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Criminal Law—Right to Public Trial

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By acquiescence in the court's delay in the imposition of sentence the defendant may waive his right to a speedy trial. *Miller v. Aderhold, supra; McLaughlin v. State,* 207 Ind. 484, 192 N. E. 753 (1934). The two judges writing minority opinions felt that under Rule 1-13, RULES IND. SUP. CT. (1954 Ed.), the defendant had waived his right. This rule provides a time limit of ninety days during which a judge may hold a case under advisement, after which, upon its being called to his attention by any party, he is disqualified from further participation in the case. The minority felt that this rule should be applied to criminal as well as civil cases, that since it is the only rule or statute limiting the power of a judge's holding a case under advisement, the defendant should have invoked its provisions, and that since the defendant had not, "he cannot now complain that he was denied his rights."

The three judges of the majority felt that the delay in making a finding deprived the defendant of his constitutional right to a speedy trial, and that the rule of *Warner v. State, supra,* that a defendant is entitled to have sentence passed with reasonable promptness, should be followed.

It is submitted that a proper decision was reached, not only for the reasons of the majority, but also because the trial court, in acting for the defendant's benefit in attempting to mitigate the harshness of the requirements of the probation statute, exceeded its power under the criminal code, and should not be upheld in such arbitrary practice. It should be left to the legislature to make rules, and to the executive to exercise clemency.

David Abbott

CRIMINAL LAW — RIGHT TO PUBLIC TRIAL

Defendant, convicted of compulsory prostitution under Section 2460 of the New York Penal Law, objected that he was denied a public trial when the judge excluded the general public and the press, but permitted the presence of the defendant's friends and relatives. Held (3-2): Reversed. The requirements of a public trial under Section 8 of the Code of Criminal Procedure and Section 12 of the Civil Rights Law as modified by Section 4 of the Judiciary Law were lacking. *People v. Jelke,* 284 App. Div. 211, 130 N. Y. S. 2d 662 (1st Dep't 1954).

The qualities incident to a public trial have been the subject of much controversy resulting in a definite split of opinion. Note, 49 COL. L. REV. 110 (1949). It is agreed that the courts have the inherent power under the demands of sound judicial administration to exclude the public because of the limited capacity of the

courtroom, *Davis v. United States,* 247 Fed. 394 (8th Cir. 1917); *Reagan v. United States,* 202 Fed. 488, 489-490 (9th Cir. 1913) (to preserve order); *People v. Miller,* 257 N. Y. 54, 177 N. E. 306 (1931) (to promote sanitary conditions); *Hogan v. State,* 191 Ark. 437, 86 S. W. 2d 931 (1935) (temporary exclusion, so that competent testimony may be obtained when a child is a witness); *People v. Murray,* 89 Mich. 276, 291, 50 N. W. 995, 1000 (1891) (to exclude minors).

The area of dispute centers around the extent to which the public may be excluded when indecent and salacious evidence is to be admitted. In part this disagreement may be traced to the obscure origin of this right and the policy behind its existence. Note, 49 COL. L. REV. 110, 114 (1949).

This origin has been attributed to a policy avoidance of the notorious use of secret trials, exemplified by the Spanish Inquisition, the excesses of the English Court of Star Chamber and the French monarchy's abuse of the *lettre de cachet.* Radin, *The Right to a Public Trial,* 6 TEMP. L. Q. 381, 386-389 (1932). The policy underlying the presence of this right is that it provides an effective restrain on the possible abuse of judicial power by enabling the public to see that the accused is fairly dealt with. *People v. Hartman,* 103 Cal. 242, 37 Pac. 153 (1894); 1 COOLEY, CONSTITUTIONAL LIMITATIONS 647 (8th ed. 1927). It has also been observed that the presence of the public may effectively tend to curb perjury. 6 WIGMORE, EVIDENCE § 1834 (3rd ed. 1940). Finally, key witnesses, unknown to the parties, are made more fully aware of the importance of their testimony. *Tanksley v. United States,* 145 F. 2d 58 (9th Cir. 1944).

One line of authority believes that the doors of the courtroom are expected to be kept open to persons of all classes except a designated few. *Davis v. United States,* 247 Fed. 394 (8th Cir. 1917).

In *People v. Hartman,* 103 Cal. 242, 245, 37 Pac. 153, 156 (1894), there is dictum to the effect that the right inheres primarily in the public rather than solely in the defendant. The other view maintains that the requirements of a public trial are fulfilled so long as specific classes of spectators are admitted even though the general public is excluded. *Reagan v. United States,* 202 Fed. 448 (9th Cir. 1913).

New York, unlike forty-one other states, does not have a constitutional provision involving the right to a public trial. In re *Oliver,* 333 U. S. 257, 268, n. 18 (1947). Since the first ten Amend-

ments of the Federal Constitution were not specifically applicable to the states, *Barron v. Baltimore,* 7 Pet. 243 (U. S. 1833), nor was the standard inherent in the due process clause of the Fourteenth Amendment violated for want of a public trial, in re *Oliver, supra,* the basis for this right in the instant case was found in Section 8 of the Criminal Code of Procedure and Section 12 of the Civil Rights Law, as modified by Section 4 of the Judiciary Law.

It had previously been established in New York that the court has the general power to exclude the public whenever the nature of the testimony was within the scope of the exceptions stated in Section 5 of the Code of Civil Procedure (now Section 4 of the Judiciary Law) even though the charge itself was not one of the named exceptions. *People v. Hall,* 51 App. Div. 57, 64 N. Y. Supp. 433 (4th Dep't 1900). In the instant case, *People v. Hall, supra,* was overruled on the ground that had the case been deemed to have correctly interpreted the legislative intent which supported the statute, the legislature would have adopted that broad rule when it amended Section 4 of the Judiciary Law in 1945 upon the recommendation of the Judicial Council. TENTH ANNUAL REPORT, 176 (1944). Instead the modification consisted of deleting certain specified charges and adding others, among which was the specific crime charged in the *Hall* case. The majority stressed that publicity, not secrecy, was deemed a part of the tradition of New York law not only for individual security but also in the public interest, reaching the conclusion that the statutory qualifications to a public trial should be confined to the specific charges enumerated in Section 4. *Rudd v. Hazard,* 266 N. Y. 302, 194 N. E. 764 (1935).

It is submitted that the legislature should make it clear whether or not the broad rule of *People v. Hall, supra,* is to be the law; and in the absence of such specific statutory provision the policy behind this right is such that it should be carefully guarded against any encroachment.

After completion of this note, the Court of Appeals affirmed the decision of the Appellate Division (4-2), *People v. Jelke,* 16 Law Rep. News 15 p. 2 (N. Y., Dec. 31, 1954) emphasizing that the right to limit a public trial, by sound judicial administration and statutory qualification, should be strictly construed, and unless the legislature makes its intention clear, the right should remain paramount.

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