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PROGRESS IN PROOF OF HANDWRITING AND DOCUMENTS

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The changes in court procedure and practices in connection with the proof of handwriting and documents in American courts during the last twenty-five years amount to a revolution. Present-day practitioners can hardly believe that no genuine writing could be introduced as a standard of comparison before 1913 in all Federal Courts and in the courts of the great states of Illinois, Indiana, Michigan and many other states. Formal, solemn arguments were made, and supported by legal opinions, that the introduction of standards of comparison would raise many collateral issues and would be a dangerous proceeding.

The change of attitude of the courts regarding the proof of handwriting is due in large measure to the scientific and convincing discussion of the history of the subject by Professor Wigmore in the first edition of his great work, "Wigmore on Evidence." He clearly traced the cause of the prejudice and the unfortunate practices, many of which were in full swing when his work was first published in 1904.[2] Preceding this thorough discussion of the subject, few judges or lawyers knew that the unscientific practices, in large measure, grew out of English political events which for a long time in England prevented any comparison of handwriting whatever. The great reform of the law in England in the Nineteenth Century, however, led to the statute of 1854 permitting comparison and the introduction of standards of comparison in handwriting cases.

Although America inherited the prejudice on the subject, it did not adopt the reform, and in a large number of the American states it was more than sixty years after the reform in England before the American courts permitted the introduction of standards of comparison. This practice is now universal in this country, and the

[1]Author of "Questioned Documents." 1910, 1929, and "The Problem of Proof," 1922, 1926.

[2]"The argument of Mr. Justice Coleridge that 'the English law has no provisions for regulating the manner of conducting the inquiry' illustrates that perverse disposition of the Anglo-American judge—the despair of the jurist—to tie his own hands in the administration of justice—to deny himself, by a submission to self-created bonds, that power of helping the good and preventing the bad which an untechnical sense would never hesitate to exercise. The enlightened procedure on this subject [admission of standards] is that which had subsequently to be introduced in England by the statute of 1854, that which the Court of Massachusetts had already adopted from the beginning. . . ." Wigmore on Evidence, Volume 4, p. 252, Par. 2000.

danger of raising collateral issues, so seriously discussed in the old opinions, has proved to be an imaginary danger. The last two states making the change were North Dakota[3] and Texas and, strange to say, these changes were not made until a few years ago.

Restrictions on Testimony

The severe restrictions surrounding handwriting expert testimony in the courts made this testimony weak and unconvincing, and it was so described in the opinions, but the opinions failed to say that the result was due to the restrictions that did not permit scientific and convincing testimony. Only standards of comparison "in the case for other purposes" could be used, and in many instances a standard of this kind was undesirable and dangerous.[4] Cases were tried with only one standard of comparison, written more than thirty years before the date of the disputed document. Under these conditions testimony on the subject of handwriting was given mainly by clerks and bankers who merely looked at the handwriting for a minute or two and offered an offhand opinion without giving any reasons whatever for the opinion.

Not only was testimony of this kind made weak and unconvincing by the exclusion of genuine writings for comparison, but there were other weakening restrictions. For a long time no reasons whatever could be given for an opinion, and this has continued in certain courts down almost to the present day. In an early decision a judge, in order to justify the exclusion of standards, made the statement in effect that the general appearance of a writing, without analysis or attention to any details, was a safer guide as a basis for an opinion than a careful, detailed study of the writing.[5] The statement was of

[3]*State v. Gummer,* 51 N. D. 445, 200 N. W. 20 (North Dakota, 1924).
"In view of what has heretofore been said regarding the modern tendency to enlarge and extend the rules with reference to the matter under consideration, we think that the exhibits in question were admissible under the terms of this third exception."]Rule regarding admission of irrelevant writings as standards of comparison changed in 1924 by Supreme Court by this opinion.]
Latham et al v. Jordan, et al, Nos. 1013-5181, 17 S. W. (2d) 805 (Texas, 1929).
"It was not error to admit in evidence the instruments admitted to be written by the plaintiff, James O. Latham, for the purpose of comparison with the alleged forged letter, even though such instruments were otherwise irrelevant to any issue in the case."

[4]*Doe, dem. Perry* v. *Newton* (1 Nev. & P. 1) England.
"This court has expressly determined that documents irrelevant to the issue shall not be received in evidence at the trial nor to enable a jury to institute such a comparison. Much less can it be permitted to introduce them in order to enable a witness to do so." [This is the rule followed by most American courts for several generations.]

[5]*Doe* v. *Suckermore* (5 Adol. & Ellis 705-6; 31 Eng. C. L. 702-3) England.
"The test of genuineness ought to be the resemblance not to the formation of the letters in some other specimen or specimens but to the general character of the writing."

course incorrect and unscientific, as it would be as applied to any subject, but this pronouncement was quoted hundreds of times in justification of limitation and restriction of testimony of this character. It is easy to understand that a traced copy of a handwriting would have the same "general appearance" as the original.

In a famous New York case (the Taylor Will Case, 10 Abb. (N. S.) 300) it was even stated that intuition was a safer guide than careful study and analysis. As stated in a common-sense way by Professor Wigmore, testimony of this kind could only be weighed by counting the witnesses. These old restrictions continued for so long a time and were repeated over and over again so many times in the books and opinions, that even now there are mature practitioners and judges who do not know the extent of the change in the presentation of testimony of this character.[6]

For a long time a juror was not permitted to look at a writing with a magnifying glass. This ridiculous restriction was, however, overruled by the Supreme Court of certain states in common-sense decisions that said that if this rule was strictly followed jurors who

[6] *Magnuson* v. *State*, 187 Wis. 122; 203 N. W. 749 (1925).

"A rule of law that would permit an expert to take the stand and state his conclusion without doing any more would place the least qualified, most prejudiced expert on the same level as the best qualified and most conscientious expert. Particularly is this true in regard to the testimony of a handwriting expert, which rests very largely for its convincing power upon the similarities and peculiarities which enable the expert to arrive at his conclusion."

"The opinion of the Supreme Court emphasizes the feature that modern expert testimony no longer can be disparaged by that doubt which hesitates to accept 'mere opinion;' because what scientific methods and apparatus has been able to do is to reveal *facts*, and these facts can be made, by microscopy and photography, as plain to the tribunal as to the expert; so that the observer may form his own opinion adequately from these facts." . . . Excerpt from Dean Wigmore's review of *Lyon* v. *Oliver*, 316 Ill. 292, 148 N. E. 251, in Illinois Law Review of November, 1926.

Venuto v. *Lizzo*, 148 App. Div. 164, 132 N. Y. Supp. 1066 (1911).

"The conclusion of a handwriting expert as to the genuineness of a signature, standing alone, would be of little or no value, but supported by sufficiently cogent reasons his testimony might amount almost to a demonstration."

Hirshfeld v. *Dana*, 223 Pac. 451 (California, 1924).

"It is the duty of the jury to consider and weigh the opinions of the experts with the other evidence in the case and then determine upon all of the evidence where the truth lies. . . . It is never proper to instruct the jury that expert testimony is or is not reliable or as to how the jury should appraise it."

In re Henry's Estate, 276 Pa. 511, 120 Atl. 454 (1923).

"Were the direct evidence discredited, or the opinion evidence strengthened by facts and circumstances, the case might be different . . . It may not be amiss to add that the weight of opinion evidence on a question of handwriting depends upon the cogency of the reasons given; here they do not appeal to us as convincing. [The quality and character of the reasoning may show the weakness of the testimony as well as its strength.]

Harrison v. *Rowan*, 3 Wash. C. C. R. 580, 587 (U. S. Cir. Ct. N. J. 1820).

". . . the mere opinions of witnesses are entitled to little or no regard unless they are supported by good reasons."

were wearing spectacles should not be permitted to look at the disputed writing without removing their spectacles. Notwithstanding the ridiculous character of this restriction, however, it continued in force in many states for several generations. Under these conditions the use of a compound microscope in court was of course not permitted under any circumstances.[7]

Another restriction surrounding testimony of this kind was the exclusion of photographs and of photographic enlargements even when photography had become a highly developed art. In an early New York Surrogate's Court opinion[8] it was pointed out in detail how dangerous it would be to allow photographs to affect in any way an opinion regarding the genuineness of a handwriting, and this opinion, like others of a similar character, did not tend to clarify the stream of justice.

Change of Attitude

The most distinctive change in the attitude of the courts regarding handwriting and document expert testimony in American courts is the radical change in the view of just what expert testimony of this kind really is. This is most clearly stated by Professor Wigmore in the following words in his Second Edition:

"On direct examination, the witness may and, if required, must point out his grounds for belief in the identity of the handwriting, on the principle already considered. Without such reenforcement of testimony the opinions of experts would usually involve little more than a counting of the numbers on either side. The progress of mod-

[7]"Special ground 4 alleges that the court erred in allowing a reading glass to be used by the jury in studying the handwriting which was in evidence. The objection was 'that it is immaterial, irrelevant, and illustrates no issue in the case, and is highly prejudicial.' The reading glass was merely an instrument to aid vision and to assist the jury in arriving at the truth. We see no objection to its use." *Sims* v. *State,* 148 S. E. 769 (Georgia, 1929).

[8]The *Taylor Will Case* (10 Abb. N. S. 316). (New York).

"I shall exclude all testimony drawn from photographs, as being inadmissible upon the question of handwriting."

Fenelon v. *State,* 217 N. W. 711 (Wisconsin) 1928.

"In the early cases [regarding photography] upon the subject involved, courts have adhered to the common-law rule. From time to time, however, the courts have adopted a more liberal rule upon the subject. Osborn, in his work on Questioned Documents, on page 324, states:

> 'Photographs are now rarely excluded, although always objected to, and in some jurisdictions it is now almost, if not quite, reversible error to exclude them. The tendency of all courts of all states is towards that procedure which assists in showing the facts. In at least ninety-nine cases out of one hundred photographs are now admitted. and the most enlightened and progressive courts will hardly listen to objections to them.'

"The instrumentalities used in photography at the present time are capable of almost perfect reproductions; in fact, reproductions from which comparisons can as safely be made as with the originals themselves."

ern chirographic science makes it all the more possible, as well as desirable, to discriminate between witnesses according to the convincingness of the reasons that may be given by them for their conclusions." *Wigmore on Evidence,* Volume 4, page 265, Par. 2014.

The present progressive attitude on the subject, now in force in the great majority of courts, is that testimony of this kind is to be tested by its "convincingness" and is an appeal to the intelligence of the hearer rather than to his credulity. This of course is a fundamental and sweeping change, and to a certain extent takes testimony regarding handwriting and documents out of the class of expert testimony where merely an opinion is given. There now are many legal opinions that specifically say that testimony of this kind is to be judged by its "convincingness."[9]

This of course is a long step from the ancient practice where no standards were admitted and where merely an offhand opinion was given. The decisions in certain states are still colored somewhat, if not directly affected, by the ancient precedents, and a few states still in effect say that the hearer of testimony of this kind should receive it with an adverse prejudice.[10] If requested to do so, a trial judge in the great state of Iowa is still obliged to charge a jury that testi-

[9]*Baird* v. *Shaffer,* 101 Kan. 585, 168 Pac. 836 (Kansas, 1917).

"The testimony of attesting witnesses to a will may be overcome by any competent evidence . . . expert and opinion evidence is just as competent as any other evidence. Indeed, where the signature to a will is a forgery, and where the witnesses have the hardihood to commit perjury, it is difficult to see how a bogus will can be overthrown, except by expert and competent opinions evidence . . . . The rule contended for would frequently baffle justice and give judicial countenance to many a high-handed fraud."

Fekete v. *Fekete,* 323 Ill. 468, 154 N. E. 215 (Illinois, 1926).

"While opinion evidence based upon hypothesis has been held to be of but little value, the opinion of an expert may be of great value where it calls the attention of the court to facts which are capable of verification by the court, which the court otherwise would have overlooked, and the opinion of the expert is based upon such facts and is in harmony therewith."

People v. *Bird,* 124 Calif. 32, 56 Pac. 639 (1899).

". . . but I think that Gibson should have been permitted to state the grounds of an opinion [as to handwriting] to which he had testified, and am unable to appreciate the objection that it was argumentative."

Boyd v. *Gosser,* 78 Fla. 64, 82 So. 758 (Florida, 1919).

"It was something more than the mere opinion of the witness . . . 'preponderance of the evidence' is a phrase which in its last analysis means probability of truth. In the case at bar we have the uncontradicted evidence of the expert on handwriting . . . . the facts to which the expert witness testified concerning the characteristics and construction of the signatures are matters within the field of demonstrative evidence."

[10]*In re* Harris' Estate, 247 Mich. 690, 226 N. W. 661 (Mich. 1929).

"To permit an expert witness in a case of contested handwriting to directly answer the question as to the genuineness of the signature in dispute is to permit him to invade the province of the jury,—to answer the very question which it is the duty of the jury to answer . . .

"The opinions of experts are of no weight when contrary to sworn testimony as to facts." [This strange reversion to the ancient practices has since been overruled by this same court.]

mony of this kind is of a low order and should be received with caution. This charge can be requested, and the judge is obliged to make it, even if the testimony is of the most convincing character. This practice of course harks back to the early days when no reasons were given, no illustrations were presented, and no standards of comparison were admitted. The courts of many states have been made ashamed of their ancient unscientific pronouncements and have reversed themselves.

Disputed Typewriting

A new field of investigation regarding questioned documents is that of disputed typewriting.[11] It is now well established that typewritten documents may be introduced for purposes of comparison and expert witnesses are permitted to testify and give reasons for opinions expressed. Numerous questions arise regarding typewriting. Among them are: Whether a particular document was written on a particular machine; whether a document was written continuously without being taken out of the typewriter; whether a document shows additions or interpolations; whether a document shows that a whole page has been interpolated; whether dated changes in the type faces show that the document could not have been written on the date it bears. As most legal documents are now typewritten, it is inevitable that many questions arise regarding the authenticity of typewriting.

Partly no doubt because of the changed attitude of the courts, there are now many questions that arise regarding disputed documents that, in some measure at least, come into the field of demonstrative testimony. Historical, chemical and mechanical questions of many kinds are involved. The length of a "t" crossing of a typewritten letter may show conclusively that a document could not have been written on its date, and the presence of a certain design of written letter, which has a distinct historical date, may show that a document could not have been written on the date it bears. The presence in an alleged ancient document of distinct cuts and indentations in the paper, which could be made only by a sharp pointed

[11] *Huber Mfg. Co.* v. *Claudel,* 71 Kans. 441, 80 Pac. 960 (1905).
"There might have been and easily could have been, some peculiarity in the manner of writing or the character of the letters of the typewriter that would serve to identify the letter by comparison with those he had received from the company."
People v. *Werblow,* 209 N. Y. S. 88 (1925).
"The law is well settled that such specimens of typewriting are properly received in evidence for the purposes of comparison."
Kerr v. *United States,* 11 Fed. (2d) 227 (1926).
"The machine was in the house of the brother-in-law where Kerr often went . . . an expert testified that the typewriting on the package [containing poisoned candy] was done on that particular machine." Conviction sustained.

pen and not a quill pen, may show that a document was not written on its date. In the first place the indentations would not have been made, and in the second place, even if made, they would have disappeared by the drying and swelling of the paper due to changes in humidity in a document one hundred years old.

In an important case an interlineation in a pen-written document was under investigation. It was claimed that the interlineation was made immediately as a part of the original writing, but the application of a chemical re-agent to the interlineation turned the ink of the interlineation a dark red color, and the same reagent, applied to the words under the interlineation, turned the ink to a blue-green color, showing unmistakably a radically different ink and proving that the interlineation was not a part of the original writing.

Watermarks

Another demonstrative question is that relating to watermarks, an important example of which arose in the recent case before the United States Mixed Claims Commission, a claim case against Germany for thirty million dollars, recently decided, December, 1932, by the official umpire, Mr. Justice Roberts of the United States Supreme Court. An attempt had been made to reopen the case on "newly discovered evidence" in the form of written documents, one of which was a letter dated 1917 which was written on paper from Poland with a distinct watermark. Investigation disclosed that the metal design of this particular watermark was made in Paris, but was not made until 1925. In his opinion in the case Mr. Justice Robert says:

". . . but non-expert inspection demonstrates to my satisfaction that the watermark in question is that made by the Mirkow factory from a dandy-roll made in Paris. The paper made by the use of that dandy-roll was delivered to Kiperman not earlier than 1926. The expert testimony supports my own independent conclusion on this point."

In one of the many recent claims against the great Wendel estate, which has been under investigation in New York City for a long time, a claim document was dated seventy-five years before the watermark was made which appeared in the paper.

In many of these disputed document cases as now conducted testimony on the subject of documents is not in fact expert testimony, as generally understood, but the demonstration of a physical fact. This marked progress and the reform of the rules and procedure in many courts in many states, where it becomes necessary to prove the facts regarding documents, now make it more difficult for fraud to succeed and crime to escape.