party by whom it was executed;[1] but in this case also, it is conceived, that the like proof of the identity of the party should be required.

§ 576. In considering the proof of private writings, we are naturally led to consider the subject of the *comparison of hands*, upon which great diversities of opinion have been entertained. This expression seems formerly to have been applied to every case, where the genuineness of one writing was proposed to be tested before the Jury, by comparing it with another, even though the latter were an acknowledged autograph; and it was held inadmissible, because the Jury were supposed to be too illiterate to judge of this sort of evidence; a reason long since exploded.[2] All evidence of hand-

---

of the subscribing witness's handwriting, if he was dead. The party executing an instrument may have changed his residence. Must a plaintiff show where he lived at the time of the execution, and then trace him through every change of habitation until he is served with the writ? No such necessity can be imposed." — Williams, J. "I am of the same opinion. It cannot be said here that there was not some evidence of identity. A man of the defendant's name had kept money at the branch bank; and this acceptance is proved to be his writing. Then, is that man the defendant? That it is a person of the same name is some evidence, until another party is pointed out who might have been the acceptor. In Jones *v.* Jones, (9 M. & W. 75,) the same proof was relied upon; and Lord Abinger said: 'The argument for the plaintiff might be correct, if the case had not introduced the existence of many Hugh Jones's in the neighborhood where the note was made.' It appeared that the name Hugh Jones, in the particular part of Wales, was so common as hardly to be a name; so that a doubt was raised on the evidence by cross-examination. That is not so here; and therefore the conclusion must be different."

[1] In Jackson *v.* Waldron, 11 Wend. 178, 183, 196, 197, proof of the handwriting of the obligor was held not regularly to be offered, unless the party was unable to prove the handwriting of the witness. But in Valentine *v.* Piper, 22 Pick. 90, proof of the handwriting of the party was esteemed more satisfactory than that of the witnesses. The order of the proofs, however, is a matter resting entirely in the discretion of the Court.

[2] The admission of evidence by comparison of hands, in Col. Sidney's case, 8 Howell's St. Tr. 467, was one of the grounds of reversing his attainder. Yet, though it clearly appears that his handwriting was proved

writing, except where the witness saw the document written, is, in its nature, comparison. It is the belief which a witness entertains, upon comparing the writing in question with its exemplar in his mind, derived from some previous knowledge.[1] The admissibility of some evidence of this kind is now too well established to be shaken. It is agreed, that, if the witness has the proper knowledge of the party's handwriting, he *may declare his belief* in regard to the genuineness of the writing in question. He may also be interrogated as to the circumstances on which he founds his belief.[2] The point upon which learned Judges have differed in opinion is, upon the source from which this knowledge is derived, rather than as to the degree or extent of it.

§ 577. There are *two modes of acquiring this knowledge* of the handwriting of another, either of which is universally admitted to be sufficient, to enable a witness to testify to its genuineness. The *first* is from *having seen him write*. It is held sufficient for this purpose, that the witness has seen him write but once, and then only his name. The proof, in such case, may be very light; but the Jury will be permitted to weigh it.[3] The *second* mode is, from *having seen letters*, or

---

by two witnesses, who had seen him write, and by a third who had paid bills purporting to have been indorsed by him, this was held illegal evidence, in a criminal case.

[1] Doe *v.* Suckermore, 5 Ad. & El. 730, per Patteson, J. See also the remarks of Mr. Evans, 2 Poth. Obl. App. xvi. § 6, ad. calc. p. 162.

[2] Regina *v.* Murphy, 8 C. & P. 297.

[3] Garrells *v.* Alexander, 4 Esp. 37. In Powell *v.* Ford, 2 Stark. R. 164, the witness had never seen the defendant write his christian name; but only "M. Ford," and then but once; whereas the acceptance of the bill in question was written with both the christian and surname at full length; and Lord Ellenborough thought it not sufficient, as the witness had no perfect exemplar of the signature in his mind. But in Lewis *v.* Sapio, 1 M. & Malk. 39, where the signature was "L. B. Sapio," and the witness had seen him write several times, but always "Mr. Sapio," Lord Tenterden held it sufficient. A witness has also been permitted to speak as to the genuineness of a person's mark, from having seen it affixed by him on several occasions. George

other documents, purporting to be the handwriting of the party, and having afterwards *personally communicated* with him respecting them; or *acted upon them* as his, the party having known and acquiesced in such acts, founded upon their supposed genuineness; or, by such *adoption* of them into the *ordinary business transactions* of life, as induces a reasonable presumption of their being his own writings; evidence of the identity of the party being of course added *aliunde*, if the witness be not personally acquainted with him.[1] In both these cases, the witness acquires his knowledge by his own observation of facts, occurring under his own eye, and which is especially to be remarked, without having regard to any particular person, case, or document.

§ 578. This rule, requiring personal knowledge on the part of the witness, has been *relaxed in two cases.* (1.) Where the writings are of such *antiquity*, that living witnesses cannot be had, and yet are not so old as to prove themselves.[2] Here the course is, to produce other documents, either admitted to be genuine, or proved to have been respected and treated and acted upon as such, by all parties; and to call *experts* to compare them, and to testify their opinion concerning the

v. Surrey, 1 M. & Malk. 516. But where the knowledge of the handwriting has been obtained by the witness from seeing the party write his name, *for that purpose*, after the commencement of the suit, the evidence is held inadmissible. Stranger *v.* Searle, 1 Esp. 14. See also Page *v.* Homans, 2 Shepl. 478. In Slaymaker *v.* Wilson, 1 Pennsylv. R. 216, the deposition of a witness, who swore positively to her father's hand, was rejected, because she did not say *how* she knew it to be his hand. But in Moody *v.* Rowell, 17 Pick. 490, such evidence was very properly held sufficient, on the ground, that it was for the other party to explore the sources of the deponent's knowledge, if he was not satisfied that it was sufficient.

[1] Doe *v.* Suckermore, 5 Ad. & El. 731, per Patteson, J.; Ld. Ferrers *v.* Shirley, Fitzg. 195; Carey *v.* Pitt, Peake's Evid. App. 81; Thorpe *v.* Gisburne, 2 C. & P. 21; Harrington *v.* Fry, Ry. & M. 90; Commonwealth *v.* Carey, 2 Pick. 47; Johnson *v.* Daverne, 19 Johns. 134; Burr *v.* Harper, Holt's Cas. 420; 2 Phil. Evid. 252, 253; Pope *v.* Askew, 1 Iredell, R. 16.

[2] Ante, § 570.

genuineness of the instrument in question.[1] (2.) Where *other writings*, admitted to be genuine, are *already in the case.* Here the comparison may be made by the Jury, with or without the aid of experts. The reason assigned for this is, that as the Jury are entitled to look at such writings, for one purpose, it is better to permit them, under the advice and direction of the Court, to examine them for all purposes, than to embarrass them with impracticable distinctions, to the peril of the cause.[2]

§ 579. A *third mode* of acquiring knowledge of the party's handwriting was proposed to be introduced, in the case of *Doe* v. *Suckermore;*[3] upon which, the learned Judges being equally divided in opinion, no judgment was given; namely, by first satisfying the witness, by some information or evidence, not falling under either of the two preceding heads, that certain papers were genuine, and then desiring the wit-

[1] See 20 Law Mag. 323; Brune *v.* Rawlings, 7 East, 282; Morewood *v.* Wood, 14 East, 328; Gould *v.* Jones, 1 W. Bl. 384; Doe *v.* Tarver, Ry. & M. 143; Jackson *v.* Brooks, 8 Wend. 426; 2 Phil. Evid. 258.

[2] See 20 Law Mag. 319, 323, 324; Griffith *v.* Williams, 1 C. & J. 47; Solita *v.* Yarrow, 1 M. & Rob. 133; Rex *v.* Morgan, Ib. 134, n.; Doe *v.* Newton, 5 Ad. & El. 514; Bromage *v.* Rice, 7 C. & P. 548; Hammond's case, 2 Greenl. 33; 2 Phil. Evid. 256; Waddington *v.* Cousins, 7 C. & P. 595.

[3] 5 Ad. & El. 703. In this case a defendant in ejectment produced a will, and on one day of the trial (which lasted several days) called an attesting witness, who swore that the attestation was his. On his cross-examination, two signatures to depositions respecting the same will in an ecclesiastical Court, and several other signatures, were shown to him (none of these being in evidence for any other purpose of the cause), and he stated that he believed them to be his. On the following day, the plaintiff tendered a witness to prove the attestation not to be genuine. The witness was an inspector at the Bank of England, and had no knowledge of the handwriting of the supposed attesting witness, except from having, previously to the trial, and again between the two days, examined the signatures admitted by the attesting witness, which admission he had heard in Court. Per Ld. Denman, C. J. and Williams, J., such evidence was receivable; per Patteson and Coleridge, Js., it was not.

ness to study them, so as to acquire a knowledge of the party's handwriting, and fix an exemplar in his mind; and then asking him his opinion in regard to the disputed paper; or else, by offering such papers to the Jury, with proof of their genuineness, and then asking the witness to testify his opinion, whether those and the disputed paper were written by the same person. This method supposes the writing to be generally that of a stranger, for if it is that of the party to the suit, and is denied by him, the witness may well derive his knowledge from papers, admitted by that party to be genuine, if such papers were not selected nor fabricated for the occasion; as has already been stated in the preceding section. It is obvious, that if the witness does not speak from his own knowledge, derived in the first or second modes before mentioned, but has derived it from papers shown to him for that purpose, the production of these papers may be called for, and their genuineness contested. So that the third mode of information proposed resolves itself into this question, namely, whether documents, irrelevant to the issues on the record, may be received in evidence at the trial, to enable the Jury to institute a comparison of hands, or to enable a witness so to do.[1]

§ 580. In regard to admitting such evidence upon an examination in chief, for the mere *purpose* of enabling the Jury to judge of the handwriting, the modern English decisions are clearly opposed to it.[2] For this, two reasons have been

[1] See 5 Ad. & El. 734, per Patteson, J.

[2] Bromage *v.* Rice, 7 C. & P. 548; Waddington *v.* Cousins, Ib. 595; Doe *v.* Newton, 5 Ad. & El. 514; Hughes *v.* Rogers, 8 M. & W. 123; Griffits *v.* Ivery, 11 Ad. & El. 322; The Fitzwalter Peerage, 10 Cl. & Fin. 193; Regina *v.* Barber, 1 Car. & Kir. 434. See also Regina *v.* Murphy, 1 Armstr. Macartn. & Ogle, R. 204; Regina *v.* Caldwell, Ib. 324. But where a witness upon his examination in chief, stated his opinion that a signature was not genuine, because he had never seen it signed R. H., but always R. W. H., it was held proper, on cross-examination, to show him a paper signed R. H. and ask him if it were genuine, though it was not connected with the cause; and he answering that in his opinion it was so, it was held proper further to ask him whether he would now say that he had never seen a genuine signature of the party without the initials R. W.; the object being to test the value of the witness's opinion. Younge *v.* Honner, 1 Car. & Kir. 51; 2 M. & Rob. 536, S. C.

assigned, namely, first, the danger of *fraud in the selection* of the writings, offered as specimens for the occasion; and, secondly, that, if admitted, the genuineness of these specimens may be contested, and others successively introduced, to the infinite multiplication of *collateral issues*, and the subversion of justice. To which may be added the danger of surprise upon the other party, who may not know what documents are to be produced, and therefore may not be prepared to meet the inferences drawn from them.[1] The same mischiefs would follow, if the same writings were introduced to the Jury through the medium of *experts*.[2]

§ 581. But with respect to the admission of papers irrelevant to the record, for the sole purpose of creating a standard of comparison of handwriting, the *American decisions* are far from being uniform.[3] If it were possible to extract from the

[1] Phil. & Am. on Evid. 700, 701. See the Law Review, No. 4, for August, 1845, p. 285–304, where this subject is more fully discussed.

[2] Experts are received to testify, whether a writing is a real or a feigned hand, and may compare it with other writings already in evidence in the cause. Revett *v.* Braham, 4 T. R. 497; Hammond's case, 2 Greenl. 33; Moody *v.* Rowell, 17 Pick. 490; Commonwealth *v.* Carey, 2 Pick. 47; Lyon *v.* Lyman, 9 Conn. 55; Hubly *v.* Vanhorne, 7 S. & R. 185; Lodge *v.* Phipher, 11 S. & R. 333. And the Court will determine whether the witness is or is not an expert, before admitting him to testify. The State *v.* Allen, 1 Hawks, 6. But upon this kind of evidence, learned Judges are of opinion that very little, if any reliance ought to be placed. See Doe *v.* Suckermore, 5 Ad. & El. 751, per Ld. Denman; Gurney *v.* Langlands, 5 B. & Ald. 330; Rex *v.* Cator, 4 Esp. 117; The Tracy Peerage, 10 Cl. & Fin. 154. In The People *v.* Spooner, 1 Denio, R. 343, it was held inadmissible. Where one writing crosses another, an expert may testify which, in his opinion, was first made. Cooper *v.* Bockett, 4 Moore, P. C. Cas. 433.

[3] In New York, Virginia, and North Carolina, the English rule is adopted, and such testimony is rejected. Jackson *v.* Phillips, 9 Cowen, 94, 112; Titford *v.* Knott, 2 Johns. Cas. 210; The People *v.* Spooner, 1 Denio, R.

conflicting judgments a rule, which would find support from the majority of them, perhaps it would be found not to extend beyond this; that such papers can be offered in evidence to the Jury, only when no collateral issue can be raised concerning them; which is only where the papers are either conceded to be genuine, or are such as the other party is estopped to deny; or are papers belonging to the witness, who was himself previously acquainted with the party's handwriting, and who exhibits them in confirmation and explanation of his own testimony.[1]

§ 582. Where the sources of primary evidence of a written instrument are exhausted, secondary evidence, as we have elsewhere shown, is admissible; but whether, in this species of evidence, any degrees are recognised as of binding force, is not perfectly agreed; but the better opinion seems to be, that, generally speaking, there are none. But this rule, with its exceptions, having been previously discussed, it is not necessary here to pursue the subject any farther.[1]

343; Rowt *v.* Kile, 1 Leigh, R. 216; The State *v.* Allen, 1 Hawks, 6; Pope *v.* Askew, 1 Iredell, R. 16. In Massachusetts, Maine, and Connecticut, it seems to have become the settled practice to admit any papers to the Jury, whether relevant to the issue or not, for the purpose of comparison of the handwriting. Homer *v.* Wallis, 11 Mass. 309; Moody *v.* Rowell, 17 Pick. 490; Richardson *v.* Newcomb, 21 Pick. 315; Hammond's case, 2 Greenl. 33; Lyon *v.* Lyman, 9 Conn. 55. In New Hampshire, and South Carolina, the admissibility of such papers has been limited to cases, where other proof of handwriting is already in the cause, and for the purpose of turning the scale, in doubtful cases. Myers *v.* Toscan, 3 N. Hamp. 47; The State *v.* Carr, 5 N. Hamp. 367; Boman *v.* Plunket, 3 McC. 518; Duncan *v.* Beard, 2 Nott & McC. 401. In Pennsylvania, the admission has been limited to papers conceded to be genuine. McCorkle *v.* Binns, 5 Binn. 340; Lancaster *v.* Whitehill, 10 S. & R. 110; or, concerning which there is no doubt. Baker *v.* Haines, 6 Whart. 284.

[1] Smith *v.* Fenner, 1 Gall. 170, 175. See also Goldsmith *v.* Bane, 3 Halst. 87; Bank of Pennsylvania *v.* Haldemand, 1 Pennsylv. R. 161; Greaves *v.* Hunter, 2 C. & P. 477; Clermont *v.* Tullidge, 4 C. & P. 1; Burr *v.* Harper, Holt's Cas. 420; Sharp *v.* Sharp, 2 Leigh, 249; Baker *v.* Haines, 6 Whart. 284; Finch *v.* Gridley, 25 Wend. 469; Fogg *v.* Dennis, 3 Humph. 47; Depue *v.* Place, 7 Penn. Law Journ. 289.

§ 583. The *effect* of private writings, when offered in evidence, has been incidentally considered under various heads, in the preceding pages, so far as it is established and governed by any rules of law. The rest belongs to the Jury, into whose province it is not intended to intrude.

§ 584. Having thus completed the original design of this Volume, in a view of the Principles and Rules of the Law of Evidence, understood to be common to all the United States, the work is here properly brought to a close. The student will not fail to observe the symmetry and beauty of this branch of the law, under whatever disadvantages it may labor, from the manner of treatment; and will rise from the study of its principles, convinced with Lord Erskine, that "they are founded in the charities of religion,—in the philosophy of nature,—in the truths of history,—and in the experience of common life."[2]

[1] Ante, § 84, note (2); Doe *v.* Ross, 7 M. & W. 102; 8 Dowl. 389, S. C.

[2] 24 Howell's St. Tr. 966.

INDEX.