report numerous instances of youths being intermixed in penal institutions with hardened criminals.[10]

By limiting the power of the court to commit a youth to even a state training school and requiring it instead to sentence the youth for an indeterminate period[11] to an integrated and unified administrative body such as the commission with the facilities[12] and personnel[13] necessary for effective solution of the peculiar problems of youth, the act gives full effect to the more modern theory with its goal of rehabilitation, correction and reform by substituting for mass punishment individualized treatment and scientific methods of examination.[14] The Youth Conservation Act is, therefore, an attempt to find the most effective method of ultimately rehabilitating and reforming the criminally inclined youth as an individual and, thereby, to return to society, as useful, law-abiding citizens, youthful offenders as a whole.

RICHARD C. WARMANN

EVIDENCE—MEMORANDA TO AID RECOLLECTION—ADMISSIBLE EITHER AS PAST RECOLLECTION RECORDED OR AS PRESENT RECOLLECTION REVIVED.—In an appeal from a decision of the United States District Court affirming the conviction of one Riccardi of feloniously having transported or having caused to be transported stolen property in interstate commerce, the United States Court of Appeals, in *United States v. Riccardi*[1] affirmed the judgment of the District Court, holding that there was no abuse of discretion by the trial court in determining that a writing may be used by an owner as an aid to memory in reviving a present recollection enumerating a numerous list of household articles, as well as by an antique dealer, qualified as an expert, to revive his present recollection that he might give his opinion as to the value of the chattels based on his prior knowledge of them.

The defendant, Riccardi, transported in a truck and station

10. See 28 MINN. L. REV. 300 (1944).
11. Bennett, *Indeterminate Control of Offenders: Realistic and Protective*, 9 LAW & CONTEMP. PROB. 617 (1942).
12. Ellington, *Youth Correction: Institutional Facilities for Treatment*, 9 LAW & CONTEMP. PROB. 667 (1942).
13. Ellis, *Youth Correction: Personnel Considerations Relating to the Authority Plan*, 9 LAW & CONTEMP. PROB. 704 (1942).
14. Healy, *Youth Correction: Principles of Diagnosis, Treatment, and Prognosis*, 9 LAW & CONTEMP. PROB. 681 (1942).
1. 174 F. 2d 883 (3d Cir. 1949).

wagon certain chattels of quality and distinction of a value of $5,000 or more consisting of bric-a-brac, linen, silverware, and household goods from the home of Doris Farid in New Jersey to the State of Arizona. Doris Farid, the owner of the chattels, who had helped pack them, made an inventory in longhand of the chattels as they were moved from the house and loaded on the vehicles. Later, she transcribed the inventory on her typewriter; only one page of the original longhand notes was available at time of trial, the others having been mislaid.

The government used Doris Farid as a witness to establish the identity of the specific chattels loaded on the vehicles as being those listed in the indictment. To establish the value of the chattels, the government relied upon the testimony of Leo Berlow, a qualified expert dealing in antiques, who testified that he knew and had had numerous business transactions with Doris Farid, and that he was acquainted with the chattels involved, even to knowing their exact location in the Farid home.

Both witnesses used the typewritten notes made by Doris Farid and the list contained in the indictment to revive their present recollection. It was the propriety of the method used to identify and value the chattels involved and more especially the actual function of the lists to the two witnesses, that was objected to by the defendant. The character and nature of the crime was not at issue since the defendant admitted receiving some of Doris Farid's chattels but denied the quantity and quality alleged.

Aside from the matter of the discretionary power of the trial judge in admitting rebuttal evidence, which was a minor consideration in the appeal and is not treated in this comment, the Riccardi case merits attention for its comprehensive treatment of the problem arising from the use of a writing for the purpose of refreshing the recollection of a witness.

In the opening paragraphs of the decision, Judge Kalodner immediately spotlights the problem in the case by reference to Professor Wigmore's observation that much of the confusion in the cases results from the failure to distinguish between what he broadly terms past recollections recorded and present recollections revived and the use of the phrase, "refreshing the recollection," for both classes of testimony.[2] Professor Wigmore credits

2. 3 WIGMORE, EVIDENCE § 755 (3d ed. 1940).

an Irish judge with first calling attention to the impropriety of this language.[3] That this distinction continues to be overlooked and enters litigation in one form or another is clearly shown in the *Riccardi* case. Here, without use of Professor Wigmore's terminology, the position of the defendant, resolved from his objections, amounts to a classification of the writing involved as a past recollection recorded and the contention that it is not admissible as such for want of the requisite characteristics of that category; the position of the prosecution is that the testimony falls under the category of a present recollection revived with the consequence that the absence of those characteristics which the defendant would require is immaterial, since the evidence as a present recollection revived is the recollection of the witness and not the writing itself.[4]

Thus, the failure to make the distinction pointed out by Professor Wigmore gives rise to the problem in the *Riccardi* case and places in issue the function of the writing to the two witnesses. Whether or not the proponent of the testimony makes the distinction by precise language and discriminating foundation and qualification of the witness, the testimony is necessarily within one or the other of the two categories and the discretionary power and technique of the trial judge in admitting the testimony should embrace that distinction, if error is to be avoided.

The Distinction Between the Two Categories

As pointed out in the *Riccardi* case, "present recollection revived and past recollection recorded are clearest in their extremes, but they are, in practice, converging rather than parallel lines; the difference is frequently one of degree."[5] It therefore follows that the determination of the function of the writing to the witness is frequently difficult for it amounts to an analysis of the mental processes of the witness. Are the characters or words seen by the eye merely transmitted by words to the ears of the jury? Does the mental process of the witness amount to a representation that what he sees, he knows to have once been his knowledge of the facts recorded, and that his present testimony offers those facts as verbally transmitted upon the warranty of his present knowledge and identification of the writing? Is his

3. Hayes, J., in Lord Talbot v. Cusack, 17 Ir.C.L.R. 213 (1864).
4. 3 WIGMORE, EVIDENCE § 758 (3d ed. 1940).
5. 174 F.2d 883,889 (3d Cir. 1949).

testimony a past recollection recorded as termed by Professor Wigmore?[6]

On the other hand, the classification of the testimony as a present recollection revived results from an affirmative answer to the query, does the witness have a present and conscious recollection of specific facts when his memory is stimulated by the writing, or other stimulus which he sees or experiences? Is the recollection independent of the writing itself? This mental reaction is best illustrated by a writing, the contents of which are foreign or extraneous to the recollection revived. To another, the writing would be unintelligible and unrelated to the facts under investigation, but to the witness, by some mental association, the writing revives an independent recollection of the facts of his testimony. The nature of the stimulus may be varied. As suggested in the instant case, it could be an odor, a photograph, a button or "even a past statement known to be false."[7] "The essential fact is that, after looking at it, he has a present memory of the facts."[8]

The classic and often quoted phrase of Judge Ellenborough is the foundation of the distinction and as satisfactory a statement of a present recollection revived as any:

> If upon looking at any document he can so far refresh his memory as to recollect a circumstance, it is sufficient; 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.[9]

The Distinction Recognized in the Federal Cases

While the distinction is explicit in the *Riccardi* case, and in the federal cases generally, it is not uncommon to find that the error assigned on appeal is a challenge of the classification made by

6. "The situation is one in which the witness is devoid of a present recollection, and therefore desires to use a past recollection. This he proposes to do by employing some record of this past recollection and adopting it as his present statement. . . . The chief difficulties here to be met have no direct dependence on the principle of Recollection. It must appear that the witness had a good recollection when it was recorded, but that is all that is required by the canons of Recollection. It is as to the nature of the record and the means of making it now available that certain restrictions must be applied, and this is a matter of the accuracy and identity of the record." 3 WIGMORE, EVIDENCE 64 (3d ed. 1940).

7. United States v. Rappy, 157 F.2d 964,967 (2d Cir. 1947).

8. Eberson v. Continental Inv. Co., 130 Mo. App. 296, 308 S.W. 62, 67 (1908).

9. Ellenborough, L.C.J., in Henry v. Lee, 2 Chitty 124, 125 (1810).

the trial court. In the federal case of *Olmstead et al. v. United States*,[10] the classification of the testimony of a prohibition agent as a present recollection revived was challenged. In this case two agents of the government testified as to the conversation they had heard over a tapped telephone wire. They listened alternatively, made longhand notes, and at the end of the day carefully edited the typewritten transcription made by a third party. The witness testified using the transcription as a reference, the longhand notes having been destroyed. The witness stated that he had an independent recollection of the conversation heard over the telephone. Professor Wigmore was cited to the effect that the memorandum need not be an original nor need it be made by the witness himself.[11] In addition several federal cases were cited concerning other characteristics of a writing and their immateriality to this classification of memorandum.[12]

McClendon v. United States[13] is another federal case with similar facts. In that case objection was made to admitting the testimony of a postal inspector who was permitted to refer to notes which he made at the time of his investigation of the case, for the purpose of refreshing his memory. The court held this was clearly admissible.

The Distinction Recognized in the Missouri Cases

The Missouri cases indicate a clear comprehension of the problem and a recognition of the distinction, although the language in a single case is not always convincing. *Hoffman v. Kansas City Laundry Service Co.*[14] was an action by a husband against a laundry for failure to return goods delivered to its agent. The court held that it was not error to permit the wife who delivered the goods to the agent of the laundry, in testifyfying, to use a duplicate list of the articles on which she had written their value. While the language of the decision is not such that it is obvious that the memorandum was admitted as a

10. 19 F.2d 842 (9th Cir. 1927).
11. 3 WIGMORE, EVIDENCE §§ 759-760 (3d ed. 1940).
12. Goodfriend v. United States, 294 F. 148 (9th Cir. 1923) (memorandum may be made by another); Grunberg v. United States, 145 F. 81 (1st Cir. 1906) (writing made soon after transaction is satisfactory); Pacific Coast S.S. Co. v. Bancroft-Whitney Co., 94 F. 180 (9th Cir. 1899) (witness can use writing, although not made by himself, if he saw it while facts therein stated were fresh in his recollection, and he knew the memorandum, as then made, was correct).
13. 229 F. 523 (8th Cir. 1916).
14. 243 S.W. 232 (Mo. App. 1922).

present recollection revived, reference to the cases cited by the court clearly indicates that the precendents relied upon so held, thus clarifying the decision of the case.[15]

The function of the trial court in crystallizing the analysis of the use of the writing made by the witness is clearly shown in *Lake Superior Co. v. Huttig Lead & Zinc Co.*[16] In this case a witness testified as to ore prices during a specified period. He referred to a memorandum to refresh his memory relative to a general market decline, then followed this with an independent present recollection of specific prices in great detail. Prior to a ruling on the objection made to this testimony, the court admonished the witness to answer "if he knew" and, upon an affirmative answer, ruled that the testimony was not objectionable as not being the best evidence.

In a 1916 Missouri case,[17] a witness identified the number, character, and value of certain tools and household goods by use of a twelve page list fastened to his petition, four years intervening between the time of the levy and when he testified. Although he testified that he had made a list of the goods and given it to a Judge Hays, no evidence was offered by him or otherwise shown, bearing upon any relation between his alleged original list and the list there testified from, nor did he have an independent recollection without use of the latter list. The evidence was properly excluded since it was admissible neither as a past recollection recorded nor as a present recollection revived. The court said:

> It is apparent that his only ground for testifying . . . is the fact that he saw listed on the paper before him certain articles and values stated. He had no refreshed memory, nor did the evidence characterize the list as one having been made by the witness or by some one for him with which he was familiar at a time when the items were fresh in his mind. Thus neither of the conditions existed which must be established before a witness may use a list and testify to facts showing that the paper before him is a correct record made at a time when his memory was fresh.[18]

15. Lumber Co. v. Ware, 150 Mo. App. 61, 130 S.W. 822 (1910); Rose v. Rubeling, 24 Mo. App. 369 (1887); Traber v. Hicks, 130 Mo. 180, 32 S.W. 1145 (1895); State ex rel. and to Use Macke v. Randolph et al., 186 S.W. 590 (Mo. App. 1916).

16. 305 Mo. 130, 264 S.W. 396 (1924).

17. State ex rel. and to Use Macke v. Randolph et al., 186 S.W. 590 (Mo. App. 1916).

18. *Id.* at 591.

Thos. Cusack Co. v. Lubrite Refining Co.[19] was an action to recover on a written contract for painted advertising display signs at locations and at prices "as per designs to be mutually agreed upon." In that case the evidentiary problem presented was the use by a witness of a statement of an account not made by *himself* in order to refresh his memory as to certain dates and to testify thereafter as to his independent recollection as to the location of the sign boards and when they were painted. The objection that the memorandum used by the witness was the bookkeeper's statement and did not appear to be made by the witness himself, was overruled as immaterial as the witness testified as to his present recollection, independent of the writing.

Another Missouri case, *Eberson v. Continental Inv. Co.*,[20] broadens the statement of the immaterial nature of the writing and its origin when used to revive a present independent recollection to substantially that of the *Riccardi* case. However, in that case the objection to the testimony was sustained because the witness testified as to quantities and values, using a list which had been made by appraisers. The witness did not know if the list was correct, had not assisted in making it, and did not examine the merchandise listed nor the extent to which it was damaged. His testimony was pure hearsay and the court so held, referring to Wigmore.[21]

The Distinction Analyzed in the Riccardi Case

The report of the *Riccardi* case evinces careful preparation by the prosecution in laying the proper foundation for admission of the testimony of each of the two witnesses under the desired category; this was no doubt facilitated by the unique quality of the chattels as antiques. The qualification of the witness, Farid, disclosed that she was not only the owner of the chattels but was familiar with them, "that she lived with these things . . . knew them" in her home, helped pack them, and was present and made a longhand inventory of them as they were loaded on the vehicles. When the court also questioned her at length as to whether looking at the list refreshed her recollection, her positive affirmative answer coupled with an appearance of truth and trustworthiness upon which reasonable men would not differ,

19. 261 S.W. 727 (Mo. App. 1924).
20. 130 Mo. App. 296, 109 S.W. 62 (1908).
21. 3 WIGMORE, EVIDENCE §§ 735-764 (3d ed. 1940).

warranted the admission of her testimony as a present recollection revived by the trial court which was affirmed on appeal.

The *Riccardi* case raises another interesting point, since the list of chattels was used not only by its author, Doris Farid, but also by the expert witness, Berlow, who was qualified as being familiar with the chattels both from his knowledge of them in the home of the owner as well as from business transactions with Doris Farid. It is at once clear that upon no basis other than as a present recollection revived would the lists be admissible for use by the expert, Berlow. No requisite quality of the list as a past recollection recorded was known to him; neither did he profess to have such knowledge, nor did the list accord with his testimony relating to the value of the chattels. The sole function of the list to him was to disclose the description of individual chattels with which he was familiar and concerning which his testimony was desired as an expert. The disclosure stimulated an independent recollection of the chattels themselves from which he gave his present recollection and appraisal of their value.

Classification of the testimony of the two witnesses, Farid and Berlow, as a present recollection revived rendered immaterial the nature of the writing, when or by whom it was made, as well as the fact that it was in part an original and in part a transcription.[22] The *Riccardi* case not only illustrates this distinction but also stands for precise legal terminology and a trial technique that forges the refinement of the offered evidence primarily upon the disclosure of its true nature. It is this disclosure of the function of the writing to the witness which determines the basis upon which the testimony is admissible as well as the extent to which it merits credibility. If the proponent by proper foundation and qualification of his witness establishes the character and nature of his offer, then false or non-essential requirements with which the opponent seeks to incumber the testimony may be swept aside, leaving to the jury the questions of weight and credibility.

Reconciling the Confusing Language in the Cases

Although in a given jurisdiction the distinction between the two categories may be established by precedent of long standing

22. 3 WIGMORE, EVIDENCE §§ 758-761 (3d ed. 1940).

it is not uncommon to find confusing language in the cases. The result achieved by the decision may be in accord with a logical conclusion based upon the distinction, yet the language frequently suggests that, in the case of "present recollections revived," characteristics of the writing may have been considered which are immaterial to the admission of testimony under that category. The query is therefore raised as to whether there is any rational explanation of this language in the cases, and with respect to such cases in a jurisdiction recognizing the distinction can this language be reconciled with the precedents of that jurisdiction?

In Professor Wigmore's treatment of present recollections revived, attention is directed to the controlling importance of the function of the writing to the witness, by his observation "that *any writing whatever is eligible for use,* while, on the other hand, *any writing whatever may, in the circumstances, become improper.*"[23] As we have seen, once the function of the writing to the witness is established solely as a stimulus to a present and independent recollection, then none of the limiting restrictions applicable to past recollections recorded have any bearing and the nature of the writing in such a case becomes immaterial.[24]

Although this general statement seems true, Professor Wigmore has taken many of the same attributive classifications used in his treatment of past recollections recorded and in sequence handled each as having no bearing on a present recollection revived.

Reference to Wigmore, plus familiarity with the same classifications under the general heading of Refreshing the Memory, no doubt explains the appearance of confusing language in the cases where testimony has been admitted as a present recollection revived and the court continues to treat the immateriality of such further facts as the writing being a duplicate, *etc.* Another possible explanation is the customary practice of a court to limit the language of a decision to the point decided, rather than to phrase the decision in broader terms. Thus, if the error assigned was that it was improper for the witness to use a writing made by another to refresh his memory, the decision sustain-

23. 3 WIGMORE, EVIDENCE 101 (3d ed. 1940).

24. "Anything may in fact revive a memory: a song, a scent, a photograph, and allusion, even a past statement known to be false." United States v. Rappy, 157 F.2d 964, 967 (2d Cir. 1947).

ing the admission of the testimony frequently is phrased in similar language, *i. e.*, that it was not error for a witness to use a writing made by another to refresh his present and independent recollection of the event,[25] rather than the broader statement that where a writing is used to refresh the present and independent recollection of the witness, its origin, nature, *etc.*, are not material.

In the *Riccardi* case the position of the defendant is confusing. However, the primary ground for the appeal seems to amount to an objection to the classification of the evidence of the two witnesses as a present recollection revived, although the category as such does not appear to have been recognized. The defendant cited *Putman v. United States*[26] to support the objection that the typewritten list made by Farid was not made by the witness at, or shortly after, the time of the transaction while the facts were fresh in his memory. In the *Putman* case the objection made and sustained was that testimony given by a witness more than four months after the occurence described was not contemporaneous for the purpose of refreshing his memory in giving testimony at a later time. The court in the *Riccardi* case distinguished this case because it did not differentiate between past recollection recorded and present recollection revived and added that so far as the condition of contemporaneity was concerned, the *Putman* decision was no longer controlling. Language used in *Hoffman v. United States*[27] is cited for authority on this point. Two additional cases relied upon by the defendant were distinguished; *Jewett v. United States*,[28] wherein it was held that the witness had no independent recollection, and *Delaney v. United States*,[29] where the court concluded that the witness did no more than read from a photostatic copy. With this disposition of the cases relied upon by the defendant, the court in precise language de-

25. Olmstead et al. v. United States, 19 F.2d 842, 846 (8th Cir. 1927).
26. 162 U.S. 687 (1896).
27. "The law of contemporary writing or entry qualifying it as primary evidence has no application. The primary evidence here is not the writing. It was not introduced in evidence. It was not offered. The primary evidence is the oral statement of a hostile witness. It is not so important when the statement was made or by whom made if it serves the purpose to refresh the mind and unfold the truth." Hoffman v. United States, 87 F.2d 410, 411 (9th Cir. 1937).
28. 15 F.2d 955 (9th Cir. 1926).
29. 77 F.2d 917 (3d Cir. 1935).

cided the case free of any ambiguity relating to the basis upon which the evidence was admissible.

In some of the Missouri cases the language is not as clear as that used in the *Riccardi* case or in the Missouri cases previously referred to in this comment. To reconcile the language used with the holding in the case, it is necessary to look back of the case itself to determine the doctrine that was in the mind of the court in deciding the case. The Missouri case of *Shepherd v. People's Storage & Transfer Co.*[30] is such a case and covers a situation in which a witness was permitted to refer to a memorandum made by herself at the time of delivery of household goods to a warehouseman charged with conversion. The list covered some 24 items and was made a year after the conversion. The witness was permitted to use the list to refresh her memory as to items and values. The court also felt that before a witness could refresh his memory from a memorandum, he must testify that the entry was made contemporaneously with the event.

While this case may be distinguished as making no distinction between past recollections recorded and present recollections revived as was done in *Putman v. United States,* still from the reference made to the Missouri cases cited,[31] it is a fair inference that the testimony was admitted as a present recollection revived, in which event it follows from the premise of this comment that the case errs in the requirements of contemporaneity and accuracy. However, reference to one of the cases cited, *i. e. Lumber Co. v. Ware, supra* note 31, discloses dictum which may be the explanation of this apparently illogical requirement. In this case the court said:

> Ware [the witness] testified as though he knew at sight every bit of material purchased from the plaintiff and ascertained the dimensions by actual measurement. . . . If he had *waited so long after the inspection before listing the items*

30. Shepperd v. People's Storage & Transfer Co., 243 S.W. 193 (Mo. App. 1922).

31. Lumber Co. v. Ware, 150 Mo. App. 61, 130 S.W. 822 (1910); Rose v. Rubeling, 24 Mo. App. 369 (1887); Traber v. Hicks, 310 Mo. 180, 32 S.W. 1145 (1895); State ex rel. and to Use Macke v. Randolph et al., 186 S.W. 590 (Mo. App. 1916). Note that these same cases are cited, note 15 *supra,* in *Hoffman v. Kansas City Laundry Service Co.,* thus indicating that in both of the principal cases the court had in mind the distinction between "past recollection recorded" and "present recollection revived" since these cases cited as a common precedent make that distinction.

> *as to render it unlikely he would remember them correctly,* the fact might give force to the objection of the counsel of the defendant.[32]

Here it appears that the attribute of contemporaneity, while discussed with regard to the writing, in reality goes to the weight and credibility of the memory of the witness and may become material as to the representation of the witness that he does have the capacity of a present independent recollection. That the court in this case was in accord with Professor Wigmore's distinction and followed the general recognition of that distinction in the Missouri cases, is further indicated by the fact that four Missouri cases cited give clear recognition to the distinction.[33] Added strength is given to this view by the further fact that these same four cases were cited in *Hoffman v. Kansas City Laundry Service Co.* decided the same year, 1922, and previously discussed in this comment.

As pointed out in the *Riccardi* case, in the long run, the primary issue is that of credibility, and it is sufficient that the jury has as sound a basis for weighing the testimony as it would in any other instance. So, the lapse of time may become an element for the jury to consider in evaluating the offer by the witness of testimony as a present and independent recollection. As the cases become commentaries, one upon the other, so do original concepts become changed and lost, the meaning assigned wholly different from that intended, the commentator neither understanding nor understood, until finally the original meaning is extinguished and the new concept is wholly unrelated to its reputed ancestor.[34]

Method of Proof Required

The nature of the proof required differs greatly between the two categories, since one category rests upon the character and nature of the writing itself and the other upon the mental process

32. Lumber Co. v. Ware, 150 Mo. App. 61, 70, 130 S.W. 822, 824 (1910).
33. See notes 15 and 31 *supra.*
34. "In discussing the grounds on which these cases were decided, reasons for the judgments are occasionally attributed to the judges which a careful reading of the decisions shows were never in the mind of the Court, and at other times the actual ratio decidendi is deliberately ignored and grounds for the judgment, discoverable only in the imagination of the learned author, are substituted for it. . . . A case is a precedent for the doctrine on which the judges based their judgment; it is not a precedent for a doctrine which was not in the minds of the judges." Goodhart, *Three Cases on Possession,* 3 CAMB. L. J. 195, 196 (1928).

of the witness in its use. The foundation for the offer of the testimony under either category rests upon the same basic necessity of showing the function of the writing to the witness and the proper classification of the testimony rests upon the ability of the proponent to draw the required distinction to the satisfaction of the trial judge.

Review of numerous cases, and study of the method of proof employed therein, suggests that the best proof that offered testimony is a present recollection revived consists in a showing that the writing does not serve the witness as a past recollection recorded. Since classification as a present recollection revived immediately eliminates the materiality of all attributes of the writing itself, it is advantageous to have the distinction made as early as possible and the suggested procedure would reveal the ultimate issue at the outset and by contrast facilitate the classification.

As a past recollection recorded the test applied to the offered testimony in determining its admissibility shifts in emphasis from the witness to the document. The document is open to attack as to its origin, authenticity, and all the other attributes which must exist for it to be a trustworthy source of facts. The function of the witness is to establish those attributes as genuine and the contents of the writing as material, thus qualifying the contents of the document as admissible by way of the witness. In the *Riccardi* case, if the testimony of Doris Farid had been offered on that basis, then the accuracy of the longhand notes, their loss except one page, the accuracy of the typewritten transcription, and the lapse of time prior to the transcription, all become material and present difficulties which might not have been overcome. As already pointed out, the expert, Berlow, could not have been qualified in this category. In the case of Farid, admission of her testimony as a past recollection recorded would depend on the extent to which the proof of surrounding circumstance and attending facts warranted the reasonable acceptance of the list as a reproduction of the original and the further acceptance of the latter as accurate.

As a present recollection revived the writing loses importance and the proponent must establish the oral statement of the witness as the evidence. The interest in testing the character of the testimony shifts to the mental process of the witness—the

actual existence of a present recollection, independent of the writing itself. Proof of the requirements of a past recollection recorded becomes pointless. The admission of the testimony will depend on the satisfaction of the trial judge with the representation of the witness that his recollections are independent of, and only stimulated by, the writing. The proof must show that once the mind is given a starting point by reference to the writing, a train of thought is recalled which then travels alone and independent of the datum point.

However, there is at least one occasion when the contents of a writing may become material as to testimony admitted as a present recollection revived and that occurs when the writing is in accord with the testimony of the witness. The following description of the situation taken from *United States v. Rappy* is clear and suggests the problem of proof raised:

> When the evoking stimulus is not itself an account of the relevant occasion, no question of its truth can arise; but when it is an account of that occasion, its falsity, if raised by the opposing party, will become a relevant issue if the witness has declared that the evoked memory accords with it. This is true because the evoked memory cannot be a truthful record when it tracks a statement shown to be false.[35]

In this situation the requirements of a past recollection recorded would have to be met to the extent, and in the manner, required to establish the trustworthiness of the memorandum.

The Importance of the Distinction

In ruling upon the admissibility of evidence under its proper category in the field here commented on, the function of the trial court extends further than the mere ruling. The bare fact of a ruling should raise a presumption, not only that a proper foundation has been laid for admission under the proper category, but also that the proper distinction between the two categories has been made to the satisfaction of the court, and that a record has been made to support the ruling of the court. In effect, it is the rebuttal of this presumption which has occasioned the confusion in the cases pointed out by Professor Wigmore. It is also the usual ground upon which is founded the complaint raised by an exception.

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35. United States v. Rappy, 157 F.2d 964, 968 (2d Cir. 1947).

Where, upon appeal in this situation, an exception has been sustained, it frequently develops that the testimony was admitted without the distinction being made and the record does not disclose sufficient information for the appellate court to determine the proper category or pass upon the correctness of the ruling of the trial court. The only disposition of the appeal is to remand it. Assuming the absence of other error, the requirement by the trial court that the distinction be made and properly supported by testimony is decisive and determines the disposition of the appeal.

In the *Riccardi* case the prosecution laid the proper foundation for admitting the testimony of both the witnesses and the trial court carefully tested that foundation by questioning the witness, Farid, to assure that her testimony was from a present and independent recollection. This skillful technique by the trial court in the *Riccardi* case illustrates how the function of the trial court extends further than merely ruling on the admissibility of evidence.

The Use of Leading Questions — An Alternative of Questionable Value

After affirming the *Riccardi* case on the ground that the evidence elicited from the two witnesses who used the lists to revive their present recollection was properly admitted, dictum in the case suggests the use of leading questions by the proponent "in lieu of the procedure followed."[36] While the trial judge has rather wide discretionary power, considering the fact that the two witnesses for the government in the *Riccardi* case gave direct testimony and did not surprise their proponent, it would appear that in most courts such a procedure would not be acceptable and would encounter strenuous objection by the opponent.[37]

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36. United States v. Riccardi, 174 F.2d 883, 890 (3d Cir. 1949).

37. The recognition by various jurisdictions accorded leading questions in this situation is not treated in this comment. The proposed Missouri Evidence Code offers an interesting illustration of the current development. In the 1948 draft § 5.06 (Present Recollection of Witness Revived. Past Recorded Recollection.) no provision is made for the use of leading questions. A later revision adds the following: "The present recollection of a witness, subject to the exercise of a reasonable discretion to prevent abuse or bad faith, may be refreshed and revived also by *leading questions*, objects or anything else that reasonably tends to refresh and revive recollection."

Professor Wigmore covers a very limited and unusual situation in which such a procedure would be acceptable.

> Where the witness is unable without extraneous aid to revive his memory on the desired point—*i. e.* where he understands what he is desired to speak about but cannot recollect what he knows—here his recollection, being exhausted, may be aided by a question suggesting the answer. The trial court's discretion must be relied upon to prevent imposition.[38]

In such a situation, before deciding on the use of these dangerous questions, he points out that the elements to be considered are the risk of losing valuable testimony on the one hand, and the danger of false suggestions raised by the questions on the other. Therefore, the alternative suggested in the *Riccardi* case would appear to have such limited acceptance that the well recognized use of a writing to revive an independent recollection recommends itself to the lawyer as the most reliable procedure available, and as a dependable procedure when fortified by the proper foundation in qualifying the witness as to the precise use served by the writing or other stimulus.

When viewed in light of the possible influence that a writing may exert on the direction of the memory, as indicated in the *Riccardi* decision, this conclusion seems even stronger. The extent of that influence is a factor going first to admissibility on any basis, ranging from exclusion as a fabrication to admission as an aid to revive a present recollection, and then to the weight accorded it by the trier of the facts.

Conclusion

Where, by proper foundation, the proponent seeks to qualify the testimony as a present recollection revived, it is not necessary to establish the reliability of the writing, nor is its reception dependent upon its truth, unless so improbable that reasonable men would not differ on its falseness. As Judge Kalodner describes the situation in the *Riccardi* case:

> the burden to ascertain the state of affairs, as near as may be, devolves upon the trial judge, who should in the first instance satisfy himself as to whether the witness testifies upon a record or from his own recollection.[39]

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38. 3 WIGMORE, EVIDENCE 134 (3d ed. 1940).
39. United States v. Riccardi, 174 F.2d 883, 889 (3d Cir. 1949).

Once the distinction has been made as to the category in which the testimony falls and upon which its admission rests, the extent of the possible influence of the writing on the course of the memory and testimony of the witness is not dropped, but continues and now becomes a factor for the jury to weigh for credibility and probative value. Here is lodged the final test of the force and technique of the proponent in qualifying the witness.

The claim of the witness to an independent recollection as well as the reliability of his memory is open to attack upon cross-examination and this extends to asking the witness if he testified from the memorandum or from memory.[40] His determination to tell the truth can be investigated and any question reasonably calculated to disclose the actual use to the witness served by the writing will not be improper.

As the function of the court is to resolve justly the rights of the litigants by application of the rules of law to the facts as found by the trier, so is the purpose of the rules of evidence to exclude incompetent, irrelevant, and immaterial testimony and at the same time to regulate the revelation by the witness of competent facts germane to the issue in a manner conducive to the presentation of those facts in their true and most revealing aspect. Upon proper occasion, this requires a disclosure by the witness of the manner, method, or mode employed in transmitting his knowledge. Such medium or mental process, or combination of both, becomes controlling as to the admissibility of the testimony and is determinative of the requisite trustworthiness which must be present if the testimony has probative value. The testimony is first channeled into the stream of competent evidence, then screened for its probable probative value and materiality to the issue before the trier of the facts.

In the use of an aid to memory, the truth as to its function to, and employment by, the witness must be disclosed in order that the trier may properly evaluate its probative value, ranging from exclusion as a probable fabrication to acceptance for its probative weight either as a past recollection recorded or a present recollection revived.

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40. "Neither should the defendant be denied the right to cross-examine the witness as to whether he testified to certain facts from what he saw in the memorandum and not from his memory of the facts as they occurred." State v. Miller, 234 Mo. 588, 597, 137 S.W. 887, 890 (1911).

The offerer will best serve his interest by making the distinction with proper foundation and qualification of his witness. By requiring that distinction before exercising discretion as to the admissibility of the offered testimony, the trial court will avoid the exceptions frequently taken and sustained in the cases. It follows that such procedure, both by the court and the offerer, will make a record which upon appeal will seldom disclose grounds for remanding the case for want of discriminating inquiry and supporting facts revealing the use made by the witness of the aid relied upon to refresh his memory.

WILLIAM E. PARTEE

PERSONAL PROPERTY — RIGHTS OF FINDER VERSUS OWNER OF LOCUS IN QUO — BILLS SECRETED IN HOTEL ROOM

A painter found $760 secreted under a rug in a hotel room. The find consisted of a number of large-size bills of a type withdrawn from circulation more than fifteen years before, wrapped in a new-style $100 bill. The facts do not disclose whether the painter who was redecorating the room was an employee or an independent contractor, but the latter would seem the case. Plaintiff painter apprised the defendants-hotel owners of his find and upon their representation that they knew the owner and would restore it to him, he turned the money over to them. A period of more than two years had elapsed and the defendants had made no effort to locate the owners. Plaintiff brought suit to recover the money. The court found the money to have been abandoned and awarded it to the plaintiff.[1]

It is submitted that the question as to the rights to personal property as between the owner of the *locus in quo* and the finder should be considered in the light of: 1) Who should hold the property so that the true owner may most easily recover his property? and 2) Who should get ultimate title in the event the true owner is not found within a reasonable time?[2]

1. Erickson v. Sinykin, 223 Minn. 172, 26 S. W. 2d 172 (1947).

2. In many states this problem has been dealt with by statute. For example, MO. REV. STAT. § 15317 (1939) provides: "If any person finds any money, goods, right in action, or other personal property, or valuable thing whatever, of the value of ten dollars or more, the owner of which is unknown, he shall within ten days, make an affidavit before some justice of the county, stating when and where he found the same, that the owner is unknown to him, and that he has not secreted, withheld or disposed of any part thereof." MO. REV. STAT. § 15320 (1939) provides: "If no owner appear and prove the money or property within forty days, and the value