

THE USE BY A WITNESS OF HIS PRIOR TESTIMONY  
FOR THE PURPOSE OF REFRESHING  
RECOLLECTION

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By way of preface, attention is called to the fact that refreshing recollection falls factually and, in many jurisdictions, legally into two categories, more particularly designated as "present recollection revived" and "past recollection recorded." In the former the stimulus revives as a present reality in the mind of the witness the facts which lie back of the stimulus. If, for example, it be even in the form of a memorandum purporting to record fully certain events, the memorandum only serves to stimulate the memory processes so that the mind reaches presently beyond the memorandum to the facts themselves. In past recollection recorded, however, the memory attaches wholly to the memorandum. The facts recorded therein do not come back to the witness as a present possession. At most he recalls that the facts were once personally known to him and that while they were fresh in his mind he made the memorandum or verified it as correct.<sup>1</sup>

Procedurally the authorities present the following distinctions and conflicts. In present recollection, it is agreed that the memorandum itself is not admissible as part of one's case in chief. The adversary may however make such use of it as he wishes, including the right of introduction in evidence.<sup>2</sup> In past recollection the right to introduce the memorandum through the witness who uses it as part of his direct examination is generally recognized.<sup>3</sup> In past recollection the courts confine the witness

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<sup>1</sup> Hutchins and Slesinger, *Some Observations on the Law of Evidence—Memory* (1928) 41 HARV. L. REV. 860; *Jewett v. U. S.* (1926) 15 F. (2d) 955; *State v. Patton* (1914) 255 Mo. 245, 164 S. W. 223; *Eberson v. Investment Co.* (1908) 130 Mo. A. 296, 308, 109 S. W. 62; *State v. Staton* (1894) 114 N. C. 813.

<sup>2</sup> *Friendly v. Lee* (1890) 20 Ore. 202; *Manchester Assurance Co. v. Oregon R. R. Co.* (1905) 46 Ore. 162.

<sup>3</sup> *State v. Patton*, n. 1 above. But there is some conflict in the cases, 10 R. C. L., EVIDENCE, sec. 350; *Wermoog v. C. & A. R. Co.* (1886) 20 Mo. A. 473; *Abel v. Strimple* (1888) 31 Mo. A. 86, 90.

to the use of a memorandum with the making or confirmation of which he was identified at or near the time of the event recorded. The justification for this limitation in past recollection resides in the fact that the witness disclaims any present recollection of the original event and offers the memorandum as expressive of his former memory. Since the weakness of his memory of the event is thus beyond the reach of the test of cross-examination a reasonable practical safeguard is found in cutting down to reasonable limits the memory-fading period between the time of observation and the time of the recording thereof. The rule is not an arbitrary one and the tests have been variously stated and applied. One finds such descriptive phrases as the following: "While the occurrences were recent and fresh," "contemporaneous with the transaction," "contemporaneously or nearly so," "shortly after," "presently committed to writing"; and Jones<sup>4</sup> adds that "at farthest it ought to have been made before such a period of time has elapsed as to render it probable that the memory of the witness might have become deficient."<sup>5</sup> In point of practical application it has been held that the lapse of a fortnight or a month is not too long,<sup>6</sup> but that a lapse of four months cannot be allowed.<sup>7</sup> A study recently collaborated in between the Professor of Evidence in Yale Law School and a Professor of Psychology attached to the staff of the School produced the following interesting conclusion:<sup>8</sup>

The general theory, for instance, that time is important because of progressive obliviscence, is meaningless without a knowledge of the curve of forgetting. Knowledge of it indicates that courts have done well who have abandoned the requirement of strict contemporaneity: for there is a difference of only six to ten per cent between the amount forgotten by the end of the first and the end of the fourth hours. For the same reason, if a lapse of two days is no ground for exclusion, there is no cause for ruling out

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<sup>4</sup> Jones, EVIDENCE (2d ed. 1926) sec. 2390.

<sup>5</sup> See also to the same effect Wigmore, EVIDENCE (2d ed. 1923) sec. 745; Wharton, EVIDENCE (3d ed. 1888) sec. 518: "The memoranda are inadmissible if corrected at such a period after the event as would deprive the memory of that exactness which only coincidence of time gives."

<sup>6</sup> Lawson v. Glass (1881) 6 Colo. 134.

<sup>7</sup> Putnam v. U. S. (1896) 162 U. S. 687.

<sup>8</sup> Hutchins and Slesinger, *op. cit.* n. 1 above.

anything recorded in less than a month. And since the course of forgetting by that time has become almost a horizontal line it is safe to say that what was forgotten between one and six months would be negligible.

In present recollection some courts impose the same or substantially the same restrictions relative to the memorandum and the witness's verification thereof as are uniformly imposed in past recollection.<sup>9</sup> On the other hand there is considerable case authority, and almost uniform text authority, in favor of allowing any kind of stimulus to be used to refresh the present memory of the witness, without reference to when or by whom it was made, subject only to the discretion of the trial court to prevent abuses in extreme cases. Since, by hypothesis, the witness assumes a present knowledge or memory he has laid himself open to full and searching cross-examination directly as to the facts, and thus the vital reason underlying the restrictions in cases of past recollection falls. Moreover, the evils of improper suggestion cannot be avoided by such restrictions for the memorandum can easily be consulted the evening before or shortly before taking the stand. On the whole it would seem preferable to have this coaching or suggesting, if such it be, done in the open.<sup>10</sup>

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\* Putnam v. U. S., n. 7 above; State v. Patton, n. 1 above. There is great difficulty in compiling the authorities accurately on this point because of the frequent failure of the courts to indicate and the facts to reveal whether the court is speaking of past recollection or present recollection. There is urgent need for the courts to abandon the general expression "refreshing recollection" and substitute therefor the more particularized terminology used herein or something equally discriminating.

<sup>9</sup> In support of the liberal rule in present recollection, see *Neff v. Neff* (1921) 96 Conn. 273, 114 Atl. 126; *Beaubien v. Cicotte* (1864) 12 Mich. 495, ("The modes of recalling a witness's memory . . . cannot be arbitrarily restricted, and if suspicious means should ever be used, the remedy is to be found in cross-examination and comment."); *Portsmouth Street Ry. v. Peed* (1904) 102 Va. 662, 676, 47 S. E. 850; *Torrey v. Burney* (1896) 118 Ala. 496, 21 So. 348; *State v. Miller* (1880) 53 Ia. 209; *Huckins v. Ins. Co.* (1855) 31 N. H. 238, 246-247; *Huff v. Bennett* (1852) 6 N. Y. 337; *Sagers v. Int. Smelting Co.* (1917) 50 Utah 423, 168 Pac. 105, 24 MICH. L. REV. 420, 41 HARV. L. REV. 860, 861; Jones, EVIDENCE (2d ed. 1926) secs. 2880, 2890; Wigmore, EVIDENCE (2d ed. 1923) secs. 759, 761 (Wigmore points out the conflict but approves liberal rule); McKelvey, EVIDENCE (2d ed. 1907) 391; Hughes, EVIDENCE (1919) 336; Thompson, TRIALS (2d ed. Early, 1912) par. 399.

The Missouri law as to present recollection is veiled in some obscurity. In *Eberson v. Investment Co.* (1908) 130 Mo. A. 296, 308, 109 S. W. 62, it

## I. THE USE OF PRIOR TESTIMONY IN PAST RECOLLECTION RECORDED

It is here assumed that a reference by the witness to his prior testimony does not bring to his mind present pictures of the original events. If therefore any principle of recollection can be applied it must be that of past recollection recorded.

Two formidable, but it is believed not insurmountable, ob-

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was boldly asserted that in present recollection it is wholly immaterial who made the memorandum: "The essential fact is that after looking at it, the witness has a present memory of the facts." The court cites 1 Wigmore, EVIDENCE, sec. 758. An earlier case, *Rose v. Rubeling* (1887) 24 Mo. A. 369, approves in terms a broad rule to the effect that "a witness may use a memorandum to refresh his [present] memory, although it is not in his own handwriting or made by himself, and although it may be a copy from some other book." The facts however involve only the last point in the quotation. *Thos. Cusack Co. v. Lubrite Refining Co.* (Mo. A. 1924) 261 S. W. 727, appears to support the liberal rule. This was an action to recover on a written contract for a printing job. It was claimed that the trial court erred in permitting the witness, Canfield, to refresh his memory by examining the statement of account in order to get certain dates as to the time when certain signboards were painted, on the ground that the memorandum was the bookkeeper's statement and did not appear to have been made by the witness himself. In affirming the trial court, the Appellate Court said: "The court permitted the witness to examine the papers to refresh his memory, and then allowed him thereafter to testify as to *his independent recollection of the facts*. This was not error." No authority is cited and it does not appear what the prior connection of the witness with the books of the company may have been. So far as appears it was not a matter of any concern to the court. In *Carp v. Queen Ins. Co.* (1906) 203 Mo. 295, 340, 101 S. W. 78, plaintiff was permitted to state the testimony of a witness given at a trial of the criminal case out of which the pending action for malicious prosecution had grown. In so doing plaintiff first examined a copy of the prior testimony of the witness. It was held that this was not reversible error. It is clear that the memorandum was not made nor as such verifiable by the witness. The question of refreshing recollection received, however, scant consideration. Also see *Littig v. Urbauer-Atwood Heating Co.* (1921) 292 Mo. 226, at 246, 237 S. W. 779.

*State v. Fannon* (1900) 158 Mo. 149, 59 S. W. 75, is the first case to call a halt on liberal practices. This was an indictment for perjury. The justice of the peace testified as to the alleged perjured testimony given before him. In reversing the case the court says: "As the case must be reversed for errors already noted, we add that if this case is further prosecuted no such liberality should be shown against the prisoner as to permit the justice of the peace to swear by an exhibit filed by the defendant in the case to refresh his memory. This witness, in view of all the circumstances, should have been required to testify to the testimony of the defendant without the aid of defendant's set-off. He was by no means an unwilling witness, and the court should not have permitted him to be led as he seems to have been

stacles stand in the way of the application of the doctrine of past recollection. The witness ordinarily cannot satisfy the requirements repeatedly announced, *viz.*, (a) that he must have made the memorandum himself or have verified it as a correct record of what he formerly personally knew and (b) that he must have made it contemporaneously with (at or near the time of) the

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in giving his evidence." This case may well be brought, however, within Mr. Wigmore's exception to a general liberal rule, which would allow the trial court, within its discretion, to prevent abuses where the particular facts seem to call for some restrictions.

The most outstanding of the more recent cases is *State v. Patton*, n. 1 above. It has contributed the one distinct note of discord to the Missouri law. It takes square issue with *Eberson v. Investment Co.*, n. 1 above, and the general liberal rule for which Wigmore contends. It ignores *Rose v. Rubeling*, above, and *Carp v. Queen Ins. Co.*, above. Its sole express reliance in the Missouri decisions is *State v. Fannon*, above, which it would have us believe stands for an arbitrary rule of strictness instead of one of exceptional discretionary strictness. And yet in formulating its rule as a rule, the opinion leaves one frankly in doubt as to how the restrictions are to be applied to varying situations; in other words, as to how strict its rule of strictness is. The rule reads thus: "In reason and logic we must deduce the privilege here of refreshing recollection from the well-settled rule that a witness being fair and truthful and desirous of stating the facts as they were, but being by lapse of time of hazy memory, may refresh his recollection by referring to writings, plats, maps and similar things *made by the witness himself*. He may likewise use in refreshing his memory data, instruments, plats or other papers, *which he knows to be correct*, however he may have obtained such knowledge, as for example, because such data were made in his presence, or under his direction, or dictated by him, or in divers other ways; but not by papers of which he knows nothing of their correctness or verity, and of which he had no part in the making."

The important point of practical inquiry is, just what familiarity with the memorandum on the part of the witness does this statement of the rule require? Only one thing is clear. It precludes the use of "papers of which he [the witness] knows nothing of their correctness or verity, and of which he had no part in the making." Contrariwise he may use a memorandum "which he knows to be correct." This carries the implication of strictness which obtains in the case of past recollection. But then the rule adds immediately that as a basis of knowledge, it is satisfactory if the memorandum was "made in his presence," or "under his direction," or "dictated by him," or "in divers other ways." Taken literally these terms do not imply an actual personal knowledge of the correctness of the memorandum. To raise the problem to which this paper is fundamentally addressed, are these requirements satisfied by the court reporter's transcript of the witness's testimony? The only thing concrete, by way of application, offered in the *Patton* opinion is found on page 258 where the court says that the state in order to refresh the memory of a witness may exhibit to him his former testimony given before the grand jury and permit him "to examine his testimony, his signature and other insignia of verity, for the purpose of identifying the

event recorded. Suppose, as is generally the case, that the prior trial occurred several months or even several years subsequent to the events involved in it, and that the testimony, though taken and transcribed by the court reporter, has not been seen at all or only recently seen by the witness. The orthodox procedure for the witness in past recollection recorded is to inspect the memorandum at the trial, to state that he recognizes it as one correctly made or seen and verified by him as correct, at or near the time of the occurrences therein recorded. This procedure does not in terms fit the case supposed. But the witness can state that he now remembers that he was a witness in a prior trial of the present case, or a prior trial involving the issues of the present case, that he there truthfully stated the facts as then known to him and that a court reporter was present and presumed to take his testimony. The court reporter may then be called to present his transcript of such testimony and to verify it as a correct transcript thereof. It is submitted that so far as the verification of the record is concerned the substance of the orthodox past-recollection rule is satisfied by this procedure.

Substantial support for this point of view is found in the cases which admit business records which have been produced by the combined labors, in sequence, of several persons connected with the business. *Mayor, etc., of New York v. Second Avenue Railroad*<sup>11</sup> is typical. In this case the plaintiff sought to show the extent of labor performed in certain public construction on behalf of the defendant. The time-book on the job was kept by *W.*, a foreman. Under him were two gang foremen in immediate charge of the workmen. The gang foremen testified that they reported each day the time put in by each laborer, though they did not see the entries made by the foreman, *W.* *W.* in turn, testified that he entered correctly what was reported to him by the gang foremen. In holding the time-book admissible the court said:

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copy of the testimony as a true type of what the witness said." The cases are rare in which the witness has his signature to verify his prior testimony. Later cases dealing with the use of prior testimony by the witness do not go into this question. In none of them is there any indication as to how the verification was made.

<sup>11</sup> (1886) 102 N. Y. 572.

The question arises, must a material, ultimate fact be proved by the evidence of a witness who knew the fact and can recall it, or who, having on [no?] personal recollection of the fact at the time of his examination as a witness, testifies that he made, or saw made an entry of the fact at the time, or recently thereafter, which on being produced, he can verify as the entry he made or saw, and that he knew the entry to be true when made, or may such ultimate fact be proved by showing by a witness that he knew the facts in relation to the matter which is the subject of investigation, and communicated them to another at the time, but had forgotten them, and supplementing this testimony by that of the person receiving the communication to the effect that he entered at the time the facts communicated, and by the production of the book or memorandum in which the entries were made. The admissibility of memoranda of the first class is well settled. They are admitted in connection with, and as auxiliary to the oral evidence of the witness, and this whether the witness, on seeing the entries, recalls the facts or can only verify the entries as a true record made or seen by him at, or soon after the transaction to which it relates.<sup>12</sup>

The absence of the element of contemporaneousness between observation and recording presents a more serious question. The courts have been uniformly strict, in past recollection recorded, in demanding that the memorandum shall have been made or verified very near the time of the occurrence of the event recorded.<sup>13</sup> The reason for this rule, as a general rule, is apparent and sound. In the pending trial the witness asserts (admits) no recollection of the original events. He cannot now therefore be effectively cross-examined as to the original events

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<sup>12</sup> For a further discerning and lucid elaboration of this principle see Morgan, *The Relation Between Hearsay and Preserved Memory* (1927) 40 HARV. L. REV. 712. In discussing the case where the memorandum of an event is the joint product of two or more persons, Professor Morgan concludes: "On their combined oaths the memorandum is as fully verified as if either had both observed and recorded. The cross-examination, however, is made somewhat harder by this division of testimony. Yet as long as a memorandum is produced which would have been admissible if made by the observer himself, reasonably adequate criteria of value are at hand for court and jury, and the contents of the writing should be received."

<sup>13</sup> Putnam v. U. S. (1896) 162 U. S. 687; Jones, EVIDENCE (2d ed. 1926) sec. 2390; Wigmore, EVIDENCE (2d ed. 1923) sec. 745. See notes 4, 5, 6, 7, and 8, above.

with a view to determining the accuracy of his observation and of his recollection at the time the record was made. In the interest of truth the very least that can be done is to place a formal barrier to those inaccuracies due to fading memory by a reasonably strict rule against the lapse of time. But the reason for the general rule, sound as it is, points the way of escape from the formal time limitation in the case of prior testimony. The witness was not then making a casual and private memorandum. He was in court. His picture there painted comes with the lights and shadows of the cross-examination testing the correctness of his observation and the power of his memory. The safeguards of such cross-examination which we cannot apply to the casual record of a past recollection, have already been applied in the case of the record of prior testimony and furnish a complete, if not more than a complete, substitute for the formal time limitation incorporated in the general rule.

In *Mahoney's Administrator v. Rutland R. R. Co.*<sup>14</sup> the action was based on the alleged negligence of the defendant in employing an incompetent operator at one of its stations. The plaintiff offered the defendant's operator as a witness. His testimony was in part in conflict with that given at a prior trial. The attorney for the plaintiff was then permitted, for the purpose of refreshing the recollection of the witness, to put inquiries which embodied questions and answers read from the transcript of the testimony given at the former trial. In approving the use of the former testimony the court deals with the following objections, among others, urged by the defendant: First, that the writing could not be used to refresh recollection because it was not made by the witness or known by him to be correct at the time it was made. The court answers: "It may be questioned whether the rules referred to are applicable to documents of this character. The writing used was a verbatim report of the witness's testimony. . . . The purpose of the report and transcript was to preserve the proceedings and evidence of the trial in a manner and form that would be authentic and certain. The court ordinarily assumes the correctness of the reporter's minutes in determining questions that arise in the progress of the trial."

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<sup>14</sup> (1907) 81 Vt. 210, 69 Atl. 652.

Second, it was objected that the record was not made at or near the time of the transaction. The court most pertinently replies: "Such a writing will often be a safer reminder than an incomplete private memorandum made soon after a transaction to preserve the writer's recollection of what he saw of it or the part he took in it. It presents a statement made by the witness when summoned to the best effort of his recollection by the caution and obligation of his oath, when his attention was directed to the material facts by competent inquiries, and when his remembrance was tested and corrected by an examination in the interest of the party against whom he was called. If not his freshest recollection, it was such as he had when he was called upon by law to give his recollection, and such that it was received by the court for use in the determination of the case. It is hardly consistent to say that a party may have the full benefit of the transcript on another trial if the witness dies or removes from the State, but cannot be allowed to use it to refresh a weak or confused recollection."<sup>15</sup>

## II. AN ALTERNATIVE TO PAST RECOLLECTION RECORDED AS A BASIS FOR ADMITTING PRIOR TESTIMONY

If the prior action was between the present parties, or parties with whom the present parties are in privity and the issues are the same in whole or in part, and the memory of the facts has departed, there is a basis in principle for admitting the prior testimony under the exception to the hearsay rule which admits the prior testimony of a deceased witness. The primary basis of this exception is that the original declarant or precipient witness is now unavailable and that his utterances were made under circumstances reasonably guaranteeing their trustworthiness, *viz.*, in court, under oath, and subject to cross-examination. While some courts have declined to apply this exception unless the non-availability of the prior witness is due to death or insanity, there is substantial authority for accepting circumstances which render the witness in fact non-available as constituting legal non-

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<sup>15</sup> On the facts the Mahoney case is apparently a case of present recollection revived. The Vermont Court either did not so classify it or assumed that the rules relative to present and past recollection were identical. In any event the argument is apropos of past recollection limitations and is therefore entitled to consideration at this point.

availability, *e.g.*, absence from the jurisdiction, inability to find, and illness.<sup>16</sup>

The present suggestion calls merely for an extension of the definition of legal non-availability to include all cases of factual non-availability. If memory has fled, the witness, as a present witness to the original events, is quite as non-available as if dead or insane. But it is argued that the witness may feign a lapse of memory. This is true, but it is no more likely to happen than in any case of past recollection recorded. The courts are agreed that a memorandum cannot be introduced under the rule of past recollection unless present recollection cannot be restored. The witness's statement that he has no present memory, subject to special interrogation, uniformly opens the door to past recollection. Why then as a practical matter will not a similar statement and a similar safeguard suffice to establish mental non-availability as a basis for the reported-testimony exception to the hearsay rule. When one pauses to consider the numerous exceptions to the hearsay rule in which the guarantees of trustworthiness are almost nil as compared with those which underlie prior testimony, a most liberal use of such testimony must commend itself in the practical search for truth in litigated issues.<sup>17</sup>

### III. THE USE OF PRIOR TESTIMONY IN PRESENT RECOLLECTION

So far as the question of refreshing recollection itself is concerned the use of prior testimony in present recollection presents no difficulties, except in those jurisdictions which hedge about present recollection with the same limitations that are imposed in past recollection. In such jurisdictions there are two possible ways of escape. One way, and probably in the long run the better way, is to shift ground on the general rule so as to impose no arbitrary restrictions upon the kind of stimulus that can be used in cases of present recollection. It is believed that the restrictive rule is not so definitely fixed in any jurisdiction as to

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<sup>16</sup> *People v. Schepps* (1922) 217 Mich. 406, 186 N. W. 508; *Wells v. New England Life Ins. Co.* (1898) 187 Pa. 166, 40 Atl. 802; Hale, *The Missouri Law Relative to the Use of Testimony Given at a Former Trial* (1929) 14 St. Louis L. Rev. 375, 378-383.

<sup>17</sup> Compare *Rothrock v. Gallaher* (1879) 91 Pa. St. 108; *Velott v. Lewis* (1883) 102 Pa. St. 326; *A. F. Stearns Lumber Co. v. Howlett* (1921) 239 Mass. 59, 131 N. E. 217; *State v. New Orleans Water Works Co.* (1901) 107 La. 1, 36 *et seq.*, 31 So. 395.

make this suggestion impracticable.<sup>18</sup> The other way out is that offered in the previous proposals in this paper relative to past-recollection and prior testimony. In either event there should be a free use of prior testimony in present recollection revived. And this represents the current of authority.<sup>19</sup>

There is, however, another respect in which the problem of present recollection has afforded difficulty to the courts. In some cases the factual set-up brings the court face to face with the rule against impeaching one's own witness. This situation exists, to a minor degree, if a witness first answers a question categorically and his counsel then seeks to induce him, and perchance does induce him, to change his statement *by placing in his hands* a transcript of his former testimony which is in conflict therewith. The problem becomes more complex and the issue more pronounced in those cases where counsel places the former contradictory testimony before the witness in the form of questions which incorporate it, and secures the witness's acknowledgment that he so testified, and, if possible, that his best present knowledge of the facts is in accord with his former rather than his later testimony.

In the first situation the impeachment element has been reduced to a minimum and has not been introduced in such a way as to contravene squarely any established rule. The second situation does present a dilemma. The courts have met it in three ways:

*Mahoney's Admr. v. Rutland R. R. Co.*, *supra*, brushes by it boldly, as follows: "But this objection [*i.e.*, that the party is im-

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<sup>18</sup> Notwithstanding some strong statements in *State v. Patton*, above, it does not seem that Missouri is utterly enslaved by requirements of strict limitations in present recollection revived, especially where the stimulus consists of former testimony. See the review of the Missouri decisions in footnote 9, above.

<sup>19</sup> Wigmore, *EVIDENCE* (2d ed. 1923) sec. 761; Jones, *EVIDENCE* (2d ed. 1926) sec. 2386; 22 C. J. 442; *Torrey v. Burney* (1896) 113 Ala. 496, 21 So. 348; *Johnson v. Gwinn* (1884) 100 Ind. 446, 475; *Ehrisman v. Scott* (1892) 5 Ind. App. 596, 32 N. E. 867; *Glenn v. State* (1908) 157 Ala. 12, 47 So. 1034; *State v. Miller and Kremling* (1880) 53 Ia. 209; *People v. Palmer* (1895) 105 Mich. 568, 63 N. W. 656; *State v. Aspara* (1904) 114 La. 940, 37 So. 883; *Portsmouth Street Ry. v. Peed* (1904) 102 Va. 662, 676, 47 S. E. 850. Also see *Mahoney's Admr. v. Rutland R. R. Co.* (1907) 81 Vt. 210, 69 Atl. 652. In support of *Putnam v. U. S.*, above, which is *contra*, see *Thompson*, *TRIALS* (2d ed. Early, 1912) 536.

peaching his own witness], whatever force and effect should be given to it when the examination fails of its purpose, is not pertinent when the examination results in a statement of the witness that his recollection is refreshed by the inquiry and that he now remembers the fact." In other words the impeachment factor is only incidental to the larger objective of a true refreshing of recollection.

*Bullard v. Pearsall*<sup>20</sup> handles it by recognizing the presence of a factor which makes it proper under the New York practice to bring in the element of contradiction in so far as it is secured from the lips of the witness himself. The court says:

The further question has frequently arisen whether the party calling the witness should upon being taken by surprise by unexpected testimony, be permitted to interrogate the witness in respect to his own previous declarations, inconsistent with his evidence. Upon this point there is considerable conflict in the authorities. We are of the opinion that such questions may be asked of the witness for the purpose of probing his recollection, recalling to his mind the statements he had previously made, and drawing out explanation of his apparent inconsistency. This course of examination may result in satisfying the witness that he has fallen into error, and that his original statements were correct, and it is calculated to elicit the truth. It is also proper for the purpose of showing the circumstances which induced the party to call him. Though the answers of the witness may involve him in contradictions calculated to impair his credibility, that is not a sufficient reason for excluding the inquiry. Proof by other witnesses that his statements are incorrect would have the same effect, yet the admissibility of such proof cannot be questioned. It is only evidence offered for the mere purpose of impeaching the credibility of the witness, which is inadmissible when offered by the party calling him. Inquiries calculated to elicit the facts or to show to the witness that he is mistaken, and to induce him to correct his evidence, should not be excluded simply because they may result unfavorably to his credibility.

The third approach is that made by the Supreme Court of Missouri. *State v. Patton*, *supra*, sets up a procedure which segre-

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<sup>20</sup> (1873) 53 N. Y. 230.

gates the two problems by providing that in order to refresh the witness's memory counsel may "exhibit the paper (without reading it and without corporeally offering to the jury the paper or the contents thereof) to the recalcitrant witness. . . . Then the question which the witness answered may again be put. . . . If necessary to prevent the paper from getting to the jury, the jurymen may be withdrawn while the witness examines the paper." This procedure has the practical advantage of eliminating all necessity either real or apparent for superimposing upon the refreshing recollection requirements those restrictions with which the courts, in varying degrees, have surrounded the right to impeach one's own witness by bringing before the jury his prior contradictory statements.<sup>21</sup> The theoretical basis of this segregation must be conceded; for the only purpose of the principle of refreshing recollection, *viz.*, that of jogging the memory of the witness to the end that he may recall and testify to the facts in accord with his renewed memory, is fully provided for if the transcript of the former testimony is placed in the hands of the witness. And if this end is not accomplished it still leaves the court free to meet on its own merits any request that counsel may wish to make to reveal the fact of contradiction. There is both clarity and precision in this method of attack.

Such segregation would be practically unnecessary, however,

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<sup>21</sup> These barriers extend all the way from a mild requirement of surprise to one of hostility or outright betrayal, and even to a rule of absolute prohibition. The Supreme Court of Missouri has uniformly followed this segregating procedure, but unfortunately has not followed it to its logical conclusion, since it refers to surprise as if it were a condition precedent to the right to place the transcript in the hands of the witness. It drags in this element in *State v. Patton*, in which the procedure is first discussed. The quotation cited in the text is preceded by the following: "But the State having been surprised by the testimony of the witness on the trial by reason of a serious departure from and contradiction of the witness's former testimony taken before the grand jury. . . ." See also *State v. Riles* (1918) 274 Mo. 618, 623-4, 204 S. W. 1 (requirement of hostility); *State v. DePriest* (1921) 288 Mo. 459, 468, 232 S. W. 83 (no reference to hostility element, but *State v. Patton* cited with approval); *State v. Henson* (1921) 290 Mo. 238, 245, 284 S. W. 832 (no reference to hostility). The one sound view expressed in *Putnam v. U. S.*, above, is that it is necessary to distinguish between the use of prior testimony for purposes of impeachment and of refreshing recollection and that to the latter use surprise is not a condition precedent.

if courts would take a more liberal stand in allowing a party to cross-examine and impeach, if you please, his own witness by showing his contradictions. If a witness gives at a second trial testimony inconsistent with the testimony which he gave at the first trial, one statement or the other is false. The falsity may arise from honest fault or deliberate falsehood. So far as the memory factor is concerned, the former statement is, of course, more likely to be true than the later statement. If the explanation is to be found in deliberate falsehood, that may have occurred at either one time or the other. The witness may have deliberately lied at the first trial and through qualms of conscience may wish at the second trial to state the facts as they were. Or at the first trial he may have told the truth and at the second, for various reasons, may have been led deliberately to lie. The quest is for the truth. If memory is at fault, memory should be aided, as in any case. But there should be no concealment. The present jury should not be the victim of any hocus pocus. If the witness has told two stories, should not that at all events be known, so that regardless of what stand he wishes to take, they should have this light on the manner of man before them. With such explanation as he has to offer, both the party and his witness stand before the jury in their true light.<sup>22</sup>

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<sup>22</sup> On the question of liberalizing the rules relative to impeachment see Wigmore, sec. 396 *et seq.*; 4 CAL. L. REV. 414; 34 YALE L. J. 214. The Missouri impeachment doctrine is narrow. See *State v. Burks* (1896) 132 Mo. 363, 34 S. W. 48. See also *Clancy v. St. Louis Transit Co.* (1906) 192 Mo. 615, 91 S. W. 509.