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THE BATTLE OF THE STANDARDS

Edward W. Spencer

SINCE the historic Battle of the Standard, that wild clash of arms upon the bloody field of England eight centuries ago, many veritable battles of the standards have been fought out in the courts of the civilized world, not by men in armor, but by men in wig and gown and learned in the law, often with the aid of those whose special knowledge, training and experience qualify them to speak ex cathedra as to the authenticity or authorship of writings where that question was in issue or relevant thereto. For years under the English common law this battle involved a struggle as to whether, the authorship of any particular writing being in issue, its genuineness or otherwise could be determined by the comparison of such writing with any proved genuine handwriting of the alleged author of the writing in dispute as an exemplar or standard of comparison and judgment by the tryers of fact, with or without the aid of experts, or whether such comparison must be confined to such writings as were already properly in the case as genuine for some other purpose. The present writer discussed this conflict generally in an article in this REVIEW in 1917 and again in one of its special and rather peculiar phases in 1929. Little attempt will here be made to invade again or to re-survey these particular fields of legal strife save incidentally. In short, the "battle for the

1 See Spencer, Spurious and Questioned Documents (1917) 1 Marq. L. Rev. 114; 11 R. C. L. 625.
2 See Spencer, Use of Extraneous or Unproved Writings in Cross-Examination in Questioned Document Cases, with some digressions (1929) 13 Marq. L. Rev. 129.
standards” has, generally speaking, been won. The law of practically all our states, by judicial decision in a few of them, and by statutes in others, as in England and Canada, permits now the comparison of a questioned or disputed writing with any proved or admittedly genuine writing of the person whose writing is in question as a measure or standard of their genuineness or authorship of the questioned writing. That is true whether such genuine writings are already in the case for some other purpose than comparison, or whether they are wholly extrinsic to the record proper being brought in that they may be used only as standards of comparison with the questioned writing. Thus under the law as it now quite generally exists questioned document cases frequently become veritable battles of the standards, or battles between conceded or proved genuine writings on either side, as a basis of comparison and judgment not only as to the genuineness of the questioned writing, but otherwise as to its particular authorship. This is true not only in prosecutions for forgery where not only forgery but the authorship of the spurious writing must be proved, but the use of proved writings of the supposed or alleged forger or other writer are admissible in other cases, since one who denies that he or some other person wrote a signature or other questioned matter has a right to corroborate his denial by showing who did write it.

It seems well to state here a fact not always understood, that while it is often quite easy to prove that a given writing is forged, since the great majority of forgeries are clumsy and unskillful affairs, it is often very difficult or even impossible to identify the forger, particularly where the amount of writing is small as in the case of a single signature, though single signatures are sometimes so skillfully forged as

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3 See Spencer, supra note 1 at 123. See also Note (1901) 62 L. R. A. 817; Wigmore, Cases on Evidence, 428-430; Jones, Evidence, (Hor. ed.) §§52, n. 16; 22 C. J. 774, n. 16.
5 Under the English statute comparison of writings with genuine writings of the alleged writer and also with the genuine writing of the supposed or alleged forger is permitted, [Creswell v. Jackson, 4 F. & F. 1, 5, 176 Eng. Rep. 440 (1864)] and this would doubtless be permissible under such a statute as our own. See also Woolbridge v. State, 49 Fla. 187, 38 So. 3 (1905); Cook v. Lambdin, 114 La. 664, 37 N.W. 665 (1901); State v. Bauer, 171 Minn. 345, 214 N.W. 262 (1927); Brown v. Hall, 85 Va. 146, 7 S.E. 182 (1888), will alleged to have been forged by proponent; Easterday v. United States, 292 Fed. 664, (D.C. App. 1923), forgery. As a practical matter it is very often impossible to identify the forger from the forged writing alone, and other evidence such as uttering or possession and attempts to utter must be resorted to. This is most frequently true of a single signature, especially a traced signature.
6 Cook v. Moeckler, 217 II. App. 479 (1920); Brown v. Hall, supra, note 5; Latham v. Houston Land & Trust Co., (Tex. Civ. App. 1933) 62 S.W. (2d) 519. See and compare Pech v. Callaghan, 95 N.Y. 73 (1884) under the statute of 1880, since amended so as to admit evidence by comparison to show forgery by a third person. See also Spencer supra note 2, at 132.
to defy detection even by the most competent expert. Indeed it is sometimes said to be almost axiomatic that the smaller the amount of questioned writing the greater the difficulty and uncertainty of proof of its authenticity or its authorship. Indeed some courts have refused, largely or wholly on this ground, to admit testimony based upon comparison as to the genuineness or authorship of mere cross marks, while others have admitted it in testamentary and contract cases on the basis of proved standards, and evidence of this character has been admitted even without such standards in the ordinary sense, at least in election cases where characteristic cross marks on a considerable number of ballots were alleged to have been made by the same person. In some forgery cases it is possible that there may be no standards in the ordinary sense of the genuine writing of the one whose signature is alleged to have been forged. This is sometimes the case where the forgery involves some tracing process, though genuine writings as standards of comparison are often highly useful even in such cases and may be almost indispensable in a close or doubtful case as showing such personal characteristics as shading, pen-pressure, line quality, fluency and the like, very difficult to reproduce in a traced forgery.

7 See Osborn, Questioned Documents (2d ed.) 282, 679, 680. There are a few experts who might deny this statement, as there are a few who might deny that they have ever made, or ever could make, a mistake in a handwriting case. It may be well to say here that it has been apparently held within the discretion of the court whether or not to require an expert on cross-examination to state whether he has ever made such a mistake or made a mistake in a particular case. State v. Stetson, 204 Wis. 250, 235 N.W. 539 (1931). Similar questions were permitted in the Hauptman Case. If this was error the defendant had no ground of complaint, since they were just experts for the state.

8 See the recent case of In re Astolas Est. 273 Mich. 189, 262 N.W. 766 (1935). For a digest of the more or less conflicting decisions on this subject, see Osborn, Questioned Documents (2d ed.) 930 et seq. See also In re Corcoran's Will, 129 N.Y. Supp. 165 (1911). That a mark is not handwriting see Wolf v. Gall, 176 Cal. 757, 169 Pac. 1017 (1917). The court could not see how an expert in handwriting could bear evidence in the matter.

9 State v. Tice, 30 Or. 457, 48 Pac. 367 (1897). See Ausman and Moon v. People, 47 Colo. 167, 107 Pac. 204 (1909). The questioned mark in one case was a smooth, firm, vigorous and rapidly made X, but the standard marks were labored and tremulous Latin crosses. See also Strong v. Brewer, 17 Ala. 706, (1850), where a witness familiar with the peculiar cross mark of an illiterate person was permitted to testify to it direct. To the same effect is In re Astolas Estate, 273 Mich. 189, 262 N.W. 766 (1935).

10 See State v. Ryan, 79 Ohio St. 452 (1908). In this case, standards were used showing peculiarity of ballot marks alleged to have been made by accused.

11 In a recent case tried in Milwaukee, three promissory notes were involved, all being almost exact counterparts or facsimiles. It was quite clear that the signatures were all traced from a common model which was not found, as often happens in such cases. The genuine signatures of the alleged maker of these notes, however, confirmed the fact of forgery, since they had a marked degree of ease, freedom, fluency, smoothness and certainty of line direction not found in the forgeries, a quality among others quite commonly lost where the tracing process is employed. The forger confessed. See the celebrated Rice-Patrick will case, In re Rice's Will, 81 N.Y. Supp. 68, 81 App. Div. 223 (1903). See also Stitzel v. Miller, 250 Ill. 72, 95 N.E. 53, 34 L.R.A. (n.s.) 1004 (1911). Careful patching and retouching and unusual pen lifts and sudden changes in line direction are not infrequent in traced forgeries, as is also true of simulated forgeries.
In cases of material alteration by mere erasure, whether chemical or by abrasion, the document itself without standards of comparison may be the sole available basis of judgment and decision. So, in certain cases, the order or sequence of writing may be shown without reference to extrinsic standards from a microscopic examination of the document itself. Again a typed document dated earlier than 1872 is not possibly authentic, at least as to date, and no amount of standard material would rebut that fact; and no such document is thus authentic when no machine showing such type or such style or design of type as the document discloses existed on that date, and there are other cases where standards in the ordinary sense are not required.

12 Such cases are comparatively rare since something is usually substituted for the matter erased. The process of chemical fuming will sometimes restore the latter temporarily so that it may be read and photographed and much has recently been done in this respect by the ultra violet ray process of photography.

13 This fact is ordinarily microscopic and may appear from the issuing or running out of the ink from the line last made upon the line first made where such lines cross. Technical discussion of this matter is impossible here since the field of possible error in cases of this class is quite considerable. See Osborn, Questioned Documents (2d ed.) c. 27, particularly pp. 517, 518.

Closely related to the question of the order or sequence of writing is that of writing over folds. Standards in any ordinary sense are not useful or available on this question alone. In a criminal case tried here, involving an alleged illegal sale of a mortgaged car, the complaining witness testified that the mortgage paper was completely written by him before it was signed by the defendant, and that it had not been folded at that time. The physical evidence was plainly to the contrary since the pen, in adding a short mortgage clause to a promissory note in ordinary printed and written form, had not only gone into the “gutter” formed by folding, but had so pierced the paper there that the ink had gone through to the other side in at least two places. The defendant, who swore he had signed nothing but a note, was acquitted. See Osborn, Questioned Documents, (2d ed.) 521 et seq.

14 This is a matter of encyclopedic knowledge. See Wharton, Criminal Evidence, §425a.


18 In Ryan v. Rockford Ins. Co., 85 Wis. 573, 55 N.W. 1025 (1893), a deed purported to have been executed in 1884 by a grantor who died the same year. Evidence that the form upon which the deed was written was not printed until 1887 sustained a finding of forgery. See also Strickland v. Strickland, (Ark. 1910) 129 S. W. 801; In re Oliver’s Will, 126 Misc. 511, 214 N. Y. Supp. 154 (1926). This last case involved a will written on a blank form not in existence when the will was dated. The code letters at the top of the blank indicating date and name of printer had been cut off, but the tail of a comma remained which, from its position, “vociferously” proclaimed the date of printing as later than that of the will. See Osborn, Questioned Documents (2d ed.) 486. Water marks will sometimes show that the paper on which an instrument was written was not manufactured until a later date, and the condition of crossed lines may sometimes (though not always) show the order or
Save in exceptional cases as above suggested the document examiner, however competent, is as helpless without standards as a ship in strange seas without compass, chart or rudder. First and foremost, however, no writing should be submitted to an expert or other prospective witness or to the jury as a standard of comparison with a questioned writing unless such standard can be proved genuine to the satisfaction of the court, unless it is properly in the case as genuine for some other purpose.\textsuperscript{27} Even under the older rule broadly excluding extrinsic standards of comparison, but permitting comparison with papers already properly in the case as part of the files or records thereof to be used as standards of comparison, the latter were admitted under the earlier theory of the English common law courts, not so much because their use as such might aid the jurors in determining the issue with respect to a disputed document, but largely because it was practically impossible to exclude such writings from their consideration.\textsuperscript{18} However, in spite of the fact that extrinsic standards of comparison duly proved may now be quite freely used, it should be remembered that a comparison of the disputed writing with writings already in the case as genuine may sometimes be of great or even decisive value in determining the question of genuineness and they should not be overlooked.\textsuperscript{19} The same is generally true of papers prop-

sequence of the writing in particular cases. See \textit{supra} note 13. Staples and fasteners with which a document is bound may sometimes prove strong evidence against the forger and a copyright imprint in a family bible has dis-authenticated dated entries therein.\textsuperscript{17} See \textsc{Osborn}, \textit{Questioned Documents} (2d ed.) 13. The submission of unprovable writings, even to a competent expert, is often bad practice as tending possibly to influence and confuse his judgment, which must be based upon proved standards or upon writings already in the case. In this connection see \textit{Steel v. Snyder}, 295 Pa. 120, 144 Atl. 912 (1929). It should be noted that while a writing might be proved to be genuine it still might not be admitted as a standard because it was illegally obtained (see \textit{infra} note 48) or because of its self-serving character. See \textit{infra} note 41.\textsuperscript{18} See \textsc{Spencer}, \textit{supra} note 1 at 116 et seq; also 3 \textsc{Wigmore}, \textit{Evidence} (2d ed.) §1991, 1992.\textsuperscript{29} See 22 C. J. 772, n. 98 et seq.

In the midst of a trial an opinion was asked as to the genuineness of the defendant's signature to a contract. The defendant had already made a number of request signatures for comparison and was apparently ready, able and willing to make many more. There was so much superficial variation between these signatures and the questioned signature as to raise considerable doubt as to the genuineness of the questioned signature and the court was reluctant to grant a substantial amount of time for any extended examination and comparison. Suspecting that the defendant was disguising his hand in making the test writings, the "papers in the case" were examined. Defendant's signature to his verified answer solved the issue of genuineness in favor of the plaintiff.

In another case, but a single genuine signature was the sole standard submitted for comparison with a questioned one purporting to have been written nineteen years later. A will and codicil, duly filed and admitted to probate, executed at about the date of the last or questioned writing in the execution clauses and on the margins of the several pages, revealed about a dozen signatures, all of which indicated a marked change in the testator's signature
erly received in evidence as admittedly genuine for some purpose other than comparison with the writing in dispute, though they may not be part of the record proper in the strictly technical sense.

Returning to the subject of purely and technically extrinsic standards, it is now the almost universal rule in England, Canada and in the United States, that they are not admissible in evidence as the basis of comparison with a disputed writing, whether by jurors or witnesses, unless they are proved to the satisfaction of the court to be the genuine writing of the person whose chirography is in dispute, and under the best practice this proof should be made before any testimony based upon their comparison with the questioned writing is received, or they are submitted to the court or to both court and jury as the basis of decision, whether with or without the aid of expert testimony. This preliminary question of genuineness is in most states one of fact for the court alone, and its decision must be deemed during the interval of nineteen years. The writer declined to testify for the claimant. See infra, notes 49 et seq. as to age of standards.


20 See Spencer, supra note 1 at n. 31; 22 C. J. 781, n. 81; Pitts v. Thompson, (Tex. Civ. App. 1934) 71 S.W. (2d) 368; that party against whom a standard is proposed to be used may be required to testify as to whether he wrote it, Nixon v. Shaver, (W. Va. 1934) 176 S.E. 849.

The occasional practice of some courts is to admit proof of the standards at any time during the trial, but with some exceptions this is probably not to be commended where it can reasonably be avoided. See, however, Matter of Marchall, 126 Cal. 95, 58 Pac. 449 (1899), holding it immaterial that the standard was not proved genuine when submitted for comparison, if its genuineness was afterward proved.

21 It seems to be the rule under most statutes that the evidence or proof of standards is addressed to the court or judge and not to the jury. In a celebrated case, however, it seems to have been held that while the genuineness of standards is for the court in the first instance, it becomes the duty of the jury in turn to decide as to whether a standard is genuine when submitted for comparison. People v. Molineux, 168 N.Y. 330, 61 N.E. 286, 62 L.R.A. 3, (1901), with which compare McKay v. Lasher, 121 N. Y. 477, 24 N. E. 711 (1890). The New York statute uses “court” instead of “judge” as does the Wisconsin statute but we find no Wisconsin case adopting the rule of People v. Molineux requiring the jury as well as the judge to pass upon the genuineness of the standards. See also Chisholm v. State, 204 Ala. 69, 85 So. 462 (1920), to the effect that if the jury finds a standard not genuine it must lay it out of view together with all evidence based thereon. Williams v. Conger 125 U. S. 397, 8 Sup. Ct. 893 (1888). See also Plymouth Sav. & L. Assn. v. Kassing, 72 Ind. App. 1, 125 N.E. 488 (1919), that question of genuineness of standard is for court in the first instance, but is ultimately for the jury. See also 10 R. C. L. 266, n. 9.
final, and conclusive where there is proper legal evidence to support it.\textsuperscript{23} As to what is proper, competent or sufficient proof of genuineness of standards much might be said. An admission of genuineness by the party against whom they are sought to be used is ordinarily sufficient,\textsuperscript{24} and so of circumstances amounting to an estoppel against him.\textsuperscript{25} While a standard itself cannot be proved by mere comparison with other writings by experts,\textsuperscript{26} it may be proved by the direct testimony of those who saw it written,\textsuperscript{27} and by some authorities by that of witnesses who speak from previous personal knowledge of the writing of the alleged author of the standard,\textsuperscript{28} though the contrary and less liberal rule has more often been asserted, where the witness speaks

\textsuperscript{23} See\textsc{Jones, Evidence} (Hor. ed.) §555; 27 C. J. 783, nn 94-97. It has been said that the decision of the court in such cases must be treated as a verdict. Lay v. Wissman, 36 Iowa 305 (1873); Plymouth Sav. & L. Assn. v. Kassing, 72 Ind. App. 1, 125 N. E. 488 (1919). See also Phillips v. Conant, (Del. Super. 1935) 180 Atl. 593. But compare the cases in the preceding note.

\textsuperscript{24} Admission in such cases, at least under the older rule excluding extrinsic standards generally, has been held to require a judicial admission either in the pleadings or in open court. See 22 C. J. 782, n. 87. See also Moore v. United States, 91 U.S. 270, 23 L. ed. 346 (1875); Southwestern Milling Co. v. Fernstrom, 226 Ill. App. 468 (1922), concession by counsel held sufficient.

\textsuperscript{25} As where writings are introduced as genuine by party claiming thereunder. Kennedy v. Upshaw, 64 Tex. 411 (1885); Smyth v. Caswell, 67 Tex. 567, 4 S.W. 848 (1887); State v. Timphkins, 71 Mo. 613 (1880); Croon v. Sugg, 110 N.C. 259, 14 S.E. 748 (1892); Burton v. Lowry, (Tex. Civ. App. 1934) 77 S.W. (2d) 1059.

\textsuperscript{26} Winch v. Norman, 65 Iowa 186, 21 N. W. 511 (1884); Sankey v. Cook, 85 Iowa 125, 47 N. W. 1077 (1891); Plymouth Sav. & Loan Assn. v. Kassing, 72 Ind. App. 1, 125 N. E. 488 (1919); Commonwealth v. Eastman, 55 Mass. 189 (1848); In re Astolas Estate, 273 Mich. 189, 262 N.W. 765 (1935). The last case involved a signature to a will by mark. No genuine mark was in evidence and the witness had never seen testatrix write so his opinion was excluded. Archer v. United States, 9 Okla. 569, 60 Pac. 268 (1900). See also Parker v. Bascle, 154 La. 1027, 98 So. 628 (1923).

\textsuperscript{27} Sankey v. Cook, 82 Iowa 125, 128, 47 N. W. 1077 (1891); Plymouth Sav. & Loan Assn. v. Kassing, 72 Ind. App. 1, 125 N. E. 488 (1919); Phillips v. Conant, (Del. Super. 1935) 180 Atl. 593; State v. Fillpot, 51 Wash. 223, 98 Pac. 659 (1908); also Roloson's Estate, 79 Pa. Super Ct. 124, holding that receipts signed while witnesses were present and delivered to them for money paid, were sufficiently proved, though they did not see the pen pass over the paper.

\textsuperscript{28} Phillips v. Conant, supra note 27; Bell v. Brewster, 44 Ohio St. 690, 10 N. E. 679 (1887) Archer v. United States, 9 Okla. 569, 60 Pac. 268 (1900); Williams v. Williams, 109 Me. 537, 85 Atl. 43 (1912); McKay v. Lascher, 121 N. Y. 477, 24 N. E. 711 (1890).
from mere general knowledge, at least in the absence of corroborating facts and circumstances. It is also sometimes said, either in express terms or in effect that the proof of standards must be direct and positive, or clear and positive or beyond all doubt or cavil, or clear and undoubted, or most satisfactory, or proof beyond a reasonable doubt, or that the genuineness of the exemplar should be established in no uncertain degree, by no uncertain means. However, failure to make timely objection to use of a writing offered as a standard has been held to amount to a practical admission of its genuineness.

Question has naturally arisen whether the mere receipt of letters purporting to have been written by the person whose handwriting is in dispute warrants their admission as standards of comparison. Generally it does not though it has been held otherwise where there is satisfactory corroborative or collateral evidence. Paid and cancelled letters from defendant to plaintiff signed in defendant's name and enclosing check.

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30 The general rule excluding the evidence of those who speak from personal knowledge or familiarity with the handwriting of the standard should not be arbitrarily applied even where this rule prevails. See Newton Centre Tr. Co. v. Stuart, 201 Mass. 288, 87 N. E. 630 (1909). The positive testimony of an intelligent witness long familiar with the standard writing through business, official or family association or connection or correspondence should, it would seem, be sufficient where the witness is in no wise impeached, especially where there is no suspicion of prejudice or interest. See Burdell v. Taylor, 89 Cal. 613, 26 Pac. 1094 (1891). See also Phillips v. Conant, (Del. Super. 1935) 180 Atl. 593, where a witness familiar with defendant's hand found writings on defendant's table. The writings were admitted as standards, though the witness had not seen them written.

31 Winch v. Norman, 65 Iowa 186, 21 N. W. 511 (1884). See also Sankey v. Cook, 82 Iowa 125, 128, 47 N. W. 1077 (1891); Hyde v. Woolfolk, 1 Iowa 159 (1855).

In Sankey v. Cook, supra, it was held that the proof must be such as to satisfy the court so that it can rule in favor of genuineness as matter of law. See 22 C. J. 782, n. 89.

32 Green v. Tervilliger, 56 Fed. 384 (C. C. Or. 1892).


35 Bragg v. Cotwell, 19 Ohio St. 407 (1869); Haycock v. Grep, 57 Pa. 438 (1868). In People v. Molinex, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193 (1901), the rule of fair preponderance was said to be obtained in civil cases and proof beyond a reasonable doubt in criminal cases. See also Rowell v. Fuller, 59 Vt. 688, 10 Atl. 853 (1887) to the effect that while great care should be taken in admitting standards, the general rule as to fair balance of testimony applies.

36a Chisholm v. State, 204 Ala. 69, 85 So. 462 (1920).


38 Taylor-Wharton Iron & Steel Co. v. Earnshaw, 259 Mass. 554, 156 N. E. 855 (1927); Flowers v. Fletcher, 40 W.Va. 103, 20 S.E. 870 (1894); Beloit v. Greene, 43 Idaho 265, 251 Pac. 621 (1926).

39 Taylor-Wharton Iron & Steel Co v Earnshaw, supra note 38; letters from defendant to plaintiff signed in defendant's name and enclosing check. Poole v. Beller, 104 W.Va. 547, 140 S.E. 534 (1927); letters received at variant peri-
checks purporting to have been signed by the one whose writing is in dispute are frequently offered as standards, particularly where signatures to other instruments are questioned, and are quite frequently received and admitted as standards without question or objection. This practice, however, may involve some peril, and it has quite recently been held that such checks found among the papers of an absentee were not sufficiently proved as standards without further evidence of their genuineness.\(^{39a}\)

By the weight of reason and authority unproved writings cannot be used to test the knowledge and ability of a witness on cross examination, even though the witness is an expert.\(^{40}\) Before going further into the subject of handwriting standards, it should be kept constantly in mind that what is otherwise a good case may be lost because the standards of comparison are insufficient in number or unsuitable in kind even though legally proved genuine under the law. By the great weight of authority a party whose writing is in dispute is not entitled to use as a standard of comparison in his own favor a writing prepared by him for use at the trial.\(^{40a}\) While many of the cases involve writings so made and offered, we see no reason why all other writings made after controversy has arisen or even after action is brought should be excluded as standards where the circumstances are such as to negative the idea that they were made for the purpose of the case.\(^{41}\)

\(^{39a}\) See Plymouth Sav. & L. Assn. v. Kassing, 72 Ind. App. 1, 125 N.E. 488 (1919). The element of danger in accepting without question paid and cancelled checks as standards is suggested by Wussow v. Badger State Bank, 204 Wis. 467, 234 N. W. 730 (1931). Here plaintiff depositor failed to check his bank account and examine his vouchers for more than a year. In the meantime the bank paid 392 obviously forged checks among a total of some 1200. A selection from this interesting mass for use as standards in any case involving Mr. Wussow's signature would very possibly have led to trouble and confusion had they been received as proved standards on the basis of the fact alone that they had been paid and returned by the bank. This case involved great interest and some excitement in banking circles. The plaintiff recovered. See also Pitts v. Thompson (Tex. Civ. App. 1934) 71 S. W. (2d) 368.

\(^{40}\) See 22 C. J. 783, n. 99 and Spencer, supra notes 1 and 2. That the Wisconsin rule excludes unproved writings on cross examination see Altsch v. Haave, 178 Wis. 19, 189 N. W. 155 (1922). That this method of cross-examination may be unwise even where it is permitted, see Spencer, supra note 2 at 141.

\(^{40a}\) See 3 JONES, EVIDENCE (Hor. ed.) §553, n. 6; Phillips v. Conant, (Del. Super. 1935) 180 Atl. 593; 22 C. J. 784 n. 6; King v. Donahue, 110 Mass. 155, 14 Am. Rep. 589 (1872) and Note (1902) 63 L. R. A. 440. See also Spencer, supra note I at 128, 129; People v. Meyer, 289 Ill. 184, 124 N.E. 447 (1919); Shinn v. Settle, 222 Ill. App. 463 (1921).

\(^{41}\) The mere fact that the writing was made after the dispute arose or action was brought should not be enough to exclude it as a standard where circumstances are such as to negative the idea that it was self-serving or made for
A signed answer in the case has been excluded, however, on the ground that it might have been intentionally so made as to be self-serving.\textsuperscript{42} While a party cannot be permitted over objection to make and offer at the trial a specimen of his own writing,\textsuperscript{43} in England under statute, and without direct or specific statutory authority here, the court has power in the exercise of a sound discretion to require a party whose signature or other writing is an issue to write in the presence of the jury,\textsuperscript{44} and a writing so made on cross-examination by request of the adverse party is plainly admissible for comparison as against his opponent who has denied making the writing in question.\textsuperscript{45} A defendant in a criminal case who offers himself as a witness on his own behalf may, if he denies the making of a document in issue, be required on cross-examination to write from dictation the matter contained therein and the writing thus made may be used as a standard of comparison as against him.\textsuperscript{46a}

Aside from the writings made under the direction of the court, writings voluntarily made by a party for the use of his adversary or others as a basis of comparison with another writing may be called request writings as a mere term of convenience rather than of art. Such writings may no doubt be used as standards of comparison if duly proved or admitted in spite of the fact that they may not be the

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\textsuperscript{42} See Shorb v. Kinzie, 100 Ind. 429 (1884); Travers v. Snyder, 38 Ill. App. 379 (1890); Springer v. Hall, 83 Mo. 693, 53 Am. Rep. 598 (1884). See, however, the cases cited in note 19, supra, and compare 22 C. J. 773, nn. 6 and 7; Frank v. Berry, 128 Iowa 223, 103 N. W. 358 (1905). Signed plea admissible against one who denies his signature to note; Korbeck v. Shannon, 101 Fla. 598, 135 So. 131 (1931).

\textsuperscript{43} As to this there is practically no dissent. See 22 C. J. 784, n. 12. However, where the plaintiff in cross examination required the defendant to write, the error, if any, in permitting him to write in the first instance was one of which plaintiff was estopped to complain. Allen v. Gardner, 47 Kan. 357, 27 Pac. 982 (1891).

\textsuperscript{44} See 22 C. J. 785, n. 14. Most of the cases denying such power were decided prior to the statutes permitting extrinsic standards. The power of the court in such cases, however, is discretionary. See Jones, Evidence, (Hor. ed.) 550, n. 6. In Williams v. Riches, 77 Wis. 569, 46 N. W. 517, 417 (1890), where the witness testified that she signed receipts years earlier as a child and that her hand had since greatly changed and improved, the refusal to order her to write was not in error. See also First Nat. Bank v. Robert, 41 Mich. 709, 3 N. W. 199 (1879).

\textsuperscript{45} See 22 C. J. 785, n. 16. This is primarily for the purpose of contradicting the witness, though it is also classed as in the nature of an experiment. A writing made in open court at the request of the opposite party may of course be used by him, State v. Gordon, 32 N. D. 31, 155 N. W. 59 (1915). See also State v. Barnard, 176 Minn. 349, 223 N.W. 452 (1929), cross-examination of defendant in criminal case.

\textsuperscript{46a} State v. McHenry, 207 Iowa 760, 223 N. W. 535 (1929).
most reliable exemplars of the natural writing of those making them, especially where suit is pending, or accusation, or perhaps exposure imminent, though nothing more than disgrace or loss of social standing or prestige may ensue as would be the case with some anonymous letters.

While no one is bound to incriminate himself, one who writes freely and voluntarily and without coercion and by request, even when in custody under a criminal charge, cannot object to the use against him of writings so made as standards of comparison. Innocent parties seldom object to making such writings and the guilty may fear to refuse to make them or may not realize or appreciate the peculiar characteristics of their own writing, or may even have an unbounded and usually unwarranted confidence in their ability to disguise their hands, or may even have the ability to do so, at least in exceptional cases. An entire chapter might be written as to the adequacy of test writings under various circumstances and conditions, some parts of which might be suggestive and valuable to the police.

That offered standards of comparison were secured by means of unlawful search and seizure has been held ground for their exclusion where there was timely application for their exclusion on that ground. If a writing is proved to the satisfaction of the court to be the genuine writing of the person whose hand is in dispute, its age or date alone ordinarily goes to its weight and not to its admissibility as a standard of comparison. As a general rule, however, standards should, so far as possible, be fairly contemporaneous with the dis-

46 People v. Molineux, 168 N. Y. 264, 61 N. E. 288, 62 L. R. A. 193 (1901); State v. Scott, 63 Or. 44, 128 Pac. 441 (1912); Magnuson v. State, 187 Wis. 122, 203 N.W. 749 (1925); United States v. Mullaney, 32 Fed. 370 (E.D. Mo. 1887). That the accused wrote reluctantly does not render his writing inadmissible against him, provided he wrote without compulsion. State v. Martenson, 26 Utah 312, 73 Pac. 562, 633 (1903).

46a In Magnuson v. State, supra, note 46, the defendant willingly wrote or pen-printed repeatedly from dictation the address on a bomb package sent through the mails, remarking: "Writing you can tell, but printing you can't tell anything about." He knows better now. For a discussion of this case and the scientific methods of detection and proof involved see Prof. J. H. Mathews in Wis. State Bar Assn. Proceedings, June 1924.

47 For a very complete and practical discussion of this matter of test or request writings see Osborn, Questioned Documents (2d ed.) pp. 32 et seq. and Osborn, Problem of Proof, c. XXI.


49 Butman v. Christy, 197 Iowa 661, 198 N.W. 314 (1924). We find no case rejecting a standard on account of age or date alone as compared with that of the questioned writing. In fact, under the common law, it seems that ancient documents coming from proper custody were admissible as standards though far earlier in date than the writing in dispute. See Spencer, supra note 1 at 120.
puted writing, and it is often quite dangerous to use standards of date very remote from that of the questioned writing. As pointed out in a previous article, the selection of too early or too late a model has sometimes worked the undoing of the forger. Even the lapse of a comparatively short time may affect the value of a handwriting standard, as where there has been an intervening change in the physical condition of the writer, as from the weakness of illness to health and strength. Where the time that has elapsed between the questioned writing and the standard is quite long, senile characteristics may of course develop in the genuine writing of the individual, especially tremor not found in the questioned writing or in standards written in middle age or earlier. The change in the writing of young persons going from school into business is often quite marked and comparatively rapid, especially where their employment involves much practical writing. There is sometimes such great similarity in school writing as to make it difficult to distinguish the work of two or more pupils taught the same system, especially where they are taught by the same teacher.

50 The idea of the forger, and particularly the novice, often is that any genuine writing of the person whose writing is to be traced or simulated will serve his purpose, or else no other model is available. See Marble v. Marble's Estate, 223 Ill. App. 524 (1922), affd., 304 Ill. 231, 136 N.E. 589 (1922).

51 In a contested will case tried in Milwaukee in 1929 the testator died of cancer of the stomach shortly after making his will. The contestant's standards were all dated about a year prior to death. The expert for the contestants testified that he did not believe that the testator, in view of his physical condition, could have made as good a capital J as there was in his will signature. Proponents introduced a signature of testator made two days before the will date, bearing quite as good a J as was found in the signature to the will. Other almost contemporaneous standards showed that the testator retained his ability to write quite well up to the last. The will was sustained as against the claim of forgery.

52 The problem of tremor in writing is not as simple as it might seem to be. It is of course quite plainly presented where the standard writing is free from it, or comparatively so, and it is found in the questioned writing to a marked or greater degree, or the reverse appears. Tremors of age, weakness or illiteracy are not always distinguishable, but it is often easier to distinguish them from the tremor of fraud which may even involve an attempt to simulate the tremor of genuine writing used as a standard or copy by the forger, or tremor may be an incident to the very nature of the forging process itself. See Osborn, Questioned Documents, (2d ed.) 110, 112, 113.

53 In a recent criminal case the earliest available standards were seven years later than the questioned writing. While a rather marked change was found which somewhat perplexed the court and the witness, enough that was quite characteristic survived to convict the defendant, a young man of 26. After the trial an old gentleman produced a contemporaneous signature that confirmed the correctness of the decision. This ancient had sat there and heard the expert qualify his testimony on account of the comparative lateness of the standards but had omitted to reach into his pocket and produce the very thing that was needed to make conviction certain—a signature made within a month of the disputed one.

54 This fact is well known to all observant writing teachers. The dead level of sameness thereby produced was brought forward against the old copy book system of teaching long prevalent and still somewhat used, and also against
Though it has been held in at least one case that there must be
more than one standard of comparison, this cannot be an arbitrary
rule, especially where no other standards are available. On the other
hand it seems that the court in the exercise of a sound discretion
would have power to limit within reasonable bounds the number of
standards on either side. The amount of standard material or writing
to be used, however, must depend very much upon the nature of the
particular case. In signature cases five signatures are usually better
than one, and ten or a dozen are better than five, or even more may be
desirable in some cases. In anonymous letter cases a single standard
letter containing a considerable amount of writing may suffice, though
more standard material should often be obtained including the writing
of all those suspected of authorship of the anonymous writing.
Accusations should never be hastily made in these “poison pen” cases,
and especially public ones as there are laws against defamation.

Pencil written standards may lawfully be compared with pen writing
and vice versa. Where pencil writing is in question, however,
penciled standards should be included if possible. Where the questioned writing is with pen, such significant means of identification as pen-pressure, pen-holding and shading habits and line quality are not well exemplified by pencil standards.62 Photographs of standards lost or destroyed may doubtless be used upon much the same principle that photographs of the questioned document may be used under such circumstances where the accuracy of such photographs is shown, at least where the genuineness of the original standard has been already satisfactorily established in the case.63 Large clear photographs are especially useful in cases involving questioned typewriting. Carbon copies of handwriting and typewriting have been admitted as standards on the ground that they are to all intents and purposes duplicate originals,64 but letter-press copies have been rejected,65 and so have tracings from genuine writings.66

62 This is, of course, fair matter of comment and argument where penciled standards alone are produced, in spite of the fact that form characteristics are generally the same in pen and pencil writing.

63 See Luco v. United States, 23 How. 515, 16 L. ed. 545 (1860). See also Moncus v. Western Life Indemnity Co., 269 Pa. 213, 112 Atl. 476 (1921); Stetzel v. Miller, 250 Ill. 72, 95 N.E. 53 (1911); Fenlon v. State, 195 Wis. 416, 217 N.W. 711 (1928). As to photographs to better illustrate the physical facts see Spencer, supra note 1 at 125; Fenlon v. State. The interesting opinion of the late Justice Doerfler in this case (430, 431) seems to go somewhat further than competent document experts would go in favor of the theories of the graphologists and in attributing belief in those theories to the experts themselves. See Osborn, Questioned Documents (2d ed.) c. 24.

While photographs are ordinarily classed as secondary evidence and it has been held improper to admit photographs of natural size of documents already in evidence, (Howard v. Illinois Trust & Savings Bank, 189 Ill. 307, 59 N. E. 1106 (1901)), enlarged photographs of both questioned and standard writings are now very freely admitted on much the same principle that magnifying glasses may be used as an aid to sight. See Spencer, supra n. 1 at 125; Hancock v. Snider, 101 W. Va. 535, 133 S.E. 131 (1926); Howard v. Illinois Trust & Savings Bank, supra. Photographs may also be cut apart and grouped or arranged so as to present the whole or parts of the questioned and standard writings in close proximity or juxtaposition and are often very useful when so arranged in bringing difference and similarities simultaneously within the field of vision on a single sheet. See Wigmore, Evidence (2d ed. 1923) §797; Adams v. Ristine, 138 Va. 173, 122 S.E. 126, 31 A.L.R. 1413, 1432 (1924). See also Spencer, supra note 2 at 146, n. 57.

While properly made photographs of handwriting as just discussed are of great value in many cases, and especially in jury trials, and it is often false economy to stint with respect to them, the court no doubt may, in the exercise of a sound discretion, limit the number of photographs that may be admitted upon much the same principles that it may limit the number of standards proper, due regard being had to the character of the pictures and the purpose for which they are to be used, otherwise the trial of a questioned document might occasionally resolve itself into a veritable picture show and be greatly and unnecessarily prolonged.


66 Howard v. Russell, 75 Tex. 171, 12 S. W. 525 (1889). Freehand drawings, whether on paper or a blackboard, made by an expert in the presence of the
An honest and competent specialist will refuse to give a definite opinion as to a questioned writing until he has carefully examined and compared it with a sufficient amount of appropriate standard material, in spite of the fact that interested parties or their counsel are often urgent for an immediate and definite opinion notwithstanding. There are also cases in which a document question is unexpectedly raised so near to the time of trial that the securing of adequate and proper standards is impossible, or the question sometimes may arise during the hearing, but the cases are much more numerous in which the employment of a specialist and the securing of proper standards is delayed or omitted through the negligence, or even the ignorance of parties or their counsel as to the necessity of standards and proper time and opportunity to examine them and to prepare for effective presentation of the essential facts in court, including the making of such photographs as may be necessary or useful for that purpose. Statutes in a few states require submission of standards to the opposite party before trial in order to make them admissible in evidence.

Primarily it is the duty of counsel and his assistants rather than the expert to procure proper standards of comparison, but the early submission of a document problem to the specialist will often elicit from him valuable suggestions as to the character and amount of standard writing requisite to a proper investigation, determination and presentation of the facts, or even to suggestions as to the specific sources from which such material may be obtained. Counsel, however, once the requirements of the case are clearly known, may usually be trusted to

\[\text{\textsuperscript{66}}\text{a}\text{ See } \text{Land Finance Corp. v. Mensies}, 114 Conn. 694, 160 Atl. 168 (1932), holding that alleged insufficiency of time and opportunity for examination and comparison does not render experts' testimony inadmissible.\]

\[\text{\textsuperscript{67}}\text{ See statutes in Georgia and Kentucky. These statutes seem wise and fair, and calculated on the whole to promote the ends of justice and the dispatch of business in the courts by preventing the unfair selection of standards discussed in the earlier cases excluding extrinsic standards, though they may sometimes prove embarrassing in practice. There are, however, in all states statutes as to discovery and inspection of documents. In this connection see the Wisconsin Statutes (1935), Section 327.21 and Wigmore, Evidence, (2d ed. 1923) §§1858, 1859 and 18 C. J. 116, as to production and inspection of writings and other matters generally. As to subpoena duces tecum see supra note 24.}\]

\[\text{\textsuperscript{68}}\text{See the possible sources of standards listed in Osborn, Problem of Proof, pp. 342,343. In one case we found the signatures of two attorneys both of whom were dead, on the signed roll of attorneys in the local circuit court. They were witnesses to a will. In this connection see the rather interesting case of Hawkinson v. Oatway, 143 Wis. 136, 126 N. W. 683 (1910). In another case many excellent standards were supplied from the vaults of a bank, where the testator had a safe deposit box. In an anonymous letter case, two pages of original entries in a day book clearly established the authorship of these letters.}\]
obtain directly or through his agents, the requisite material if it can be found.

The subject of request writings as standards, including writings by those accused or in custody, has been briefly noticed. The entire field of request writings has in our opinion been quite ably covered in Mr. Osborn's books and are we not inclined to rediscuss the problems involved. The questioned writing, however, should not be given to the request-writer to copy, but the test matter should be dictated, or else typed. If possible, the party should be required to write at intervals or even at separate sittings and each separate writing should be taken away as soon as it is complete. The surroundings and treatment of the writer should, so far as possible, be such as to put him at his ease. The matter to be written need not, and often should not, be the very matter of the questioned writing but if possible should contain all the written characters, including figures, embraced in the questioned document. Such writings however, should, if possible, be so framed as to bring out any such peculiarities of spelling and punctuation as are found in the questioned writing, and its peculiarities of arrangement. The writing time of the several specimens should be varied, if possible, especially in anonymous letter cases.

It has been suggested that arrested persons who might otherwise be disinclined to write may sometimes be induced to do so by being asked to make and sign a list or inventory of their personal effects taken in charge by the police. With ordinary and inexperienced offenders this plan may often succeed in securing a reliable standard, but with the seasoned forger who has long resided on Queer Street or up Crooked Lane, there is more doubt whether writing, even if thus secured, would have much evidential value. Though handwriting records in police files sometimes help to fix responsibility for crime even in the case of experienced criminals, the records and files of penal institutions should not be overlooked where the suspected party, as is often the case, has a prison record.

While standards of comparison obtained under a void or illegal search warrant have been held inadmissible against a party charged with crime, the fact that evidence has been wrongfully obtained by other means has quite generally been held not to render it inadmissible, provided it is otherwise competent. Courts, however, frown

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69 See the cases cited in note 46, supra.
70 Osborn, Problem of Proof 344; Osborn, Questioned Documents (2d ed.) 32, 34, 423.
71 See also People v. Bain, 359 Ill. 455, 195 N. E. 42 (1935).
72 See 16 C. J. 570.
upon the employment of strong-arm, fraudulent or other questionable or devious means of obtaining evidence, and such evidence seldom finds favor with juries.

Without considering what legally constitutes forgery or the uttering of a forged instrument, it must suffice to say that in spite of all penalties against forgery, however severe,\(^7\) forgery is and long has been a common and rather profitable offense which, supported by perjury, as is often the case, not infrequently defies detection or proof.\(^7\)

Statistics as to the number of forgeries committed or the losses to individuals or the public caused thereby are necessarily quite meagre and incomplete.\(^7\)

Various devices and expedients have been suggested and adopted as safeguards against forgery by alteration and substitution with many of which lawyers, conveyancers and others similarly employed should be familiar as part of their professional or special training.\(^7\) Few rules of law, however, require those who prepare or execute written instruments to use safeguards or precautions for the protection of others against alteration or spoliation. It is held in some states, however,

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\(^7\) By statute in England forgery was for many years a capital offense. As late as 1777 a clergyman, Dr. Dodd, was hanged at Tyburn for the forgery of a bond for some 4000 pounds. See Berkenhead, Famous Trials of History, 151. While forging and uttering are still technically felonies in most states, the penalties therefor are now comparatively mild, and probation rather than prison may in many states be granted at least to first offenders. This is true in Wisconsin. The forgery cases definitely before the trial court in Milwaukee are about one hundred each year. The great majority of the defendants plead guilty.

\(^7\) See the report of the Wickersham Commission of the Cost of Crime, June 1931, pages 403, 104. The estimate of $40,000,000 annually seems very conservative, particularly in view of the fact that many forgeries are never discovered or are never exposed and hence do not find their way into statistics of any kind. Many cases involving actual forgery are simply "settled," not to say compounded, at least occasionally. The annual loss to banks through forgery has been estimated at from $600,000 to $800,000, some of it through altered or "raised" paper, but largely by means of forged signatures.

\(^7\) See Osborn, Questioned Documents (2d ed.) 663 and cc. 25 and 26, as to the physical preparation and the execution of documents for many valuable suggestions with the soundness of which intelligent and experienced readers must quite generally agree. We cannot fully agree, however, with his view that it is usually bad practice for a lawyer who prepares a will and supervises its execution to sign it as an attesting witness. See In re Carpenter's Will, 145 N. Y. Supp. 365 (1913); McMaster v. Scriven, 85 Wis. 162, 55 N. W. 149 (1893); Adams v. Rodman, 102 Wis. 456, 78 N. W. 588 (1889).
though denied in others, that one who makes, draws, accepts or in-
dorses a negotiable instrument with blank and uncanceled spaces so
negligently left thereon as to facilitate or invite alteration is liable to
a subsequent holder thereof in due course for the full amount of the
instrument in its altered form.\(^7\)

Without going much further into this important subject, it is sug-
gested that the practice of drawing wills and other important documents
in several loose or detached sheets or upon sheets insecurely fastened
together at the time of execution is especially dangerous and open to
criticism.\(^7\) Generally no erasures, alterations or additions or interlinea-
tions should be made or permitted on any important document where
this can be avoided unless they are of such nature as to be clearly
immaterial. In other cases the facts as to the change or addition should
be carefully noted in the document before the attesting clause, or in a
separate memorandum thereon signed by the parties and their witnesses
to the effect that it was made before the instrument was executed.\(^7\)

\(^7\) See Spencer, Cyclopaedia of Bus. Law, §§580, 581. See also 7 C.J. 684 as to the
duty of the depositor to his bank to use due care to so draw his checks as
not to facilitate or invite alteration. No case, however, goes so far as to hold
that the use of safety paper, protectographs or similar devices is necessary to
escape liability for the negligent drawing of a negotiable instrument. The
use of a pencil in writing any part of such an instrument is of course to be
condemned. See Harvey v. Smith 55 Ill. 224 (1870), where a condition written
in pencil was wholly erased from a pen-written promissory note and an inno-
cent holder was held to take it free from the defense of alteration.

\(^8\) See Osborn, Questioned Documents (2d ed.) 657, 668; see 68 C. J. 983, nn.
64 to 66, as to wills, composed of two or more sheets. See also In re Swain's
Will, 162 N. C. 213, 78 S. E. 72 (1913); Sellards v. Kirby, 82 Kan. 291, 108
Pac. 73 (1910). The use of cheap and inadequate fasteners permitting a docu-
ment to be taken apart without leaving any evidence of tampering is of course
extremely bad practice and can be easily avoided.

\(^9\) For the almost hopelessly conflicting decisions involving the presumptions as
to the time when alterations were made see 3 Jones Evidence (Hor. ed.)
§§188, 189. See also 2 C. J. 1273; 3 Williston, Contracts §1916, 1917; Note
(1925) 44 A.L.R. 1244.

In Wisconsin it is presumed, in accordance with the prevailing rule, that
an alteration was made before execution unless the circumstances are sus-
picious, as where it appears to be in a different hand or ink than the rest of
the document. See Maldaner v. Smith, 102 Wis. 30, 36, 78 N. W. 140 (1899);
Bradley v. Lumber Co., 105 Wis. 245, 81 N. W. 394 (1900). The burden of
showing the existence of alterations not apparent on the face of the instrument
is upon the party alleging them. See Jones, Evidence (Hor. ed.) §564, n. 46.
For the presumption as to wills see Martin v. Martin, 334 Ill. 115, 165 N. E.