

## Competency of Children as Witnesses; Significance of Oaths to Children

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the obstacle that he was not accused under the statute of the Price Control Act. Here is a vicious circle. A law which might be flagrantly unconstitutional could be in effect indefinitely without challenge.

Our law of conspiracy needs clarification, not to permit offenders to avoid entrapment, but to allow each alleged transgressor to know definitely that he will not be convicted for doing a lawful act in a lawful manner and to prevent the exceptions from becoming so numerous that they completely overwhelm the original Section 37 of the Criminal Code.

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#### COMPETENCY OF CHILDREN AS WITNESSES; SIGNIFICANCE OF OATHS TO CHILDREN

In New York, no unsworn testimony is admissible on the trial of either a civil or a criminal case, except in one instance. The exception is to be found in Section 392 of the Code of Criminal Procedure:<sup>1</sup>

The rules of evidence in civil cases are applicable also to criminal cases except as otherwise provided in this code. Whenever in any criminal proceedings a child actually or apparently under the age of twelve offered as a witness does not in the opinion of the court or magistrate understand the nature of an oath, the evidence of such child may be received though not given under oath if, in the opinion of the court or magistrate, such child is possessed of sufficient intelligence to justify the reception of the evidence. But no person shall be held or convicted of an offense upon such testimony unsupported by other evidence.

The unsworn testimony of an infant is inadmissible in a civil action<sup>2</sup> (unless waived by both parties), and that leads to our first query, "At what age is an infant competent to testify under oath?" Whereas, in a criminal jurisdiction, if a witness is over twelve, the law presumes capacity; in civil jurisdiction there is no definite rule as to the age at which an infant is competent to testify under oath. The test is an individual one. In one case, it was held no error to admit sworn testimony of a boy five years old; this on the ground of the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as his duty to tell the truth.<sup>3</sup> A witness, six and a half years old, who knew she would

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<sup>1</sup> As amended by Chapter 279 of the Laws of 1892.

<sup>2</sup> *Gehl v. Bachmann-Bechtel Brewing Co.*, 156 App. Div. 51, 141 N. Y. Supp. 133 (1913); *Arico v. New York Central R. R.*, 240 App. Div. 721, 265 N. Y. Supp. 503 (1933).

<sup>3</sup> *Wheeler v. United States*, 159 U. S. 523, 40 L. ed. 244 (1895).

be punished if she told an untruth, was held competent.<sup>4</sup>

By Section 365 of the Civil Practice Act,<sup>5</sup> the trial court may examine a child of tender years before the child is sworn "so as to ascertain his capacity and extent of his knowledge."<sup>6</sup> The court sees the proposed witness, notices his manner, and resorts to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the oath.

It has been said that, "If a witness is over fourteen years of age the law presumes him to possess the requisite discretion and understanding. If under that age, the duty devolves upon the trial court, . . . to determine . . . capacity . . ."<sup>7</sup> In criminal cases it has been held that, "the magistrate must examine a child under twelve to determine whether the presumption of incapacity is overcome."<sup>8</sup>

Our second query then is, "If twelve years is adopted as the age when the law presumes competency in criminal cases, why is the age of fourteen years set as the standard in some civil cases?"

The twelve-fourteen-year conflict is irreconcilable and seems to be an arbitrary difference. A child of twelve, named X, testifying in a criminal action would still be a child of twelve, named X, with the same mental capacity, although now testifying in a civil action. If X understands right from wrong, and that wrongs are punishable, but does not understand the significance of an oath, is it justice to exclude unsworn civil testimony? The stakes in civil matter do not involve personal liberties and that probably accounts for the more liberal rule in criminal evidence, but in both instances truth is what the court should seek and not just the understanding of an oath. "Does the taking of an oath necessarily secure the performance of a public duty or the real truth in the trial of the case? Politicians and moralists have placed much reliance on oaths as a practical security."<sup>9</sup> In fact, in no jurisdiction has the use of the oath been abolished. Wigmore calls for a special class of persons of whom an oath ought not to be required, nor even the exercise of an option to affirm be expected, namely children qualified to testify but lacking in theological understanding.<sup>10</sup> In New York we have provided for such exception but only in criminal cases.

<sup>4</sup> *Agnew v. Brooklyn City R. R. Co.*, 5 N. Y. Supp. 756, *aff'd* 117 N. Y. 651, 22 N. E. 1132 (1889).

<sup>5</sup> C. P. A. 365: "Court may examine witness before swearing. The court or officer may examine an infant or a person apparently of weak intellect produced before it or him, as a witness, to ascertain his capacity and the extent of his knowledge; and may inquire of a person produced as a witness what peculiar ceremonies in swearing he deems most obligatory."

<sup>6</sup> *Olshansky v. Olshansky*, 185 App. Div. 469, 172 N. Y. Supp. 856 (1918); *Ellarson v. Ellarson*, 198 App. Div. 103, 190 N. Y. Supp. 6 (1921).

<sup>7</sup> *People v. Linzey*, 79 Hun 23, 29 N. Y. Supp. 560 (1894).

<sup>8</sup> *People v. Klein*, 266 N. Y. 188, 194 N. E. 402 (1935).

<sup>9</sup> W. Erskine Williams, *The Oath as an Aid in Securing Trustworthy Testimony* (1931) 10 TEXAS L. REV. 64, 66.

<sup>10</sup> WIGMORE, EVIDENCE (3d ed.) §§ 488, 508.

In Michigan,<sup>11</sup> for children under ten, the oath may be dispensed with. The nature of the child's belief is in theory to be judged by the same theological standards but by simpler language and more concrete tests. In Illinois,<sup>12</sup> a witness who said she "would go to hell" if she didn't tell the truth was accepted. However, in Arkansas,<sup>13</sup> the following was held not to have enough theology in it: "Do you know what you mean when you hold up your hand and take the oath?" "Yes, sir; tell the truth." "If you were not to tell the truth, what would be done to you?" "I don't know, sir." "Would it be wrong?" "Yes, sir." In order to overcome this lack of understanding and so as not to preclude testimony from being received, the child's mind may be conditioned to be properly influenced by the oath. In Massachusetts,<sup>14</sup> a temporary postponement of the trial was allowed, enabling the child to be instructed by a priest.

Wrote Justice Buller,<sup>15</sup> "If the first speech were without oath, that there was such speech, makes it no more than a bare speaking and so of no value in a court of justice." That this view, as to the significance of an oath, has been modified, we note in the ruling as to waiver: "In a case where an oath is required, the parties may waive the administration of the oath, and the waiver may be either express or implied."<sup>16</sup> But the waiver seems to be limited, or rather, seems to be strictly interpreted. The unsworn testimony of a seven-year-old boy as to how an accident in which another infant was injured happened, was held to be insufficient to support a judgment where there was no other proof, even though no objection was made to the competency of the witness.<sup>17</sup> Silence of counsel in failing to object to such unsworn testimony cannot be considered a waiver.<sup>18</sup> The weight of a waiver is lessened in criminal cases in that the Code of Criminal Procedure, Section 392, leaves it to the court to determine if the intelligence of the child justifies the reception of the unsworn testimony; only in that instance, have we the additional factor of the necessity of corroborative testimony before conviction can be supported. It was found to be a harmless error to admit unsworn testimony of a seven-year-old infant suing for personal injuries where no objection was taken thereto, and the jury's verdict was not based solely upon such testimony.<sup>19</sup> In a similar case, the trial judge permitted a boy, nine years of age at the time

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<sup>11</sup> Comp. L. 1915, § 12556; Comp. L. 1929, § 14222.

<sup>12</sup> *Draper v. Draper*, 68 Ill. 17 (1873).

<sup>13</sup> *Crosby v. State*, 93 Ark. 156, 128 S. W. 781 (1910).

<sup>14</sup> *Com. v. Tatisos*, 238 Mass. 322, 130 N. E. 495 (1921).

<sup>15</sup> BULLER, *LAW OF NISI PRIUS* (Eng.) 294.

<sup>16</sup> *People ex rel. Niebuhr v. McAdoo*, 184 N. Y. 304, 77 N. E. 260 (1906).

<sup>17</sup> *Scherback v. Stern*, 246 App. Div. 746, 283 N. Y. Supp. 804 (1935).

<sup>18</sup> *Ranofsky v. Frank*, 208 App. Div. 213, 203 N. Y. Supp. 160 (1924).

*Contra*: *Gavrilutz v. Savage*, 166 App. Div. 309, 151 N. Y. Supp. 808 (1915).

<sup>19</sup> *Razaukas et al. v. N. Y. Dugan Bros., Inc.*, 263 App. Div. 1002, 33 N. Y. S. (2d) 411 (1942).

he testified, to testify without having been sworn, over the objection of the defendants. The recovery here, however, was based so largely on this unsworn testimony that it could not stand. Upon the record, there was nothing that could be construed to be consent to the reception of this testimony without the sanction of the oath.<sup>20</sup>

"The preliminary examination by the presiding justice as to competency of a witness is not evidence in the action. It is not addressed to any issue and is for the consideration of the court only, not of the jury. It is usually an informal conversation upon different subjects, designed to put the child at ease so that he will talk naturally. His intelligence and ability to tell the truth are tested by noting his answers and his general appearance. . . ." The presumption is that a child thus admitted without oath was duly found by the trial court not to understand its nature. ". . . It (C. C. P. § 392) limits the effect of such testimony by providing that no conviction can be founded upon it unless it is supported by other evidence. It permits the unsworn statement to be received for what it is worth, subject to the test of cross-examination. A child may not be able to understand the nature of an oath and yet be capable of telling what he saw and heard on a certain occasion with entire accuracy."<sup>21</sup> We have no statute applicable to civil cases wherein the oath is done away with when it is useless and the evidence might be valuable. Indeed, the court is not permitted to cast off the safeguard of an oath which the law has placed on testimony in civil cases.<sup>22</sup>

There is no specific age below which capacity will always be deemed wanting; even an infant under seven, if found to possess sufficient knowledge of the nature and consequence of an oath, may be sworn. Once the oath has been given, C. C. P. § 392 by its terms does not apply and so generally no corroboration is thereafter necessary—the jury must consider the weight of the testimony, the competency has been ruled upon as a question of law. Even though an oath has been administered, corroboration is still required by statute as to confessions, rape, abduction, adultery, and other special charges.

The Model Code of Evidence<sup>23</sup> attempts to answer the problem of oaths to children, as follows:

Rule 101—Qualification of Witnesses.

Every person is qualified to be a witness as to any material matter unless the judge finds that:

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<sup>20</sup> *Michel v. Semer*, 205 App. Div. 281, 199 N. Y. Supp. 512 (1923).

<sup>21</sup> *People v. Johnson*, 185 N. Y. 219, 77 N. E. 1164 (1906).

<sup>22</sup> *Stoppick v. Goldstein et al.*, 174 App. Div. 306, 160 N. Y. Supp. 947 (1916).

<sup>23</sup> Model Code of Evidence (1942) Ch. II, p. 91.

(a) the proposed witness is incapable of expressing himself concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or

(b) the proposed witness is incapable of understanding the duty of a witness to tell the truth.

Rule 11 of the Model Code requires the judge to try and determine disputes as to the existence of facts, which are prerequisite to the qualification of a witness. The judge must determine whether the proposed witness understands his duty to tell the truth. The opponent has the burden of seeing that the question is raised and that there is evidence before the judge which would justify him in finding incapacity. The conduct of the witness might be such as to impel the judge to raise the question, treating such conduct as persuasive evidence of incapacity, and consequently to require the proponent to bring forward evidence of capacity.

Rule 103 of the Model Code does not require an oath; all that is requisite in the "expression of purpose to testify only to the truth" is that the "judge finds it to be binding upon the conscience of the witness" who has qualified under Rule 101.

An illustration under the Model Code serves to show the result of the proposed statute:

*W*, a child under seven years of age, is called to testify to an event occurring when he was only five years of age. The judge finds that, while *W* is incapable of making understandable answers to some pertinent questions which might be asked, he is not incapable of making understandable answers to appropriately framed relevant questions sufficient in number and variety to constitute reasonable direct and cross-examination. *W* is qualified to be a witness.<sup>24</sup>

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<sup>24</sup> *Id.* at Ch. I, p. 87.