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July 30.
August 2 and 9.

CAVE *v.* KRELTSZHEIM.

P. C., Colombo, 38,081.

Evidence—Forgery—Comparison of handwriting in disputed document with handwriting in genuine document.

In a case of forgery, a Judge sitting without a jury should not arrive at a decision on the comparison of handwritings without some proof that the handwriting of the disputed document is the handwriting of the accused.

BONSER, C.J.—I am not satisfied that it was intended to allow a jury to find a man guilty of forgery, when no qualified witness could be found willing to state his belief that the alleged forgery was in the handwriting of the accused.

WITHERS, J. (with much hesitation).—It is permissible for a jury or Judge to bring in a verdict of guilty on the comparison of a disputed handwriting with a well-proved handwriting, unsupported by other evidence as to the disputed handwriting.

But a decision of Judge or jury resting solely on a comparison of other than ancient documents is dangerous.

THE complaint against the accused was that he committed criminal breach of trust of certain goods entrusted to him as Value-Payable Parcel Register Clerk of Messrs. Cave & Co. of Colombo. At the inquiry it appeared that some of the goods mentioned were parted with by Cave & Co. on the strength of two letters (marked C and D), which purported to come from one Fernando from Kandy. The first letter ordered the goods, and

the second called attention to it, and it was proved that Fernando was a fictitious person. Certain books (marked B and G) kept by the accused and in his handwriting were also produced and referred to by a witness for the prosecution. The Police Magistrate thereupon framed three charges against the accused :— 1895.

(1) Under section 457 of the Penal Code, that he committed forgery of the letters C and D.

(2) Under section 403 of the Penal Code, that he cheated Cave & Co. and dishonestly induced them to deliver to him certain goods.

(3) Under section 391 of the Penal Code, that he committed criminal breach of trust of the property.

The accused consented to be tried by the Police Magistrate, and after he had adduced evidence for the defence, the Police Magistrate found him guilty of having forged the two letters C and D, for the purpose of cheating and dishonestly inducing delivery of property in question, and sentenced him to nine months' rigorous imprisonment, observing : " The articles mentioned in the charge " under section 403 of the Penal Code were ordered by letter C ; " and this order was repeated by letter D. These two letters, " I have not the slightest doubt, were written by one and the same " person, and that person was the accused, the person who made " the entries in the books B and G, which have been proved to " have been made by the accused. There is a striking general " similarity between the writing and each letter to the writing " of the other, and between the writing of both letters to the " writing of the entries in the books B and G ; and a close " examination with a glass discloses a similarity and an identity " in detail which is more than a coincidence," &c.

The accused appealed.

The appeal was argued first on the 30th July, 1895, when *Pereira* appeared for appellant and *Van Langenberg* for respondent. And the case having stood over for *Pereira* to furnish authorities, it was argued again on the 2nd August, 1895, when *Pereira* appeared for appellant and *Dornhorst* for respondent.

Pereira, for appellant,—

The accused was originally charged with theft of certain articles. But the Police Magistrate charged him with forgery of the documents C and D and with cheating, and convicted him on those charges. There was no evidence before him to justify these charges. He based his finding on the charge of forgery entirely on a comparison of the documents C and D with certain other

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documents produced by the complainant, not to prove handwriting, but to prove the fact of certain entries made by the accused. A Judge or jury may compare handwriting to test the correctness of opinions expressed by witnesses with regard to an impeached document, but where no witness has given any evidence as to impeached documents being forgeries, and where it is not a part of the case for the prosecution that the accused forged such documents, it is not open to Judge or jury to discover, so to say, after the close of the whole case, evidence by comparison of documents not produced expressly for purpose of comparison. The effect of the judgment of Blackburn, J., in *Regina v. Harvey*, is stated, in *Archibold's Pleading and Evidence in Criminal Cases, 21st ed., p. 312*, to be that under *section 8 of 28 Victoria, c. 18*, the disputed handwriting and the writing whose genuineness is proved cannot be submitted to a jury in order that they may draw their unaided conclusion from a comparison, but that they must be assisted by the evidence of an expert. Besides, the accused in this case was taken by surprise. He had no reason to anticipate that the absence of evidence would be supplied by a comparison of handwriting by the Magistrate himself, and he had no opportunity of stating to the Court his reasons against the conclusions drawn by the Magistrate by comparison of handwriting.

Dornhorst, for the respondent,—

Comparison of handwriting may be made without the intervention of any witnesses at all, by the jury themselves, or in the event of there being no jury by the Court (*Taylor, 8th ed., vol. II., p. 1585*). According to the old law, only Judge or jury can compare handwriting. The statute left the old law where it was. [BONSER, C.J.—There must be positive evidence that the disputed writing is the writing of the accused.] According to *Solita v. Yarrow* (*1 Moody and Robinson, 133*) a jury may judge of a disputed handwriting by comparing it with other documents put in evidence for other purposes, and admitted to be of the handwriting of the party. [BONSER, C.J.—But Mr. Pereira says that there is no evidence whatever that the documents were in accused's handwriting.] But it is open to the Court, nevertheless, to compare. Again, according to *Griffith v. Williams* (*1 Crompton and Jervis, p. 47*), the rule that comparison of handwriting is not evidence does not extend so far as to prevent Judge or jury from instituting a comparison between two documents of which *primâ facie* evidence has been given.

Pereira in reply. *Cur. adv. vult.*

9th August, 1895. WITHERS, J.— 1895.

WITHERS, J.

In this case the appellant has been convicted by Mr Moor, the Police Magistrate of Colombo, of the offence of forging two letters, and of the offence of cheating by means of those letters.

The main question which we have to decide is whether the evidence sustains the conviction of forgery.

In the information which founded these criminal proceedings the accused was charged with criminally misappropriating certain articles entrusted to him by Mr. S. Cave.

At the close of the case for the prosecution, the Magistrate, considering that a *primâ facie* case had been made out against the appellant of the offence of forgery and cheating, charged him accordingly, and called on him to answer these charges.

In the course of the inquiry into the original charge of criminal misappropriation two books were produced, which were proved to the satisfaction of the Magistrate to contain entries in the handwriting of the accused. The Magistrate founded his judgment on a comparison of the imputed with the genuine handwriting. He had no doubt that the man who wrote the one wrote the other, and, so believing, he convicted the accused of forging the letters C and D.

It was urged by appellant's counsel that a Judge or jury could not bring in a verdict of guilty upon the mere comparison of a genuine with a controverted writing ; that before any such comparison could be made some foundation of proof must be laid as to the disputed writing being in the hand of the party accused.

In this case, no one acquainted with the accused's handwriting was called to swear to his belief that the letters C and D were in the accused's handwriting. Nor was any expert or skilled witness called to compare the genuine with the imputed handwriting, and state upon oath that he believed that both writings were in the hand of one and the same person. In support of his contention, appellant's counsel cited the case of *Regina v. William* and *Henry Harvey* reported in *Cox, C. L. Cases, vol. XI., p. 546.* These prisoners were indicted for forging and uttering a cheque, and the case against Henry Harvey rested on the evidence of some copy books found by a policeman at that prisoner's house, the handwriting of which, it was contended, corresponded with the writing on the cheque. The prisoner's counsel objected to the evidence, on the ground that police officers and constables were not competent to give evidence as experts.

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Blackburn, J., who presided at the trial, is reported to have observed as follows :—

> The jury can inspect them and compare them with the forged document. But still they are only copy books, which go no further than to show that the prisoner was taught writing. I think the evidence is very weak, and I do not think the jury ought to act upon it without the assistance of an expert. The policeman is certainly not a skilled witness, and, according to *Regina v. William*, not a competent one. Mr. Cherry drew attention to *28 Victoria, c. 18, section 8*, which enacts that "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 writing 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." But here we have no expert, and I do not think it would be right to let the jury compare the handwriting without some such assistance. The evidence is very slight.

The learned Judge seems to have regarded the copy books as very slender evidence of the prisoner's handwriting, and he was not minded to submit them to the jury for comparison without the aid of an expert in handwriting.

I gather from the report that he would have let them go to the jury for comparison if he had been satisfied that the books were in the prisoner's handwriting. If I am right, this case is rather against Mr. Pereira. The Act of *28 Victoria, c. 18, section 8*, was passed to bring the criminal law on the subject in conformity with the practice in civil cases under the *Common Law Procedure Act, 1854, section 27*, which is identical with the former.

Taylor's comment on these Acts in the 8th edition of his work is that the comparison of a writing, proved to the satisfaction of a Judge to be genuine, may be made either by witnesses acquainted with the handwriting, or by witnesses skilled in deciphering, or without the intervention of any witnesses at all by the jury themselves, or in the event of there being no jury, by the Court. He cites in support of his opinion the case of *Cobbett v. Kilminster* (*4, Foster and Finlayson, per Martin B*), which is thus referred to in *Fisher's Common Law Digest, vol. 3, p. 1440* :—

> The question being whether a memorandum was in the handwriting of the defendant, and he, in the course of cross-examination, having been got to write something on a piece of paper, this was allowed to be shown to the jury for the purpose of comparison of handwriting.

The law laid down in *Allport v. Meek* (*4, Carrington and Payne, p. 267*) is, he considers, no longer law. This was an action of assumpsit on a bill accepted by the defendant drawn and endorsed by one Williams. The witnesses called to prove the handwriting of Williams said that neither the drawing nor the indorsement

was written by him. It was then proved that the defendant had acknowledged the acceptance to be his, and this being in mercantile law a conclusive admission as against the acceptor of the drawer's signature, it was contended that the jury might look at the indorsement and compare it with the drawing. Tindal, C.J., would not allow this to be done, observing, "I think you must "call some witness to lay some evidence before the jury on which "they may decide." This decision was in the year 1830. It is to be observed that in this case the admission on the one side was met by counter-evidence on the part of the plaintiff, so that there was really no standard of comparison. *1 Moody and Robinson, p. 133 (Solita v. Yarrow)*, referred to in the course of argument, is thus summed up in the head note: "A jury may judge of a "disputed handwriting by comparing it with other documents in "evidence for other purposes and admitted to be the handwriting "of the party." In that case evidence had been received for and against the genuineness of the writing used as a standard of comparison. In *Griffith v. Williams (1, Crompton and Jervis, p. 47)*, also referred to in argument, it was decided *per curiam* that where two documents are in evidence it is competent for the Judge or jury to compare them. This was an action for breach of promise to marry, and the plaintiff having put in several letters of the defendant which were admitted, endeavoured to prove another letter of an important character as written by him. This was met by counter-evidence on the part of the defendant.

The old English law no doubt allowed ancient deeds to be put in for the purpose of comparing the seals with those of a disputed deed, and these might be compared by Judge and jury. That was permitted, as the Judges in *Doe dem. Mudd v. Suckermore (5, Adolphus and Ellis, p. 703)* observe, on the ground of necessity. The later English law referred to allows comparison by jury or witnesses of any other documents except those already in the case.

As to comparison by a jury of handwriting produced in the cause for other purposes than the question of authenticity of a disputed document, Lord Denman observed in *Doe dem. Perry v. Newton (5, Adolphus and Ellis, p. 516)* that the comparison was unavoidable, "there being two documents in "question in the cause, one of which is known to be in the "handwriting of the party, the other alleged, but denied to be so, "no human power can prevent the jury from comparing them "with a view to the question of genuineness, and therefore it is "best for the Court to enter with the jury into that inquiry and

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"to do the best it can under circumstances which cannot be "helped." He added, "The best rule is, that comparison of "writings by the jury shall not be allowed in any case where it "can be avoided. When we consider that the same course which is "permitted in a case like this may also be resorted to in a criminal "case for the purpose of a conviction, we cannot draw the limit "too carefully." In this case the will of Mr. John Brockbank was disputed, and in the course of the trial the plaintiff's counsel, in cross-examining one of the defendant's witnesses, put into his hand some letters, which the witness said he believed from the character to be of Brockbank's handwriting. It was afterwards proposed on behalf of the plaintiff to submit these letters to the jury, in order that they might compare them with the disputed signature, and thereby judge both of its genuineness and of the credit due to the witnesses on this subject. The letters were not in evidence for any other purpose. The Judge would not allow them to be put in, and his order was sustained by the Court of King's Bench. This was in 1836. It is clear that the statute of 28 Victoria has altered that law.

Giving my best consideration to the arguments adduced to us and to the cases before referred to, I come with no little hesitation to the conclusion that jury or Judge may bring in a verdict of guilty on the comparison of a disputed with a well-proved handwriting, unsupported by other evidence as to the disputed handwriting. I think, however, that a decision resting solely on comparison by Judge or jury of other than ancient documents is of a very dangerous character, and speaking for myself I should not venture, as a Judge sitting without a jury, to arrive at a decision solely on the comparison of two or more documents. I think some foundation of proof as to the handwriting of the disputed document should first be laid before a Judge should act upon his own comparison.

Another point of importance was pressed upon us by Mr. Pereira. He urged that his client had not sufficient opportunity given to him to meet the altered charge of forgery. The judgment by comparison of the incriminated letters with certain entries in books alleged to have been made by him, it was urged, took the prisoner by surprise. Not anticipating that the Magistrate would found his judgment pronouncing him guilty of forgery on such comparison, he did not show cause against the value of that evidence on which he was convicted. He may, for all I know, have contested the writing in the books alleged to be in his handwriting.

I think he should have a further opportunity of meeting the

charge of forgery, and indeed I think evidence should at least be called for as to the handwriting of the imputed papers before he is required to meet the charge, and I would accordingly quash the conviction and remit the case for further trial on the charges of forgery and cheating.

BONSER, C.J.—

I agree that there should be a new trial in this case. At the same time I doubt whether the statute *28 Victoria, c. 18, section 8*, has the effect that Mr. Taylor in his work on *Evidence* ascribes to it. The question is not one of much practical importance, for I do not think that the case of a man being convicted of forgery solely on the evidence afforded by a comparison of written documents, without any testimony either of experts or of persons acquainted with his handwriting, has ever before occurred or is likely to occur again. The statute appears to me to have been passed to facilitate proof of handwriting in two ways—first, by allowing written documents to be put in evidence merely for the purpose of comparison with the disputed document, although they were not evidence for any other purpose; and secondly, by admitting the evidence of persons who were not acquainted with the handwriting of the person charged, but who, as experts, could give their opinion based on a comparison of an admitted writing with disputed writings.

I am not satisfied that it was intended to allow a jury to find a man guilty of forgery, when no qualified witness could be found willing to pledge his oath to his belief that the alleged forgery was in the handwriting of the accused.

I would add that this case, involving as it does questions as to the course of business in a shop, seems to me to be one which should be tried with the assistance of some persons who are acquainted with the way in which business is carried on in this town, and it should therefore be tried either in this Court or by the District Judge of Colombo with assessors.

Remitted for new trial.