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Criminal Law—Public Trial

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The majority thought that the extensive psychiatric testimony elicited in the case clearly presented the question, and had been weighed and rejected by the jury. The dissent opined that forcing the defense psychiatrist to give categorical answers created the impression that defendant's alleged delusions, though they convinced him that his act was not morally wrong, were still not wthin the definition of section 1120.

The dissent stated that the court's charge on the insanity question was a bare reading of the applicable section of the Penal Law.[72] In such case the judge's failure to explain the proper interpretation of "wrong" should in itself be valid ground for reversal.

Public Trial

The cynosure of the tabloids, *People v. Jelke*,[73] presented the question of whether a trial judge can exclude, over defendant's objection, the press and idle spectators from a compulsory prostitution trial.[74] The court held the right of "public trial"[75] to be such a basic privilege that a trial judge has discretion to exclude only in those instances enumerated in section four of the Judiciary Law,[76] and anticipation of filthy and indecent testimony is not sufficient. A persuasive dissent by Judges Desmond and Conway refused to concede that tradition compels allowing the public admittance to "sex trials."[77] They argued that the public trial requirement has always been subject to the inherent power of the trial court to exclude in order to facilitate the testimony of emotionally disturbed witnesses,[78] or to limit their number to prevent overcrowding or disorder.[79] Therefore, this right

72. That the charge should be illuminated by reference to the evidence in the case, so that the jury can properly apply the law to the facts, see *People v. Fanning*, 131 N. Y. 659, 30 N. E. 569 (1892); *People v. Becker*, 210 N. Y. 274, 104 N. E. 396 (1914).

73. 308 N. Y. 56, 123 N. E. 2d 769 (1954).

74. N. Y. PENAL LAW §2460.

75. N. Y. JUDICIARY LAW §4, provides: "The sittings of every court within this state shall be public, and every citizen may freely attend the same, except that in all proceedings and trials in cases for divorce, seduction, bastardy or filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court."
N. Y. CIVIL RIGHTS LAW §12, provides: "In all criminal prosecutions, the accused has a right to a speedy and public trial . . ."
N. Y. CODE CRIM. PROC. §8, provides: "In a criminal action the defendant is entitled (1) To a speedy and public trial . . ."

76. *Supra*, note .75.

77. COOLEY, CONSTITUTIONAL LIMITATIONS, 379 (6th ed. 1890); ABBOTT, TRIAL BRIEF, CRIMINAL CAUSES, §157 (1st ed. 1889); 6 WIGMORE, EVIDENCE, 338 (3d ed. 1940). See *People v. Hall*, 51 App. Div. 57, 64 N. Y. Supp. 433 (4th Dep't 1900).

78. *Hogan v. State*, 191 Ark. 437, 86 S. W. 2d 931 (1935); *Moore v. State*, 151 Ga. 648, 108 S. E. 47 (1921); *State v. Damm*, 62 S. D. 123, 252 N. W. 7 (1933); *State ex rel. Baker v. Utecht*, 22 Minn. 145, 149, 21 N. W. 2d 328, 331 (1946).

79. *People v. Miller*, 257 N. Y. 54, 60, 177 N. E. 306, 308 (1931); *Reagan v. United States*, 202 Fed. 488, 489-490 (9th Cir. 1913).

is not so sacrosanct that it cannot yield when there is danger of impairment of public morals in allowing free entrance and reporting of filthy sexual episodes.

Heavy criticism might be leveled at the majority for its dogmatic invocation of the *unius expressio, alterius exclusio* canon decried by modern writers.[80] The concept of statutory analogy[81] would have induced an opposite result, for the unbridled publicity given this case is an example of the precise evil which the legislature intended to correct by section four of the Judiciary Law. This is especially clear in that the trend, as evinced by the legislative history of that section,[82] has been to allow the trial judge greater latitude in excluding the prurient from attempting to view and report salacious testimony in the courts.

The connected case of *United Press Association v. Valente*[83] tested the right of the press to object to an exclusion order. The Court held that the applicable language of the Judiciary Law, "The sitting of every court within this state shall be public, and every citizen may freely attend the same,"[84] is to be historically construed[85] as affording freedom of access and protection from arrest to those whose presence was *essential* to the work of the court, and affords no rights to mere spectators. Hence an accused may waive *his* right to a public trial if the trial judge permits.

Judge Desmond, in a separate opinion, concurs with the result on the ground of his dissent in the *Jelke* case, citing the majority's ratio decidendi as specious. The dissent joins issue on the ground that common law tradition,[86] as embodied in section four of the Judiciary Law, guarantees the public an enforceable right to view and report judicial proceedings. The dissenters also feared that justice might be subverted if the judge and the accused could combine to bar the press and public from certain trials.

Evidence

In *People v. Dales*,[87] defendant was convicted of forgery in the second degree

80. See LENHOFF, CASES AND COMMENTS ON LEGISLATION, 692 (1949); Beutel, *Problems of Interpretation Under the Negotiable Instruments Law*, 27 NEB. L. REV. 485, 491 (1948).

81. LENHOFF, *op. cit. supra*, note 80, at 945.

82. Section 4 was amended in 1945 to include sodomy and filliation proceedings.

83. 308 N. Y. 71, 123 N. E. 2d 777 (1954).

84. N. Y. JUDICIARY LAW §4 (3).

85. The court referred to 1 COLONIAL LAWS OF NEW YORK 159-160 (1894), respecting freedom from arrest of all persons *voluntarily* attending court on court business.

86. "These words are of great importance, for *all causes* ought to be heard, ordered, and determined before the judges of the kings courts *openly* in the kings courts, whither all persons may resort." COKE'S SECOND INSTITUTES, v. I, p. 703 (1797); (emphasis supplied).

87. 309 N. Y. 97, 127 N. E. 2d 829 (1955).