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Evidence

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V. EVIDENCE

A. Lay Testimony, Based on Combination of First-Hand Knowledge and Hearsay, Admitted to Show Truth of Matters Asserted

In a condemnation action the sole issue at the trial was the compensation due from the water and sanitation district to the landowners for the taking of an easement for a water pipe line. From judgment entered on the verdict for the landowners the water district appealed to the Supreme Court of Colorado, asserting as error that the testimony of one of the landowners regarding the depth of gravel on the condemned land was hearsay and therefore inadmissible.

The knowledge upon which the witness based his testimony was derived from two sources. First, he was present when the pipe line was dug, and he observed the pipe being put in. Second, he was present at the time "test holes" were dug to determine gravel depth prior to the commencement of quarrying operations by a gravel company which had leased the land. The witness observed the depth measurements being made and received them at that time from the owner of the gravel company. The witness, therefore, was testifying to facts that he knew partly at first hand, and partly from the reports of another. The supreme court held:

> Under such circumstances the judge should exclude, or admit, according to his view of the reasonable reliability of the evidence. McCormick, Evidence, § 10, p. 20. The trial court saw fit to admit Dan Pomponio's testimony, and in this ruling we see no abuse of discretion.[1]

The supreme court failed in its holding on this issue to include any identifiable theory upon which it based its decision. It is not clear whether the court decided that the testimony was admissible as reliable first-hand knowledge, or whether the testimony was partly hearsay but admissible for some other reason.

It is apparent that there is a hearsay problem that should have been resolved. The testimony of the witness as to the measurements reported to him out of court by the owner of the gravel company was offered to show the truth of the matters asserted therein, and thus rested for its value upon the credibility of the out-of-court declarant who was not subject to the normal safeguard of oath, confrontation, and cross-examination. Such testimony is clearly hearsay.[2] Many occasions naturally arise where a lay witness will testify to facts that he knows partly from his own opportunity to observe and partly from reports of others. To what extent should such evidence be admissible? That the judge should admit such evidence if

[1] Baker Metropolitan Water and Sanitation District v. Calvaresi, 397 P.2d 877 (Colo. 1964).

in his discretion it appears reliable may be stating the rule too broadly.

Will testimony of this nature be admitted if the greater portion of it is based on knowledge derived from the out-of-court reports of third persons? May the rule be stated that unless testimony is wholly hearsay, it will be admitted if it appears reliable? Probably the supreme court did not intend to open the door to the admission of this type of testimony to that degree.

The court cited McCormick, Evidence, § 10, p. 20, as the basis for its decision. McCormick states:

> One who has no knowledge of a fact except what another has told him cannot, of course, satisfy the present requirement of knowledge from observation. When the witness, however, bases his testimony partly upon first-hand knowledge and partly upon the accounts of others, the problem is one which calls for a practical compromise. Thus when he speaks of his own age, or of his kinship with a relative, the courts will allow the testimony. And in business or scientific matters when the witness testifies to facts that he knows partly at first-hand and partly from reports, the judge, it seems, should admit or exclude according to his view of the need for and the reasonable reliability of the evidence.

A careful scrutiny of the cases which McCormick cites in support of this passage will reveal that if testimony consisting of both hearsay and first-hand knowledge is to be admissible, the circumstances giving rise to its reliability must be very potent indeed if any substantial part of it is based on the report of others. In all the cases which McCormick cites, there is either a substantial relationship between the witness and the reporting parties which gives rise to the reliability of the reported information,[3] or the witness is testifying as an expert and the information relayed to him by others out of

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[2] MCCORMICK, EVIDENCE § 225 (1954); 31A C.J.S. *Evidence* § 200 (1964).

[3] Hunt v. Stimson, 23 F.2d 447, 452 (6th Cir. 1928). The trial court excluded testimony of the general sales manager of a lumber company on the grounds that his testimony was incompetent for lack of first-hand knowledge. The witness was testifying to the amount of lumber on hand on a given day to prove ability to perform a contract. Part of the basis for his conclusion was his memory of certain memoranda, in the form of tallies prepared by other employees regularly in the course of the business, which had not been preserved. The court of appeals considered that the witness was the general sales manager, he was "constantly familiar" with the particular lumber yard, he observed all of the piles of lumber in question, he participated in tallying many of them, he could estimate with fair accuracy the quantity of a pile from his observation, he necessarily kept informed as to amounts currently available, and that there was a 40% margin of safety in his estimate, and reversed. The court said, "We think that such objections as there were went to its weight, not its competency . . . ." because the witness' memory of the former memoranda was "... so aided by the circumstances as to entitled it to jury consideration . . . ." In this case not only is the information reported to the witness by employees in the regular course of the business but the witness is testifying as to matters with which he is particularly qualified. There is a substantial guarantee of trustworthiness to the testimony.

Dick v. Puritan Pharmaceutical Co., 46 S.W.2d 941 (Mo. App. 1932). Testimony of the owner and manager of a business that certain letters were mailed out was held not excludable as hearsay even though he had not personally mailed them

court is within his qualified realm,[4] or the court has allowed in the hearsay portion of the testimony under one of the exceptions to the hearsay rule.[5] The law review article he cites deals entirely with the problems encountered where an expert bases his opinion upon his own first-hand knowledge and the reports of others dealing with matters within his qualified field.[6]

The examples that McCormick uses as a vehicle for his expression that mixed hearsay and first-hand testimony should be admissible according to the judge's view of the need for, and the reasonable reliability of, the evidence indicate that it may not have been his intention to apply this rule to the situation where a lay witness is testifying to facts which do not have a considerably high degree of reliability. In the example he gives of a witness speaking of his own age, or of his kinship with a relative, the unreasonableness of applying the hearsay rule on the ground that knowledge of the fact was based partly on reports of third persons is obvious.[7] The other examples fall within testimony relating to business or scientific matters. Generally when a witness testifies to business matters and his knowledge thereof is derived partly from reports of third persons, the knowledge thus derived has been received in the

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but had been informed of their mailing by the secretaries who sent them. The court observed that the witness was in close touch with the business and such information was ordinarily known and continually acted upon by men in charge of such a business and held; "Testimony based on knowledge thus coming to him in the course of business is not to be excluded as hearsay . . . . It was not necessary for him to prove this fact by every factory girl who attended the details of mailing each and every sample and letter . . . ."

[4] Schooler v. State, 175 S.W.2d 664, 670 (Tex. Civ. App. 1943). A research geologist testifying as an expert gave testimony as to structure and oil prospects of land based on personal inspection and in large part on geological reports made by others. The court held:

> We think the testimony was admissible. The conclusions of an expert as to so technical a subject as the geological features of a defined area arrived at in part from study of unsworn reports prepared by other experts are analogous to the diagnosis by a physician based in part on unsworn reports of tests made by hospital technicians. Testimony of diagnoses based in part on such reports has been held to be admissible. Sundquist v. Madison, Rys. Co., 197 Wis. 83, 221 N.W. 392; see also Abbott's Civil Jury Trials, 5th Ed., p. 587. The objection, we think, goes more to the weight to be given to, than to the admissibility of, such testimony. Testimony predicated both upon personal knowledge and upon hearsay has been held to be admissible in this jurisdiction. Norris v. Lancaster, Tex. Com. App., 280 S.W. 574. 175 S.W.2d at 670.

[5] Gresham v. Harcourt, 75 S.W. 808 (Tex. Civ. App. 1903). The witness was testifying as to the number of sheep belonging to partnership. The witness was present when the sheep were counted and heard two men who did the counting call out the numbers and she put the numbers down in a book at that time. The court said that this was not hearsay, but was "original testimony coming within the rule of res gestae . . . ." 75 S.W. at 808.

[6] Maguire and Hahesy, *Requisite Proof of Basis for Expert Opinion,* 5 VAND. L. REV. 432 (1952).

[7] This may properly be called the common sense exception to the hearsay rule—"Plainly the whole human scheme is acrawl with hearsay, and highly intolerant we should be of any legal technician who tried substantially to cut down the convenient operation of this huge undefined exception to the rule of exclusion." MAGUIRE, EVIDENCE —COMMON SENSE AND THE COMMON LAW 130 (1947).

course of the business and has found its way into business records. Reports of this nature are commonly regarded as being one of the exceptions to the hearsay rule.[8] The need for and the reliability of such evidence has been recognized by the majority of jurisdictions. And almost inevitably, when a witness is testifying to scientific matters, he is first qualified as an expert in that field. There are sound reasons for regarding expert testimony based partly on the reports of other investigators or technicians as being competent.[9] And this is especially true when the reports of third persons are attested by the expert as being information upon which he would normally act, or use as the basis for his judgment, in the practice of his profession.[10] Even though there are good grounds for the need for, and reliability of, such expert testimony, McCormick himself recognizes that the majority of jurisdictions probably would still not allow an expert to base his opinion on the report of others because of the absence of the first-hand knowledge qualification.[11] Colorado stands with the majority which would exclude such testimony.[12]

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[8] Business records as an exception to the hearsay rule: See generally Empire Diesel, Inc. v. Brown, 146 Colo. 477, 361 P.2d 964 (1961); MCCORMICK, EVIDENCE §§ 281-90 (1954); 5 WIGMORE, EVIDENCE §§ 1517-20 (3d ed. 1940); Tracy, *Introduction of Business Records,* 24 IOWA L. REV. 454 (1939).

[9] National Bank of Commerce v. New Bedford, 175 Mass. 257, 261, 56 N.E. 288, 290 (1900). (The court held that knowledge derived from hearsay is reliable because the expert gives it the "sanction of his general experience."); Finnegan v. Fall River Gas Works Co., 159 Mass. 311, 34 N.E. 523 (1893); MCCORMICK, EVIDENCE § 15 (1954); Maguire, *supra* note 6. In *Finnegan, supra,* Holmes approved reception of such testimony on the theory that the out-of-court report "gains an authority" by being accepted by the expert.

[10] MCCORMICK, EVIDENCE § 15 at 33 (1954).

[11] *Id.* at 32. See also People v. Black, 367 Ill. 209, 10 N.E.2d 801 (1937) wherein the court found that an expert witness "invaded the province of the jury" in weighing matters privately reported to him; People v. Keough, 276 N.Y. 141, 11 N.E.2d 570 (1937) in which the court said:

> Where his [expert's] opinion, however, is based upon the statements of third persons not in the presence of the jury, the latter not only is in ignorance of what those statements contain, but also has no opportunity to pass on the truth and probative force of the statements or to determine whether the statements were not concocted to produce a desired result . . . . 11 N.E.2d at 572;

State v. David, 222 N.C. 242, 22 S.E.2d 633 (1942) where the court held that testimony of an expert based on information obtained in any other manner than from the evidence given in court is hearsay and inadmissible; Annot., 98 A.L.R. 1109 (1935). *But see* United States v. Aluminum Co. of America, 35 F. Supp. 820 (S.D. N.Y. 1940) in which it was held that:

> Opinion testimony by an acceptable expert resting wholly or partly on information, oral or documentary, recited by him as gathered from others, which is trustworthy and which is practically unobtainable by other means, is competent even though the firsthand sources from which the information came be not produced in court . . . . In other words, when hearsay evidence is offered it is admissible if resort to it be essential in order to discover the truth and if the surroundings persuade the court that the information adduced by the expert as a basis of his opinion is reliable. 35 F. Supp. at 823.

[12] Walsen v. Gadis, 118 Colo. 63, 194 P.2d 306, 319 (1948). In an action between conflicting claimants to subterranean ore, a map drawn by mining company not a party to the litigation was inadmissible to establish basis for the opinion of a mining engineer, who had independent first-hand knowledge, as to location of ore. The court said the exhibit "should be the result of the engineer's own effort and observations and could then be the basis for his opinions; otherwise not . . . ." 118 Colo. at 88.

Surely, then, it would be premature to apply the statement of the rule in the principal case to the situation where a lay witness is testifying, where there are no circumstances which clothe the hearsay part of the testimony in a substantial degree of trustworthiness, and where there is no clear showing of necessity to resort to such evidence. There has been growing recognition of the need to liberalize the exclusionary rules of evidence in favor of admissibility, and the unruliness of the hearsay rule has been especially criticized.[13] But the nature of the legal profession is notoriously conservative[14] and its natural inclination is to resist any revolutionary change.

Only Texas, which is notably a jurisdiction of comparatively liberal rules toward admissibility of evidence,[15] has admitted testimony based on facts known partly at first hand and partly from hearsay when neither need to resort to such testimony nor strong circumstances which give rise to the reliability of the hearsay element are present.[16] That jurisdiction goes so far as to say that unless testimony is "wholly hearsay" it is admissible.[17] The adoption of such a rule would seem to give too much discretion to the trial judge to admit testimony based in large part on hearsay. The principal reasons for the exclusion of hearsay are the want of the normal safeguards of oath, confrontation, and cross-examination for the credibility of the out-of-court declarant.[18] And it is evident that most jurisdictions adhere to the rule quite stringently.[19] The Texas rule intimates that

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[13] Maguire, *op. cit. supra* note 7, at 147.

[14] *Id.* at 150.

[15] Texas is probably the only jurisdiction to clearly accept declarations of "present sense impressions" as an exception to the hearsay rule. This theory is roughly akin to the excited utterances (res gestae) exception except that it does not require a startling or shocking event and is therefore without the supposed safeguards of impulse, emotion, or excitement. Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942). See generally McCORMICK, *op. cit. supra* note 10, § 273.

[16] Schooler v. State, 175 S.W.2d 664 (Tex. Civ. App. 1943); Fort Worth and R.G. Ry. v. Thompson, 77 S.W.2d 289 (Tex. Civ. App. 1934); Norris v. Lancaster, 280 S.W. 574 (Tex. Com. App. 1926). In *Norris, supra,* the testimony of shipper's superintendent as to the condition of vegetables which he had inspected prior to shipment held admissible although he did not remember the particular freight car and referred to records of shipment, which had not been made by him, and were not offered into evidence. The court said:

> The rule undoubtedly is that, where it appears a witness' testimony is predicated both upon personal knowledge and upon hearsay, his testimony is admissible . . . . To exclude testimony upon the ground of hearsay, it must affirmatively appear that such testimony is wholly hearsay, and that the witness is not speaking as to matters otherwise within his own knowledge . . . . 28 S.W. at 576.

[17] Norris v. Lancaster, *supra* note 16.

[18] McCORMICK, *op. cit. supra* note 10, § 225 at 460.

[19] Board of Com'rs of Lake County v. Keene Five-Cents Sav. Bank, 108 Fed. 505, 510 (8th Cir. 1901) which held that "The rule that hearsay is incompetent evidence is essential to the preservation of personal liberty and the rights of property. It should be guarded against encroachment with jealous care . . . ."

as long as the witness has some first-hand knowledge his testimony is admissible even if mostly hearsay. Such a rule applied liberally would vitiate the hearsay rule as well as the reasons which created it. There have been comparativly few cases in Texas that have recited the rule, which may indicate a reluctance to apply a rule so liberal and potentially limitless in application.

It is notable that while McCormick included as an element of his proposed rule that the judge in his discretion ". . . should admit or exclude according to his view of the need for . . ." evidence of the type in question, the Colorado Supreme Court chose to exclude the element of necessity. In the statement of the rule, the judge can admit or exclude merely on the basis of the reasonable reliability of the evidence.[20] There was no showing in the reported case that the out-

[20] Leading legal scholars have recognized the probative value of hearsay in situations where it was excluded because it did not come under a recognized exception and have advocated drastic revision of the hearsay rule for that reason. The proposed solution is to allow relevant, material hearsay if it satisfies general requirements of necessity and trustworthiness. See *e.g.* MCCORMICK, *op. cit. supra* note 10, 626-34; 5 WIGMORE, EVIDENCE § 1427 (3d ed. 1940); and 13 STAN. L. REV. 945 (1961). Perhaps this is not such a drastic revision in view of the fact that Wigmore maintains the original basic principles underlying the exceptions themselves are necessity and circumstantial guarantee of trustworthiness. When the courts have adopted the proposals and have gone outside the orthodox hearsay exceptions to allow hearsay, they have invariably done so on the grounds of necessity and circumstantial guarantee of trustworthiness. In Dallas County v. Commercial Union Assur. Co., 286 F.2d 388 (5th Cir. 1961) the court said:

> We do not characterize this newspaper as a "business record", nor as an "ancient document", nor as any other readily identifiable and happily tagged species of hearsay exception. It is admissible because it is necessary and trustworthy, relevant and material, and its admission is within the trial judge's exercise of discretion in holding the hearsay within reasonable bounds. 286 F.2d at 397.

Even in this relatively liberal approach to admissibility, necessity is a vital element. Courts that have recognized that hearsay may be admissible if resort to it be essential in order to discover the truth, do not generally hold that total inaccessibility of first hand knowledge is a condition precedent to its admissibility, but they rarely find "necessity" to exist in absence of at least a showing that "great practical inconvenience" would be imposed in producing the first-hand material. See United States v. Aluminum Co. of America, 35 F. Supp. 820 (S.D.N.Y. 1940).

In a situation like ours, where a witness testifies to facts known partly at first-hand and partly from hearsay, it is likely that much probative value would be lost if the testimony were excluded, and this is undoubtedly the type of situation the legal scholars had in mind. But there must be solid grounds on which to admit such testimony. The supreme court, in the principal case, by failing to include necessity as a condition precedent to admission, seems to have strayed from the recognized theories and general trend and has adopted, probably unintentionally, a very liberal rule indeed.

This paper does not intend to delve into other areas of evidence which necessarily come into play in considering a problem of the scope of the one at hand. However, at this point it is apparent that there is a best evidence question that should be considered. It is generally accepted in Colorado that testimony of what certain persons told the witness is inadmissible where such persons can be produced, since the best evidence of which the case is susceptible must be produced. See Sloan Sawmill and Lumber Co. v. Gutthal, 3 Colo. 8 (1876). Proof of unavailability, which might take the form of great practical inconvenience, may satisfy this problem but would necessarily bring into play the degrees of secondary evidence problem. Assuming that the

of-court declarant was unavailable at all, or even that it would have been inconvenient to bring him in. Furthermore, the degree of reliability that McCormick evidently intended, on the basis of the cases and articles he cited, is hardly met in the principal case. There is nothing in the relationship between the landowner (witness) and the out-of-court declarant, his lessee, or in the surrounding circumstances, that gives the reported information any substantial degree of reliability; nor is the witness testifying as an expert; nor did the court consider the hearsay element of the testimony as coming under one of the exceptions.

Perhaps the supreme court considered the hearsay element in the witness' testimony so insignificant as compared to the first-hand knowledge that it was not worth serious consideration, or the court may have found that the hearsay-derived knowledge was only supplementary to the first-hand knowledge. That is, the knowledge based on the report of the out-of-court declarant was offered to prove the truth of a matter which the witness already knew from his first-hand observation. In the latter case the court would be thoroughly justified in its holding.[21]

The case is probably not valuable, as to the issue in question, for the very reason that it is based upon no identifiable theory. It is probable that if an attorney were to use this case as a vehicle to get lay testimony admitted where the witness has some knowledge from personal observation, but which is based largely on hearsay, the court will require a considerably higher degree of reliability of the hearsay element before it allows the testimony. It is also probable that the court will resort to such testimony only when necessary.[22]

If the reliability of the hearsay element of such testimony can be proved by showing that it falls under one of the exceptions to he hearsay rule, the evidence is clearly admissible. The court in the principal case might have considered a few possible exceptions—

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out-of-court declarant is unavailable, shouldn't there also be a showing that the written report of the test hole measurements, if there was one in the principal case, was also unavailable before the hearsay testimony should be admitted? See Hartford Fire Ins. Co. v. Smith, 3 Colo. 422 (1877); *but see* Allen v. W.H.O. Alfalfa Milling Co., 272 F.2d 98 (10th Cir. 1959) which held that the mere fact that matter is provable by writing does not bar oral proof, and that parol proof based on knowledge gained independently of the written matter is admissible even though it may pertain to the same matter.

[21] See Allen v. W.H.O. Alfalfa Milling Co., *supra* note 20, which held that where a witness swears he has personal knowledge of a fact, his testimony is not rendered inadmissible by a further showing that he also knows it from hearsay. See also, 31A C.J.S. *Evidence* § 203 (1964).

[22] See note 20 *Supra.*

res gestae,[23] declarations of present sense impressions,[24] or past recollection recorded.[25] It is difficult, however, to apply a recognized exception to the particular facts in the principal case and this is precisely the type of situation which prompted this review.

Surprisingly little authority has considered the problems encountered when a lay witness testifies to facts known partly at first hand, and partly from hearsay. What little authority there is has dealt with the problems only sparsely and has done nothing to develop a necessary systematic rationale[26] for the admission or exclusion of such testimony. Perhaps the lack of authority in this area is due to the fact that the hearsay and first-hand elements are generally separable and the court merely separates out the hearsay, thereby eliminating the problem. At other times the reliability of the hearsay is readily apparent through application of one of the exceptions or for other reasons already discussed.

The real problem arises when the knowledge derived from the mixed hearsay and first-hand observation is so interwoven or ultimately dependent on both elements that it is impossible to separate the hearsay from the first-hand testimony, and where the hearsay does not fall within a recognized exception. More often than not, testimony of this nature will have a high degree of probative value and blanketly to exclude it because based partly on hearsay would not be desirable or in accordance with the need to revise the

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[23] See generally MCCORMICK, *op. cit. supra* note 10, at 585-87. In Baney v. People, 130 Colo. 318, 275 P.2d 195 (1954) the Colorado Supreme Court stated that whether a declaration is part of the res gestae depends upon whether the declaration was "the facts talking through the party," or "the party talking about the facts." The latter is not part of the res gestae and is clearly the situation in the principal case. In another case, Stahl v. Cooper, 117 Colo. 468, 471, 190 P.2d 891 (1948), the court, while recognizing that the tendency is to broaden, rather than restrict, the res gestae rule, nevertheless restricted it to statements "in the nature of an exclamation, rather than an explanation; it must be spontaneous and instinctive rather than deliberate . . . ." For an article discussing res gestae in Colorado which recognizes that the rule of necessity should govern admission of this type of evidence, see Burke, *More on Res Gestae,* 30 DICTA 351 (1953).

[24] See generally Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942); MCCORMICK, *op. cit. supra* note 10, at 584-85; Note, 46 U. COLO. L. REV. 430 (1964). Even this extremely liberal approach requires that the out-of-court declarant comment on what he sees at the very time that he is receiving the impression, and this element is missing in the principal case.

[25] See generally MCCORMICK, *op. cit. supra* note 10, 590-595. The recording itself, under this exception, is the evidence. The original writing, if procurable, must be produced, and secondary evidence of its terms is admissible only when the original is shown to be unavailable. It may be possible, in a search to apply the facts in the principal case to a recognized exception, to consider the much-debated oral co-operative records exception. But if that were applied both the out-of-court declarant and the person to whom he reported must appear and vouch for the correctness of the reported information.

[26] The need for systematic rationale was recognized by Maguire in dealing with problems where an expert testifies to mixed hearsay and first-hand testimony, Maguire and Hahesy, *supra* note 6, at 450. Texas is a shining example of lack of reasoning in its decisions on such issues—blanketly admitting the testimony. See the Texas cases cited, *supra* note 16.

strict application of the hearsay rule.[27] Whether the court should exclude or admit should depend, it seems, on a careful analysis of the various factors, looking ultimately to see if there is a *necessity* to resort to such testimony, and if the circumstances clothe the hearsay basis of the testimony with a *substantial degree of trustworthiness.* By stating the rule as such there is room for flexibility within the structural principles Wigmore expounded as the original basis for the exceptions to the hearsay rule.[28] Because the rule is basically the same as applied where an expert witness gives an opinion based partly on hearsay,[29] the courts will have the benefit of looking to that more developed area for guidance. However, the standards as to the degree of circumstantial reliability necessary to admit the evidence where a lay witness testifies must necessarily be higher than those where an expert is testifying, because the knowledge derived from the expert's out-of-court sources has the sanction of his general experience and is therefore more reliable by its very nature.

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[27] Maguire, *op cit. supra* note 7, at 145, 147; see also the discussion *supra* note 20.
[28] *Id.* at 147.
[29] United States v. Aluminum Co. of America, 35 F. Supp. 820 (S.D.N.Y. 1940).
[30] Maguire and Hahesy, *supra* note 6, at 450.