (1890), where a charge to the jury to the effect that defendant must reasonably satisfy the jury as to alibi was approved.

<sup>28</sup> *People v. Schade*, 161 Misc. 212, 292 N. Y. Supp. 612 (1936).

<sup>29</sup> *Ibid.*

New York County Lawyer's Association for the American Bar Association drew up a bill which was similar to the *alibi notice statute* in Ohio<sup>30</sup> and Michigan.<sup>31</sup> Thereafter, with amendments suggested by the Association of Grand Jurors of New York County, the bill was introduced in the legislature and enacted into law, becoming effective July 1, 1935.<sup>32</sup> The Supreme Court of Ohio held that the Ohio statute is constitutional.<sup>33</sup> In Michigan no direct attack has been made upon the alibi statute; however, it has been considered and approved.<sup>34</sup> In New York, the Queens County Court upheld the constitutionality of Section 295(1) of the Code of Criminal Procedure.<sup>35</sup> It has not yet appeared before the New York Court of Appeals.

The prosecutors of the State of New York felt that the day of the sudden alibi witnesses had vanished due to the requirement put on the accused to give notice of intention to use alibi witnesses to prosecutor, upon the latter's request.<sup>36</sup> Then on October 31, 1940, the Supreme Court, Appellate Division, Third Department, held that the alibi statute does not apply to the testimony of the defendant, but only to the testimony of other witnesses produced for the purpose of giving evidence upon the question of alibi.<sup>37</sup> Thus the door is again opened to the sudden appearance of an alibi defense.<sup>38</sup> It is true that

<sup>30</sup> OHIO GEN. CODE § 13444-20, 113, v. 190, c. 23, § 20.

<sup>31</sup> COMP. LAWS MICH. (1929) §§ 17313, 17314.

<sup>32</sup> N. Y. CODE OF CRIM. PROC. § 295(1) (In all cases where a defendant has been indicted by a grand jury, the prosecuting officer may, not less than eight days before the case is moved for trial, serve upon such defendant or his counsel and file a demand which shall require that if such defendant intend to offer, for any purpose whatever, testimony which may tend to establish his presence elsewhere than at the scene of the crime at the time of its commission, he must within four days thereafter serve upon such prosecuting officer and file a bill of particulars which shall set forth in detail the place or places where the defendant claims to have been, together with the names, post-office addresses, residences and places of employment of the witnesses upon whom he intends to rely to establish his presence elsewhere than at the scene of the crime at the time of its commission. Unless the defendant shall, pursuant to such demand, serve and file such a bill of particulars, the court, in the event that such testimony is sought to be interposed by the defendant upon the trial for any purpose whatever, or in the event that a witness not mentioned in such bill of particulars is called by the defendant to give such testimony, may exclude such testimony or the testimony of such witness. In the event that the court shall allow such testimony or the testimony of such witness, it must upon motion of the prosecuting officer, grant an adjournment not to exceed three days).

<sup>33</sup> In *State v. Thayer*, 124 Ohio St. 1, 176 N. E. 656 (1931), it was said in reference to the Ohio alibi statute, "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 impossible for the state to ascertain any facts as to the credibility of the witnesses called by the accused, who may reside at some point far distant from the place of trial.

<sup>34</sup> *People v. Marcus*, 253 Mich. 410, 235 N. W. 202 (1931).

<sup>35</sup> *People v. Schade*, 161 Misc. 212, 292 N. Y. Supp. 612 (1936).

<sup>36</sup> N. Y. CODE OF CRIM. PROC. § 295(1).

<sup>37</sup> *People v. Rakiec*, 260 App. Div. 452, 23 N. Y. S. (2d) 607 (3d Dep't 1940); (1941) 15 ST. JOHN'S L. REV. 304.

<sup>38</sup> *People v. Rakiec*, 260 App. Div. 452, 23 N. Y. S. (2d) 607 (3d Dep't

the defendant's own testimony may be partially disregarded by the jury when there are no witnesses to substantiate it, but only a reasonable doubt is required for an acquittal to follow,<sup>39</sup> and the defendant's prevarications may induce such reasonable doubt. The need for a new statute requiring defendant to give notice if he himself intends to testify as to his presence elsewhere is apparent. The objection to this is that failure to give such notice would prevent the defendant from having a fair trial<sup>40</sup> by denying him his right to testify in his own behalf.<sup>41</sup> But, the defendant would still have a fair trial for there is no denial of his right to testify in his own behalf. All that would be required is that he give notice of his intention to use alibi evidence. The loophole in the present statute could be removed by making the following amendment to the present statute: " \* \* \* This act shall apply to defendant's own testimony. But if the defendant fail to serve and file a bill of particulars as to his own testimony, the court, in the event that such testimony is sought to be interposed by the defendant upon the trial, shall not exclude such testimony, but must, upon motion of the prosecuting officer, grant an adjournment not to exceed three days."

With this act in hand, the prosecution may again go forward in its fight against crime prepared to meet any contingency and without fear of a sudden, unaccounted for and unforeseen alibi defense.

ARTHUR MARCHIANO.

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1940), dissenting opinion of Bliss, J.: "Section 295(1) of the Code of Criminal Procedure is very broad and by its plain terms prevents a defendant as well as other witnesses in his behalf from testifying to his presence elsewhere unless he has given a bill of particulars when demanded by the prosecuting officer. The statute makes no exception when the defendant himself offers to testify to the alibi. There is nothing in the statute which would prevent a defendant or other witnesses from testifying that he was not at the scene of the crime. However, if he desires to prove his presence elsewhere at the time the crime was committed and the district attorney has served the demand mentioned in the statute, then the defendant must follow the procedure outlined in the statute before he may give such testimony. The statute relates only to the procedure to be followed in advance of the trial. A defendant by following such procedure, may prove an alibi by himself or others. There has been no deprivation of a substantive right. Although the statute by its own terms provides otherwise, the majority are about to read into it an exception to the effect that it does not apply when a defendant himself offers to testify to the alibi. I feel that we have no recourse other than to accept the law as written."

<sup>39</sup> *People v. Wells*, 10 Cal. 610, 76 P. (2d) 493 (1938); *State v. Carver*, 213 N. C. 150, 195 S. E. 349 (1938); *Simpson v. State*, 93 Tex. Cr. 303, 247 S. W. 548 (1923); 16 C. J. 775, n.65.

<sup>40</sup> "A fair trial is a legal trial conducted according to the rules of common law except so far as it has been changed by statute and one wherein legal rights of the accused are safeguarded and respected." *Universal Adjustment Corp. v. Midland Bank, Ltd.*, 281 Mass. 303, 184 N. E. 152 (1933); *Johnson v. City of Wildwood*, 116 N. J. L. 462, 184 Atl. 616 (1936).

<sup>41</sup> *People v. Rakiec*, 260 App. Div. 452, 23 N. Y. S. (2d) 607 (3d Dep't 1940); (1941) 15 ST. JOHN'S L. REV. 304.