

ALEXANDER E. ALEXANDER (DE- } APPELLANT; 1889
 FENDANT)..... }
 AND
 GEORGE A. VYE (PLAINTIFF).....RESPONDENT.

*Feb'y. 20, 21.

*April 30.

ON APPEAL FROM THE SUPREME COURT OF NEW
 BRUNSWICK.

*Evidence—Lost writing—Proof of handwriting—Subsequently acquired
 knowledge—Change of signature.*

That a document not in existence was written by a particular individual may be proved by a person who has had possession of and destroyed it, though he only acquired knowledge of the handwriting of the alleged writer some weeks after the document was destroyed and could only say that from his recollection of the document it was written by the same person. Gwynne J. dissenting.

In an action for a written libel the defendant was asked, on cross-examination, if he had not changed his signature since the action begun, which he denied.

Held, Gwynne and Patterson JJ. dissenting, that documentary evidence was admissible to show that the signature had been changed.

Per Patterson J.—The witness could properly be asked, on cross-examination, if he had not changed his signature, but the opposing party must be satisfied with his answer, and could not go further and give affirmative evidence of the fact.

APPEAL from a decision of the Supreme Court of New Brunswick refusing a non-suit or new trial to the defendant.

This was an action for a libel alleged to have been published by the defendant in a newspaper at Moncton, N.B. The publication was proved by the editor of the newspaper, who swore that he received the original manuscript, which had been destroyed, from Campbellton, N.B., where both plaintiff and defendant

*PRESENT.—Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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resided, accompanied by a letter requesting its publication; that on the plaintiff complaining of such publication he had written to defendant and received an answer; and that from the signature and writing of this last letter he, the editor, believed the original manuscript to have been written by defendant. This was the only evidence of publication.

Evidence was also admitted of the defendant's signature in a hotel register and on other occasions, to show that he had altered his usual signature in order to mislead the plaintiff and affect the trial.

The jury found a verdict for the plaintiff which the court *in banc* refused to set aside. The defendant then appealed to the Supreme Court of Canada.

The only questions to be decided on the appeal is as to the admissibility of the above evidence.

Weldon Q.C. and *Gregory* for the appellant cited *Doe Mudd v. Suckermore* (1); *Greenleaf on Evidence* (2); *Arbón v. Fussell* (3); *Tennant v. Hamilton* (4).

Hanington Q.C. for the respondent referred to *Folkard's Starkie on Libel* (5); *Odgen on Libel* (6); *Fryer v. Gathercole* (7).

STRONG J. — At the conclusion of the argument I had formed and was prepared to express the opinion that the appellant had not succeeded in establishing error in the judgment of the court below. Subsequent consideration of the case has not led me to alter this opinion. It seems to me that there was no improper admission of evidence, and the other objections do not, in my judgment, call for any observation. Therefore, without writing more fully which I could only do by repeating, quite unnecessarily, the same reasons as

(1) 5 A. & E. 705.

(2) 14 Ed. pp. 576-7, 579.

(3) 3 F. & F. 152.

(4) 7 C. & F. 122.

(5) Ed. pp. 318-9.

(6) P. 560.

(7) 4 Ex. 262.

have been already given in the well considered and able judgments delivered in the court below, I may at once state my conclusion to be that the appeal must be dismissed with costs.

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FOURNIER and TASCHEREAU JJ. concurred.

GWYNNE J.—The question which has arisen in this case is one of a very novel character ; indeed, it would seem to be one of the first impression, for the industry of the learned counsel has found no reported case directly in point, nor does the precise point appear to have been referred to in any treatise. The action is one of libel. The plaintiff in his declaration alleges that the defendant falsely and maliciously composed and wrote of and concerning the plaintiff, and printed and published, and caused to be printed and published in a certain public newspaper called “The Daily Transcript,” published at Moncton, in the county of Westmoreland, in the province of New Brunswick, a certain false, scandalous, malicious and defamatory libel of and concerning the plaintiff, set out at length in two counts of the declaration. The defendant pleaded not guilty, and the sole question was as to the admissibility of the evidence, by which it was sought to be established that the defendant was the author of the article containing the libel and had caused its publication.

One Robert McConnell was the editor and publisher of the “Daily Transcript,” published at Moncton. In his paper of the 1st April, 1887, he published the article complained of. The plaintiff's name did not appear in the article, but he had no difficulty, from the matters treated of, in recognizing himself as the person alluded to. He received the paper containing the article complained of on the 2nd April, 1887, at

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Campbellton, in the province of New Brunswick, where he resided; and in about ten or twelve days thereafter he went to Moncton to see McConnell, the publisher of the paper in which the article appeared. In a conversation then had with him, McConnell stated that the defendant was the author of the article, and the plaintiff told him that unless an apology was made by the party who wrote the article, and published as publicly as the article had been, he would proceed against him, McConnell; to which McConnell replied that he would publish the retraction if the writer would agree to it. No retraction having been published, the plaintiff brought two actions for the publication of the libel, one against McConnell and the other against the defendant, and both were entered for trial at the same court, but that against the defendant was the only one tried, the action against McConnell having been withdrawn upon a verdict being rendered against the defendant. In this latter action McConnell was called for the purpose of connecting the defendant with the article, and it is as to the admissibility of McConnell's evidence for that purpose that the question arises.

His testimony in substance was, that upon the 31st of March or the 1st of April, 1887, he received by post a paper as coming from Campbellton, having on it the Campbellton post mark. Upon opening it he found in manuscript, in six or seven sheets, the article in question, and he published it in his paper of the 1st of April. After the type was set and he had read the proof he threw the MSS. away into the waste basket, and he stated that in the ordinary course of things it would go into the stove, and be destroyed. He had a distinct recollection of throwing it into the waste basket, and he had never seen it since. Upon the last sheet, or the back, there was, as he said, a request that he should publish

the article, and assuring him that the facts could be proved, under which was subscribed the name, "A. E. Alexander." McConnell swore that he did not know the defendant; that he had never, to his knowledge, seen him until he seen him in court upon the trial of the present action; that he had never seen him write; and that he had never had any communication from him until the beginning of May, 1887, when he received from him a letter in answer to one written by McConnell to him in relation to the subject matter of this suit, and except from that letter he had no knowledge whatever of the defendant's handwriting. McConnell's letter to the defendant was written for the plain purpose of endeavouring to obtain from the defendant some admission of his having been the author of the article, so as to relieve himself from responsibility to the plaintiff. He had written a previous letter in April to the defendant, to which he had received no answer, and so upon the 4th May he wrote to him the following letter:

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Mr. A. E. ALEXANDER, Campbellton:—

Dear Sir,—You have not replied to my request either to produce proof in support of the statement about Mr. Vye contained in your letter signed "Facts that can be proved," or to publish a disclaimer. If one or other is not done I shall be obliged to give your name and the manuscript of your letter to Mr. Vye, as I do not intend standing in the gap of a libel suit. Please answer at once.

That this letter was, to say the least, disingenuous, appears from the fact that the writer had already, as we have seen, named the defendant to the plaintiff as being the author of the article, and had destroyed the manuscript which he threatens in his letter to give up in case the defendant should not come forward and accept the responsibility of the publication. The defendant appears to have known that McConnell had already accused him of being the author of the article and had given his name as such to the plaintiff, and

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as the letter threatens also to give up the manuscript, of the destruction of which the defendant had no knowledge, he challenges McConnell to proof of his accusation in his reply, dated the 5th May, as follows :

Campbelltown, May 5, 1887.

On the 16th April you gave Vye's lawyer my name. Lately you have shown the document you claim I wrote ; all that now remains is for you to prove it if you can.

A. E. ALEXANDER.

It is under these circumstances that McConnell, with an action pending against himself in case he should fail to fix the responsibility for the article upon the defendant, is called as the sole witness to prove that the defendant was the person who wrote and sent to him for publication the article containing the libel complained of; and the question is : Was the knowledge which McConnell could have obtained of the defendant's handwriting by his receipt of this letter sufficient to justify his being received as a witness competent to prove that the manuscript of the article, so as aforesaid published by him (and which he said he had thrown away, and that it had become destroyed immediately after the manuscript was put in type, on the day of its receipt, and therefore could not be produced before the jury), was in the defendant's handwriting? for the learned judge who tried the case received the evidence against the protest of the defendant's counsel, and it was submitted to the jury, notwithstanding the most emphatic denial of the defendant upon his oath that he had written the article, or that he knew anything about it, and that if the writing in it looked like his it was a forgery ; and the jury rendered thereon a verdict for the plaintiff, with \$400 damages. Upon a motion having been made in the Supreme Court of New Brunswick to set aside this verdict, and for a rule to enter a non-suit for the reception of this evidence, and of other evidence which was also objected to and

to which I shall refer later ; or for a new trial upon the ground, among others, of misdirection in the learned judge who tried the case telling the jury that it was quite possible that McConnell might be able to carry in his mind the impression produced on him by the character of the handwriting in the communication or note received on 1st April, and so to be able to speak of its similarity to the defendant's handwriting contained in his letter of 5th May, and that McConnell's evidence was sufficient to go to them, for them to exercise their judgment upon it in determining the question in issue before them, namely, whether or not the defendant was the author of and responsible for the libel published in McConnell's paper of the 1st of April ; the court refused a rule and maintained the verdict. From the judgment of the court refusing a rule this appeal is taken.

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Bentham in his "Rationale of Judicial Evidence" (1) calls proof of a document, the execution of which is the point in issue, authentication by circumstantial evidence, of which there are three modes :—

1st. When the handwriting is proved by similitude of hands, asserted by the testimony of a witness, who, on other occasions, has observed the characters traced by the party in question while in the act of writing. This he calls presumption *ex visu scriptiois* or presumption from similitude of hands established by view of the act of writing.

2nd. When the handwriting is proved by similitude of hands, asserted by a witness, who, without having ever seen the party write, is sufficiently acquainted with his hand by correspondence, or by having seen other writings, which, by indications sufficiently permissive appeared to have been written with his hand. This he calls presumption *ex scriptis olim visis* ; and

(1) Vol. 3 p. 598.

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3rd. When the handwriting is proved by similitude of hands, asserted by a witness, who, without such previous acquaintance with the handwriting of the party, pronounces the handwriting in question to be the handwriting of the party, on a comparison made of it with other specimens of his handwriting now, for the purpose of comparison, produced to him for the first time. This he calls presumption *ex comparatione scriptorum* or *ex scripto nunc viso*—or presumption from comparison of hands.

In *Doe ex dem Mudd v. Suckermore* (1) the rule as to the proof of handwriting, where the witness has not seen the party write the document in question, is laid down by Coleridge J. thus :

Either the witness has seen the party write on some former occasion, or he has corresponded with him, and transactions have taken place between them, upon the faith that letters purporting to have been written or signed by him have been so written or signed. On either supposition the witness is supposed to have received into his mind an impression, not so much of the manner in which the writer has formed the letters in the particular instances as of the general character of his handwriting, and he is called on to speak as to the writing in question by a reference to the standard so formed in his mind. The test of genuineness ought to be the resemblance, not to the formation of the letters in some other specimen, but of the general character of writing, which is impressed on it, as the involuntary and unconscious result of constitution, habit or other permanent causes, and is therefore itself permanent. And we best acquire a knowledge of this character by seeing the individual write at times, when his manner of writing is not in question, or by engaging with him in correspondence, either supposition giving reason to believe that he writes at the time, not constrainedly, but in his natural manner.

Patteson J. states the rule in somewhat similar language, and referring to the two modes recognized of acquiring knowledge of handwriting, namely, by having seen the person, as to whose handwriting the same is raised, write ; or, by having received letters from him. He says :

(1) 5 A. & E. 703.

The knowledge (that is, of the character of the person's handwriting) is usually, and especially in the latter mode, acquired incidentally and, if I may say so, unintentionally, without reference to any particular object, person or document.

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That the rule was as stated by Coleridge and Patte-son JJ. was not disputed by the learned judges who differed from them on the point then in judgment. Indeed it was admitted to be well established beyond all controversy, and this same rule is still laid down in all text-books as the prevailing rule, subject to the additional mode of proof since authorised by law, namely, by comparison of the handwriting of the document in question with authentic handwriting of the party whose handwriting the document in question is alleged by his adversary and denied by him to be, by persons skilled in discerning the character of handwriting, although they have never seen the party write, nor had acquired any previous knowledge of the character of his handwriting, being the third mode of authentication mentioned by Bentham.

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Now, the rule in question and its application have hitherto been limited to the case of knowledge of the handwriting of a party, acquired by a witness in one or other of the two modes above described, and applied to the enquiry as to the handwriting of a document produced before the court and jury in respect of which an issue is joined upon the question whether the document so produced is or is not in the handwriting of the person, of whose handwriting the witness had previously acquired the knowledge from which he is asked to give his testimony upon the point so in issue. In no other case than one calling in question the handwriting of a document produced before the court or jury engaged in the trial of an issue in which the handwriting of *such* document is disputed has the rule hitherto been applied; but it is now, apparently for the

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v. the Supreme Court of New Brunswick, that the rule is
VYE. equally applicable to the case of an issue joined as to
Gwynne J. the handwriting of a document necessary to be proved,
but not at all produced, before the court trying such
issue ; and of which handwriting the only evidence
offered or capable of being offered is that of a witness
who says that he had destroyed the document almost
immediately after its receipt ; and who, although he
admits that he had no knowledge whatever of the per-
son or of the handwriting of the writer, nor of the
defendant or of his handwriting, save that some time
subsequently to the destruction of the document in
question, he had received from the defendant a letter,
which he produces in court, undertakes to say that the
destroyed document was, in his opinion, in the same
handwriting as is this letter so received from the
defendant. But, as it appears to me, it is of the very
essence of the rule, and reason and justice require,
that it should be confined to these cases for which it was
established, and to which alone it has hitherto been ap-
plied, namely, the application of the witness's acquired
knowledge of the handwriting of the party charged
with having written a document produced before the
court trying an issue joined in an action wherein the
handwriting of such document is necessary to be
proved. To extend the application of the rule to cases
similar to that now under consideration would result
in opening a ready way to the greatest abuse,
and in effectually closing the door to all rea-
sonable and intelligent inquiry into the truth
of the matter in issue. In every action wherein
the plaintiff asserts and the defendant denies that the
document upon which an action depends is in the
handwriting of the defendant, it is of the utmost
importance, in the interest of truth and justice, that the

defendant should have the most ample opportunity afforded him of convincing the tribunal charged with the trial of the issue, by persons well acquainted with his handwriting, that the document in question is not in his handwriting. Every such issue may involve a question of forgery; and it is, therefore, essential to the due administration of justice that the defendant should not be prevented from having the fullest opportunity given him to have the question tried under such circumstances that the truth may be reasonably expected to be arrived at, by enabling him to have the disputed document submitted to the strictest scrutiny of persons well acquainted with his handwriting. He has a right to call, and may possibly be able to call, a vast number of witnesses who have had infinitely superior means of acquiring knowledge of his handwriting than had the single witness who, upon such slender means as that possessed by McConnell, undertakes to testify against him. This, it is obvious, would be absolutely impossible unless the document to be proved should be produced in court. If produced it might appear that the handwriting in it did not bear the slightest resemblance to that in the letter which McConnell received from the defendant, and with which he undertook to compare the destroyed document. Without the production of the document in a case like the present, where the document was never seen by any one but McConnell, who had no knowledge whatever of the defendant nor had ever seen his handwriting until some five weeks after the receipt and destruction of the document by him, it is impossible that the issue joined between the parties could be intelligently tried, for no evidence whatever could be adduced to test the truth of McConnell's evidence or the accuracy of his opinion. He was, in fact, free without fear of contradiction to endeavor to

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ALEXANDER he himself was subjected by reason of his having
v. published in his paper an article transmitted, as he
VYE. says, to him in a handwriting unknown to him, and
Gwynne J. subscribed with the name of a person whom he did not
 know, and which, as soon as published, he destroyed.
To apply the rule in question to a case like the present
would be to provide means best calculated to prevent
rather than to promote the discovery of the truth upon
the question in issue. It was agreed that if it may be
assumed that a witness who had only once seen a
person write may have such an impression formed in
his mind of the character of the handwriting of the
writer that he may at any distance of time be admitted
as a witness to speak as to the handwriting of a docu-
ment alleged to be in the handwriting of the same
person, so likewise an impression may be assumed to
be formed in the mind of a person upon his once seeing
a written paper of the character of the writing, without
knowing any thing of the writer, or who he is, so that
he could, at a subsequent time, upon seeing another
document under such circumstances as to enable him
to know it to be in the writing of a particular indi-
vidual wholly unknown to him, pronounce the former
document to be in the same handwriting as the latter ;
and that, therefore, his evidence in the latter case
should be equally as admissible as that of the
witness in the former case. The assumption
in the former case may be, and perhaps is,
an extravagant one ; but it does not in any manner
prejudice the party whose handwriting is in question,
who is given ample opportunity to test the accuracy
of the opinion of the witness who, with only such
means of acquiring knowledge of his handwriting,
testifies against him ; but the assumption in the latter
case is more extravagant, and as its necessary effect

would be to deprive the party affected of all means of testing the accuracy of the opinion of the witness, there is good reason why it should not be accepted in practice. Between the two cases there appears to be this difference: that in the former case the witness speaks from a knowledge supposed to have been acquired by him of the general character of the handwriting of the person as to whose handwriting he subsequently undertakes to speak; and in the latter case he speaks, not from a knowledge supposed to have been acquired of the general character of the handwriting of any person, but from a knowledge which he assumes to have been acquired of the formation of the letters in the first document, and a comparison of the impression on his mind of such formation of the letters with the subsequently written document; and without any knowledge of the writer of either, he pronounces both to be written by the same person. This, as stated by Coleridge J. in *Doe ex dem Mudd v. Suckermore* is not the proper test in the authentication of handwriting *ex scriptis olim visis*, but is simply Bentham's third mode of authentication—namely, mere comparison of handwriting, but very imperfectly instituted, in the absence of the principal document the handwriting in which is the subject of enquiry. McConnell, after receipt of the letter of the 5th May from the defendant, would be an admissible witness to give his opinion as to the handwriting of a document produced in court upon the trial of an issue raising a question whether it was or was not in the handwriting of the defendant. In that case, as already pointed out, the defendant would have ample opportunity to test the accuracy of the opinion and to secure an intelligent trial of the issue; but, for the reasons already given, the interests of truth and justice require that evidence of the nature of that given by McConnell should not

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be received upon the trial of an issue involving a question as to the handwriting of a document not produced, and which the defendant denies to be his. Reference has been made to the case of an action upon a lost note, but from such a case no argument can be adduced in favor of the plaintiff's contention (1). Although upon a plea of *non-fecit* in such an action the defendant cannot insist that the plaintiff cannot recover without producing the note sued upon, if he should prove it to have existed and to have been lost or destroyed; still, the proof of the former existence of the lost or destroyed note in order to admit secondary evidence of its contents, if the substantial defence be that, in point of fact, the note never was made by the defendant, must be equally as sufficient to show it to have been made by the defendant as if the note were before the court and the defendant was *bonâ fide* insisting that he had never made it. In such a case, if the evidence offered by the plaintiff should be only of the same nature as that of McConnell in the present case, then, no doubt, the cases would be identical and the same reasoning would be applicable to both. But no such case has as yet arisen in the case of an action upon a lost note, and so no argument in favor of the plaintiff's contention can be founded on the fact that in the case of a lost note the law, notwithstanding the loss or destruction of the note, provides a remedy against the maker. Suppose that, in the present case, the witness had said that the document received by him on the 1st of April contained a promise by the writer to pay for the insertion of the article in his paper, can it be held that he could have recovered in an action against the defendant upon the evidence as given? And again, inasmuch as the evidence in

(1) *Blackie v. Pidding*, 6 C. B. 196; *Clarnley v. Grundy*, 14 C. B. 608.

question would have been as admissible and as sufficient in a criminal as in a civil action, does not one's sense of justice revolt at the idea of a conviction on an indictment for libel being sustained upon the evidence of the witness McConnell in the present case?

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The other question, as to evidence which was objected to but received, arose in this manner: Upon the defendant having been called, and having emphatically denied upon oath that he ever wrote the article in question or that he knew anything about it, the plaintiff's counsel cross-examined him, and he answered as follows:—

Q. It was the 16th of last April that you knew you were charged with being the author of this communication? A. Yes.

Q. Then, why have you changed your signature since? A. I have not changed my signature since.

Q. You got a letter from me or from our firm, did you not? A. Yes.

A letter is shown to witness and he is asked:

Q. Is that your signature? A. Yes.

Q. Tell me why you changed that "A" from an "A" of that shape to a capital A? A. I don't make any difference.

Q. Have you not since this thing was charged home to you made all your signatures different? A. No.

Q. Have you not written your signature like a school boy in the hotel register here? A. If I have, I always do.

Here an affidavit is shown to witness, and he is asked:

Q. You made an affidavit to get this trial put off? A. Yes.

Q. Are not the signatures in answer to our letter and to this affidavit here entirely different from what you swore was your ordinary signature? A. I don't think so.

— Upon this, it appears that the learned counsel for the plaintiff was proceeding to show these documents to the jury—to which counsel for the defendant objected. The learned counsel for the plaintiff then stated his object in submitting the signatures to the jury, thus:

I offered the account made out by him, which he swore was in his 33½

1889 ordinary handwriting, and I offered the signatures of the other two.
 ALEXANDER I don't hesitate to say that since he knew he was accused of writing
 v. this communication he has changed his signature.

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 Gwynne J. The court allowed the evidence, subject to the objection, and the cross-examination of the defendant proceeded, thus:

Q. You say that you wrote this letter to McConnell hurriedly in the post office? A. I did not say hurriedly.

Q. Did you not say you wrote it with a lead pencil? A. Yes, because I had no pen.

Q. Then, you did not write hurriedly at all; will your swear you did not write it hurriedly in the post office? A. I don't think I did.

Q. It is perfectly clear that these two signatures (indicating them) are different? A. With reference to that one, Mr. Vye wanted his account right away, and I picked up a pen, which I did not usually write with, and wrote it. In regard to this affidavit, I wrote my name in full, because the commissioner told me to do so, and I make no difference as to the use of the capital and small A.

There can, I think, be no doubt that this question, as to the suggested change in the defendant's mode of signing his name, was not a proper one to have been submitted to the jury upon the only issue they had to try. The theory upon which the right to submit the question to the jury was rested was plainly stated by the learned counsel for the plaintiff to be: that since the defendant, on the 16th April, knew he was accused of writing the article which was the foundation of the action, he had changed the character of his signature, for the purpose of insisting, when the document should be produced on the trial of this action, that the signature to it was not in his handwriting. The document not having been produced, the plaintiff, in order to cast discredit on the defendant's denial upon oath that he was the writer of the article, or that he knew anything about it, suggests through his counsel the alteration in the defendant's signatures, and the purpose for which the alteration was adopted, which purpose assumes the defendant to have been the writer of the

article in question, and the sender of it to McConnell for publication; and having made this assumption in order to get the question of alteration raised he asks the jury to find the fact of alteration from their own inspection of the documents shown to the defendant and admitted to have his signature, that therefrom they may conclude that defendant did write the article which, in order to institute the enquiry as to alteration of signatures, he was assumed to have written.

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The singularity of this theory appears further, from this, that the signature to the letter of the 5th May to McConnell, from which alone McConnell spoke as to the handwriting in the document destroyed by him, is one of the signatures which is suggested to have been written, not in defendant's ordinary handwriting, but in a handwriting altered for the purpose suggested. But the question whether the defendant's mode of signing his name was or not different in the documents produced raised a different issue from the only one the jury had to try, and the defendant's answers to the questions put to him upon that subject must be taken as conclusive. The submission of the documents to the jury for them to form their opinion by comparison of handwriting upon the question of the suggested difference was improper, so that for this reason also the appeal must be allowed; but as, in my opinion, McConnell's evidence was inadmissible, the proper order I think to make will be to allow the appeal with costs and to order a rule to enter a non-suit to be issued in the court below.

PATTERSON J.—The court below was, in my opinion, right in holding that there was evidence to go to the jury of publication of the libel by the defendant.

It has been urged on his behalf that in admitting the evidence of McConnell, as evidence of the communica-

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tion to the newspaper being in the handwriting of the defendant, the court went further than any decided case to be found in the reports had gone, because the witness had no knowledge of the defendant's handwriting until after the destruction of the paper which, he says, from his recollection of it, was written by the defendant, or at all events accompanied by a letter or memorandum signed by the defendant. It seems to be true that in no reported case was the position precisely like this; but the principle on which the evidence is admissible is affirmed in many cases, including *Doe Mudd v. Suckermore* (1), on which the appellant has based a good deal of his argument. The principles there laid down by Coleridge J. and Patteson J., and usually found stated in the text books in the words of the last named judge, as in the passage quoted by the appellant from Greenleaf on Evidence (2), make it proper to hold that such knowledge of the defendant's handwriting as the witness McConnell acquired from the correspondence he had with the defendant after the publication, and after the asserted destruction of the libellous communication, was legally sufficient to enable the witness to say that he knew the handwriting, although he had seen only one or, at most, two specimens of it.

That handwriting may be proved in the absence of the paper containing it is established by *Sayer v. Glossop* (3).

In ordinary cases the witness has to compare two things—one existing only in his mind and the other being before him. The mental entity is his recollection of the handwriting of the party, the other is the writing before him. He finds that they correspond, and therefore concludes that the writing before him

(1) 5 A. & E. 730.

(2) Sec. 576.

(3) 2 Ex. 409.

is by the same person whose hand-writing is the exemplar in his mind.

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The present case is nearly the converse. There are two things, one mental, being the recollection of the writing the witness threw into the basket after reading the proof, the other before him in the letter from which he became acquainted with the defendant's hand-writing. He compares them, and finds that they correspond, concluding therefrom that the same person wrote both manuscripts.

There is no difference, that I can perceive, in the principle of evidence as applied to one case or the other.

In *Sayer v. Glossop* (1) Lord Cranworth, then Rolfe B., illustrates the point by the case of a treasonable announcement chalked upon a wall, being thus incapable of being produced in court, and a person recognising the handwriting and giving evidence of it.

The case he puts is that of one who recognizes the writing from previous acquaintance with it.

It must be the same thing if, after stopping to read the words on the wall as he passed on his way to his place of business, but not knowing in whose hand-writing they were, he found awaiting him a letter or other document, and recognised in it the same hand that wrote the words on the wall.

The time that elapsed between receiving the mental impression from the one writing and seeing the other, whether ten or fifteen minutes, as we may suppose in the case put for illustration, or a month, as in the present case, touches the value of the evidence not its principle. In any case, the evidence must be weaker and less satisfactory than when the writing to be proved can be produced, but that, as pointed out by Pollock C.B. in *Sayer v. Glossop*, (1) is a matter of degree, not of principle.

(1) 2 Ex. 409.

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Along with this evidence of the handwriting the jury could properly consider the correspondence between McConnell and the defendant. It is, no doubt, susceptible of being regarded as weakening, or at least of not strengthening, the inference that the defendant was the author of the libel, but it may be looked at as having an opposite effect, and it was proper evidence for the jury.

There could not, therefore, have been a non-suit. The case had to go to the jury; and, going with the express denial by the defendant under his oath of all concern with the libel, that oath being opposed to evidence which was indirect and by no means of the most convincing character, the jury might have been expected to find for the defendant, unless led to form an unfavorable opinion of his veracity and candor.

The plaintiff, of course, directed his efforts at the trial to produce that unfavorable impression. He was probably assisted by the manner in which the defendant gave his evidence, but in the use of certain signatures I think he overstepped the recognised limits.

The point avowedly aimed at was to show that after the defendant became aware that he was charged with having written the libel, and while he supposed the manuscript to be in existence, and while, in fact, it was in existence, if McConnell's letter to the defendant, and not his oath at the trial, stated the truth, he prepared to baffle any attempt to prove his handwriting by comparison by changing the character of his signature. For this purpose the plaintiff had provided himself with two or three later signatures of the defendant, which it was urged differed in some particular from something or other, I do not very well know from what, for there was no pretence, as far as I can observe, of proving what was the usual style of the signature, much less of proving anything respecting the general

handwriting, apart from the ordinary signature, of the defendant.

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These papers could not have been given in evidence as part of the plaintiff's case. It is not contended that they could. The case was not proved by comparison by experts of one writing with another, and if that had been the mode of proof attempted it is obvious that the production of several different styles of writing would have embarrassed rather than assisted the proof. And, besides, the avowed purpose in producing these papers was foreign to the issue.

Nor could they have been produced, or the fact that the defendant had, on several occasions since the middle of April, adopted a changed style of signature, have been proved, in reply to the defendant's denial that he wrote the libel. To do that would have been to do what, if admissible, should have been done at first.

But it was allowable and regular, for the purpose of affecting the defendant's credibility, to educe from him the fact that he had changed his signature. He stood, however, in the position of any other witness for the defence, as far as the rules of evidence were concerned; and while the questions could not be objected to, the answers had to be taken as he gave them. He denied that he had changed his signature, and denied that those produced differed from his ordinary signature or were intended to differ.

The plaintiff could not, upon that, raise a side issue and prove what he could not, either as part of his case or as independent evidence in reply, have been allowed to prove. Yet that is what he was allowed to do when the signatures were submitted to the jury.

These propositions are so well established as not to require the citation of authority in support of them. I may, however, refer to *Attorney-General v. Hitchcock*(1)

(1) 1 Ex. 91.

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 ALEXANDER v. YEE. v. PATTERSON J. where the general rules are very fully discussed, and to *Palmer v. Trower* (1) where the witness was also the defendant; and to three cases where the rule was acted on at *nisi prius*—*McKewan v. Thornton* (2); *Fowkes v. Manchester and London Insurance Co.* (3); *Regina v. Dennis* (4).

It is said, and the court below seems to have acted on the idea, that the objection to the reception of the evidence was made too late. I do not so read the notes before us.

Q. Are not the signatures in answer to our letter and to this affidavit here entirely different from what you swore was your ordinary signature? A. I don't think so.

Mr. Weldon objects to Mr. Hanington showing the papers to the jury till he has put them in evidence.

Mr. Hanington—I offered the account made out by him, which he swore was in his ordinary handwriting, and I offered the signatures of the other two. I don't hesitate to say that since he knew he was accused of writing this communication he has changed his signature.

Court—I will allow it, subject to objection.

The question here put was, as I have said, a question which could not have been objected to on the cross-examination of the witness. But the plaintiff had to be content with his answer. The irregularity was in putting in the documents in order to contradict the witness or to make substantive evidence of them. That was promptly objected to, and allowed subject to the objection, the plaintiff choosing to take the risk of it.

I have no doubt that the objection ought to prevail.

I might adopt the language of Patteson J. in *Melhuish v. Collier* (5) as almost literally applicable, where he said: "I think that the point in *Winter v. Butt* (6) was taken too early; and that the learned judge

(1) 8 Ex. 247.

(2) 2 F. & F. 594.

(3) 3 F. & F. 440.

(4) 3 F. & F. 502.

(5) 15 Q. B. 878, 888.

(6) 2 M. & Rob. 357.

should have allowed the question, but stopped the enquiry when evidence was called to contradict the witness. Indeed, the question seems to have been put with the view of offering such evidence ; and probably both the judge and counsel knew that, and treated the point accordingly."

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The improper reception of evidence does not in all cases necessitate a new trial. It will not have that effect where it is evident it cannot have affected the verdict. Here the object was to discredit the defendant who had directly denied what the plaintiff had given rather slender evidence to prove. The jury did disbelieve the defendant. It may be that they would have done so if this evidence had not been given, but it is impossible for us to say that it did not influence the verdict ; and the plaintiff, who pressed it for the purpose of producing that influence, cannot, with a good grace, ask us to hold that it did not accomplish that purpose.

The defendant is therefore, in my opinion, entitled to a new trial without costs, and to have the appeal allowed with costs ; but as the majority of the court think the appeal should be dismissed, I may add that I should not look upon a new trial as likely to be of much advantage to the defendant.

*Appeal dismissed with costs.**

Solicitor for appellant : *Theophilus Desbrisay.*

Solicitors for respondent : *Hanington, Teed & Hewson.*

*Application was made for leave to appeal to the Judicial Committee of the Privy Council but was refused.