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The Problem of the Child Witness

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CONCLUSION

The "quick freeze" of the pronouncement in *Falbo v. United States* that judicial review under the Act was altogether unavailable, because Congress had entrusted the administration of the selective service system to the civilian agency and not to the courts, has been melted by later decisions. It is now established that the silence of Congress as to judicial review⁵³ does not preclude federal courts from extending relief in the exercise of their general jurisdiction, which has been expressly granted by Congress. The registrant can now predict fairly accurately when he will or will not be afforded judicial review of draft orders.

It has been established through the cases herein discussed that a judicial review of draft orders will be afforded: (a) when a registrant is compelled to comply with an order before being given the right to exhaust his administrative remedies by appeal within the agency, (b) if there is no "basis in fact" for the order issued by the board, (c) or the order by the board is not supported by substantial evidence, (d) or if the registrant is denied a procedural right to which he is entitled, (e) or if the order is arbitrary and capricious.

The total effect of the judicial product to date is to curb the inclinations of some local boards to be careless or dogmatic in the issuance of draft orders, a consummation devoutly to be wished in an area which so profoundly affects the lives of many people.

THEODORE JEFFERSON

 THE PROBLEM OF THE CHILD WITNESS

As nearly any mother will concede, one of the primary features of small children is the ambulatory characteristic; they get around. Thus, they often are in the right place at the right time to see people, things and events that are never witnessed by an adult. Because of this propensity their testimony may on occasion be of extreme importance in the litigation of a civil action or in a criminal prosecution. It should be pointed out that this same characteristic frequently places children in out-of-the-way places where atrocious crimes are committed against their persons. Since such acts are always committed in privacy the testimony of the child is frequently the most important evidence available in prosecuting the perpetrator of such a crime. These factors indicate that the probability is quite good that at some time during his professional career an attorney will want to call upon the testimony of a child. When he does he is confronted by two problems:

- (1) He must qualify the child as a competent witness.
- (2) He must elicit testimony from the child in an understandable and convincing manner.

53. 62 Stat. 604 (1948), for amendments—supra note 8.

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*¹ the court announced the rule:

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

This was the rule that the American courts adopted starting around the mid-part of the 19th century,² and during the next half century it was even incorporated into statutes in some states.³

In 1895 the United States Supreme Court, in *Wheeler v. United States*,⁴ announced the established policy in America. The Court held that a five and one-half year old child was competent to testify in a criminal trial for murder, saying:

That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness is clear. While no one would think of calling a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as 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 erroneous. These rules have been settled by many decisions, and there seems to be no dissent among the recent authorities.⁵

This case has been cited and followed many times, and is still represents good basic law on the point of competency of child witnesses.

The rule has received varied treatment among the different states of the United States so far as statutory enactments are concerned. Eighteen

1. 11 Leach 199, 168 Eng. Rep. 202 (1779).

2. E.g., *State v. Whittier*, 21 Me. 341 (1842); *Washburn v. People*, 10 Mich. 372 (1862); *State v. Edwards*, 79 N.C. 648 (1878).

3. E.g., *Ridenhour v. Kansas City Cable Ry. Co.*, 102 Mo. 270, 13 S.W. 889 (1890), rehear. 102 Mo. 270, 14 S.W. 760 (1890) referring to Mo. Rev. Stat. § 4017 (1879), Mo. Rev. Stat. § 8925 (1889); *Blackwell v. State*, 11 Ind. 196 (1858) referring to 2 Ind. Rev. Stat. § 239 (1852); *State v. Jackson*, 9 Ore. 457 (1881) referring to Ore. Civ. Code § 701 (1862).

4. 159 U.S. 523, 16 S.Ct. 93, 40 L.Ed. 244 (1895).

5. *Wheeler v. United States*, 159 U.S. 523, 524, 16 S.Ct. 93, 40 L.Ed. 244 (1895).

of them⁶ have simply relied on the common-law rule as it has developed in the courts without devoting any legislation to the competency of witnesses. Statutes substantially like section 3-2601 of the Wyoming Compiled Statutes, 1945⁷ have been enacted in another group of fifteen states.⁸ Indiana and New Mexico also place the age of presumed competency at 10 years, but their statutes incorporate a test of understanding the nature and obligation of an oath.⁹ Iowa, Nebraska, Tennessee and Wisconsin have general competency statutes which require the capacity to understand the nature and/or the obligation of an oath;¹⁰ these statutes, of course, apply to children who are offered as witnesses. The statutes in Alabama and Georgia are quite similar to those in the preceding group of states except that they refer specifically to children.¹¹ Kentucky and Massachusetts impose a test, again applicable to children, of sufficient understanding for witnesses generally,¹² while Louisiana requires a child under 12 to satisfy the court that he has sufficient understanding to be a witness in a criminal case.¹³ These statutes, with the exception of that of Louisiana, are all applicable in both civil and criminal cases, in some states by virtue of a statute like section 10-1206 of the Wyoming Compiled Statutes, 1945,¹⁴ in others without such a statute.

Arkansas and Texas present an interesting contrast. In Arkansas there is a statute relating to the competency of children as witnesses in civil cases,¹⁵ but their competency in criminal cases is not governed by statute. Texas, on the other hand, has a statute relating to their competency in criminal cases,¹⁶ but it does not have such a statute for civil cases. It seems that the criminal statute in Texas is simply a codification of the rule for civil cases, however, while, as will appear below, the same thing is certainly not true of the Arkansas statute for civil cases. Michigan has a

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6. Connecticut, Delaware, Florida, Illinois, Maine, Maryland, Mississippi, New Hampshire, New Jersey, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, Virginia, West Virginia.
 7. "All persons are competent witnesses, except those of unsound mind and children under ten (10) years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly."
 8. Ariz. Code Ann. § 23-103 (2) (1939); Deering's Cal. Code Civ. Pro. Ann. § 1880 (2) (1949); Colo. Stat. Ann. c. 177, § 8 (1935); Ida. Code § 9-202 (2) (1947); Kan. Gen. Stat. § 60-2805 (1949); Minn. Stat. § 595.02 (1953); Mo. Rev. Stat. § 491.060 (1949); Mont. Rev. Code § 93-701-3 (2) (1947); Nev. Comp. Laws § 8970 (2) (1929); Ohio Rev. Code Ann. § 2317.01 (Baldwin 1953); Okla. Stat. § 12-385 (1951); Ore. Rev. Stat. § 44.030 (1953); Utah Code Ann. § 78-24-2 (2) (1953); Wash. Rev. Code § 5.60.020 (1951); Wyo. Comp. Stat. § 3-2601 (1945).
 9. Ind. Stat. Ann. § 2-1714 (Burns 1933); N.M. Stat. Ann. § 20-108 (1941).
 10. Iowa Code § 622.1 (1954); Neb. Rev. Stat. § 25-1201 (1943); Tenn. Code § 9774 (1932); Wis. Stat. § 325.30 (1953).
 11. Ala. Code § 7-439 (1940); Ga. Code § 38-1607 (1933).
 12. Ky. Rev. Stat. § 421.200 (1953); Mass. Gen. Laws c. 233, § 20 (1932).
 13. La. Rev. Stat. § 15-469 (1950).
 14. "Except as otherwise provided, the provisions of the code of civil procedure, relative to or compelling the attendance and testimony of witnesses, their examination and the administering of oaths and affirmations, and proceedings for contempt, to enforce the remedies and protect the rights of parties, shall extend to criminal cases, so far as they are in their nature applicable."
 15. Ark. Stat. § 28.601 (1947).
 16. Tex. Code Crim. Pro. art. 708 (1948).

statute that is somewhat different,¹⁷ and it seems to present a more modern view. It provides, in effect, that a child under 10 can be permitted to testify upon a promise to tell the truth rather than an oath if the court is satisfied that the child has sufficient intelligence and sense of obligation to tell the truth. The statutory situation in New York is also somewhat different; there the usual rule with respect to competency governs generally¹⁸ except that in criminal cases the testimony of a child actually or apparently under 12 who does not understand the nature of an oath can be received though not given under oath if the child has sufficient intelligence.¹⁹

In line with the policy announced in *Wheeler v. United States*²⁰ age is not a determinative factor so far as qualifying the child to be a witness is concerned under any of these statutory situations. The age of the child does have some influence in this respect; however, if the child is younger than a certain age there is no presumption of competency.²¹ This means that it is the duty of the trial court to determine the competency of a witness who is younger than the established age. At common law 14 was the age of presumed competency, and that is the age of presumed competency now in the absence of a governing statute.²² If the statute does establish a different age, however, that will be the age of presumed competency in that jurisdiction.²³ Only in Arkansas is age of primary consideration. By virtue of the peculiar wording of the statute there a child under 10 years of age is conclusively presumed to be incompetent to testify in a civil case.²⁴

One well recognized authority has announced the rule to be that the child must have the capacity to observe, recollect and communicate the events about which he is asked to testify.²⁵ In order for the child to have the capacity to communicate he must be able to understand the questions asked and to frame and express intelligent answers to them. In addition there must be a realization of a moral responsibility to tell the truth.²⁶ The presence of these requirements will depend to a large extent upon the intelligence of the child, and this is usually given as the main factor in determining the competence of the child witness. Of course, his experience and training will also have a certain amount of influence in the determination of his ability to be a witness.

The trial judge will nearly always conduct some sort of voir dire examination for the purpose of determining whether the proffered child

17. Mich. Comp. Laws § 617.68 (1948).

18. N.Y. Civ. Prac. Act § 365 (1920).

19. N.Y. Crim. Code § 392 (1881).

20. 159 U.S. 523, 16 S.Ct. 93, 40 L.Ed. 244 (1895).

21. E.g., *Westbrook v. Texas & P. Ry. Co.*, 203 S.W.2d 279 (Tex. Civ. App. 1947).

22. E.g., *Westbrook v. Texas & P. Ry. Co.*, 203 S.W.2d 279 (Tex. Civ. App. 1947); *Radiant Oil Co. v. Herring*, 146 Fla. 154, 200 So. 376 (1941).

23. E.g., *Burt v. Burt*, 48 Wyo. 19, 41 P.2d 524 (1935).

24. *Lamden v. St. Louis Southwestern Ry. Co.*, 115 Ark. 238, 170 S.W. 1001 (1914).

25. 2 Wigmore on Evidence § 506 (3rd ed. 1940).

26. *Ibid.*

witness possesses these qualifications.²⁷ During this examination the judge or the attorneys, if the judge so permits, will ask simple questions designed to ascertain the general intelligence of the child and whether he understands a duty to tell the truth.²⁸ In some jurisdictions where the test of competency is an understanding of an oath the entire voir dire may be devoted to this latter determination.²⁹ If the child answers these questions in a satisfactory manner he will then be permitted to go ahead and testify. In the usual case he is accepted as a competent witness at this point, and his testimony is considered in determining the merits of the case. A word of warning must be given, however. The trial judge will consider the child's entire testimony in determining competency, and if it is apparent from his testimony that the child is really not a competent witness because he did not possess the ability to observe the events at the time they took place, that he cannot remember them or that he is unable to communicate them his testimony will be stricken from the record, and the jury will be instructed to disregard it despite the fact that he was considered a competent witness after the voir dire examination.³⁰

At an earlier time the courts were rather strict with respect to the child's understanding of an obligation to tell the truth.³¹ This rule has gradually been relaxed, however, and now if the child can show an understanding that he will be punished in some way if he fails to tell the truth on the witness stand that will usually be sufficient.³² This trend has been accompanied by other relaxations of the rules relating to competency of child witnesses. Some states are quite progressive in this area. The Michigan statute, mentioned above, which permits a child under 10 to testify upon a promise to tell the truth rather than upon oath is an example of this trend.³³ Washington has permitted this without relying on a statute.³⁴ The New York statute which permits a child under 12 to testify in a criminal case without being under oath if he does not understand the nature of an oath³⁵ is another example of such progress, even though the courts have been quick to strike down any attempt to extend this rule to civil cases.³⁶

Other suggestions have been forthcoming. In another law journal

27. E.g., *Carpenter v. Commonwealth*, 186 Va. 851, 44 S.E.2d 419 (1927).

28. E.g., *State v. Oliver*, 78 N.D. 398, 49 N.W.2d 564 (1951); *State v. Merritt*, 236 N.C. 363, 72 S.E.2d 754 (1952).

29. E.g., *State v. Ragona*, 232 Iowa 700, 5 N.W.2d 907 (1942).

30. E.g., *State v. Smith*, 3 Wash.2d 543, 101 P.2d 298 (1940).

31. E.g., *State v. Edwards*, 79 N.C. 648 (1878).

32. E.g., *Bonewald v. State*, 157 Tex. Cr. 521, 251 S.W.2d 255 (1952); to the effect that sometimes this can be very informal knowledge are *Yarborough v. State*, 202 Miss. 820, 32 So.2d 436 (1947); *Hill v. Skinner*, 81 Ohio App. 375, 79 N.E.2d 787 (1947); *Russell v. State*, 83 Ga. App. 841, 65 S.E.2d 264 (1951).

33. Mich. Comp. Laws § 617.68 (1948).

34. *State v. Collier*, 23 Wash.2d 678, 162 P.2d 267 (1945).

35. N.Y. Crim. Code § 392 (1881).

36. E.g., *Gehl v. Bachmann-Bechter Brewing Co.*, 156 App. Div. 51, 141 N.Y. Supp. 133 (2nd Dept. 1913); *Napieralski v. Pickering*, 278 App. Div. 456, 106 N.Y.S.2d 28 (4th Dept. 1951).

article³⁷ the authors suggest the possibility of using psychological intelligence tests in determining the competency of child witnesses. They do recognize, however, that it would probably be necessary to develop a special test designed to ascertain the ability to be a witness rather than attempting to use a test that is designed to determine intelligence only. Wigmore thinks that rather than try to measure the trustworthiness of a child as a witness it would be better to just put him on the stand and let him tell his story for what it is worth.³⁸ The jury would then consider the apparent competence of the child witness in weighing the testimony .

It is interesting to note, however, that the most recent formulation of the rules of evidence does not go this far. The Uniform Rules of Evidence³⁹ provide:

RULE 7. General Abolition of Disqualifications and Privileges of Witnesses, and of Exclusionary Rules. Except as otherwise provided in these Rules, (a) every person is qualified to be a witness, . . .

RULE 17. Disqualification of Witness. Interpreters. A person is disqualified to be a witness if the judge finds that (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. An interpreter is subject to all the provisions of these rules relating to witnesses.

As they would apply to child witnesses these rules stick pretty close to the general doctrine although they are more progressive than many rules that are now applied to child witnesses. They certainly do not open the door as widely as Wigmore would like to, though.

It is well settled that this matter of competency is one that rests solely within the discretion of the trial judge. For this reason a general discussion of the competency of child witnesses can only serve as a series of guide posts for attorneys. Some additional information of value, however, can be obtained from another fairly recent law journal article.⁴⁰ Attorneys should become familiar with what the judges before whom they practice expect from child witnesses. In the vast majority of cases the determination of the trial judge will be final, because the rule is that his determination will not be reversed on review unless it is clearly erroneous or the upper court feels that there has been an abuse of discretion.⁴¹

Even after the attorney has qualified the child as a competent witness the most difficult part of his task still remains. He must elicit the testi-

37. Hutchins and Slesinger, *Some Observations on the Law of Evidence—The Competency of Witnesses*, 37 *Yale L.J.* 1017 (1928).

38. 2 *Wigmore on Evidence* § 509 (3rd ed. 1940).

39. Drafted by the National Conference of Commissioners on Uniform State Laws.

40. Note, 39 *Va. L. Rev.* 358 (1953).

41. *E.g.*, *Russell v. State*, 83 *Ga. App.* 841, 65 *S.E.2d* 264 (1951); *Hill v. Skinner*, 81 *Ohio App.* 375, 79 *N.E.2d* 787 (1947); *Ruerger v. Hawks*, 150 *Neb.* 834, 36 *N.W.2d* 236 (1949).

mony from the child in an effective manner, and that testimony, in order to accomplish the ends of our legal system, should be an accurate depiction of what actually took place. The latter consideration means that the attorney must take into account the factors of error in perception, error in memory, supplementing of the facts observed or remembered, emotion, etc. These are present in all witnesses, but they are likely to be magnified or distorted when the witness is a child. These matters are, however, beyond the scope of this article which is now concerned with the method of eliciting the testimony.

Extensive use of leading questions which is permissible in this situation is the prevailing method of obtaining evidence from a child witness. There are obvious dangers associated with this method. The child may be testifying to what the examining attorney thinks the child saw rather than to what the child actually saw. One psychologist reports the following:

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 per cent 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.⁴²

On the other hand, the attorney also faces the danger of having the perfectly accurate testimony of his child witness discounted by the court or the jury because it was elicited by the use of leading questions. The remainder of this note will be devoted to the offering of possible solutions to this dilemma.

The use of demonstrative evidence is becoming increasingly popular in the courts of our land, and the attorney may find that he can use this technique quite effectively with a child witness particularly when the child's testimony concerns the position or movement of physical objects. This experience of a practicing attorney is offered as an example. He was investigating an accident case in which a child had been hit by an automobile. One of the witnesses was a playmate of the injured child. The little boy was unable to tell the attorney much when invited to narrate the events in question, but when he was invited to pretend that a nearby object was the building next to which the accident occurred, and was given a toy automobile and some toy soldiers to use he was able to give an accurate demonstration of what had happened. This technique might be subject to the objection that the child is an incompetent witness because he is unable to "relate" his testimony. The court should, however, consider

42. H. E. Burr, *Applied Psychology*, p. 307 (1948).

demonstrations as simply a form of "relation" or "communication." Testimony given in this manner is probably more accurate than that obtained by asking leading questions. It would need to be supplemented, for the record, by explanatory statements of the attorney examining the witness, but this technique is often employed. Demonstrations are frequently permitted on both direct and cross examination of adult witnesses. Thus it would seem that the reenactment of events by a child witness would be acceptable testimony.

It might be well for the attorney to avail himself of the services of a child psychologist in preparing for the examination of an important child witness, since emotional factors or psychological blocks induced by shyness or apprehension may render the child quite unresponsive in the courtroom. A private examination by a psychologist would throw light on the intelligence, perceptive ability and memory of the child, and through the experimentation the psychologist could make valuable suggestions to the attorney concerning the most effective means of eliciting the testimony. In at least most instances the examining attorney should request that the child's testimony be taken in the judge's chambers, in order to provide a more informal atmosphere than that of an austere courtroom.

Another method that might prove useful would involve the introduction of the child's knowledge of the affair through some adult such as a parent, teacher or doctor as the actual witness on the stand. Attempts to use this method in the past have not generally been successful. Such evidence has been admitted for the limited purpose of showing that the child had complained of an injury,⁴³ but the courts have not permitted the adult to testify concerning the child's statements for the purpose of showing the details of the event in issue.⁴⁴ The same courts have, however, indicated that the adult can testify to the statements of the child if the evidence can be qualified under the *res gestae* exception to the hearsay rule. These dicta indicate that a court might prove susceptible to an argument to the effect that the factors upon which the *res gestae* exception are based, i.e. that the remarks are made spontaneously while under the influence of some exciting event, are likely to endure for a longer period in children, and, therefore, things that they say for a relatively long period after the event should be admissible through an adult witness as part of the *res gestae*. The possibility of convincing the court that the adult could qualify as an "interpreter" should not be overlooked. Qualifying the adult as an interpreter would be a very useful vehicle for introducing testimony in this manner.

The trend toward relaxation of the rules governing the competency of child witnesses demonstrates a growing appreciation by the courts of the fact that in many instances the testimony of a child is practically indis-

43. E.g., *People v. Figueroa*, 134 Cal. 159, 66 Pac. 202 (1901).

44. E.g., *State v. Roth*, 152 Minn. 73, 188 N.W. 50 (1922); *State v. Segerberg*, 131 Conn. 546, 41 A.2d 101 (1945).

pensable. The suggestions made above for eliciting that testimony from the child fit into this trend, and they should be acceptable to trial courts once it is demonstrated that the essential reliability of the evidence is not damaged by such methods. Since the factors of necessity and trustworthiness are the basis of the presently recognized exceptions to the hearsay rule it is even within the realm of possibility that at some time in the future a special exception to the hearsay rule may arise to be applied only in cases in which the testimony of a child is sought to be introduced through another person. Even if this should not happen it is at least probable that many states will follow the lead of some of our more modern minded jurisdictions and make it much easier to qualify the child as a witness.

RICHARD V. THOMAS

LIABILITY OF CITY OR TOWN COUNCILMEN FOR DEFECTS IN STREETS

A recent case in the United States District Court for the District of Idaho has brought to the foreground a problem which has apparently lain dormant for many years: the liability of a city or town councilmen for defects in streets.

*Lemmon v. Clayton*¹ was an action in tort against the mayor and councilmen of a second class city in Idaho for injuries sustained when the automobile in which the plaintiff was riding ran through an unmarked deadend street into a drainage ditch. On a motion to dismiss, the court held that the mayor had no duty to keep the streets in a reasonably safe condition for the traveling public and could not be held personally liable, and dismissed as to him. But the court said the complaint stated a claim upon which relief could be granted as against the councilmen individually. The decision was based upon dicta from a 1926 Idaho Supreme Court decision² and an Idaho statute,³ similar to that of other states,⁴ which granted the city councilmen or board of trustees, within their respective jurisdictions, power to construct, maintain, repair and improve streets and highways. The court construed the statute as being mandatory in nature and imposing duties upon the councilmen, the negligent performance or non-performance of which created individual liability.

The personal liability of various public officers is not of recent origin and there are almost unlimited cases holding them so liable.⁵ Generally,

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1. *Lemmon v. Clayton*, 128 F. Supp. 771 (D. Idaho 1955).
 2. *Strickfaden v. Greencreek Highway District*, 42 Idaho 738, 248 Pac. 456, 49 A.L.R. 1057 (1926).
 3. Idaho Code 1947, § 40-1665, 40-1611; See also §§ 50-1141, 52-101, 18-5901.
 4. Nebraska (Neb. R. S. 1943, § 17-567); Colorado (Colo. Rev. Stat. 1953, §§ 139-15-6, 139-32-1 (2)); Montana (Rev. Code of Mont. 1947, §§ 11-906 to 11-910); Wyoming (Wyo. Comp. Stat. 1945, §§ 29-231, 29-430).
 5. *Robinson v. Chamberlain*, 34 N.Y. 389 (1866); *Cottongim v. Stewart*, 283 Ky. 615, 142 S.W.2d 171 (1940); *Wynn v. Gandy*, 170 Va. 590, 197 S.E. 527 (1938); See also 40 A.L.R. 1358 for collection of cases regarding other officers.