St. John's Law Review

Volume 11
Number 2 *Volume 11, April 1937, Number 2*

Article 12

Criminal Law--Constitutionality of New York's "Alibi Statute" (The People of the State of New York v. Shade, 161 Misc. 212 (1936))

St. John's Law Review

ted others, it was held [13] that the parties excluded the conditions not specifically mentioned.

Where a particular building is specified in a contract merely for the sake of convenience and it is in truth immaterial whether or not the work is to be done there, destruction of that building will not excuse performance since there was no inherent impossibility of performance in the contract.[14] This does not contravene the doctrine that destruction of the building or other means of performance which is necessary by the terms of the contract or within the contemplation of both parties discharges the duty to perform.[15]

It is well to keep in mind that it is the function of the courts to interpret contracts and they are loath to make them for individuals. As has been aptly said "where a person has expressly agreed to do an act in a contract of his own drawing and neglected to insert a clause (express condition) saving himself from liability for non-performance, in case a foreseeable contingency arises the law should not imply a condition for his own protection which by his own carelessness he failed to insert in the contract." [16] The court may not inject into a contract a provision not expressly or by necessary implication included therein.[17]

R. I. R.

CRIMINAL LAW—CONSTITUTIONALITY OF NEW YORK'S "ALIBI STATUTE." [1]—Section 295-1 of the Code of Criminal Procedure provides, that if a person indicted by a grand jury intends to offer testimony establishing his presence elsewhere than at the scene of the crime at the time of its commission, he must, when demanded by the prosecuting attorney, file a bill of particulars not less than eight days before

[13] Standard Oil Co. of N. Y. v. Central Dredging Co., 225 App. Div. 407, 233 N. Y. Supp. 279 (3d Dept. 1929); Texas Co. v. Hogarth Shipping Co., 256 U. S. 619, 41 Sup. Ct. 612 (1921).

[14] Booth v. Spuyten Duyvil Rolling Mill Co., 60 N. Y. 491 (1875); Hefferon v. Neumond, 198 Mo. App. 667, 201 S. W. 645 (1918).

[15] Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595 (1891).

[16] WHITNEY, CONTRACTS (2d ed. 1934) 260; Amer. Central Ins. Co. of St. Louis v. McHose, 66 F. (2d) 749 (C. C. A. 3d, 1933); Public Schools of Trenton v. Bennett, 27 N. J. L. 513 (1859); Krappman Whiting Co. v. Middlesex Water Co., 64 N. J. L. 240, 45 Atl. 692 (1900); Foley v. Mfg. Fire Ins. Co., 152 N. Y. 131, 64 N. E. 318 (1897); Tompkins v. Dudley, 25 N. Y. 272 (1862). In contracts to build entire structures failure to insert a clause relieving from liability, not only disables contractor from collecting compensation for a partially erected building which has been destroyed by fire but renders him liable for damages for non-performance if he fails to replace the building on time.

[17] American Central Ins. Co. of St. Louis v. McHose, 66 F. (2d) 749 (C. C. A. 3d, 1933).

[1] N. Y. Laws 1935, c. 506.

the trial, setting forth in detail his alleged whereabouts, together with the names and addresses of the witnesses upon whom he relies to corroborate his allegations. Upon failure to comply, the court may, in its discretion, exclude such evidence introduced at the trial. In his motion to vacate and set aside the state's demand for a bill of particulars, the defendant contends that the aforementioned statute is in contravention of both the federal and state constitutions,[2] which proclaim that no person shall be compelled in a criminal action to be a witness against himself. *Held,* motion denied. The statute does not compel the defendant to incriminate himself, but merely stipulates that if he contemplates interposing an alibi defense, he must first apprise the district attorney of the salient facts thereof. *The People of the State of New York* v. *Shade,* 161 Misc. 212, 292 N. Y. Supp. 612 (1936).

It is a well established rule that in construing a statute which is susceptible to two constructions, one of which would render it unconstitutional, it is the duty of the court to apply the construction which will be in concord with the constitution.[3] The defendant's contention is that Section 295-1 of the Code of Criminal Procedure, is repugnant to the ancient doctrine *"Nemo tenetur prodere seipsum*—nobody is bound to accuse himself," [4] a principle which has been so jealously guarded and preserved in our federal and state constitutions. But the statute does not impair the self-incrimination clause,[5] for it does not compel the defendant to give any information to the district at-

---

[2] U. S. CONST. Amdt. V.; N. Y. CONST. art. I, § 6.

[3] United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658 (1916); N. Y. Central v. Williams, 199 N. Y. 108, 92 N. E. 404 (1910); People v. Crane, 214 N. Y. 154, 108 N. E. 427 (1915); Mathews v. Mathews, 240 N. Y. 28, 147 N. E. 237 (1925).

[4] Authorities are in conflict as to the origin of this maxim. One traces it to the ecclesiastical practice. Wigmore, *Nemo tenetur prodere seipsum* (1891) 5 HARV. L. REV. 71. Another, citing ancient and modern authors, points out that in no text of canon law is the specific maxim to be found. He also proves convincingly that in the time of Bacon and Coke torture was employed not infrequently to force testimony from a defendant, proving that the Common Law was not the original source of the maxim. Corwin, *Self-Incrimination* (1930–31) 29 MICH. L. REV. 1; see also BLOCK, EDWARD COKE—ORACLE OF THE LAW (1929) pp. 192–3. Prof. Corwin, *ibid.,* also mentions Bentham's belief that the maxim was of Coke's invention, who, in a vehement attack upon the *oath ex officio,* stated it in the present form. Coke is said to have delighted in giving his ideas a Latin phraseology for the sake of apparent sanction of antiquity. But it seems to me that the maxim has its roots in the ancient Talmudic Law of more than two thousand years ago, which would take no cognizance of a defendant's confession unless corroborated by at least two witnesses, for "No man may acuse himself". Tract Sanhedrin, 9, 25, Yevumoth, 25. See 1 GREENLEAF, EVIDENCE (15th ed.) 467 for a review of legislation centering about the doctrine against self-incrimination; see also Note (1935) 10 ST. JOHN'S L. REV. 66.

[5] The earliest statement of the principle against self-incrimination in an American Constitution is found in § 8 of the Virginia Declaration of Rights (1776). THORPE, AMERICAN CHARTERS, CONSTITUTIONS, ETC. (1909); see also F. J. STIMSON, FEDERAL AND STATE CONSTITUTIONS (1908) § 136.

torney, unless he, voluntarily and for his own benefit, intends to interpose an alibi defense. The defendant is not thereby divested of his right to offer, or to refrain from offering, any defense he deems propitious to his interests. A condition is merely imposed upon him, that, in the exercise of such rights, he shall not take undue advantage of the state, by suddenly flaunting in the face of court and jury fabricated testimony which cannot be readily contradicted. For alibis are usually very easily proven, but not so easily disproven.

Another prominent feature of constitutionality in the statute is the provision vesting discretionary power in the court, as to the admissibility of the alibi testimony, in cases where no prior notice was given by defendant. Where a different defense was contemplated, but rendered unavailable by sudden death of a witness, or the occurrence of another unforeseen contingency, it need not prove fatal for defendant. Under such a state of facts, the statute leaves the door open for clemency, by leaving within the discretion of the court the question of the admission of the alibi evidence, thus averting a possible miscarriage of justice.[6]

Furthermore, it is a well settled rule in New York practice, that the prosecution must be given notice of an intended defense of insanity.[7] This, too, is a modification of the common-law rule that every kind of defense is admissible under a plea of not guilty. The same cry of self-incrimination is applicable to both rules with equal force. No one, however, is now heard to assail the requirement as to the plea of insanity, so why not apply the same rule to the alibi defense?[8]

The principle of the Fifth Amendment was embodied both in our state and federal constitutions, as a result of the terrible severity of the English Penal Code of the Eighteenth Century, and the sufferings of the Puritans through the *oath ex officio*.[9] Its perpetuation within

---

[6] The statute provides: "In all cases where a defendant has been indicted by a grand jury the prosecuting attorney may, not less than eight days before the case is moved for trial, serve upon such defendant * * * a demand which shall require that if such defendant intends to offer * * * 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 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 * * * serve and file such bill of particulars, the court * * * may exclude such testimony, or the testimony of such witnesses. In the event that the court shall allow such testimony, * * * it must, upon motion of the prosecuting officer, grant an adjournment not to exceed three days."

[7] As the state, in the indictment, gives the accused reasonable notice of all the charges he will meet, and thus gives him ample time to prepare any defense he pleases, then why not give the state the same advantage?

[8] See JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, Vol. 3, p. 890, Vol. 4, p. 67 (1911).

[9] CORWIN, *op. cit. supra* note 4; see also MILLAR, *The Modernization of Criminal Procedure*, 2 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY (1920).

our legal system was actuated by lofty ideals of justice and ethics. But at no time was it intended as a shrine of worship for our super-criminals. To exculpate a murderer because of a legal technicality, is at best a ludicrous anomaly. Such practice will undermine our system of jurisprudence, and relegate it to the fate of sophism in ancient Greece. The ideal of justice is the search for human truth. The ultimate inquiry in every criminal proceeding should be whether the accused is innocent or guilty and not whether all the requirements of the legal formulae are met with mathematical precision. If we are to dam the flood of twentieth century crime, with its scientific efficiency, we must recast and reform our Criminal Code,[10] so as to weed out whatever [11] impedes the successful administration of justice. The assailed statute is a stride forward in our state's battle against intrenched criminality. It will close a main avenue of escape to the guilty, and will reduce the voluminous amount of perjury prevalent in our courts as a direct consequence of the dilatory plea of alibi. It would seem to follow that the contention that the statute is in contravention of the principle against incrimination, is nebulous and unfounded.[12]

A. F.

CRIMINAL LAW—MURDER IN FIRST DEGREE—INSANITY AS A DEFENSE—RECOMMENDATION FOR MERCY BY JURY.—Defendant, a woman, overcome by economic hardship, drowned her infant son, believing that by this act she could free him from the suffering that might otherwise be his lot. She was indicted for murder in the first degree. The defense was tempory insanity.[1] The trial judge charged

[10] POUND, *Program of Procedural Reform,* PROCEEDINGS OF ILLINOIS STATE BAR ASSOCIATION FOR 1910, p. 395; *Report of Committee E of the Am. Institute of Criminal Law and Criminology,* 1 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, 587.

[11] See 3 WHARTON, CRIMINAL PROCEDURE (10th ed. 1918) citing cases which hold it error for a judge to say without qualification, that an alibi is a defense which should be offered at the preliminary hearing, and that it should be regarded with suspicion.

[12] This measure, one of the significant landmarks in New York's fight for a more effective prosecution of the criminal, was originally drawn by the Committee on Criminal Courts and Procedure of the N. Y. County Lawyer's Association, for the American Bar Association. It was introduced in the New York Legislature as early as 1931, but was not passed until 1935. Its enactment was undoubtedly influenced by the similar statutes of Michigan, Ohio, and New Jersey, which were enacted in 1927, 1929, and 1934, respectively. See People v. Miller, 250 Mich. 72, 229 N. W. 475 (1930); People v. Marcus, 253 Mich. 410, 235 N. W. 202 (1931); Reed v. State, 44 Ohio App. 318, 185 N. E. 558 (1933). In the above jurisdictions, the constitutionality of the alibi statutes was either expressly decided upon, or its validity assumed.

[1] 1 BISHOP, CRIMINAL LAW (9th ed. 1923) § 381. "Insanity in the criminal law is any defect, weakness or disease of the mind rendering it incapable of