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# Recent Colorado Decisions

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WILLS — COLORADO'S FIRST DEVISE BY IMPLICATION. *Spathariotis v. Estate of Spathas*, 398 P.2d 39 (Colo. 1965).

John Spathas, by his last will and testament, provided that if his wife should survive him, his non-business property should go outright to her and his business property should go to a trustee, to pay the income to his wife for life but with no provision for the remainder. The will further provided, "In the event that my wife shall predecease me then I devise . . . all my property . . . to the . . . Bank . . . in trust . . . to pay the . . . income . . . to my nephew . . . for . . . twenty years . . . [and then to] distribute to the . . . issue of my nephew. . . ."

The wife did *not* predecease the testator; yet the court held that even though the express trust in favor of the nephew failed, a devise to the nephew and his issue of the remainder of the trust for the wife was effectively created *by implication.*[1]

The court insisted that, "In so holding we are not making a new will but 'merely giving effect to testamentary intention limited to language within the four corners of the will'." The opinion was based upon the proposition that, "If . . . the property . . . claimed to be . . . devised by implication, in a contingency which has occurred, has been made the subject of an express . . . devise in another contingency, which did not occur, then effect may be given to such . . . devise by implication, in the contingency which did occur, if a reading of the entire will makes manifest that such was the intention of the testator."[2]

No reliance was placed upon the frequently used presumption against partial intestacy, although the facts would have made that argument appropriate.[3] The case therefore may be taken as strongly indicating that the court would not be reluctant to resort to implication in order to salvage poorly drawn deeds as well as wills.[4]

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[1] Spathariotis v. Estate of Spatha, 398 P.2d 39, 45 (Colo. 1965).

[2] *Id.* at 44.

[3] The wife contended that in the contingency which did occur, there was no devise, express or implied, of the remainder interest in the business property, and that it should pass by intestate laws. 398 P.2d at 41.

[4] Brock v. Hall, 33 Cal. 2d 885, 206 P.2d 360 (1949), holds "that implied gifts may be raised in both wills and inter vivos transfers in trust," and relies, *inter alia*, upon RESTATEMENT, PROPERTY § 115, Comment a., and § 272 (1936). See also, Implication of gift in inter vivos instrument, Annot. 11 A.L.R. 2d 681 (1949).

The opinion is strong, sophisticated, and orthodox, and could have been made even more convincing by the inclusion of some additional material from the briefs. The only occasion for this comment is afforded by the remark that, "A 'devise by implication' is a well-recognized concept in the general field of will construction, though Colorado authority bearing on this point is quite limited."[5] It may therefore be of some interest to bring to mind some situations, other than those mentioned by the court, in which remainders will usually be implied.

"Blackacre to A and B for their lives, as tenants in common, and upon the death of the survivor, to C and his heirs." Suppose that A dies first. Who then is entitled to the possession of his undivided one-half interest? Not C, because his remainder will become possessory only upon the death of B. B cannot claim the interest of A by right of survivorship because he and A were not joint tenants, and yet B will probably take, as the owner of an implied cross-remainder.[6] The normal construction in such cases is to say that as to one undivided half A has an estate in possession for his own life, B has an implied remainder for his own life, and C has a remainder in fee simple absolute; as to the other half B has an estate in possession for his own life, A has an implied remainder for his own life, and C has a remainder in fee simple absolute; and all of the remainders are vested, though of course, one or the other of the implied cross-remainders is bound to come to an end before it becomes possessory.

"Blackacre to A for life, and if no children survive him, then to B and his heirs." What if a child of A does survive him? It is usually held that the child had a remainder in fee simple, by implication.[7] If the implied remainder in fee simple absolute were contingent upon the child surviving A, then B would have an alternative contingent remainder in fee simple absolute; if the implied remainder in fee simple were vested, subject to divestment by no child surviving A, then B would have a shifting executory interest in fee simple absolute.

"Blackacre to A for life, and then to such of his children as he

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[5] Spathariotis v. Estate of Spatha, 398 P.2d 39, 41 (Colo. 1965).

[6] Hartford National Bank and Trust Company v. Harvey, 143 Conn. 233, 121 A.2d 276 (1956). See also, Disposition of decedent's share of income or property during interval between deaths of life beneficiaries sharing therein, where remainder was given over after death of all life benficiaries, Annot. 71 A.L.R. 2d 1332 (1960). See also, RESTATEMENT, PROPERTY § 115 (1936).

[7] Shepherd v. Peratino, 182 F.2d 384 (D.C. Cir. 1950). See also, Gift to issue, children, wife, etc., as implied from a provision over in default of such persons, Annot. 22 A.L.R.2d 177 (1952). See also RESTATEMENT, PROPERTY § 272 (1940).

may by deed or will appoint." There is no express gift in default of appointment. If A dies without having exercised the power, there will be found, according to one line of authority, an *implied* gift in fee simple to the objects of the power, vested, in this case in the children of A, subject to divestment only by the exercise of the power.[8] Upon the death of A the power of course ends, and the fee simple becomes absolute.

These orthodox instances of gifts by implication are especially interesting by way of contrast to those equally orthodox cases which hold that a mistaken description may be stricken from a will, but that the correct description may not be added. In the case which is the subject of this comment, all of the provisions of a somewhat complicated trust were added, by implication.

*Thompson G. Marsh**

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CRMINAL LAW — CONSTITUTIONAL RIGHTS — INDISCRIMINATE EXCLUSION OF PUBLIC ATTENDANCE AT A CRIMINAL TRIAL DENIES THE DEFENDANT'S CONSTITUTIONAL RIGHT TO PUBLIC TRIAL. *Thompson v. People,* 399 P.2d 766 (Colo. 1965).

In a trial for forcible rape, the prosecutor, before the jury was impaneled, moved to exclude all spectators who had "no legitimate purpose" in the courtroom. He contended that the trial would involve detailed testimony concerning female sexual organs, removal of clothing of the prosecutrix, and four-letter obscenities uttered during the alleged offense. Over defense objection, the court, remarking on the number of younger people in attendance, granted the motion. The order excluded the public generally, including friends of the defendant, but excepted relatives within the third degree of both the prosecutrix and the defendant, the press, all court officials, necessary police officers, bailiff, and attorneys. The Supreme Court of Colorado reversed the ensuing conviction, holding that the defendant had been

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[8] Bridgewater v. Turner, 161 Tenn. 111, 29 S.W.2d 659 (1930). This is a very strong case which seems to provide an exception to the statement by Simes and Smith, "It is believed that so far no reported case, either American or English, has been decided which tests absolutely the question whether the court is applying a trust theory or an implied gift theory." FUTURE INTERESTS § 1033 at 504 (2d ed. 1956). Here title to a portion of the property was decreed to be in the heirs of an object of the power who had died before the donee. This result could only be reached by the theory of implied gift, and the court expressly adopted that theory.

*Professor of Law, University of Denver College of Law.

denied his constitutional right to a public trial under Article 2 of the Constitution of Colorado.[1]

The constitutional guarantees, both federal and state, of a public trial originate in the English common law, although the derivation apparently has escaped identification with any particular moment in English jurisprudence.[2] Neither common law commentators (*e.g.,* Coke and Fortescue) nor early charters of liberty (*e.g.,* Magna Carta and the English Bill of Rights of 1689) use the exact wording "public trial" or "speedy and public trial." Nevertheless the general understanding is that a public trial was a common law privilege.[3] Its development in England may well have sprung from a popular revulsion to the secrecy and tortures of the Inquisition, and the abuses to criminal process in the French *lettre de cachet.*[4]

The salutary effects[5] of a public trial — *i.e.,* one with spectators, interested or not, free to come and go at will — seem to be ideally that: it produces in the witness' mind a disinclination to falsify by stimulating the instinctive responsibility to public opinon as symbol-

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[1] COLO. CONST. art. 2, §16. "In criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury . . . ." The Supreme Court of Colorado adopted without reservation, 399 P.2d at 781-82, the opinion of the United States Court of Appeals for the Third Circuit in United States v. Kobli, 172 F.2d 919 (3d Cir. 1949):

> ". . . [T]he Sixth Amendment precludes the general indiscriminate exclusion of the public from the trial of a criminal case . . . over the objection of the defendant and limits the trial judge to the exclusion of those persons or classes of persons only whose particular exclusion is justified by lack of space or for reasons particularly applicable to them. Moreover whatever may have been the view in an earlier and more formally modest age, we think that the franker and more realistic attitude of the present day toward matters of sex precludes a determination that all members of the public, the mature and experienced as well as the immature and impressionable, may reasonably be excluded from the trial of a sexual offense upon the ground of public morals. 172 F.2d at 923-24.

[2] Radin, *The Right to a Public Trial,* 6 TEMP. L.Q. 381-84 (1932). See also 1 BISHOP, NEW CRIMINAL PROCEDURE § 957 (4th ed. 1895); Re Oliver, 333 U.S. 257, 266-72 and notes, an extensive collection of cases and judicial, statutory, and historical sources on public trial.

[3] See Radin, *supra* note 2, at 382. Professor Radin notes at page 382 of this article that Sir Thomas Smith, who wrote his *De Republica Anglorum* in 1565, nearly a century after Fortescue, does make a particular point of the public character of English trials. As early as 1649, the demand was made, in an English treason trial, for a public proceeding, and apparently was granted. Trial of John Lilburne, 4 Corbett's St. Tr. 1270, 1273-74 (Comm'n of Oyer and Terminer 1649):

> Lt. Col. Lilburne: "[B]y the laws of this land all courts of justice always ought to be free and open for all sorts of peaceable people to see, behold and hear, and have free access unto; and no man whatsoever ought to be tried in holes or corners. . . . But if I be denied this undoubted privilege, I shall rather die here than proceed any further. . . ."
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> Judge Keble: "Mr. Lilburne, look behind you and see whether the door open or no."
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> Lt. Col. Lilburne: "Well then, Sir, I am satisfied as to that. . . ."

[4] Radin, *supra* n. 3, at 388-89.

[5] Summarized in 6 WIGMORE, EVIDENCE § 1834 at 332-37 (3d ed. 1940).

ized in the audience, and objectively, it secures the presence of those who may be able to furnish testimony or contradict falsehood;[6] publicizing the trial by the news media invites testimony or contradiction to false testimony;[7] it produces a wholesome effect upon the officers of the court in performance of their duty with restraint and absence of bias, and instills in the public respect for and confidence in the law and judicial procedure.[8] Courts generally agree, however, that the right to public trial is subject to certain limitations.[9] The defendant is not deprived of his right if the court limits attendance

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[6] *E.g.*, Tanksley v. United States, 145 F.2d 58, 59 (9th Cir. 1944). See also BLACKSTONE, COMMENTARIES at 1983 (Jones ed. 1916):

> The open examination of witnesses *viva voce,* in the presence of all mankind, is much more conducive to the clearing up of truth than the private and secret examination before an officer or his clerk, in the ecclesiastical courts and all that have borrowed their procedure from the civil law: When a witness may frequently depose that in private that he will be ashamed to testify in a public and solemn tribunal.

[7] Re Hearings Concerning Canon 35, 296 P.2d 465, 467, 469-70 (Colo. 1956); New York Post Corp. v. Leibowitz, 2 N.Y.2d 677, 163 N.Y.S.2d 409, 143 N.E.2d 256, 258, 259-60 (1958); and see 6 Wigmore, *supra* n. 5, at 333-34; People v. Jelke, 130 N.Y.S.2d 662, 680-81, *aff'd,* 308 N.Y. 56, 123 N.E.2d 769 (1954). To be distinguished, of course, is the clear right of a criminal defendant to *waive* his right to a public trial. *E.g.,* United States v. Sorrentino, 175 F.2d 721, 723 (3rd Cir. 1949); Gibson v. United States, 31 F.2d 19, 22 (9th Cir. 1929); Keddington v. State, 19 Ariz. 457, 172 Pac. 273, 275 (1918); Dutton v. State, 123 Md. 373, 91 Atl. 417, 423 (1914). And see the recent Supreme Court decision holding that the telecasting of a two-day pretrial hearing, the opening and closing arguments of the State, the return of the jury's verdict and its receipt by the trial court constituted deprivation of due process under the Fourteenth Amendment. Estes v. State, 85 Sup. Ct. 1628, 1629, 1632-33 (1965). The opinion of Clark, J., discusses closely, at 1634-36, the potential of prejudice to a defendant in the impact of television upon jurors and witnesses in both original trial and a retrial.

[8] *E.g.,* Re Oliver, 333 U.S. 257, 270 (1947) (dictum); People v. Murray, 89 Mich. 276, 50 N.W. 995, 998 (1891); State v. Keeler, 52 Mont. 205, 156 Pac. 1080, 1083-84 (1916).

The *Estes* decision, announced June 7, 1965, evoked immediate action by the Supreme Court of Colorado, the only State besides Texas which permitted photographs and broadcasting in court during the course of a criminal trial. Canon 35, Canons of Judicial Ethics, Appendix B to Rules of Civil Procedure, COLO. REV. STAT. (1963). The Colorado court, on July 1, 1965, amended its Canon 35 to prohibit photographing or broadcasting or televising of any portion of a criminal case, beginning with the selection of the jury and continuing until submission of the issues to the jury, ". . . unless all accused persons who are then on trial shall affirmatively give their consent; . . ." The Canon retains, of course, the requirement of the trial court's permission to photograph or broadcast. The court expressly attributed the amendment to the *Estes* decision, stating that it wished to avoid the possibility that the Supreme Court of the United States might reverse judgments of conviction on the ground that the presence of a camera or microphone in a courtroom deprived an accused person of a fair trial. It concluded,

> We make the change without reference to our own views on the subject. The amendment is made solely for the purpose of avoiding expensive retrials of criminal cases and the delays in ultimate justice which are caused thereby.
> . . .
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> Nothing in this statement shall be construed as a requirement that persons who have already been tried under the old rule must be granted a rehearing.

STATEMENT OF THE COURT RE AMENDMENT OF CANON 35, en banc, Promulgated July 1, 1965.

[9] 1 COOLEY, CONSTITUTIONAL LIMITATIONS 647 (8th ed. 1927).

to prevent overcrowding.[10] Conduct in the courtroom which interferes, or threatens to interfere, with the administration of justice may be met by an exclusion order.[11] Indeed, the court may even screen or search or issue passes to incoming spectators if it reasonably apprehends that some intend to interfere with or frustrate justice.[12] The court may exclude those of tender years because of the imminence of indecent, scandalous, disgusting, or immoral matters in evidence, in order to prevent the corruption of young minds.[13] The court may even be temporarily cleared of some or all the spectators because of the tender age, severe embarrassment, or emotional disturbance

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[10] *E.g.,* United States v. Kobli, 172 F.2d 919, 922 (3d Cir. 1949); Davis v. United States, 247 Fed. 394, 395 (8th Cir. 1917); Murray v. State, 202 Miss. 855, 33 So. 2d 291, 292-93, *cert. denied,* 333 U.S. 959, 869 (1948) (a case in which spectators of same race as defendant were required to sit in the balcony when their presence on main floor was barred by segregation as well as overcrowding; the court held that any complaint on the seating arrangement must come not from the defendant, but from those who considered the order a denial of equal protection of the laws); People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769, 772, 48 A.L.R.2d 1425, *aff'd,* 130 N.Y.S.2d 662 (1954); Commonwealth *ex rel.* Paylor v. Cavell, 138 A.2d 246, 249 (Pa. Super. 1958); State v. Collins, 50 Wash.2d 740, 314 P.2d 660, 663 (1957).

[11] *E.g.,* United States v. Kobli, *supra* note 10, at 922 (spectators must observe "proper decorum," and if their conduct tends in any way to interfere with the administration of justice in the courtroom, they may be removed without violating the defendant's constitutional guarantee of "public trial"); People v. Jelke, *supra* note 10, at 772 (it is the "inherent power" of the court); Grimmett v. State, 22 Tex. App. 36, 2 S.W. 631, 633-34 (1886); State v. Collins, *supra* note 10, at 663.

[12] *E.g.,* People v. Santo, 43 Cal.2d 319, 273 P.2d 249, 256 (1954), *cert. denied* 348 U.S. 959 (1955) (it was the trial judge's duty to see that no conduct on the part of any person obstructed justice at a murder trial highly sensationalized in the news media, and the presence of armed policemen in the courtroom and a search of arriving spectators outside the courtroom, unknown to the jury, did not prejudice the defendant); Pierpont v. State, 49 Ohio App. 77, 195 N.E. 264, 267-68, *petition in error dismissed* 128 Ohio St. 572, 192 N.E. 740 (1934) (where the defendant charged with murder in connection with the jail delivery of the notorious Dillinger was known to the court to be desperate and dangerous, and where it was common report and evidently possible that his cohorts might try to rescue defendant during trial, the court did not deprive him of a public trial when each spectator was required to have a pass signed by either the judge or the officer in command of soldiers guarding the courthouse. See People v. Mangiapane, 219 Mich. 62, 188 N.W. 401, 403 (1922) (no error, since the court discovered, and stopped, a police search outside the courtroom of underworld characters, of which the jury was still unaware). *But cf.,* Davis v. United States, 247 Fed. 394, 395 (8th Cir. 1917) (though the crowd was noisy, and becoming boisterous, and could have been excluded to prevent overcrowding, a general exclusion order was error).

[13] *E.g.,* United States v. Kobli, *supra* note 10, at 922 (trial for violation of the Mann Act; the exclusion of high school girls was permissible — but not of the public generally); State *ex rel.* Baker v. Utecht, 221 Minn. 145, 21 N.W.2d 328, 331, *cert. denied,* 327 U.S. 810 (1946) (Sodomy; persons of "immature years" could be excluded temporarily); E. W. Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896, 904, *appeal dismissed* 164 Ohio St. 261, 130 N.E.2d 701 (1955) (pandering; trial judge not only has the right but the duty to exclude from a trial involving a morals offense those who by reason of "immaturity," or otherwise, would be harmfully affected by attending); Commonwealth *ex rel.* Paylor v. Cavell, *supra* note 10, at 249 (rape, robbery, assault and battery with intent to ravish; a portion of the public may be excluded where special circumstances warrant, such as "youthful" spectators in a case involving scandalous or indecent matters).

of a witness which would interfere with competent testimony on facts material to the case.[14]

The general agreement ends, however, with the "sex" cases, in which the court seeks to protect public morals, not because of the tender years of the spectators or witnesses, but simply because of the indecent, disgusting, or immoral matters to be presented in evidence.

The Supreme Court of Colorado, by adopting the opinion of *United States v. Kobli,*[14a] now joins those jurisdictions which safeguard the right to public trial with permissive rules directed in favor of general attendance. *Kobli* forbids the "general indiscriminate" exclusion of the public from a criminal trial and limits the discretionary exclusion to only those persons or classes whose particular exclusion is justified.[15] *Kobli* explicitly recognizes the "franker more realistic attitude" of today's society toward matters

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[14] *E.g.,* Geise v. United States, 262 F.2d 151, 156-57 (9th Cir. 1958), *reh. denied,* 265 F.2d 659 (9th Cir. 1959) (rape; exclusion of all except press, bar, and relatives and close friends of defendant and the nine-year-old prosecutrix and witnesses aged seven and eleven, in view of difficulty of obtaining testimony from children before a large audience); Kirstowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P.2d 163, 169 (1956) (murder; where the defendant requested exclusion of all, including the press, and waived right to public trial, the court had the right to do so because of the witness' emotional disturbance which would have prevented her testifying freely and completely — but it was error thereafter to make the order effective at beginning of testimony and continue it throughout trial); People v. Byrnes, 84 Cal.App.2d 72, 190 P.2d 290, 294, *cert. denied,* 335 U.S. 847 (1948) (court noted that what it had said relative to the exclusion of general public from the trial in the interest of "public morals" being a deprivation of the right to public trial, did not apply to a situation in which it would appear to the court that a material witness because of emotional disturbance would be substantially prevented from giving testimony in the presence of a crowd of spectators); State v. Poindexter, 231 La. 630, 92 So. 2d 390, 391-92 (1956) (homicide within prison walls; because it refused to exclude prison officials upon request of defendant who feared for them to hear his testimony concerning death of a fellow-inmate, the court abused its discretion); Commonwealth v. Blondin, 324 Mass. 564, 87 N.E.2d 455, 460 (1949), *cert. denied,* 339 U.S. 984 (1950) (rape and abuse of child; exclusion was correct under statutory authority covering sex cases involving a minor under 18); Commonwealth v. Principatti, 260 Pa. 587, 104 Atl. 53, 57-58 (1918) (murder; error to deny its power to exclude all "Italians" at request of a defense witness who feared vendetta if they heard his testimony) *But see* State v. Hashimoto, 389 P.2d 146, 155 (Hawaii 1963) (rape; it was not error to refuse defendan't motion to exclude eighteen police recruits who were present in uniform to observe criminal procedure).

On occasion, the very physical circumstances may force or allow the court correctly to order evidence presented so that some of the spectators present happen to hear it and some don't. *E.g.,* Gillars v. United States, 182 F.2d 962, 977-78 (D.C. Cir. 1950) (treason; evidence by way of recordings was heard by jury and court by individual earphones, with twenty-three sets of earphones provided for the press and six spectators); Iva Ikuki Toguri D'Aguino v. United States, 192 F.2d 338, 365 (9th Cir. 1951), *cert. denied,* 343 U.S. 935 (1952), *reh. denied,* 345 U.S. 931 (1953) (treason; evidence presented by recordings, with forty sets of earphones for court, jury and press); People v. Cash, 52 Cal.2d 841, 345 P.2d 462, 466 (1959) (murder; because of poor acoustics in courtroom, tape-recordings as evidence were played in chambers in presence of all principals, with no order of exclusion of spectators).

[14a] 172 F.2d 919 (3d Cir. 1949), *supra* note 1.

[15] 172 F.2d 919, 923 (1949).

of sex, and that such an attitude precludes the exclusion of mature spectators as well as the immature and impressionable.[16]

The theory underlying the *Kobli* standard of exclusion is that there is a difference between a trial in which *everyone is admitted except a few* and a trial in which *everyone is excluded except a few;* the latter is not a public trial. Whether a trial court thinks merely of public morals, or is convinced that the spectators attend from prurient or morbid curiosity, it cannot exclude the public generally.[17] Admission of several classes is nevertheless a denial of a public trial because of the exclusion of other classes.[18] The exclusion of the press is usually sufficient to constitute a denial of a public trial, even if other classes are admitted.[19] Though the court may exclude those of

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[16] *Ibid.*

[17] *E.g.,* People v. Byrnes, 84 Cal. App. 2d 72, 190 P.2d 290, 293-94, *cert. denied,* 335 U.S. 847 (1948) (rape and perversion; general exclusion); State v. Keeler, 52 Mont. 205, 156 Pac. 1080, 1081 (1916) (statutory rape; exclusion not only of additional spectators, but also of those present when once they left the courtroom); People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769, 744, 48 A.L.R.2d 1425, *aff'g* 284 App. Div. 211, 130 N.Y.S.2d 662 (1948) (compulsory prostitution; exclusion of press and public only during presentation of people's case).

[18] *E.g.,* Tanksley v. United States, 145 F.2d 58, 60 (9th Cir. 1944) (rape of a 19-year-old married woman; only parties, law officers, the press, and brother and father of the defendant were admitted); United States v. Brown, 7 U.S.C.M.A. 251, 22 C.M.R. 41, 47-48 (1956) (obscenity; press, defendant's relatives and anyone else he wanted admitted); People v. Murray, 89 Mich. 276, 286, 50 N.W. 995, 998, 1000 (1891) (murder; only "respectable" citizens admitted as spectators); State v. Haskins, 38 N.J. Super. 250, 118 A.2d 707, 710 (App. Div. 1955) (lewdness, fornication; lawyers, witnesses, and press admitted); People v. Jelke, *supra* note 17 (defendant's friends and relatives admitted during people's case, all others thereafter); Neal v. State, 86 Okla. Crim. 283, 192 P.2d 294, 296 (1948) (transporting for purposes for prostitution; only those actually engaged in the trial admitted). *But cf.* Lancaster v. United States, 293 F.2d 519 (D.C. Cir. 1961) (violation of Mann Act and possession of obscene pictures with intent to exhibit; proper to exclude all except the press when alleged obscene film was shown in court). *See also* those cases in which exclusion is authorized by state statute, *e.g.,* Commonwealth v. Blondin, 324 Mass. 564, 87 N.E.2d 455, 459-60, *cert. denied,* 339 U.S. 984 (1950) (exclusion under statute in cases of sex crimes involving a minor under 18) or by state constitution, *e.g., Ex parte* Rudolph, 162 So. 2d 486, 487 (Ala. 1964) (exclusion of general public from trial for rape or assault with intent to ravish.

[19] *E.g.,* Kirstowsky v. Superior Court, 300 P.2d 163, 169 (Cal. App. 1956) (murder; the exclusion of the public and press during defendant's testimony because of her emotional disturbance was within the discretion of the court, but not exclusion from the very beginning of taking testimony which continued throughout trial; *In re* Hearings Concerning Canon 35 of the Canons of Judicial Ethics, 296 P.2d 465-67 (Colo. 1956) (the constitutional right to a public trial is abridged if the press is excluded); People v. Jelke, 308 N.Y. 56, 123 N.E.2d 123 N.E.2d 769, 774, 48 A.L.R.2d 1425, *aff'g* 284 App. Div. 211, 130 N.Y.S.2d 662 (1954) (compulsory prostitution; error to bar press and public during presentation of people's case); E. W. Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896, 903-04 (1955), *appeal dismissed,* 164 Ohio St. 261, 130 N.E.2d 701 (1955) (pandering; exclusion of press and others except for one witness, on no accepted ground, was error). See Craig v. Harney, 331 U.S. 367, 374-75 (1947); Note, 35 MICH. L. REV. 474, 476 (1937).*But cf.,* State v. Jackson, 43 N.J. 148, 203 A.2d 1, 9-10 (1964) (dictum) (murder; in hearing motions by co-defendants for severance and bail, the trial court could, in order to protect them from prejudicial publicity, have granted defendants' request for exclusion of press and public. *See* Estes v. State, 85 Sup. Ct. 1628, 1632-33 (1965).

tender years or immature minds,[20] they must be that.[21] The right to a public trial applies to the entire trial,[22] although not to matters which are by their nature confidential, not intended for consideration by the jury or spectators,[23] or are simply not a part of the trial.[24]

In contrast, some opinions seem to consider a trial public as long as it is not secret, and allow general exclusion when warranted by presentation of immoral, disgusting, or indecent matters at trial.[25]

The weight of authority holds that denial of a public trial

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[20] *Supra* note 13.

[21] Reynolds v. State, 126 So. 2d 497, 498 (Ala. App. 1961) (indecent molestation of child; an order excluding all those under eighteen yeears of age went beyond excluding children of tender years); DeBoor v. State, 182 N.E.2d 250, 254-55 (Ind. 1962) (murder; it was not error to refuse defendants' motion for exclusion of high school students, when there was no evidence that they committed misconduct or attempted to influence jury).

Exclusion of the defendant's friends has been held error. State v. Haskins, 38 N.J. Super. 250, 118 A.2d 707, 710 (App. Div. 1955) (lewdness, fornication; order excluding all and intended to exclude defendant's friends is error, and to be noticed by appellate court though defendant failed to object at the time); *see Re* Oliver, 333 U.S. 257, 271-72 (1947) (the accused is at the very least entitled to have his friends, relatives, and counsel present). By this authority, the *Thompson* conviction could have been reversed on the exclusion of the parties' friends alone. In State v. Holm, 67 Wyo. 360, 224 P.2d 500, 513 (1950), a statutory rape case, the court kept count, and though it excluded spectators at first, it later modified the order to allow in friends of the parties, noting 35 to 45 people in the courtroom throughout the trial. No error.

[22] People v. Jelke, *supra* note 18; Bonicelli v. State, 339 P.2d 1063, 1065-66 (Okla. Crim. 1959) (burglary; error to permit the jury to enter chambers because of courtroom's noisy air-conditioning system, and, while the door was closed deliberately against all but court and counsel, to hear tape-recordings of evidence. *But cf.* People v. Buck, 46 Cal. App. 2d 558, 116 P.2d 160, 162 (1941) (rape; there was no prejudice in ordering courtroom doors locked during instructions to the jury, to obviate the disturbance of spectators coming and going, since the court ordered no one to depart and opened the doors immediately afterward); State v. Meyers, 14 Utah 2d 417, 385 P.2d 609, 610 (1963) (rape of own daughter; exclusion of witnesses alone, except prosecutrix, during opening statement of prosecutor not error); State v. Collins, 50 Wash. 2d 740, 314 P.2d 660, 663-65 (1957) (murder; though appellate court does not commend it, the trial court met the requirement for public trial despite locking the courtroom doors during state's closing argument so that the jury "wouldn't be disturbed").

[23] People v. Rodriguez, 338 P.2d 41, 48 (Cal. App. 1959) (narcotics; conferences between court and counsel at the bench and in chambers do not deny defendant "public" trial); *cf.* People v. Spencer, 338 P.2d 484, 487 (Cal. App. 1959) (uttering forgery); People v. Teitelbaum, 329 P.2d 157, 171-72 (Cal. App. 1958).

[24] Hayes v. United States, 296 F.2d 657, 668 (8th Cir. 1961) (kidnapping; conferences in chamber to decide whether defendant will defend self are pre-trial, not part of trial).

[25] *E.g.*, Reagan v. United States, 202 Fed. 488, 490 (9th Cir. 1913) (rape of one under sixteen; no error to exclude spectators when there was no evidence of prejudice to defendant thereby and he wasn't deprived of the presence, aid, or counsel of any person who presence might have aided him); Keddington v. State, 19 Ariz. 457, 172 Pac. 273, 274 (1918) (contributing to "dependency" of a minor; relatives of defendants and press, which latter class would ensure more of a public trial than "a housefull of idle and curious courthouse loungers"); Benedict v. People, 23 Colo. 126, 129, 46 Pac. 637, 638 (1896) ("the infamous crime against nature"; exclusion of all except bar, officers of the court, law students, and witnesses; State v. Nyhus, 19 N.D. 376, 124 N.W. 71, 72 (1909) (rape of female under fourteen; exclusion of all except counsel, witnesses, and any other requested by either party).

necessarily implies prejudice and nothing more need be shown.[26]

In *Thompson v. People,* the court rejected the attorney general's reliance upon the only Colorado precedent, *Benedict v. People,*[27] distinguishing that case upon its procedural facts on appeal and the failure of the defendant to object to exclusion of the public. While it is true that the Colorado court did not explicitly overrule *Benedict,* the effect, as contended by Justice McWilliams in his dissent,[28] seems to be exactly that.[29] In approving *United States v. Kobli,* the court has adopted the standard that indiscriminate exclusion of the public from a criminal trial is denial of a public trial, and such a denial, *ipso facto,* warrants an assumption of prejudice to the defendant which requires reversal.

*Benedict v. People* was the sole and aged precedent in Colorado Its propriety and correctness arose from "an earlier and more formally modest age."[30] That age is past. So, it would seem, is *Benedict* as legal precedent in Colorado.

*William K. Hickey*

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[26] United States v. Kobli, 172 F.2d 919, 921 (3d Cir. 1949) adopting the rule of the Eighth and Ninth Circuits. Tanksley v. United States, 145 F.2d 58, 59 (9th Cir. 1944) (rape); Davis v. United States, 247 Fed. 394, 398-99 (8th Cir. 1917) (train robbery); People v. Byrnes, 84 Cal. App. 2d 72, 190 P.2d 290, 294, *cert. denied,* 335 U.S. 847 (1948) (rape and sexual perversion); State v. Haskins, 38 N.J. Super. 250, 118 A.2d 707, 710 (1955) (lewdness, fornication; prejudice presumed even with no objection from defendant); People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769, 775, 48 A.L.R.2d 1425, *aff'g* 284 App. Div. 211, 130 N.Y.S.2d 662 (1954) (compulsory prostitution); Neal v. State, 86 Okla. Crim. 283, 192 P.2d 294, 296 (1948) (transporting persons for purpose of prostitution); State v. Collins, 50 Wash. 2d 740, 314 P.2d 660, 663 (1957) (murder); *Contra,* Benedict v. People, 23 Colo. 126, 129, 46 Pac. 637, 638 (1896) ("the burden of showing . . . prejudice rests upon the one assigning it . . . and in the absence of a contrary showing, . . . we are justified in assuming that it [the exclusion] was made at the request or with the consent of the accused himself. . . ."); Reagan v. United States, 202 Fed. 488, 490 (9th Cir. 1913) ("[I]t is not reversible error to exclude the spectators as was done, when there is no showing whatever that the defendant was prejudiced thereby. . . ."). But even this pronouncement has been described as "dictum" in a later opinion by the same court. Tanksley v. United States, 145 F.2d 58, 59 (9th Cir. 1944). And see the reference to *Reagan* in note 28, *infra.*

[27] 23 Colo. 126, 46 Pac. 637 (1896).

[28] 399 P.2d at 783-84. Justice McWilliams, dissenting in *Thompson,* preferred the opinion in Reagan v. United States, 202 Fed. 488 (9th Cir. 1913), which reflected the view of *Benedict* that exclusion of those who come from morbid curiosity is not reversible error so long as the exclusion does not render the trial a secret one, or cause some prejudice to the defendant by depriving him of some person whose presence might have been of advantage to him. Note, however, the fact that the Court of Appeals for the Ninth Circuit a generation later distinguished its *Reagan* opinion when it said in Tanksley v. United States, 145 F.2d 58, 59 (9th Cir. 1944), "In the Reagan case, this court did not hold that the exclusion of the public was not a violation of the defendant's right to a public trial. What was held was that, on the facts existing in that case, no possible prejudice could have been suffered by the defendant from the exclusion of the public." Still later, in 1958, the Ninth Circuit again distinguished *Reagan,* but declared that it had never overruled or disapproved it, when it approved exclusion of the public from a rape case involving a nine-year-old prosecutrix. Geise v. United States, 262 F.2d 151, 156-57 (9th Cir. 1958), *reh. denied* 265 F.2d 659 (9th Cir. 1959).

[29] 399 P.2d at 783.

[30] United States v. Kobli, 172 F.2d at 923 (3rd Cir. 1949).