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PARDONS AND HABITUAL CRIMINAL STATUTES—CONFLICTS OF CRIMINAL LAWS.—[Federal] A pardon does not have the effect of mullifying a conviction of crime so far as habitual criminal statutes are concerned, according to the holding of the United States Circuit Court of Appeals in *Groseclose v. Plummer,* 106 F. (2d) 311 (C. C. A., 9th, 1939). The case came before the court on an appeal from the United States District Court in California, which denied appellant's petition for a writ of habeas corpus. Appellant had been convicted in California and sentenced to the state's prison as an habitual criminal. The conviction had been affirmed by the Appellate Court (*People v. Biggs et al.,* 65 P. (2d) 75 (Cal. App., 1937) and by the Supreme Court of California, *People v. Biggs,* 9 Cal. (2d) 508, 71 P. (2d) 214 (1937).

Petitioner contended in the state courts and in the Federal court that two of the three felony convictions on which the finding of habitual criminality was based were convictions in Texas for which he had been pardoned by the executive; further that Texas law did not permit the introduction of evidence for which a man had been pardoned, in any subsequent proceedings whatsoever. In answer to that contention Circuit Judge Stephens, writing the opinion in the instant case, said (supra, 313): "It may be true (we do not so hold) that the Texas pardon law goes all the way and prohibits the Texas courts from giving any consideration to a pardoned offense. Yet such a law could not turn back the hand of time long enough to delete an actuality from its long course. It still remains true that petitioner was the subject of two prior final convictions when the law of California overtook him in the commission of another felony. Notwithstanding the Texas pardons, the stubborn fact remains that the *habit* of crime was upon him. *The executive clemency of one state could not, under the law of such a state, prevent a sister state from taking cognizance of plain facts, and from applying its police laws to them.*" (Italics supplied)

The holding of the California court in refusing to treat the pardons as a bar to the consideration

of the two prior convictions was in line with an earlier decision of the California District Court of Appeals, *People v. Sheridan*, 16 Cal. App. (2d) 476, 60 P. (2d) 870 (1936). There the court sustained the conviction of a man, convicted as an habitual criminal, despite prior California pardons.

Texas, on the other hand, gives a broad construction to the pardon and refuses proof of conviction to be made in any case where the felon is subsequently pardoned. In the case of *Scrivenor v. State*, 113 Tex. Cr. App. 194, 20 S. W. (2d) 416 (1928) the court reversed a conviction for a second offense in robbery because the appellant in that case had been pardoned by Governor Miriam Ferguson after the first conviction, and hence could not be a second offender. In that case Judge Lattimore (supra, at 416) cited 20 R. C. L. §§40, 41: " 'In case of full pardon, it relieves the punishment and blots out of existence the guilt of the offender to such an extent that, in the eyes of the law, he is as innocent as if he had never committed the offense,'" and further observed, ". . . in our judgment the learned trial court was in error in allowing proof of the former conviction of this appellant and in permitting the same to be used to secure a greater penalty, when it was shown that he had been granted a full pardon therefore."

With the Texas law as stated by Judge Lattimore, the United States Courts and the courts of California were in opposition to the general proposition of the conflicts of criminal laws, as stated by Professor Stimson: ". . . the law applicable to an individual is the law to which he was subject at the time of the acts or omissions, the legal effect of which are in question, and not the law of the forum in which his rights may afterwards be brought into question." Stimson, *Conflicts of Criminal Laws* (1936) 4; cf. Beale *Conflicts of Law* (1916) §73. Following this principle, it could be argued that the California forum (and the Circuit Court of Appeals) should have allowed the rule of the Texas forum to govern, and the conviction be set aside, since the defendant's prior convictions were for acts committed in Texas.

Opposed to this position is the more realistic approach to the problem of conflicts tacitly adopted by the court in the instant case, which holds that when the public policy of a state is in question, the domestic forum may apply its own laws. This view is upheld by many students of conflicts of laws and finds succinct expression in the words of Professor W. W. Cook (40 W. Va. L. Q. 303 (1934) at p. 328): "If, on the other hand, the emphasis is shifted primarily to the prevention of conduct regarded in the given state as anti-social, and if, in connection with this, the segregation of the offender is regarded in large part from the point of view of reclaiming the 'criminal,' the place in which the 'crime is committed' at once comes to assume less importance. The enforcement of the criminal becomes to a considerable degree a means of selecting persons in need of remedial treatment, or of permanent detention where 'cure' is impossible."

Returning to the question of the effect of pardons in general, a study of the decisions from other jurisdictions shows a varying attitude. By means of treaty construction, the United States District Court found that one pardoned by the

King of Prussia could lawfully enter the United States, *Hempel v. Weeden,* 23 F. (2d) 949 (D. C. W. D. Wash., 1928). The court, however, stated that Congress could disregard the effect of a foreign pardon wiping out conviction in that state, and deny admission. The court also suggested that it would not be bound to treat all pardons from all states as it did the one from Prussia.

The states in general treat convictions as restoring civil rights but not privileges or licenses. In Oklahoma, for example, a pardoned felon was permitted to be a candidate for the legislature, *State ex rel Cloud v. Election Board of State of Oklahoma,* 169 Okla. 363, 36 P. (2d) 20, 94 A. L. R. 1007 (1934). However, the appellate division of the Supreme Court of New York held that while civil disabilities were removed by full pardon, the pardoned person was still a convicted criminal (*Beck v. Finigan,* 3 N. Y. S. (2d) 1009, 254 App. Div. 110, aff'g 298 N. Y. S. 675) and upheld the civil service commission of New York city in denying a position to one whose record bore a conviction. In Georgia a policeman, discharged from his job by reason of a felony conviction, felt aggrieved when he was not restored to his former position upon pardon. The court told him the pardon restored him to all civil rights but could not restore him to office. *Morris v. Hartsfield,* 186 Ga. 156, 197 S. E. 281 (1938).

The right to practice medicine or law is in a class of special license in so far as restoration by pardon is concerned. Anyone who would be re-admitted to the practice of law or even halt disbarment proceedings may not rely solely upon executive clemency as a grounds for restoration to his profession. *In re Egan,* 52 S. D. 394, 218 N. W. 1 (1928); *Commonwealth ex rel Harris v. Porter,* 257 Ky. 563, 78 S. W. (2d) 800 (1935); *State v. Snyder,* 136 Fla. 875, 187 So. 381 (1939). A woman convicted of manslaughter in Washington and subsequently pardoned was denied the right to regain her license to practice the art of healing. *State v. Hazzard,* 139 Wash. 487, 247 P. 957, 47 A. L. R. 538 (1926). The court in that case answered the suggestion that a pardon by the governor should be treated as a finding of innocence, saying that to ask the court to believe that even a bare majority were pardoned because they were innocent was to ask the court "to assume that which we all know to be untrue."

It would seem that the Circuit Court of Appeals took the better course in denying the appeal to release Groseclose. The courts are to be commended when they treat a pardon as opening the way to rehabilitating a man and permitting him to resume his place in society. It is highly offensive to any sense of social policy to demand that the court overlook the first offense for which he has been pardoned when he is caught later in some rascality.

The gist of the rationale behind the case is well put by Judge Stephens, ". . . a law could not turn back the hand of time long enough to delete an actuality from its long course . . . the *habit* of crime was upon him."

JOHN L. DAVIDSON, Jr.

PROMISE OF IMMUNITY FROM PROSECUTION.—[Ill.] Defendants were indicted for conspiracy to defraud the state of money due it under Motor Fuel Tax Act. The state's attorney promised the de-

fendants immunity from prosecution if they would settle claims against them. The court approved this agreement and allowed the prosecutor to withdraw the indictment with leave to reinstate. The defendants fulfilled all the terms of the agreement by paying large sums in open court and surrendering their license to do business. Notwithstanding this agreement the defendants were subsequently indicted for the same offense and convicted. On appeal it was held that the People, having reached an agreement with defendants, were bound to live up to it. *People v. Johnson et al,* 372 Ill. 18. 22 N. E. (2d) 683 (1939).

This case appears to increase the power of the state's attorney in granting immunity from prosecution in a form binding on the state, if made with the consent of the court. This rule derives from and expands the doctrine established in the *Bogolowski* cases. *People v. Bogolowski,* 317 Ill. 460, 148 N. E. 260 (1925); id, 326 Ill. 253, 157 N. E. 181 (1927). In these cases, a witness turned state's evidence in consideration for a promise of immunity made by the prosecutor. Irrespective of this promise, the witness was subsequently tried without being permitted to withdraw his original plea of guilty. On appeal, the Supreme Court ruled that in such circumstances the defendant should be allowed to withdraw his plea. Upon retrial and conviction, the defendants again appealed, this time asserting the promise of immunity as a bar to prosecution. The court accepted this view and held that the state's attorney, having power to grant immunity, bound the state by his promise.

The holding in the instant case sanctions a prosecutor's agreement with the accused—approved by the trial court—wherein the latter promises reparation for the crime in consideration for a promise not to prosecute. If the defendant adheres to his agreement he has a valid defense against a subsequent trial.

The Illinois legislature has given to the court the power to grant immunity to witnesses testifying in grand jury investigations or at trial, in cases involving bribery or attempted bribery of public officials. A prerequisite to the exercise of this power is that the witness be material and the testimony offered self-incriminatory. [Smith-Hurd Illinois Ann. Stat., Ill. Rev. Stats. (1937) c. 38§82. Ch. 38, Sec. 82.] In light of the statutory principle "expressio unius est exclusio alterius" it would appear as though the Illinois courts have assumed a power which the Legislature has not seen fit to grant them. That is, since the legislature has declared that an immunity be granted in bribery cases, the legislative intent would appear to prohibit these agreements in other criminal situations. Thus a statutory predicate cannot be found to justify the holding in the *Bogolowski* or the instant case; and at common law, agreements, as involved in the present case, were not recognized. See Lord Mansfield's opinion in *Rex v. Rudd,* 1 Cowp. 331 (1775). This doctrine established by this case presently obtains in England. 14 Am. Juris. 844, §115.

The procedure here involved is not to be confused with a *nolle prosse,* which in Illinois, is no bar to a subsequent prosecution. *People*

v. McGinnis, 234 Ill. 68, 84 N. E. 687 (1908); *O'Donnell v. People,* 224 Ill. 218, 79 N. E. 639 (1906). The basis of both the *Bogolowski* and the instant case is the express promise not to prosecute; this consideration is not present in the *nolle prosse* cases.

The majority of courts hold that an immunity agreement, even if made with the consent of the trial court, is not binding on the State. At best, it creates only an equitable right to executive clemency. *Wilson v. State,* 134 Fla. 391, 184 So. 31 (1938); *Cortes v. State,* 135 Fla. 589, 185 So. 323 (1938); *U. S. v. Ford* (whiskey cases), 99 U. S. 594 (1878), *Ex Parte Irvine,* 74 Fed. 954 (1896); *Lowe v. State,* 111 Md. 1, 73 Atl. 637 (1909); *State v. Guild,* 149 Mo. 370, 50 S. W. 909 (1899). This is the same view that obtains in the English courts. 14 Am. Juris. 844, §115. Some states, however, recognize these agreements as binding if the consent of court is had. *Morrison v. State,* 49 Okla. Cr. 369, 294 P. 825 (1931); *Camron v. State,* 32 Tex. Cr. 180, 22 S. W. 682 (1893); *Dollar v. State,* 92 Tex. Cr. 254, 242 S. W. 733 (1922). The Illinois court in this regard occupies a distinct position. It holds valid immunity agreements even if not made with the consent of the court. *People v. Bogolowski,* supra. In the instant case, the court's consent was had, but whether such consent would be a requisite to the validity of an agreement to make reparations. still remains a matter of conjecture.

Once again is presented the problem of seeking a balance of equities on one side and the words of the statute on the other. Under the criminal statute, the defendants should have been fined and imprisoned. However, it seems highly inequitable to prosecute individuals who have gone through the hardships that the defendants have in the situation presented by this case. It appears as though the Illinois court was influenced more strongly by the equities of the defendants, and consequently, in its desire to aid them, upheld their agreement with the state's attorney.

DANIEL G. LEVIN.

RECOMMENDATIONS FOR MERCY BY THE JURY.—[R. I.] In a prosecution for "operating an automobile . . . so as to endanger life, resulting in the death of another . . ." the trial judge told the jury, in response to a question from the foreman, that they could recommend mercy if they found the defendant guilty. The judge refused to instruct the jury that he could completely ignore the recommendation if he so wished. The Supreme Court of Rhode Island held that it was error for the judge to fail to instruct the jury that he could disregard their recommendation for mercy, but because of the weight of evidence it was not reversible error. *State v. Ruzzo,* 7 A. (2d) 693 (R. I., 1939).

As to the first issue, some jurists contend that the sole function of the jury is to determine whether the accused is guilty or not, and that any other matter which might divert their attention from this function is to be discouraged. *State v. Lunsford,* 163 Wash. 199, 300 P. 529 (1931). Under such a theory some courts have decided that when a jury returns with a verdict and also a recommendation for mercy. the jury is not responding solely to the issues submitted to it, and that they must retire, reconsider the matter and bring in a verdict in the proper form, i.e., one with-

out any recommendation for mercy. *State v. Godwin,* 138 N. C. 582, 50 S. E. 277 (1905); *State v. McKay,* 150 N. C. 813, 63 S. E. 1059 (1909); *State v. Potter,* 15 Kan. 234 (1875), 23 L. R. A. 725. In this manner, the jury is to be closely held within the scope of its duty. *People v. Lee,* 17 Cal. 76 (1860).

Other jurists have held that, though a recommendation of mercy may be made and need not result in redeliberation by the jury, the trial judge must at least tell the jury that any such recommendation on their part can be disregarded by the judge as so much surplusage (*Commonwealth v. Zec,* 262 Pa. 251, 105 Atl. 279 (1918)), and that failure to tell the jury would be error. *State v. Kernan,* 154 Iowa, 672, 135 N. W. 362 (1912); also see 40 L. R. A., N. S., 239.

The Supreme Court of Louisiana held, in *State v. Sweat,* 159 La. 769, 106 S. 298 (1925), that a court's statement to the jury that a mercy recommendation would not be binding on the court but that the court would give consideration to such request in passing sentence, was not erroneous. The court cited no authority and its holding seems to have been unique. Moreover, this was decided before the Code of Criminal Procedure was passed which changed the common law of Louisiana. That state now holds that the trial judge *must* tell the jury that any recommendation for mercy on their part can be disregarded by the judge and if the judge intimates or says that he will give great weight to recommendations of the jury it will be reversible error, for the duty of determining punishment rests solely with the judge. *State v. Doucet,* 177 La. 63, 147 So. 500 (1933).

In a number of states statutes have been passed allowing juries to recommend mercy with a verdict of guilty. N. M. Stat. (1929) §105-2226; Ga. Code (1933) §27-2501, 26-1302, 26-1304, 27-2302. Some of these statutes, such as the Georgia Code, declare that the judge must inform the jury that they can recommend mercy whether such instruction is requested or not (*Johnson v. State,* 100 Ga. 78, 25 S. E. 940 (1896)) and that although the recommendation is not binding upon the judge, it nevertheless constitutes a persuasive influence which might result in mitigating the penalty to be imposed on the accused. *Taylor v. The State,* 110 Ga. 150, 35 S. E. 161 (1899). Florida has held that the court, without request, does not have to inform the jury that a majority of their number can recommend the accused to the mercy of the court where the statute allows the jury to make such recommendations. *Garner v. State,* 28 Fla. 113, 9 So. 835 (1891). The legal rationale for such statutes is that the jury may well find the accused guilty, but recommend mercy because of ameliorating circumstances in the case, or out of sensible sympathy for the culprit. The purpose of the statutes may well have been to allow flexibility in the judicial machinery so that justice may be more easily obtained.

Unless the common law has been changed by statute, by far the best practice to follow would be to allow the jury to make no recommendations of mercy whatever. To tell the jury that they can recommend mercy might induce a verdict of guilty from the jurors on less evidence than they otherwise would have needed to convict the defendant. *State v. Knight,* 34 N. M.

217, 279 P. 947 (1929). A mercy recommendation, at best, has but a psychological affect upon a judge, and very often may mislead a jury of laymen into believing, erroneously of course, that the recommendation might have some force. It is more desirable that they concentrate all of their efforts on the sole issue of guilt or innocence.

Though holding error in the instant case, the court deemed it unprejudicial, in view of the theory that no error of court in performing its duty in instructing a jury can be overlooked or disregarded unless the error is of such a character that it clearly appears that the error could not have affected the verdict of the jury. This is especially true where the case isn't close, *People* v. *Fox,* 269 Ill. 300, 110 N. E. 26 (1915); see also Moore, Ill. Cr. Law and Procedure (3rd ed., 1932) §1394. And where a case is not close, a recommendation for mercy does not necessarily show that there was a doubt in the minds of the jurors as to the guilt of the accused. *State* v. *Arata,* 56 Wash. 185, 105 Pac. 227 (1909).

On the other hand, in cases where the evidence is conflicting or contradictory and where the instructions are inaccurate, a new trial will be granted if there is enough evidence favorable to the defendant to raise a reasonable doubt whether the jury would have returned such a verdict if properly instructed. *Steinmeyer* v. *People,* 95 Ill. 383 (1880); *Chambers* v. People, 105 Ill. 409 (1883). Some courts hold that if a jury asks a judge whether they can recommend mercy, that the question is usually asked only when one or several of the jurymen are doubtful as to the accused's guilt and that they would only vote for guilty if they could recommend mercy. For instance, where a jury was told that they could recommend mercy for a prisoner on trial for his life, it was held that as the jury or some of them upon recommending mercy, had agreed upon the instructions of the court and as they might have understood that the court had the power to exercise clemency, it was prejudicial error to the prisoner. *State* v. *Matthews,* 191 N. C. 378, 131 S. E. 743 (1926).

Failure to instruct the jury correctly should be reversible error where the case is an obviously close one, but where there is a preponderance of evidence against the defendant and where failure to instruct the jury correctly merely resulted in a mercy recommendation arising out of sympathy for the guilty criminal rather than doubt of his guilt, the verdict should not be disturbed.

THE "RIGHT" TO A PUBLIC TRIAL. —[Utah] Defendant was on trial for carnally knowing a female between the ages of 13 and 18 years. After the jury was sworn and the information read, including defendant's plea of not guilty, the State moved to exclude spectators from the court room. Over defendant's objection, the court made the following order: "The motion to clear the court room is granted, and the motion of the State to invoke the exclusion rule is likewise granted. With the exception of all witnesses the Court at this time orders the courtroom cleared. Spectators will please leave the courtroom." It was apparent from statements and objections made that the court and counsel had in mind Sections 20-7-1 and 20-7-2, revised Stat. Utah 1933, which read:

Sec. 20-7-1, "The sittings of every court of justice are public, except as provided in the next section.

Sec. 20-7-2, "In an action of divorce, criminal conversation, seduction, rape, or assault to commit rape, the court may, in its discretion, exlude *all persons* who are not directly interested therein, except jurors, witnesses and officers of the court; and in any cause the court may, in its discretion, during the examination of a witness exclude any and all other witnesses in the cause." In passing, the ambiguity as to the dual meaning of "witness" as used here needs some clarification. From the context of the section it appears that witnesses as last used is not synonymous with spectators in the courtroom.

The trial court's conviction of defendant was reversed on the ground that that part of Sec. 20-7-2 before the semi-colon applied to civil actions and the part after the semicolon applied to "all other causes," including criminal prosecutions and limited the court in its exclusion to any and all other *witnesses,* not spectators, in the cause. In addition it is limited to exclusion of witnesses only during the taking of testimony from a particular witness. Under this construction the trial courts order excluding all spectators throughout the course of the trial was error and deprived the defendant of his constitutional right to have a public trial. *State* v. *Beckstead,* 88 P. (2d) 461, 96 Utah 528 (1939).

This raises the general inquiry into how far and in what situations the courts may exercise their discretion to exclude spectators from the courtroom. The right to a public trial in all criminal cases is guaranteed by the 6th Amendment to the Federal Constitution and by most, if not all, of the state constitutions. These guarantees, like others found in the Bill of Rights, owe their existence to the manifest abuses prevalent in the English and colonial courts of that time. In light of the criticism which has been leveled against the government, the courts, and many administrative tribunals for the alleged denial of those rights, the question of defendants right to a public trial holds renewed interest. The problem seems to be one of balancing the conflict between the court's inherent power to conduct the trial in a manner within its own discretion against the defendant's guaranteed right. *People* v. *Hall,* 51 App. Div. 57, 64 N. Y. Supp. 433 (1900). The question has not often been litigated and a search of the cases indicate divergent views which make generalization difficult.

Since the 6th Amendment to the Federal Constitution applies only to offenses against the federal government (*Gaines* v. *State of Washington,* 277 U. S. 81 (1928)) the decisions must depend in each case upon the particular state constitutions of statutory provisions involved. Some states, such as Alabama, Idaho, Montana, Utah and Wisconsin, for example, have statutes in addition to constitutional provisions concerning defendant's right to a public trial. They are generally confined to certain civil actions, different in each state, and to the sex offenses of rape or assault with intent to commit rape. In one instance, Wisconsin, the court's discretion is limited to the exclusion of minors during the conduct of such trials.

These statutes give the court a wide range of discretion and seem to be merely declaratory of the common law rule permitting the trial judge to use his free discretion as to the exclusion of witnesses and spectators.

In the application of the court's right to exclude spectators the majority of courts have held that it has been within the "inherent power" of the court to so regulate admission to the courtroom that the proper administration of justice would not be interfered with. *Bloomer* v. *Bloomer,* 197 Wis. 140, 221 N. W. (1928). The court in *Cholia* v. *Kelty,* 155 Ore. 287, 63 P. (2d) 895 (1937) interpreting this common law principle said "that the manner of conducting the trial rests solely in the sound discretion of the trial court." Thus, in the interests of an orderly administration of justice, it has been held, that when the courtroom is comfortably filled it is not a denial of a public trial to exclude spectators by denial of entry to the courtroom. *People* v. *Greeson,* 230 Mich. 124, 203 N. W. 141 (1925). Likewise, in one jurisdiction, the prosecuting attorney with the sanction of the court under an order to exclude, took the names of all spectators of the same race as the defendant, and in addition had them searched for concealed weapons. apparently to relieve the court of the possible embarrassment of unexpected violence and gun-play during the course of the trial. *People* v. *Mangipane,* 219 Mich. 62. 188 N. W. 401 (1922).

But the courts apparently have also exercised their right to exclude on the basis of protecting the general public, as well as for the orderly administration of justice. Thus, when there is an influenza epidemic raging in the community the court validly exercised its exclusion power when on its own motion spectators were excluded from the courtroom in persuance of the court's police power to protect the general welfare and the public health. Likewise, it is generally said, the court may exclude spectators when the testimony to be heard will be "vulgar, lewd, or obscene," and those in attendance likely to be present for mere prurient curiosity. Cooley, 1. Const. Lim. 647 (8th ed. 1927); *State* v. *Callahan,* 100 Minn. 63, 110 N. W. 342 (1907) but the court may also exercise its police power in the interests of a witness, as well as a spectator; thus in *Commonwealth* v. *Principatti,* 260 Pa. 587, 104 Atl. 53 (1919) it was held that the court could exclude all other persons of the same race as the witness on his claim that he feared reprisals as a result of the testimony that he was about to give.

Where the court has abused its discretion in excluding spectators, the defendant must, of course, object in the trial court if he wishes to avail himself of this error on appeal. Thus it has been held that the defendant may, if he so desires. waive his right to a public trial, and that he waives the right by failing to object seasonably to the exclusion order, or by requesting the order himself. *People* v. *Swafford,* 65 Cal. 223, 3 P. 809 (1894): *Carter* v. *State,* 99 Miss. 435, 54 Sou. 734 (1911): *State* v. *Keeler,* 52 Mont. 205, 156 P. 1080 (1916). In Illinois the Supreme Court in *People* v. *Harris,* 302 Ill. 590. 135 N. E. 75 (1922) held that the right may be waived, but that it may not be taken from the accused without

his consent. Moreover, since the right to a public trial is guaranteed the defendant by statutory or Constitutional provision, its denial is presumed to be prejudicial. *State* v. *Hensley*, 75 Ohio St. 255, 79 N. E. 462, 9 L. R. A. (N. S.) 277 (1906). Consequently once the court finds that a public trial has not been had it is reversible error, regardless of how clear the defendant's guilt may be.

The exclusion order of the trial court in the instant case which deprived the defendant of a public trial was unlimited in scope and was applied to all spectators present, including the defendant's relatives and friends. The majority opinion makes much of this point and suggests that if the trial judge had employed a little discretion and had "allowed the defendant to retain in the courtroom a reasonable number of relatives and friends of his own choosing" that would have insured him a public trial. This then brings up the question of how widely the judge may exclude. That the court may always exclude individuals who are guilty of unruly conduct and boisterous laughter so as to interfere with the court and confuse the witnesses is self evident. *Grimmett* v. *State*, 22 Tex. App. 36, 2 S. W. 631 (1886). In one jurisdiction the court exhibited the prevailing differences in interpretation of the number excludable, by holding that the trial judge cannot widely exclude spectators. *People* v. *Letoile*, 31 Cal. App. 166, 159 P. 1057 (1916), but a year later, in *People* v. *Tugwell*, 32 Cal. App. 520, 163 P. 508 (1917) held an order to exclude all but fifteen spectators did not deprive the defendant of his right to a public trial. In Idaho it has been held that the exclusion of those persons not necessarily in attendance will not deprive the accused of a public trial. *State* v. *Johnson*, 26 Id. 609, 144 P. 784 (1914). These cases poise the question also raised by Larsen, J. in the instant case, namely, what number has the defendant a right to retain? In addition it presents the problem of how the defendant shall choose, when the court has limited the number, between sister and brother, father or mother, or close friend and associate. If these objections are held to be determinative it would of course mean that no order of less than complete exclusion would suffice, for any order of partial exclusion would bring up the problem of degree. Apparently, the ultimate solution of this problem must of necessity be left to the discretion inherent in the trial court.

It may be true, of course, that the very victim of the defendant's alleged conduct may "suffer such embarrassment and humiliation as to cause a mental disintegration on the witness stand," as the majority suggests. But, on the other hand, is it not also conceivable that the witnesses are more apt to be truthful when confronted with the members of the public in the courtroom, some of whom may possibly call attention to their derelictions from the truth? In all, a sparing use of the discretionary power to exclude the public from the courts would seem advisable, and from a study of the cases it appears that for the most part that power has been carefully regarded by trial courts and by reviewing courts on appeal.

FREDRICK MERRITT.

CORROBORATION AND CIRCUMSTANTIAL EVIDENCE IN RAPE CASES.—[S. D.] In a recent case, *State* v. *Husman,* 287 N. W. 30 (S. D., 1939) the defendant was convicted of rape. The conviction was based on testimony of the prosecutrix, a minor, and circumstantial evidence consisting of certain metal particles, alleged to have come from the defendant's automobile as it passed over a rock in the road at the scene of the crime. The State did not relate this circumstantial evidence to the defendant's automobile in any way. The State Supreme Court upheld the action of the trial judge in treating the question of the circumstantial evidence as one concerning the weight of the evidence, rather than one concerning its admissibility, and hence a problem for the jury.

At common law, a conviction of rape could be had on the uncorroborated testimony of the prosecutrix, if such testimony was not contradictory, incredible, or inherently improbable. *Boddie* v. *State,* 52 Ala. 395 (1875); *State* v. *Rash,* 27 S. D. 185, 130 N. W. 91, Ann. Cas. 1913D 656 (1911); *State* v. *Dcchtler,* 43 S. D. 407, 179 N. W. 653, 60 A. L. R. 1131 (1920). By statute, this rule has been changed in many states.

Illustrative of the various statutory changes away from the common law rule are Wisconsin, which requires corroboration where the prosecutrix' testimony is not most clear and convincing. *Brown* v. *State,* 127 Wis. 193, 106 N. W. 536, 7 Ann. Cas. 258 (1906); California, which requires corroboration where the prosecutrix' chastity is impeachable, *People* v. *Benson,* 6 Cal. 221, 65 Am. Dec. 506 (1856); and Oklahoma, which requires corroboration where the prosecutrix' testimony is obtained through fear, threats, coercion, or duress. *Palmer* v. *State,* 7 Okla. Cr. 557, 124 P. 928 (1912). The cases in the instant state, as do a majority of the states, follow the common law rule that a conviction for rape may be had on the uncorroborated testimony of the prosecutrix. *State* v. *Fehr,* 45 S. D. 634, 189 N. W. 942 (1922).

Illinois follows the common law rule generally, although there is evidence that the Illinois courts may require corroboration where there is a conflict of evidence or testimony. *People* v. *Polak,* 360 Ill. 440, 196 N. E. 513 (1935); *People* v. *Nelson,* 360 Ill. 562, 196 N. E. 726 (1935); *People* v. *Burns,* 364 Ill. 49, 4 N. E. (2d) 26 (1936). Also see 26 J. Crim. L. 463 (1935).

The public policy in these states which require corroboration of prosecutrix' testimony to support a conviction of rape would seem to look toward the further safeguarding of those against whom this accusation is easily made. In many of the states which adhere to the common law rule, the purpose of the rule (requiring corroboration) is already completely attained by the trial judge's power to set aside a verdict upon insufficient evidence. and under this power, verdicts are constantly set aside in jurisdictions having no statutory rule upon the same evidence which in other jurisdictions would be insufficient under the statutory rule requiring corroboration. 4 Wigmore, Evidence (2d ed., 1923) §2061, 378.

Beginning at common law there has developed in the field of evidence the "Original and Orthodox Rule," which recites that the erroneous admission or exclusion of evidence, duly objected to, would

not be the basis for a new trial if the rest of the testimony is sufficient to warrant the conclusion which the jury reached. *Rex* v. *Ball,* R. & R. 132 (1807). *State* v. *Crawford,* 96 Minn. 95, 104 N. W. 822 (1905). An erroneous admission or rejection of a piece of evidence is not a sufficient ground for setting aside the verdict and ordering a new trial, unless, upon all the evidence, it appears to the judge that the truth has thereby not been reached. *Tinkler's* case, R. & R. 133 (1781). 1 Wigmore, Evidence, §21.

As opposed to this Original and Orthodox rule of evidence, there developed the so-called "Exchequer Rule," which regarded errors in the admission or rejection of testimony as good grounds per se for a reversal and the granting of a new trial, irrespective of the nature of the error. *Rutzen* v. *Farr,* 4 A. & E. 53 (1835); *Wright* v. *Tatham,* 7 A. & E. 313 (1837); *Rex.* v. *Gibson,* 18 Q. B. D. 537 (1887). This rule viewed evidence as an end in itself, and meant the automatic reversal of decisions not procedurally perfect, even though such variances from the norm were unintentional and immaterial. The instant jurisdiction adheres to the Orthodox Rule, and provides for new trials on evidentiary bases, only when the substantial rights of the defendant are prejudiced and when the evidence is insufficient to justify the verdict. Compiled Laws, S. D. 1929, §4945. re-enacted in substance in the S. D. Code of 1939, §34.4002. not yet in effect when the instant case was tried.

In the principal case, the dissenting judge spells out in detail the error that was made by the trial court in admitting the metal particles in evidence. The majority of the court ignores this aspect of the case as "undisputed." *State* v. *Husman,* supra, at 33. The trial court considered the bits of metal, found on a rock in the road near the scene of the crime eight days after the crime was committed, and also considered the fact that the distributor on the defendant's automobile was broken on the same day; without further inquiry into the materiality of the metal particles, or its possible prejudicial effect on the jury, the trial judge proceeded with the case, over the defendant's objection. The fact that the defendant objected indicates the error of the majority opinion in treating the question as "undisputed." The majority opinion never reaches the stage of inquiry as to whether or not this error made in the court below should be a ground for reversal.

If inadmissible evidence is admitted, or if improper argument be made of such a nature that it can be said that the jury would have decided substantially the same way without having seen such inadmissible evidence or heard such improper argument, such error is said to be harmless. *State* v. *Nelson,* 36 Nev. 403, 136 Pac. 377 (1913); *State* v. *McGrath,* 46 S. D. 465, 193 N. W. 60 (1923); *State* v. *Williams,* 47 S. D. 68, 196 N. W. 291 (1924); *State* v. *Keliher,* 46 S. D. 484, 194 N. W. 657 (1923). *Rex* v. *Teal,* 11 E. 153 (1809). Thus, where there is sufficient evidence to sustain the conviction, independently of the evidence objected to, and admitted, the admission of such evidence does not constitute reversible error.

But if there is a substantial chance that a jury might decide the other way in a trial conducted without such erroneously admitted

evidence, and if it can be said that such evidence influenced the jury's decision, as alleged in the principal case, then a reversal and new trial should be granted. It is thus the duty of the court to reverse a conviction where it is based on unsatisfactory evidence, or where there remains grave and serious doubt of the guilt of the defendant such as to lead to the conclusion that the verdict is the result of passion or prejudice, and not that of the calm deliberation that the law requires. *People* v. *Allen*, 279 Ill. 159, 116 N. E. 625 (1917). *State* v. *Ruhaak*, 59 S. D. 636, 241 N. W. 793 (1932); *Rex v. Berry*, 18 Cr. App. R. 65 (1924).

In the instant case, the delay of the sheriff in verifying the defendant's alibi and the sheriff's vague testimony in this regard, the questionable statements of the state's attorney before the jury, the extreme amount of local prejudice and newspaper comment on account of which the defendant asked for a change of venue, which was denied, combine with the defendant's allegation that the evidence with reference to the metal particles was inadmissible, to give support to the defendant's argument that a new trial should have been granted. Whether the accused is prejudiced by the erroneous admission of evidence at a trial should not be considered abstractly, but the question is one of practical effect, when the trial as a whole and all the circumstances of the case are regarded. *Williams* v. *U. S.*, 265 F. 625 (1920). In a case with as direct a conflict of testimony as is presented in the instant case—where the State's case consisting of testimony of the prosecutrix and a companion, both minors, was in direct conflict with the testimony presented by the defense, and where the very presence of the defendant at the scene of the crime, and even in the county in which the crime was committed was rebutted by the host of witnesses offered by the defendant—with such a direct and irreconcilable clash of testimony, no judge in such a situation can say it was not the consideration of the metal particles, erroneously admitted into evidence, which influenced the jury in their attempt to weigh the scales of justice. Who can say what effect might have been produced on the minds of the jury if they had discovered that the only corroborative testimony was testimony that could not be accepted? *Rex.* v. *Berry*, supra.

To insist that evidence in a criminal trial be material is not to condone the over-technical Exchequer Rule of Evidence. To label as "undisputed" that which from the court record itself was most strongly "disputed" is to build a judicial decision on an assumption of fantasy. To deny the defendant in the instant case a new trial based only on material and competent evidence is an abuse of judicial discretion and a gross miscarriage of justice.

GEORGE A. GAUTHIER.