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# THE INVESTIGATION AND TRIAL OF A QUESTIONED DOCUMENT CASE

Albert S. Osborn\*

Documents that will be disputed are coming to light every day. Scores of questions arise regarding these documents, but the usual question is whether or not the signature is genuine.

## Early Inspection of Document

In whatever manner or form a suspected claim document may come to light, it should be promptly examined and correctly photographed. The alleged existence of an unusual document is sometimes known or suspected for sometime before it is actually shown. In some of these cases the document may not have been entirely completed, or the premature publicity is merely to gain time or to test the force of the reaction of the opposition.

If it is true that a document, purporting to be several years old, was recently made, it is especially important that an early examination should be made of the ink, which may be too fresh in view of the date of the document, although, unfortunately, certain modern inks do not materially change on the paper.

If to those directly interested knowledge has come of the existence of a claim paper against an estate, that is not exhibited, an order of court in most jurisdictions can be obtained or-

dering the filing of the document and permitting the examination and photographing of it. If necessary, an order of this kind should be promptly asked for. Refusal to show a document sometimes casts serious suspicion upon those who are the sponsors of it.

## Selection of Experienced Attorney

A necessary early act in a disputed document case usually is the consulting of an attorney and an expert. The attorney of the family usually becomes the attorney of record in a forgery against an estate and may carry the case through to a final decision. If he is qualified and has had some experience in this special field, this procedure may be advisable. If, however, this attorney, brought into the case by circumstances, has had no special experience in alleged forgery cases and tries a case only now and then, he should not attempt to carry an important forgery case through a trial. Experienced trial counsel should be engaged.

The preparation and trial of a case of this kind many times is a difficult undertaking that to be successful requires not only technical knowledge and some natural ability, but also some special experience. The old adage, "To do a thing well once you must do it

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(1910; 2d ed. 1929); *The Problem of Proof* (1922) and *The Mind of the Juror* (1937).

twice," applies with special force in a case of this kind.

More and more in the courts of this land important trials are being conducted, not by the old family lawyer, but by special trial counsel who are able to find their way around the courthouse without a guide. A selection of this kind should not be made hastily, of course, any more than a surgeon should be hastily selected.

For this special service the best is none too good. The family lawyer will of course be consulted in the matter, or the selection of a more experienced attorney may be turned over to him entirely. Unwise economy at this point may lead to disaster. This experienced attorney will know what early important steps should be taken and will also be able to advise what should not be done. This special counsel at once begins to determine, as far as possible, what the total effect of all the various classes of evidence will be; that is his special job.

#### Selection of Document Examiner

One of the questions usually referred to special counsel is that of consulting and engaging the services of the experienced technical witness. He will understand the importance of correct and convincing testimony of this kind, testimony of an illustrative, demonstrative character that does not present a bare opinion but gives the reasons and reasoning upon which an opinion is based.

The special counsel will know something at least of the comparative competency and, what may be more important, reliability of witnesses of this

class. He will also probably know of special witnesses who aid unworthy attorneys in the effort to defeat justice in these cases, and will not only avoid them but will understand how best to meet adverse testimony of this kind. Fortunately, as in all fields, a man's reputation, like a shadow, follows him wherever he goes. Certain definite knowledge of this kind may alone almost justify the employment of special counsel who knows the circumstances of these cases.

#### Precautions Regarding Investigation of Case

The history of a document that is under suspicion is usually obtained by interviewing those directly interested. These interviews in most cases should be carefully planned and made promptly. At least two responsible persons, representing the possible contestant, should be present and, if it can be arranged, a stenographer should be present who can make a verbatim record of the admissions and explanations. If no stenographer is available, then written notes should be made. At the beginning of an investigation claimants who seek to profit from false documents are inclined to talk quite freely but may later deny that they made certain definite statements, the significance of which they did not realize when the statements were made.

"When and where was the document made?" should be asked; and also such questions as the following: "Just where has it been kept since it was signed?" "Who has seen it and who has been told of its existence?" "Is there any letter or other writing re-

ferring to the document directly or indirectly?" Information should be sought as to just where the document was found (if it is a "found" document), and who found it, and was it being looked for at the time? Information should also be obtained as to who was first told of the discovery and just when were they told? Moreover, it should be ascertained whether or not the document has been changed in any way since its finding, by folding, erasures, cleaning, trimming, marking, or crumpling? A detailed description should be requested of the search made for the document, and further facts should be learned as to where the document was kept since its finding—i. e., in pocket, desk, safe, or bank?, and also as to what was done with it immediately after its alleged signing? Additional questions of the following nature should be asked: "How did the document come to be written?" "Was the making a sudden impulse or the final act of extended discussion and consideration?" "Did the maker say anything about the possibility of the document being attacked as not genuine?" "When was a lawyer first consulted about the document?"

The claimant in cases of this type can be truthfully told in advance, "If we are satisfied that this is a genuine document it will be paid without contest." In many instances claimants hope that the story and circumstances can be made so convincing that there will be no contest and thus are led to talk freely. If the whole story of the document is a fabrication, as it may be, it is practically certain there will be numerous deep and dark holes in it

that, when looked into, will tend to discredit the whole conspiracy.

If possible, this interview should be held before the claimant has consulted a lawyer. However, the interview should be held even if the claimant already has a lawyer, and even if he must be present at the time.

It is practically certain, as stated above, that an invented story will have loose joints and vulnerable places, but no criticism whatever should be made at the time of the interview. If a somewhat garrulous claimant is led to talk freely, and the main points of the story are written down as they are told, it simply cannot be perfect if it is not true.

If the story is true, the facts will confirm each other as facts are consistent simply by being facts. Interviews often are later grossly misrepresented by guilty claimants. This fact shows the importance of written reports and a reliable observer, who may be used as a witness along with the interviewer himself.

When a document is finally exhibited at the courthouse, or the office of the attorney, or the office or home of the claimant, a detailed and careful examination should be made of everything about it that may shed any light on the question of its genuineness. If the document is genuine and unassailable, then that of course ends the matter, but if it appears that it probably is not genuine, then certain definite steps should at once be taken. In some rare cases a prompt and vigorous attack on a document leads to its withdrawal, and it is also true that presumptuous documents are sometimes

presented as a basis, not for a trial, but for a settlement; the document is sold to those who would naturally contest it.

There are certain of these phases of the preparation of a disputed document case that to be effective require promptness. One of these, especially in the smaller places, is the early interviewing of the bank president or the retired banker and the active paying-teller in the bank where the decedent kept his account. The opinions of some of these men are technically worthless but the moral effect of favorable testimony by these home town witnesses may be very valuable. The active paying-teller may be qualified on the subject and should of course be seen promptly. These men can be interviewed before any writing is available with the understanding that they are to be consulted later.

Promptness is important in this interviewing because an astute opposing attorney, employed by a party who produces a forged document, understands the importance of this testimony and interviews these various men and tells his client's story, and even if these witnesses do not testify for the claimant, the fact that they were consulted may make them unavailable as witnesses on the right side of the case.

Promptness is also important in interviewing the possible local technical expert witness, whatever his qualifications may be, so he will not be prevented from testifying because he has been interviewed and perhaps given an adverse opinion to the opposition. The approved ethics do not permit a technical witness to testify for the op-

position in a case in which he has been consulted, and especially if he has been paid. This prompt consultation of one who is likely to be an adverse witness is a phase of sharp practice sometimes employed by attorneys arrayed against the facts.

There may be someone out in a small county-seat town whose opinion on the genuineness or falsity of a specimen of handwriting can be safely depended upon, but hasty decisions of any kind should never be made on what may be an unreliable report. Hasty accusations especially should never be made, and every phase of the whole matter should be taken up with proper care and caution.

Neither the local tottering, old notary public, nor the self-confident young bank clerk, should be implicitly depended upon, and an opinion not based upon careful reasoning should be given but little consideration. A positive opinion is sometimes based on one poor standard signature or the hazy recollection of a lay witness.

The examination of a disputed writing, and especially of what may be forged writing, often is a difficult, scientific problem. The interests of justice would be served if there could be somewhere a central bureau, conducted by competent and experienced specialists, where the original documents, or accurate photographs of disputed or suspected handwriting or typewriting could be sent for preliminary examination and report.

This procedure might be particularly helpful if the document happens to be a typewritten one. There are only a few specialists who can solve these

typewriting problems. There may eventually be such a central bureau established. Sometimes an individual specialist is in effect such a bureau and submissions of this kind are more numerous each year. In the absence of such outside help, the problem should be studied with all the available printed help in hand and the best human aid that is immediately available.

The incompetent and inexperienced observer, whose only practical qualification is that he can read writing, as a rule reports that all suspected writing is genuine because he does not recognize and understand the qualities that show forgery, and in his comparisons he makes no distinction between similar and same. This observer is inclined to decide that similarity (and there is always some similarity in a forgery) indicates genuineness, but, on the other hand, he may make the error of deciding that any natural variation indicates forgery.

In these inquiries there should, if possible, be a consensus of opinion of those best informed, after considering all the circumstances, but it must be said that, where only inexperienced lay witnesses are available, it is safer in some cases to decide on other evidence rather than on the handwriting itself. If, however, the problem is taken up with caution and deliberation, and carefully considered, error may be avoided even by the inexperienced.

The spirit of uncontrolled advocacy that often enters into a contest of this kind may easily lead toward error. When a document is brought to trial it is in this connection that the experi-

enced and competent judge may be of great aid, if the procedure permits him to guide the inquiry in the most approved manner. Some Federal judges and the judges of New Jersey are permitted to assist, but in many courts the law makes the judge utterly helpless; he cannot even say that the problem is a difficult one that requires careful study, and the law requires that he must be absolutely silent on the facts.

There are a few judges who are violently prejudiced against all expert testimony, no matter how good it may be, and restriction of a judge of this class happens to be in the interest of justice. As a general rule, however, the restriction is an undesirable one.

#### The Examination of the Document

At the first view of a disputed document certain things should be looked for and looked at, and it is well to have in hand a list of the various things to be done. At such an examination there is usually a lawyer for and one against the document, also one or more of the interested parties. The best available specialist in handwriting may be present and perhaps also a document photographer.

Examination should be made in good daylight, where ink colors can be clearly seen, and the examination should not be hurried. Suitable magnifying glasses should be in hand and, as a rule, appropriate genuine writing in sufficient quantity should be available for direct comparison. In many, if not most, cases it is desirable to make a second examination after all the facts and circumstances as first

observed have been carefully gone over and considered. Only a brief, artificially lighted, stand-up view of a document is sometimes permitted, but those who question a document should not allow themselves to be thus permanently restricted.

It is important at these early first views of a document that all the claim statements and explanations, made by lawyer or claimant, should, as already stated, be written down verbatim. It can be briefly stated that in order to determine whether or not the document is genuine it is thus desired to get all the available particulars regarding its history and origin. At these early interviews statements may be made by a claimant that later become very important in the course of a trial. Claimants should be skillfully encouraged to talk, as previously suggested, and questions should be asked that relate to every important detail regarding the document. At this time a few discreet and sagacious questions by the lawyer may secure information that wins the case.

At this first viewing of a suspected document it is well, if conditions permit, to give attention to the following phases of the examination. It is easy to overlook what may be important.

*Handwriting:* Form, speed, skill, smoothness, continuity, pen-lifts, spacing, tremor and location of tremor, shading and location of shading, slant, angularity, size, alignment, proportions, system of writing, retouching and overwriting, pencil marks or outline, erasures, character of beginning and ending of strokes, character of "t" crossings, location of signature on the page

of the document, and the character of the signatures of witnesses.

*Ink:* Old or fresh, exact color on shaded parts and on thin lines, secondary color by oblique light, dense or thin ink, uniform or unequal width and bunches in strokes, heavy and light spots in strokes, presence of sediment, blotted or not blotted writing, flow-backs on points, or crossings, crossed lines of signatures and other writing, ink in body of document, ink showing through on back of document, ink over folds, blots and smudges and kind or class of ink.

*Paper:* Exact size, shape and color, rectangular or unevenly cut by hand, chemical or abrasion erasures, location and character of all folds, ink spreading at folds, crumpled or smooth sheet, indentations or frayed edges, stains, exact watermark, horizontal or vertical watermark in relation to lines of writing, class and kind of paper, ruling, binding and possible second binding or wire stitching of document, pocket wear and soiling, uneven soiling, contact copy of document to be made directly on film and development in darkroom.

*Typewriting:* Kind of machine and style of type, approximate age, writing by novice or by experienced operator, date in typewriting or in pen and ink writing, identifying qualities in the typewriting (the five phases), continuous writing or added parts, depth of indentation of paragraphs, who wrote the document, was carbon copy made, double-tone ribbon or double-tone ribbon-shift on machine, fresh, medium or old ribbon, erasures or corrections, margins and indentations, placing of writ-

ing on paper, open or crowded, short or long lines, uniform or uneven spacing of lines, errors, width of line spacing.

*Contents or Subject Matter:* Note all facts stated, incidents related, names, places, dates, statements, spelling, use of capitals, punctuation, reasons or arguments, legal language or ordinary language, day of week shown by month, day and year of date, erroneous statements, irrelevant parts, peculiar identifying expressions or errors, property descriptions, manner of writing figures and dollar-signs, errors in grammar and composition.

If a suspected document is an alleged holographic writing some additional important points should be given careful consideration. A fraudulent document of this kind will almost certainly fail in that freedom, variation, abbreviation and obvious carelessness that are characteristics of genuine continuous writing. A study of variation in the writing is especially important. These qualities should all be carefully examined. Repeated words should be compared and natural variation or unnatural uniformity looked for. A model for every letter and word may not be available and these parts may diverge in design. The questions of freedom, speed and care should be especially considered. A holograph writing often is a careful, painstaking piece of drawing. The question should be carefully considered whether the document may be a forgery over a genuine signature.

The first examination of a document in the specialist's own office, brought to him by a party or interested lawyer, is quite a different matter from going out to see a claim paper just brought

to light. The wise specialist not only gives no offhand opinion, but does not even give any offhand intimation. Until he is formally engaged on the case, he looks at no papers of any kind and in no case makes an immediate examination and report while his caller is present. He may say, "Come back in and hour and I may be able to report."

The experienced specialist learns that there are inquirers who are merely fishing for information regarding a document. In some instances they are seeking to learn whether an examiner has already been engaged on a case. The inquiries that say, "Are you free to accept employment?" are properly answered by saying, "Do you wish to engage my services in this matter?"

It is advisable, as suggested, that wherever and whenever an examination is made, no immediate report should be given. There are instances where this may be necessary and advisable, but generally notes should be made and the facts carefully reviewed and interpreted before a report is made. Of course, there are cases where the facts are so obvious that an opinion can be formed very soon, but even in these cases it is usually best not to give an offhand opinion. When photographs are made, an opinion can be rendered when the photographs are printed. If photographs are not made at the first view of the document, a further examination can of course be made when photographs are available.

### The Trial

When a surprising document appears it is supported or is attacked by two classes of evidence, external and in-

ternal. The justification for its existence and the conditions out of which it arose, and the alleged knowledge of it by living witnesses, constitute the external evidence, and the document itself, the style, history and character of its handwriting, the style, model and history of its typewriting, the kind, class and age of its ink, the quality, character, origin, shape, and watermark in the paper, its repeated or peculiar folding, its form, its style of composition, its errors, its erasures, its freshness or its aged or excessively soiled appearance, its lack of continuity, its seal, its envelope, all in combination constitute its internal evidence.

There is usually one group of those interested who at once approve the document and assume that it is genuine, and another group that are inclined to assail it as a forgery. If the document is genuine, of course those who made it and produced it and witnessed it so assert or testify, and in certain cases, no matter how unwelcome, surprising and suspicious it may be, it eventually must be accepted as genuine.

If the document is not genuine, and its creation is not an example of what is decried as "a perfect crime," then proper and skilful investigation will be likely to begin to uncover certain evidence unfavorable to the thin, flattened fiber with arbitrary marks and designs upon it that is described as a document.

In the interests of justice all this external and internal evidence must be sifted, weighed and interpreted until it can be reasonably asserted that the document is genuine or a forgery. The

proof of this fact is what is called a legal trial. Cases of this kind differ from most trials because of the existence of these two classes of evidence, the internal and external. In the usual trial the evidence is nearly all external and not inherent as in a document.

A decision in a legal trial must be based upon these two main classes of evidence. The first class is made up in its main part from the oral testimony of witnesses, and the second class of evidence is the evidence of things, of facts and circumstances, of a succession of events, all of which must be investigated and interpreted. This latter evidence does not depend upon human memory or human honesty or reliability but is the evidence of inanimate things which often is the most conclusive evidence offered in a court of law.

The weighing and sifting and interpretation of all this evidence finally depends upon human intelligence, clear eyesight, and correct reasoning. Whether the decision is by jurors who are picked from the "run of the mill," or by a trained and experienced judge, it is mainly the result of a course of reasoning. The parties and the attorneys are compelled to employ the means at hand with all its faults and do the best they can with what is known as a contentious trial. Cases of this kind in other lands are all tried and decided by trained and experienced judges but in this country a decision may be made by a group, some of whom can hardly read writing.

Unfortunately, all those who are interested in one of these disputed document trials are not sincere, scientific participants who are seeking to find

and prove the fact. The spirit of advocacy spreads its baneful influence over the proceeding, and there may be perjury, suppression and misrepresentation that must be exposed and counteracted if the truth is finally to prevail. Ingenious conspiracies no doubt sometimes succeed and the old restrictive rules and the poorly qualified juries and the handicapped judges in the trials in many courts are influences that all aid those who seek to defeat justice.

It certainly is to be regretted that the methods of the arbitration board, with qualified and unprejudiced arbitrators, cannot be utilized in important and difficult disputed document cases. With competent men of this class to hear and decide a case, with no old restraining influences to interfere with free inquiry, and the door wide open to all the available evidence, the truth would prevail in a great majority of cases. A time will no doubt come, when civilization is more advanced than it is now, when these sane and sensible methods will be followed and a trial will be a scientific investigation and not what it now is in many jurisdictions.

There are those who in coarse terms scoff at these ideas and call them examples of impractical idealism. Some who are called lawyers are opposed to all law reform of every kind and class; they say to the layman, keep your hands off. Those interested in a disputed document case must necessarily take up the matter under the laws and rules that the past has furnished and do the best they can under the conditions imposed.

In the first place, it becomes necessary to know what these rules are so that they can be utilized as far as they are helpful and counteracted as far as possible when they impede the course of justice. The technically competent and experienced witness may be a valuable assistant in this work. These cases are similar in numerous ways and an intelligent participant who has been through them can furnish helpful suggestions. In the absence of such assistance printed matter on the subject may be of some assistance and silent printed pages may furnish the essential help, but many poorly prepared cases are tried by those who will not make proper preparation.

Numerous of the phases of a disputed document trial of course come under the head of general trial procedure and practice that cannot be here discussed, but there are some special phases of such a trial that need to be considered.

One of these phases is preparation of trial counsel on the established principles underlying the technical facts regarding handwriting and documents, so that in arguments regarding objections throughout the course of the trial, and in the final argument, the matter can be discussed in a clear, correct and convincing manner. Many opportunities come to the prepared and alert attorney to enforce the technical testimony by timely and pointed discussions of the underlying principles, as well as the outstanding features of the evidence. Many opportunities arise that can at once be taken advantage of by the prepared attorney but many cases are tried by attorneys who hardly know what the case is about.

The determination of the fact regarding a disputed handwriting is, as suggested above, a scientific problem, the solution of which is finally the result of a course of reasoning, and of course one cannot do the reasoning if he does not understand the principles of the subject. For example, there is a natural variation in genuine signatures, and a forgery, as a rule, varies from the writing imitated, and, in order to avoid error, it is necessary to distinguish the variation due to forgery from the natural variation in the genuine writing.

It of course cannot be expected that a trial attorney will be able to master every subject about which litigation may arise, but, if in an alleged forgery case an attorney inadvertently discloses that he himself does not understand what he is trying to prove to a jury, his case is in grave danger. Even if only one or two astute jurors recognize his ignorance, it will be difficult for him to convince them that his contention is a correct contention.

It is pleasing to record the fact that there are an increasing number of attorneys in important fact cases who become better informed on the technical subject involved in the litigation than certain of the so-called experts called by the opposition. A lawyer of this kind can sometimes very nearly force his views on a listening jury; he can almost make them see the fact.

There are treatises in the law libraries from which an industrious attorney can in short time secure some information by which he can test his own witnesses, as well as those of the opposing attorney. A partly informed witness is sometimes in terror when he discovers that a cross-examiner knows more about the technical subject under inquiry than he does. The testimony of such a witness is often shown to be absolutely worthless.

It is particularly unfortunate when an unprepared attorney fails to bring out from his own witnesses, in a complete and convincing manner, the testimony that they are prepared to give; he may not know how to ask the questions correctly, nor how to begin, or when to stop. With an unprepared attorney, and a stupid witness, the interests of justice are of course in double jeopardy, but even a good witness may be seriously handicapped by his own attorney.

Fortunately there are each year an increasing number of trial attorneys who have had experience in disputed document cases, and have carefully studied the subject, and are able to present technical evidence in a forceful and effective manner and also are fully qualified to make an interesting, correct and convincing final argument. In the hands of these men the interests of justice are safe.