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cided that the word "surviving" referred to the testator's death, then, because Claire and Oliver survived the testator, their children would share with Dudley in the corpus of the trust set up for Marie Louise. It could be argued that this construction of the will would prevent Dudley's share from passing by intestacy to Charles Gautier, who was expressly excluded by the will.²⁶ Courts very frequently try to avoid a construction that will lead to intestacy.²⁷ The added fact that Charles Gautier might inherit some of the testator's property upon Dudley's death could have deterred the court from construing the remainder as contingent upon survival of the life beneficiary. The answer given by the court to this argument was that "a court may not rewrite the will in order to avoid intestacy."²⁸

The problem presented in the principal case could have been avoided by careful draftsmanship. Explicit language as to what period of time survivorship is referred would eliminate needless litigation over a matter that should have been handled previously by the draftsman. There could have been no dispute in the *Gautier* case had the will provided as follows:

"... and in the event that the nephew or niece dies leaving no children the share shall be divided equally among his or her brothers and sisters who are living at the death of such nephew or niece."

The New York Court of Appeals has adopted a rule of construction which makes words of survivorship referable to the death of the life tenant rather than the death of the testator. Whether the rule of *Moore v. Lyons* still prevails in New York remains to be determined by future decision. It is submitted that *Moore v. Lyons* will still be applied in similar cases.

MERRILL C. TRADER

A DEFENDANT'S APPEARANCE AS EVIDENCE OF HIS AGE

Whether in a judicial proceeding the triers of fact may "use their eyes as well as their ears"¹ to fix one's age presents a more perplexing

²⁶Charles Gautier was a nephew of the testator, but not a son of the primary life beneficiary, Clara.

²⁷In *re* Carney's Estate, 171 Ind. 379, 86 N.E. 400 (1908); In *re* Vance's Estate, 209 Pa. 561, 58 Atl. 1063 (1904).

²⁸146 N.E.2d at 774.

¹*State v. Gebhardt*, 219 Mo. 708, 119 S.W. 350, 352 (1909), quoting from *Garvin v. State*, 52 Miss. 209 (1876).

problem than would appear at first blush. It is a question fairly well settled in the United States,² but yet one which has arisen recently in Indiana in near-unique form. *Watson v. State*³ has posed the question: May an age determination be founded solely on a nontestifying defendant's physical appearance?

Watson was convicted of armed robbery, a crime explicitly requiring the perpetrator to be more than sixteen years of age.⁴ No evidence, however, was directed to that point by the state, nor did the defendant take the witness stand to testify. The court instructed the jury that proving defendant to be "over sixteen years of age"⁵ was a necessary element of the state's case, but that his appearance as observed in court would substantiate a finding on the question.⁶ The jury returned a verdict of guilty and a finding that Watson was "38 years of age."⁷ On appeal Watson argued two grounds of error: (1) the verdict was not

²For cases affirmatively allowing the trier of fact to utilize physical appearance in fixing age, see *United States ex rel. Fong On v. Day*, 54 F.2d 990 (2d Cir. 1932); *Wong Fook Ngoey v. Nagle*, 300 Fed. 323 (9th Cir. 1924); *Williams v. State*, 98 Ala. 52, 13 So. 333 (1893); *Dutzler v. State*, 41 Ariz. 436, 19 P.2d 326 (1933); *People v. Elgar*, 39 Cal. App. 78, 178 Pac. 168 (1918); *Slocum v. People*, 120 Colo. 86, 207 P.2d 970 (1949); *Quinn v. People*, 51 Colo. 350, 117 Pac. 996 (1911); *Slaughter v. District of Columbia*, 134 A.2d 338 (D.C. Munic. App. 1957); *Cunningham v. United States*, 86 A.2d 918 (D.C. Munic. App. 1952); *Louisville & N.R.R. v. Bean*, 49 Ga. App. 4, 174 S.E. 209 (1934); *State v. Scroggs*, 123 Iowa 649, 96 N.W. 723 (1903); *State v. Dorathy*, 132 Me. 291, 170 Atl. 506 (1934); *Commonwealth v. Hollis*, 170 Mass. 433, 49 N.E. 632 (1898); *Commonwealth v. Phillips*, 162 Mass. 504, 39 N.E. 109 (1895); *People v. Elco*, 131 Mich. 519, 91 N.W. 755 (1902); *State v. Davis*, 237 Mo. 237, 140 S.W. 902 (1911); *State v. Gebhardt*, 219 Mo. 708, 119 S.W. 350 (1909); *State v. Thompson*, 155 Mo. 300, 55 S.W. 1013 (1900); *Waterman v. Waterman*, 42 Misc. 195, 85 N.Y. Supp. 377 (Sup. Ct., App. T. 1903); *Garbarsky v. Simkin*, 36 Misc. 195, 73 N.Y. Supp. 199 (Sup. Ct., App. T. 1901); *State v. McNair*, 93 N.C. (Davidson) *628 (1885); *State v. Arnold*, 35 N.C. (Ire.) *184 (1851); *Schnoor v. Meinecke*, 77 N.D. 96, 40 N.W.2d 803 (1950); *Stiles v. State*, 39 Okla. Crim. 142, 264 Pac. 226 (1928); *Hunter v. State*, 6 Okla. Crim. 446, 119 Pac. 445 (1911); *Commonwealth v. Emery*, 51 Pa. Super. 55 (1912); *Shepherd v. Smith*, 198 Wash. 395, 88 P.2d 601 (1939); *State v. Fries*, 246 Wis. 521, 17 N.W.2d 578 (1945).

But see *People v. Rogers*, 415 Ill. 343, 114 N.E.2d 398 (1953); *Wistrand v. People*, 213 Ill. 72, 72 N.E. 748 (1904); *McGuire v. State*, 4 Tex. Civ. App. 386, 15 S.W. 917 (1891).

³140 N.E.2d 109 (Ind. 1957). *Contra*, *State v. Dorathy*, 132 Me. 291, 170 Atl. 506 (1934), the only case aside from the principal one having answered this specific question.

⁴Ind. Ann. Stat. § 10-4709 (1956).

⁵*Ibid.*

⁶"[Y]ou are further instructed that you may observe the defendant and draw upon your observation of him in determining whether or not the defendant was a person over sixteen years of age at the time of the commission of the alleged offense." 140 N.E.2d at 110.

⁷140 N.E.2d at 110.

sustained by sufficient evidence, and (2) the court's instruction was improper.

In a 3-2 decision the Supreme Court of Indiana accepted defendant's argument that admission of such evidence would effect a vital loss of control by the trial court. "A jury looking about the court room, seeing objects brought into the court room, has no right to consider such extrinsic material, and base their verdict thereon The same rule holds true as to persons within the view of the jury during the trial."⁸ In basing their decision upon this line of reasoning, the majority accepted several fundamental assumptions.⁹ It was the assumption by the majority that evidence need be specifically directed at the question of age to raise a "reasonable inference"¹⁰ thereof that motivated the dissenting opinion. The minority contended that when defendant was described by a witness as a "man," the inference must be obvious. Moreover, when defendant was described as drinking beer in a tavern, the minority was willing to take judicial notice of the statute which made this unlawful for a "person under the age of 21 years."¹¹ In short, the minority found sufficient evidence in the record to raise a "reasonable inference" as to Watson's age.

⁸Id. at 112.

⁹The court clearly assumes the basic concept that physical appearance is admissible evidence in fixing a person's age. In accepting this principle the court was not persuaded by previous Indiana cases to the contrary. See *Bird v. State*, 104 Ind. 384, 3 N.E. 827 (1885); *Robinius v. State*, 63 Ind. 235 (1878); *Ihinger v. State*, 53 Ind. 251 (1876); *Stephenson v. State*, 28 Ind. 272 (1867). The older cases rested upon the ground that evidence nonreviewable by an appellate court is inadmissible.

Moreover, the court casually assumed age to be an element of the case to be proven by the state. This may be questioned. The Indiana statute, Ind. Ann. Stat. § 9-3204(2) (1956), fixes eighteen years as the maximum age embracing delinquent children and also defines a delinquent child as one under the age of eighteen who has committed what for an adult would be a crime not punishable by death or life imprisonment. Furthermore, the burden is on the defendant to prove himself within the juvenile age requirements—not upon the state to prove that he is not. Annot., 48 A.L.R.2d 663, 700 (1956). Indiana has for some reason fixed a minimum age requirement in the particular felony of armed robbery. Absent that provision, it would seem that an offender under the age of eighteen would be a juvenile offender, amenable only to the juvenile courts. It is arguable that the Indiana Legislature has in this particular crime merely reduced the age requisite for adult responsibility by two years—from eighteen to sixteen. If this be so, it would appear that the burden of proof must still rest upon the defendant to show that he should fall under the juvenile code.

¹⁰140 N.E.2d at 113 (dissenting opinion).

¹¹Ind. Ann. Stat. § 12-610 (1956). The majority specifically states that the doctrine of judicial notice could not be invoked here. This statement is unexplained, but in *State v. Dorathy*, 132 Me. 291, 170 Atl. 506 (1934); *State v. Gebhardt*, 219 Mo. 708, 119 S.W. 350 (1909); and *State v. Fries*, 246 Wis. 521, 17 N.W.2d 578 (1945), the courts, under similar circumstances, applied judicial notice when the question of age arose.

It is clear that acceptance of the minority view would have obviated a decision on the appearance problem.¹² It is less clear why the majority strained so to avoid the obvious sufficiency of evidence in the record itself.¹³ In every other jurisdiction which has been faced with such clear inferences as to age the decision has been that reasonable inferences may arise from indirect evidence as well as from evidence directed specifically to the point.¹⁴ But even if the court's cautious scrutiny of the record be accepted, its reasoning as to the admissibility of appearance has something less than a firm foundation. The court justifiably balks at jurors' seeking their own evidence, but "extrinsic material"¹⁵ brought into the court room seems hardly analogous to a person required by statute to be continuously present throughout the trial.¹⁶ *State v. Dorothy*¹⁷ appears to be the only case on all fours with the principal case.¹⁸ Therein the court held that the defendant must "present himself before court and jury, to secure acquittal. This he may do voluntarily, but whether voluntarily as a witness, or by force of his compelled attendance, as here, he inevitably reveals that he is a person, a male perhaps. He reveals his race, color, and, we hold, somewhat as to his age."¹⁹ This reasoning has been accepted expressly or impliedly in slightly distinguishable cases in other jurisdictions.²⁰ Though *Watson* represents a liberalizing of previous Indiana rulings,

¹²I.e., the sufficiency of the evidence of record would have made even an erroneous admission of appearance nonprejudicial.

¹³"Are we to say that when a person it [sic] designated as a 'man' or 'woman' that is evidence they are over sixteen years of age and when designated by a witness as a 'boy' or a 'girl' it is presumed they are under sixteen years of age?" 140 N.E.2d at 112. What could be a more reasonable inference than to expect a "man" to be more than sixteen years old? This need not require the corollary inference that a "boy" be less than sixteen.

¹⁴*State v. Gebhardt*, 219 Mo. 708, 119 S.W. 350 (1909); *State v. Thompson*, 155 Mo. 300, 55 S.W. 1013 (1900); *Commonwealth v. Emery*, 51 Pa. Super. 55 (1912); *State v. Fries*, 246 Wis. 521, 17 N.W.2d 578 (1945).

¹⁵140 N.E.2d at 112.

¹⁶Ind. Ann. Stat. § 9-1801 (1956).

¹⁷132 Me. 291, 170 Atl. 506 (1934).

¹⁸In neither case did the court find evidence of age in the record, nor did the defendants take the witness stand. But each state did have a statute requiring defendant's presence. Ind. Ann. Stat. § 9-1801 (1956); Me. Rev. Stat. Ann. c. 148, § 14 (1954).

¹⁹170 Atl. at 508.

²⁰*State v. Gebhardt*, 219 Mo. 708, 119 S.W. 350 (1909); *State v. Fries*, 246 Wis. 521, 17 N.W.2d 578 (1945). In each the court found other evidence which was weighed in conjunction with defendant's appearance. *State v. Fries*, supra, like *State v. Dorothy*, supra note 17, stressed the absolute requirement of defendant's presence in court in criminal cases. In all states accepting the general principle of appearance as admissible evidence, the question as to validity of observing a non-testifying defendant has arisen in only four cases: *State v. Dorothy*, supra; *State v. Fries*, supra; *State v. Gebhardt*, supra; and the principal case.

it does not go to the extent reached in *State v. Dorathy*.²¹ It does not, however, seem improbable that Indiana may someday accept the still more liberal *Dorathy* view.

In determining to what extent the triers of fact may utilize physical appearance in fixing a person's age, the cases, speaking generally, have done so within the framework of a few significant factors—i.e., the appearance may or may not have been corroborated by direct evidence as to age; and the person in question may or may not have taken the stand as a witness.²² Thus, it seems that closely related to the narrow question put by *Dorathy* and *Watson* are several others arising from combinations of the above factors.²³

Of these various possibilities, the greatest number of cases have arisen where the appearance evidence was corroborated by other evidence and the party also appeared as a witness.²⁴ The quantity is not indicative of a highly contestible issue, however, for each case was resolved in favor of admitting appearance when supported by other evidence. None of these cases propound a clear line of reasoning as to why appearance in conjunction with other evidence—as contrasted with instances in which the appearance is unsupported by other evidence—is admissible.²⁵ In fact, only one case, *Garbarsky v. Simkin*,²⁶

²¹See note 9 supra, citing previous Indiana cases held not persuasive by the court in the *Watson* case.

²²See Annot., 40 L.R.A. (N.S.) 470 (1912).

²³The cases previously and hereafter cited represent an exhaustive research of this subject by the writer. He has attempted to cite at least one representative case from each jurisdiction deciding the right of the trier of fact (whether it be jury, judge without jury, or a board of inquiry in a judicial proceeding) to weigh appearance in determining age. This comment includes no cases which accept or reject the admissibility of physical appearance based upon controlling statutes. Neither does the comment contain any cases which rule upon the admissibility of a witness' opinion, based on appearance, as to another's age.

²⁴*Williams v. State*, 98 Ala. 52, 13 So. 333 (1893); *Dutzler v. State*, 41 Ariz. 436, 19 P.2d 326 (1933); *People v. Elgar*, 39 Cal. App. 78, 178 Pac. 168 (1918); *State v. Scroggs*, 123 Iowa 649, 96 N.W. 723 (1903); *Commonwealth v. Phillips*, 162 Mass. 504, 39 N.E. 109 (1885); *State v. Davis*, 237 Mo. 237, 140 S.W. 902 (1911); *State v. Thompson*, 155 Mo. 300, 55 S.W. 1013 (1900); *People v. Elco*, 131 Mich. 519, 91 N.W. 75 (1902); *People v. Lammes*, 208 App. Div. 533, 203 N.Y. Supp. 736 (4th Dep't 1924) (dictum); *State v. McNair*, 93 N.C. (Davidson) *628 (1885); *Stiles v. State*, 39 Okla. Crim. 142, 264 Pac. 226 (1928); *Hunter v. State*, 6 Okla. Crim. 446, 119 Pac. 445 (1911); *Commonwealth v. Emery*, 51 Pa. Super. 55 (1912). Accord, *United States ex rel. Fong On v. Day*, 54 F.2d 990 (2d Cir. 1932); *Wong Fook Ngoey v. Nagle*, 300 Fed. 323 (9th Cir. 1924); *Waterman v. Waterman*, 42 Misc. 195, 85 N.Y. Supp. 377 (Sup. Ct., App. T. 1903); *Garbarsky v. Simkin*, 36 Misc. 195, 73 N.Y. Supp. 199 (Sup. Ct., App. T. 1901); *Schnoor v. Meinecke*, 77 N.D. 96, 40 N.W.2d 803 (1950).

²⁵Annot., 40 L.R.A. (N.S.) 470, 471 (1912).

²⁶36 Misc. 195, 73 N.Y. Supp. 199, 200 (Sup. Ct., App. T. 1901), upholding admission of appearance with other evidence but specifically stating that it was not to be implied that "the physical appearance of the defendants was alone suf-

goes beyond its particular facts to point out in an unexplained dictum that this contrast does exist. Frequently quoted in these decisions is Professor Wigmore, who says, "Experience teaches us that corporal appearances are approximately an index of the *age* of their bearer, particularly for the marked extremes of old age and youth. In every case such evidence should be accepted and weighed for what it may be in each case worth. In particular, the *outward* physical appearance of an alleged minor may be considered in judging of his *age*; a contrary rule would for such an inference be pedantically over-cautious."²⁷ It should be noticed that Wigmore makes this observation in reference to "*every* case."²⁸ Those cases citing this quotation from Wigmore as their authority appear committed to follow the doctrine to the extreme—to apply it in the absence of corroborating evidence even when the party fails to appear as a witness. This passage was also cited in *Watson*, but not applied to the extent Wigmore apparently intended.

Unfortunately, those cases wherein there is more evidence than mere appearance, as to the age of a nontestifying defendant, do not commit themselves by quoting Wigmore, nor do they go beyond bare assertions of the jury's right to give weight to such inspections.²⁹ The absence of either of these guides renders it highly uncertain whether such courts would hold in accord with *Dorathy* or commit themselves merely to the extent of *Watson*. The uncertainty arises because both cases deal fundamentally with the question of jurors' seeking their own evidence. Neither the presence nor absence of supporting evidence would affect the court's view on what constitutes the jury's seeking out its own evidence.

When a court has given weight to the uncorroborated appearance of a person on the witness stand,³⁰ the court's acceptance of a witness'

ficient" to substantiate a finding on age. And in *People v. Lammes*, 208 App. Div. 533, 203 N.Y. Supp. 736, 738 (4th Dep't 1924), the court stated: "Under the circumstances as disclosed by the evidence, an inspection of the complaining witness would not aid the jury in determining her age . . ." The value of the inspection would have been small as the question turned on a difference of 30 days in age, but see 2 Wigmore, *Evidence* § 222 (3d ed. 1940): "In every case such evidence should be accepted and weighed for what it may be in each case worth."

²⁷2 Wigmore, *Evidence* § 222 (3d ed. 1940).

²⁸*Ibid.* (Emphasis added.)

²⁹*State v. Gebhardt*, 219 Mo. 708, 119 S.W. 350 (1909); *State v. Fries*, 246 Wis. 521, 17 N.W.2d 578 (1945).

³⁰*Cunningham v. United States*, 86 A.2d 918 (D.C. Munic. App. 1952); *Slaughter v. District of Columbia*, 134 A.2d 338 (D.C. Munic. App. 1957) (a jury trial, specifically affirming *Cunningham v. United States*, supra, which was a trial by a judge); *Louisville & N.R.R. v. Bean*, 49 Ga. App. 4, 174 S.E. 209 (1934); *Commonwealth v. Hollis*, 170 Mass. 433, 49 N.E. 632 (1898); *State v. Arnold*, 35 N.C. (Ire.) *184 (1851); *Shephard v. Smith*, 198 Wash. 395, 88 P.2d 601 (1939).

appearance in conjunction with additional evidence would seem to follow necessarily. However, a case following Wigmore³¹ is logically committed to the extreme found in *Dorathy* and all intermediate views.

One further line of cases needs to be examined. These cases inject one factor correlative to all those mentioned before. The Colorado court has continuously held that physical appearance is inadmissible unless the jury is specifically notified that the person is being inspected for that purpose.³² Whether such notification will cure the absence of any other evidence, or whether the inspection must be coupled with other evidence, remains uncertain from the language used.³³ Notwithstanding the qualification placed upon it, Colorado clearly accepts the general principle that appearance can be admitted when properly presented. *Watson* and *People v. Lammes*³⁴ also accept this. In this respect all previously cited cases agree.

This acceptance in principle is not unanimous throughout the states. Texas and Illinois have specifically held otherwise. In *Wistrand v. People*,³⁵ the Illinois court contended that physical appearance as personally observed by the jury was not susceptible to appellate review. Such evidence, the court held must therefore be admissible. The court cited as support *Stephenson v. State*,³⁶ which *Watson* effectually overruled. The one Texas case, *McGuire v. State*,³⁷ took the same line of reasoning, citing two more Indiana cases³⁸ which were also criticized and disregarded by *Watson*. The fallacy of this reasoning must inhere in all real evidence and stems from the fact that the bill of exceptions purportedly contains all the evidence of a trial.³⁹ Yet if a juror's per-

³¹2 Wigmore, Evidence § 222 (3d ed. 1940).

³²*Slocum v. People*, 120 Colo. 86, 207 P.2d 970 (1949); *Quinn v. People*, 51 Colo. 350, 117 Pac. 996 (1911).

³³"[W]here no evidence has been offered upon the subject, and where the attention of the jury has not been called to the appearance of the witness for that purpose it is prejudicial error to accept the finding of a jury concerning the age of the witness when it is material to conviction, with no evidence of any kind upon the subject." *Quinn v. People*, 51 Colo. 350, 117 Pac. 996, 997 (1911). Does this mean that where there is no other evidence, but where the jury's attention is directed to the witness, it will not be prejudicial error?

³⁴208 App. Div. 533, 203 N.Y. Supp. 736 (4th Dep't 1924). See note 26 supra.

³⁵213 Ill. 72, 72 N.E. 748 (1904), recently followed in *People v. Rogers*, 415 Ill. 343, 114 N.E.2d 398 (1953). But see *People v. Grizzle*, 381 Ill. 278, 44 N.E.2d 917 (1942), using different language but citing *Wistrand v. People*.

³⁶28 Ind. 272 (1867). See note 9 supra.

³⁷4 Tex. Civ. App. 386, 15 S.W. 917 (1891).

³⁸*Robinius v. State*, 63 Ind. 235 (1878); *Ihinger v. State*, 53 Ind. 251 (1876). See note 9 supra.

³⁹*Wistrand v. People*, 213 Ill. 72, 72 N.E. 748, 751 (1904); *McGuire v. State*, 4 Tex. Civ. App. 386, 15 S.W. 917, 918 (1891). See 1 Thompson, *Trials* § 900 (2d ed. 1918).

sonal observations is evidence ipso facto, the bill of exceptions does not contain all the evidence. Illinois and Texas resolve this paradox by saying in effect that the observations of the triers of fact are *not* evidence. To react thus, however, is to ignore that "it has been the immemorial practice in criminal trials to exhibit to the jury burglars' tools, blood stained clothing, and other *indicia* of crime. Although the knowledge acquired by the jurors from such an inspection can never be accurately conveyed to the minds of the appellate judges through a bill of exceptions, would any court therefore fall into the wild dream of holding that the jurors should be instructed to disregard the evidence thus acquired?"⁴⁰ The answer is clearly no, and at the same time no ready distinction presents itself as between the example and the *Wistrand* doctrine. To contend that what a juror *sees* may not be evidence, but only that which is described to him, would seem somewhat incongruous. Applying this as a rule of law may assure a criminal a new trial under the most ludicrous of circumstances.⁴¹ If, on the other hand, acceptance of the principle of personal inspection is made, the court may within its own devices protect the innocent in close cases.⁴² It is unlikely that the Illinois court will influence other jurisdictions in this matter.

That triers of fact may "use their eyes as well as their ears" appears in retrospect quite substantially supported. Of the jurisdictions deciding the question raised in this comment, the great majority have done so affirmatively.⁴³ The others do not stand on firm ground.⁴⁴ As between the majority jurisdictions, differences do exist, but at the same time there subsists between them the salutary principle that to ignore physical appearances would be "pedantically over-cautious."⁴⁵ This principle, when properly applied, will aid the courts in sifting realistic justice from the morass of technical procedure.

KINGSWOOD SPROTT, JR.

⁴⁰1 Thompson, *Trials* § 900 (2d ed. 1918).

⁴¹Consider *State v. Dorathy*, 132 Me. 291, 170 Atl. 506 (1934). Dorathy was a 72 year old child-molester, but no formal proof was made of his age.

⁴²*People v. Lammes*, 208 App. Div. 533, 203 N.Y. Supp. 736 (4th Dep't 1924), is a good example of a court's protecting the person where the inspection might do injustice. This is particularly incumbent upon all courts where the appearance evidence is uncorroborated and where it is shown that under the particular circumstances the inspection could not establish a reasonable inference one way or the other.

⁴³See note 2 *supra*.

⁴⁴See *People v. Rogers*, 415 Ill. 343, 114 N.E.2d 398 (1953); *Wistrand v. People*, 213 Ill. 72, 72 N.E. 748 (1904); *McGuire v. State*, 4 Tex. Civ. App. 386, 15 S.W. 917 (1891).

⁴⁵*Wigmore, Evidence* § 222 (3d ed. 1940).