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Some Observations on the Law of Evidence

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SOME OBSERVATIONS ON THE LAW OF EVIDENCE

I. SPONTANEOUS EXCLAMATIONS¹

Spontaneous² utterances, exclamations or declarations are, under certain conditions, admissible in evidence though the party who made them does not take the stand. According to most courts the occasion must be startling enough to cause shock, which in turn creates an emotional state. The utterance must be made under stress of that emotion; it must be "spontaneous and natural; impulsive and instinctive";³ it should be immediate, or "so clearly connected (with the occasion) that the declaration may be said to be the spontaneous explanation of the real cause."⁴ Although in some jurisdictions there is insistence that the declaration be "contemporaneous" with the act, or "while the act is going on,"⁵ the progressive view seems to be that the time interval, beyond which a declaration would no longer be spontaneous, is in the sound discretion of the trial court.⁶ Thus, in one case,⁷ after a wreck the conductor came up to the engine, went back to the caboose, and then walked a mile to a telephone, where he consumed twenty-five minutes in calling headquarters. On his return to the train, while moving the injured to the caboose, he remarked that a defective rail had caused

¹ This series of articles is the joint work of Mortimer J. Adler and Jerome Michael of Columbia University, and Robert M. Hutchins and Donald Slesinger of Yale University. The first paper in the series was prepared by the Yale authors with the approval of the Columbia authors. The Yale authors acknowledge their indebtedness to the Sterling Fellowship Fund, through the assistance of which their part of the work has been carried on, and to A. J. Russell, an honors student in Evidence at Yale.

² Throughout this article the word "spontaneous" is used as the courts use it, rather than in a strictly scientific sense. Since Pasteur's experiments on "spontaneous generation" the word has lost caste scientifically. What the courts mean is obvious from the context. Instead of an act of pure free will, stimulated by nothing, created out of the air, so to speak, the courts mean an act so dominated by considerations external to the self, that rational thought or personal will plays no part. The authors have that meaning in mind.

³ 2 WIGMORE, EVIDENCE (2d ed. 1923) §1749. For the present no attempt will be made at criticism from the standpoint of terminology. As long as the meaning is clear, there seems to be no point in substituting one technical vocabulary for another, especially in the absence of an unequivocal dictionary of psychology.

⁴ Leahy v. R. R., 97 Mo. 165, 10 S. W. 58 (1888), reported in WIGMORE, *supra* note 3.

⁵ See note 19 L. R. A. 733 (1893); Reg. v. Bedingfield, 14 Cox Crim. Cas. 341 (1879); People v. Wong Ark, 96 Calif. 125 (1892); Holmes v. Wharton, 140 S. E. 93 (N. C. 1927).

⁶ See (1921) 70 U. P. A. L. REV. 332; (1926) 25 MICH. L. REV. 277; Krooner v. City of Waterbury, 136 Atl. 93 (Conn. 1927); Kressen v. Chicago & N. W. Ry., 215 N. W. 908 (Wis. 1927).

⁷ Walters v. Spokane Int. Ry., 58 Wash. 293, 108 Pac. 593 (1910), annotated in 42 L. R. A. (N.S.) 917.

the disaster, and his statement was admitted in evidence as a spontaneous declaration. In other cases declarations made from a few seconds to fifteen minutes after the occurrence have been termed "mere narration of past events," and therefore excluded.⁸

Apparently the type of utterance toward which the courts are most favorably inclined is that which follows a severe shock to the declarant.⁹ A startling invasion of the declarant's repose is assumed to lead to a trustworthy statement, whether the declarant be a congenital liar, an infant, a murderer, or a minister of the gospel.¹⁰ Whereas an identical blow on the head might conceivably produce different emotions in a boxer and a bookkeeper, it is likely that statements made by each would, by many courts, be admitted in evidence as spontaneous exclamations.

Since the shock is what guarantees the truth of these declarations, some courts rule that it alone must produce them. Although dying in agony, if, in response to an inquiry as to the identity of his assailant, the declarant says that the defendant shot him, the statement must be excluded.¹¹ As a result of the interpolation of the question, what would otherwise be admissible becomes "not the natural and spontaneous outgrowth of the murderous assault on him, but a mere narrative of a past transaction, and hence not a part of the *res gestae*."¹²

Where no questions have been asked, the courts are willing to concede that physical shock to the declarant is likely to produce the truth

⁸ See (1928) 37 YALE L. J. 524; Parker v. State, 136 Ind. 284, 35 N. E. 1105 (1896) (immediately); Green v. State, 113 So. 121 (Fla. 1927), (immediately after); Eastman v. B. & M. Ry., 165 Mass. 342, 43 N. E. 115 (1896), (exclusion of statement made ten minutes after affirmed as not *res gestae*); Guild v. Pringle, 130 Fed. 419 (C. C. A. 4th, 1904). Cf. (1915) 64 U. PA. L. REV. 99, 851.

⁹ The usual case is one of physical shock. Some cases where there is no physical damage discuss the statements as though they were spontaneous declarations, but they appear to be circumstantial evidence of state of mind, and not hearsay at all. Such cases are Western Union Tel. Co. v. Davis, 24 Tex. Civ. App. 427, 59 S. W. 46 (1900); in action for injured feelings: "Oh, that I could have seen him before he died!" and Houston Chronicle Pub. Co. v. McDavid, 157 S. W. 224 (Tex. 1913)—to show mental anguish in libel, plaintiff's wife's statements: "How could they say that about her! . . . I will be afraid to look my friends in the face" admissible.

¹⁰ This tendency of the law of evidence to disregard individual differences will be treated more fully in a later article. It will suffice to call attention to it here. Cf. the annotations in 65 L. R. A. 316 and L. R. A. 1915 E 202.

¹¹ Greener v. Gen. Electric Co., 209 N. Y. 135, 102 N. E. 527 (1913); Rogers v. State, 88 Ark. 451, 115 S. W. 156 (1908). *Contra*, State v. Mack, 138 S. E. 153 (Ga. 1927); Lucchesi v. Reynolds, 125 Wash. 352, 216 Pac. 12 (1923).

¹² People v. Westcott, 260 Pac. 901 (Cal. App. 1927). Cf. Whipple, *Psychology of Observation and Report*, (1918) 15 PSYCH. BULL. 217 *et seq.* remarks that "Items recalled by interrogation . . . may often be reported as accurately as other items." GORPHE, *La Critique du Temoignage* (1927) and MÜNSTERBERG, *ON THE WITNESS STAND* (1908) find stories without question more accurate than those with. Clearly the type of question is important. The question "who did it?" would probably not cause an inaccurate, suggested reply, while phrasing it "Did John do it?" might.

if the utterance comes before time to misrepresent has been afforded him. They are willing to go a step further and concede that a speaker who has received no injury, but who is involved in the startling occurrence will, if sufficiently excited, be honest, too. A motorman, a brakeman, or an engineer,¹³ although he escapes unscathed from the wreckage of his train, will not lie about the cause of the catastrophe until he has regained his equilibrium. But the casual bystander¹⁴ who has no interest in later suits against the railroad, but who is much affected by the sad spectacle, is by no means so reliable.¹⁵ Some courts exclude what he has said because he is disinterested. He is not an actor, however much he was moved by the action. The fact that his statement appears to be made without premeditation or design cannot save it. The reason given for admitting an actor's statement is sufficient to exclude his. As the Kentucky court has put it, the admission of the utterances of excited bystanders would open the door to "reckless, thoughtless and ill-considered exclamations,"¹⁶ which are precisely the kind, and the only kind that are admitted under the rule as to spontaneous declarations made by injured persons or actors.¹⁷

Even though most courts do admit the statements of excited bystanders, where there is a stimulus which is not sufficient to produce excitement, they do not ordinarily attribute to it the truth-evoking qualities ascribed to shock. This is so even though there is no conceivable motive to misrepresent, and the person who heard the exclamation is

¹³ *Chawkey v. Wabash Ry.*, 297 S. W. 20 (Mo. 1927) (fireman); *Swanson v. Pacific Shipping Co.*, 60 Wash. 87, 110 Pac. 795 (1910) (ship captain); *L. & N. Ry. v. Molly's Admx.*, 122 Ky. 219, 91 S. W. 685 (1906) (buggy driver); but *cf. L. & C. Parket Co. v. Samuel*, 22 Ky. L. R. 979, 59 S. W. 3 (1900) (deck hand).

¹⁴ See the discussion of this attitude from the psychological standpoint, *infra*:

¹⁵ As to the exclamations of excited bystanders, see (1921) 35 HARV. L. REV. 209; (1923) 22 MICH. L. REV. 843; (1926) 25 MICH. L. REV. 466; and the annotations 20 L. R. A. (N. S.) 133 (1909) and 33 L. R. A. (N. S.) 109 (1910). In *Atlantic Coast Line v. Crosby*, 53 Fla. 400, 43 So. 318 (1907); *Ganaway v. Salt Lake Drama Assn.*, 17 Utah, 37, 53 Pac. 830 (1898); *Dean v. State*, 105 Ala. 21, 17 So. 28 (1895); *Hall v. Comm.*, 289 S. W. 1102 (Ky. 1927), such evidence was held inadmissible. In *DuBois v. Luthmer*, 147 Ia. 315, 126 N. W. 147 (1910); *Hedlund v. Minneapolis St. Ry.*, 120 Minn. 319, 139 N. W. 603; *Cromeenes v. San P. L. A. & S. L. Ry.*, 37 Utah, 475, 109 Pac. 10 (1910); *Johnson v. St. P. & W. Coal Co.*, 126 Wis. 492, 105 N. W. 1048 (1906), it was admitted.

¹⁶ *Louisville Ry. v. Johnson*, 131 Ky. 277, 115 S. W. 207 (1909).

¹⁷ A delicate situation has arisen several times where, under the influence of a strong emotion, contradictory statements were made. Some judges who have had to consider the subject seem to take the view that though the declarant was still emotionally upset when he made the second statement, the time elapsed alters its credibility. There is no sound psychological reason for this judicial choice. *Cf. Vaughn v. St. L. & S. F. Ry.*, 177 Mo. App. 155, 164 S. W. 144 (1914); *Westcott v. Waterloo C. F. & N. Ry.*, 173 Iowa, 355, 155 N. W. 255 (1915); *Stukas v. Warfield, Pratt, Howell Co.*, 188 Iowa 878, 175 N. W. 81 (1919); *Flanagan v. Provident Life & Acc. Ins. Co.*, 22 F.(2d) 136 (1927).

on the stand, subject to cross-examination as to all the circumstances of its making. Thus, if just before an automobile runs down a pedestrian, a witness watching it from a trolley car remarks on its high speed, the statement is inadmissible.¹⁸ If, where the plaintiff's contention is that death was caused by the unnecessary blowing of a whistle which resulted in the frightening of the deceased's horse, he offers a woman's statement, made a block and a half away, that "it was brutish the way they whistled," the evidence cannot come in because the declarant was sitting calmly in her home.¹⁹ The declarant's report that, at the time of the shot, which he heard three-quarters of a mile off, he said someone was trying his pistol, is not admitted as a spontaneous exclamation.²⁰

The general theory under which these declarations are admissible has been well stated by Mr. Wigmore.²¹ "Under certain external circumstances of physical shock a state of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock." And "since this utterance is made under the immediate and controlled domination of the senses, and during the brief period when considerations of self-interest could not have been fully brought to bear by reasoned reflection, the utterances may be taken to be particularly trustworthy."

This reflective self-interest is a curious doctrine, dating back to a mentalist psychology, and the utilitarian philosophy that made use of it. Man's conduct, according to this theory of behavior, was always personally motivated, his acts being planned by an elaborate calculus of interests, immediate and remote. Since that calculus involved reflection, it clearly followed that by eliminating reflection, self-interested conduct became impossible. The entrance of instinct into psychology shifted the emphasis, without changing the fundamental idea, by putting self-interest on an instinctive basis. The modern tendency is to substitute groups of habits or habit patterns for such general concepts as self-interest. These, if they serve the self, may afterward be called self-interested. That they are not, in fact, due to a force or instinct of self-interest, is shown by their persistence beyond the point of general

¹⁸ *Gouin v. Ryder*, 38 R. I. 31, 94 Atl. 670 (1915). The declarant was on the stand.

¹⁹ *Chicago & E. Ry. v. Cummings*, 24 Ind. App. 192, 53 N. E. 1026. (1899) The declarant was on the stand.

²⁰ *Baker v. State*, 45 Tex. Crim. App. 392, 77 S. W. 618 (1903). The declarant was on the stand. Cf. *Emens v. Lehigh Valley Ry.*, 223 Fed. 810 (D. N. Dak. 1915); *Mo. Pac. Ry. v. Collier*, 62 Tex. 318 (1884).

²¹ 3 WIGMORE, *op. cit. supra* note 3, 738.

efficiency. The habit of saving money, for example, is, in certain circumstances, self-interested. But a person having the habit will tend to continue to save even when it is directly against his interest. Reflection plays a part, both in the formation of habits, and in resolving conflicts between them. But once formed, they continue, on their own inertia, creating the illusion of a definite force.

To still, or circumvent this "force," the law relies in part on immediacy. The veracity of a response, according to the courts, varies directly with its speed. The desire to lie requires time and reflection to develop. And the intervention of reflection may be avoided by giving it no time to occur, thus rendering lying difficult, if not impossible.

In order to estimate the time required for reflection, it is necessary to know something of the difficulty of the task reflection is to perform. Ordinarily the choices are very simple ones, involving few alternatives. "John did it!" or "John did not do it!" The gentleman of after-dinner fame who, on being informed that his train had fallen over an embankment while he slept, cried, "Oh, my shoulder" in all probability did not take many moments to respond to the situation. If his general character is pointed to by way of explanation, the answer is simply that it is precisely that sort of character that the courts are guarding against.

A number of laboratory psychological experiments have been performed which throw some light on the problem under consideration. A subject is asked to disobey one of several orders,²² concealing from the examiner which order he has disobeyed. Or two subjects are sent out of the room, one to perform a series of acts, the other to do nothing, the actor trying to conceal his "crime."²³ To each subject, then, is read a series of words, some of which are directly associated with the crimes in question, with the request that he respond as quickly as possible with the first word that comes to his mind, taking care, however, to avoid giving away his crime.²⁴ All observers report a delay in reaction time to key words where deception is attempted, although Marston²⁵ discovered a small group, which he called good liars, whose reaction time to significant words was actually faster than to the rest of the list. It seems, then, that the courts are on the right track in demanding speed as a guarantee of truth, or, at least of the absence of attempted falsehood.

²² Marston, *Reaction Time Symptoms of Deception*, (1920) 3 JOUR. EXPER. PSYCH., 72-87.

²³ Langfeld, *Psycho-physical Symptoms of Deception*, (1920) 15 JOUR. ABN. PSYCH., 319-28.

²⁴ Similar experiments have been performed by Jung, *The Association Method*, (1910) 21 AMER. JOUR. PSYCH., 219-69; Yerkes & Berry, *The Association Reaction Method of Mental Diagnosis*, (1909) 20 AM. JOUR. PSYCH., 22-27; Whipple, *Observer v. Reporter*, (1906) 6 PSYCH. BULL., 153-70, and others.

²⁵ *Supra*, note 22.

The difficulty comes when the speed is considered, not as a general idea, but quantitatively. Here we find that the difference in time between the ordinary reaction and the deception reaction to significant words is so slight, from .83 seconds to $3\frac{1}{2}$ minutes, that it cannot be measured without the aid of instruments. The sound discretion of the trial judge, with the best of intention in these cases, is likely to be fallible.

But it will be remembered that speed is not the only guarantee of truthful response. In order more fully to guard against deceit, a good deal of reliance is placed on shock, and the emotion generated thereby, provided it is severe enough to still the reflective faculties. There is every reason to suppose that such an emotion would render difficult a consciously planned lie. As Mr. Watson inelegantly puts it,²⁶ emotion is an affair of the guts, beyond control of the intellect, and 'pretty well running it during its active phase. It halts digestion, speeds up heart rate, increases blood pressure,²⁷ creates general muscular tension throughout the body, pours sugar and adrenin into the blood stream. These bodily changes are certainly discomfoting to intellectual activity. They paralyze and distort it all along the line; unfortunately, while they make thinking difficult, they render observation and judgment all but impossible.

One need not be a psychologist to distrust an observation made under emotional stress; everybody accepts such statements with mental reservation. M. Gorphe²⁸ cites the case of an excited witness to a horrible accident who erroneously declared that the coachman deliberately and vindictively ran down a helpless woman. Fiore²⁹ tells of an emotionally upset man who testified that hundreds were killed in an accident; that he had seen their heads rolling from their bodies. In reality only one man was killed, and five others injured. Another excited gentleman took a pipe for a pistol.³⁰ Besides these stories from real life, there are psychological experiments which point to the same conclusion. After a battle in a classroom, prearranged by the experimenter but a surprise to the students, each one was asked to write an account of the incident.³¹ The testimony of the most upset students was practically worthless, while those who were only slightly stimulated emotionally scored better than those left cold by the incident. Miss Hyde of Nebraska tells of an unpublished experiment, the results of

²⁶ HARPER'S MAGAZINE, February, 1928, at 315.

²⁷ CANNON, BODILY CHANGES IN FEAR, HUNGER AND RAGE, (1915).

²⁸ *Op. cit supra* note 12.

²⁹ Fiore, *Il valore psicologico delle testimonianze*, 2e Cg. d. Soc. filas, ital. Bologna-Modena. Formaguine, 1908, 26 p. Reported in GORPHE, *supra*, note 12.

³⁰ GROSS, *Handbuch für Untersuchungsrichter als System der Kriminalistic*, (1893).

³¹ Kobler, *Ein Rechtspsychologisches Experiment*, (1914) 8 ZSCHE F. ANGEN. PSYCH., 317-25. Reported by Whipple, (1915) 12 PSYCH. BULL. 221-24.

which differed only in the general inaccuracy of all accounts, regardless of the amount of emotion generated.³² The conclusion drawn from these, and other similar experiments,³³ is that "emotion may virtually hold connected perception in abeyance so that the subject has only isolated sensations to remember instead of a logically connected unit perception."³⁴

That participants, as well as bystanders,³⁵ have their perceptions clouded by strong emotions will not be doubted. When a carriage containing the inevitable psychologist³⁶ upset, that worthy gentleman amused himself and his companions by taking depositions while they awaited assistance. He had no known reality to check their stories against, but it was obvious that if any one was right, all the rest were wrong. That even trained observers are fallible is well brought out in an editorial in the *New York World* in which several accounts of newspaper reports of the striking of Kerensky on his recent visit to America are printed. Though the reporters were all experts, and sitting close to the platform, each one told a different story of what must have been a fairly simple event.³⁷

³²The amount, or presence of any emotion at all presents another interesting problem. *Syz, Observations on the Unreliability of Subjective Reports of Emotional Reactions*. (1920) 17 *BRR. JOUR. PSYCH.* Gen. Sect. 119-26 reports the following. His subjects were hooked up to a psycho-galvanometer capable of recording the electrical change which takes place in one under emotional stress. Then a list of words was given, and they were asked to report those words which caused in them an emotional feeling. Their reports and the galvanometer readings were not in accord. They reported emotion to conventional words like mother, father, etc., whereas they registered emotion with entirely different ones.

³³MÜNSTERBERG, *ON THE WITNESS STAND*, (1908).

³⁴Marston, *Studies in Testimony*, (1924) 15 *JOUR. CR. LAW AND CRIMINOLOGY*, 5-32.

³⁵It will be remembered that some courts make a distinction between the two.

³⁶Cholvec, *Die Schwarmerische Lüge*. (1905) *Beitr. z. Psych. der Auss. II* (2) 93-97 (reported in *GORPHE*, *supra* note 12).

³⁷These are descriptions of the manner in which the young woman struck her blow:

WORLD: "Slashed him viciously across the cheek with her gloves."

NEWS: "Struck him on the left cheek with the bouquet."

AMERICAN: "Dropped her flowers and slapped him in the face with her gloves."

TIMES: "Slapped his face vigorously with her gloves three times."

HERALD TRIBUNE: "Beat him on the face and head . . . a half-dozen blows."

EVENING WORLD: "Struck him across the face "several times."

MIRROR: "Struck him a single time."

POST: "Vigorously and accurately slapped him."

And this is what happened next:

AMERICAN: Kerensky "reeled back."

EVENING WORLD: "He stood unmoved."

NEWS: "He stepped back, maintaining a calm pose."

WORLD: He stood still, but used his arms to "wave back his friends."

HERALD TRIBUNE: He stood still, with his arms "thrown back."

JOURNAL: "He reeled."

POST: "He remained unmoved."

MIRROR: "He reeled from the blow. His supporters were stemmed by a handful of royalists. Fists flew; noses ran red; shirts and collars were torn."

The result of these observations is a dilemma. From the point of view of subjective veracity, the speed the courts demand does not necessarily guarantee truth. And from the standpoint of objective accuracy, emotion is little better. If a speedy reaction means nothing without the aid of a stopwatch, an emotional reaction means nothing without eliminating the emotion. What the emotion gains by way of overcoming the desire to lie, it loses by impairing the declarant's power of observation. On the one hand, if reflective self-interest has not had a chance to operate because of emotional stress, then the statement should be excluded because of the probable inaccuracy of observation. On the other, if little emotion is involved, clearly a very short time is sufficient to allow reflective self-interest to assume full sway. On that basis there would seem to be no reason for this hearsay exception. In fact, the emphasis should be all the other way. On psychological grounds, the rule might very well read: Hearsay is inadmissible, especially (not except) if it be a spontaneous exclamation.

Of course, such a result would be preposterous. The evidence is relevant and should be admitted unless it is so worthless as to mislead the tribunal or waste its time. It would do neither to a tribunal trained to decide the weight to be given to evidence in the light thrown by a knowledge of the background of the declarant, and the circumstances in which an exclamation was made. To this tribunal statements now viewed with suspicion because they are not made under emotional stress, would seem to represent more accurate observation for that very reason. Since an injured person is the one most affected by his injury, his observations would be considered less reliable than those of an uninjured motorman, brakeman, or engineer, and *a fortiori* less than those of a casual, unexcited bystander. And, according to this view, the best evidence of all is a statement made in immediate response to an external stimulus which produces no shock or nervous excitement whatever.

Professor Morgan's³⁸ insistence on the admissibility of declarations closely connected in time with such a stimulus seems entirely justified. With emotion absent, speed present, and the person who heard the declaration on hand to be cross-examined, we appear to have an ideal exception to the hearsay rule. Statements by passengers before any damage has been done about the roughness of the train ride;³⁹ observations as to the speed of a train as it is going by;⁴⁰ remarks

³⁸ *A Suggested Classification of Utterances Admissible as Res Gestae*. (1922)
31 YALE L. J. 229.

³⁹ *Marlatt v. Erie Ry. Co.*, 154 App. Div. 388, 139 N. Y. Supp. 771 (4th Dept. 1913).

⁴⁰ *Norfolk & W. Ry. v. Gesswine*, 144 Fed. 5 (C. C. A. 6th, 1906).

made on hearing a fight in progress some distance away;⁴¹ "why don't the train whistle?", spoken as the declarant saw it approaching the crossing;—⁴² all these are exclamations the value of which is indicated by the opportunity to cross-examine the hearer as to the surrounding circumstances, by the speed⁴³ of the reaction, and the unemotional condition of the speaker.⁴⁴

Thus it appears that the spontaneous declarations regarded with least favor by the courts are more trustworthy than those which most of them admit without question: those where the trial judge rules that the statement was made under the influence of severe physical shock. It is by no means suggested, however, that these last should be excluded simply because other types of evidence assumed to be less reliable turn out, on investigation, to be more reliable. It is suggested, on the contrary, that all these varieties of declarations be admitted. If relevant they should go to the jury; for some are demonstrably more accurate than we have hitherto supposed, and those now admitted are not so inaccurate as to be arbitrarily excluded. To exclude any because they are not the immediate outpourings of an injured person is to insist on requirements shown to be artificial, if not mistaken.

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⁴¹ *Pope v State*, 174 Ala 63, 57 So. 245 (1911).

⁴² *Emens v. Lehigh Valley*, *supra* note 20.

⁴³ As was pointed out above, speed is of relatively slight importance in the absence of instruments. Some knowledge of the habits and temperament of the declarant would be more relevant. Otherwise it is safe to assume that if reflective self-interest had not put in an appearance before three and a half minutes, it was not likely to do so later on, without some outside interference.

⁴⁴ The possible objection being that hearsay is about twenty per cent less accurate than the testimony of eye witnesses. 6 Whipple, (1909) *PSYCH. BULL.* 153-70.