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Evidence -- Jury Comparison of Handwriting Without Aid of Experts

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before the principal decision was handed down, the Florida Legislature changed the penalty for forgery by making the forger *punishable as for the crime of larceny*.[30] Since no property need be obtained by the forger for a conviction to stand,[31] it seems likely that this new penalty provision will fare little better at the hands of the judiciary than that of the worthless check statute. In creating such penalties by reference to the larceny statute, the legislature may have in mind the species-to-genus relationship which such crimes as obtaining property by gaming, false personation, worthless check passing, forgery and embezzlement do in fact bear to larceny, the common law father of them all. Such a rationale, however, when applied to make the species hark back to the genus for the purpose of a uniform punishment provision, may overlook certain characteristics of the tree not present in the branches. It is submitted that in the face of these snares[32] the technique of penalty by reference should be used with vigilance, if at all. Unclear legislative intent is a needless burden on the already complex determination of where misdemeanor ends and felony begins.

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EVIDENCE — JURY COMPARISON OF HANDWRITING WITHOUT AID OF EXPERTS

The court in a check forgery case allowed the jury to compare the maker's signature with the endorsement, unaided by skilled or expert testimony in making the comparison. Florida Statute § 90.20[1] states: "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permited to be made by witnesses; and such writings, *and the evidence of witnesses respecting the same*, may be submitted to the jury . . . as evidence of the genuineness, or otherwise, of the writing in dispute." (Emphasis added.) *Held*, reversed: The statute

30. FLA. STAT. § 831.01 (1957), condemning forgery, was amended by Fla. Laws 1959, ch. 59-31, to read (in part): ". . . if the instrument altered or forged be an order for money or other property the person convicted of altering or forging the same shall be punished in the same manner provided by law for *punishment for the crime of larceny*." (Emphasis added.) FLA. STAT. § 831.02 (1957), condemning the uttering of forged instruments, was amended by Fla. Laws 1959, ch. 59-31, to read (in part): ". . . any person convicted for uttering and publishing as true an altered or forged order for money or other property shall be punished in the same manner as provided by law for *punishment for the crime of larceny*." (Emphasis added.)

31. Hawkins v. State, 28 Fla. 363, 9 So. 652 (1891).

32. "The Florida Legislature has seen fit to provide in some criminal statutes that the penalties for their violation shall be ascertained by reference to other statutes. This procedure can lead to complications. . . . Penalties by reference should be the exception rather than the rule in devising criminal statutes, and when utilized they should be expressed in an unambiguous language. . . ." Clark, *supra* note 28, at 305.

1. FLA. STAT. § 90.20 (1957).

requires production of skilled or expert testimony when handwriting specimens are submitted to the jury for comparison. *Clark v. State*, 114 So.2d 197 (Fla. App. 1959).

Evidence of two kinds may be employed in proving the authorship of a writing: first, testimony by someone who witnessed the act of writing; and, second, evidence as to the style of handwriting.[2] The latter, which is at issue in the instant case, requires comparison by witnesses (either from memory or juxtaposition[3]), the jury, or both. At common law differing standards were developed in civil and criminal cases where handwriting comparison was involved; however, courts frequently confused the two.

In *civil* cases at early common law the jury could make comparisons without the testimony of witnesses.[4] Later, some courts permitted a witness who was familiar with the handwriting in question to make comparisons,[5] provided he had previous knowledge of the handwriting.[6] However, in order to avoid collateral issues, witness and jury comparisons were subsequently restricted to comparison of documents already in the case.[7]

In *criminal* cases it was early established that only direct evidence as to the act of writing was acceptable.[8] Comparison testimony of witnesses and comparisons by jurors were rejected for two reasons: first, honestly mistaken witnesses and jurors could err too easily; and second, whereas only "slight" proof was required in civil cases, "positive and substantial" proof was required in criminal cases, and evidence by comparison was *not*

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2. 7 WIGMORE, EVIDENCE § 1991 (3d ed. 1940).

3. A placing or being placed in nearness or contiguity; or side by side. Brown v. State, 126 Tex. Crim. 449, 72 S.W.2d 269 (1934).

4. Osbourne v. Hosier, 6 Mod. 167, 87 Eng. Rep. 924 (K.B. 1716).

5. Lord Ferrers v. Shirley, Fitzg. 195 (K.B. 1731).

6. The kinds of witnesses excluded were: (1) laymen who merely juxtaposed a writing of known authorship with the one in question and compared them, Brookbard v. Woodley, Peake N.P. 21 (K.B. 1770); and (2) those skilled in handwriting, Stanger v. Searle, 1 Esp. 14 (K.B. 1793). However, in some cases all witness comparison was rejected. Brookbard v. Woodley, Peake N.P. 20 (K.B. 1770) ("Where a witness has seen the party write, . . . that is evidence. But where it is merely opinion on similitude of the writing collected from barely comparing them, the jury may compare as well as anyone else.").

7. Doe v. Newton, 1 Nev. & P. 1 (K.B. 1836); Doe *ex. dem.* Mudd v. Suckermore, 5 A. & E. 750, 111 Eng. Rep. 1331 (K.B. 1836); Griffith v. Williams, 1 C. & J. 47 (Exch. 1830). The reasons espoused for restricting comparison to documents already in the case were: (1) the writings offered in evidence as specimens might be manufactured for the occasion; (2) fraud might be practiced in the selection of the writings; (3) the opponent might be surprised by the introduction of documents otherwise foreign to the case; (4) handwriting of a person might be changed by age, health, state of mind, position, haste, penmanship, and writing materials; and (5) genuineness of specimens might be contested leading to multiplication of collateral issues and subversion of justice.

8. In 1689, by act of Parliament, 1 W. & M. 24, an attainder for treason in the case of Col. Algernon Sidney, 9 How. St. Tr. 818 (K.B. 1683), was reversed on the ground that testimony of witnesses comparing writings allegedly authored by the accused was insufficient and a comparison by the jury was improper. In the Trial of the Seven Bishops, 12 How. St. Tr. 183 (K.B. 1688), a divided court also took the view that such testimony could not support a conviction.

"positive and substantial."[9] It was not until 1781 that a court in a criminal case allowed comparison by a jury and testimony by witnesses acquainted with the handwriting of the defendant.[10] It should be noted that American jurisdictions adopted the English common law as of 1776,[11] so that technically this 1781 decision post-dated such adoption.

In 1854, the English Common Law Procedure Act,[12] from which the Florida statute herein involved was drawn, expressly allowed jury comparison of writings not otherwise in the case.[13] Application of the statute was restricted by judicial construction to civil cases,[14] but was later extended by statute to criminal cases.[15] In both civil[16] and criminal[17] cases the Act has been interpreted to permit the admission of documents for jury comparison *without* the need of accompanying testimony of witnesses.

The rule in American jurisdictions varies because some states have statutes and others follow what they believe to be the English rules as of the time they adopted the common law. American statutes differ widely, some being patterned after the Common Law Procedure Act of 1854. In jurisdictions which have adopted a statute identical to the English Act,[18] there

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9. *Ibid.*

10. De La Motte's Case, 21 How. St. Tr. 687 (K.B. 1781). But proof of authorship by *comparison* of handwriting by *witnesses* was expressly barred, Horne Tooke's Case, 25 How. St. Tr. 1 (Spec. Comm'n of Oyer & Terminer 1794); Sheare's Trial, 27 How. St. Tr. 255, 323 (Spec. Comm'n of Oyer & Terminer 1798) (Witness who had corresponded with the author of questioned writings could testify); Fitzwalter Peerage Case, 10 Cl. & F. 193, 8 Eng. Rep. 716 (H.L. 1843).

11. *E.g., Ga.:* Harris v. Powers, 129 Ga. 74, 58 S.E. 1038 (1908); *Fla.* FLA. STAT. § 2.01 (1957); *Pa.:* PA. STAT. tit. 46, § 152 (1936); *Tenn.:* Moss v. State, 131 Tenn. 94, 173 S.W. 859 (1915).

12. 17 and 18 Vict. c. 125, § 8 (1854): "Comparison of a 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." FLA. STAT. § 90.20 (1957) is substantially drawn from this statute.

13. In Birch v. Ridgway, 1 Fost. & F. 270, 175 Eng. Rep. 722 (K.B. 1858), the statute of 1854 was interpreted to mean that *any* writings, not otherwise relevant, were admissible for the purpose of comparison by the jury when properly proved to be in the defendant's handwriting.

14. Reg. v. Aldridge, 3 Fost. & F. 781, 176 Eng. Rep. 358 (C.P. 1863).

15. 28 and 29 Vict. c. 18 (1865).

16. Scard v. Jackson, 24 Week. Rep. 159 (C.P. 1875).

17. Rex v. Richard, 13 Crim. App. Rep. 140 (Crim. App. 1918) (Expert testimony was not required but the conviction was not sustained where there was a jury comparison without expert testimony).

18. *Ariz.:* ARIZ. CODE ANN. § 23-306 (1939); *Del.:* DEL. REV. CODE ch. 10, § 4912 (1953); *Fla.:* FLA. STAT. § 90.20 (1957); *Hawaii:* HAWAII REV. LAWS ch. 224, § 2 (1955); *Md.:* MD. ANN. CODE GEN. LAWS art. 35, § 12 (1957); *Mo.:* MO. ANN. STAT. § 490.640 (Vernon 1949); *N.H.:* English statutory rule judicially adopted, University of Illinois v. Spaulding, 71 N.H. 163, 51 Atl. 731, (1902); *N.J.:* N.J. REV. STAT. § 2:98-1 (1937); N.Y.: N.Y. LAWS 1880, ch. 36; N.C.: N.C. GEN. STAT. § 840 (1955); R.I.: R.I. GEN. LAWS ch. 9, § 19-17 (1956); *Tenn.:* TENN. CODE ANN. § 24-708 (1956); Wis.: WIS. ANNOTATIONS § 327.26 (1958).

is a division of authority as to whether witness testimony is a prerequisite to a jury comparison of handwriting.[19] The courts, however, do not discuss whether the statute is to be construed differently depending upon the civil or criminal nature of the case. In jurisdictions with statutes similar, but not identical,[20] to the English Act, jury comparison is expressly allowed in both civil and criminal cases without the requirement of precedent testimony of witnesses.[21] In all jurisdictions without statutes, jury comparison is allowed in both civil and criminal cases without witness testimony being required.[22]

In the instant case the court maintained that Florida adopted the common law during the period that both witness and jury handwriting comparisons were not allowed in English *criminal* cases. Florida adopted

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19. Those not requiring expert testimony are: *Mo.*: Hermonas v. Orphan, 191 S.W.2d 352 (Kan. City Ct. of App., Mo. 1945); Weber v. Strobel, 194 S.W. 272 (Mo. Sup. 1917); *N.H.*: University of Illinois v. Spaulding, 71 N.H. 163, 51 Atl. 731 (1902); *N.J.*: State v. Skillman, 76 N.J.L. 474, 70 Atl. 83 (1908); Mutual Ben. Life Ins. Co. v. Brown, 30 N.J.Eq. 201 (1878). Those requiring expert testimony are: *Md.*: McIntyre v. Saltysiak, 205 Md. 415, 109 A.2d 70 (1954); *N.Y.*: Glenn v. Roosevelt, 62 Fed. 550 (C.C.S.D.N.Y. 1894); People v. Pinckney, 67 Hun. 428, 22 N.Y. Supp. 118 (Sup. Ct. 1893); *N.C.*: Boyd v. Leatherwood, 165 N.C. 614, 81 S.E. 1025 (1914).

20. 28 U.S.C. § 638 (1913): "[A]ny admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses, or by the jury, court, or officer conducting such proceeding, to prove or disprove such genuineness." (Emphasis added.); ALA. CODE tit. 7, § 420 (1940); CAL. CODE CIV. PROC. §§ 1944, 1945 (1959); GA. CODE § 38-709 (1933); IDAHO CODE ANN. § 9-412 (1949); ILL. REV. STAT. ch. 51, § 50-52 (1957); IND. ANN. STAT. § 2-1723 (Burns, 1954); IOWA CODE ch. 622.25 (1954); KY. REV. STAT. § 422.120 (1953); LA. CODE CRIM. PROC. § 15.460 (1950); MICH. COMP. LAWS §§ 617.51, 768.25 (1948); MONT. REV. CODES ANN. § 93-1101-15 (1947); NEB. REV. STAT. § 25-1220 (1943); N.M. STAT. ANN. § 20-2-15 (1953); ORE. REV. STAT. §§ 42.070-42.080 (1959); TEX. CODE CRIM. PROC. ANN. art. 731 (1941) and TEX. STAT. REV. CIV. art. 3737b (1959); W. VA. CODE ANN. § 5722 (1949).

21. Persons v. State, 32 Ala. App. 266, 25 So.2d 44 (1946); Winslow v. Fisher, 109 Ind. App. 644, 37 N.E.2d 280 (1941); Herd v. Herd, 293 Ky. 258, 168 S.W.2d 762 (1943); Wade v. Galveston, H. & S. A. Ry. Co., 110 S.W. 84 (Tex. Civ. App. 1908); Commercial Standard Ins. Co. v. McGee, 40 S.W.2d 1105 (Tex. Vic. App. 1931); Young v. Wheby, 126 W. Va. 741, 30 S.E.2d 6 (1944); Poole v. Beller, 104 W. Va. 547, 140 S.E. 534 (1927).

22. Hall v. State, 171 Ark. 787, 286 S.W. 1026 (1926); Walker v. State, 171 Ark. 375, 284 S.W. 36 (1926); Lyon v. Lyman, 9 Conn. 60 (1831); Keyser v. Pickrell, 4 D.C. App. 198 (1894); State v. Ryno, 68 Kan. 348, 74 Pac. 1114 (1904); Macomber v. State, 10 Kan. 254 (1872); State v. Thompson, 80 Me. 194 (1888); Woodman v. Dana, 52 Me. 13 (1860); Chandler v. LeBarron, 45 Me. 534 (1858); Commonwealth v. Eastman, 1 Cush. 217 (Mass. 1848); Hall v. Huse, 10 Mass. 39 (1813); State v. Lucken, 129 Minn. 402, 152 N.W. 769 (1915); Morrison v. Porter, 35 Minn. 425, 29 N.W. 54 (1886); Harrison v. Eagle L. & S. Co., 152 Miss. 466, 119 So. 203 (1928); State v. Gummer, 51 N.D. 445, 20 N.W.20 (1924); Cochrane v. National Elevator Co., 20 N.D. 169, 127 N.W. 725 (1910); Dakota v. O'Hare, 1 N.D. 43 (1890); Bell v. Brewster, 44 Ohio 696, 10 N.E. 669 (1887); Eckles v. Busey, 191 Okla. 644, 132 P.2d 344 (1943); Brueckner v. City of Pittsburgh, 368 Pa. 554, 84 A.2d 197 (1951) (There is, however, a statute allowing experts to testify, PA. STAT. tit. 28, § 161-165 (1936); State v. Ezekiel, 33 S.C. 116, 11 S.E. 636 (1890); Mississippi L. & C. Co. v. Kelly, 19 S.D. 577, 104 N.W. 265 (1905); Tucker v. Kellog, 8 Utah 11, 28 Pac. 870 (1892); State v. Kent, 83 Vt. 28, 74 Atl. 389 (1909); Rowell v. Fuller, 59 Vt. 692, 10 Atl. 853 (1887); Adams v. Ristine, 138 Va. 273, 122 S.E. 126 (1924); Mitchell v. Mitchell, 24 Wash. 701, 166 P.2d 938 (1946).

the common law as it stood in 1776,[23] whereas witness and jury comparisons in English criminal cases were not allowed until 1781.[24] The Florida handwriting comparison statute was, therefore, considered to be in derogation of the common law; and, under the long-standing rule of statutory construction recognized in Florida, it must be construed strictly. Consequently, the jury may not make comparisons except after the testimony of skilled or expert witnesses. The court noted that comparison of handwriting is an art which can be practiced judicially only by expert or skilled witnesses;[25] a juror, whose qualifications do not even require that he be literate, cannot qualify as an expert.[26]

The dissenting judge challenged the accuracy of the majority's analysis of the common law. Based upon a cited English decision[27] (which in actuality was a civil case), he concluded that juries could make comparisons without the aid of witnesses in criminal cases at the time Florida adopted the common law, and that the statute in question was *not*, therefore, in derogation of the common law. The dissent further argued that in some cases even an unlettered juryman is capable of determining authorship of a writing by comparison with a specimen, and that expert or skilled testimony is but an aid to the already-qualified juror.

The court's ultimate decision, though based in part on a value judgment as to the incapability of modern jurors to make comparisons without the aid of expert witnesses, is a sound one, particularly in view of the court's analysis of the common law and its traditional application of the strict statutory construction rule. When criminal sanctions are invoked the accused is entitled to require the state to assert the full measure of proof leading to a conclusion of guilt beyond a reasonable doubt.

This strict construction of the statute may be inapplicable in *civil* cases because jury comparison without the aid of witnesses was always allowed at common law. This writer would suggest that the dissenting judge fell into error in failing to distinguish the differing common law rules in civil and criminal cases. Although the majority's argument concerning the inexpertness of lay jury is cogent, it remains to be decided in Florida whether expert testimony will be required prior to a jury comparison of writings in a civil case.

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23. FLA. STAT. § 2.01 (1957).

24. See note 10 *supra*.

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

26. 7 WIGMORE, EVIDENCE § 2002 (3d ed. 1940). This reason has been considered insufficient in England and by most American jurisdictions on the ground that inability of some jurors to read was no reason to deprive literate juries from making comparison, and to bar the former would also bar the latter.

27. Macferson v. Thoytes, Peake, N.P. Cas. 20, 170 Eng. Rep. 67 (N.P. 1790).