Michigan Law Review

Volume 29 | Issue 2

1930

WITNESSES-REFRESHING MEMORY-PAST RECOLLECTION

WITNESSES—REFRESHING MEMORY—PAST RECOLLECTION.—Action on a claimed oral renewal of a burglary insurance policy. Nearly six months after the alleged renewal W made an affidavit stating that she heard defendant's agent tell plaintiff that plaintiff's policy had been renewed. This affidavit was drawn up by plaintiff's attorney. On the trial eight years later W was unable to recall any such conversation and the affidavit did not refresh her memory. The court over objection admitted the affidavit itself in evidence. *Held,* since the affidavit was not made at or near the time of the event recorded, and was drawn up by one of the lawyers in the case, the court erred in admitting it in evidence. *Rice v. Fidelity and Casualty Co. of New York,* 250 Mich. 398, 230 N.W. 181 (1930).

The court indicated that a memorandum made by a witness at the time of the event recorded, even if it does not refresh his memory, may be admitted in evidence if he testifies that he knew it to be true when made. This is in harmony with the so-called modern rule which under proper safeguards admits evidence of past recollection as such. *State v. Rawls,* 2 N & McC. (S. C.) 331; *Graves v. Boston and M. R. R.,* (N. H. 1930) 149 Atl. 70; 2 WIGMORE, EVIDENCE, 2d. ed., secs. 735-6. This should be distinguished from the practice of refreshing the present recollection of a witness with such a memorandum. The essential difference between the two kinds of evidence is that in the former the memorandum itself is admitted as evidence, while in the latter it is not the memorandum but the refreshed memory of the witness which is put in evidence. *Neff v. Neff,* 96 Conn. 273, 114 Atl. 126. The chief danger in allowing a witness to refresh his memory by a memorandum is that he will not remember the facts in issue but will testify to what he read in memorandum. The chief objection against admitting the memorandum itself in evidence is that it may be an inaccurate record of what the witness once remembered but has since forgotten. In cases of refreshing memory the question is essentially whether the memorandum is offered in good faith, and whether it is at all likely to stimulate the memory of the witness. Thus a rigid rule would be inadequate; it should rather be a matter of discretion with the court whether under the circumstances of the particular case to let a witness refresh his memory by reading a memorandum. *Neff v. Neff,* 96 Conn. 273, 114 Atl. 126; *Turner v. Turner,* 90 Conn. 676, 98 Atl. 324. On the other hand, where the memorandum is to be used as evidence of past recollection, the question is whether it is an accurate record; its accuracy may be and generally is insured by definite rules. 2 WIGMORE, EVIDENCE, 2d. ed., secs. 744-754. The most general restrictions are that the witness must testify that he knew the record to be true when made, *Stockyards Loan Co. v. Nichols,* 260 Fed. 393, and that his recollection of the facts must have been fairly fresh when the memorandum was made. *Murray and Peppers v. Dickens,* 149 Ala. 240, 42 So. 1031; *The J. S. Warden,* 219 Fed. 517. On the latter point many courts lay down the more arbitrary rule that the memorandum must have been made. "at or near the time" of the event in question. *Halsey v. Sinsebaugh,* 15 N. Y. 485; *Roll v. Dockery,* 219 Ala. 374, 122 So. 630.

WORKMEN'S COMPENSATION ACTS—DEATH BY LIGHTNING.—The deceased, an employee of the defendant, while seeking shelter under a tree during a rainstorm, was struck by lightning and killed. *Held*, that the accident was not compensable as it did not "arise out of some causative danger peculiar to the work and not common to the neighborhood." *Deckard v. Trustees of Indiana University* (Ind. 1930) 172 N.E. 547.

With this case sixteen jurisdictions have passed on the so-called "lightning cases" in connection with the Workmen's Compensation Acts. And while the court in the instant case followed the current of authority in denying compensation where the hazard of injury was not increased by the employment, 26 MICH. L. REV. 307, nevertheless this appears to be the first reported case in which recovery has been refused where the workman sought shelter under a tree. *Fontenot v. Lyon Lumber Co.*, 6 La. App. 162; *Lebourgeois v. Lyon Lumber Co.*, 6 La. App. 216; and cases cited in 26 MICH. L. REV. 307. Compensation has heretofore been awarded in the "tree cases" on the ground that wet trees are ready conductors of electricity, and one seeking shelter thereunder is in increased danger of being struck by lightning. *Madura v. City of New York*, 238 N. Y. 214, 144 N.E. 505. Implicit in the ruling of the court in the instant case is the intention to deny compensation in the "Act of God" cases and to limit recovery to industrial accidents per se. In this decision the court took refuge in the principle that the findings of the commission should not be disturbed where there is any substantial basis for them in evidence. *Hoenig v. Industrial Commission*, 159 Wis. 646, 150 N.W. 996. At least this decision places the workman, who runs for shelter, in the same position as one who remains at work in the open—a desirable result, certainly, provided that the latter must be denied compensation. The instant case obviously indicates that many of the courts will not adopt a more liberal interpretation of the legislative phrase, "arising out of the employment"; and, taken in conjunction with *Lickfett v. Jorgenson*, 179 Minn. 321, 229 N.W. 138, 28 MICH. L. REV. 944, points to the conclusion that legislative action is really necessary to bring order out of the chaos of the lightning cases. 26 MICH. L. REV. 307.