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WHEN A PROMISORY NOTE EXECUTED ON SUNDAY IS VALID AS A WORK OF CHARITY OR NECESSITY.

In a recent Georgia case the court held that where a person is in the common jail of the county under a warrant charging a bailable offense, and in order to be released from imprisonment he employed a lawyer to secure a bond for him, and was thereupon released, a note given by the prisoner to the lawyer for his services, including the services rendered in procuring the bond, was valid and collectible although executed on Sunday, the consideration being in the nature of a work of charity within the meaning of the Sunday statute exception from its operation works of charity or necessity. *Few v. Gunter,* 72 S. E. Rep., 720.

This case involves the questions of the lawfulness of procuring bail on Sunday, as a work of charity or necessity, and the validity of a contract or note executed in the undertaking of that work.

In *People v. Johnson,* 31 Ill., 469, it was held that the entering into a recognizance, by one charged with a criminal offense, is not such a judicial act as to render its execution void, either at common law or by statute, because it was entered into on Sunday; and that any work necessary to be done to secure the public safety,

by the keeping of a felon, or delivering him to bail, comes within the true exception of the statute. A recognizance entered into on Sunday has also been held good by the Indiana court. *State v. Douglas,* 69 Ind., 544. And the undertaking of an appeal bond, executed on Sunday, has been held valid in Nevada. *State v. Cal. Mining Co.,* 13 Nev., 203. While in Texas a convict hiring bond is held to be valid, although executed on Sunday. *Ex parte Millsap,* 39 Tex. Cr. R., 193. But in *State v. Suhur,* 33 Me., 539, it was held that a recognizance taken on the "Lord's Day," to prosecute an appeal in a criminal case, is unauthorized and void.

In *Salter v. Smith,* 55 Ga., 244, it was said that bail entered into on Sunday came within the statutory exception of a work of charity or necessity, and was valid. And this court further holds in *Weldon v. Colquitt,* 62 Ga., 449, that it is lawful to take bond on Sunday, admitting a prisoner to bail, the same being in favor of liberty, and in the nature of a work of charity to a human being in distress. The Louisiana court says that the prohibition against the issuance of process on Sunday does not extend to criminal cases, and that a prisoner may be bailed on Sunday. *State v. Wyatt,* 6 La. An., 701. In *Hammons v. State,* 59 Ala., 164, the court holds that an undertaking of bail, entered into on Sunday, is sanctioned by the law and is perfectly valid; for it is a work of necessity in the sense that it is an act morally fit and proper under the circumstances of the case. And in *Watts v. Com.,* 68 Ken. (5 Bush.), 309, it was held that a bail bond executed on Sunday, for the appearance of a person accused of a felon, is as much binding on the sureties as if it had been made on any other day.

In *Burns & Co. v. Moore,* 75 Ala., 339, the Court says: "The necessity which will excuse, if not a physical one, must, at least, be a moral emergency which will not reasonably admit of delay, but is so pressing in its nature as to rescue the act done from the imputation of a wilful desecration of a day made sacred for certain purposes in morals as well as in law." And that a contract made on Sunday, if made in a case of necessity, is not void. The case of *Sheppey v. Eastwood,* 9 Ala., 198, involves a note made on Sunday where the maker was arrested on that day with the charge of bastardy against him. The note was then executed in discharge of the arrest and was given for the support of the

supposed bastard child; but the Court held that the note was not made in the execution of a work of necessity or charity and was therefore void because made on Sunday. Still in *Hooper v. Edwards,* 18 Ala., 280, a bill of sale of a number of slaves, which a debtor was endeavoring to spirit away, made by that absconding debtor to his creditor, who overtook him on Sunday and forced him to deliver the slaves over, was held to be valid and binding.

In *Clap v. Smith,* 16 Pick., 247 (Mass.), a debtor had made an assignment for the benefit of his creditors, which recited that the annexed schedule contained a list of the property, when in reality the schedule was not so annexed at the time of the delivery of the bill of assignment. However, it was annexed at a later date, but on Sunday, and it was held that if the annexation of the schedule of the property was necessary to complete the sale it was not a void act although done on Sunday. But in *Mace v. Putnam,* 71 Me., 238, it was held that the making of a draft on Sunday, in order that a man about to leave home may receive pay for labor done, is not a work of necessity or charity so as to take the case out of the statute.

Aldrich v. Blackstone, 128 Mass., 148, lays down the rule that it is not unlawful for the overseers of the poor to make a contract on Sunday for the relief of a sick pauper. And a contract for hiring a horse on Sunday to take a prisoner to jail on legal process, is a work of necessity and valid. *Fisher v. Kyle,* 27 Mich., 454. Also the hiring of a horse and carriage on Sunday, by a son to visit his father in the country, is a valid contract, as the law does not forbid the discharge of a filial duty. *Logan v. Matthews,* 6 Pa., 420. Nor is it unlawful for a husband and wife to contract for a conveyance on Sunday to attend the funeral of the husband's brother-in-law. *Horne v. Meakin,* 115 Mass., 326. It has also been held that the employment of a physician, and a contract to pay him for his services, made on Sunday, is not prohibited, as healing the sick, or employment of a doctor to do so, is a work that is required by necessity and charity. *Smith v. Watson,* 14 Vt., 332; *In re Stagger's Estate,* 8 Pa. Super. Ct., 260.

It is settled beyond doubt that the raising of a subscription from a congregation on Sunday to pay off a church debt, or purchase a house of worship, is a work of charity, and hence not unlawful;

that therefore contracts and promises made on Sunday for donating such subscriptions are valid and enforcible. *Allen v. Duffie,* 43 Mich., 1; *Dale v. Knepp,* 98 Pa., 389; *Bryan v. Watson,* 127 Ind., 42. But subscribing in aid of a railroad on Sunday is unlawful. *S. T. & R. R. Co. v. Campbell,* 55 Mich., 190. And procuring and affixing signatures of taxpayers to a petition for issuance of railroad aid bonds is unlawful. *De Forth v. W. & M. R. Co.,* 52 Wis., 320. However, it seems to be well established that a will is perfectly valid although executed on Sunday. *Bennett v. Brooks,* 9 Allen (Mass.), 118; *Breitenman's App.,* 5 Pa., 183; *George v. George,* 47 N. H., 27; *Rapp v. Rehling,* 124 Ind., 36.

At common law it was lawful to perform any act on Sunday not expressly prohibited. *Rex. v. Brotherton,* 1 Stra., 702; *White v. The Hundred of Stoke,* Cro. Jac., 496. And in *Beham v. Ghio,* 75 Tex., 87, it was said that contracts made on Sunday, when not made in the course of a business prohibited upon that day, are valid.

The trend of the English decisions, although not based upon exactly the same line of reasoning, is very similar to that of the American cases. The earlier English cases interpreted the statute, prohibiting labor on Sunday, except works of charity or necessity, as meaning that to be unlawful the act must be done in the ordinary calling of the doer. For example, the private sale of a horse, at the request of the owner, who was a baker, by one whose business was to sell horses at public auction, was held lawful. *Drury v. De Fountaine,* 1 Taunt., 131. But in a later case, *Smith v. Sparrow,* 4 Bing., 88, Judge Park lays down the inflexible rule that the expression, "any worldly labor," cannot be confined to a man's ordinary calling, but applies to any business he may carry on, whether it is his ordinary calling or not. And in *William v. Paul,* 6 Bing., 653, the Court expressly condemns the construction of the statute in *Drury v. De Fountaine, supra.*

In England a bail bond may be validly given on Sunday, and bail may take their principal on Sunday, as well as any other day, to surrender him in their discharge. *Anonymous,* Mod. Cas., 236 (6 Mod. Rep.). An undertaking by an attorney on Sunday to become surety for his client was held not to be unlawful in *Peate*

v. Dickens, 3 Dowl. R., 171. And in *Norton v. Powell,* 4 Man. & G., 42, it was held that a guaranty may lawfully be given on Sunday by one tradesman to another for the faithful services of a commercial traveler to be employed by the latter. In both of the above cases, however, the Court seems to revert to the earlier construction of the statute. In *Wolton v. Gavin,* 15 Jur., 329, it was held that an army enlistment may be validly made on Sunday. And in *Stallard v. G. W. Ry. Co.,* 2 Best. & S., 419, the Court holds that a railroad company may lawfully transact the ordinary business of checking baggage on Sunday.

The foregoing decisions seem to show that it has been firmly established that the procurement of bail by a person deprived of his liberty, through confinement in a prison, may be lawfully done on Sunday, as coming within the exception of an act of necessity or charity; and that a note given in consideration of the accomplishment of that office of charity is perfectly valid and enforceable although made on Sunday.

THE EFFECT OF MARRIED WOMAN'S ACTS UPON THE HUSBAND'S LIABILTY FOR THE WIFE'S TORTS.

At common law the husband, as an inevitable incident of marriage became responsible for the misconduct of the wife and answerable in damages for her torts. In 2 *Kent's Commentaries* 149 the author, discussing the rights and liabilities which grow out of the marital relation says, "the husband is liable for the torts of the wife committed during coverture. If committed in his company or by his order, he alone is liable. If not, they are jointly liable, and the wife must be joined in the suit with the husband.

The torts of the wife for which the husband could be held liable at common law may be conveniently divided into four classes. (1) Where the act is committed by the wife during the husband's absence and without his knowledge. (2) Where the husband, although absent, induced the wife to do the tortious act. (3) Where the husband was present but the wife acted entirely of her own accord. (4) Where the husband is present and the act is done in his company and by his encouragement or persuasion. It is to torts arising under subdivision (1) that this article is

especially adapted, and it is interesting to observe how these common law principles have been dealt with in the different jurisdictions since the enactment of the Married Woman's Property Act.

In a recent case, *Poling v. Pickens,* 73 S. E. (W. Va.), 251, it was held that the husband was liable for slanderous words spoken by the wife although he was absent at the time and notwithstanding the fact that there was a married woman's property act in that State.

Declaratory of the common law rule is an early English decision, *Head v. Briscoe,* 5 Carr. & Payne, 484, which holds in substance that when the wife commits a libel against a person, even during the temporary or permanent absence of the husband, unless such separation caused the legal relation of husband and wife to cease, the husband shall be answerable for her tort. About fifty years after this decision was rendered Parliament passed the Married Woman's Property Act. In this act there was no express provision relieving the husband from liability for his wife's torts, and consequently in a later case it was held that husband and wife were properly joined in an action where recovery was sought for a tort committed by the wife. *Seroka v. Kallenberg,* 55 Law J. (N. S.), Q. B. D., 375.

So in New York the common law rule making the husband liable for the torts of the wife has not been abrogated by the enactment of statutes allowing suits to be brought against married women as if they were sole. Nor has such result been brought about by statutes giving the wife absolute control of her property. *Fitzgerald v. Quann,* 109 N. Y., 441. And *Fowler v. Chichester,* 26 Ohio State, 9, is in accord with the principal case in holding that the statutes "concerning the rights and liabilities of married women" have not changed the common law rule in regard to the husband's liability for the wife's torts. And it further declares that in an action against husband and wife for slanderous words spoken by the wife exemplary damages may be allowed. But the Tennessee court, recognizing the common law doctrine as laid down in *Fowler v. Chichester, supra,* presents a modification of the rule and declares that while the husband is liable under the circumstances of that case he can only be held to answer for compensatory damages. The reasoning of the Court upon which

this modification is based proceeds upon the theory that since exemplary damages are given for a flagrant wrong, the husband, who was absent at the time and in no way participated in the misconduct, should only be held to compensatory damages. And similarly in *Taylor v. Pullen,* 152 Mo., 434, it was said with respect to the married woman's act of that State, *expressio unius exclusio alterius,"* and accordingly where husband and wife were joined for the wife's slanderous words the Court held the husband liable. Upon the same principle North Carolina holds the husband liable for words spoken by the wife during his absence and without his knowledge or encouragement. *Presnell v. Moor,* 120 N. C., 390.

Contrary to the doctrine of the principal case and the succeeding line of authorities, many States refuse to place a strict construction upon the Married Woman's Act, and consequently by implication or a process of judicial legislation the following States hold that statutes giving the wife absolute control of her property necessarily exonerate the husband from liability for her torts.

Thus in *Lane v. Bryant,* 100 Ky., 138, the Court holds that since the liability of the husband at common law for the torts of the wife was based upon the idea that upon marriage he acquired control of her property, any legislative act which gives the wife control of her estate destroys the reason for the common law rule and by implication relieves the husband from liability. Thereupon a judgment rendered against husband and wife for slanderous words spoken by her in his absence was reversed and remanded. The Utah court in a similar case held that the intervention of a statute giving the wife control of her property during coverture removed the husband's liability for her torts. *Culver v. Wilson,* 13 Utah, 129. In an almost evenly divided court it was held in *Martin v. Robson,* 65 Ill., 132, that while the statutes giving married women control of their property "do not expressly repeal the common law rule that the husband is liable for the torts of his wife, they have made such modifications of his rights and her disabilities as wholly to remove the reason for the liability." So the husband was held not liable for the tort of the wife in speaking slanderous words. And the Louisiana court removed the husband's liability by implication under similar circumstances when the wife uttered slanderous words without the knowledge

or participation of the husband. *McClure v. McMartin,* 104 La., 496. The same doctrine is established in Kansas. See *Norris v. Corkill,* 32 Kans., 409.

To remove all possibility of doubt, to prevent continuous dissension among the judges of the respective courts, and to determine once for all the law that should govern in the particular jurisdiction, it has been found expedient to enact statutes in many States relieving the husband by express language from liability for the wife's torts. Alabama, Massachusetts, Indiana, and Michigan are among the States which have enacted express statutes upon the subject.

Upon a careful examination of the authorities there can be no doubt that the decided weight of authority is in support of the common law rule making the husband liable for the torts of the wife irrespective of the statute giving the wife absolute control of her property. Where there is no express statute upon the subject comparatively few States exonerate the husband from liability by reading into the Married Woman's Act, contrary to the wording of the statute, language sufficient for that purpose.

THE EFFECT UPON A PRIOR WILL OF THE REVOCATION OF A SECOND WILL CONTAINING A REVOKING CLAUSE.

The authorities are in irreconcilable conflict as to the effect of the destruction of a second will containing a revoking clause upon a prior will, in the absence of any statutes.

In the recent case of *Blackett v. Ziegler,* 133 N. W. (Iowa), 901, the testatrix executed a will in 1895. She subsequently made another will which contained a clause revoking the will of 1895. The later will was destroyed by the testatrix. The Court held that the destruction of a second will which expressly revoked a former will does not raise any presumption that the former will is thereby revived, but it is a question of the testator's intent, to be gathered from admissible parol testimony.

This case follows the rule of the ecclesiastical courts of England, which is stated in the case of *Helyar v. Helyar,* 1 Lee Ecc., 472. This rule is that the revival of a former uncancelled

will by the destruction of a subsequent revocatory will was purely a matter of the testator's intention.

This rule was never followed by the common law courts of England, but it has been instrumental in molding the decisions rendered by a number of jurisdictions in this country, the leading case being *Pickens v. Davis,* 134 Mass., 252. The Court there held that in the absence of any statutory provisions to the contrary the proof of such an intention at the time of the cancellation of the second will would give to the act of cancellation the effect of reviving the former will.

Under this rule there is no presumption either way, but it is to be determined solely according to facts and circumstances. *Horton v. Head,* 3 Phillim. Ecc., 26.

Some of the American decisions which have adopted the ecclesiastical rule have digressed somewhat from the doctrine stated in *Horton v. Head, supra.* The Court says in *Pickens v. Davis, supra*: "It is more natural and reasonable to assume that such revocatory clause shows emphatically and conclusively that he has abandoned his former intentions and substituted therefore a new disposition of his property." Therefore it is held that in the absence of evidence as to the testator's intention the prior will will not be revived. *Williams v. Miles,* 94 Nev., 591.

The doctrine of the ecclesiastical courts is based on the assumption of actual destruction, for, as is stated in *Daniel v. Nockalds,* 3 Hagg. Ecc., 777, an effort to revive a revoked will by oral declarations without destroying the later will would be ineffectual.

The reason given by some of the American courts for adopting this doctrine in preference to the common law rule, *infra,* is that the ecclesiastical courts had jurisdiction over wills disposing of personalty, and from their decisions our law is derived in large part. At the same time they say this rule is the most reasonable that can be formulated. *Williams v. Miles,* 94 Nev., 591.

The common law rule was that the cancellation or destruction of the second will *ipso facto* revives the former will, irrespective of the intention of the testator. This rule was based on the

statement of Lord Mansfield in *Goodright, Glazier v. Glazier,* 4 Burr, 2512, which held that the destruction of the second will containing a revocatory clause will cause the first will to operate as if the second will had never been executed. The last will existing is given effect as the "last will." The revoking clause is treated as purely testamentary in its character.

The theory upon which this rule is based has been stated to be that "all wills are ambulatory and have no operation until the testator's death, and the destruction *animo revocandi* by the testator of a second will will necessarily leave the first to go into operation at his death, nor does the fact that the second contains a clause of revocation alter the case, because that clause is just as inactive as the rest of the will and so continues up to the time the whole will is cancelled." *Stetson v. Stetson,* 200 Ill., 594.

The rule laid down by Lord Mansfield is no longer of any force in England. It has been abrogated by the *Statute of Wills,* 1 Vict., c. 26, s. 22, which provided that no will or codicil or any part thereof which shall be in any manner revoked, shall be revived other wise than by the re-execution thereof, or by a codicil executed as required by the act, and showing an intention to revive the same. The old English rule prior to the statute has still some force, however, in this country, as is shown by the case of *Stetson v. Stetson, supra.*

In addition to the rules stated, there is another line of cases which hold that the revocatory clause is not testamentary in its character, but that it operates to revoke the prior will immediately upon the execution of the second will.

The Court in *In re Noon's Will,* 115 Wis., 299, states: "Where the second will contains a revoking clause, all former wills are wiped out and held for naught. The operation of the revocatory clause is immediate and absolute. It is an act done solemnly and deliberately for present effect, and not one contemplating that future circumstances are to determine whether it shall have force."

A deed of revocation separate from the will operates instantaneously, and the operation is the same, whether the revoking

clause be in a deed or will, for it is never a necessary part of the latter. *James v. Marvin,* 3 Conn., 576.

This doctrine has been criticised by some of the text writers. 1 *Redfield on Wills,* Sec. 328: "This doctrine has an air of plausibility from the fact that an instrument of revocation alone would unquestionably have this effect so long as it was allowed to remain operative. But that would show a present purpose of becoming intestate carried into effect as far as practicable before death. But the making of a will with a revocatory clause is very different. It is but substituting one will for another, and the revocatory clause is made dependent in some sense upon the subsequent will going into operation, and there is ordinarily no purpose of having the revocatory clause operate except upon that condition."

Much of the uncertainty existing in these cases has been removed by legislation in a number of the States, some following the English statute, *supra.* In those States, however, which have no express statute regulating this matter, the greater number follow the doctrine of the principal case, which is substantially the old ecclesiastical rule, that the question as to whether or not the earlier will is revived by the cancellation of the later will depends upon the intention of the testator, and that in the absence of affirmative evidence of such intent there will be no revival. The common law doctrine as stated by Lord Mansfield is in the main disapproved in this country, according to *Schouler on Wills,* Sec. 415.

REFRESHING MEMORY BY REFERENCE TO COPY OF REPORT PRINTED IN A NEWSPAPER.

At times a witness is unable to recall facts clearly, at the time when he is being examined. The question as what may be used to refresh his memory then becomes important. That he may use a memorandum made by himself at the time, provided it calls up an independent recollection in his mind, is fully settled. But many cases arise where although the witness made a memorandum at the time, the original has since been lost, or is unavailable, and only a copy can be produced.

Erdman v. State, 134 N. W. (Neb.), 258, presents such circumstances as those mentioned. The defendant was being tried for

attempted murder, and during the course of the trial a newspaper reporter was called by the defense. After testifying that he was present at the time of the examination of a certain suit case, he was asked as to how many cartridges were in the pistol found in the suit case. His answer was, in substance, that it was impossible for him to remember the details of what he saw in making that examination; that he wrote out what he had seen and furnished it to the paper for publication; that his writing was accurately published, but the original manuscript was not kept; that he could refresh his memory from the published article and testify to what he saw in the examination made; but that he could not otherwise do so, having no present recollection of the matter suggested by the inquiry. The lower court, upon objection, refused to allow the evidence, holding that the witness could refresh his memory only from the original memorandum. The Supreme Court, however, held that this was error, and that the evidence should have been allowed.

The opinion quoted from the case of *Topham v. McGregor,* 1 Car. & Kir. (Eng.), 320, as a case representing both the English and American rules. In that case the writer of articles in a newspaper testified that all the articles written by him were true, and it was held that the newspaper containing the article under consideration might be placed in his hands for the purpose of refreshing his memory ,and that he might be asked whether, looking at the articles, he had any doubt that the fact was as therein stated. To the same effect is *Hawes v. State,* 88 Ala., 37, which was an indictment for murder. There, the witness being called to prove a conversation which he had with the defendant at the time of his arrest, testified that he was then acting as a reporter for the Evening Chronicle; that he made notes of the conversation, and from them wrote out an account of what was said for the paper; and that this account was published in the paper, after being cut down, and some parts of it being omitted. It was shown that the notes from which the article was written had been destroyed. Upon this showing the witness was allowed to refer to and read the article as published, to refresh his memory in regard to what was said by the defendant at the time in question. To this there was an exception, but the Court overruled it, saying, "We do not think it is tenable. The article as published, was written by the witness. It contained, the witness swears, the

substance of what the defendant said. The question presented by the exception comes within the principle adjudged in the case of *Horne v. McKenzie,* 6 Clark & Finnelly, 628, where a surveyor was permitted to refresh his memory by reference to a printed copy of his report, which had been made out from his original notes, of which it was, in substance, though not in words, a transcript. The same principle is negatively asserted in New York, where the Court held, that the memory of a witness could not be refreshed by reference to an article which "*did not* purport to be, and was not in truth, a statement of a conversation with, or declaration made by the plaintiff, and which was *therefore* not competent for the purpose in view. *Downs v. R. R. Co.,* 47 N. Y., 87."

Where a witness is testifying as to the testimony which a person gave on a former trial, he may refresh his memory from notes taken at the time ,or from a newspaper printed by him, containing the evidence as taken down by him. *U. S. v. Wood,* Fed. Cas. No. 16, 756 (3 Wash. C. C., 440). Again, it has been held, that where the original manuscript of an alleged libelous article published in a newspaper was lost, the reporter who wrote the same from a verbal interview with the person sued might be shown the article to refresh his memory. *Clifford v. Drake,* 110 Ill., 135. Also, that a witness who is a newspaper reporter may be allowed, for the purpose of refreshing his recollection of what was said at a particular time, to look at a printed copy of his own printed report of the proceedings at that time, although the absence of the written report is not accounted for. *Commonwealth v. Ford,* 130 Mass., 64. Likewise, in *Jackson v. State,* 66 Miss., 89, a reporter was permitted to refresh his memory by reference to a newspaper, the Court saying: "The testimony of the witness was properly admitted. As we understand the record, he testified that his report of the interview with the prisoner, as published, was an accurate statement of what occurred between him and the prisoner, and he adopted it as his testimony, but was not willing to affirm that it was verbally accurate, or that it contained all that the prisoner said. It accords with both English and American authorities in such cases to admit the testimony."

The true rule regarding the refreshing of a witness' memory is well stated in *Union Bank v. Knapp,* 3 Pickering (Mass.), 96. If

the witness does actually recall the transactions through the aid of the memoranda, he thereafter testifies to matters within his knowledge, and the weight of his testimony is to be regarded independently of the memoranda. These memoranda, therefore, may as well be copies as originals, there being no especial importance attaching to them other than their power to awaken the memory of the witness. *Bullock v. Hunter,* 44 Md., 416.

This is supported by the cases, which seem to indicate that the manner in which a witness shall be allowed to refresh his recollection by reference to memoranda must be left to the trial court to be determined with reference to the circumstances of the case and the bearing of the witness. *Johnson v. Coles,* 21 Minn., 108. In *Madigan v. DeGraff,* 17 Minn., 52, it is said, that allowing a witness to refresh his recollection by reference to a memoranda is a question of a preliminary nature, addressed to the court, and where a witness has been allowed so to do, unless it clearly appears that the Court has erred, a new trial will not be granted. In addition, a great number of cases might be cited to the effect that in refreshing his memory a witness need not be confined to original records made by himself. A few, however, will be sufficient to indicate the weight of authority.

Where a witness as to measurements testifies that the figures used by him to refresh his memory were made at the time the measurements were taken, and are correct, but that the paper on which they are written is a copy of the original, and that he has lost the original, he may use the copy. *Anderson v. Imhoff,* 34 Neb., 335. A witness may refresh his memory from a memorandum, known by him to be correct, which is made by another person. *Bowden v. Spellman,* 59 Ark., 251. A writing used by a witness to refresh his memory need not necessarily be an original writing, provided that, after inspecting it, the witness can speak of the facts from his own recollection. *Lamson v. Glass,* 6 Colo., 134. For the purpose of refreshing his memory, a witness may use a copy of a copy without the production of the original. *Wernmag v. Chicago & A. Ry. Co.,* 20 Mo. App., 473.

In 1 *Greenleaf Evidence,* 436-439, the rule is stated thus: "The witness need not have made the record himself; the essential thing is that he should be able to guarantee that the record actually

represented his recollection at the time, and this he may be able to do, either by his general custom in making such records, or by his assurance that he would not have made the record if he had not believed it correct. The original record should be produced, not a copy; nevertheless a copy may be used if the original is lost or otherwise unavailable. So far as concerns stimulation by reference to a writing or the like, the fundamental notion is that any paper may in the circumstances be properly used for the purpose. The particular that the paper was not written by the witness himself is no objection. Furthermore it is not an objection that the paper is a copy, and not an original, provided it does in fact serve to revive the recollection. Accord: 1 *Whart. Evidence,* Par. 522; *Taylor on Evidence,* pp. 1198 *et seq.*; 3 *Russell, Law of Crimes* (7th Eng. Ed.), p. 2303.

It may be stated with certainty, then, that a witness may be permitted to refresh his memory by reference to a printed copy of a record made by himself, and if he is able thereafter to testify to the facts as matter of present recollection, his testimony must be admitted. From this it follows that the Supreme Court of Nebraska was in agreement with the weight of authority in deciding that the testimony of the witness in the principal case was competent evidence.