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THE CHILD AS A WITNESS

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Most parents will agree that small children have an uncanny ability of being in strange places at unexpected moments. Children are often in the right place at the right time to see people, things and events that are never witnessed by adults. As we know from experience, they often overhear things that adults have felt were said in confidence or were said because they felt there were no witnesses. While this faculty is often a mere source of annoyance to the adult members of the family, it may have considerable impact upon the outcome of some legal action.

Unfortunately, the child's tendency to wander also places him in out-of-the-way places where he may have crimes committed against his person. As a result, the child may be the only witness available to the state in prosecuting a crime. The prosecuting attorney will then be faced with the difficult task of establishing that child's competency as a witness. For all practical purposes, it will be necessary to determine whether his testimony will enhance or stay the cause of justice.¹

COMPETENCY

What elements determine the competency of the child witness?

It was recognized in England as early as 1778 that children could be competent witnesses in criminal trials. In the leading case of *Rex v. Brasier*,² it was announced:

... [T]hat an infant, though under age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath... for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the

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¹ *Wheeler v. United States*, 159 U.S. 523, 526 (1895).

² 1 Leach 199, 168 Eng. Rep. 202 (1779). For a discussion of the historical development of this rule in the British Commonwealth, see *Children as Witnesses*, 100 SOL J. 904 (1956).

court; but if they are found incompetent to take an oath, their testimony cannot be received....³

In 1895 the United States Supreme Court established the policy followed by most of the state courts thereafter. In *Wheeler v. United States*⁴ it was held that a five and one-half year old child was competent to testify in a criminal trial for murder. The Court held:

... [T]he boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends upon the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review, unless from that which is preserved it is clear that it was erroneous⁵

Generally the rule of the *Wheeler* case has been adopted by the Washington Supreme Court.

RCW 5.60.050 provides in part as follows:

"The following persons shall not be competent to testify: ... (2) Children under ten years of age, who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly." It should be noted that this statute imposes no lower age limit for a child's capacity to testify. In Washington, tender years alone are not a ground for refusing to permit a witness to testify.⁶ Intelligence and not age is the proper test by which the competency of an infant witness must be determined.⁷ Where it appears that a child has sufficient intelligence to receive just impressions of the facts re-

³ 1 Leach 199, 200, 168 Eng. Rep. 202, 203 (1779).

⁴ *Wheeler v. United States*, 159 U.S. 523, 524 (1895).

⁵ *Id.* at 526.

⁶ *State v. Priest*, 132 Wash. 580, 584, 232 Pac. 353, 354 (1925).

⁷ *State v. Collier*, 23 Wn.2d 678, 683-89, 162 P.2d 267, 270-75 (1945); *State v. Smith*, 3 Wn.2d 543, 552, 101 P.2d 298, 301 (1940); *State v. Smith*, 95 Wash. 271, 273, 163 Pac. 759 (1917); *Kalberg v. The Bon Marche*, 64 Wash. 452, 453, 117 Pac. 227-28 (1911); 58 AM. JUR. *Witness* § 129 (5th ed. 1948); 3 JONES, *EVIDENCE* § 757 (5th ed. 1958) [hereinafter cited as 3 JONES]; 1 UNDERHILL, *CRIMINAL EVIDENCE* § 257 (5th ed. 1956) [hereinafter cited as 1 UNDERHILL]; 3 WHARTON, *CRIMINAL EVIDENCE* § 762 (12th ed. 1955) [hereinafter cited as 3 WHARTON]; 2 WIGMORE, *EVIDENCE* § 505 (3d ed. 1940) [hereinafter cited as 2 WIGMORE]; 16 AM. & ENG. *ENCY. LAW* § 270 (2d ed.).

specting which he is to testify, has sufficient capacity to relate them correctly and has received sufficient instruction to appreciate the nature and obligations of an oath, he should be permitted to testify,⁸ no matter what his age.⁹

By applying the foregoing test, the Washington court has considered children of the age of nine to be competent witnesses,¹⁰ as well as those of the age of eight,¹¹ seven,¹² six,¹³ and five.¹⁴ Such testimony has been admitted in cases ranging from rape,¹⁵ carnal knowledge¹⁶ and indecent liberties¹⁷ to murder,¹⁸ as well as in civil actions.¹⁹ On the other hand, the court has also held that children of similar tender years were *not competent* to testify.²⁰ However, in each case the determination of competency or lack thereof was made on the basis of intelligence or ability to truly relate the facts rather than upon the ground of age.²¹ Although Washington has not yet been faced with the problem, the appellate courts of most states have held that four years of age is about the absolute minimum at which a child will be considered competent to testify.²²

⁸ State v. Fairbanks, 25 Wn.2d 686, 688, 171 P.2d 845, 847 (1946); State v. Whitfield, 129 Wash. 134, 139, 224 Pac. 559, 562 (1924); State v. Smith, 95 Wash. 271, 273, 163 Pac. 759 (1917); State v. Bailey, 31 Wash. 89, 71 Pac. 715 (1903); Kalberg v. The Bon Marche, *supra* note 7; 58 AM. JUR. *Witnesses* § 129 (1948); 1 UNDERHILL § 257; 3 WHARTON § 762; 2 WIGMORE § 506.

⁹ Kalberg v. The Bon Marche, 64 Wash. 452, 454, 117 Pac. 227 (1911); 58 AM. JUR. *Witnesses* § 129 (1948); 1 UNDERHILL § 257; 3 WHARTON § 762; 2 WIGMORE § 505.

¹⁰ State v. Fairbanks, 25 Wn.2d 686, 171 P.2d 845 (1946); State v. Gruber, 150 Wash. 66, 272 Pac. 89 (1928); State v. Whitfield, 129 Wash. 134, 224 Pac. 559 (1924); Kalberg v. The Bon Marche, *supra* note 9; State v. Myrberg, 56 Wash. 384, 105 Pac. 622 (1909).

¹¹ State v. Fairbanks, 25 Wn.2d 686, 171 P.2d 845 (1946); State v. Collier, 23 Wn.2d 678, 162 P.2d 267 (1945); State v. Priest, 132 Wash. 580, 232 Pac. 353 (1925); State v. Smith, 95 Wash. 271, 163 Pac. 759 (1917).

¹² State v. Collier, *supra* note 11.

¹³ Kalberg v. The Bon Marche, 64 Wash. 452, 117 Pac. 227 (1911). (6 at the time of the accident and 9 at the time of testifying).

¹⁴ State v. Smith, 3 Wn.2d 543, 101 P.2d 298 (1940). In this case the testimony was stricken because the child later proved to be unable to meet the test of intelligence during her actual testimony. However, age was not the reason for exclusion. Wheeler v. United States, 159 U.S. 523 (1895). (5½ at the time of giving the testimony).

¹⁵ State v. Priest, 132 Wash. 580, 232 Pac. 353 (1925); State v. Myrberg, 56 Wash. 384, 105 Pac. 622 (1909).

¹⁶ State v. Smith, 95 Wash. 271, 163 Pac. 759 (1917).

¹⁷ State v. Fairbanks, 25 Wn.2d 686, 171 P.2d 845 (1946); Kalberg v. The Bon Marche, 64 Wash. 452, 117 Pac. 227, (1911).

¹⁸ State v. Gruber, 150 Wash. 66, 272 Pac. 89 (1928); State v. Whitfield, 129 Wash. 134, 224 Pac. 559 (1924).

¹⁹ Kalberg v. The Bon Marche, 64 Wash. 452, 117 Pac. 227 (1911).

²⁰ Getty v. Hutton, 110 Wash. 124, 188 Pac. 10 (1920); Macale v. Lynch, 110 Wash. 444, 188 Pac. 517 (1920).

²¹ State v. Smith, 3 Wn.2d 543, 101 P.2d 298 (1940); Getty v. Hutton, *supra* note 20; Macale v. Lynch, *supra* note 20; 2 WIGMORE § 505.

²² See, e.g., Wheeler v. United States, 159 U.S. 523 (1895); Jackson v. State, 239 Ala. 38, 193 So. 417 (1940); State v. Juneau, 88 Wis. 180, 59 N.W. 580 (1894). 58

If the cause is heard too long after the occurrence about which the child testifies, the rule imposed by Washington statute law, as well as the cases previously cited, presents a practical problem. According to the statute, the child must not only be able to relate facts truly (which refers to the time of trial), but must have been capable of receiving just impressions of the facts²³ (which obviously refers to the time of the event). Thus, it is possible for the child to have been much younger or of a different mental capability at the time of the event than at the time he is offered as a witness. On the other hand, the child may have been more competent before the event than thereafter (such as in the case of a serious accident involving the child's mentality).

Generally speaking, Washington has followed the majority view,²⁴ holding that the age at time of testifying governs²⁵ (if we must be concerned with *age* alone). However, most states hold that, with the exception of *res gestae* utterances,²⁶ and seasonably made complaints of the prosecuting witness in morals cases,²⁷ the court must determine that the child was also competent at the *earlier* date as well.²⁸ This latter point has not been decided in the Washington State Supreme Court.²⁹

AM. JUR. *Witnesses* § 132 (1948); 3 JONES § 757; 1 UNDERHILL § 257; Collins, Bond, *Youth as a Bar to Testimonial Competence*, 8 ARK. L. REV. 100 (1953-54) [hereinafter cited as 8 ARK. L. REV. 100].

²³ RCW 5.60.050.

²⁴ See, e.g., Litzkuhn v. Clark, 85 Ariz. 355, 339 P.2d 389, 392 (1959); Sommers v. Deepdale Gardens 3rd Corp., 14 Misc.2d 464, 178 N.Y.S.2d 516 (N.Y. City Ct. 1958). 58 AM. JUR. *Witnesses* § 129 (1948); 3 WHARTON § 762; 2 WIGMORE § 505; 8 ARK. L. REV. 100.

²⁵ See Kalberg v. The Bon Marche, 64 Wash. 452, 117 Pac. 227 (1911). 58 AM. JUR. *Witnesses* § 129 (1948); 3 WHARTON § 762.

²⁶ 2 JONES § 331; 3 WHARTON § 762; 6 WIGMORE § 1751; 8 ARK. L. REV. 100, 106.

²⁷ Such complaints, when seasonably made, tend to corroborate the prosecuting witness, State v. Boyles, 196 Wash. 227, 231-32, 82 P.2d 575, 577-78 (1938); State v. Griffin, 43 Wash. 591 86 Pac. 951 (1906) under the ancient doctrine of "hue and cry," State v. Murley, 35 Wn.2d 233, 237-37; 212 P.2d 801, 804 (1949). However, the rule excludes evidence of the details of the complaint, including the identity of the offender and the nature of the act, and admits only such evidence as will establish whether a complaint was made timely. State v. Murley, *supra*. In this regard, State v. Beaudin, 76 Wash. 306, 136 Pac. 137 (1913), is of considerable interest. The defendant was accused of the crime of sodomy with a 2½ year old infant. The prosecution called a witness who testified that after the crime the child made complaint. The witness then related the details of the complaint. The court held that *it was proper to have permitted the witness to testify that the 2½ year old youngster had made complaint at or about the time of the alleged act*. However, the court also held that it was error to have permitted the witness to repeat the details related by the child because the child herself could not have testified about the details due to her tender years.

²⁸ See, e.g., Hollaris v. Jankowski, 315 Ill.App. 154, 42 N.E.2d 859 (1942); Maynard v. Keough, 145 Minn. 26, 175 N.W. 891 (1920). 58 AM. JUR. *Witnesses* § 129 (1948). Unlike the *res gestae* utterance and the "hue and cry" complaint, the *dying declaration* depends partially upon the competency of the declarant. Thus, the dying declaration of a child who is not competent to testify is inadmissible. 3 WHARTON § 762.

²⁹ However, this is hinted at in Macale v. Lynch, 110 Wash. 444, 448-49, 188 Pac. 517, 518-19 (1920).

However, it seems logical that the majority view would be followed in light of the statute requiring an ability to receive just impressions of facts at the time of the event.³⁰

A review of the subject indicates that cases involving an indecent assault upon a child seem to receive rather special treatment. The courts quite frequently have admitted hearsay statements of a child tending to incriminate the defendant.³¹ Usually such statements are justified on the basis of *res gestae*,³² or because they tend to show the condition of the child at the time of the statement.³³ However, some cases leave the impression that the testimony was allowed purely because of abhorrence of the crime involved.³⁴ The better-reasoned cases seem to require that, with the exception of *res gestae* utterances,³⁵ all hearsay statements introduced under any exception to the rule should be made by someone competent as a witness at the time the statement was made.³⁶

This raises another practical problem. When hearsay statements of young children are offered under some exception to the hearsay rule, should the trial court determine the competency of that child at the time of the event, even though the child is not personally offered as a witness? Although the Washington court has not decided that point, it would appear to be a safe course of action for the judge to take in most cases, including those instances involving dying declarations.³⁷

³⁰ RCW 5.60.050.

³¹ People v. Figuerora, 134 Cal. 159, 66 Pac. 202 (1901); 3 WHARTON § 762; 8 ARK. L. REV. 100, 106.

³² Turner v. State, 66 Fla. 404, 63 So. 708 (1913); Williams v. State, 145 Tex.Crim. 536, 170 S.W.2d 482 (1943); 3 WHARTON § 762; 8 ARK. L. REV. 100, 106. See Thomas, *The Problem of the Child Witness*, 10 Wyo. L. J. 214 [hereinafter cited as 10 Wyo. L. J. 214]. The true *res gestae* statement is not considered a statement of the person making it, but is treated as the event speaking through the declarant. The declaration derives credibility from the strength of the circumstances surrounding its making, not from the competency of the person making the declaration. 1 WHARTON § 283. Thus, the fact that the utterance sought to be introduced as part of the *res gestae* is that of a child of tender years, possibly incompetent as a witness, is not controlling. 1 WHARTON § 283. This is true whether the child is the one who suffered the injury or was merely present at the time of an accident or the commission of a crime. 2 JONES § 331. In State v. Beaudin, 76 Wash. 306, 136 Pac. 137 (1913), the supreme court held it to be error for the trial court to have permitted the witness to detail the complaint made by the 2½ year old victim of an indecent assault, "there being no contention that the remarks made by the child were any part of the *res gestae*." This seems to be a slight indication that our supreme court may follow the majority view and allow competent third party witnesses to testify about the *res gestae* statements of infants as young as 2½ years of age.

³³ People v. Figuerora, 134 Cal. 159, 66 Pac. 202 (1901); State v. Jerome, 82 Iowa 749, 48 N.W. 722 (1891); 8 ARK. L. REV. 100, 106. See 10 Wyo. L.J. 214.

³⁴ Territory v. Godfrey, 6 Dak. 46, 50 N.W. 481 (1888); 8 ARK. L. REV. 100, 106.

³⁵ 3 WHARTON § 762; 8 ARK. L. REV. 100, 106.

³⁶ State v. Segerberg, 131 Conn. 546, 41 A.2d 101, 157 A.L.R. 1355 (1945); 3 WHARTON § 762; 8 ARK. L. REV. 100, 106.

³⁷ See 2 JONES § 304; 3 WHARTON § 762; see notes 28 and 22 *supra*.

It is frequently said that the trial judge has the best opportunity to observe the child on the witness stand and thus the determination of his competency will rest in the sound discretion of the court.³⁸ However, a word of caution should be added. The trial court has only the infant's answers to exploratory questions on *voir dire* as a basis to determine competency while the appellate court will review the *entire record* made by the child.³⁹ Reversals are possible where the error becomes apparent from the evidence given by the child even though it could not have been foreseen by the trial court in view of a previous show of competence.⁴⁰ Thus, the trial judge must carry the onus of being prescient without possessing this quality.

Therefore, the younger the child, the greater the burden upon the court to determine his intelligence and ability to understand and relate the truth.⁴¹ Even though a child has initially been determined competent to testify, if his subsequent testimony proves that he lacks such ability, his testimony should be stricken and the jury instructed to disregard the same.⁴² This action should also be taken in the event it becomes evident that the child lacks understanding.⁴³ Furthermore, even though the child is found to be competent, he should not be permitted to answer questions which he might not in fact understand. While a question may be proper for an adult, there is a danger that the child might not know the meaning of the words and be led into making a false answer.⁴⁴

The trial court should also proceed with caution when, through the use of leading questions, it becomes evident that the answers of the child are what his attorney thinks the facts are, rather than what the child actually recalls.⁴⁵ He should seriously consider striking the testimony when a lapse of time has obviously erased actual impressions

³⁸ E.g., Wheeler v. United States, 159 U.S. 523, 524-25 (1895); State v. Fairbanks, 25 Wn.2d 686, 688, 171 P.2d 845 (1946); State v. Gruber, 150 Wash. 66, 272 Pac. 89 (1928); State v. Priest, 132 Wash. 580, 232 Pac. 353 (1925); State v. Whitfield, 129 Wash. 134, 224 Pac. 559 (1924). 58 AM.JUR. *Witnesses* § 136 (1948); 3 JONES § 757; 1 UNDERHILL § 257; 3 WHARTON § 743; 2 Wigmore § 507.

³⁹ See State v. Smith, 3 Wn.2d 543, 101 P.2d 298 (1940); Macale v. Lynch, 110 Wash. 444, 188 Pac. 517 (1920); State v. Bailey, 31 Wash. 89, 71 Pac. 715 (1903). 58 AM. JUR. *Witnesses* § 136.

⁴⁰ E.g., Macale v. Lynch, *supra* note 39. 8 ARK. L. REV. 100, 101-103.

⁴¹ State v. Smith, 3 Wn.2d 543, 551-52, 101 P.2d 298, 301 (1940).

⁴² State v. Smith, *supra* note 41; 10 Wyo. L.J. 214, 217-18.

⁴³ Macale v. Lynch, 110 Wash. 444, 449, 188 Pac. 517, 519 (1920); 10 Wyo. L.J. 214, 217-18.

⁴⁴ Riggs v. State, 235 Ind. 499, 135 N.E.2d 247 (1956); 3 WHARTON § 762 (Supp. 1960).

⁴⁵ See Macale v. Lynch, 110 Wash. 444, 188 Pac. 517, 519 (1920). 10 Wyo. L.J. 214, 220.

from a child's mind, so that at the time of trial, he is unable to truly relate the facts.⁴⁶ He should follow the same course when it becomes evident that the child did not originally possess the ability to observe the events at the time they took place,⁴⁷ or that he is presently unable to communicate them in his testimony.⁴⁸ In other words, the trial court like the appellate tribunal, must also consider the entire testimony of the child if the judge is to be on the safe side.

However, the mere fact a child may make contradictory statements does not, in and of itself, destroy his competency and require that his testimony be stricken. The court may also consider the nature of the cross-examination and how the child has reacted to it, whether the questions were understandable, whether the child was simply embarrassed, whether the contradictions were material and whether they involved major or minor issues.⁴⁹

Once the evidence of the child is admitted, the trier of fact must determine its probative value. Frequently, the testimony of a child will be of doubtful value even if admitted, because of the physical and mental limitation on the powers of an infant due to his immaturity.⁵⁰ There is the danger that a child will intermingle imagination with memory and thus have incorrect statements irretrievably engraved on the record by a guileless witness with no conception that they are incorrect⁵¹ or that the words should not have been spoken.⁵²

⁴⁶ See Macale v. Lynch, *supra* note 45, 10 Wyo. L.J. 214, 217-18.

⁴⁷ See State v. Smith, 3 Wn.2d 543, 551-52, 101 P.2d 298, 301-02 (1940). 10 Wyo. L.J. 214, 217-18.

⁴⁸ See State v. Smith, *supra* note 47. 10 Wyo. L.J. 214, 217-18.

⁴⁹ See State v. Priest, 132 Wash. 580, 584-85, 232 Pac. 353, 354-55 (1925); State v. Smith, 95 Wash. 271, 163 Pac. 759 (1917); State v. Bailey, 31 Wash. 89, 71 Pac. 715 (1903).

⁵⁰ 10 Wyo. L.J. 214, 217-20.

⁵¹ 3 JONES § 759; 8 ARK. L. REV. 100, 105; 10 Wyo. L.J. 214, 220.

⁵² ARK. L. REV. 100, 105-06. J. F. Stephen has the following interesting comment to make in his discussion of the English Criminal Law: "A child will have been taught to say that, if it tells a lie, it 'will go to the bad place when it dies' (which is usually taken to show that it knows the meaning of an oath) long before it has any real notion of the practical importance of its evidence in a temporal point of view; and also long before it has learned to distinguish between its memory and its imagination, or to understand, in the least, degree what is meant by accuracy of expression. It is hardly possible to cross-examine a child, for the test is too rough for an immature mind. However gently the questions may be put, the witness grows confused and frightened, partly by the tax on its memory, partly by the strangeness of the scene; and the result is that its evidence goes to the jury practically unchecked, and has usually greater weight than it deserves, for the sympathies of the jury are always with it. This is a considerable evil, for in infancy the strength of the imagination is out of all proportion to the power of the other faculties; and children constantly say what is not true, not from deceitfulness, but simply because they have come to think so, by talking or dreaming what has passed. The evil, however, is one which the law cannot remedy. It would be a far greater evil to make children incompetent witnesses up to a certain age. The only remedy is that the judges should insist to juries more strongly that they generally do

The right of cross-examination is often impotent in eliciting the truth from a child because often he will speak what is in his mind as his impression of the truth.⁵³ However, in all fairness, it should be stated that this same problem is faced with many adults. Furthermore, it is generally recognized that the natural language of a child is that of innocence and truth, and his testimony is apt to be free from the prejudice or sinister motives which too often affect the testimony of adults.⁵⁴

In the final analysis, if the mental impression of the litigated incident has become obscure through the passage of time or the importunities of interested parties, the child is patently useless as an instrument of justice.⁵⁵ On the other hand, to exclude from the witness stand one who shows himself capable of understanding the difference between truth and falsehood and who does not appear to have been simply taught to tell a story may sometimes result in staying the hand of justice.⁵⁶ In this regard, the judge's decision is both difficult and important to the outcome of the litigation.

Who has the burden of proving the competency of the child witness?

There do not appear to be any Washington cases that determine who has the burden of proving the competency of a child under the age of ten years.⁵⁷ However, the court has held generally that the party who produces a witness has the burden of proving that he is qualified.⁵⁸ Most states apply the same rule to one who offers a child as a witness.⁵⁹ One can assume that such rule would undoubtedly be applied to the question of a child's competency in this state.

Inasmuch as the one who calls an infant witness must establish his

on the unsatisfactory nature of the evidence of children, and on the danger of being led by sympathy to trust in it." J. F. STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 287 (1863). However, the authorities are definitely not in accord on the unreliability of children's testimony. Jones has this to say: "Perhaps it may be appropriate to suggest that the reliability of a very young child as a witness may lie in the very fact of his immaturity and lack of moral perception because of the instinctive impulse to describe what he has seen and repeat what he has heard. The temptation of misstatement comes with maturity and the realization of falsehood as an alternative to truth. Any kindergarten teacher can vouch for this from her experience as the recipient of revealing facts from the lips of the children as to happenings at home. 3 JONES § 757 n. 12. See also 2 WIGMORE § 509 wherein it is suggested that the child should simply be placed on the stand and allowed to testify for what it is worth.

⁵³ Macale v. Lynch, 110 Wash. 444, 188 Pac. 517 (1920); 8 ARK. L. Rev. 100, 105.

⁵⁴ Young v. State, 72 Ga. 838, 35 S.E.2d 321 (1945); 3 JONES § 759.

⁵⁵ Macale v. Lynch, 110 Wash. 444, 188 Pac. 517 (1920); 8 ARK. L. Rev. 100, 104-05.

⁵⁶ Wheeler v. United States, 159 U.S. 523 (1895); 10 Wyo. L.J. 214, 217-18.

⁵⁷ RCW 5.60.050.

⁵⁸ *Accord*, Cowan v. Chicago, Milwaukee, St. Paul & Pacific Ry., 55 Wn.2d 615, 622, 349 P.2d 218, 222 (1960).

⁵⁹ 1 UNDERHILL § 257.

competency, it is usually held that the proponent also should have the first opportunity to question the child in an attempt to establish the fact in question.⁶⁰ The Washington cases are silent on this subject. However, it is a rule of logic, and the court will probably follow it when the question is presented.

Once an attorney is ready to call a child as his next witness, he should ask to have the jury excused just as he would if he intended to make an offer of proof in their absence. After the jury has retired, counsel should then call the unsworn child for the purpose of establishing his competency as a witness.

If opposing counsel has no objection to the youngster's competency, he can make it known at this time. Thereafter, the jury can be returned to the jury box, the child can be sworn in their presence, and the case can proceed. However, if there is an objection to the witness' competency, the matter can be raised and finally determined in the absence of the jury.

The one who calls the child-witness should assume the initiative of having the jury excused. He should not place him on the stand with the vague hope that opposing counsel will not object to his competency. An experienced opponent will seldom concede the competency of a very young witness, especially if his testimony is important. He knows that such a concession, in the presence of the jury, can emphasize the child's competency too strongly in their minds. He also knows that a sudden explosive challenge of the child's competency may leave some doubt in the jury's mind, even after the youngster is later found competent to testify. However, the unexpected explosive attack has even greater psychological importance. Through sheer fright, embarrassment or shock, the effectiveness of the young person's ability to demonstrate his competency may be completely neutralized before the jury ever hears him. In this way, the value of a potentially dangerous opposition witness may be checked. Thus, by taking the lead on behalf of his young witness, the proposing attorney can deny his opposition an excellent opportunity for making an explosive objection in the presence of the jury just after the child is sworn.

The duty of the court

Although the party offering a child as a witness has the burden of proving his competency, the onus of the determination of competency

⁶⁰ Linder v. State, 156 Neb. 504, 56 N.W.2d 734, 741 (1953); 1 UNDERHILL § 257.

falls upon the trial judge. When a child is under ten years of age (where competency is apparently presumed by statute⁶¹), the court must assume the initiative in determining his competency.⁶²

The preliminary examination of a child should take place at the time he is offered as a witness,⁶³ prior to the time he is sworn.⁶⁴ It should be conducted first by the court without interference by counsel.⁶⁵ Thereafter, the court, in his discretion, may allow such examination by both counsel as he feels is necessary.⁶⁶ In a criminal prosecution, the defendant is entitled to have the question of competency heard and determined in his presence at the trial. In fact, it is the best policy for a trial judge to refuse a private examination of a child even in a civil action.⁶⁷

Some authorities have held that the examination *should* take place in the presence of the jury. They contend that the youngster's understanding of the nature of the oath and his capacity to comprehend the distinction between right and wrong, as disclosed by his preliminary examination, are proper matters to be considered in determining the weight to be given to the testimony of the infant.⁶⁸

Other authorities assert that the examination *should not* take place in the presence of the jury. They hold that the issue of competence is a factual question reserved entirely for the court. It is not advisable for the jury to hear often incipiently prejudicial *voir dire* testimony even before it has been determined that the witness will be allowed to testify concerning the subject of the litigation.⁶⁹ It is the consensus of these latter cases that once the matter of competency is determined,

⁶¹ RCW 5.60.020; RCW 5.60.050.

⁶² See State v. Gruber, 150 Wash. 66, 272 Pac. 89 (1928); State v. Priest, 132 Wash. 580, 232 Pac. 353 (1925); State v. Whitfield, 129 Wash. 134, 224 Pac. 559 (1924); 58 AM.JUR. *Witnesses* § 134 (1948); 3 JONES § 758; 1 UNDERHILL § 257; 2 WIGMORE § 508.

⁶³ 3 WHARTON § 740; 8 ARK. L. REV. 100, 101.

⁶⁴ State v. Priest, 132 Wash. 580, 585, 232 Pac. 353, 354 (1925); State v. Smith, 95 Wash. 271, 163 Pac. 759 (1917); 3 WHARTON § 740.

⁶⁵ State v. Wilson, 156 Ohio 525, 103 N.E.2d 552, 555-56 (1952). See State v. Whitfield, 129 Wash. 134, 224 Pac. 559 (1924). 58 AM.JUR. *Witnesses* § 134; 3 WHARTON § 763. See also Commonwealth v. Tatisos, 238 Mass. 322, 130 N.E. 495 (1921) and the interesting comparison of the judge's lengthy examination in that case with the standard psychological intelligence-tests in Hutchins & Slesinger, *The Competency of Witnesses*, 37 YALE L.J. 1017 (1928).

⁶⁶ State v. Gruber, 150 Wash. 66, 74-75, 272 Pac. 89, 92 (1928); State v. Priest, 132 Wash. 580, 232 Pac. 353 (1925); 58 AM.JUR. *Witnesses* § 134; 3 JONES § 758; 8 ARK. L. REV. 100, 101-02; 10 Wyo. L.J. 214, 217-18.

⁶⁷ 58 AM.JUR. *Witnesses* § 134; 3 WHARTON § 763.

⁶⁸ 58 AM.JUR. *Witnesses* § 134; 3 JONES § 759.

⁶⁹ See State v. Moorison, 43 Wn.2d 23, 259 P.2d 1105 (1953). (Competency of a witness previously declared insane.). *Accord*, Radiant Oil Co. v. Herring, 146 Fla. 154, 200 So. 376 (1941); McGuire v. People, 44 Mich. 286, 6 N.W. 669 (1880); Lo Biondo v. Allan, 132 N.J.L. 437, 40 A.2d 810 (1945); 8 ARK. L. REV. 100, 101-02.

the testimony of the child should be presented to the jury in the same manner, subject to the same limitations, and the same attacks on credibility as any other testimony.⁷⁰

This problem has not been resolved in Washington. However, where the preliminary examination is conducted *prior* to swearing of the youngster, it is done in part to determine whether he can in fact take an oath. Thus, if the preliminary examination is conducted in the presence of the jury, and if the child is later permitted to testify, the trial court would be guilty of having permitted the jury to determine the credibility of a witness based partially upon unsworn testimony. The Washington court has frowned upon the receiving of unsworn testimony of children.⁷¹ Thus, the best procedure is to require that the preliminary examination be conducted out of the presence of the jury.⁷² This procedure was suggested by the court in *State v. Moorison*⁷³ when the competency of a witness was challenged under RCW 5.60.050, on the ground of prior insanity. The suggested procedure will not prevent an attack upon the child's credibility in the usual manner. Likewise, it will not prevent re-asking of many questions formerly used on *voir dire*.⁷⁴

What should the preliminary examination encompass?

Three problems confront an attorney who is involved in a preliminary hearing to determine the competency of a child witness. First, what are the elements of competency? Second, how does one set the stage for his witness to meet the test? Third, what subjects should be touched upon to establish the necessary elements?

The test of a child's competency involves four fundamental elements:⁷⁵ "(1) present understanding or intelligence to understand, on instruction, an obligation to speak the truth; (2) mental capacity at the time of the occurrence in question to observe and register such occurrence; (3) memory sufficient to retain an independent recollection;

⁷⁰ Once the question of competency has been determined, the young person's testimony is placed on the same footing as an adult. Thus, there should be no special cautionary instructions given by the court. In fact, such an instruction would undoubtedly violate WASH. CONST. art. IV, § 16. See *State v. Smith*, 103 Wash. 267, 269, 174 Pac. 9, 10 (1918). *Contra*, J. F. STEPHEN, *op. cit. supra* note 52 at 288.

⁷¹ *Hodd v. Tacoma*, 45 Wash. 436, 438-39, 88 Pac. 842, 843 (1907).

⁷² *State v. Moorison*, 43 Wn.2d 23, 259 P.2d 1105 (1953).

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Robinson v. State*, 235 Miss. 100, 108 So.2d 583 (1959); *Burnam v. Chicago Great Western Ry. Co.*, 340 Mo. 25, 100 S.W.2d 858, 862 (1936); 6 AM.JUR. PROOF OF FACTS, *Infants* at 334 (1960) [hereinafter cited as 6 AM.JUR. PROOF, *Infants*]; 2 WIGMORE § 506.

tion of the observations made;⁷⁶ and (4) capacity truly to translate into words the memory of such observations."

The examination should be as friendly as possible. The questions should be simple and direct and designed to ascertain the general intelligence of the child and his recognition of a duty to speak the truth. If necessary, questions answerable by simple affirmatives and negatives may be used. In any case, the questions should be kept within the grasp of the child's mind.⁷⁷

The interrogators should remember that questions which appear simple and direct to them may be confusing or absolutely meaningless to a child. A six-year-old child might give an unsatisfactory answer if asked, "With whom do you reside?" However, he could readily answer, "With whom do you live?" He might have similar trouble with the word "prevaricate" and yet would be able to correctly tell the difference between the "truth" and a "lie."

The importance of speaking a youngster's language is well illustrated in *State v. Collier*.⁷⁸ Butch, a nine year old boy, was asked: "Who is God?" He was wholly unable to deal with the question except to say: "I know he never told a lie." In determining that the child was competent to testify, the court said: "We may observe, parenthetically, that a good many adults would have some difficulty with that question." If it appears that the child actually possesses the knowledge but is unable to express it on a single point, or if the child and interrogator reach an actual impasse in communication, it may be advisable to pass over the immediate problem and substitute other questions to demonstrate his competency. Competency will seldom be determined by an answer to a single question.⁷⁹

The basic reason for a preliminary hearing is to establish a child's competency as a witness. However, it fulfills another important function. If properly handled, the time spent on the stand prior to actual appearance before the jury can be used constructively to put the child at ease in an otherwise strange atmosphere. On the other hand, if the situation is handled improperly, the child's confidence (and thus his

⁷⁶ Where the child's testimony will relate to facts and circumstances that took place a long time prior to trial, it should be established that the child remembers other things that happened at or about the same time. This will help determine whether the child was too immature at the time of the happening to recall the events. It should also help gauge his ability to recall. 6 AM.JUR. PROOF, *Infants* at 335, 342.

⁷⁷ Jackson v. State, 239 Ala. 38, 193 So. 417, 419 (1940).

⁷⁸ State v. Collier, 23 Wn.2d 678, 687, 162 P.2d 267, 272 (1945).

⁷⁹ See *State v. Collier*, *supra* note 78; Davenport v. Commonwealth, 285 Ky. 628, 148 S.W.2d 1054 (1941); Pierce v. New England Tel. and Tel. Co., 86 R.I. 326, 134 A.2d 421 (1957); 6 AM.JUR. PROOF, *Infants* at 335.

effectiveness as a witness) may be destroyed before the jury ever has an opportunity to see him.

Most adults are uneasy and tense in the unfamiliar surroundings of a courtroom. This reaction can be magnified many-fold with a youngster. He is confronted with a new and different world occupied exclusively by adults who use a strange vocabulary. Thus, it is incumbent upon both court and counsel to put him at ease so that the information he possesses can be imparted to the jury in the most readily understandable fashion.

The preliminary examination should begin with informal questions of a general nature. This will make it easier for the youngster to talk. These questions may range over a wide area and yet, indirectly, produce important information on the subject of competency. For instance:

- Q. What is your name?
- A. Katherine Anne Craig.
- Q. How are you feeling today, Katherine?
- A. Fine.
- Q. What are the names of your mother and father?
- A. - - -
- Q. Do you have any brothers and sisters?
- Q. What are their names?
- Q. Do they live at home?
- Q. By the way, how do you spell your name?
- Q. How old are you, Katherine?
- Q. When is your birthday?
- Q. How did you get here today?
- Q. Do you know what building you are in now?
- Q. What town are you in now?
- Q. Where do you live?
- Q. What school do you go to?
- Q. How far do you live from school?

All of the foregoing questions should be easy to answer and thus should help relax the child. However, critical examination will also reveal that they help establish:

- (1) Ability to understand simple questions. (2) Age, as well as the child's knowledge of his own age and birthdate. (3) His residence

and the location of his home in relation to another important place. This also helps illustrate his ability to observe and relate what he observes. (4) Knowledge of other people who live with him. (5) Ability to remember. (6) General intelligence. The foregoing questions also form a good base from which the interrogator may, with ease, branch off into other important questions.

It is assumed that the attorney who offers a child as a witness will have talked with him before placing him on the stand.⁸⁰ Before he ever brings him to court, the attorney should know something of the child's background and should have formed some opinion as to his competency and his ability to answer necessary questions. With this knowledge at his fingertips, counsel should be in a position to formulate his own questions. For this reason, no attempt will be made to outline specific questions to assist in establishing a young person's competency as a witness. Each child differs in age, personality, background and intelligence. All questions must be tailored to the individual involved. However, there are certain topics that should be covered to establish competency:

1. General questions about the home and members of the family;
2. Questions about his schooling, including his grade, present teachers, former teachers, subjects studied, class standing, grades received in former years, regularity of promotion, failures, if any, favorite subjects, attendance record and extra-curricular activities. If the child is of pre-school age, or is very young, he should also be tested on his ability to count, read and spell simple words;⁸¹
3. Questions about his attendance at church or Sunday school, including his frequency of attendance, names of his teachers, pastor and location of the church;⁸²
4. Questions to demonstrate his knowledge of the difference between

⁸⁰ Many attorneys feel that it is advisable to tell the child something about what to expect in the courtroom. By so doing, the youngster will not be completely lost when he takes the stand. Some lawyers actually take a child-witness to an empty courtroom in advance of trial. This helps the youngster familiarize himself with the surroundings.

⁸¹ 6 AM.JUR. PROOF, *Infants* at 338.

⁸² Such questions would not appear to violate the child's rights under the WASH. CONST. art I, § 11, amend. 34. *Accord*, State v. Leuch, 198 Wash. 331, 333-37, 88 P.2d 440, 441-42 (1939). That case dealt with the subject of "competency" and "religious faith" of a juror. However, it is felt that the same general principle would apply to questions touching upon religion as they relate to a child's understanding of the difference between the truth and a lie, and the obligation to testify truthfully. See Commonwealth v. Myers, 189 Pa. Super. 198, 150 A.2d 380, 382 (1959); 6 AM.JUR. PROOF, *Infants* at 343.

the truth and a falsehood, that it is wrong to lie and the consequences of telling a lie,⁸³ and

5. Lastly, the child should be asked some questions to dispel the possibility of coaching. A child that has been coached is suspect. In this regard, the following type of questions would be appropriate:

Q. Have we met before, Katherine?

A. Yes.

Q. Where?

A. At your office.

Q. When was that?

A. Last Saturday.

Q. Was anyone else in the room?

A. Yes.

Q. Who?

A. My dad and my sister Joan.

Q. What did we talk about?

A. About what I'd seen at the wreck.

Q. Did I tell you about the wreck, or did you tell me?

A. I told you.

Q. Did I tell you what to say in court?

A. Yes.

Q. What did I tell you to say?

A. To tell everything I know.

Q. Did I tell you anything else?

A. You said to tell the truth.

THE OATH

All children, regardless of age, must be sworn once they have been found competent to testify.⁸⁴ This fact has given rise to the argument that child under the age of eight may not properly qualify as a witness even though otherwise competent. It is contended that one reason for the oath is to subject one to the criminal penalty of perjury for false swearing.⁸⁵ It is then pointed out that RCW 9.01.111 provides that children under the age of eight years are incapable of committing a crime. From this foothold, it is contended that inasmuch as a child of eight cannot commit or be punished for the crime of perjury, he can-

⁸³ It is not necessary for a child to be able to explain the legal nature of an oath. *State v. Collier*, 23 Wn.2d 678, 686-94, 162 P.2d 267, 272-75 (1945); *People v. Delaney*, 52 Cal. App. 765, 199 Pac. 896 (1921); 3 WHARTON § 762; 8 ARK. L. REV. 100, 101-04.

⁸⁴ *Hodd v. Tacoma*, 45 Wash. 436, 438-39, 88 Pac. 842, 843 (1907).

⁸⁵ 58 AM.JUR. *Witnesses* § 132; 1 UNDERHILL § 251; 8 ARK. L. REV. 100, 103-105.

not properly take an oath⁸⁶ and, thus, cannot testify. Although the Washington court has not decided this question, most states have resolved this interesting argument in favor of the child's competency if he is otherwise competent.⁸⁷

It is not necessary that he have any particular religious or moral background.⁸⁸ However, it is essential that he appreciate the obligation of an oath.⁸⁹ It is sufficient to qualify him that he understand the difference between truth and falsehood, and his duty to tell the truth, and that he will be punished if he testifies falsely.⁹⁰ It is not necessary that he understand the legal nature of an oath or appreciate the formality of taking it as long as he has an adequate sense of the impropriety of falsehood. In other words, he need not be able to define an oath, perjury or testimony.⁹¹ Furthermore, if the child does not seem to actually understand the significance of taking an oath, it is within the discretion of the court to momentarily postpone the trial for the purpose of such instruction.⁹²

No particular words or form need be used in administering the oath. Article I, § 6, of the Washington Constitution provides: "The mode of administering an oath or affirmation shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered." The constitution thus gives a wide discretion as to the mode of administering an oath. The administering officer is commanded to employ that mode which he believes will be most binding upon the conscience of the witness. It has been held that RCW 5.28.020, which sets out the manner of administering an oath, is permissive only.⁹³

⁸⁶ RCW 9.01.111.

⁸⁷ 58 AM.JUR. *Witnesses* § 132; 1 UNDERHILL § 251; 3 WHARTON § 762; 8 ARK. L. REV. 100, 103-05; Annot., 159 A.L.R. 1102 (1945). Criminal offenses of very young children are first handled in juvenile court under the provisions of the Washington State Juvenile Code, RCW 13.04. When thus handled, the offense is not considered a criminal conviction, even if the offense is perjury, RCW 13.04.240. The Washington court has not decided whether a child's competency is affected by the fact that prosecution for perjury is subject primarily to juvenile court proceedings. However, most of the cases that have considered the matter have determined that the child's competency is not affected. Annot., 159 A.L.R. 1102, 1104 (1945).

⁸⁸ 58 AM.JUR. *Witnesses* § 130, 131; 8 ARK. L. REV. 100, 103-105.

⁸⁹ State v. Collier, 23 Wn.2d 678, 686-94, 162 P.2d 267, 272-75 (1945); 58 AM. JUR. *Witnesses* § 130, 131; 3 WHARTON § 762; 8 ARK. L. REV. 100, 103-105; 10 Wyo. L.J. 214, 217-18.

⁹⁰ State v. Collier, *supra* note 89; 58 AM.JUR. *Witnesses* § 130; 1 UNDERHILL 257; 10 Wyo. L.J. 214, 217-18.

⁹¹ State v. Collier, *supra* note 90; People v. Delaney, 52 Cal. App. 765, 199 Pac. 896 (1921); 3 WHARTON § 762; 8 ARK. L. REV. 100, 101-05.

⁹² 58 AM.JUR. *Witnesses* § 133; 8 ARK. L. REV. 100, 101-02.

⁹³ State v. Collier, 23 Wn.2d 678, 686-94, 162 P.2d 267, 272-75 (1945); RCW 5.28.030.

This means that it is not necessary to use the words "oath" or "swear" or any other particular words or form as long as the youngster is made to understand the necessity of telling the truth. Merely to ask the child if he will "promise" to tell the truth is sufficient if it fits the understanding of the child.⁹⁴

LATITUDE OF THE EXAMINATON

Direct Examination

After the child has been qualified, his examination should be carefully conducted and kept within the range of his mind.⁹⁵ He may know and be able to tell many facts, and yet be wholly in the dark as to other matters open to a more mature mind.⁹⁶ He should not be permitted to answer questions which he might not in actuality understand.⁹⁷ This is particularly true where leading questions are used.⁹⁸ For instance, it is doubtful that girl of eight should be permitted to answer "yes" to the question "[D]id he have sexual intercourse with you?"⁹⁹ While an adult might understand the question, there is the danger that the child might not know the meaning of the words and be led into making a false answer.¹⁰⁰

This is especially true in cases which involve a morals offense against a child of tender years. By reason of the nature of the details, there is a natural reticence to ask a young person to speak out in detail. However, the delicacy of the situation should not be permitted to outweigh the fact that a man's liberty and reputation are at stake. The consequential embarrassment to the interrogator and the child is a small price to pay for proof that the witness understands the details

⁹⁴ State v. Collier, *supra* note 93.

⁹⁵ 6 AM.JUR. PROOF, *Infants* at 335; 10 Wyo. L.J. 214, 219-21; See note 44 *supra*.

⁹⁶ Jackson v. State, 239 Ala. 38, 193 So. 417 (1940); 6 AM.JUR. PROOF, *Infants* at 335.

⁹⁷ Riggs v. State, 235 Ind. 499, 135 N.E.2d 247, 249 (1956); 3 WHARTON § 762 (Supp. 1960 at 8).

⁹⁸ 3 WHARTON, *op. cit. supra* note 97, § 762; 10 Wyo. L.J. 214, 220.

⁹⁹ Riggs v. State, 235 Ind. 499, 135 N.E.2d 247, 249 (1956); 3 WHARTON, *op. cit. supra* note 97, § 762.

¹⁰⁰ Riggs v. State, *supra* note 99. In that case a 12-year-old child was asked "Did you have sexual intercourse with Hiram Riggs?" She answered in the affirmative. This statement was the sole direct testimony that the defendant had committed the crime. There was no evidence that the child understood the legal significance of "sexual intercourse" or what particular acts were necessary to constitute it. She related no details with reference to the acts comprising her conclusion. Concerning this, the court said: "A child of 12 is not competent to give her conclusion of 'sexual intercourse' without showing her understanding of details supporting such conclusion, while at the same time a more mature person with more knowledge of such matters might be qualified." Cf., Flinn v. State, 188 Ind. 531, 124 N.E. 875 (1919). In that case, the child testified to having "sexual intercourse." However, the record disclosed that she understood the meaning of the term and the answer was not criticized.

upon which his conclusion is based.¹⁰¹ On the other hand, a youngster's own simple words often paint a more vivid and convincing picture for the jury than testimony rephrased in the nicety of legal terminology.¹⁰² Thus, insofar as possible, the child should be permitted to tell his story in his own language, or at least in language he understands.

It may be necessary to use leading questions from time to time. In this regard, the State of Washington has held that, with witnesses of tender years, wide latitude is allowed in their examination.¹⁰³ However, even though leading questions are the prevailing method of obtaining evidence from a child, they should be avoided whenever possible.¹⁰⁴ By leading a child, an attorney may elicit what he thinks the child saw and heard rather than what the child actually saw and heard.¹⁰⁵ Also, there is the danger of having perfectly accurate testimony discounted by the court or the jury because it was elicited by the use of leading questions.¹⁰⁶

Wigmore recognizes the childish disposition to weave romance and to treat imagination for verity as well as the rooted ingenuousness of children and their tendency to speak straightforwardly what is in their minds. He suggests that the sensible way is simply to put the child on the stand and let him tell his story for what it may be worth.¹⁰⁷ As yet, no state court has gone this far although many, including our own, hold that the latitude of a child's examination is within the discretion of the trial court.¹⁰⁸ It is felt that it is more prudent to recognize the fact that many children are more impressionable than adults.¹⁰⁹ Thus,

¹⁰¹ *Ibid.*

¹⁰² A youngster's graphic description of a particularly sordid morals offense does more than merely illustrate a knowledge of details that support his conclusions. Such testimony also makes a greater impact upon the minds of the jurors than an attorney's professionally dry-cleaned version. The author recalls a criminal action in which a prominent citizen was charged with a disgusting morals offense involving three young boys. The prosecuting attorney attempted to censor the version of the story related by the first two boys. The faces of the jury indicated that they were completely unconvinced. Feeling that there was nothing to lose, the prosecuting attorney permitted the third youngster to tell the story in his own way in his own words. The jury's reaction was almost electric. The facts were so sordid and disgusting in the uncensored version that one of the jurors almost became ill. The tide of the trial turned when the child was permitted to use a language with which he was familiar.

¹⁰³ *State v. Davis*, 20 Wn.2d 443, 444-46, 147 P.2d 940, 942 (1944); *State v. Tenny*, 137 Wash. 47, 241 Pac. 669 (1925); *State v. Hanson*, 133 Wash. 527, 234 Pac. 28 (1925); 10 Wyo. L.J. 214, 218-20.

¹⁰⁴ *Jackson v. State*, 239 Ala. 38, 193 So. 417 (1940); 6 AM.JUR. PROOF, *Infants* at 335; 10 Wyo. L.J. 214, 219-20.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Macale v. Lynch*, 110 Wash. 444, 188 Pac. 517 (1920); 10 Wyo. L.J. 214, 220.

¹⁰⁷ 2 WIGMORE § 509.

¹⁰⁸ *State v. Davis*, 20 Wn.2d 443, 444-46, 147 P.2d 940, 942 (1944); *State v. Tenny*, 137 Wash. 47, 241 Pac. 669 (1925).

¹⁰⁹ See H. E. BURTT, APPLIED PSYCHOLOGY at 307 (1948) wherein the following

the court's discretion should be exercised with care, and with understanding of the individual child's capability to understand the questions and to give intelligent, comprehensible answers.

Cross-Examination

The right of cross-examination is an important tool in the hands of a skillful attorney. However, it is frequently impotent in eliciting the truth from a child who speaks what is in his mind as his impression of the truth.¹¹⁰ For this reason, the scope, extent and limitation of the cross-examination is left largely to the discretion of the trial court.¹¹¹

Usually great latitude is allowed in the cross-examination of minors.¹¹² However, the trial court may confine the examination within reasonable limits and may curtail one that is unduly protracted, frivolous, repetitious or concerned with irrelevant matters.¹¹³ The interrogator is not prohibited from re-asking many of the questions posed during the child's *voir dire* examination on competency.¹¹⁴ In fact, such a re-examination may frequently prove quite fruitful. Furthermore, once the child has taken the stand, before the jury, he is on the same footing as any other witness subject to cross-examination. His credibility may be attacked in the same manner.¹¹⁵

interesting observation is made: "Suggestion is especially apt to play a role in the testimony of children because they are more suggestible than adults. In simple tests where a picture is shown and tricky questions are asked about it, seven-year-old children accept about 50 per cent of the suggestions, whereas eighteen-year-olds accept only 20 percent of the same suggestions. It is possible to go into one of the lower school grades with a bottle of distilled water, tell the pupils that you want to see who has the keenest smell and that after the stopper is removed they are to raise a hand as soon as they smell anything. In a few moments most of the hands in the room will be up. On one such occasion, a little girl became sick from the odor of the distilled water." See also note 52 *supra*. On the other hand, it must not be forgotten that one of the most valuable tools in the cross-examination of *adults* is the same power of suggestion just mentioned. All attorneys have seen adult witnesses positively determine which of two bottles contain gasoline or whisky or some other liquid only to find that both contain water. The same approach has been used with equal success for measurements, dates and colors. Thus, it can be seen that suggestibility is not a weakness peculiar to children. At least, by comparison with an adult, the testimony of a child is more apt to be free of prejudice or sinister motives. 3 JONES § 760. See also State v. Jackson, 121 Kan. 711, 249 Pac. 688, 689-90 (1926). (excellent satire on adult witnesses swayed by sinister motives)

¹¹⁰ See notes 52 and 53 *supra*.

¹¹¹ 2 CONRAD, MODERN TRIAL EVIDENCE § 1184 (1956) [hereinafter cited as 2 CONRAD]; 3 WHARTON § 861.

¹¹² People v. Voice, 68 Cal. App. 2d 610, 157 P.2nd 436 (1945); 2 CONRAD 1184.

¹¹³ State v. Steik, 161 Wash. 194, 296 Pac. 546 (1931); 2 CONRAD 1184; 3 WHARTON 861.

¹¹⁴ See note 74 *supra*.

¹¹⁵ A witness may be impeached by proving a prior *conviction*. This may be done by the record thereof, a duly authenticated copy of the record, cross-examination or other competent evidence. RCW 10.52.030. Such impeachment is permitted whether the previous conviction is a felony or a misdemeanor. State v. Maloney, 135 Wash. 309, 237 Pac. 726 (1925); State v. Overland, 68 Wash. 566, 123 Pac. 1011 (1912). However, a youngster who has appeared in juvenile court and who has been declared

The cross-examination of a young person presents a number of difficulties because he has a number of natural defenses that an adult does not. The fact that a very young child appears defenseless gives rise to a feeling of sympathy on the part of the jury. Also, a parent's natural, protective instinct is a factor that must not be overlooked in the minds of jurors who have children. If a child is small for his age and is particularly cute, an attorney is faced with what appears to be a very precocious youngster. Unfortunately, the lawyer is forced into an undesirable battle of wits with a witness who has a near-adult mind in a child's body. The interrogator is immediately placed on the horns of a dilemma. If he attempts to emphasize the youngster's actual age, experience and sophistication to combat the appearance of precociousness, he also emphasizes the competency of the child. In such a situation, the jury frequently sides with the child in amused enjoyment over the attorney's consternation.

The cross-examiner should never attack the child rudely and should avoid any appearance of attempted "bullying." An attack that seems to be overly tricky or unfair will build up a feeling of resentment in the minds of the jury. Thus, an attorney who has an opportunity to demolish the testimony of a child-witness should do so courteously.

An excellent example of such an examination occurred in the author's court a few years ago. The attorney was confronted with a youngster whose testimony was the very foundation of his opponent's case. The witness had done well on direct examination and the jury was obviously impressed. The boy was small in stature, clean-cut, handsome, well-mannered, and he wore a high school letterman's sweater with two stripes. The lad was asked a few questions about his direct examination. He gave no ground, and the matter was dropped. The attorney then concluded his examination in a courteous and kindly manner as follows:

Q. What did you say your age is?

A. Fourteen.

Q. Are you attending school right now?

to be a "dependent" or "delinquent" child *has not been convicted of a crime*, even though the basis of his legal status is a criminal act. RCW 13.04.240. The Washington court has not passed on the question yet. However, it would appear that a child cannot be impeached by questions pertaining to an appearance in juvenile court, or orders resulting therefrom. The right to impeach is based strictly upon *convictions* and a declaration of "dependency" or "delinquency" is not a conviction. On the other hand, if the attorney who calls a child as a witness asks it questions pertaining to a prior juvenile record, a different rule is involved. In such a case, the attorney has opened the door to a searching cross-examination at least as broad as the questions on direct examination.

- A. Yes.
- Q. How are you getting along in school?
- A. Not too well.
- Q. I see you are wearing a letterman's sweater. What do the stripes mean?
- A. The stripes show how many letters a fellow has.
- Q. Do you mean those stripes on your sweater signify that you earned a letter in some sport?
- A. Yes.
- Q. What sport did you win your letters in?
- A. None.
- Q. Do you mean you didn't earn any letters at all?
- A. No, I didn't.
- Q. How did you get the sweater then?
- A. Anyone can buy them.
- Q. Did you buy your sweater?
- A. Yes.
- Q. Now, _____, when you wear that sweater with the stripes, isn't it the same as saying—"I won a letter in two high school sports?"
- A. Yes.
- Q. But when you wear that sweater, you aren't actually telling the truth, are you?
- A. No.
- Q. When you wore that sweater on the stand today, you really told this jury that you were a high school letterman, didn't you?
- A. Yes.
- Q. But it is not true, is it?
- A. No, it is not.
- Q. The jury might never have found out about it if you and I hadn't straightened it out here, would they?
- A. No, they wouldn't.
- The result of the examination was devastating. The boy was discredited in the eyes of the jury by a courteous cross-examination by an attorney with his eyes open.

SPECIAL INSTRUCTIONS

Some authors and a few state courts are so impressed with the unreliability of children's testimony that they suggest the necessity of a special instruction for the jury. They contend that the jury should

be advised to give special attention to the youngster's testimony because of a tendency of children to imagine, misunderstand and fabricate. It is said that the jury should give less weight to such testimony, or at least consider these drawbacks when weighing a child's testimony.¹¹⁶

Although the Washington court has not ruled upon the exact subject, a similar cautionary instruction was rejected in the case of a witness who a dope addict.¹¹⁷ The court held that:

While testimony is admissible showing the character of, or effect of the use of drugs upon a witness as affecting her credibility, it is not proper for the court to violate the constitutional prohibition against commenting upon the evidence by instructing the jury that it should regard the testimony of *any class of witnesses* with caution or suspicion.¹¹⁸ (Emphasis added)

It is likely that the Washington court will be consistent in its interpretation of the above-mentioned constitutional prohibition, insofar as the child-witness is concerned.¹¹⁹ Once the matter of competency has been decided by the court, the question of credibility is strictly for the jury.

CONCLUSION

When faced with the problem of examining a child-witness, too many attorneys throw up their hands in despair. This defeatist outlook has nullified the effectiveness of many *good* witnesses just as it has permitted the testimony of numerous *incompetent* children to go to the jury. Actually the problem is more apparent than real. It arises mostly from non-critical thinking that attributes to the youngster some kind of super-legal status in the scheme of things. Unfortunately, few articles have discussed the subject, and the case authority in the State of Washington is sparse. Thus, there are few guide lines for the busy practitioner. This article was written in an attempt to chart a few paths through an area clouded with misconception. Only a summary of the problems can be presented in this article, and only a few examples can be given as an aid to resolving these problems. By so doing, it is hoped that some unnecessary pitfalls inherent in the use of child-witnesses may be avoided.

¹¹⁶ See note 52 *supra*.

¹¹⁷ *State v. Smith*, 103 Wash. 267, 174 Pac. 9 (1918) (competency of a dope addict). See *State v. Siebenbaum*, 105 Wash. 157, 177 Pac. 669 (1919).

¹¹⁸ *State v. Smith*, *supra* note 117, at 269, 174 Pac. at 9, 10.

¹¹⁹ WASH. CONST., art. IV, § 16.