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Richardson v. State: An Opportunity Missed

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RICHARDSON v. STATE: AN OPPORTUNITY MISSED

In *Richardson v. State*,[1] an Indiana case in which the defendant was charged with having perjured herself during a grand jury investigation, the prosecution called as a witness the foreman of the grand jury before whom the defendant had testified. The foreman stated that while he remembered the substance of the defendant's testimony, he could not repeat it verbatim without the aid of the grand jury transcript. He was then allowed to respond to questioning by reading from the document.[2]

In affirming the defendant's conviction, the Indiana Supreme Court upheld the trial court's ruling that the transcript was used solely for the purpose of refreshing the recollection of the witness, and that such use was proper. A dissenting opinion[3] agreed with the majority's position in respect to the applicable law,[4] but disputed the majority's holding that the witness was using the transcript simply to revive his present recollection. The dissent contended that the foreman used the transcript as a substitute for present memory and that this evidence, under Indiana law, constituted inadmissible past recollection recorded rather than admissible present recollection revived.[5]

It seems clear that the witness, in reading verbatim from the transcript, was using that document, a record of past recollection, as a substitute for present memory. If a witness's memory is truly revived by a document, there should be no need for him to read it after he has examin-

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1. —Ind.—, 266 N.E.2d 51 (1971).

2. Apparently, another grand jury member was called to testify at the defendant's trial. He was also unable to repeat the defendant's testimony verbatim and was allowed to read from the transcript.

3. Throughout this note the dissenting opinion referred to is that of Judge DeBruler. Judge Prentice also filed a dissent which substantially agreed with Judge DeBruler's.

4. The majority reaffirmed Indiana's recognition of the doctrine of present memory revived and in dictum rejected the doctrine of past recollection recorded. — Ind. at—, 266 N.E.2d at 53. The dissent agreed with the majority on this point:

> There is no question that a witness may use a written memo to refresh his memory concerning past events. . . . [W]hen this is permitted, the evidence concerning the past events is the testimony relating the independent recollection of the witness and not the written memo.

Id. at —, 266 N.E.2d at 55.

The court first adopted the doctrine of present memory revived in Clark v. State, 4 Ind. 156 (1853).

5. It is obvious that the witness is reading the transcript verbatim and is not testifying from memory concerning the testimony of appellant before the Grand Jury. . . . [A]ll we have is the reading verbatim of an unauthenticated, inadmissible, purported transcript of the grand jury proceedings.

Id. at ——, 266 N.E.2d at 56-57.

ed it. *Richardson* thus afforded the supreme court an opportunity to align itself with the large majority of other jurisdictions which apply the doctrine of past recollection recorded to situations in which such a record is used as a substitute for present memory.[6] Rather than take this opportunity, however, the court rejected the doctrine and sanctioned this type of evidence on the tenuous ground that the transcript was merely used to aid the present memory of the witness.

The *Richardson* decision is disturbing in that it exemplifies the general approach of Indiana courts to situations in which a record of past recollection is used as a substitute for present memory. Under this approach, the courts, while refusing to recognize the doctrine of past recollection recorded, have allowed the admission of such evidence under exceptions to the hearsay rule and through misapplication of the doctrine of present recollection revived.

THE INDIANA APPROACH

The doctrine of past recollection recorded applies to two situations. The first involves a memorandum which so moves a witness's mind that he remembers making or verifying the document but is able to recall only a part of the events recorded therein.[7] The second involves a memorandum which stimulates a witness's mind so that he is only able to remember the occurrence of some event and his making or verification of the memorandum as a record.[8] Although justified in other jurisdictions on grounds of elemental necessity,[9] the practice of allowing the use of a memorandum as a substitute for present memory in these situations was rejected in *Clark v. State*,[10] an 1853 case in which the Indiana Supreme Court first dealt with this type of situation. *Clark*

6. 3 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 736 (rev. ed. J. Chadbourn 1970) [hereinafter cited as WIGMORE]; Annot., 125 A.L.R. 19 (1940); Annot., 82 A.L.R.2d 473 (1962). The doctrine of past recollection recorded is primarily a common law doctrine. However, Alaska, California, Georgia, Idaho, Kansas and Oregon are among the states that have adopted by statute the doctrine of past recollection recorded. ALASKA R. CIV. P. 43(g)(9)(b) (Supp. 1963); CAL. EVID. CODE § 1237 (West 1966); GA. CODE ANN. § 38-1707 (1954); IDAHO CODE § 9-1204 (Supp. 1969); KANSAS STAT. ANN. § 60-460(a) (1964); ORE. REV. STAT. § 45.580 (1969 Repl.).

7. 3 WIGMORE, *supra* note 6, § 734; C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 9, 276 [hereinafter cited as MCCORMICK]; Morgan, *The Relation between Hearsay and Preserved Memory*, 40 HARV. L. REV. 712, 717-18 (1927) [hereinafter cited as Morgan].

8. *Id.*

9. 3 WIGMORE, *supra* note 6, § 738. The objective of the doctrine of past recollection recorded is to secure the best available evidence of an event that a witness can offer.

10. 4 Ind. 156 (1853).

involved a witness who claimed a lack of present recollection of the facts in issue. The witness testified that at a former trial he did have such knowledge and that a list made from his memory at that trial was correct. He was allowed by the trial court to read the list into evidence. In reversing the defendant's conviction on the ground that the trial court had erroneously allowed such a verbatim reading, the supreme court stated:

> A witness may be permitted to refresh his memory of facts, by referring to a written memorandum, written either by himself or by another, at or near the time of the occurrence; but the memorandum cannot be substituted in the stead of the recollection of the witness.[11]

Subsequent Indiana decisions have similarly refused to adopt the doctrine of past recollection recorded.[12]

The possible consequences[13] of a complete prohibition of past recollection recorded, however, have been somewhat alleviated by application of certain exceptions to the hearsay rule[14] which serve to allow the use

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11. *Id.* at 157.

12. Hottenstein v. Hottenstein, 191 Ind. 460, 133 N.E. 489 (1922); Southern Ry. v. State, 165 Ind. 613, 75 N.E. 272 (1905); Elmore v. Overton, 104 Ind. 548, 4 N.E. 197 (1886); Bank of Poneto v. Kimmel, 91 Ind. App. 325, 168 N.E. 604 (1929).

13. The primary consequence would be that courts could not admit records of past recollection into evidence, thus decreasing their ability to resolve disputes justly and possibly increasing the incidence of perjury.

14. For present purposes, it is only necessary to state that admission of evidence under these exceptions is justified primarily on two grounds: (1) if courts are to resolve disputes justly, they must in many instances admit evidence of out-of-court statements; and, (2) in the situations to which these doctrines apply the possibility that such a statement has been falsified is minimal. The requirements for the exceptions to apply are designed to implement these justifications. To the extent that these prerequisites are not met, the justifications lose their force. It is unnecessary to set out here all the prerequisites that Indiana courts have imposed for the admission of evidence under the exceptions. For these requirements, see McCORMICK, *supra* note 7, §§ 281-90 (business records), 272-74 (*res gestae*), 230-38 (prior testimony); 5 WIGMORE, *supra* note 6, §§ 1517-33, 1536-61 (business records), 1370, 1371, 1386-89, 1402-15, 1666-69 (prior testimony) (3d ed. 1940, Supp. 1970); 6 *id.*, §§ 1745-61 (*res gestae*). A record of past recollection used as a substitute for present memory can also be admitted as a "prior admission" or "official record" under exceptions to the hearsay rule. Indiana, however, has never utilized this approach to situations in which a record of past recollection was used as a substitute for present memory when a past recollection recorded rationale would have been more appropriate. For a discussion of the prerequisites to admission of evidence under these exceptions to the hearsay rule, see McCORMICK, *supra* note 7, §§ 239-52 (prior admissions), 291-95 (official records); 4 WIGMORE, *supra* note 6, §§ 1048-87 (prior admissions) (3d ed. 1940, Supp. 1970); 5 *id.*, §§ 1630-84 (official records).

It should also be noted that the Indiana statutes dealing with the subject of admission of written evidence do not alter the common law to such an extent as to render a treatment of the cases irrelevant. The statutes deal primarily with the admission of "official records" and "business records." IND. CODE §§ 34-1-16-3 to 6,

of such evidence as a substitute for present memory. Such an application may be found in *Sage v. State,*[15] in which an official stenographer was permitted to read from his record the testimony of a witness, since deceased, which had been given at a previous trial. In upholding the trial court's admission of the evidence, the supreme court alluded to the propriety of using a memorandum to refresh a witness's memory[16] but made it clear that its holding was based upon application of the "prior testimony" exception to the hearsay rule. The court stated:

> That the testimony of a deceased witness may be repeated at a subsequent trial is well settled. . . . It is also settled that the reproduction of the testimony of a witness, who was examined on a former trial, is not a violation of the fundamental rule that the accused has a right to be brought face to face with the witnesses against him. . . . [W]e think it is also proper to say that there is much reason why a distinction should be made in a case where a sworn official stenographer is called to testify as to the testimony of a deceased witness, and a case where an ordinary witness is called for that purpose.[17]

Although *Sage* represented a correct application of an exception to the hearsay rule,[18] a number of Indiana decisions have upheld admission of past recollection recorded through misapplication of such exceptions. In *Culver v. Marks,*[19] for example, the supreme court upheld the admission of evidence constituting past recollection recorded[20] without accepting the doctrine. Despite the availability of witnesses who had made the business entries in question, the court upheld the admission by finding that the requirements of the "business records" exception to the hearsay

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34-1-17-1 to 18-12, 34-1-65-1, 34-3-1-1 to 2-7, 34-3-4-1 to 3, 34-3-7-1 to 8-1, 34-3-10-1 to 17-3, 34-4-22-1 (1971); IND. ANN. STAT. §§ 2-1601 to 1662 (1968).

15. 127 Ind. 15, 26 N.E. 667 (1891); *accord,* Bass v. State, 136 Ind. 165, 36 N.E. 124 (1893).

16. 127 Ind. at 25, 26 N.E. at 671. The court could not justifiably have upheld the trial court's admission of the evidence on the ground that the stenographer was simply refreshing his memory because he was clearly using the report as a substitute for his memory.

17. *Id.* at 25-26, 26 N.E. at 671.

18. *See* 5 WIGMORE, *supra* note 6, §§ 1370, 1371, 1386-89, 1402-15, 1666-69 (3d ed. 1940, Supp. 1970); MCCORMICK, *supra* note 7, §§ 230-38.

19. 122 Ind. 554, 23 N.E. 1086 (1890); *accord,* Lowe v. Swafford, 209 Ind. 514, 199 N.E. 709 (1936).

20. *Culver* was a suit against the administratrix of an estate for allowance of a claim based on certain checks made by her decedent. The entries in the books of the bank with which the decedent had done business were read at trial to show the state of the decedent's account at and after the execution of the checks. Some of the entries had been made by persons who could not recall the contents of the entries but testified that the account books were accurate.

rule had been satisfied.[21] The court thereby ignored the requirement that the makers of business entries be unavailable before such records may be admitted into evidence.[22] This misapplication of the "business records" exception could have been avoided if the court had recognized the applicability of the doctrine of past recollection recorded.[23]

The Indiana Supreme Court has also misapplied the *res gestae* exception to the hearsay rule in cases where admission of evidence upon a past recollection recorded rationale could have been justified.[24] Illustrative is *Place v. Baugher*,[25] wherein the supreme court upheld the trial court's admission of entries from defendant's account books as being *res gestae* although the defendant had made the entries sometime after his transaction with the plaintiff.[26] The court thus failed to recognize that the justification for admission of evidence under the *res gestae* exception is the minimal likelihood of fabricating statements made contemporaneously with, or spontaneously during, a transaction.[27]

In addition to allowing the admission of past recollection recorded under exceptions to the hearsay rule, Indiana has allowed the admission of such evidence through misapplication of the doctrine of present recollection revived. As pointed our earlier, the docrine of past recollection recorded applies when a witness is not able to testify from memory even with the aid of a memorandum. In contrast, the doctrine of present recollection revived applies to situations in which a witness, by some stimulus such as a written memorandum, has his recollection revived to such an extent that he is able to testify from present memory.[28] Analyzed together, *Prather v. Pritchard*[29] and *Johnson v. Culver*[30] demonstrate that the admission of past recollection recorded through misapplication of the doctrine of present recollection revived occupies a strong position in Indiana evidence law.

In *Prather* the supreme court held that a deponent who could recall the approximate, but not the specific, details of a business transaction could testify as to those specifics by reading from a memorandum pre-

21. 122 Ind. at 562-64, 23 N.E. at 1089-90.
22. McCormick, *supra* note 7, § 288; 5 Wigmore, *supra* note 6, § 1521 (3d ed. 1940, Supp. 1970).
23. *See* McCormick, *supra* note 7, § 280; 3 Wigmore, *supra* note 6, § 737.
24. The cases involve the use of past recollection recorded as a substitute for present memory. The safeguards designed to avoid abuse of the practice of allowing such evidence could have been implemented easily. *See* notes 42-46 *infra* & text accompanying.
25. 159 Ind. 232, 64 N.E. 852 (1902).
26. *Id.* at 235-36, 64 N.E. at 853.
27. 6 Wigmore, *supra* note 6, § 1747 (3d ed. 1940, Supp. 1970).
28. McCormick, *supra* note 7, § 9; Morgan, *supra* note 7, at 717.
29. 26 Ind. 65 (1866).
30. 116 Ind. 278, 19 N.E. 129 (1888).

pared at the time of the transaction.[31] Clearly this decision allows the use of a record of past recollection as a substitute for present memory.[32] However, the court did not adopt the doctrine of past recollection recorded, nor did it base its decision on the rationale that any of the exceptions to the hearsay rule applied. Arguably, an explanation of the basis of the decision is provided by the supreme court's statement in *Johnson*:

> A witness may refresh his memory by reference to a written memorandum made by himself in a case where many items of personal property are involved. He can not, to be sure, testify entirely from the writing, for he must have a knowledge and recollection independent of the memorandum, but for the purpose of assisting his memory and giving accuracy to his statements he may refer to what he has written.[33]

Johnson indicates that a witness with some degree of independent recollection of the events recorded in the memorandum may use that document to supply information not actually recalled. Such use is beyond the normal scope of legitimate renewal of present memory[34] and actually constitutes the utilization of past recollection recorded as a substitute therefor.[35] However, this is precisely the rationale used by the supreme court in *Richardson*. The trial court's admission of the grand jury foreman's testimony was upheld on the basis of the unpersuasive argument that the witness, in reading verbatim from the transcript, was not using that document as a substitute for present memory. The *Richardson* court may have felt justified in upholding admission of the evidence because of its necessity under the circumstances. Also the court may have assumed a minimal likelihood of abuse due to the witness's attested independent recollection. However, the court's unwillingness to adopt the doctrine of past recollection recorded forced it to base its decision upon the unjustified holding that the witness used the transcript for "refreshing recollection" rather than as a substitute for present memory.

Despite appearances to the contrary, Indiana has not completely rejected the doctrine of past recollection recorded[36] but rather has recognized a limited application of the rule. In *Higgins v. State*,[37] a

31. 26 Ind. at 67.
32. *See* notes 7-8 *supra* & text accompanying.
33. 116 Ind. at 290, 19 N.E. at 135, *cited with approval in* Sage v. State, 127 Ind. 15, 26 N.E. 667 (1891) *and* Southern Ry. v. State, 165 Ind. 613, 75 N.E. 272 (1905).
34. *See* note 28 *supra* & text accompanying.
35. *See* notes 7-8 *supra* & text accompanying.
36. *See* note 12 *supra* & text accompanying.
37. 157 Ind. 57, 60 N.E. 685 (1901).

court stenographer was allowed by the trial court to read into evidence notes he had taken at a prior grand jury investigation.[38] In reviewing the trial court proceedings, the supreme court used a past recollection recorded rationale in upholding the admission of the evidence:

> If a person takes the evidence at the time it is given, either in longhand or shorthand, and can testify as to the accuracy of his notes, they may be read in evidence, or he may refresh his recollection from said notes, and testify from memory. Such person may read in evidence such copy made at the time, although aside from said copy he has no recollection of what the witness said, and this may be done in all cases, when such person would be allowed to testify to the same facts from memory.[39]

Despite the general language, this holding merely represents an acceptance of the doctrine of past recollection recorded for the type of fact situation represented by *Higgins* rather than an overall adoption of the rule.[40]

To summarize, the approach of Indiana courts to situations in which a record of past recollection is used as a substitute for present memory has been notable for its inconsistency. Despite their general refusal to adopt the doctrine, Indiana courts have sanctioned the admission of such evidence by utilizing exceptions to the hearsay rule and by misapplying the doctrine of present recollection revived.

Reflections on the Indiana Approach

The Indiana approach to the use of past recollection recorded as a substitute for present memory is disturbing for several reasons. Initially, refusal to adopt the doctrine of past recollection recorded has resulted in,

38. The safeguards designed to avoid abuse of the practice of allowing the use of past recollection recorded as a substitute for present memory (*see* notes 42-46 *infra* & text accompanying) were satisfied. The witness had no present recollection of the "prior testimony," but testified that his notes of it were accurate. *Id.* at 63, 60 N.E. at 687.

39. *Id.* at 63, 60 N.E. at 688.

40. *See* Sekularac v. State, 205 Ind. 98, 185 N.E. 898 (1933), where the supreme court upheld the trial court's admission of the transcript of the testimony at a previous hearing of a witness who was unavailable to testify at trial. The transcript had been made by an unofficial stenographer who stated that she did not recollect the testimony of the witness but that the transcript was an accurate record. It is not clear whether the supreme court upheld the admission of the evidence on the ground that the requirements of the "prior testimony" exception to the hearsay rule were met or on a past recollection recorded rationale. The indications are that the former ground was utilized; indeed, the decision in *Higgins,* probably the best authority the court could have used to justify a past recollection recorded rationale, was not even mentioned. *See also* note 12 *supra.*

or at least been directly linked to, the misapplication of hearsay exceptions. Admission of out-of-court statements under any particular exception may be justified primarily on two grounds: (1) if courts are to resolve disputes justly, they must often admit an out-of-court statement as probative of matters in issue; and (2) in certain situations the likelihood of a false out-of-court statement is minimal. The prerequisites to the admission of an out-of-court statement under an exception to the hearsay rule are designed to insure that admission is justified upon these grounds. To the extent that the admission of past recollection recorded results in the acceptance of evidence in situations where the prerequisites are not met, two undesirable results occur. First, admission of that evidence can prejudice the party opposing admission. Second, precedents are set by which improper evidence may be admitted in subsequent cases under the doctrine of stare decisis. Hence, Indiana's misapplication of exceptions to the hearsay rule in upholding admission of evidence which could have been admitted under a past recollection recorded rationale is, according to conventional wisdom, unjustifiable.[41]

A second criticism of the Indiana approach lies in the use of records of past recollection as a substitute for present memory without employing safeguards designed to avoid abuses. This problem arises not only in the decisions based on misapplication of hearsay exceptions, but also in decisions which uphold admission of past recollection recorded through misapplication of the doctrine of present recollection revived. The safeguards which must be met before such evidence can be admitted[42] are:

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41. *See generally* note 14 *supra*.

42. Since the memorandum is read into or admitted as evidence, the requirements are designed to increase the probability that the writing is an adequate and correct record of past recollection. 3 WIGMORE, *supra* note 6, § 734. Additionally, the "best evidence" rule requiring that the original be produced if procurable is applicable. *Id.*, § 749.

The requirements outlined here indicate that whether or not the memorandum is in fact a correct record of past recollection depends on the credibility of the witness. Therefore, it should be noted that the witness's credibility is not simply assumed when he says that he perceived the events recorded in the memorandum, that the memorandum is a correct record of those events and so forth. The party opposing the use of a memorandum must be given access to it for purposes of inspection and cross-examination. *Id.*, § 753. The party opposing the use of a memorandum can thus test the witness upon the adequacy, identity and correctness of the writing. Of course, the argument is sometimes made that a piece of paper cannot be cross-examined and, therefore, the practice of allowing the use of a memorandum as a substitute for present memory denies the party opposing its use the right to confront the witnesses against him in a criminal case. In response to this argument the Arizona Supreme Court correctly stated:

> What is the purpose of cross-examination? Obviously it is to convince the triers of fact, in some manner, that the testimony of the witness is untrue. . . . How, then, may the truthfulness of the evidence of a witness be attacked through cross-examination? It seems to us that all attacks thereon must be reduced to one of three classes: (a) Upon the honesty and integrity of the

(1) a present recollection must appear to be lacking;[43] (2) the witness must have perceived the events set forth in the memorandum;[44] (3) the past recollection must have been recorded when fairly fresh in the mind of the witness;[45] and (4) the witness must be able to assert that the memorandum accurately represented his knowledge of the events at the time it was made and that the evidence now offered is in fact identical with the record formerly made.[46]

Richardson provides an apt example of the failure to implement these safeguards. The court did not require that the past recollection have been recorded when fairly fresh in the mind of the witness, that the witness be able to assert that the transcript was accurate or that the transcript be identified as such. In summary, the Indiana courts, rather than misapplying evidentiary doctrines, should have either candidly recognized the doctrine of past recollection recorded or refused to admit the evidence, thereby preserving the integrity of all the relevant doctrines.

The third problem inherent in Indiana's treatment of past recollection

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witness; (b) upon his ability to observe accurately at the time the incident occurred; and (c) upon his accuracy of recollection of the past events. When a witness testifies as to his present recollection, independent or revived, he may, of course, be cross-examined fully on all three points. When he testifies as to his past recollection recorded, he can be examined to the same extent and in the same manner as to the first and second of these matters. He cannot well be cross-examined on the third point, but this is unnecessary, for he has already stated that he has no independent recollection of the event, which is all that could be brought out by the most rigid cross-examination on this point when the witness testifies from his present recollection, independent or revived. Kinsey v. State, 49 Ariz. 201, 220, 65 P.2d 1141, 1149-50 (1937).

43. 3 WIGMORE, *supra* note 6, § 738. This requirement is not geared to assuring the adequacy, identity or correctness of the record or to securing the best available memory of the witness; rather, it is based on the notion that the credibility of a witness testifying from present memory can be tested better than the credibility of a witness who uses a record of past recollection as a substitute for present memory. Because the requirement is not so geared, the wisdom of maintaining the requirement has been questioned. Both Wigmore and McCormick advocate abandoning the requirement. *Id.;* MCCORMICK, *supra* note 7, § 277.

44. MCCORMICK, *supra* note 7, § 277.

45. 3 WIGMORE, *supra* note 6, § 745.

46. *Id.*, §§ 746-47. The witness need not have been the writer so long as the memorandum can be identified and verified as an accurate record of the events to be proved. *Id.*, §§ 748, 750-52; MCCORMICK, *supra* note 7, § 279. A number of situations can arise in which the witness has not himself made the memorandum, but it is, nevertheless, admissible as evidence. The first occurs when the witness has not made the memorandum but testifies that when the event recorded was fresh in his mind, he read the document and knew it was true. In the second situation, the witness has made a writing which another person has copied; the witness testifies that his writing was correct, and the person who made the copy testifies that the copy accurately reproduced the witness's writing. In this situation the copy is admissible as evidence. The third situation arises when the witness has reported the facts orally to another person who has written them down; the witness testifies that his oral report was correct, and the person who made the memorandum testifies that he recorded the witness's oral report correctly.

recorded may be illustrated by the state of the law following *Sage*[47] and prior to *Higgins*.[48] Despite the correctness of *Sage*,[49] that decision, coupled with the courts' refusal to recognize the doctrine of past recollection recorded, created the possibility of arbitrary and capricious, though doctrinally sound, results. Following *Sage*, the courts recognized the "prior testimony" exception to the hearsay rule but did not recognize the doctrine of past recollection recorded. Consequently, when prior testimony of an unavailable witness was offered as evidence, an Indiana court could have either admitted the evidence on the ground that the requirements of the "prior testimony" exception to the hearsay rule were met or rejected it on the ground that it was past recollection recorded and therefore inadmissible. Either decision would have been doctrinally sound prior to *Higgins*. Although *Higgins* obviated this danger in cases involving "prior testimony" through limited adoption of the doctrine of past recollection recorded,[50] the danger still exists in cases involving *res gestae*. A situation could arise in which a person who had spontaneously recorded figures during the occurrence of an event testifies that he has no present recollection of the figures but that his record is accurate. In such a situation a court would have the alternative of admitting the evidence under the *res gestae* exception or rejecting it as inadmissible past recollection recorded. Once again, either decision would be doctrinally sound. However, as in the pre-*Higgins* situation, potential danger exists in that arbitrary decisions could result.[51] The type of evidence involved is clearly past recollection recorded.[52] Since the courts believe that admis-

47. 127 Ind. 15, 26 N.E. 667 (1891). *See* notes 15-17 *supra* & text accompanying.

48. 157 Ind. 57, 60 N.E. 685 (1901). *See* notes 37-40 *supra* & text accompanying.

49. All prerequisites to the admission of evidence under the "prior testimony" exception to the hearsay rule were satisfied. *See* note 18 *supra*.

50. The recognition in *Higgins* of the doctrine of past recollection recorded for stenographer situations cannot be criticized. *Higgins* utilized the safeguards associated with the doctrine. The possibility of abuse of the practice of allowing the use of a memorandum as a substitute for present memory in the *Higgins* situation is probably less than in any other type of situation. A stenographer is usually a trained specialist in recording testimony and has nothing to gain by falsifying the record. Additionally, evidence of a stenographer's past experience and accuracy is readily available for impeachment purposes.

51. A situation might also arise in which a person who has made a memorandum of a business transaction is unavailable to testify. The court would have two alternatives: (1) it could admit the evidence under the "business records" exception to the hearsay rule; or, (2) it could reject it as inadmissible past recollection recorded. Acceptance of the doctrine of past recollection recorded for this situation is theoretically impossible, for the witness by hypothesis is unavailable to testify that he perceived the event recorded, that his record is accurate and so forth. Hopefully, however, the courts will properly define this situation as one to which the "business records" exception applies and not as one involving inadmissible past recollection recorded. In this manner, the danger of arbitrary decisions would be avoided.

52. *See* notes 7-8 *supra* & text accompanying.

sion of such evidence is warranted on one ground, they should, in the situations discussed, also allow admission upon the rationale that it is admissible past recollection recorded.[53] By doing so, the Indiana courts would eliminate the danger of arbitrary and capricious decisions in these situations.

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53. This does not necessarily mean that the courts should adopt the doctrine of past recollection recorded for all situations to which it normally applies. The courts may be justified in their reluctance to adopt the doctrine completely. However, the danger of inconsistent holdings is sufficient to warrant adoption of the doctrine for those situations in which the danger exists.