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SOME OBSERVATIONS ON THE LAW OF EVIDENCE —THE COMPETENCY OF WITNESSES*

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Courts of last resort now seldom reverse a ruling on the competency of witnesses.¹ Convinced, and rightly so, that they cannot learn from the record all the circumstances which influenced the decision below, they usually let it stand, even when the transcript alone might suggest another conclusion. Trial courts, in their turn, to a greater extent than formerly prefer to admit the evidence of infants, insane people, and mental defectives, and leave the jury to estimate its value. Perhaps this is because exclusion has heretofore worked particular hardship in prosecutions for crimes against children and the insane, where the only evidence available was that of the victim.² Now these aggrieved individuals may testify even when the gist of the action, as in statutory rape,³ or the title of the action, as where a "lunatic" sues by his next friend,⁴ indicates their infirmity. The infirmity alone does not render them incompetent.

In all jurisdictions witnesses must show that they possess

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¹ WIGMORE, EVIDENCE (2d ed. 1923) c. 19, 20.

² Reg. v. Hill, 5 Cox. C. C. 259 (1851).

³ Beard v. State, 256 Pac. 354 (Ark. 1927); State v. Crouch, 130 Iowa 478, 107 N. W. 173 (1906). See also L. R. A. 1916 F 749, annotation and 9 Ann. Cas. 1218 (1906) annotation.

⁴ Worthington v. Mercer, 96 Ala. 310, 11 So. 72 (1892).

intelligence enough to observe what went on, recollect it, and tell a comprehensible story.⁵ In a few no additional requirements must be met.⁶ In others the witness must appear able to tell right from wrong, truth from falsehood, and to appreciate the duty to tell the truth on the stand.⁷ In most courts, however, that is not enough. The witness must understand the nature and obligation of the oath.⁸ It will not suffice that he knows enough to testify; he must understand that divine punishment will follow false swearing.⁹ These are apparently the only items the trial court need consider. If these requirements are satisfied, the witness will not be incompetent because he was hysterical at the time of the event,¹⁰ or an insane epileptic at time of the trial.¹¹

These rules, even the mildest of them, look rigid enough on paper. In practice they acquire a good deal of flexibility because of the discretion which the trial judge has in their administration. In *Bell v. State*,¹² for instance, a nine year old boy told the court that he did not know what an oath was, that he had never heard of God or the devil, and that he had never heard of the truth before. Affirming the ruling below that the witness was competent, the Supreme Court of Georgia said:¹³

"Children who do not understand the nature of an oath are incompetent witnesses; but it is left to the sound discretion of the trial judge to determine whether a boy 9 years of age is a competent witness; and where the court examines a boy of that age as to his understanding of the nature of an oath, and decides that he is competent to testify, this court will not grant a new trial where it does not appear that the discretion of the court has been manifestly abused, which does not appear in this case."

⁵ WIGMORE, *op. cit. supra* note 2, § 5091; *Lanier v. Bryan*, 184 N. C. 235, 114 S. E. 6, 26 A. L. R. 1491 (1923) annotation; *White v. Corn*, 96 Ky. 180, 28 S. W. 340 (1894).

⁶ *State v. Prokosch*, 152 Minn. 86, 187 N. W. 971 (1922); *Mead v. Harris*, 101 Mich. 585, 60 N. W. 284 (1894); see (1927) 36 YALE LAW JOURNAL 423.

⁷ *Goy v. Director General of Railroads*, 79 N. H. 512, 111 Atl. 855 (1920), noted in (1921) 7 VA. L. REV. 663. And compare the statement in *State v. Meyer*, 135 Iowa 507, 508, 113 N. W. 322, 323: "If, without being familiar with the use of such words, she had an adequate sense of the impropriety of falsehood, she understood the nature of an oath, even though not able to state what those words meant."

⁸ *Jimenez v. State*, 280 S. W. 829 (Tex. Cr. App. 1926); *Ruocco v. Logiocco*, 104 Conn. 585, 134 Atl. 73 (1926); 37 L. R. A. 423 (1897) annotation.

⁹ See *State v. Abercrombie*, 130 S. C. 358, 126 S. E. 142 (1925).

¹⁰ *State v. Pryor*, 74 Wash. 121, 132 Pac. 874, 46 L. R. A. (N.S.) 1028 (1913) annotation.

¹¹ *People v. Enright*, 256 Ill. 221, 99 N. E. 936, Ann. Cas. 1913 E 318, annotation.

¹² 164 Ga. 292, 138 S. E. 238 (1927).

¹³ *Ibid.* 295, 138 S. E. at 240.

As might be expected, most of the reversals on questions of competency occur in jurisdictions requiring an understanding of the oath. Even mature and intelligent laymen might be somewhat put to it to give a definition that would strike the fancy of every court. On what basis, for example, does an Episcopal judge assess the definition given by a deist, an atheist, or a Primitive Baptist? The more deeply one has thought about the nature and obligation of the oath, or even the difference between right and wrong, the more difficult one will find it to give a straightforward response to the questions upon which the competency of infants, mental defectives, and insane people now generally depends. In view of this difficulty, the judge may resort to one of three methods of determining whether the witness complies with the requirement of understanding the oath. He may content himself with a purely formal question, "Do you understand the nature of an oath?" and the purely formal reply, "Yes." Or he may assume, as he apparently did in *Bell v. State*, that any person of reasonable intelligence is able to appreciate the moral problem, thus in effect abolishing the rule. Or he may make an earnest effort to discover whether the witness really understands what an oath is and what it means. In this case the judge will simply be measuring the witness's religious and moral standards against his own. Religious and moral standards in this country are at present in such dispute that this method greatly reduces the usefulness of the rule in practice.

The trial judge, then, is on the issue of competency clothed with great, and for America, unusual powers. He it is who determines whether a person has sufficient conscience and intelligence to tell a story to the jury which will not be so foolish or so false as to require exclusion in advance. The methods he may employ in reaching his conclusion are also in his discretion. If the rules of his jurisdiction compel him to find that the witness understands the nature and obligation of an oath, he may resort to any one of the three methods described above, or to a combination of them. If intelligence alone is the criterion he may apparently rule that a proffered witness is incompetent from inspection alone.¹⁴ Usually, of course, he will conduct some sort of examination, either with or without the advice of experts.

Thus, in *Commonwealth v. Tatisos*,¹⁵ the following questions were put to a six year old child:

"What is your name? Mabel Stafford.
How old are you? Six.....
Do you go to Sunday School? No.
To church? Yes....."

¹⁴ *State v. Martin*, 132 Atl. 93 (N. J. 1926).

¹⁵ 238 Mass. 322, 130 N. E. 495 (1921).

Do you know what happens to anybody when they tell a lie?
 Yes Lick them.
 Who does the licking. The mother
 Anything else happen to them? Whipping.
 Do you know why you are here today? No.
 Do you know what an oath is? Mouth?
 Ever hear about that [the catechism]? Yes.
 What is it? Do you know any of it? No.
 Did you ever hear of God? No"

The trial judge thought the child intelligent but uninstructed, and suspended the case till the next day in order that she might converse with a priest. The next morning the questions began again: ¹⁶

"Did the priest talk to you last night? Some
 Do you know what happens to little girls when they tell lies?
 God punishes them.
 Who? God."

The defense attorney then added some questions of his own:

"Who is God? God is a creator.
 Do you know what you came down here to court for?
 No, sir
 You don't know what an oath is? I don't know what that is.
 How does God punish anybody? Sends them down to the
 ground
 Where is God? God is up in heaven"

The judge thereupon decided that the child could testify. Jenny, J., in overruling exceptions said: ¹⁷

"The child was examined twice on different days, in the absence of the jury, and instructed by a priest in the interval. *After most careful consideration*, she was permitted to testify." (Italics are the writers').

In a seduction case,¹⁸ the daughter of the plaintiff, at the time an inmate of an institution for defectives, was permitted to take the stand after having told the court that she had never heard of a supreme being; that she did not know what God meant; that she had no idea what happened when you lied, except that you would get into trouble; and that she was ignorant of the obligation of the oath. But she knew what the oath was because "I see it with my eyes in the court when I went to the court and they testified." An expert then declared that although not mentally deranged, the girl was defective in judgment and comprehension. The trial judge permitted her to be sworn, saying, "I think she

¹⁶ *Ibid.* 323, 130 N. E. at 496.

¹⁷ *Ibid.* 326, 130 N. E. at 498.

¹⁸ *Ruocco v. Logiocco*, *supra* note 8.

knows enough to testify." But the Supreme Court of Errors felt compelled to reverse his judgment, in spite of the admittedly great difficulty of diagnosing mental ability from a record.

A study of some of the other infrequent cases where the trial judge's ruling on competency is reversed shows that this usually occurs because of a difference of opinion as to the type of questions asked, or as to the value of the answers given. In *People v. Delaney*,¹⁹ "In reply to the court's questions, the boy gave his name and age, stated that he had been in court before . . . , that he attended Sunday School; that he lived with his mother, who, he said, had taught him to tell the truth, and that he thought that boys who do not tell the truth would be put in jail." On appeal it was held that this investigation was insufficient, because "there is nothing in the trial court's examination that tends to disclose the strength or weakness of the child's power of recollection." In *Carter v. State*,²⁰ a nine year old girl "answered, that she did not know what the Bible was; had never been to church but once, and that was to her mother's funeral; did not know what book it was she laid her hand on when sworn; had heard tell of God, but did not know who it was; and said if she swore to a lie, she would be put in jail but did not know she would be punished in any other way." The court held the examination inadequate. In *State v. Jackson*,²¹ decided in February, the Supreme Court of Missouri thought the child's answers indicated "appalling ignorance" although the trial judge had permitted her to testify. The court saw this ignorance in the fact that she thought the prosecuting attorney was "trying to clear Papa," when he was trying to do just the opposite. She did not know what an oath was, though she had taken one a moment ago.

The cases cited raise several problems. One of them is: does the oath have a predictable effect on testimony? Here we have only the result of a few experiments²² that when statements are made under oath the number of items recalled is smaller but the objective accuracy is greater than without the oath. Even assuming these to be conclusive they lead to a further inquiry as to the intelligence of the subjects of the experiment. Until we know more about that we cannot tell what the oath is worth or how much intelligence is required to understand its nature and obligation. Another problem raised by the rules on competency is that of the accurate diagnosis of mental ability.²³ At the

¹⁹ 52 Cal. App. 765, 199 Pac. 896 (1921).

²⁰ 63 Ala. 52 (1879).

²¹ 2 S. W. (2d) 758 (Mo. 1928).

²² POFFENBERGER, APPLIED PSYCHOLOGY (1927) c. 24; WHIPPLE, MANUAL OF MENTAL AND PHYSICAL TESTS (1915) c. 8. Most of the experiments cited use the oath as a test of certainty.

²³ If psychology can help solve this problem it will also help the courts

present time mental ability is diagnosed by the trial judge in the ways that have been indicated. It remains to be seen whether psychology can give him any assistance.

Dr. Alfred Binet²⁴ when he began the test movement that has contributed so much to American psychology was less concerned with competency than with the commitment of the feeble-minded to institutions. Before Binet's work the routine process of commitment in France was to have a few questions asked by an expert or a judge and a speculative decision rendered as to the mental ability of the person before the tribunal. Binet sought an objective uniform standard, so little dependent upon the idiosyncrasies of an individual examiner that a decision might be as accurately checked from a transcript of the proceedings as is a column of figures by an adding machine. In order to understand the efficacy of his tests it is desirable first to clear up some questions of methodology.

Courts and psychologists²⁵ speak of the "intelligence" they are attempting to measure as though it were an objective reality like a hat, or a coat, or a number. To test "intelligence" psychologists ask a child to repeat eight digits backwards, or tap cubes in a certain order.²⁶ Then, when they argue that they are testing objective reality, the simple refutation seems to be that it does not take intelligence to answer such questions. Or the judge tells the psychologist, as recently happened in a New York court,²⁷ that the questions of the court are better than the ques-

to ascertain whether a person has the capacity to understand the obligation of an oath.

²⁴ Binet et Simon, *Le Developpement de l'Intelligence chez les Enfants* (1908) 14 ANNEE PSYCHOLOGIQUE 1.

²⁵ See, for instance, such excellent discussions as THURSTONE, *THE NATURE OF INTELLIGENCE* (1926) 156 *et seq.*, and GATES, *PSYCHOLOGY FOR STUDENTS OF EDUCATION* (1923) 421 *et seq.*

²⁶ Repeating digits is part of the Stanford Revision of Binet, fully described in TERMAN, *THE MEASUREMENT OF INTELLIGENCE* (1916) 121. Tapping cubes, the Knox cube test, is described in GATES, *op. cit. supra* note 25, at 425.

²⁷ *New York Times*, Mar. 30, 1928, at 2: "One man, alleged to have been a victim of delirium tremens, committed on complaint of his wife, was questioned closely by the Court and answered all the questions intelligently.

"This man should be given a chance to get away from drink in his private life and he would be all right. He isn't crazy," said Justice Cropsey.

"He has no insight into his condition," said Dr. H. B. Blau, who was in charge of the patients. "Suppose he should harm some one after he is released?"

"That would be a mistake," the Justice remarked, "but doctors make mistakes, too. If it is a mark of insanity not to have insight into your own condition, then half the people in the world must be insane. I am not going to send people away on the mere say-so of any doctor."

tions of the Stanford-Binet because common sense tells us that they have a more direct bearing on intelligence. It seems closer to reality to ask a person what happens to liars than to get at the same result by suggesting that he fit blocks into a form, or copy diamonds in ink.²⁸

But "intelligence" is not an objective entity; it is a logical fiction. It is a formula expressing the relation of one set of facts to another.²⁹ People who behave in certain ways are called intelligent, or, to avoid confusion, X. Behaving in certain ways means that they live up to a general average. They earn their own living, support their dependents, obey the laws of their jurisdiction, read the newspapers, and live according to the mores of their group. In spite of striking individual differences which they display, we may assume as a working basis that these X persons can get along in society, and in that part of society which is called a court. People who vary from this norm, who are subnormal or supernormal, have to be watched and specially studied. Their activities are less predictable. In that sense they are not as reliable either in court or out as the X group. The child who saw the oath every time she came to court was held to be a poor witness. The genius who wrote "The Importance of Being Earnest" was equally unsatisfactory, though much more diverting on the stand. Both fell outside the general average. An intelligent person, then, as the psychologists use the term, is not necessarily an intellectual person. He is an inconspicuous person, a member of the great middle group. Inspection alone, or inspection plus casual unstandardized

"But this case was examined by Dr. William H. Blake and Dr. Hiram Elliott," said Dr. Blau.

"Yes, I see," was the Court's terse comment. "Their names are on a lot of papers certifying as insane a number of people I have released, but *it doesn't mean so much—this funny stuff they write on these papers*—and I am going to give this man a chance."

The patient's wife interrupted.

"How about support, Judge?" she asked. "He hasn't supported me."

Statements in the commitment papers showed the woman had not asked for financial aid during the period her husband was confined. After reading this Justice Cropsey said:

"Perhaps he's right in the things he said about you. Perhaps he's not as crazy as you think he is," and he ordered the man released under condition that he make periodic reports to the Court."

²⁸ Fitting blocks is used in various tests, such as the Healy A and the Goddard form board. It is useful as a measure of native ability where language presents a problem. Copying a diamond is one of the seven year tests of the Stanford Binet.

²⁹ Logical fictions or hypotheses are discussed in VAHRINGER, *THE PHILOSOPHY OF AS-IF* (1927); BARRY, *SCIENTIFIC HABIT OF THOUGHT* (1927); LEWIS, *THE ANATOMY OF SCIENCE* (1926). A simple untechnical discussion will be found in HART, *PSYCHOPATHOLOGY AND MEDICINE* (1927) c. 1.

questions, may enable us to detect some of those who fall far outside the general average, like the driveling idiot.³⁰ But where the mental infirmity is not accompanied by some physical infirmity or by obvious incoherence in reply, we need rigidly to exclude the subjective element³¹ if we would avoid letting a pleasant looking defective get by where an ugly just-normal person would not. Without the aid of science we must rely on intuitive judgments alone.

We shall accept the aid of science with a clear conscience if we recall at every step that "intelligence" is a logical fiction, a formula, and that we are concerned here only with the relationship of one set of known events to another, which the formula describes. The problem is not the measurement of "intelligence," but the correlation of these two sets of events. Given one, the presence or absence of the other may within limits be predicted, not infallibly, but with a high percentage of probability. There need be no apparent logical relationship between the two sets of events. They may seem ridiculously incompatible. But we shall have attained our object if, for example, we discover in ten thousand cases a correlation of .75 between the antepenult of the middle name of one's fourth cousin and membership in Phi Beta Kappa.³² However absurd such a connection may seem, it gives us in this case an objective method of measuring what is termed intelligence.

With this attitude toward the measurement of intelligence, Binet and his followers³³ gradually worked out a series of graded questions which by actual test correlated with the average ability of children of certain ages.³⁴ This led to the establishment of mental age standards. One of the best known of these

³⁰ WATSON, *BEHAVIORISM* (1925) 232.

³¹ The most difficult subnormal to detect is the so-called verbal defective. Long words and a ready flow of language get him into all sorts of situations that he cannot cope with. Even a trained psychologist finds it hard to identify this type by inspection alone. HEALY, *INDIVIDUAL DELINQUENT* (1915) 273.

³² These correlations, which at first sight appear ridiculous, occur in other fields of science. In medicine, for example, it must have at first seemed rather silly to believe that a reddening and scar following vaccination correlated with immunity from smallpox. That has become a commonplace now, but when it was a theory it was viewed with as much suspicion as are psychological tests today.

³³ It would take many pages to enumerate the followers of Binet. Terman, Goddard, Yerkes, and Bridges are some who have modified the original Binet-Simon tests. Healy, Bronner, Knox, Pintner, Patterson, Gates, Thorndike, Thurstone, Haggerty, Whipple, Woodworth, Gesell, Wells, Downey, Otis, etc.,—almost every psychologist today has at least one standardized test of some trait or quality to his credit. They are not all of equal merit, however, and any one should be carefully scrutinized before being used.

³⁴ The method of standardization was as follows: innumerable tests

tests, the Stanford Revision of Binet, has from four to six questions in each age group and can be administered in less than twenty minutes. If greater speed is necessary the starred³⁵ questions only can be given in half the time, and the measure is still accurate enough for practical purposes. Thus in less than ten minutes it is possible to make a test of intelligence which is wholly objective and which can be checked from the record alone by anybody who is familiar with the method.

These advantages have in the past ten years induced people who are constantly confronted, as the courts are, with the problem of determining quickly and with a fair degree of accuracy competency for different positions to resort to psychological tests.³⁶ School systems all over the United States use tests to distribute children according to ability, with a resultant decrease in repeated grades and maladjustment. Universities are following their lead; recently the College Entrance Board adopted a psychological test as part of its requirements. Even the law schools are becoming interested. One of the leading schools in the East has just announced that it will base its system of entrance henceforth partly on a "capacity test." During the war the army by this method chose men for various posts with signal success.³⁷ Industry is now making use of this time and labor saving device.³⁸ A large department store has found that through it their labor turnover has been greatly decreased. The experience of these widely varied interests, all of whom have

were given to children ranging in age from four to eighteen. The situations were such as asking name, age, number of fingers on each hand, making rhymes, copying figures, tapping cubes, repeating a series of numbers forward and backward, etc. To determine the eight year norm, for example, some fifteen hundred eight year old solutions were analyzed. Any question that no eight year old child answered was obviously too difficult. Any question answered correctly by all the eight year olds and most of the sevens was obviously too easy. But a problem solved by about three quarters of the eights, practically all of the nines, and hardly any of the sevens was apparently an appropriate test for a normal eight year old child. After this process had been completed there remained a larger number of questions than could be readily used for each age group. These tests were then intercorrelated. If all the children solving *A* also solved *B*, clearly one of the tests, preferably the one that took the most time, could be eliminated. The tests retained were those which had the lowest intercorrelation and, therefore, most certainly did not duplicate each other or measure the same trait.

³⁵ The starred tests on the Stanford-Binet constitute an abbreviated test. In actual practice they are found to be slightly less reliable than the whole test.

³⁶ Again the only attempt is to devise a test on the basis of which the future ability of individuals may be predicted.

³⁷ FREEMAN, *MENTAL TESTS* (1926); YERKES (editor), *PSYCHOLOGICAL EXAMINING IN THE U. S. ARMY* (1921).

³⁸ R. H. Macy & Co. of New York and the Yellow Cab Co. of Chicago are two important examples of this tendency.

an eye to speedy results, seems to show that the tests are practicable as well as reliable.

Although the intelligence tests were not designed to reveal mental aberrations, their use in practice has indicated that a certain distribution of right and wrong answers is correlated with mental unbalance.³⁹ The normal ten year old child answers correctly all the questions up to and including the ten year group. If, on the other hand, the distribution of his answers is scattered over all the age groups, with failures all the way down to four years, and successes all the way up to sixteen, the performance would be sufficiently suspicious to warrant turning the prospective witness over to a psychiatrist. In the absence of a court psychiatrist one may at least distrust the testimony of a witness whose performance on an intelligence test is scattered.

Since this form of examination has been employed with success by countless organizations which have to settle the question of competency much as the courts have to settle it, and since it can be used with all the types of witnesses about whom the question of competency is raised, it would seem that the courts might use it with equal success. As a matter of fact, the kinds of questions asked by courts and psychologists are not strikingly dissimilar. Here in parallel columns are the examination of the judge in *Horton v. State*⁴⁰ and of the psychologist in one of the best known intelligence tests:⁴¹

“How old are you?	“What is the date?
How many days in the week?	Name the months of the year.
What day of the week is it?	Make change.
How many days in the month?	Repeat these numbers backward: 6-5-2-8.
What year is it?	
Has anybody talked to you about this case?	Use these three words in a sentence: boy, river, ball.
Would you be punished for telling a lie?”	Give me some rhymes for day, mill, spring.”

This comparison indicates that there are no shocking discrepancies between the investigation conducted by the court and the investigation conducted by the psychologist. Obviously the psychologist has one advantage. His test could have been administered in ten or at most twenty minutes. The judicial inquiry in *Commonwealth v. Tatisos*⁴² took part of two days. And in almost all cases where competency is important, it will be found that the psychological test has this advantage. But the advan-

³⁹ TERMAN, *op. cit. supra* note 26, at 134; WELLS, MENTAL TESTS IN CLINICAL PRACTICE (1927) 60. A more comprehensive study is necessary in order to determine what is the “cause” of the special ability or disability.

⁴⁰ 35 Ga. App. 493, 133 S. E. 647 (1926).

⁴¹ The nine year test, Stanford-Binet.

⁴² *Supra* note 15.

tage of speed is not the only one. There is also the advantage of certainty. Thus, in *People v. Delaney*,⁴³ after an extended examination by the trial court, the California Court of Appeal, because it had a different standard from that of the court below, felt compelled to reverse his judgment. In *Ruocco v. Logiocco*,⁴⁴ in *Carter v. State*,⁴⁵ in *Horton v. State*,⁴⁶ and in *State v. Jackson*⁴⁷ the same difference of standard produced the same regrettable result. The trial judge from his private background decides that the witness is competent or incompetent. Then the appellate court from its private background must pass on the question, and has only a record to guide it. This leads to uncertainty; and uncertainty in turn leads to delay, expense, and miscarriages of justice. We find therefore that under the present rules, the trial judge often needlessly consumes time at the trial, the litigants needlessly consume time and money in appealing, and the appellate courts needlessly consume time in reversing and remanding, after writing protracted opinions about vague abstractions to justify their action.

All these difficulties would be eliminated by the use of psychological tests to determine competency. These are valuable not because the questions asked are more relevant (which they are not), but because the replies are standardized into measurable units. The time required is less than that expended on the conventional judicial examination, and the results are clearly more accurate. They can be used in all situations where competency is involved. The present methods of ascertaining ability to testify can only be sustained on the assumption that there must be a logical relation between the subject of the investigation and the questions asked. Science, however, demands not a logical relation, but only a psychological correlation.⁴⁸

⁴³ *Supra* note 19.

⁴⁴ *Supra* note 8.

⁴⁵ *Supra* note 20.

⁴⁶ *Supra* note 40.

⁴⁷ *Supra* note 21.

⁴⁸ Standardized intelligence tests of proved effectiveness in other fields are probably better for the courtroom than the casual unstandardized questions now used by trial judges to determine competency. But "we should always remember that when we measure a child we measure only *what we measure* and should not make inferences concerning what we have not measured. Until we know much more than we do about the interrelationships of human functions we should measure *each function separately*." Pyle, *The I. Q. and the Individual* (1927) 26 SCHOOL AND SOCIETY 788. It does not necessarily follow that a test which has been employed successfully to predict ability to do grammar school work will predict ability to testify equally well. Tests predicting ability to cope with the courtroom situation must be developed in the courtroom situation in order to get the maximum of usefulness from them. Until this is done, however, courts may employ standardized intelligence tests with a fair degree of confidence.

For recent cases in which questions relating to psychological tests have been raised, see *State v. Schlaps*, 254 Pac. 858 (Mont. 1927); *Strand v. State*, 252 Pac. 1030 (Wyo. 1927); and *Clark v. State*, 156 N. E. 219 (Ohio App. 1926). In the last, expert opinion as to the normality of the accused based on three tests was held proper.

Cf. Chaffee, The Progress of the Law (1922) 35 HARV. L. REV. 302, 309: "Although the law has refused to admit lay evidence that a witness's mentality is low, except when it approaches insanity, the report of a Binet-Simon or other intelligence test would be of distinct value to a trained judge in weighing testimony, and attempts to introduce such reports have recently been made. Undoubtedly the wide use of such tests in the army will have its influence."

Whether the cases indicate that a turning point has been reached cannot be definitely stated for some time yet. But certainly enlightened opinion is leading the way. Recently the National Crime Commission suggested that the sanity or insanity of the accused be settled before trial so as not to make that a major issue. Once the agency is created for the solution of the problem in criminal cases it will be simple to use it for the determination of competency, also before trial.