to the common sense of justice and is widely used in out-of-court settlements,[40] there are, as yet, no techniques in contract law by which the court can achieve this result.

Evidence—Testimonial Recollection—Present Recollection of Past Recollection Recorded in Memorandum Now Lost—[Federal].—The plaintiff intervened in a corporate receivership proceeding, claiming to be the owner of 10,126 shares of lost stock. Although he remembered purchasing the stock, he admitted that he had no present recollection as to the number of shares. He testified, however, that two years previous to his original petition to intervene he had seen a memorandum, written by him shortly after the stock transactions, which stated the number of shares purchased. The memorandum had since been lost or stolen, but the plaintiff recalled its contents and was thus able to testify as to the amount of stock he had bought. He also testified concerning his habits in the writing of such memoranda and asserted that when he saw this particular memorandum he had recognized his handwriting and had known the memorandum to be correct. Upon appeal from a disallowance of the plaintiff's claim, *held*, that the past recollection recorded, reflected in the memorandum, was sufficient to sustain the validity of the claim. *Putnam v. Moore*.[1]

The opinions of both the district court and the circuit court of appeals are indicative of the confusion prevalent in regard to the introduction of memoranda into evidence. The lower court refused to admit the testimony of the plaintiff on the ground that he had no independent recollection which the memorandum might serve to revive. Doubtless influenced by the plaintiff's brief on appeal, which took pains to establish the rule of past recollection recorded in the absence of present memory, the circuit court of appeals allowed introduction of the evidence without considering the fact that no memorandum had in fact been introduced.

The principal case thus presents the problem of the admissibility of oral testimony offered to prove the existence and contents of a past recording of recollection, which writing, if available, would be admissible evidence bearing on the ultimate question at issue. Substantially the same question was involved in the early case of *Pidgeon v. Williams' Administrators*.[2] It was there held not to be error to admit oral evidence by a bank officer regarding an entry he had made on a bank record or "scratcher" indicating the account to which a deposit should be credited. But since that decision did not analyze the question at any length, the principal case presents the first real opportunity for analytical discussion. Such a case, moreover, has been anticipated, with trepidation by some and with acquiescence by others.[3]

[40] This is particularly true among organizations whose inter-connections are more intimate than those depending merely on contract. In view of the close questions involved in the instant case, the usual efforts at settlement would be a normal incident of the progress of litigation. We are informed that the lower court attempted such a solution during the trial of the instant case, but it was rejected by the defendant. May there not be cases where splitting the loss may be achieved under the authority of the court, somewhat as in admiralty?

[1] 119 F. (2d) 246 (C.C.A. 5th 1941).

[2] 21 Gratt. (Va.) 251 (1871).

[3] Morgan, Hearsay and Preserved Memory, 40 Harv. L. Rev. 712, 721 (1927); Bannister, Recollection on the Witness Stand, 15 Wash. L. Rev. 257, 260–61 (1940).

Whether or not there is a hearsay objection to the evidence presented by the plaintiff in the principal case depends upon the view one takes as to whether the memorandum itself, if introduced, would be hearsay. It has been argued that a memorandum presents no hearsay problem because the maker of the memorandum is in court and can be cross-examined, even though the memorandum was made out of court and the maker was not then subject to cross-examination.[4] Others have contended that the memorandum is hearsay because the maker does not recall the facts and hence cannot be cross-examined on anything except their recording.[5] Although the memorandum is an extra-judicial statement which is offered as the sole proof of its contents, adherents of the latter view are willing to admit it as an exception to the hearsay rule since there are sufficient safeguards against error.[6] The offering witness may be questioned as to his identification of the writing and his habits in the making of such memoranda. Moreover, recorded recollection may frequently be more reliable evidence than testimony from present memory, especially when some time has elapsed since the event in question. If the view be accepted that past recollection recorded, although hearsay, is admissible as an exception to the hearsay rule, the argument in favor of a hearsay exception where the memorandum must be established by oral evidence is somewhat weaker. The possible advantage of past recollection recorded over present memory is absent, for it is necessary to rely upon the memory of the witness in order to have presented in evidence the contents of the memorandum. Opposing counsel would still, however, have ample opportunity to question the witness as to the memorandum, his identification of it when he last saw it, and his habits in regard to the writing of such documents.[7]

If, however, one accepts the view that the past recollection recorded is not hearsay, t does not become hearsay merely because the contents of the memorandum are being presented orally by the person who wrote the memorandum. Nor should the best evidence rule afford an obstacle to oral proof of the memorandum. Ordinarily, where the contents of a lost document are proved by oral testimony, the contents of the document are themselves the ultimate fact. But such testimony has been permitted where, as in the instant case, the contents of the document were being used only to prove the existence of some further fact.[8]

Analogous to the situation where the memorandum must be proved orally is the case where the memory of one person, instead of being recorded in a writing, is preserved in the mind of another. In *Shear v. Van Dyke*,[9] A was permitted to testify as to

[4] Consult 3 Wigmore, Evidence §§ 726–55 (3d ed. 1940).

[5] Morgan, Hearsay and Preserved Memory, 40 Harv. L. Rev. 712 (1927); Strahorn, Extra-Legal Materials and the Law of Evidence, 29 Ill. L. Rev. 300 (1934).

[6] Note 5 supra.

[7] See Kinsey v. Arizona, 49 Ariz. 201, 65 P. (2d) 1141 (1937), for a good discussion of the opportunities to cross-examine when a memorandum is introduced.

[8] Fleming v. Doodlesack, 270 Mass. 271, 169 N.E. 795 (1930). A letter's contents were there established by oral evidence, the ultimate purpose of which was to prove that solicitations had been made for the purchase of a home.

[9] 10 Hun (N.Y.) 528 (S.Ct. 1877); Hart v. Atlantic Coast Line R. Co., 144 N.C. 91, 56 S.E. 559 (1907) (B, who made memorandum of what A told him, allowed to testify as to contents, even though A could not remember what he said); Chalmers v. Anthony, 151 Atl. 549 (N.J. L. 1930) (traffic officer allowed to testify as to license number told him by A, though A could not

the number of loads of hay which B had counted, where A had only been told the number by B and the latter had forgotten the number. Stating that hearsay was not involved since the question was as to the declaration made by B and not as to its truth or falsity, the court analogized A's testimony to a memorandum. The conclusion that no hearsay was involved may be questioned, for it seems that, viewed broadly, B's extrajudicial statement was relevant only if true. Moreover, the fact that A's testimony was regarded as a memorandum of B's statement does not necessarily remove the hearsay factor, for it has been pointed out that many authorities regard past recollection recorded as hearsay. But, since both A and B were present in court and could be questioned as to parts of the total transaction, the court would seem justified in admitting the evidence as an exception to the hearsay rule. The *Van Dyke* case is significant, however, because it required present memory as a means of transition to the contents of the "memorandum." Consequently, there was the same element of unreliability as was present in the principal case. The opportunity for cross-examination at this crucial point in the *Van Dyke* case was therefore no greater than in the principal case; nor was it improved at this point by the presence of an additional witness.

Even if there be no technical objection to the evidence, it should perhaps have been excluded in the instant case. The plaintiff first stated in a deposition that he did not know the number of shares he owned. Only later, before the master, did he testify as to the memorandum and his memory of its contents.[10] While the fabrication of a memorandum seems just as easy as fabrication of a present memory, the memorandum does make a more convincing story. The fact that would-be stockholders were claiming more than twice as many shares as could have ever been issued lends some significance to the plaintiff's failure to stand by his original story.[11]

Income Taxes—Persons Subject to Tax—Taxation of Investment Trust as Corporation—[Federal].—Distributors Group, Incorporated, and the respondent, as trustee, executed a trust agreement whereby the former was to deposit with the trustee bonds conforming to requirements set out in the trust instrument, and the trustee was to issue certificates representing undivided interests in the corpus. The respondent was to hold the bonds and receive and distribute to certificate holders the income and proceeds from the sale of securities. It had no power to reinvest earnings or the proceeds from sales and could sell only at the direction of the depositor, which might require sales whenever in its opinion a bond should be eliminated in order to preserve the in-

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remember number); cf. Clute v. Small, 17 Wend. (N.Y.) 238 (1837) (B not permitted to testify as to contents of lost letter which had been dictated to him).

[10] Q. "When you gave your deposition here some time back why did you say at that time that you were unable to state the number of shares you owned at this time or purchased?"

A. "I do not know, that was the first deposition I ever filled out, ... " Transcript of Record, at 56.

Q. "How many shares did that memorandum show that you had?"

A. "I had ten thousand in the Virginia Company, Inc. and 126 shares in the Virginia Oil and Refining Company." Transcript of Record, at 35.

". . . . I based my claim on this memorandum. . . . " Transcript of Record, at 61.

[11] Brief of Appellee, at 3.