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Recollection on the Witness Stand

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will be construed as giving authority for such recording so that it will carry constructive notice to grantees of the realty. Under either procedure, he subjects himself to the possibility that his hopes will not be realized.

To clear up the course open to such a chattel mortgagee and to fairly protect purchasers of the land from claims of chattel mortgagees which are not in the real property records, it is suggested that a provision requiring recordation with the realty records similar to that at present provided for conditional sales contracts would be a highly desirable legislative enactment. Such a statute seems to afford the best way to adjust the rights of the chattel mortgagee and those who subsequently deal with the realty.

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RECOLLECTION ON THE WITNESS STAND

The art of witness interrogation is difficult where the witness on the stand is unable to narrate the event which he has observed because of some present defect in his recollection.[1] In such case there are the following possibilities:

A. The impressions once made upon the mind of the witness may be revived by some means. This is "present recollection revived".[2]

B. If a record has been made of the witness' impressions, such record may come in as evidence if certain requirements be met. This is "past recollection recorded".[3]

The purpose of this comment is to collect the Washington cases involving these situations and to indicate whether or not our court follows the usual rules, analyzing those cases which have departed therefrom which special regard to some recent decisions which seem out of line.[4] Reference will also be made to illustrative cases from the Ninth Circuit Court of Appeals as indicative of the rules followed by the Federal Court for this circuit.

A. Present Recollection Revived

The witness testifies as to what is actually called up from the recesses of his memory. For the purpose of reviving a recollection anything may be used.[5] Most commonly it is a writing, around which centers most of the difficulty because of the frequent failure to distinguish between the present situation where the witness is now testifying as to what has been recalled to his mind and the situation, treated subsequently, where the witness, though without any present

[1] Essential testimonial qualifications are observation, recollection, and narration. 1 Wigmore, Evidence (2d ed. 1923) § 478.

[2] 2 *id.* § 758 *et seq.*

[3] 2 *id.* § 734, *et seq.*

[4] State v. Harkness, 1 Wn. (2d) 530, 96 P. (2d) 460 (1939); Clausen v. Jones, 191 Wash. 334, 71 P. (2d) 362 (1937).

[5] Jewett v. United States, 15 F. (2d) 955 (C. C. A. 9th, 1926); Hinkleman v. Pasteelnick, 3 N. J. Misc. 1010, 130 Atl. 441 (1925); Note (1926) 24 Mich. L. Rev. 420

recollection, has made a fairly reliable record of the event.

It may be any writing.[6] The following are the generally accepted rules relative to the use of a writing for the purpose of refreshing memory.

1. *The writing need not be made by the witness himself.*[7]

Early Washington cases[8] indicated that the writing should be made by the witness himself but subsequent cases[9] have not so required and Washington would probably now follow the general rule, as does the federal court.[10]

2. *The writing need not be the original, but may be a copy.*[11]

The recent case of *Clausen v. Jones*[12] requires the original, although two years before, in *Schmidt v. Van Woerden,*[13] not mentioned in the later decision, a copy was used. If *Clausen v. Jones* be taken at face value, Washington is out of line, but a closer analysis of the case indicates that present recollection was not involved.[14] The federal court recognizes a copy may be used.[15]

3. *The writing need not be made at the time of the event.*[16]

Again there is inconsistency in the cases. *Bergman v. Shoudy*[17] held that a memorandum made seven months after the event could not be used to refresh the memory. Yet for the same purpose the use of bills

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[6] 2 WIGMORE, EVIDENCE § 758. The cases often require that the witness know that the writing is correct, otherwise he may be subject to incorrect impressions. State v. Patton, 255 Mo. 245, 164 S. W. 223 (1914); Seattle v. Erickson, 99 Wash. 543, 169 Pac. 985 (1918).

[7] 2 WIGMORE, EVIDENCE, § 759. "If upon looking at any document he can so far refresh his memory as to recollect a circumstance, it is sufficent; and it makes no difference that the memorandum is not written by himself, for it is not the memorandum that is the evidence but the recollection of the witness." Henry v. Lee, 2 Chitty 124 (1814).

[8] Williams & Co. v. Miller & Co., 1 Wash. Terr. 88 (1860). A bill of particulars made in the handwriting of the witness could properly be used. Bergman v. Shoudy, 9 Wash. 331, 37 Pac. 453 (1894) (requiring the memorandum to be made by the witness.)

[9] Seattle v. Erickson, 99 Wash. 543, 169 Pac. 985 (1918). "Conceding that a witness might refresh his recollection for the purpose of testifying in court by reference to book entries made by another, there should at least accompany the offer of such proof a showing that the witness knew the entries to be correct." State v. Paschall, 182 Wash. 304, 47 P. (2d) 15 (1935) (out of court use by the witness of a transcript of stenographic notes made when the defendant was questioned on being taken into custody.) Frair v. Caswell, 79 Wash. 470, 140 Pac. 564 (1914) (bill of particulars).

[10] Pacific Coast S. S. Co. v. Bancroft-Whitney Co., 94 Fed. 180 (C. C. A. 9th, 1899); *see* Jewett v. United States, *supra* note 5; Olmstead v. United States, 19 F. (2d) 842 (C. C. A. 9th, 1927) (typewritten record book made by the wife of the witness). *See* Hoffman v. United States, 87 F. (2d) 410 (C. C. A. 9th, 1937) (indicating that it wasn't important by whom the statement was made.)

[11] 2 WIGMORE, EVIDENCE § 760.

[12] 191 Wash. 334, 71 P. (2d) 362 (1937). Notes (1937) 17 ORE. L. REV. 78; (1927) 13 WASH. L. REV. 61.

[13] 181 Wash. 39, 42 P. (2d) 3 (1935).

[14] See note 51, *infra.*

[15] Goodfriend v. United States, 294 Fed. 148 (C. C. A. 9th, 1923). *See* Jewett v. United States, *supra* note 5. Olmstead v. United States, 19 F. (2d) 842 (C. C. A. 9th, 1927) (typewritten copy of memorandum of overheard conversations). Prentiss v. Chandler, 85 F. (2d) 733 (C. C. A. 9th, 1936) (memorandum from documents, some of which were in court).

[16] 2 WIGMORE, EVIDENCE § 761.

[17] 9 Wash. 331, 37 Pac. 453 (1894).

of particulars, which most likely would be made at some considerable time after the event, was upheld in a prior case[18] and in a subsequent case.[19] It is probable that Washington would follow the usual rule. The dicta in the *Jewett* case[20] and in *Hoffman v. United States*[21] indicates this rule to be the one followed by the federal court.

4. *The memorandum may be used by the opponent for purpose of cross-examination.*[22]

This rule is recognized in both jurisdictions where the writing was used in court.[23] Washington has declined to apply it where the memorandum was used out of court for the purpose of refreshing memory.[24]

If the witness has made a memorandum at some prior time but does not resort to it, there is no reason why the opponent should have access to it.[25]

5. *The writing cannot be introduced and is not part of the evidence,*[26] *but at the request of the opponent or the jury the jury may see it to determine the propriety of its use.*

While the Washington court has held that the proponent of the witness cannot put in the memorandum,[27] it has also refused to allow the opponent the right to have it go to the jury.[28] The federal court would evidently follow the usual rule.[29]

6. *The cross-examiner may use it to revive recollection.*[30]

Dictum in *State v. Tyree*[31] indicates that Washington would follow this rule, as would probably the federal court.[32]

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[18] Williams & Co. v. Miller & Co., 1 Wash. Terr. 88 (1860).

[19] Frair v. Caswell, 79 Wash. 470, 140 Pac. 564 (1914).

[20] See note 5 *supra.*

[21] 87 F. (2d) 410 (C. C. A. 9th, 1937). "It is not so important when the statement is made . . . if it serves the purpose to refresh the mind and unfold the truth."

[22] 2 WIGMORE, EVIDENCE § 762.

[23] State v. Tyree, 143 Wash. 313, 255 Pac. 382 (1927); Green v. United States, 19 F. (2d) 850 (C. C. A. 9th, 1927) (opponent denied right to take into possession the volume containing the memorandum, but not denied the right to inspect it); Brownlow v. United States, 8 F. (2d) 711 (C. C. A. 9th, 1925) (opponent denied right to entire volume but not the particular memorandum).

[24] State v. Paschall, 182 Wash. 304, 47 P. (2d) 15 (1935). Wigmore contends that the same rule should apply as where used in court, the risk of imposition being as great. 2 WIGMORE, EVIDENCE § 762.

[25] Mullaney v. United States, 82 F. (2d) 638 (C. C. A. 9th, 1936); *cf.* Butcher v. Seattle, 142 Wash. 588, 253 Pac. 1082 (1927).

[26] 2 WIGMORE, EVIDENCE § 763.

[27] Kirkpatrick v. Collins, 95 Wash. 399, 163 Pac. 919 (1917) (receipt stubs of payments testified to by the witness from present memory held improperly admitted); Dennis v. Trick, 165 Wash. 403, 5 P. (2d) 493 (1931) (appellant's diary used to refresh her recollection excluded).

[28] State v. McKeown, 172 Wash. 563, 20 P. (2d) 1114 (1933); State v. Tyree, 143 Wash. 313, 255 Pac. 382 (1927) (exclusion based on improper and inadmissible matter in the memorandum).

[29] Wells v. United States, 257 Fed. 605 (C. C. A. 9th, 1919) (memorandum going in after being used to refresh was held technical error but not prejudicial); Luse v. United States, 49 F. (2d) 241 (C. C. A. 9th, 1931) (the admission of a memorandum used to refresh the recollection was held error).

[30] 2 WIGMORE, EVIDENCE § 764.

[31] 143 Wash. 313, 255 Pac. 382 (1927).

[32] Hoffman v. United States, 87 F. (2d) 410 (C. C. A. 9th, 1937).

Another factor to be considered is whether the stimulation of the memory should be done in the presence of the jury. There has been little judicial expression on this and in most cases it would make no difference.[38] The procedure in such cases should be left to the trial court.

Before dealing with preserved memory, it is worthwhile to reiterate that the situation just discussed is one in which the witness has all the circumstances in his mind, but momentarily is unable to recall them. He sees a writing, something "clicks" in his mind, and he actually remembers and testifies to what he remembers. Theoretically, his testimony is not a recital of what he reads, nor does he obtain any information from the memorandum. True, the mind is easily influenced by suggestion and although a witness asserts he is testifying from his memory and honestly believes that he is, it may be that some of his "recollection" comes from the writing used to refresh his memory. Since this can be detected by cross-examination and the trial court has the opportunity of seeing and hearing the witness, a ruling in such a situation should rarely require reversal.[34]

In considering the rules under the next heading it should be kept in mind that the situation is entirely different from the foregoing and that on principle none of the rules applicable to recorded memory apply to the problem just discussed.

B. PAST RECOLLECTION RECORDED

Now the witness has made a record of the event which record meets the requirements outlined below and comes in as evidence. It is apparent that a question of hearsay is presented, although no judicial discussion of this aspect of the problem has been found. Wigmore says that no hearsay is involved since the witness himself is in court and is subject to cross-examination.[35] As pointed out by Morgan, in most cases the witness cannot possibly be effectively cross-examined.[36] This out-of-court statement, not made under oath nor subject to cross-examination at the time it was made, seems to be an exception to the hearsay rule.[37] With this additional factor in mind, the following rules should govern in order to insure a maximum of trustworthiness.

1. *The past recollection must have been written down.*[38]

It is arguable that on principle the record may be oral.[39] Nevertheless, such an extension of the rule would appear to offer a too convenient device to avoid the penalties of fabrication and this danger no

[33] Where the witness looks at an object or reads over to himself some writing no harm is done. Radley v. Seider, 99 Mich. 431, 58 N. W. 366 (1894). In cases in which prejudice might result it would seem desirable that the refreshing be done elsewhere than in the presence of the jury.

[34] 2 WIGMORE, EVIDENCE §§ 755, 765.

[35] 3 WIGMORE, EVIDENCE §§ 1530, 1560.

[36] Morgan, *Relation Between Preserved Memory and Hearsay* (1927) 40 HARV. L. REV. 712.

[37] Two requirements should be met, says Wigmore, before recognizing an exception to the hearsay rule: a necessity and a circumstantial guaranty of trustworthiness. 3 WIGMORE, EVIDENCE §§ 1420-1422. See note 36 *supra.*

[38] 2 WIGMORE, EVIDENCE § 744.

[39] Shear v. Van Dyke, 10 Hun. 528 (N. Y. 1877). The witness testified that although he couldn't now remember the number of loads of hay, he had at the time called it out to the plaintiff. The plaintiff was allowed to testify as to what that number was. One judge dissented.

doubt outweighs the advantages otherwise gained. Neither Washington nor the federal court has had occasion to pass on this.

2. *The recollection must be trustworthy at the time of recordation.*[40]

Two tests as to the time are used:

(a) The recollection should be fresh when recorded.

(b) The recollection should be recorded at or near the time of the event.

Washington has not passed directly on this point although in the decided cases the memoranda were made at or near the time of the event.[41] The federal court has only indirectly expressed itself in regard to this requirement.[42]

3. *The witness must guarantee the correctness of the record.*[43]

This may be by recalling his state of mind at the time he made the record, *i.e.*, that he knew it was correct when it was made. The cases arising in Washington involve writings made in the usual course of business, it thus fairly appearing that the witness would not have made the record unless it was correct.[44]

It is necessary that the witness have actual personal knowledge of the facts recorded, which has defeated attempts in this jurisdiction to introduce some certain records.[45]

No federal cases on this point were found.

4. *The witness need not himself be the writer.*[46]

All that is necessary is that the witness saw the memorandum while the facts were still fresh in his mind and at that time knew that it was correct. There are no Washington cases directly in point although the court has stressed the fact that the witness made the record himself where such has been the case.[47] The federal court has not passed on this.

5. *The original is required, if available.*[48]

This is the rule in Washington[49] and in the federal court.[50] *Clausen v. Jones*[51] probably involved past recollection recorded although the

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[40] 2 WIGMORE, EVIDENCE § 745.

[41] Still v. Swanson, 175 Wash. 553, 27 P. (2d) 704 (1933) (bus inspector's report); State v. Douette, 31 Wash. 6, 71 Pac. 556 (1903) (hotel register); Callihan v. Washington Water Power Co., 27 Wash. 154, 67 Pac. 697 (1902) (street car conductor's report).

[42] In Jewett v. United States, 15 F. (2d) 955 (C. C. A. 9th, 1926), the court distinguished the case before it from Goodfriend v. United States, 294 Fed. 148 (C. C. A. 9th, 1923), by saying that the copies in the latter case were made soon after the event and while the facts were still fresh in the memory and implied that had such been true in the Jewett case it would have been governed by the general rule.

[43] 2 WIGMORE, EVIDENCE §§ 746, 747.

[44] See note 41, *supra*.

[45] Seattle v. Erickson, 99 Wash. 543, 169 Pac. 985 (1918); Tingley v. Fairhaven Land Co., 9 Wash. 34, 36 Pac. 1098 (1894).

[46] 2 WIGMORE, EVIDENCE § 748.

[47] Still v. Swanson, 175 Wash. 553, 27 P. (2d) 704 (1933); State v. Douette, 31 Wash. 6, 71 Pac. 556 (1903).

[48] 2 WIGMORE, EVIDENCE § 749.

[49] Davis v. Associated Fruit Co., 135 Wash. 614, 238 Pac. 629 (1925). See note 54, *infra*.

[50] Jewett v. United States, 15 F. (2d) 955 (C. C. A. 9th, 1926).

[51] 191 Wash. 334, 71 P. (2d) 362 (1937). Action for personal injuries. The witness was the doctor who had attended the plaintiffs and testified as to

opinion deals with the memorandum as having been used to refresh the witness' recollection.

The reason for requiring the original is to make more sure that the evidence is trustworthy and where there is this assurance it would seem unnecessary to apply the rule arbitrarily.[52]

6. *A copy made and verified by another is admissible.*[53]

This will arise most often in business transactions. It has been recognized as permissible in this jurisdiction.[54] No cases from the ninth circuit were found.

7. *The record must be shown to the opponent on demand, for inspection and cross-examination.*[55]

This point evidently has not been directly in issue in either jurisdiction.[56]

8. *The record goes as testimony to the jury.*[57]

This rule is followed in Washington.[58] The federal court has not passed on it.

9. *The record must be complete, embodying substantially all that the witness knew at the time of the event.*[59]

Apparently Illinois and Washington are the only jurisdictions in which this requirement has been recognized.[60]

Assuming the writing to have met these requirements, the question arises: When may it go in as evidence?

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the calls made and treatment given them. The witness professed to having a present recollection of the relevant facts after having read a copy of his office book. The court ruled that the original should have been used for the purpose of refreshing his memory. It is submitted that the court reached the proper result but used some unfortunate language. The situation involved was probably past recollection recorded. Part of his direct examination clearly shows no present memory, but complete reliance upon the copy. Further the court cites 2 WIGMORE, EVIDENCE § 749, which is the section now under consideration. Possibly the similarity of the expression "past recollection recorded" and "present recollection revived" has led to much of the confusion and some other designation should be used in referring to the two situations.

[52] In Davis v. Associated Fruit Co., 135 Wash. 614, 238 Pac. 629 (1925), the defendant sought to show the condition of fruit when delivered to the railroad. A witness who had made a certificate as part of his duties in inspecting the fruit was called and while he had no present memory his testimony appeared to qualify the certificate as the record of a past recollection. As the certificate was the property of the railway company and could not be let out of its possession the defendant offered to have it read into the record. The court rejected the offer on the ground that the original was necessary in order that the opponent might examine it and have it go to the jury room.

[53] 2 WIGMORE, EVIDENCE § 750.

[54] Lawn v. Prager, 67 Wash. 568, 121 Pac. 466 (1912), contractor's book of account admitted in evidence where the foreman testified as to the correctness of the original data and to the record made thereof.

[55] 2 WIGMORE, EVIDENCE § 753.

[56] See Davis v. Associated Fruit Co., *supra* note 52.

[57] 2 WIGMORE, EVIDENCE § 754.

[58] Still v. Swanson, 175 Wash. 553, 27 P. (2d) 704 (1933); *see* Davis v. Associated Fruit Co., *supra* note 52.

[59] Note (1939) 14 WASH. L. REV. 230.

[60] People v. Parker, 284 Ill. 272, 120 N. E. 14 (1918); Preston v. Metropolitan Life Insurance Co., 198 Wash. 157, 87 P. (2d) 475 (1939).

> "Is the use of the past recollection necessary; (1) because in the case in hand there is not available a present recollection in the specific witness, or (2) because in the usual case a faithful record of a past recollection, if it exists, is more trustworthy and desirable than a present recollection of greater or less vividness?"[61]

The latter view would seem more desirable. The former is the so-called New York doctrine, which requires that an absence of present recollection be shown as a preliminary to the use of a record of past recollection. Washington is committed to the New York doctrine.[62] The Circuit Court has not expressed its view as to this.

Not all the possibilities of preserved memory have been recognized by the Washington court. There is a group of cases involving stenographer's notes of former testimony in which the court has flatly stated that the stenographer cannot read his notes.[63] Since such notes meet all the requirements for recorded memory, such rulings cannot be justified.[64]

Another group of cases deals with records which were admitted as business entries under that exception to the hearsay rule.[65] Where the witness has himself made the entries Wigmore suggests that they really come in as past recollection recorded, avoiding many of the restrictions placed on the business entry exception.[66] Recognition of the true situation should make the task of the attorney and trial court easier.

Conclusion

When dealing with these two situations under the stress of trial much will have to be left to the discretion of the trial court. Whether we wish to go to the extent recommended by Wigmore, that no exercise of that judicial discretion should be reversible error, is doubtful.[67] To

[61] 2 Wigmore, Evidence § 738.

[62] State v. Mann, 39 Wash. 144, 81 Pac. 561 (1905). "As the question called for the contents of the insurance policy, it is plain that, as between the witness' memory of what it contained and the memoranda of its contents made by him, his memory was the best evidence, even though he had been compelled to use his memoranda to refresh his memory." In Kirkpatrick v. Collins, 95 Wash. 399, 163 Pac. 919 (1917), after using receipt stubs to refresh his memory, the witness testified from present memory. Evidently the stubs could have qualified as recorded memory, but their admission was held error the court saying: "Manifestly, when the witness testifies from his present memory, that which he may have written or said at some other time concerning the facts of which he testifies, is incompetent."

[63] State v. Freidrich, 4 Wash. 204, 29 Pac. 1055 (1892) (no effort made to qualify as past recollection recorded); Kellogg v. Scheuerman, 18 Wash. 293, 51 Pac. 334, 52 Pac. 237 (1897) (likewise no effort made to qualify); Duffy v. Blake, 91 Wash. 140, 157 Pac. 480 (1916) (ruling citing only Kellogg v. Scheuerman, *supra*; State v. Harkness, 1 Wn. (2d) 530, 96 P. (2d) 460 (1939), where the previous cases were cited and also Preston v. Metropolitan Life Insurance Co., 198 Wash. 157, 87 P. (2d) 475 (1939), in which it was recognized that stenographer's notes might come in as past recollection recorded.

[64] 2 Wigmore, Evidence § 737.

[65] Callihan v. Washington Water Power Co., 27 Wash. 154, 67 Pac. 697 (1902); Lloyd v. Reinard, 133 Wash. 114, 233 Pac. 292 (1925). *Cf.* Pacific Tel. & Tel. Co. v. Huetter, 68 Wash. 442, 123 Pac. 607 (1912).

[66] 3 Wigmore, Evidence § 1560.

[67] 2 Wigmore, Evidence § 755.

increase the benefits to be gained in the use of these two "memory aids", and to decrease the possibility of error in these situations, the following suggestions are made:

1. The New York doctrine, requiring an absence of any present recollection to introduce the record of a past recollection, should not be longer followed.

2. The statements in *Clausen v. Jones*,[68] applying past recollection rules but calling the situation one of present recollection, should be corrected.

3. A close analysis of each decided case on its facts, when cited as authority, espectially those dealing with the use of stenographer's notes, should be made.

4. Most important in avoiding confusion is effort on the part of both the attorney and trial judge to differentiate between revival of memory and recordation of memory, and the rules applicable to each.

This study brings with it the conviction that on the facts of the decided cases the Washington court has probably reached the right result in most of them but the trail is poorly marked and should be re-blazed.

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[68] Note 12, *supra*.