December 1960

Evidence--Past Recollection Recorded--Present Recollection Revived

John George Van Meter
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Evidence Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol63/iss1/13

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
The *Ithaca* case, a United States Supreme Court decision, has not been expressly overruled even partially by the Supreme Court so as to conform to the limitations set forth in the Revenue Ruling or the cited cases. Further, the decisions which have employed the limitations have been in inferior courts. The final decision regarding the intentment of the statute rests with the Supreme Court. It should be construed in such a way as to make for certainty and uniformity in its application.

*Robert Glenn Lilly, Jr.*

Evidence—Past Recollection Recorded—Present Recollection Revived

Upon prosecution for murder in the first degree *D* objects to the use by two witnesses of documents upon which his alleged confession to the crime was recorded. Both witnesses read their notes verbatim after testifying that they could achieve greater accuracy from the notes than from their recollection alone or their recollection refreshed by the notes. *Held*, it is not error to allow a witness to read a faithful memorandum where he is devoid of a present recollection but possesses an accurate account of the events made by him at the time of their occurrence. *Hall v. State*, 162 A.2d 751 (Md. 1960).

The instant case states clearly and concisely the best and most widely accepted view concerning a field of evidence which has in the past been the subject of much misunderstanding. 3 *Wigmore, Evidence* § 735 (3d ed. 1940). It is impossible to discuss past recollection recorded without also considering the concept known as present recollection revived. It is this interrelation which has caused the courts some trouble in distinguishing between the two. *Hall v. State, supra*, clearly involves a case of past recollection recorded. Here both witnesses testified that they could not remember clearly the contents of the confession, but both testified that they could remember having made accurate recordings of the defendant's statements at the time of their occurrence. The value of such testimony is readily discernible, the frailty of the human memory gives impetus to the acceptance of this rule by the courts, and the ends of justice are best served by its use.
The terminology used to distinguish these two concepts appears to have been first used by Professor Wigmore in his treatise on evidence, wherein he discusses the two concepts. The use of past recollection recorded envisions a situation in which the witness has no present memory concerning an event, but does recall having recorded the event by note or memorandum at the time. Whereupon the record is produced, sworn to be correct by the witness, and then read into the record. Use of such evidence is generally allowed, but some jurisdictions have imposed restrictions on the doctrine. In New York past recollection recorded may not be used until it is shown that no present recollection exists at all. National Bank v. Madden, 114 N.Y. 280, 21 N.E. 408 (1889). While in Massachusetts the rule is recognized but limited to regular entries in the course of business. 3 Wigmore, Evidence §§ 734, 736, 758 (3d ed. 1940).

The latter restriction apparently has some authority in West Virginia. In the case of Vinal v. Gilman, 21 W. Va. 301 (1883), the question was raised as to whether a copy of an invoice was admissible in evidence when read by a party who was present at the time when the invoice was copied but not when it was originally written. The West Virginia court held, citing several Massachusetts decisions, that such a memorandum made in the regular course of business stands upon a different footing from that of a mere private memorandum. The former is admissible in evidence, even though the original transcriber be deceased, upon proof of handwriting. But if the party is still alive the case holds, at page 309: "...though he remembers and can testify nothing about the facts recorded in the entry but simply testifies that he made the entry in the usual course of business at the time of the transaction, such entry is of itself primary evidence of the facts recorded." But, when the memorandum is one other than one made in the regular course of business, the court emphasized that such a record could not itself be evidence and as such given to the jury. Such a record could be used by the witness to refresh his memory, but, added the court "still it is the statement of the witness and not the private memorandum or entry which is evidence."

One must keep in mind that past recollection recorded of necessity involves no present recollection of the witness whatsoever, and the document itself is the primary source of the testimony. The West Virginia court committed the not too uncommon error of confusing these two concepts. It would apparently limit the ap-
plication of the past recollection recorded concept to memoranda made in the regular course of business. Where the entry is a private memorandum, it is quite clear that the court would allow the witness to refresh his memory from the document but would not allow it to be entered in evidence. But to hold that the memorandum may be read, and by this it is assumed to be a verbatim reading, by the witness yet still be inadmissible in evidence is fallacious. If the court would allow the memorandum to be read then why keep the document itself out? The court is correct in not allowing a memorandum from which the witness merely refreshes his memory as he testifies to be admitted, but it is incorrect in its statement that the memorandum may be read evidently verbatim and still not be admissible itself. More significant, however, than the mere admission of the private memorandum in evidence where its use is only that of refreshment, is the apparent limiting of the doctrine of past recollection recorded to business entries only. Vinal v. Gilman, supra, has been cited in a long line of holdings as a correct statement of the law, both as to shop book entries and as to the two evidence concepts under discussion. For the most part the situations involved present recollection revived, but apparently there is no direct holding that would extend the doctrine of past recollection recorded beyond business entries in regularly kept books. Di Bacco v. Benedetto, 82 W. Va. 94, 95 S.E. 601 (1918); Delitz v. McVey, 77 W. Va. 601, 87 S.E. 926 (1916); Sand Co. v. Smith, 76 W. Va. 246, 85 S.E. 513 (1915).

However, in a later West Virginia case, where a witness in a second trial was unable to recall much about the events of the crime, examining counsel was allowed to use the transcript of the prior trial in order to refresh his memory. The court by dicta seemed to indicate that the use of past recollection recorded extends to all memoranda whether made in the regular course of business or not. Although no subsequent cases were found relating specifically to this point, it is hoped that the practice has been adopted through usage. But should the West Virginia court later restrict the use of such memoranda to business transactions only, as the implication of prior cases apparently does, the result would be a needless restriction upon an extremely valuable procedure. State v. Legg, 59 W. Va. 315, 53 S.E. 545 (1906).

As stated before, discussion of past recollection recorded necessarily requires a discussion of present recollection revived. The West
Virginia court has had a little less trouble with this principle than with its apparent double. *State v. Legg*, supra, which deals directly with this point holds: "The testimony of a witness upon a preliminary examination of one accused of a crime may be used by the witness upon trial of such accused person for the purpose of refreshing his memory." Usage of the concept of present recollection revived is further bolstered in West Virginia by a succession of cases dealing with books of original entry. *State v. Larue*, 98 W. Va. 667, 691, 128 S.E. 116 (1925); *Architects & Builders v. Stewart*, 68 W. Va. 506, 70 S.E. 113 (1911). Similarly, a case allowing the testimony of a nurse, who had refreshed her memory as to the number of persons visiting the plaintiff's room by use of the bed chart, was held proper. *Browning v. Hoffman*, 90 W. Va. 568, 589, 111 S.E. 492 (1922).

The use of notes by a witness to refresh his memory immediately raises the danger of a witness being given a script from which to testify. The threat of such sharp practice has given rise to inspection of the notes so used either by opposing counsel or by the trial judge. 3 Wigmore, Evidence § 111 (3d ed. 1940). Even so, the process of refreshing the memory by notes is comparatively unrestricted save by the use of common sense.

From the cases it would appear that the doctrines of past recollection recorded and present recollection revived are established in this state in varying degrees. Concerning the latter, there is little doubt, but some confusion does exist among the cases as to past recollection recorded. As stated before, this doctrine is extremely useful and instances of its applicability should come readily to mind. Perhaps a clear affirmation of it by the West Virginia court would be appropriate some time in the future.

*John George Van Meter*

---

**Income Tax—Alimony—Payment for Months**

*Prior to Divorce Decree Not Deductible*

In May 1953 while a divorce action was pending, the respondent and his wife entered into an agreement by which the respondent agreed to pay his wife $30,000 annually in advance beginning in February of that year. In June an interlocutory divorce decree was entered, and in September this divorce decree became final. On the