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<th>A Guide to Obtaining Evidence from Testimony</th>
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A GUIDE TO OBTAINING EVIDENCE FROM TESTIMONY

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Preface

One of my subjects of study is the psychology of testimony. Even when a witness intends to tell nothing but truths he is not safe from unavoidable mistakes. However, we are not without any means as much as possible to prevent such errors. Intermittent as my study has been, I have perused a voluminous literature, made many experiments and studied a lot of cases that had been handled by the court, for more than twenty years and, as result, I have come to be able, to a certain degree, to show what should be the guide to hearing a testimony. I should like, therefore, to present such guide that has been obtained as result, so that opportunities may be easily made available to make use of it in the practical business of dispensing justice. I shall be happy, if it proves of help in the actual work of the investigation, defence counsel and trial of the court.

1. Re modes of questions.
1. The questions and their words should be few so that the testifier may be made to talk much.

(Explanation) As any question has in it a nature to suggest an answer, it is better that no question should be asked, if it would not be necessary to ask one. One may make a telltale utterance, and while talking spontaneously he may reveal the truth which he cannot pervert. Therefore, it is preferable that a method should be taken such as to ask a blanket question, for instance, "Please tell me anything you know in this case." and then make the testifier talk freely, and his statement should be supplemented by asking minute questions for fulfilling wanting parts. As an ordinary person cannot make a statement that comes to the heart of a thing in answer to an all-round question, a mere generalized question will not, as a rule, clarify essential points.

2. As modes of questions, questions containing such interrogatives as "when", "where", "who", etc. should be asked.

(Explanation) As a question with an interrogative have the least suggestiveness, it is the best of all types of questions. If asked this question, the testifier finds himself in a state wherein he can freely give any answer that he chooses, so he is liable to testify according to his cognizance of truth without being under any other influence.

3. Questions which are usually asked take the form of "Was it the 6th of March?" or "Was the offender a man about thirty?" Such a question can often be answered by saying "Yes." or "No.", but it is not an ideal question. As such questions are liable to be answered in the affirmative by the testifier, they should be avoided as far as possible. (This
question is called the yes-or-no question.)

However, as answers to the question which begins with an interrogative are sometimes circumlocutory and indirect it is necessary to resort to the yes-or-no question more or less to save time.

(Explanation) Speaking simply logically, this kind of questions have half-and-half possibilities of being answered in the affirmative and in the negative, but when we ask them we find that a suggestive power works to bring about an affirmative answer.

4. Questions in the form of "......isn't it?", and "not so, eh?", are clearly suggestive and misleading, the former to affirmation and the latter to negation. (The former is called the affirmative question and the latter the negative question.) Such leading questions are liable to err the testimony, and therefore should be avoided.

5. A question like "Is it of blue colour or of any other colour?" has in itself a nature to demand an alternative answer of blue or some other colour. In the case of such question the testifier is apt to give an answer of "blue", which has been pointed out in the question. Because it has such suggestiveness, this is as bad as the yes-or-no question as a form of the question. (This is called the complete disjunctive question.)

(Explanation) Logically, as "blue" and "any other colour" covers all the cases, it seems that the testifier is afforded a complete freedom to choose an answer amongst all the cases, but psychologically, a suggestion of "blue" operates, because it is pointed out in the question.

6. A question like "Was it on the 3rd or the 4th?" is the worst. The 3rd and the 4th are not necessarily exhaustive but there are other dates such as the 1st, the 2nd, the 5th, the 6th and others. The answer may be of any of them, but if the testifier is asked a question like this, he is psychologically driven in to give an answer by choosing one or the other of the 3rd and the 4th. As all the other answers are checked, the danger of getting the wrong answer is exceedingly great. (This is called the incomplete disjunctive question.)

7. In asking a question from a certain premise, the question must be such that the premise should be confirmed by the other party. (Such a question is called the "premised question." )

(Explanation) For example, as a question like "Was the hat he had on at that time brown?" is at least on the premise that he had on a hat, the question should not be asked except in the case where the testifier has the certain knowledge of the fact. Even in the case where the testifier does not think that the person had on a hat but he is actually not very sure, he may be hallucinated into thinking that the person had on a hat and will give an imaginary answer as to the hat having been of brown colour.

8. The more the testifier thinks that the questioner has authority, the more easily he becomes the victim to the suggestion and the leading questions of the interrogator. This is not only so in the case where the questioner purposely gives him suggestions and leads him, but also in the already mentioned cases in which the unintended suggestions work on the testifier.

9. Of course suggestions and leading questions cannot, in principle, be avoided, but there are cases in which their use is extremely helpful in examining whether or not the testifier is easily influenced by suggestions and leadings. This is helpful to judge whether the testimony given by a person is generally reliable. This is, however, especially an exceptional case.

10. In short, the questioner should not give the testifier any suggestions as to what he
expects to hear from him. Even though where the testifier knows anything of the fact which is to be made clear, the questioner should take such an attitude as if he knew nothing.

(Explanation) For the above reason the question with an interrogative is the best. The question which begins with "When", "Where", "Who" or "What" is a question asked on the premise that the questioner does not know anything about the matter. Sometimes the questioner knows something of the fact which he is asking as result of his previous investigation. For instance, let us suppose that the questioner heard witness "A" say, when he examined him, "It was about one o'clock in the afternoon." With this in his mind, the questioner is now going to ask the second and the third witnesses to ascertain the truth. In such a case it often happens that the questioner will show an attitude of knowing it himself. The questioner may well take a knowing attitude as long as he does not give any suggestion of details, but it is extremely detrimental to ask a suggestive question, for example, "Isn't it?" (affirmative question) in such a case.

Even the testimony obtained by a question of suggestive and leading nature is sometimes true to the fact. However, even if a testimony that agrees with the fact may have been obtained in such a manner, it is not to be known whether it has agreed with the truth by chance. It is the testimony obtained without any suggestion that is of real worth. While, on the contrary, if a testimony should have been led by suggestions that were out of agreement with the truth, such testimony, though in agreement in over so many points, is nothing but a fabrication made in unison with the suggestions made from the imagination of the questioner. The fact that the sentencing court often blames the investigating authorities for their "air-castle" will be sometimes derived from such state of things.

II. Concerning the attributes of the testifier.

1. The sort of the person of the testifier has a great bearing on the reliability of his testimony. In short, the more the testifier is hard to be influenced by suggestions or his imaginative power is rather dull, the more he can be relied on, in principle. The difference in testifying capacity corresponding to the personality classification in general psychology has not been confirmed yet.

2. As ordinary witnesses of the scene, persons in the age-grade of 17 or 18 are generally the most reliable testifiers.

(Explanation) This will not apply to some matters to be testified.

3. As young children easily get influenced by suggestions, a questioner should especially be cautious when he hears their testimony. It is not seldom that a child may be prepossessed from the influence of people around it, such as its family members and others, before inquiry. However, so long as this state does not exist, a young child can often be an excellent testifier. Moreover, among children there are exceptional cases who have such excellent personality as not easily be influenced by suggestions.

(Explanation) As is said in common talk, "One cannot depend on what children say." or "Children are honest." tells us the both sides of the truth.

4. As the power of imagination is especially active at puberty, what has really been experienced as an objective fact and what has been pictured, by imagination are confused, and there originates a great danger of testifying as if both were objective facts. Especially when a young girl says that she has received sexual violation, careful examination is, in this sense,
very necessary.
5. Generally speaking, old people have only low ability of testifying. Of course, although the persons engaged in intellectual work are exceptions, for all this especially with respect to matters which must be testified purely from memory, their reliability is exceedingly small. In the actual cases of trial, cases are few in which the testimony of a young child is required, but testimonies of old people are so very frequently required that much care should be exercised.
6. A comparison between males and females in respect to their testifying ability shows that after the prime of life males show superiority but, among children, females contrarily show a small degree of superiority over males.
7. Females are generally prone to be influenced by suggestions, and besides their imaginative power is very active, and, so much so that they are less reliable. For example, a fact of females having the excellent power of observation of clothing has experimentally proved to be as exactly as it has been commonly believed. However, males are superior in the power of grasping the contents of words. In short, the superiority or inferiority of men or women cannot generally be determined; it can only be certified with distinction of matters to testify.
8. As one who has expert knowledge in some matter has special interest in it and power of observation with respect to it more than any other ordinary person, we can expect that he is an excellent testifier in respect of such matter. However, sometimes he may give wrong testimony from the vanity of an expert. There are, of course, cases in which he consciously smooth over externals, but here I must point out that sometimes a testimony is erroneously given unconsciously and from the operation of vanity. One who performs his duty of obtaining evidence should, with this point born in mind, take care in asking questions and in weighing the testimony.
9. It is rather usual that testimonies given by a lot of persons do not agree with one another on the matter which is one and the same thing as objective fact. It is a gross mistake to try to force witnesses into agreement. It is a misconception formed from a long established idea that unless the testimonies agree with one another they are of no worth. One who listens to a testimony should hold a perfectly passive attitude and hear the contents of the testimony as they are.
10. In the case where the testimonies of tens of people are heard with respect to one and the same matter, testimonies of the greatest number of the testifiers which agree with one another mostly tell of the truth of the objective fact. In this sense, the majority opinion is correct. However, cases in which so many witnesses can be had are exceptional. In many cases merely several witnesses, at the most, are made available, so it is often meaningless to discuss the number among such several. With respect to a matter of which generally an accurate testimony is not expected such as the precise time, for instance, even though there are tens of witnesses to testify and although comparatively many of them should agree, their testimonies could not be said to tell the truth.

III. Re matters to testify.
1. Even if the fact is physically one and the same, psychologically, it is not necessarily one and the same to an individual person. For this reason, an infant child sometimes remembers a thing which is interesting to it so well that an adult is surprised.
Therefore, whether or not a testimony concerning a certain matter is of evidential value greatly depends on how much interest the testifier has taken in it at the time when he had his original experience. In obtaining evidence it is necessary to clarify whether the testifier had much interest at his original experience. (In psychology the fact that distinctly has come across in the consciousness is called the "figure" and the fact that is receding in the background is called the "ground").

2. In the case where there is anything different from the ordinary condition in the object of observation which has become the prerequisite of the testimony, while, if the degree of extraordinariness is slight, the testimony will be given as if such extraordinariness did not exist (law of normalization), if the degree of extraordinariness is remarkable, such extraordinariness will tend to be exaggerated (law of emphasis), and a disorderly fact will tend to be testified in good order (law of order). For instance, as men in these days go out most frequently in black, dark blue or deep grey clothes in winter, special attention is not drawn to one's deep green clothes which are not so often seen to be worn in that season, so it is frequently testified that the clothes were black, dark blue or deep grey. But if white shoes which are extremely rare in winter were worn then, although footgears are usually go unnoticed, they are sufficiently perceived, remembered and sometimes testified as pure white. The testimony should be weighed with the consideration of these laws.

(Explanatory) Psychologically, as an application of the Gestalt Theory, E. Wulf has clarified the operation of the three principles of standardization, emphasis and autonomy on the memory and as result this agrees with my statement of the preceding paragraph. It should be noted that these principles have been proved as applicable to the memory which has very close connection with the testimony.

3. Everybody tends to supplement his testimony with his already acquired knowledge rather than to tell exactly what he has had cognizance of. For instance, we often come across a testimony in the proceeding of a trial that what could not have been seen from the position of the witness has been sighted by him. Therefore, it is necessary that he who hears the testimony should always make a post-examination as to whether such a observation was possible or not. If he has found it impossible, he must scrutiny whether it is impossible because there was no fact of "having seen it" or because there was a mistake in the testimony with respect to the conditions at that time, such as the position from which the testifier says he has seen.

4. A testimony relating to time and date is extremely unreliable as long as there is no special ground for the memory. It even happens sometimes that the night and day are confused, and cases are surprisingly many in which two things that happened during one and the same day are mistaken to have occurred on different days. In hearing a testimony about time and date, such mistakes must be avoided as far as possible, by asking the ground on which the testimony rests, and this should not be omitted.

5. In the testimony about time and date, individual difference of testifiers is especially great. Therefore, it is not surprising that the testimony of one person may heavily differ from that of another. The right and wrong of the testimony should by all means be judged by examining the ground that underlies the testimonial statement.

6. When a person has a feeling of expectation, such as a wish for an early realization of a certain fact or its quick passing away, a certain length of time is felt to be long in passing more than it actually passes, but when one has a reverse feeling, he feels time longer in
passing than it actually passes. For example, the length of time when one is waiting for a fire-engine at the time of a fire or the time when the person who is visited by a robber is waiting for his departure is liable to be overestimated. In weighing the testimony these points must be sufficiently considered.

7. When one is actually experiencing the passage of time, one feels as if time were short if he is driven by his work, but he feels it long when he is idle. On the contrary, however, when one recollects the passage of time that is past, the experienced time when he was busy seems to have been long, and the time spent in dull idleness seems to have been short. It is thought that this is because the time is measured according to the amount of experience in the case of recollection. This must also be considered in weighing a testimony.

8. With respect to a spot, it is also not easy precisely to point it out, but a correct testimony is more easily to be had than that of time and date. However, in the eye-measurement of the size of space or distance, mistakes are exceedingly frequent except in the cases of skilled persons. Therefore, in effecting the on-the-spot inspection of evidence or inspection of the actual condition one should strictly be warned against depending upon eye-measurement.

9. The number—such as of those who were present at a gathering,—may, from common-sense, be thought to be correctly testified, if the number is small, for instance, fewer than ten. However, it is not always so. Especially in case it concerns unknown persons, even their number is very often mistaken, so that we must be careful.

10. The number, cases in which it relates to time and date being included, is governed by the law of order, and tends to be testified by making it easier to say, for instance 5 or 10. This comes from the usual habit concerning numbers, and it is thought that in our daily experience this is well known to us, but unless we take this into account when we hear a testimony, an unexpectedly great error may ensue.

11. Errors are many in the testimony concerning colours. People are apt to attach importance to colours in the identification, but this is dangerous and misleading. Stress should be put to shapes and forms rather more than to colours.

12. The testimony of an eye-witness who has seen a certain person can be reliable in respect to the distinguished characteristics of the person he has seen, but his characteristics which are not salient tend strongly to be left out of the testimony by the law of normalization and accordingly it is helpful to indicate especially distinguished points in the search for an offender by his personal appearance and physical build, but it is no use to point out so many minute details. In such a case, as a rule, characteristics of personal appearance are more correctly grasped by an eye-witness than the features of the dress. For instance, it has been confirmed that a testimony as to whether a pair of spectacles, moustache or beard was worn or not has a high degree of reliability.

13. The purport of what one has said is comparatively easy to be grasped and, therefore, although the probability of a correct testimony in this regard is not small, it is extremely difficult for one to give testimony in exactly the same words that were spoken. It often happens in trial cases that wording itself becomes the point at issue but it is questionable whether truth can be arrived at by persistent questioning. It is not a good plan to stick to the wording in hearing a testimony.

14. With respect to what has been said, the purport can more easily be grasped than the words themselves but the more complicated and delicate are the contents, the more strongly are emphasised their features through the subjective view of the testifier and confused points
are put in good order. This happens especially when the contents of utterance are carried from mouth to mouth and also when time lapses.

15. In the method of confrontation, too, the principles found in the modes of questioning should be made use of.

(1) Such a way of asking a witness as by showing to him no one but the suspect or the accused and to ask, "Is he the robber that broke into your house?" is not good. (This is called the "single confrontation"). The result will be to give the witness a suggestion of an affirmative answer. It is good that the witness shall see the suspects or the accused standing in a row together with several other people and to ask him by saying, "Is there the robber who broke into your house among these people?" and let him make a free choice. (This is called the "selective confrontation"). Then, if the witness has pointed out the suspect or the accused from amongst the several, his testimony has in principle a most high degree or reliability.

(2) However, in case there is no subject offender among the several (in other words, the suspect or the accused is not the real offender,) the witness is liable to be in such a state of mind as in which he is bound to point out person who he thinks is the offender from among the several. It is dangerous, therefore, that the witness may point out a person who he thinks most resemble the real offender as if he were the real offender.

In short, in principle the "selective confrontation" should be resorted to, but we must not neglect to exercise precaution against the fact that therein also lies the cause of error.

(Explanation) When we adopt the single confrontation and ask a question in the form of "Is he the robber who broke into your house?", we use nothing but a yes-or-no question. Contrarily, however, if we adopt the selective confrontation and ask a question in the form of "Is there the robber who broke into your house among these people?", there is the merit of the use of a question in the form near to the question with an interrogative same as asking "Which is the offender?", but in the point that there is the defining of selection out of the shown several, this has the demerit of the use of the incomplete disjunctive question, which is the worst form of the question.