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Witnesses -- Exclusion From Courtroom While Others Testify

James J. Linus

pliance with existing laws.[15] When a will or any part thereof is open to two interpretations, one of which is illegal or invalid, the valid interpretation should be adopted as expressive of the true testamentary intent.[16] The court in interpreting a will should indulge every legal presumption in favor of validity of the will.[17]

As the courts, wherever possible, should presume that the testator intended to comply with the law, rather than to break it, it is felt that the will should have been given effect so long as the son was not incapacitated.

PHILIP W. KNIGHT

WITNESSES—EXCLUSION FROM COURTROOM WHILE OTHERS TESTIFY

A trial judge refused to excuse appellant's witness, a psychiatrist, from the rule excluding a witness from the court room while others are testifying. *Held*, the discretion of a trial judge governs those witnesses who are to be excused from this rule, and his decision will not be reversed unless it is prejudicial to the party complaining. *McVeigh v. State*, 73 So.2d 694 (Fla. 1954).

The separation of witnesses, for the purpose of exposing inconsistencies in their testimony, has long been practiced. Like most of our jurisprudence it is said to descend from the common law of England but its inception is indeed much older.[1] Though brought to America by that medium, the first report of separating witnesses in a trial is recorded in the book of

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15. Cleveland Clinic Foundation v. Humphries, 97 F.2d 849, 855 (6th Cir. 1938)(". . . the golden rule of interpretation is the intent of the testator which should be made to conform to the rules of law which it is presumed the testator knew and considered when drafting his will.") *Cf. In re* Nugen's Estate, 223 Iowa 428, 272 N.W. 239 (1937)(A gift to form a charitable library with reference to administration duties which were in conflict with statutory regulations was upheld, the gift being subjected to the statute); *In re* Griffin's Will, 159 Misc. 12, 287 N.Y.Supp. 514 (Surr. Ct. 1936)(Existing laws held incorporated into wills as into every other document).

16. Fussey v. White, 113 Ill. Rep. 637 (1885); Rotch v. Emerson, 105 Mass. 431, 433 (1870); Dennett v. Dennett, 40 N.H. 498, 500 (1860); Coon v. Coon, 38 Misc. 693, 78 N.Y.Supp. 245 (1902); Post v. Hoover, 33 N.Y.Supp. 593 (Ct. of App. 1865); Atkinson v. Hutchinson, 3 P. Wms. 258, 260 (Eng. 1734):

> "Where words are capable of a twofold construction even in the case of a deed (and much more of a will), it is just and reasonable that such construction should be received as tends to make it good . . . ."

17. Cartinhour v. Houser, 66 So.2d 686 (Fla. 1953).

18. Hooper v. Stokes, 107 Fla. 607, 145 So. 855 (1933) (Testator's express intent will determine the interpretation of a will, though the will is harsh and unnatural); Vanroy v. Hoover, 96 Fla. 194, 117 So. 887 (1928); Newman v. Smith, 77 Fla. 633, 82 So. 236 (1918); Eberlin v. Brunner, 233 Mo. App. 563, 123 S.W.2d 543 (1939); *In re* Bose's Estate, 136 Neb. 156, 285 N.W. 319 (1939).

1. TRIBBLE, FLA. EVIDENCE § 4757, p. 1061.

the Apocryphol.[2] The story of Daniel's judgment in Susanna's case has given to this expedient a unique and classical place in our law as well as in our literature.[3] The primary object of the separation of witnesses is to prevent witnesses from hearing the testimony of other witnesses and concocting evidence in support of, or contradictory to, each other.[4] The practice of keeping witnesses from the court room in both civil and criminal cases has an early history in the United States.[5] However, there does exist a difference of judicial opinion as to whether separation is demandable as a right[6] or at the trial court's discretion.[7] The great majority of courts follow the early English doctrine[8] in holding that it is within the discretion of the trial court,[9] although motions for exclusion are rarely denied in criminal cases,[10] especially in trial for a felony. Under the majority rule a motion to exclude witnesses in a civil case need not be granted where no practical reason for the motion exists or is alleged.[11] It appears that the motion to keep the witnesses apart from the court room in criminal cases is more a matter of right and when sought is practically always granted, while in civil cases it is more discretionary. The parties demanding removal may not as of right insist upon the court

2. History of Susanna, verses 51-64; 6 WIGMORE, EVIDENCE § 1837 (3d ed. 1940); WIGMORE, A KALEIDOSCOPE OF JUSTICE (Washington Law Book Co., 1941), p. 658. Here is recorded the History of Susanna: "'Two elders coveted Susanna, a Matron of Israel of high degree, and charged her with adultery; and she was brought before the assembly; and Daniel said: 'Put these two aside, one from another and I will examine them.' The witnesses were separated, and in their testimony so contradicted each other that Susanna was vindicated, and from that day forth was Daniel held in great reputation in the sight of the people."

3. *Sir Walter Raleigh's Trial*, JARDINE CRIM. TR., I, 419 (1603) ("My lords, for the matter I desire remember too the Story of Susanna; she was falsely accused, and Daniel called the judges 'Fools, because without examination of the truth they had condemned a daughter of Israel,' and he discovered the False witnesses by asking them questions.")

4. 6 WIGMORE, EVIDENCE § 1839 (3d ed. 1940); 1 CHAMBERLAYNE, MODERN LAW OF EVIDENCE § 189 (1911); 2 BEST, LAW OF EVIDENCE § 636 (1876); ENCY OF EVIDENCE 589 (1909); 1 GREENLIEF, LAW OF EVIDENCE § 432 (16 ed. 1899).

5. People v. Duffy, 1 Wheeler 123 (N.Y. 1822).

6. Rainwater v. Elmore, 1 Heisk 363 (1870) (but the motion must be supported by affidavit; other states hold the same way by statute but they are mostly magistrates statutes); *cf.* W. L. Holcomb Inc. v. City of Clarksdale, 217 Miss. 892, 65 So.2d 281 (1953); *accord*, State v. Zellers, 7 N.J.L. 224 (1824); Hughes v. State, 126 Tenn. 40, 148 S.W. 543 (1912) (affidavit must be filed stating sufficient grounds for the rule); Bishop v. State, 81 Tex. Cr. 96, 194 S.W. 389 (1917); See, 3 WIGMORE, EVIDENCE § 1839 (3d ed. 1940).

7. Wilson v. State, 52 Ala. 299 (1875) (the order of exclusion of witnesses may be made by the court on its own motion, if deemed essential to the discovery of the truth); *accord*, McLean v. State, 16 Ala. 672 (1849); Ray v. Commonwealth, 241 Ky. 286, 43 S.W.2d 694 (1931); Roberts v. State, 100 Neb. 199, 158 N.W. 930 (1916); Binfield v. State, 15 Neb. 484, 19 N.W. 607 (1884).

8. Cooks Trial, 13 How. St. Tr. 311, 348 (1696).

9. Ill. et. ux. v. U. S., 198 F.2d 112 (9th Cir. 1952); *cf.* Mitchell v. U.S., 126 F.2d 550 (10th Cir. 1942); *accord*, Gates v. U.S., 122 F.2d 571 (10th Cir. 1941); Vance v. State, 56 Ark. 402, 19 S.W. 1066 (1892); *cf.* Holler v. State, 136 Fla. 880, 187 So. 781 (1939); Cason v. State, 86 Fla. 276, 97 So. 720 (1923); Romano v. Palazzo, 83 Fla. 243, 91 So. 115 (1922); Seaboard Air Line Ry. v. Smith, 53 Fla. 375, 43 So. 235 (1907); State v. Jackson, 136 Mo. 1069, 83 S.W.2d 87 (1935); State v. Compton, 317 Mo. 475, 296 S.W. 137 (1927).

10. Roberts v. State, 100 Neb. 199, 158 N.W. 930 (1916).

11. Coonan v. Baltimore O. R. Co., 25 F. Supp. 834 (D.C. Penn. 1938).

including all witnesses in the rule without exception,[12] and frequently the trial courts sanction the omission of prospective witnesses, whose assistance in the management of the case is under circumstances indispensable.[13]

In the instant case appellant contended that the trial court erred by not excusing its expert witness from the rule since there was no dispute or conflicting testimony as to the facts. And in so doing the witness was prevented from hearing the testimony in the case so as to better form and express his opinion as to the sanity of defendant. The decisions[14] relied upon by appellant are concerned with the right of an expert witness to give his opinion when he has heard all the evidence of the case and there is no conflicting or disputed testimony. The matter of exempting or refusing to exempt a witness from the operation of the rule is largely within the discretion of the trial court[15] and it is not ground for reversal unless the discretion is flagrantly abused to the prejudice of the party complaining.[16] Furthermore, the action of the trial court will not be disturbed unless its order was arbitrary and prejudicial.[17] There is, however, a small minority of jurisdictions which hold that the discretion of the trial court in excusing witnesses from the rule, when it is envoked, is not subject to revision.[18] The major part of the decisions which allow a witness

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12. 6 WIGMORE, EVIDENCE § 1841 (3d ed. 1940).

13. Ryan v. Couch, 66 Ala. 244 (1880); *accord*, Robinson v. State, 80 Fla. 736, 87 So. 61 (1920); Shaw v. State, 102 Ga. 660, 29 S.E. 477 (1897).

14. Porter v. State, 135 Ala. 51, 33 So. 694 (1903); State v. Privitt, 175 Mo. 207, 75 S.W. 457 (1916) ("The better practice where the facts are contradicted or are not entirely clear is to put to the expert a hypothetical question based on the facts claimed to have been proven, that the jury may know the circumstances on which the opinion is based"); State v. Hayden, 51 Vt. 296 (1878); State v. Spangler, 92 Wash. 636, 159 Pac. 810 (1916); Cornell v. State, 101 Wis. 527 (1899); 2 WIGMORE EVIDENCE § 418 (10th ed. 1918). § 563 (3rd ed. 1940); 1 WHARTON, CRIMINAL EVIDENCE.

15. McDowell v. State, 238 Ala. 101, 189 So. 183 (1934); *cf.* Hamrick v. Town of Albertville, 219 Ala. 465, 122 So. 448 (1929); Brooks v. State, 146 Ala. 153, 41 So. 156 (1906); Roberts v. State, 122 Ala. 47, 25 So. 238 (1899); Riley v. State, 88 Ala. 193, 7 So. 149 (1889); Vance v. State, 56 Ark. 402, 19 S.W. 1066 (1892); People v. McClure, 117 Cal. 381, 4 P.2d 211 (1931); People v. McCarty, 117 Cal. 65, 48 Pac. 984 (1897); Platt v. State, 124 Fla. 465, 168 So. 804 (1936); Taylor v. State, 88 Fla. 555, 102 So. 884 (1925); State v. Forbes, 111 La. 473, 35 So. 710 (1903); Johnston v. Farmer's Fire Ins. Co., 106 Mich. 96, 64 N.W. 5 (1895); State v. Whitworth, 126 Mo. 573, 29 S.W. 595 (1895); M. A. Cooper and Co. et al. v. Sawyer, 31 Tex. Civ. App. 620, 73 S.W. 992 (1903).

16. Raarup v. U.S., 23 F.2d 547 (5th Cir. 1928); *cf.* West v. State, 149 Fla. 436, 6 So.2d 7 (1942); Robinson v. State, 80 Fla. 736, 87 So. 61 (1920); Roberts v. State, 100 Neb. 199, 158 N.W. 930 (1916); Goldman v. State, 95 S.W.2d 423 (1936); Jackson v. Commonwealth, 96 Va. 107, 30 S.E. 452 (1898).

17. Mikel v. State, 182 Ark. 924, 33 S.W.2d 397 (1930); *cf.* St. Louis Ry. v. Plate, 90 Ark. 135, 118 S.W. 260 (1909); Glass v. Fulford, 77 Ark. 603, 92 S.W. 862 (1906); Wise et al v. City of Abilene, 141 S.W.2d 403 (1940); *accord*, Southland Greyhound Lines Inc. v. Matthews, 130 Tex. 142, 74 S.W. 717 (1934); *cf.* Beaumont and G. N. R.R. v. Elliot, 148 S.W. 1125 (Tex. 1912); *accord*, Devlin v. Dept. of Labor & Industries, 194 Wash. 549, 78 P.2d 952 (1938).

18. Hill v. State, 137 Ala. 44, 34 So. 680 (1903); *cf.* Huskey v. State, 129 Ala. 94, 29 So. 838 (1901); *accord*, Roberts v. State, 122 Ala. 47, 25 So. 238 (1899); Burks v. State, 120 Ala. 386, 24 So. 931 (1898); McClellan v. State, 117 Ala. 140, 23 So. 653 (1895); Barnes v. State, 88 Ala. 204, 7 So. 38 (1890); McGuff v. State, 88 Ala. 147, 7 So. 35 (1889).

to be excused from the rule do so for the purpose of allowing the witness to stay in the court room to assist in the trial.[19]

The discretion of the trial court must be shown to be arbitrary and unreasonably exercised,[20] and it is the duty of the appellant to make the errors apparent of which he complains,[21] for a strong presumption exists in favor of the court as to the proper exercise of its discretionary power.[22] The courts presume that in the administering of that power the trial judge will exercise it with due regard to the rights of the parties involved. There is a strong logical basis for the action of the trial court in refusing to except a witness from this rule. There appears no good reason why witnesses summoned to testify as experts should be placed upon a higher plane than other witnesses, especially as to matters upon which they are called to testify. Let us bear in mind the true purpose of the rule; namely, that its design is to prevent witnesses from hearing the testimony of others and concocting evidence in support of, or contradictory to, each other.[23] "The expedient of excluding witnesses from the court room is one of the greatest engines that the skill of man has ever invented for the detection of liars in the courts of justice."[24]

JAMES J. LINUS

19. Benton v. State, 96 Ala. App. 291, 71 So. 8 (1911) (however it is better that the witness be first examined); Cathy v. State, 28 Ga. App. 666, 112 S.E. 915 (1922); Mathews Admr's v. Louisville & N. R.R., 130 Ky. 551, 113 S.W. 459 (1908); State v. Smith, 216 La. 1041, 45 So.2d 617 (1950); *cf.* Shaw v. State, 102 Ga. 660, 29 S.E. 477 (1897); Meyer v. Renner Co., 109 N.E.2d 573 (Ohio 1951).

20. State v. Barton, 207 La. 820, 22 So.2d 183 (1945) (Exempting a medical officer, an investigating officer and peace officer from the rule was not an abuse of discretion, where trial judge stated that such witness testifield only to facts brought out by their investigation.); *accord*, Combs v. State, 49 S.W. 585 (Tex. 1899); Jackson v. Commonwealth, 96 Va. 107, 30 S.E. 452 (1898).

21. See note 4, *supra.*

22. Williams v. Yelvington, 103 Fla. 145, 137 So. 156 (1931); *cf.* Morasso v. State, 74 Fla. 269, 76 So. 777 (1917); Falk et al. v. Kimmerle et al., 57 Fla. 70, 49 So. 504 (1909).

23. Morasso v. State, 74 Fla. 269, 76 So. 777 (1917); *accord*, Huffman v. Commonwealth, 185 Va. 524, 29 S.E.2d 291 (1946).

24. Wigmore, *Sequestration of Witnesses*, 14 HARV. L. REV. 475, 482 (1901).