Spurious and Questioned Documents

Edward W. Spencer

Milwaukee Bar

Follow this and additional works at: https://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Available at: https://scholarship.law.marquette.edu/mulr/vol1/iss3/3

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
SPURIOUS AND QUESTIONED DOCUMENTS
By EDWARD W. SPENCER, of the Milwaukee Bar.
Former Associate Dean Marquette Law School;
Author of a Treatise on Suretyship, Domestic Relations, etc.

INTRODUCTORY.

"Assuredly nature would prompt every individual to have a distinct writing, as she has given a peculiar countenance, voice, and manner."—Disraeli.

The present subject naturally embraces a very wide and interesting field of legal and judicial inquiry and discussion, for upon the authorship, authenticity or genuineness of a particular writing or document may depend issues of the greatest consequence involving public as well as private interests, including the guilt or innocence of individuals with respect to the gravest and most disgraceful legal or social offenses. Witness, for example many of the English State trials, the so-called "Morey Letters" which might have cost James A. Garfield the presidency in the campaign of 1880; the Patrick-Rice will; the Mollineaux murder case; the Webster murder case; the Fair will; the Crawford will; and many other testamentary causes involving enormous estates, and the thousands of other questions and cases of varying interest and importance that have hinged upon documentary authorship, from the forged Decretals of Isidorus and the "Junius Letters," down to the latest vulgar check forgery or threatening or obscene letter. Indeed, few lawyers are long in active practice without having to deal with questions, litigated or otherwise, involving the authorship or authenticity of handwritings. Furthermore the advent of the typewriter has complicated and in some sense widened the field of investigation of questioned documents, and it is often possible by means of broken or misplaced letters and similar data, to identify the machine used in a given case with a certainty amounting to practical demonstration, or to determine the date of a document, or at least to exclude the possibility of a particular date, by reference to the style of type and other characteristics of the different machines in use at the time it is claimed or purports to have originated.¹

¹. See Osborn, Questioned Documents, Chap. XXV.
SPURIOUS AND QUESTIONED DOCUMENTS

It seems highly desirable, therefore, that the practitioner should have sufficient technical knowledge, not merely to apply the rules of evidence peculiar to handwriting cases, but to form some intelligent office opinion with respect to questioned writings and to enable him to properly deal with such witnesses, expert or otherwise, both before and at the trial, as may appear in this branch of his case.²

For this reason we will, after reviewing generally the rules of evidence involved, endeavor to show what tests may, and should ordinarily, be applied in determining the facts or forming an opinion as to them. At the same time no attempt will be made to accomplish the impossible by exploring in detail the entire field covered by the work of the so-called handwriting specialist or expert.

MODES OF PROOF—ENGLISH AND AMERICAN COMMON LAW.

Obviously, anyone who saw a writing executed or to circumstances leading up or pointing back to its execution, is competent to testify to its authorship upon the same principle that an eye witness may testify to the striking of a blow or to circumstances showing that a blow has been struck. Generally, also anyone is competent to testify (give an opinion) as to the authorship of a given writing, who is familiar with the handwriting of the alleged author, either by seeing him write, or by acquiring familiarity with his handwriting by carrying on correspondence with him, or through other opportunities of observing writing which there was reasonable ground for presuming to be his;³ and the jury have been quite generally held qualified to examine and compare the questioned writing and such other writings as are already in evidence for some other purpose and relevant to the issue.⁴a

---

². See the author's introduction to Osborn, Questioned Documents.
³. 1 Best. Ev. (1st Am. Ed.) 450. According to the older notion which persisted as late as 1798, the evidence of witnesses who had not seen the party write but had become conversant with his writing through correspondence, etc., was rejected unless witnesses who had seen him write were not available.
⁴a. See Sheare's Trial, 27 How. St. Tr. 323.
See Eagleton v. Kingston, 8 Ves. 473 per Eldon L. C.

115
EXTRINSIC STANDARDS—DOE vs. SUCKERMORE.

But the chief point of dispute and of variance in the decisions has been, and in some jurisdictions still is, whether other writings other than those already admitted as relevant to the case may be introduced for purposes of comparison by manual juxtaposition with the disputed writing. "And it certainly is a technicality calculated to astound anyone but a lawyer that precludes going out and getting the genuine writing of the person whose penmanship is in dispute for purpose of comparison," particularly in view of the fact that millions of dollars in money and property change hands every day upon the basis of a mere scratch of a pen—that the business of the world in fact depends largely upon the identity of handwriting.

Without reviewing the older history of the matter which has been carefully and learnedly examined by Prof. Wigmore,4b the English law apparently crystalized, or at least was first fairly reduced to a basis of reasons, though not wholly of reason, in Doe d. Mudd vs. Suckermore,5a decided in 1836, "which, as its title implies, has not tended to clarify the stream of justice." This case excluded, not all standards of comparison in handwriting cases, but all standards that were not already in the case as relevant for some other purpose. This meant, of course, that without such standards, without witnesses who had seen the party write or who were familiar with his writing, the triers of fact often had little to help them but the questioned writing, their sense of duty and the guidance of Almighty God. The principal reasons given in Doe vs. Suckermore and in subsequent cases for the exclusion of extraneous standards are three: (1) ignorance of jurors, and their inability to make intelligent comparison; (2) danger of unfairness and fraud in the selection of specimens, which the opposing party had no opportunity to investigate and expose; (3) the danger of collateral issues as to the genuineness of specimens presented. To these reasons may prob-


It seems that extrinsic standards were always allowed in the ecclesiastical courts. See Beaumont v. Perkins, 1 Phillm. 78; Crisp v. Walpole, 2 Hagg, Ecc. 535.


See also Doe v. Newton, 1 Nev. and P. 1, 5, Ad. & El. 514 (1836), following the same reasoning.
ably be added a fourth which, though seldom directly expressed as the basis of decision, seems to have pervaded and animated the cases down to and including that case. It was the distrust of expert testimony with respect to handwriting, or perhaps of all conclusions based on comparison with the mere standards of the writing in dispute, reflected in the oft-repeated phrase of condemnation and rejection, particularly when extrinsic standards were sought to be brought in, "comparison of handwritings," and reflected also in the frequent reiteration of the reasons given by Lord Denman for the exception permitting the juxtaposition of genuine writings already in the case, i. e., that "comparison in such case is unavoidable." As to such writings he says: "When two standards are placed before a jury, one of which is in question, and the other is clearly known to be the handwriting of the party, no human power can prevent the jury from forming some opinion whether those two were written by the same person; and consequently when such is the case, and the mind of the jury must be so employed, it is better for the court to enter into the consideration, and to direct any observations that may occur as to the value of such evidence."6

Another and a better reason for admitting as standards writings already in the case as genuine, appears to be the absence of the danger of collateral issues and the introduction of unfair specimens.7

5b. All proof of handwriting, save by witnesses who saw the writing executed or can testify to some fact which lead up or points back to it, involves in some sense comparison of hands. If the witness testifies from a previous familiarity with the type through seeing the party write or by familiarity with other proved or admittedly genuine writings we have comparison of the questioned writing with the mental standard or exemplar thus formed. By the later cases, however, "comparison of hands" meant comparison by persons previously unfamiliar with the "type," who were shown specimens in court for comparison with the writing in dispute. This was what the common law latterly excluded and in so doing it naturally excluded a class of witnesses altogether, i. e., experts, unless genuine standards were already in the case as relevant for some other purpose than mere comparison with the disputed hand. See supra note, 3; Wigm. Ev. §§ 1991, 1992.

6. Doe v. Newton, 1 Nev. & P. 1, 5 Ad. & El. 514.
7. I Best, Ev. sec. 239.

117
When a proved or admitted standard was already in the case, however, for some other purpose, it seems that the comparison could be made by the jury alone, or by experts speaking solely from juxtaposition, or by both.

The English law as thus expounded, with some local modifications, and differences, some of them traceable to earlier interpretations of the common law, has been the basis of subsequent decisions in most of our courts independent of statutes, most of which latter are comparatively recent. Proceeding to examine the soundness of the three reasons principally urged for the exclusion of extrinsic standards in Doe vs. Suckermore and later cases, the first has no weight in jurisdictions where intelligence and education are general, and the second is almost equally inconclusive, as an impartial administration of the law, allowing equal opportunities for comparison by both parties, and allowing both to submit standards, and subjecting both specimens and wit-


Comp. Fee v. Taylor, 83 Ky. 259; Tome v. Parkersburg Branch Railroad Co., 39 Md. 35, 17 Am. R. 540;

10. See Pate v. People, 8 Ill. 644; Chance v. Indianapolis, etc., Road Co., supra; Tower v. Whip, 53 W. Va. 135, 44 S. E. 179.

See Taves v. Brown, 43 Pa. 9, 82 Am. D. 540 and cases cited and reviewed in the note to 62 L. R. A. 855 for the peculiar views in Pennsylvania prior to the act of 1895.
nesses to the process of examination and cross-examination, makes the danger from unfair specimens too trivial to warrant the rejection of such important means of investigation.\footnote{See University of Illinois v. Spalding, 71 N. H. 163, 51 Atl. 731, 62 L. R. A. 817, and authorities cited in the opinion and notes.}

The objection on the ground of the possibility of collateral issues is more serious. Whatever be the law of a particular jurisdiction as to extrinsic writings, the rule of exclusion still does and must apply so long as standards are in dispute, for so long as the standards offered and the particular writing in issue are both in question, there can be no comparison in any proper sense, and the submission of so-called standards to the jury could only result in confusion, uncertainty and doubt. When the standards are once proved as a preliminary fact to the satisfaction of the judge, however, under principles later discussed, the difficulty disappears and no rational objection can be raised to the opinions of “experts speaking from juxtaposition,” unless indeed, it be based upon some peril or infirmity in the very character of such evidence so serious as to warrant its exclusion altogether, as a matter of policy. No one who is practically familiar with the work of the intelligent conscientious handwriting expert can discover any such danger or concede many more cogent reasons for excluding his opinion than apply to expert testimony in most other delicate matters of science or art.

\textbf{EXCEPTIONS TO RULE EXCLUDING EXTRINSIC STANDARDS—ANCIENT DOCUMENTS.}

An exception to the rule excluding extrinsic standards has long prevailed in the case of “ancient documents.” The rule as to these is thus stated by Mr. Best: “When a document is of such date that it cannot be reasonably expected to find living persons acquainted with the handwriting of the supposed writer, either by having seen him write, or by having held correspondence with him, the law, acting on the maxim, “\textit{Lex non cogit}...
"impossibilia," allows other ancient documents, which are proved to have been treated and regularly preserved as authentic, to be compared with the disputed one.12 Neither, it should be added, is there much if any room in such cases for the unfair selection of specimens.13

Precisely what are to be deemed ancient documents within the foregoing rule is not altogether clear,14 nor is it entirely clear how they should be used. Whether the disputed writing was to be compared with the standard by their custodian or by one who had full opportunity to observe and note the handwriting in the ancient document and who is thus familiar with the writing, or whether the comparison was to be visually made by the jury, or whether it could be made and an opinion given by experts, seems uncertain. In this country at least, the courts have apparently interpreted the rule to embrace all three modes of comparison.15


14. See Doe d Jenkins v. Davies, 10 Q. B. 314, 16 L. J. Q. B. 218, 11 Jur. 607; Macombert v. Scott, 10 Kan. 335; McAllister v. McAllister, 7 B. Mon. 270, to the effect that the instruments need not be ancient in the strict or technical sense (documents thirty years old), so long as they are too old to be proved in the ordinary way, as where there are no living witnesses to prove them. See the civil codes of Cal., Oreg. and Mont., substituting twenty years for thirty.

15. That the comparison could be made and an opinion given by non-experts familiar with the ancient standard. See Nicholson v. Eureka Lumber Co., 156 N. Car. 59, 72 S. E. 86, 36 L. R. A. (N. S.) and note.

That the comparison could be made by the jury, see 3 Wigm. Ev. sec.
SPURIOUS AND QUESTIONED DOCUMENTS
SAME—WRITING HABITS—ORTHOGRAPHY.

Still another apparent exception to the rule of Doe vs. Suckermore has been recognized that may be helpful to the court or practitioner in those few states where the rule of that case still substantially persists. It is that testimony may be given, even where it involves documents otherwise irrelevant and dehors the record, to show the writing habits of the alleged author as to orthography and syntax as bearing on the probability or improbability of his authorship. This is not deemed to impinge upon the rule forbidding “comparison of writings.”

The so-called “Garfield-Morey Letter” for example contained such errors in orthography that it obviously could not have been written by a college graduate, a teacher and a great statesman such as Gen. Garfield was.16a

As a learned writer says: “If, in the disputed instrument, certain words are wrongly spelled, and it is a fact that the person alleged to be the author misspells the same words whenever he makes use of them, such facts tends to prove the authorship of the disputed writing; the more numerous the misspelled words, the more cogent the proof for the reason that while two or more persons may misspell one word in the same manner, it is less probable that they will misspell two or more words in the same manner. If many words are misspelled, and proof can be made of numerous instances in which such words have been used, and

1994. In North Carolina the jury were not permitted to make the comparison alone. It must be made by the aid of a witness familiar with the ancient standard or by experts. See Nicholson v. Eureka Lumber Co., supra, and authorities cited.

A non-expert is not competent to testify from mere comparison of ancient documents without previous familiarity with the standards. Jarvis v. Vomerford, 116 N. Car. 147, 21 S. E. 302.

That the comparison could be made by scientific witnesses or experts and their opinion given, see Doe v. Suckermore, supra, with which compare the Fitzwalter Peerage case, 10 Cl. & F. 193, apparently overruled in Crawford & L. Peerages, 2 H. L. Cas. 534. See also State v. Clinton, 67 Mo. 384; West v. State, 22 N. J. L. 241; Williams v. Conger, 125 U. S. 413, 8 Sup. 933; Pope v. Anthony, 29 Tex. Civ. App. 298, 68 S. W. 521; Clark v. Wygatt, 15 Ind. 277, 77 Am. D. 90; Goza v. Browning, 96 Ga. 421, 23 S. E. 832; McAllister v. McAllister, 7 B. Monr. 270. See also Clay v. Robinson, 7 W. Va. 359, and Clay v. Alderson, 10 W. Va. 49.

16a. As to this see Ames on Forgery, pp. 185, 187.
it can be shown that the same words have always been misspelled in the same manner, the identity of the authorship is shown almost to a demonstration."^{16b}

Upon similar principles it has been held, even in states where comparison of extrinsic writings is not allowed, that an extrinsic writing may be brought in to show that the writing in question is the exact or practically exact counterpart or facsimile of the other, to prove that the disputed signature must have been forged by some process of tracing either from the extrinsic writing or from a common model, and that expert testimony on that point is admissible.^{17}

SAME—OTHER EXCEPTIONS TO RULE OF EXCLUSION.

Finally, as a remaining apparent exception to the common law rule excluding extrinsic standards of comparison, a witness who is already familiar with the handwriting of a party by having seen him write, or otherwise than by mere comparison of standards, may refresh his memory as to such writing by comparing the disputed document with extrinsic writings proved or ad-

16b. Article in 2 Mich. Jour. 16, reprinted in 3 Jones Ev. sec. 635. See also 3 Wigm. Ev. sec. 2034 and authorities cited. See also Brooks v. Tichborn, 5 Exch. 929, 20 L. J. Exch. 69, 14 Jur. 1122; Pate v. People, 8 Ill. 644; State v. Freshwater, 30 Utah 442, 85 Pac. 447, 116 Am. St. R. 853; Outlaw v. Hurdle, 1 Jones L. (N. Car.) 150. Evidence of this kind should be addressed to the jury, and is not usually a proper subject for expert opinion. Such an opinion should be based solely upon the writings themselves and not upon his knowledge of the education and literary attainments of the alleged writer, or partly upon these and partly upon such knowledge. Throchmorton v. Holt, 180 U. S. 553.


See also Smith v. Walton, 8 Gill, (Md.) 85.

Evidence rejected in McNair v. Comw., 26 Pa. St. 388, where the witness could speak only from comparison and not at all from recollection, though he had seen the party write.
mitted to be genuine, even at the trial, or may use the latter to corroborate his testimony.

**STATUTORY CHANGES—AMERICAN LAW.**

Naturally, the common law of this country was substantially, or at least in its main essentials, the common law of England as above outlined, modified in some instances by earlier and sometimes inconsistent rulings. A few states, indeed, discarded it without legislative aid as archaic, unreasonable and calculated to defeat the ends of justice, and freely admitted extrinsic standards properly proved for comparison by the jury and by witnesses, and a number of courts, while excluding extrinsic standards generally, have allowed comparison with such writings as are conceded by the adverse party to be genuine, or the genuineness of which he is estopped to deny, or the use of which, for some other reason involves no danger of collateral issues.

19. *U. S. v. Larned, 4 Cranch C. C. 312;*  
*Hopkins v. Simmons, 1 Cranch C. C. 250;*  
*Smith v. Fenner, 1 Gall. 170, 175;*  
*Comp. Power v. Frick, 2 Grant (Pa.) 305;*  
*Clark v. Wyatt, 15 Ind. 271, 77 Am. D. 90.*

20. *Lyon v. Lyman, 9 Conn. 55;*  
*Adams v. Field, 21 Vt. 256;*  
*Rowell v. Fuller, 59 Vt. 668, 10 Atl. 853;*  
*St. v. Brown, 4 R. I. 528, 70 Am. D. 158;*  
*University of Illinois v. Spalding, 71 N. H. 163, 62 L. R. A. 817;*  
*Moody v. Rockwell, 17 Pick. (Mass.) 490;*  
*Hanriot v. Sherwood, 82 Va. 1;*  
*Hammond's Case, 2 Me. 33, 11 Am. D. 39;*  
*Calkins v. State, 14 Ohio St. 222;*  
*Moore v. Palmer, 14 Wash. 134, 44 Pac. 142.*

In South Carolina comparison of extrinsic standards was allowed, but only in aid of doubtful testimony.  
*State v. Ezekel, 33 S. Car. 115, 11 S. E. 635.*

21. See *Chance v. Gravel Road Co., 32 Ind. 472;*  
*Skorb v. Kinsie, 100 Ind. 429;*  
*McComber v. Scott, 10 Kan. 335;*  
*Morrison v. Porter, 35 Minn. 425, 59 Am. R. 331;*  
*Rose v. Springfield F. Nat. Bank, 91 Mo. 399, 60 Am. R. 258;*  
*Morris v. Porter, 35 Minn. 425, 29 N. W. 54;*  
*Turnstall v. Cobb, 109 N. Car. 316;*
The law as laid down in *Doe vs. Suckermore*, persisted in England, however, down to 1854, and has persisted in many of our own States to a much later date. Indeed the prohibition against extrinsic standards was not removed in the federal courts until 1913. Generally now, the law with us is upon the same general basis as was established in England by the Common Law Procedure Act of 1854 (17, 18 Vict. c. 125. Sec. 27), which provides:

"Comparison of disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise of the writing in dispute."22

*Jarvis v. Vanderford*, 116 N. Car. 147;  
*Croom v. Sugg*, 110 N. Car. 259;  
*Clay v. Alderson*, 10 W. Va. 49;  

See also *Moore v. United States*, 91 U. S. 270, 21 L. Ed. 346;  

That extrinsic writings may be compared by consent of parties, see  
*Titford v. Knott*, 2 Johns. Cas. (N. Y.) 211;  

22. By sec. 103 this enactment applies to all courts of civil jurisdiction and by 28 Vict. c. 18, sec. 1, 8, it is extended to criminal cases. The Canadian statute is an exact copy of the English act. See *Langley v. Joudry*, 13 Dom. L. R. 563 and note. By act of Congress approved Feb. 26, 1913, any admitted or proved handwriting is competent as a basis for comparison by witnesses or by the jury, court or judicial officer, where the matter is in issue. This English statute has been construed to permit comparison of the disputed writing not only with that of the alleged writer but with that of the supposed forger. *Cresswell v. Jackson*, 4 F. & F. 1, 5. Our own statute would doubtless admit of the same construction, for it provides that “Comparison of any disputed instrument with any writing proved to the satisfaction of the court to be the genuine handwriting of any person claimed on the trial to have made or executed the disputed instrument or writing shall be permitted to be made by witnesses, and such writings or the evidence respecting them may be submitted to the court or jury,” Wis. Stat. Sec. 4189a. Similar statutes have sometimes received a narrower construction. See comments on *Peck v. Callaghan*, in 3 Wigm. Ev. p. 2683 note. See also *Powers v. McKenzie*, 90 Tenn. 167, 16 S. W. 559.
SPURIOUS AND QUESTIONED DOCUMENTS

The provision that preliminary proof of standards shall be addressed to the judge is not a denial of the right to trial by jury, or an invasion of its province.23

USE OF PHOTOGRAPHS—ENLARGEMENTS, ETC.

Despite these enactments one stumbling block may still remain to the best and most efficient proof in handwriting cases, for when photographic reproductions or enlargements are offered, with or without the aid of the stereoscope, a few courts have so dealt with them as to confirm the belief that the law is the last science to profit by the progress of other sciences.24

Generally, however, the courts have held them admissible subject to proper proof that they are honestly and accurately made, as can be readily done by the lenses in modern use, a matter usually quite easy to verify by comparison with the originals themselves. They should be, and usually are, taken to be just what they are—mechanical aids, like the spectacles of judge or the jury or a glass held in the hand, to the discovery and elucidation of the truth.25

23. Powers v. McKenzie, 90 Tenn. 167, 16 S. W. 559, and note in 62 L. R. A. 871. The statutes of the several states, and many of the more or less conflicting rulings under or independent of them, are given in 3 Wigm. Ev. §§ 2008, 2016, in the notes and the notes to 62 L. R. A. 832 et seq.

24. See matter of Foster, 34 Mich. 21, 23, with which compare
McLean v. Scripps, 52 Mich. 214, 219;
Taylor Will Case, 10 Abb. Pr. (N. S.) 300;
Tome v. Parkersburg Branch R. Co., 39 Md. 36, 17 Am. R. 540;
Buxard v. McAnulty, 77 Tex. 438, 14 S. W. 138.
See also Hynes v. McDermott, 82 N. Y. 41, 50;
Houston v. Blythe, 60 Tex. 506;
People v. Van Alstyne, 57 Mich. 69.

25. One court aptly speaks of enlarged photographs in such cases as "only a more enduring form of exhibiting the signatures to the jury as under a magnifying glass." First Nat. Bank v. Wisdom's Ex'srs., 111 Ky. 63, 63 S. W. 461 (1901). See also Frank v. Chemical Nat. Bank, 5 Jones & S. 26, 5 N. Y. Sup. Ct. (1874) aff. 84 N. Y. 209; 1 Wigm. Ev. sec. 797.

125
Furthermore the use of photographs in a protracted trial, where the questioned handwriting or available standards may suffer obliteration or defacement through the necessity of frequent handling, may be almost essential to the ultimate ends of justice.

Without attempting any exhaustive discussion of the subject, photographs are admitted in handwriting cases (1) as secondary evidence where the originals are lost or cannot be produced, upon the same principles and under the same limitations that other copies are admissible, or (2) as aids to the understanding and elucidation of the appearance and character of things already received or described in evidence, upon the same general principle as pictures, drawings, maps, plats and plans are so received, subject to the same preliminary proofs by the photographer, draftsman or other competent person as to their accuracy or exactness. Such proof is addressed to the sound discretion of


27. State v. Ready, 77 N. J. L. 329;
See notes to Gambill v. Schooley in 63 L. R. A. 438;
Diederichs v. R. Ro. and Hampton v. R. Co., 35 L. R. A. 802;
U. S. v. Ortiz, 176 U. S. (1899);
People v. Mooney, 132 Cal. 13, 63 Pac. 1070;
Marcy v. Barnes, 16 Gray (Mass.) 161, per Merreeck, J.;
First Nat. Bank v. Wisdom’s Ex’rs., 111 Ky. 135, 63 S. W. 461;

Photographs should not, of course, be admitted alone as primary evidence or for expert comparison where the originals are or can be produced.


The readiness with which retouching, so common both in traced and simulated forgeries, can be shown by photographic enlargements is well recognized, and so in greater or less degree of erasures, line crossings, folds and many other facts and peculiarities.

See Rowell v. Fuller, 59 Vt. 688; Marcy v. Barnes, supra.
the court and its decision is, it seems, not subject to review if it has any reasonable ground of support.  

These principles would seem to apply to the use by experts of the stereoscope on, or even the blackboard and other devices, to illustrate the peculiarities, likenesses, differences and other facts upon which their opinions are based.

**PROOF AND ADMISSION OF EXTRINSIC STANDARDS.**

Naturally, where specimens not otherwise in the case as genuine are brought into it as standards of comparison, under statutes or otherwise, a proper foundation must be laid before they can be used, or an expert or other opinion based upon a comparison of them with the questioned document can be elicited. Generally their genuineness must be established by admission or estoppel, or else by proof to the satisfaction of the presiding judge, by testimony so clear and positive as to enable him to

---


29. McKay v. Lasher, 121 N. Y. 479 (blackboard).

In State v. Ready, 77 N. J. 329, it was held that the fact that the photographs offered exhibited the signatures on ruled squares (a common device with the expert) did not destroy their admissibility. "No one," said Reed, J., "will, I think, dispute that a glass, plain or with magnifying powers, marked with lines so as to afford a measure of space and standard of proportion, could have been put into the hands of the jury for the purpose of applying it to the signatures, whether of a written size or a magnified size. It would amount to no more than applying a measure to the signatures, and then viewing the measure and the signatures through a glass." See generally Ligon v. Allen, 157 Ky. 101, 162 S. W. 536, 51 L. R. A. (N. S.) 842, note.

30. The admission must ordinarily be judicial, i. e., for the purposes of the trial or in the pleadings.


Generally this estoppel arises where a party claims under the document offered as a standard by his adversary. Keyser v. Pickrell, 4 App. D. C. 198. Admissions by the party seeking to use the writing are inadmissible, Sorb v. McKenzie, 80 Ind. 500.

31. The decision of the court on this preliminary question is final and conclusive, unless it appears to have been based upon an erroneous idea of legal principles.

State v. Thompson, 80 Me. 194, 13 Atl. 892, 6 Am. St. R. 172; Costello v. Crowell, 139 Mass. 588, 2 N. E. 698;
rule practically as a matter of law that the standards are genuine. And it should be remembered that in most states the standards cannot be proved by comparison of experts or others, under the rule requiring direct and positive testimony to the fact of genuineness.

This is sometimes construed to mean that the standards must be established by those who saw the party write, or by his admission that he wrote such standards, or by estoppel. But the true rule doubtless is that they may be circumstantially established by other means than a comparison with other writings; hence that the party recognized a writing by paying money on it, would ordinarily be sufficient.

Writings specially prepared by a party in or out of court for use as standards at the trial will usually be held inadmissible, as they may obviously be unfairly made and be in the nature of self-serving evidence, made for the occasion post litem motam.

---

32. Sankey v. Coon, 82 Ia. 125, 47 N. W. 1077;
Winch v. Noonan, 65 Ia. 186, 21 N. W. 511;
Hyde v. Woolfolk, 1a. 159;
State v. Stegman, 62 Kan. 476, 63 Pac. 746;
Bell v. Brewster, 44 Oh. St. 690, 10 N. E. 678;
Parvey v. Parvey, 30 Oh. St. 600;
University of Illinois v. Spalding, 11 N. H. 163, 51 Atl. 731;
Costello v. Crowell, 133 Mass. 152.

In People v. Molineaux, 168 N. Y. 264, 68 N. E. 286, 62 L. R. A. 193, it was held that the standards must be proved by a fair preponderance of the evidence in civil cases, and in criminal cases beyond a reasonable doubt.

Sankey v. Coon, 82 Ia. 125, 47 N. W. 1077.
McKay v. Lasher, 121 N. Y. 477, 24 N. E. 711.
Martin v. Maguire, 7 Gray (Mass.) 177;
34b. Little v. Rogers, 99 Ga. 95, 24 S. E. 856.
King v. Donahue, 110 Mass. 155, 14 Am. R. 589;
Williams v. State, 100 Ala. 33;
State v. Koontz, 31 W. Va. 129, 5 S. E. 328;
People v. De Kroyst, 49 Hun. 71.

Even a signed answer in the same cause by the party offering it has been excluded under this rule.

Shorb v. Kenzie, 100 Ind. 429.
But standards written in the presence of the jury, by direction of the judge, in the exercise of a sound legal discretion have been held proper. 36

Clearly a writing done at the request of the adverse party on cross-examination, is a proper standard in the case against the party requesting it. 37

But even in among the jurisdictions that retain generally the orthodox rule as laid down in Doe vs. Suckermore and Doe vs. Newton, forbidding the comparison of writings not otherwise in the case, the phrases “writings in the case” or “writings otherwise in evidence,” has by many of our courts been held to include, not merely writings in evidence as relevant to the issues, but such other writings as constitute a part of the files or record proper, as the signatures to affidavits, bail bonds, undertakings for costs, and the like. 38 Certainly as to these there is little if any risk of collateral issues.

Failure to object to standards when offered is taken to be an admission of their genuineness, and a subsequent objection comes too late. 39 But it has been held that the standards are not suffi-

See also Williams v. Riches, 77 Wis. 569, 46 N. W. 817; First Nat. Bank v. Robert, 41 Mich. 709, 3 N. W. 199.
See also Osbourne v. Hosier, 6 Mod. 167.
37. 3 Jones Com. on Ev. sec. 550. In Smith v. King, 62 Conn. 516, 26 Atl. 1059, it was held that the court had power in the exercise of its discretion, to direct the witness to write. See Williams v. Riches, supra.
in both of which cases they were rejected as standards of comparison on account of the danger that they might be self-serving. See also on this point 9 Ann. Cas. 452.

See, however, Snow v. Wiggin, 19 Ill. App. 542; Frank v. Taubman, 31 Ill. App. 592, with which compare Marsey v. Farmers’ Bank, 104 Ill. 327.
ciently proved by mere admissions of the party offering them, for
they may not be his writing at all, or they might have been made
with a view to subserve his interests,40 and their admission would
tend to the production of collateral issues.

WHO DEEMED HANDWRITING EXPERTS.

Having considered the admissibility and basis of expert
testimony in handwriting cases, it remains to be seen who is an
expert. The rule as to those who are familiar with the handwrit-
ing of the party by reason of their familiarity gained by seeing
him write, or by business or social correspondence involving
undoubtedly genuine writings or the custody of ancient documents
are hence in some special sense experts, having been already
considered, we may define an expert in a wider and more proper
sense as one who, by reason of special study, observation and
experience is, or may reasonably be presumed to be, qualified to
form a more intelligent and trustworthy opinion than the average
of men, as to the authorship or authenticity of handwriting, upon
the basis of knowledge acquired or standards examined and com-
pared for the particular occasion.

It should be noted here that the ability of the expert to draw
correct conclusions, or indeed any conclusions at all in some
cases, depends largely upon the number and character of the
standards submitted to him, and his ability to demonstrate those
conclusions in court is subject to the same conditions. Indeed
the conscientious expert will decline to venture his judgment or
to testify in court at all, unless there is sufficient data to warrant
a demonstrable opinion. The specimens, also should be as nearly
contemporaneous with the disputed writing as practicable, and if
possible should be executed under the same or similar conditions.
Counsel should therefore be diligent in obtaining a sufficient
number of legally admissible standards of this description.41

While comparatively few in this country make it their entire
or principal business to examine and pass upon questioned docu-
ments, still we have experts of a high order of intelligence and
skill, who make the solution of handwriting problem partly or

40. Dowd v. Reid, 53 Mo. App. 553;
Bank of Comw. v. Mudgett, 44 N. Y. 514 and cases supra, note 38.
wholly a vocation. Such is Mr. John F. Tyrell of Milwaukee, who has appeared in many important cases and to whom the writer is indebted for many valuable suggestions, and Mr. Albert S. Osborne of New York, the author of a most scholarly work on questioned documents from which the writer has received great aid, and there are no doubt many others.

And it is well to note here that many persons can qualify so that their testimony as experts is legally admissible, whose opinions should still be entitled to little weight. Indeed the faker, the charlatan, and the paid partisan are not unknown in this department of legal investigation; and finally we have the so-called “gaphologist” whose deliberate pretense or blind infatuation leads him to assert that he can find in handwriting such indications as love of animals, sterility in the male or female, or functional disturbance of the bowels. People who make such claims as these should not be confused with the honest, intelligent and painstaking handwriting expert, who attempts to do no more than he can fairly demonstrate, and fairly demonstrates what he honestly believes.

In order that his opinion may be admitted at all, the witness must qualify, for if he has no special knowledge or skill in matters of handwriting, and no previous familiarity with the hand of the supposed writer, the jury are deemed to be as competent as he to form an opinion, and it is for them to perform that duty. In short, he must bring himself within the opinion rule. Whether he has done so or not is a preliminary question for the judge and not the jury to decide in the exercise of a sound legal discretion as applied to the circumstances of each case, and like the question of the admissibility of standards, it is not usually subject to review except for plain and palpable disregard of legal principles, amounting to an abuse of judicial discretion.

42. Page v. Homans, 14 Me. 482; Spottiswood v. Wier, 80 Cal. 448, 22 Pac. 289; McKay v. Lasher, 42 Hun. 270.

This is true under modern statutes. Mixer v. Bennett, 70 Ia. 329, 30 N. W. 587.


The rulings of the courts in particular cases are therefore to be regarded as suggestive rather than as establishing fixed precedents for accepting or rejecting the witness.

Among those whose special knowledge and experience has been held to qualify them as experts in the narrow sense to authenticate or disauthenticate a document, we have the following: A writing master professing skill in detecting forgery, an experienced bank teller or cashier, who is of course competent to testify as to the genuineness of bank bills that he has been accustomed to handle, or generally as to disputed signatures, or to say whether a particular writing shown him has been altered, or whether a writing on an erasure was done before or after the body of the note. A clerk in the postoffice accustomed to inspect franks to detect forgeries has been likewise held competent on the question of disputed handwriting. Skilled engravers have usually been held so competent, particularly where the genuineness of dyes or seals is involved, and an expert repairer of typewriters has been admitted on a question of peculiarities of typewritten work. A treasurer and clerk of a railroad company accustomed to examining signatures on stock and bank bills in order to determine their genuineness, and a photographer accustomed to examining handwriting in connection with his business in order to detect forgeries have been held experts. Upon principle, indeed, all that seems necessary is that the party should have made such special study of handwriting or have had such a large experience in examining and comparing hands or signatures or other features of documents, as to make his opinion or inference a probable aid to the jury. But it has been held that a witness does not show himself qualified by stating merely that he is clerk of the courts, without stating also his length of service

48. Pate v. People, 3 Gilm. (Ill.) 644.
52. See State v. Freshwater, 30 Utah 442, 85 Pac. 447.
53. Withee v. Rowe, 45 Me. 571.
in that capacity;\textsuperscript{55} nor is the mere occasional comparison of
disputed signatures in the course of business enough;\textsuperscript{56} nor is
mere skill in the use of the microscope.\textsuperscript{57}

Disclaimer of expertness, however, does not necessarily
require the rejection of the witness.\textsuperscript{58}

Among those whose testimony as experts has been rejected
we sometimes find bank officers or clerks, but in such cases, unlike
tellers or cashiers, the witness usually had no special experience
in comparing writings.\textsuperscript{59} Merchants have been rejected under
similar circumstances,\textsuperscript{60} and so have lawyers,\textsuperscript{61} and convey-
ancers.\textsuperscript{62} Bookkeepers and others whose experience in such
matters would seem to be but little if any more than is acquired
by most persons in business or professional life have been re-
jected, they having made no special study of the subject of hand-
writing particularly as to its comparison or identification. Indeed,
as we have already said, proof of expertness is addressed to the
judge and his decision will stand unless it clearly appears to
involve an erroneous view of legal principles or is not justified
by the evidence.\textsuperscript{63}

\textit{NON-EXPERT OPINION—QUALIFICATIONS
OF WITNESS.}

When a non-expert witness is offered to give an opinion from
having seen the party write, he has been held sufficiently qualified

\begin{footnotes}
\footnote{55. \textit{Winch v. Norman}, 65 Iowa 186, 21 N. W. 511.}
\footnote{56. \textit{Spottiswood v. Weir}, 80 Cal. 448, 22 Pa. 289.}
\footnote{See also \textit{People v. Spooner}, 1 Den. 343, 43 Am. D. 672.}
\footnote{57. \textit{State v. Ward}, 39 Vt. 225;\
\textit{Stevenson v. Gunning's Est.}, 64 Vt. 601, 25 Atl. 697.}
\footnote{58. \textit{Tower v. Whip}, 53 W. Va. 158, 63 L. R. A. 939 and cases cited
on the note thereto at page 941.}
\footnote{Contra \textit{Heacock v. State}, 13 Tex. App. 97.}
\footnote{And see generally on the competency of witnesses in handwriting
cases, note to \textit{Tower vs. Whip}, 63 L. R. A. 939, and 3 Wigm. Ev. § 1012,
note 3; Lawson Expert Ev. (2nd Ed.) 455.}
\footnote{59. See \textit{Stone v. Hubbard}, Cushing (Mass.) 595;\
\textit{Pate v. People}, 8 Ill. 644;\
\textit{Birmingham National Bank v. Bradley}, 18 Ala. 205, 19 So. 791.}
\footnote{60. \textit{Edmonstone v. Hubbard}, 45 Mo. App. 346.}
\footnote{61. \textit{Hyde v. Woolfolk}, 1 Ia. 159;\
\textit{State v. Phair}, 48 Vt. 366.}
\footnote{63. \textit{Comw. v. Nefus}, 135 Mass. 533;\
\textit{Nunes v. Perry}, 113 Mass. 274;\
\textit{State v. David}, 131 Mo. 380, 33 S. W. 28.}
\end{footnotes}
though he has seen him write but once and that only a little, and many years before, though necessarily under such circumstances, his testimony is not entitled to much weight.\textsuperscript{64}

Where, however, his alleged familiarity with the particular hand is based upon his having seen other alleged writings of the party, their genuineness must be satisfactorily established. If the writer has acknowledged them expressly, or impliedly by acting upon them as genuine, that is usually held sufficient.\textsuperscript{65} When knowledge of the standard is claimed to have been acquired by correspondence, however, it is well settled that the mere proof of receipt of letters or papers purporting to have been written by him whose writing is in dispute,\textsuperscript{66a} is not enough. But it is generally held enough, that he has received such letters or documents in reply to communications written by himself or by his authority,\textsuperscript{66b} or even that he has acted upon them as authentic.\textsuperscript{67} Neither need the witness be the sendee or recipient of the papers. He may be a mere clerk or custodian or have seen them in any other way. It is enough that he has seen them and that their genuineness has been satisfactorily proved. It is sufficient in other words that his mental standard is based upon visual familiarity with a genuine writing.\textsuperscript{68}

It has even been held in England, prior to the statute, that one whose familiarity with the handwriting in dispute was by seeing it on an affidavit filed in the case, was competent to give an opinion,\textsuperscript{69} and it is no disqualification that the witness has

\textsuperscript{65} Johnson v. Davenport, 19 Johns. (N. Y.) 134, 10 Am. D. 198;
\textsuperscript{66a} Pinkham v. Cockrell, 77 Mich. 265, 43 N. W. 921;
\textsuperscript{66b} See 3 Jones Com. Ev. sec. 547 and cases cited in note 76 and in the note to Lancaster v. Ames, 17 L. R. A. (N. S.) 229.
Parker v. Amazon Insurance Co., 34 Wis. 363.
\textsuperscript{67} Thorpe v. Grisbourne, 2 Car. & P. 21;
Harrison v. Fry, R. & M. 90, 1 Car. & P. 289, 2 Bing. 179.
\textsuperscript{68} Rex v. Slaney, 5 Car. & P. 213.
\textsuperscript{69} Smith v. Sainsbury, 5 Car. & P. 196.
refreshed his memory by the perusal of genuine specimens, though such specimens are not in evidence.\(^{70}\)

**EXAMINATION OF HANDWRITING WITNESSES—WEIGHT TO BE ACCORDED TESTIMONY.**

Of the weight to be accorded testimony of witness in handwriting cases and the tests to be applied to it by the court and counsel much has been said and much more might be added. We are forced, however, to content ourselves with some general observations here, leaving more to be gathered from the discussion of the practical side of the expert's work which is necessarily postponed to another issue. Of course the direct and positive testimony of a single intelligent, credible and disinterested witness that he saw the very writing done is almost always conclusive, particularly where he is an attesting witness. But where the witness testifies from memory as to the writing characteristics of the party (from mere knowledge of the type) his testimony may be entitled to much weight or little depending upon how extensive his observations have been and how recent, relatively to the origin of the disputed writing, and his ability to see and observe depending on occupation, education and experience. All these are of course proper matters both for direct and cross-examination.

When we come to the expert in the ordinary sense, his qualifications may clearly be gone into on cross-examination, not for the purpose of disqualifying him unless this can be done utterly so that his testimony may be stricken out, but in order to minimize the weight that might otherwise be given to his opinion.

Furthermore, in testing his knowledge and judgment much latitude has been allowed. It has even been held that on cross-examination any writings or parts of writings may be exhibited to him for that purpose, and that neither the expert nor counsel calling him is entitled to know beforehand what writings will be so used, or whether they are genuine or not.\(^{71}\) Even spurious

---

\(^{70}\) See *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474; *Miller v. Coulter*, 156 Ind. 260, 59 N. E. 853 and cases cited supra notes 18, 19.


writings prepared for the occasion have been admitted on cross-examination for the purpose of discrediting the witness by having him pronounce them genuine.\textsuperscript{72}

Both of the procedures above indicated are on the whole often unfair to the witness unless, indeed, he is given a reasonable time under decent conditions to examine the material thus submitted. This the exigencies of the trial will not always permit.\textsuperscript{73}

The weight to be accorded to the testimony handwriting experts as a class has elicited various judicial utterance. Naturally, the older of these are for the most part less favorable to it than the comparatively recent. It has been declared even recently, however, to be "of the lowest order,"\textsuperscript{74} "weak and unsatisfactory," and the like,\textsuperscript{75} and instructions embodying this idea have been upheld in Iowa and Vermont,\textsuperscript{76} though such

\begin{footnotesize}

See also Tyler v. Todd, 36 Conn. 218; Andrews v. Hayden, 88 Ky. 455, 11 S. W. 428.

This last course at least is almost universally condemned when applied to non-experts (Pierce v. Northey, 14 Wis. 10, and note in 63 L. R. A. 171 et seq.), unless, perhaps, the test writing is first admitted or proved to be genuine.


Where an expert commits an error in attempting to distinguish between genuine and spurious writing, such error may, unless he acknowledges it, be shown by other testimony. Hoag v. Wright, supra; overruling People v. Murphy, 135 N. Y. 450, 32 N. E. 138. Contra: Rose v. Bank, 91 Mo. 399, 60 Am. R. 268; Gaunt v. Harkness, supra; Massey v. Bank, 104 Ill. 327; Tyler v. Todd, supra.

\textsuperscript{73} See the approximately fair procedure in Bishop Atterbury's Trial, 16 How. St. Tr. 571. See also Demerritt v. Randall, 116 Mass. 331.

\textsuperscript{74} Patton v. Lund, 114 Ia. 201, 86 N. W. 296, and cases cited.

\textsuperscript{75} Browning v. Gosnell, 91 Ia. 448, 59 N. W. 340.

\textsuperscript{76} Pratt v. Rawson, 40 Vt. 183, 188. In the federal courts it seems proper to instruct that such evidence should be received with caution. U. S. v. Pendergast, 32 Fed. Rep. 198.
\end{footnotesize}
SPURIOUS AND QUESTIONED DOCUMENTS

instructions are usually justly condemned elsewhere as invading the province of the jury. 77

The judicial distrust of handwriting testimony by experts is partly due to the occasional partisanship of such witnesses, which is usually no more and no less than that of privately paid experts in other departments of knowledge; and partly to a failure to appreciate the real value of the service that the really capable and conscientious expert can render, not only in discovering the truth but in bringing it to the understanding. And conceding that, in addition to the tendency to partisanship, the handwriting expert may also be "affected by that pride of opinion and that kind of mental fascination with which men are affected when engaged in what they call scientific inquiries," 78 it is doubtful if he is any more prone to it than are other professional or scientific witnesses. Perhaps the chief criticism of this class of witnesses in their inclination to regard their so-called science as exact and to exhibit too much confidence both in its possibilities and in their own conclusions. It is doubtful, however, on the whole, whether their professional enthusiasm, pride of opinion, self-confidence or partisanship have hung, imprisoned, disgraced or impoverished more innocent people, in proportion to the number of cases in which they have appeared, than have similar traits in the medical men, the professional alienists and the professors of chemistry and experts in toxicology, in whose society the handwriting specialists are sometimes compelled to work. 79 Yet the bond of sympathy between these several classes of experts should be strong, for they have all come in for their full share of judicial condemnation upon identical or similar grounds. We therefore omit the favorable or lauditory expressions of courts and judges as applied to handwriting experts with the remarks that they are quite or nearly as strong as those of an opposite character. 80

77. Coleman v. Adair, 75 Miss. 660;
Davis v. Lambert, 69 Neb. 242, 95 N. W. 592.
78. See the dissenting opinion of O'Brien, J., in People v. Patrick, 182 N. Y. 131, 74 N. E. 843.
80. Both classes of expressions are given in 1 Moore on Facts, sec. 615 et seq. and particularly in secs, 629, 630. See also 3 Wigm. Ev. sec. 2026. Rogers' Expert Testimony, 199 et seq. to the relative value of.
As to the relative values of the testimony of the non-expert who has seen the party write, or has become otherwise familiar with his writing, and has thus acquired a mental standard for comparison, and that of the expert who speaks from comparison or juxtaposition alone, much has been said and much more might be added. Those who have seen a flock of tottering, toothless veterans who have acquired their mental standards many years before, and have listened to their conflicting and uncertain testimony, will usually look for better assistance than theirs in a close or doubtful case. That their testimony should neutralize or outweigh that of a single honest and intelligent expert speaking from comparison with adequate proved standards is inconceivable. That an intelligent lawyer or business man should err as to the signature of his partner of long standing is possible but not probable. That the trained expert should err at least as to a writing of any considerable length, when speaking from juxtaposition of numerous fairly contemporaneous standards is also possible but not probable. That the testimony of an expert so speaking should be inferior to that of one who speaks from a mental standard or exemplar formed by seeing the party write but once twenty years before, is ridiculous. We therefore dismiss the discussion as likely to bring us for practical purposes to the uttermost confines of nowhere, unless it is directed to the facts of some concrete case, contenting ourselves with a quotation from a Canadian decision. "It seems plain that a more correct judgment as to the identity of handwriting would be formed by a witness [expert] by a critical and minute comparison with a fair and genuine specimen of the party's handwriting than by a comparison of seen signatures with the faint impressions produced by having seen the party write, and even then perhaps under circumstances which did not awaken his attention." 81

Most important of all to bear in mind, both as a basis for the examination and cross-examination of experts and for argument upon the weight of their testimony is, that the opinion of an expert is valuable only when it points out satisfactory reasons for his conclusion. A bare expression of opinion, unless supported

---

by intelligent reasons is entitled to little weight, and the writer willingly concedes, as will any competent expert, the justice of nearly all of the judicial utterances derogatory to the value of testimony of handwriting experts as a class, provided such utterances are confined to such testimony when consisting of a mere unreasoned and undemonstrated opinion.

The fact is as stated by the Supreme Court of Mississippi: "The evidence of experts (in handwriting) is neither intrinsically weak nor intrinsically strong; its value depends upon the character, capacity, skill, opportunities of observation, the state of mind of the expert himself on the nature of the case, and of its weight and worth the jury must judge without any influencing instruction, either weakening or strengthening from the court."

The courts, therefore, are practically unanimous in holding that the expert, where it is competent for him to give an opinion at all, should be allowed to testify as to the grounds or reasons upon which it is based, and to point out and explain to the jury the differences, similarities or other peculiarities of the document which induce his belief, and a careful examiner will bring out the full strength of a competent expert in this regard, by a few well directed questions.

Finally, in handwriting cases, there is no distinction under the rule requiring "best evidence" as to the admissibility of the testimony of experts and non-experts even though the latter claim to have seen the very writing in question executed. The testimony of witnesses of one class may either corroborate, rebut or discredit the testimony of a witness of another class.


83. Coleman v. Adair, 75 Miss. 660 (1898). See also remarks of Chancellor McGill in Gordon's Case, supra, with which compare the opinion of Surrogate Hutchins in the Taylor Will Case, 10 Abb. Pr. N. S. (N. Y.) 309.

On principle, and generally upon authority, even where the older common law rule forbidding the comparison of writings prevails, there is no objection to expert testimony as to paper, ink, type, erasures, illegible words or characters, and the like, as shedding light upon the age, authenticity or contents of an instrument or some part of it. Clearly this does not constitute comparison of writings in any strict or proper sense.\(^8\)

Whether the opinion of an expert should be received that a document is a spurious or in a feigned hand from mere inspection or examination without juxtaposition with any standard, seems at least on the older decisions quite doubtful.

**PRESERVATION AND PRELIMINARY USE OF QUESTIONED DOCUMENTS**

The fact that the present article has already extended far beyond the limits originally planned, makes it necessary to postpone the expert’s side of the discussion until a later issue. We close it therefore with a few practical suggestions. The moment a document is questioned it should be handled and preserved with the greatest care. Its present physical condition should be carefully observed and noted in writing, and above all it should not be cut, torn or mutilated in any way, or unavoidably creased or folded, particularly in any new place, or subjected to heat or moisture or to the action of chemicals, except in expert hands. If it is much worn it may, if not too large, be preserved between two pieces of glass. Above all it should not be the subject of

---

85. See 3 Wigm. Ev. secs. 2023, 2024, 2025. On the question of inks, a chemist or other expert in such matters, should of course, on principle, be permitted to testify after making the requisite tests. Expert testimony that the style of penmanship indicated a different epoch has even been held admissible where comparison of writings in the strict sense would have been forbidden. Tracy Peerage Case, 10 Cl. & F 161, 176.
SPURIOUS AND QUESTIONED DOCUMENTS

marks or erasures, nor should letter press copies be made of it, or any tracings save by the gentlest and most skilful hand. Generally the earlier such documents reach the control of the court or its custodians, the better.

Finally, counsel seeking the aid of an expert, should call upon him as soon as the necessity appears in order that he may have ample time within which to make his investigations and prepare for trial. As Prof. Wigmore well observes, "It is preposterous to expect him invariably to obtain by a brief inspection on the stand the necessary data for an opinion. Close measurements, detailed enlargement, and other expedients of the expert, may often require not only a length of time but a quantity of apparatus and a certain degree of seclusion." 8

CONTRIBUTION BETWEEN JOINT TORT-FEASORS

CHAS. B. QUARLES.*

With all the litigation in negligence cases and the greater part of the cases tried in our courts is of this kind, it seems strange indeed that the courts have not since long settled and placed beyond dispute all questions as to the rights of persons liable on joint tort-judgments.

But such is far from being true. The right of the judgment creditor to enforce the judgment in solido against any of the defendants is plain. But where one such judgment debtor has been forced to pay more than his aliquot part of the liability, what his rights are if any he has against the others, is very much unsettled at least in the minds of most lawyers.

In the ordinary negligence case where there was no concert of action and no real intent to do the plaintiff an injury, it is obviously fair for each of the defendants to stand his proportionate share of the loss. But after such a judgment has been

86. 3 Ev. sec. 2011.
* Member of the Milwaukee bar.