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MOTION PICTURES IN EVIDENCE

By CARL M. GRAY*

The development of the motion picture industry afforded another method, to produce evidence, in the trial of cases. With the development of sound pictures an additional method was afforded. The bar, progressive as it is, took advantage of the opportunity, to utilize motion and sound pictures, in evidence. This form of evidence was first attempted in 1923 and was rejected by the trial court. The bar was persistent and made frequent efforts to introduce pictures in evidence before it was successful. There is no question now about the admissibility of such evidence when the proper foundation is established by competent evidence.

In considering the admissibility of motion and sound pictures in evidence, we should not lose sight of the fact that the Courts, when the question was first presented to them, did not immediately admit still photographs in evidence, and when the X-ray was developed and offered in evidence, the Courts did not immediately admit them in evidence. It naturally follows, when motion pictures were first offered in evidence they were not immediately admitted. An examination of the cases reveals that the Court exercised its usual sound discretion in receiving motion and sound pictures in evidence.

The admissibility of motion and sound pictures in evidence depends upon establishment, by competent evidence, the proper foundation for their introduction. The Courts have uniformly held, in all jurisdictions where the question has been presented, that a proper foundation must be established by the evidence, before the pictures are admissible in evidence. By proper foundation we mean, a showing by the evidence, the manner in which the picture was taken, the manner in which it was developed, the thing it portrays or attempts to portray, whether it exaggerates or minimizes,

* Of the Petersburg Bar.

the manner in which it will be projected or exhibited to the jury, whether the projection exaggerates or minimizes or shows the exact conditions as they existed at the time the picture was taken. When the proper foundation is established by the evidence, the Courts have held uniformly that motion and sound pictures are admissible.

Before discussing the necessary foundation and necessary proof to be made in reference to the introduction and projection of pictures in evidence, the authorities should be carefully examined. They show the trend of judicial thought upon this subject in the various jurisdictions in the United States. This is one legal question which has confronted the Courts, which has resulted in almost a unanimity of opinion. The Courts have substantially agreed that motion and sound pictures are admissible in evidence but have differed upon the necessary foundation for their admission. Before referring to the cases which have been decided by the Courts, in the various jurisdictions in the United States, upon this subject, your attention should be called to the foresight of a leading authority upon the subject of "Evidence," in this country. I refer to Dean Wigmore. As early as 1923 he foresaw the problem which would eventually confront the Courts, as the result of the rapid progress being made in the motion picture industry, and the manner in which the public was receiving it. The decided cases disclose his influence upon the Courts and other authors upon this subject. This is best exemplified by quoting section 798 of his Second Edition of "Wigmore on Evidence":

"Conceding the verisimilitude of any particular photograph's reproduction of the object photographed, there remains always the assumption that the object photographed is identical with the object in issue. This assumption underlies, of course, all use of photographs, as it does that of all other forms of testimony. It represents the element elsewhere referred to as involving the principle of Authentication, applied to chattels (post. Sec. 2130).

"(a) Now ordinarily the evidence to support this assumption will be supplied incidentally and as a matter of course; e. g. the witness will say, 'The front gate represented in this photograph, taken by me, is

the same front gate referred to by Witness X as the place where the wagon drove in' (or, 'the survey line started').

"But it will often be desirable to establish 'prima facie' this assumption by more explicit or more ample evidence. This will be so where the original conditions have concededly changed or disappeared and where there has been an *attempted reconstruction* of them, by artificial means, for the purposes of the photograph.

"Common examples of this are found in still photographs purporting to represent the relative location of freight cars, gates, and vehicles, at the place of a crossing collision; or of the alignment of machines, windows, materials, and operatives in a factory-room at the time of an injury. In such a case, there is always the possibility that the bias of the party or agent preparing the scene and taking the photograph has given to the reconstructed scene a misleading alteration, or has been content with a reconstruction which was only as close as is feasible to the original scene, but is put forward by him as actually identical with it.¹ Here the trial judge may require sufficient evidence of a substantial identity of conditions before admitting the photograph. But instead, if any serious doubt exists on this point, the judge may well cause additional photographs to be taken of a scene reconstructed as the opponent's testimony alleges, if that is feasible.

"The foregoing element of weakness may reach its maximum in a *moving-picture*. In so far as such a picture has any value beyond a still picture, this value depends on the correctness of the artificial reconstruction of a complex series of movements and erections, usually involving several actors, each of them the paid agent of the party and acting under his direction. Hence its reliability, as identical with the original scene, is decreased and may be minimized to the point of worthlessness.

"Where this possibility is serious, what should be done? Theoretically, of course, the moving-picture can never be assumed to represent the actual occurrence; what is seen in it is merely what certain witnesses say was the thing that happened. And, moreover, the party's hired agents may so construct it as to go considerably further in his favor than the witnesses' testimony has gone. And yet, any moving-picture is apt to cause forgetfulness of this and to impress the jury with the convincing impartiality of Nature herself. In view of these inherent risks of misleading, the trial judge may well deem a picture unsafe and inadmissible when the introductory evidence has not convinced him that the risk is negligible.²

¹ A few rulings of this sort will be found in the citations ante, Sec. 792, n. 1.

² 1920, *People v. —*, Calif., Colusa Co. Superior Court (reported in *Moving Picture World*, as quoted in *N. Y. Times*, Feb. 22, 1920, homicide; Weyand, J., excluded a moving-picture of a reconstructed scene of the parties' conduct).

"No general rule can be laid down as to the kinds of occurrences, artificially reconstructed, in which the moving picture would have a special risk of misleading.

"(b) But where the moving-picture is taken *without artificial reconstruction*, i.e. at the time and place of the original event (a possibility not infrequent), it lacks the above element of weakness and is entitled to be admitted on the same principles as still photographs. The only circumstance then to be considered is that in a few matters, such as speed and direction of human movement, or relative size in the focus, the multiple nature of the films requires special allowances of error to be made; but these allowances are no different in kind from the elements of error inherent under certain conditions in still photographs."³

This same subject was discussed fully in "Cyclopedia of Automobile Law and practice," by Blashfield, (Vol. 9, pages 643-647, Permanent Edition 1935), in the following sections:⁴

MOVING PICTURES AS PHOTOGRAPHS

"Just as the map and engineer's diagram succeeded the rough sketch and as the photograph succeeded the diagram and map, so it appears that the ultimate in legal photography has been reached with the use of moving pictures in accident cases and the approach of aerial photography to a similar purpose. That moving pictures come within the definition of photographs and are subject to the same rules of evidence seems to be established in judicial minds.

"Courts recognize the duty of using every means for discovering the truth, reasonably calculated to aid in that regard. In the performance of that duty, every new discovery, when it shall have passed beyond the experimental stage, is necessarily treated as a new aid in the administration of justice, in the field covered by it. In that view, courts show no hesitation, in proper cases, in availing themselves of moving pictures and aerial photography just as they availed themselves of the art of photography by the X-ray process."

ADMISSIBILITY WITHIN DISCRETION OF COURT

"Recent cases acknowledge that the well-known progress being made in the moving picture world has resulted in great accuracy in depicting the true conditions sought to be shown and that the mechanical means

³ 1920, *Algeri v. Cleveland R. Co.*, Cleveland Common Pleas (as reported in Cleveland Plaindealer, May 13, 1920; personal injury; to disprove plaintiff's alleged incapacity, a moving-picture of the plaintiff at work as a bricklayer since the date of the injury was received, by Hay, J.).

⁴ The footnotes cited in Cyclopedia of Automobile Law and Practice by Blashfield were omitted.

of perfecting such pictures have become so general that it may become necessary in the near future to permit their introduction in evidence. It is admitted, however, that in many cases the pictures may not only have a bearing upon the facts, but may be absolutely decisive on the issues involved in the action.

"It is not yet settled, however, as to whether the separate still pictures taken on a film are the proper evidence or whether the machine itself may be installed and an exhibition made before the jury. The rule against stage setting and posed photography mitigates against such demonstrations. Another equally potent reason for rejecting such ocular demonstrations is the impossibility of including them in a record for review; there being no rule as yet for incorporating action in a written or printed record. The rules applied as to photographic exhibits, rejecting pictures of moving animate objects, hereinabove stated, are likewise opposed to the extension of the rule so as to permit the admission of moving pictures.

"Some of these considerations, doubtless, moved the court in *Gibson v. Gunn* to reject moving pictures because of the abuse of this form of evidence, in bringing before the jury irrelevant matter, hearsay, and incompetent evidence and tending to make a farce of the trial. In that case, the admission of a moving picture of plaintiff's performance of a vaudeville entertainment prior to the accident in which the injury was sustained constituted reversible error. Aside from the fact that moving pictures present a fertile field for the exaggeration of any emotion or action, and the absence of evidence as to how the particular picture film was prepared, the court of review was of the opinion that the exhibition made a farce of the trial, since the plaintiff's ability as a vaudeville performer was not in issue and his eccentric dancing, comic songs, and the dialogue and remarks of his fellow performers had no place in the trial. The court therefore regarded the admission of a moving picture in evidence as a radical departure from the rules of evidence.

"In another well-known case, counsel for the defeated party asked to install in the courtroom a moving picture apparatus so that he might exhibit on the screen a picture of a car in motion on the track at or near the point of the accident. He was not permitted to do so. The picture of the car which he wished to exhibit was not a picture of the one in which the decedent was a passenger at the time of the accident, but was a picture subsequently taken of another car. The purpose of the evidence was to show that all the cars that came around the curve swayed. The court concluded that in the moving picture the car might possibly have swayed more than the one in which the accident took place, because of greater speed. Furthermore, it was suggested that the rapidity of the movement or sway of the car appearing on the screen was subject to the manipulation of the camera-

man who took the picture of the car. The court was of the opinion that it was within the power of the operator to make the movements appear faster or slower than the car was actually going, that questions of convenience and possible confusion in the courtroom might and might not be used advantageously and properly in placing the facts before juries is a question the answer to which must vary with one case and another, so that the decision in each case must be left largely to the judgment and discretion of the trial court without any restricting general formula laid down to control it. In the particular case above referred to, there were other available means of proving with accuracy the movements of the car, and the court of review was of the opinion that the trial court properly excluded the resort to moving pictures.

"Dean Wigmore, in his second edition on Evidence, came to the conclusion that moving pictures are to be admitted on the same principles as still photographs, that the only circumstance to be considered is that, in a few matters, such as speed and direction of human movement or relative size in the focus, the multiple nature of the films requires special allowances of error to be made, but that these allowances are no different in kind from the elements of error inherent under certain conditions in still photographs. So he concludes that moving pictures are admissible, providing the requisite precautions are followed by the presiding judge, and that, if they have any tendency to exaggerate any of the true features sought to be proved, that situation may be met and properly disposed of by the court, but that, when proper safeguards are followed, no harm can come from the introduction of such pictures."

WHEN MOVING PICTURES ADMITTED

"While it seems to be well established that a moving picture of the location of the place of an accident, taken after the accident, may only be admitted when it can be shown without question that the conditions are the same as those existing at the time of the accident, such pictures of the plaintiff, taken while walking along a public street, have been held admissible when offered to impeach or discredit the testimony of the plaintiff by showing that, at the particular time the picture was taken, after the accident, he conducted himself as a perfectly well man, instead of the invalid he claimed to be. In other words, a New York court was of the opinion that such pictures should be shown to the jury to enable them to pass intelligently upon the question whether the condition claimed to exist was real or feigned.

"The court of last resort of Texas, however, arrived at a different conclusion, and refused to permit the introduction of motion pictures, offered to show that the claims of the plaintiff as to total disability were true. The rejection in that instance was on the ground that

the pictures were not properly identified nor their correctness shown. The reviewing court pointed out, however, that the bill of exceptions did not contain the pictures nor show what they would disclose nor how the pictures were to be exhibited to the jury. Commenting on the matter, the court said: 'It is a matter of common knowledge that pictures showing a person in action may be made very deceptive by the operator of the machine used in taking the picture. The subject of the pictures in this instance was before the jury, and the nature and extent of his injuries were fully inquired into. He admitted doing the only labor which appellant relied on to disprove the claim of total disability. We think the court correctly refused to admit the pictures.'

"There are apparent reasons for rejecting such evidence where the question of speed or proper control of an automobile may be involved. Any one having witnessed a moving picture and seen the harrowing escapes of occupants of automobiles in close places, through the manipulation of the camera, can come to no other conclusion. Still pictures, however, made from the movie films, may be more appropriately admitted in connection with the testimony of eye-witnesses, and even they are subject to various interpretations. Recently a newspaper published a photographic reproduction of an automobile skidding on the pavement, striking and killing a woman and injuring a child which she was wheeling in a baby carriage across a slippery street. The writer made a test of several persons by exhibiting these photographic reproductions and asking for a reading of them. Not a single person tested gave a proper interpretation of the occurrence. Some thought the woman in the first picture was pushing the automobile to assist in getting it started. Not one of those tested concluded rightly that the car was skidding.

"It is apparent that the speed of a car and the ability to stop when the driver should have observed the imminent danger to the pedestrian would be issues in such a case. The movie camera might be manipulated either by fast or slow motion and thereby convey to the jury vastly misleading suggestions on the identical questions in issue."

In referring to the cases upon this proposition, it is desirable to examine the cases in the order in which they were decided by the Court.⁵ No doubt many cases were presented to the lower courts, where pictures were admitted in evidence, which were not appealed and reported. The first reported

⁵ The West Publishing Company deals with this subject under the following key numbers. *Ind. and Northeastern Digest* Decimal and General Digests Evidence 359, 380, 382; Criminal Law 206(1), 393(1), 419(1), 438, 538(3), 662(4), 736(2); Witnesses 227, 266; Constitutional Law 266.

case upon this subject is the case of *Pandolfo v. U. S.*, 286 Fed. 8, 16 (Aug. 21, 1922), Circuit Court of Appeals, Seventh Circuit. Pandolfo was indicted with others for a conspiracy to defraud by use of the mails.

The company had buildings located at St. Cloud, Minnesota. The defendant had one Forsyth, the advertising manager for the company, take motion pictures of the factory at St. Cloud, and attempted to introduce the film in evidence after making the proof, showing in what manner the pictures were taken and what they represented and that they were correct. The Court indicated that the pictures would be admitted in evidence until it developed that they were taken by the company's advertising manager. When this fact was disclosed, the Court rejected the pictures. Some seventy-five still photographs had been introduced in evidence showing the machinery contained in the factory, and detailed description had also been introduced in evidence. The Court, in refusing the motion pictures, had the following to say:

"The motion pictures would not amplify this, beyond showing the movement of the machinery and the action of the employees, at the particular time of the making of the film. The fact of operation, and manner thereof, were not at all in dispute, and the question of permitting the motion pictures to be displayed before the jury was so far within the discretion of the court, that, while it might not have been error to have received it, it was not error to exclude it."

The next case upon this subject is the case of *Gibson v. Gunn*, 202 N. Y. S. 19, 206 App. Div. 464, (Nov. 2, 1923):

"Appeal by the defendant, Basil H. Gunn, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 11th day of October, 1922, upon the verdict of a jury for \$10,000, and also from an order entered in said clerk's office on the 18th day of October, 1922, denying the defendant's motion for a new trial made upon the minutes. This is an action to recover for personal injuries suffered by the plaintiff when he was struck by defendant's automobile. Prior to the accident, the plaintiff, who was a vaudeville dancer and performer, lost his left foot, which was amputated about five inches above the ankle. He procured an artificial leg and was able to continue his career as a theatrical dancer and performer. His vaudeville act opened with a

motion picture, which was exhibited to the jury on the trial over the objection of defendant's counsel. In this picture there was first projected on the screen a poem, and then the picture showed the plaintiff on crutches walking along the street. He stopped in front of a shop, and looked at a row of artificial limbs in a window. Then the picture showed him entering the shop, and later leaving it and walking down the stairs and up the street. The next scene showed the plaintiff meeting two friends, who were dancers, and who did certain tricks, which the plaintiff imitated, and in addition did stunts himself, which the others refused to attempt, because they were too hard."

* * * * *

"*PER CURIAM.* We think the introduction in evidence, over defendant's objections and exceptions, of a moving picture of plaintiff's performance in a vaudeville entertainment prior to the accident in which the injury was sustained, constituted reversible error. Aside from the fact that moving pictures present a fertile field for exaggeration of any emotion or action, and the absence of evidence as to how this particular motion picture film was prepared, we think the picture admitted in evidence brought before the jury irrelevant matter, hearsay and incompetent evidence, and tended to make a farce of the trial.

"The plaintiff's ability as a vaudeville performer was not the issue, and his eccentric dancing, comic songs, and the dialogue and remarks of his fellow performers, had no place in the trial in the Supreme Court of the state of the issues presented by the pleadings. The effect of this radical departure from the rules of evidence is found in the excessive verdict returned by the jury. The judgment should be reversed upon the law and the facts, and a new trial granted, with costs to abide the event.

"Judgment and order reversed upon the law and the facts, and new trial granted, with costs to abide the event."⁶

The next case is the case of *DeCamp v. U. S.*, 10 Fed. (2d) 984 (Court of Appeal of the District of Columbia, decided January 4, 1926). The appellant, DeCamp, appealed from a conviction under an indictment charging him and others of the crime of conspiring to use the mails in furtherance of a scheme to defraud in connection with the promotion and sale of the capital stock of the Crystal Glass Casket Company, a corporation.

⁶ See 2 New York Law Review 96.

"Error is assigned on the admission and exclusion of certain evidence. It appears that a reel of motion pictures was taken at the company's plant in Oklahoma, purporting to show the actual manufacture, in all stages, of glass caskets of different sizes. Defendants offered the reel in evidence, and moved the court for permission to exhibit the pictures to the jury by a moving picture machine in the courtroom. The court denied the motion and declined to permit the exhibition to be made to the jury. One of the principal criminating charges of the government in this case was that glass caskets could not be made, and evidence was introduced to sustain this contention. It was to meet this evidence that the moving picture was produced and offered. We think the court was right in refusing to admit the picture in evidence. A motion picture does not of itself prove an actual occurrence. The thing reproduced must be established by the testimony of witnesses. While the photograph may be a proper representation of the thing produced, yet the testimony of witnesses is required to verify the production. 'Theoretically, of course, the moving picture can never be assumed to represent the actual occurrence; what is seen in it is merely what certain witnesses say was the thing that happened, and, moreover, the party's hired agents may so construct it as to go considerably further in his favor than the witnesses' testimony has gone, and yet any moving picture is apt to cause forgetfulness of this, and to impress the jury with the convincing impartiality of Nature herself. In view of these inherent risks of misleading, the trial judge may well deem a picture unsafe and inadmissible, when the introductory evidence has not convinced him that the risk is negligible.' 2 Wigmore on Evidence, Sec. 798."

The next case in point of time is the case of *Massachusetts Bonding and Ins. Co. v. Worthy* (Texas, Aug. 11, 1928; rehearing denied Oct. 4, 1928), 9 S. W. (2d) 388, 393.

"Among the errors assigned is the refusal of the court to permit the appellant to introduce in evidence and exhibit to the jury pictures of the plaintiff in action, such as are commonly called 'motion pictures.' It is stated in the assignment that those pictures would have conclusively shown that the claims of the plaintiff as to total disability were untrue. The court refused to permit the introduction of those pictures, apparently upon the ground that they were not properly identified or their correctness shown. We are not prepared to say that the court abused his discretion in ruling as he did. The bills of exception do not contain the pictures, nor show what they would disclose; nor do the bills of exception show how the pictures were to be exhibited to the jury. It is a matter of common knowledge that pictures showing a person in action may be made very deceptive by the operator of

the machine used in taking the pictures. The subject of the pictures in this instance was before the jury, and the nature and extent of his injuries were fully inquired into. He admitted doing the only labor which appellant relied on to disprove the claim of total disability. We think the court correctly refused to admit the pictures. *Gibson v. Gunn*, 206 App. Div. 464, 202 N. Y. S. 19; *Rodick v. Ry. Co.*, 109 Me. 530, 85 A. 41; 22 Corpus Juris, 914."

The next case in point of time is the case of *State of Maryland for the Use of Anna Chima, Appellant, v. United Railways and Electric Company of Baltimore* (April 15, 1932), Maryland Court of Appeals, 162 Md. 404, 159 Atl. 916, 83 A. L. R. 1307.

"This leaves only the second exception to the evidence to be considered and passed upon. In this exception, the appellant's counsel asked to install in the courtroom a moving picture apparatus so that he might exhibit on the screen a picture of a car in motion on the track at or near the point of the accident, but was not permitted to do so. The picture of the car which he wished to exhibit was not a picture of the car in which the decedent was a passenger at the time of the accident, but a picture of a car subsequently taken. As stated by the counsel this evidence 'was for the purpose of showing that all cars that come around there (the curve) sway.' The only purpose for which such testimony could possibly be admissible would be to show that the sway of the car was unusual or extraordinary, and it seems not improbable that this could not be shown by the movements of a car other than the one in which the accident occurred. In the moving picture, the car, because of greater speed, might possibly have swayed more than the car in which the accident took place. If so, the sway of that car could not be relied upon as representing the movements of the car in question. Moreover, the rapidity of the movement or the sway of the car appearing on the screen was subject to the manipulation of the cameraman who took the picture of the car. It was within his power to make the movements appear faster or slower than the car was actually going. Questions of convenience and possible confusion in the courtroom might have to be considered. When moving pictures might and might not be used advantageously and properly in placing the facts before juries is a question the answer to which must vary with one case and another, and we think the decision in each case must be left largely to the judgment and discretion of the presiding judge, without any restricting general formula laid down to control him. In this case there were other available means of proving with accuracy the movements of the car, and we do not see any ground for holding that the court acted erroneously in excluding the resort to moving pictures."

The next case is the case of *Pacific Mut. Life Ins. Co. of California v. Marks* (Ala. May 23, 1935), 161 So. 543-545.

"The trial court permitted the introduction in evidence of certain photographs taken by the plaintiff, and of him taken by another when in Arizona. The defendant then made an effort to have them reproduced or displayed upon a screen in the courthouse. There is no question but what moving pictures have reached a marvelous degree of production and reproduction, not only accurately, but often in a most exaggerated form; the accuracy depending largely upon conditions, etc., of the camera when the first impression is taken. It also appears that motion pictures have been received in evidence in many courts when a proper predicate has been established, Wigmore on Evidence (Supp. to 2d Ed.), Sec. 798a, wherein the question is discussed and the essentials of a sufficient predicate are outlined. It is sufficient to say, however, that the examination of defendant's witness, Bromberg, was such as to fail to establish the fact that the reproduction by him of the photographs on the screen could be done with such accuracy as to put the trial court in error for rejecting this offered evidence. The pictures were not authenticated, and Bromberg's testimony shows that whether a motion picture accurately reflected the movements of the object taken depends on the speed at which the camera is operated during the exposure; that the matter of speed of motion will depend upon the speed at which the camera was set in Arizona; and that he did not know and had no way of definitely ascertaining the speed, and there was no evidence as to the speed at which the camera was set at the time the pictures were taken. Nor did the testimony of the plaintiff, Marks, help matters. While he owned the camera, and took some of the pictures, the ones in which he appeared, and the only ones of any relevancy, were taken by another and he did not know just how the speed was set when the pictures of him were taken."

The next case is that of *Owens v. Hagenbeck-Wallace Shows Co.* (R. I. May 8, 1937), 192 Atl. 158, 160:

"The defendant's twelfth exception is to the refusal of the trial justice to declare a mistrial and take the case from the jury on the ground that they had been permitted to view the showing of a certain motion picture in which the plaintiff Mr. Owens and his trained horse had taken part. It is the contention of the plaintiffs that the showing of this picture was material and proper by way of answer to one of the pleas filed by the defendant. This plea, in substance, alleged that the contract, which was the basis of this action, was obtained from the defendant by the fraud and misrepresentation of the plaintiffs in connection, among other things, with their appearances

in numerous moving pictures in which, the plaintiffs claimed, they and their horse had been featured.

"In pressing the above exception, the defendant has attempted to have us pass upon the correctness of the ruling of the trial justice in permitting the jury to view this picture. This unusual procedure should be resorted to, if at all, with extreme caution. If for any reason it should ever become necessary and proper for a jury to view a moving picture during the course of a trial, it should be made to appear clearly to the trial justice that the picture was a true reproduction of the scene photographed and was properly authenticated according to the rules of evidence. Otherwise, because of the skill and development in the fabrication of moving pictures and the possibilities of producing desired effects by cutting and other devices, a jury might receive misleading and prejudicial impressions as to important issues in a case."

Counsel for the defendant failed to take exception to the exhibition of the pictures to the grand jury, and no question was therefore presented for the Court to pass upon on appeal.

In the case of *Denison v. Omaha & C. B. St. Ry. Co.* (Nebraska, July 15, 1938), 280 N. W. 905-906, the plaintiff recovered a verdict against the defendant railway company in the sum of \$5,000.00. In the trial of the case the plaintiff introduced evidence, supported by medical testimony, that he had received an injury to dorsal and cervical nerves and injuries to his back and side and that by reason of the injuries his salary was diminished fifty per cent, and that he was permanently injured.

"The defendant, to offset this evidence, introduced exhibits Nos. 7 and 8, being two reels of moving pictures, which had been taken by Felber Maasdam, an industrial cinematographer. He testified that he spent parts of September 15, 16 and 17, 1937, taking these films, with his camera equipped with a telescopic lens. These pictures show the plaintiff around the stockyards, engaged in various activities. The operator was instructed to run the projection machine, to show the normal speed of the movements of the plaintiff, before the jury, not faster or slower. The plaintiff is shown on top of a runway, opening a gate, driving three cows, closing the gate, carrying hay, putting it in feed troughs, inspecting stock, and other movements.

"The operator on cross-examination testified he was paid \$1.50 an hour and some other expenses for taking the pictures, and \$25 a day

for running them for the jury in court. He testified that, so far as he knew, the plaintiff had no knowledge that these motion pictures were being taken during the parts of three days while they were being 'shot.'

"The use of moving pictures for the purpose of proving certain facts before the jury is a matter that should be left largely to the judgment and discretion of the trial judge. *State v. United Railways & Electric Co.*, 162 Md. 404, 159 A. 916, 83 A. L. R. 1307."

The above is the only statement and ruling of the court upon the admission of the motion pictures.

It is interesting to note, however, the Court in this case ordered a remittitur, and ordered the plaintiff to remit \$1,000.00, of the amount recovered.

Reference is now made to the cases where the Court admitted motion pictures in evidence or where the motion pictures were offered in evidence and the trial Court refused to admit them, and the Supreme Court reversed the trial Court by reason of the refusal to admit the pictures. The first case on this subject is the case of *Boyarsky v. G. A. Zimmerman Corp.*, 270 N. Y. S. 134, 137 (March 16, 1934).

"To disprove the plaintiff's testimony as to his physical condition, the appellant offered in evidence certain moving pictures taken in Bridgeport, Conn., eleven months after the accident. The pictures were taken without the knowledge of the plaintiff, and the appellant argues that they show that the plaintiff's claim that he was physically incapable of working was untrue. The reason advanced by the court for refusing to allow the motion pictures in evidence was not sufficient to warrant their rejection. The appellant says that motion pictures were admitted in evidence and permission granted for the projection of pictures in the federal court and also in a recent case in the Supreme Court, First Department, which latter case was settled before the trial was concluded. The appellant argues that if a still photograph of the plaintiff is admissible there is no reason for rejecting a moving picture showing the plaintiff walking along the public highway carrying a parcel or bundle. A sharp issue of fact involving the physical condition of the plaintiff having been presented on the trial, the so-called moving pictures were very material on that point.

"The admissibility in evidence of moving pictures has been before the courts of this state several times and there appears to be very decided and divergent views with reference to their admission in evidence.

"In view of the claim of the plaintiff that he was totally disabled and unable to work or earn a living at any useful employment this case is a striking illustration of an instance where moving pictures are not only admissible but very important. It may be that there are many cases where moving pictures should not be allowed in evidence. In no case should they be admitted unless a proper foundation has been laid therefor. In most cases the question should be left largely to the discretion of the trial judge. If a trial is to be unduly delayed by exhibiting moving pictures, the court may very properly refuse to permit such a delay. If moving pictures are sensational only and unnecessary, the court should refuse to permit such evidence, particularly where the facts may be described or the evidence submitted in another form and thus avoid the delay and difficulty which will result from their introduction. If their use is solely for the purpose of advertisement or in an effort to obtain publicity, they should not be allowed in evidence.

"Several cases have been cited where evidence of moving pictures has been properly rejected. In these cases the purpose was shown to be merely sensational. Where there is no need of such pictures, as in several of the cases adverted to, the trial court is within its right in rejecting such testimony.

"In the present case the defendant appellant properly points out that the pictures taken of the plaintiff, who contends that he received very severe injuries, will show that he went to live in another city and there evidently conducted himself as a perfectly well man instead of the invalid which he claimed to be. It is argued that these moving pictures should be shown to the jury so that it may intelligently pass upon the question whether the condition claimed to exist is real or feigned.

"The well-known progress being made in the moving picture world has resulted in great accuracy in depicting the true conditions sought to be shown. The mechanical means of perfecting such pictures has become so general it may be necessary in the near future to frequently permit their introduction in evidence. In many cases the pictures may not only have a bearing upon the facts, but may be absolutely decisive of the issues involved in the action. Their remarkable accuracy is now generally acknowledged through their constant use as a means of recording and publishing news items of interest to the public, and for that purpose they are featured daily in many of the moving picture theaters of the world.

"While it is true that in *Gibson v. Gunn*, 206 App. Div. 464, 202 N. Y. S. 19, the attempted introduction of moving pictures was rejected, that case illustrates the fact that there may be a great abuse of this form of evidence if it is permitted when wholly unnecessary or when

simply cumulative. It may be, as the court said, that to admit such a picture in evidence would bring 'before the jury irrelevant matter, hearsay and incompetent evidence' and tend 'to make a farce of the trial.' This would be particularly true if a dialogue or conversation were permitted at the time the moving picture is presented.

"In *Massachusetts Bonding & Insurance Co. v. Worthy* (Tex. Civ. App.), 9 S. W. (2d) 388, the court considered a similar proposition and refused to allow moving pictures in evidence upon the ground that such pictures are so very deceptive they can be presented in a manner to exaggerate the conditions which are sought to be presented to the jury. Of course, all of the necessary precautions should be taken to see that the proper foundation is laid for the introduction of such a moving picture, and, if there is any exaggeration, it may be pointed out by the court or the moving picture wholly rejected.

"In *State v. United Railways & Electric Co.*, 162 Md. 404, 418, 159 A. 916, 921, 83 A. L. R. 1307, the court said: 'When moving pictures might and might not be used advantageously and properly in placing the facts before juries is a question the answer to which must vary with one case and another, and we think the decision in each case must be left largely to the judgment and discretion of the presiding judge, without any restricting general formula laid down to control him.'

"A preliminary examination by the trial judge may be necessary in some cases to determine the admissibility of such evidence. In *Field v. Gowdy*, 199 Mass. 568, 574, 85 N. E. 884, 886, 19 L. R. A. (N. S.) 236, Rugg, J., writing for the court said: 'A photograph has no higher character as evidence than the experiment itself. Whether the conditions were sufficiently similar to make the observation of any value in aiding the jury to pass upon the issue submitted to them was primarily for the trial judge to determine as a matter of discretion. His decision in this respect will not be interfered with unless plainly wrong.'

"In *Everson v. Casualty Co. of America* 208 Mass. 214, 219, 94 N. E. 459, 461, the court said: 'The general rule respecting the admission of photographs, plans and models is that whether they are to be received or not is a preliminary question resting largely, though not entirely, in the discretion of the trial judge, whose duty is primarily to determine whether there is sufficient similarity between what is offered and the original which is the subject of inquiry to make it of any assistance to the jury in passing upon the issue before them. While this is not wholly a matter of discretion with the trial court and his discretion is not unlimited, his action will not be revised unless it appears to have been plainly wrong or in disregard of some rule of law governing the rights of the parties. As was stated by

Chief Justice Gray in *Blair v. Inhabitants of Pelham*, 118 Mass. 420: 'A plan or picture, whether made by the hand of man or by photography, is admissible in evidence if verified by proof that it is a true representation of the subject to assist the jury in understanding the case.'

"In Wigmore on Evidence (2d Ed.), vol. 2, p. 108, Sec. 798, the matter is very fully considered, and it is there stated:

"'No general rule can be laid down as to the kinds of occurrences, artificially reconstructed, in which the moving picture would have a special risk of misleading.

"'(b) But where the moving picture is taken without artificial reconstruction, i. e., at the time and place of the original event (a possibility not infrequent), it lacks the above element of weakness and is entitled to be admitted on the same principles as still photographs. The only circumstance then to be considered is that in a few matters, such as speed and direction of human movement, or relative size in the focus, the multiple nature of the films requires special allowances of error to be made but these allowances are no different in kind from the elements of error inherent under certain conditions in still photographs.'

"Based on the rule there stated, it seems to us that the moving picture which the defendant sought to introduce in the present case was admissible providing the requisite precautions were followed by the justice presiding at the trial. If such moving pictures have any tendency to exaggerate any of the true features which are sought to be proved by the introduction thereof, that situation may be met and properly disposed of by the court. When proper safeguards are followed, no harm can come from the introduction of such pictures.

"Our attention has been called to the case of *Algeri v. Cleveland R. Co.* (Cleveland Common Pleas, May 13, 1920), cited in Wigmore on Evidence, *supra*. That was a personal injury action. To disprove the plaintiff's alleged incapacity, a moving picture of the plaintiff at work as a bricklayer, taken after the date of the injury, was received in evidence.

"That case is strikingly similar to the one now under consideration. While we do not believe a moving picture of the location of the place of the accident taken after the accident should be admitted in evidence unless it can be shown without question that the conditions are identical with those existing at the time of the accident, we hold that moving pictures of this plaintiff taken while walking along a public street may be admitted in evidence.

"It follows, therefore, that, in view of the error committed by the court in refusing to admit in evidence the testimony of Michael Birnbaum and in refusing to allow the projection of moving pictures, the

judgment and order should be reversed, and a new trial ordered, with costs to the appellant to abide the event."

On June 9, 1937, the Supreme Court of California decided the case of *Heiman v. Market St. Ry. Co.*, 69 Pac. (2d) 178, 180. The quotation from this case is as follows:

"After Mrs. Heiman became convalescent, she went to Palo Alto for the purpose of rest and to further recuperate. During the period she was at Palo Alto she claimed to have been so debilitated, sick, sore, and nervous, as to be a confirmed invalid. As a part of its case, the defendant introduced a set of moving pictures. They purported to show Mrs. Heiman's movements in Palo Alto; to show her driving an automobile in and out of heavy traffic; and to show her shopping, walking, stooping, and bending without assistance from any one. They also showed her carrying grocery bundles. The testimony showed that the pictures were taken in August, about two and a half months after the injury occurred. The plaintiffs contend no foundation was laid, but they do not show in what respect it was not laid. The plaintiffs go further and contend that in no instance should moving pictures be received in evidence. This contention is based on the fact that numerous 'pranks and tricks' may be developed on the screen. The same contention can be made regarding many classes of evidence. The record before us does not disclose that the reels were examined and it was disclosed they had been altered in any respect. But when, as here, testimony is introduced to the effect that the picture is a true representation of the scene as witnessed by the photographer, the objections mentioned are without foundation. That photographs may be admitted in evidence will hardly be questioned (10 Cal. Jur. 896); that moving pictures are but a series of single pictures is known to every one. If single pictures may properly be received in evidence, it is difficult to see any reason why moving pictures may not be, and at the present time the general rule is that they may be. *Boyarsky v. G. A. Zimmerman Corp.*, 240 App. Div. 361, 270 N. Y. S. 134, 137; Wigmore's 1934 Supplement to his work on Evidence, p. 339. It has been held that under certain circumstances moving pictures should not be received in evidence. *State of Maryland for Use of Chima v. United Rys. & Elec. Co.*, 162 Md. 404, 159 A. 916, 83 A. L. R. 1307. In that case and cases there cited, it will be noted that under the facts a still picture would not have been admitted in evidence. However, in 162 Md. at page 418, 159 A. at page 921, 83 A. L. R. at page 1315, the Supreme Court of Maryland said: 'When moving pictures might and might not be used advantageously and properly in placing the facts before juries is a question the answer to which must vary with one case

and another, and we think the decision in each case must be left largely to the judgment and discretion of the presiding judge, without any restricting general formula laid down to control him.' In the instant case we think it is clear that the trial court did not abuse its discretion in allowing the moving pictures to be exhibited to the jury. Moreover, while the plaintiffs objected to the moving pictures when offered by the defendant, on a later date they caused the pictures to be exhibited again to the jury. By doing so, they waived their objection. *In re Estate of Visaxis*, 95 Cal. App. 617, 625, 273, p. 165. At no time did they question the truth of the portrayals. We think the trial court did not err in admitting the pictures in evidence and furthermore that on the record as made the plaintiffs are in no position to complain."

On June 30, 1937, the Supreme Court of Florida decided the case of *Gulf Life Ins. Co. v. Stossel*, 175 So. 804-805; in this case the appellee contended he had received injuries which resulted in total disability. The appellant contended that no such disability had been incurred as the result of an accidental injury.

"In support of its contention, appellant exhibited here and in the court below some moving picture films. We have not before been called on to rule on the challenge to this class of evidence. We hold that such evidence is admissible, but to be so, it must be produced under the direction of a commissioner appointed by the court for that purpose. Opposing counsel should also have notice and an opportunity to be present and the application to take it must make it appear to the trial court that it is material and will enlighten the court on the issues involved. Otherwise it should not be admitted."

The same case, before the Supreme Court of Florida, on February 4, 1938, on a petition for rehearing, 179 So. 163, quoting from the opinion as follows:

"The petition for rehearing is directed to that part of the court's opinion reading as follows:

"In support of its contention, appellant exhibited here and in the court below some moving picture films. We have not before been called on to rule on the challenge to this class of evidence. We hold that such evidence is admissible but to be so it must be produced under the direction of a commissioner appointed by the court for that purpose. Opposing counsel should also have notice and an opportunity to be present and the application to take it must make it appear to

the trial court that it is material and will enlighten the court on the issues involved. Otherwise it should not be admitted.'

"This procedure for admitting moving picture films in evidence grew out of charges and counter-charges of bad faith on the part of counsel with reference to the verity of the evidence or films in question. On further consideration, we are convinced that the procedure so prescribed should not be required in all cases.

"We do not renounce the requirement as to notice and the production of such evidence under the direction of a commissioner. We think it the proper procedure in many cases, but if in the judgment of either litigant the notice and appointment of a commissioner should not be availed of, the litigant may proceed in the manner deemed by him advisable, but to be competent evidence, the films must be properly authenticated and shown to be a faithful representation of the subject, sound, movement, or other tangible or intangible thing which they purport to reproduce. When such a showing is made to the trial court, moving picture films should be admitted under the same rules as photographs."

It will be observed, from an examination of the cases cited, that where the pictures were introduced in evidence or where the case was reversed by reason of the failure of the lower court to introduce the pictures in evidence, in each instance, the defendant offered the pictures in evidence. The plaintiff was permitted to introduce motion pictures in evidence in a personal injury case, the case of *Rogers v. City of Detroit, Department of Street Railways* (Mich., June 5, 1939), 286 N. W. 167.

One of the questions presented on appeal for decision is as follows:

"(2) Was it prejudicial to permit the jury to view motion pictures of the rapid pulsation of plaintiff's throat?"

The following quotation from the opinion answers the question in the affirmative:

"The second question has to do with the admission of moving pictures that were taken in plaintiff's home showing the rapid pulsation of plaintiff's throat. Counsel agreed that it would be dangerous to bring Mrs. Rogers to the court room. Testimony had already been received of her condition, but the court felt the jury would better

understand that condition if the moving pictures were shown. The trial judge investigated the circumstances and conditions under which they were made and viewed them apart from the jury before admitting them in evidence. No claim is made that they were not an accurate portrayal of Mrs. Rogers' condition, or that the proper foundation was not laid for their introduction. See 'Motion Pictures in Evidence,' 27 Ill. Law Rev. 424. Certain circumstances under which motion pictures might convey an erroneous impression to a jury are pointed out in Wigmore on Evidence, Vol. 2, 2d ed., 107. The reception of such evidence should be left largely to the judgment and discretion of the trial judge. *Heiman v. Market St. Ry. Co.*, 21 Cal. App. 2d 311, 69 P. 2d 178; *State to Use of Chima v. United Rys. & Electric Co.*, 162 Md. 404, 159 A. 916, 83 A. L. R. 1307; and *Denison v. Omaha & C. B. St. Ry. Co.*, Nebr., 280 N. W. 905. It was not error to permit the jury to view these motion pictures."

The phenomenal development in the motion picture industry, which resulted in producing and exhibiting sound pictures, has presented another interesting question for the Courts to pass upon in the admission of evidence in the trial of cases.

The first case upon this subject appears to be that of *Commonwealth v. Harold Roller*, 100 Pa. Superior Ct. 125, (1930), and the opinion is as follows:

"OPINION BY GAWTHROP, J., November 20, 1930:

"Defendant appeals from five sentences of imprisonment imposed on bills of indictment charging him with entering with intent to steal, and larceny. The cases were tried together in the court below and were argued together in this court. They raise but a single question which will be answered in one opinion. After defendant was arrested he confessed to the various burglaries that he had committed. His confession was taken and recorded by a talking motion picture machine and the record thus made, which was offered in evidence and admitted over the objection of the defendant, was exhibited to the jury upon a screen. The question presented to us is whether it was proper to admit this evidence. This is the same and the only question which was raised in the court below on the motion for a new trial. It was answered in the affirmative by the learned trial judge in a well considered opinion which so fully justifies the conclusion reached as to warrant our adopting considerable portions thereof. The question, which is a new one in this state, involves two subordinate questions,

first, the general relevancy and admissibility of such evidence; and second, the adequacy of the authentication of the evidence offered.

“As to the general relevancy and admissibility of such evidence it is a matter of common knowledge that motion pictures are no longer a novelty. They are constantly used for commercial and scientific purposes. The talking motion picture, or movietonè, as it is technically known, results merely from an adaptation of the scientific processes used in producing phonographic records in order that words spoken, or sounds produced at the time of the taking of the picture, may be reproduced with the picture. The Commonwealth presented the testimony of expert witnesses respecting the method by which the talking motion pictures are made and produced and their reproductive accuracy upon the screen. From this evidence it appears that the movietone is, in the language of the court below, ‘in basic characteristics, no different, on the one hand, from ordinary photography, in regard to the visual picture reproduced, and, on the other hand, from phonographic records, in regard to the auditory recording of sound. The principles that underlie their admissibility into evidence, therefore, differ in no way from those governing the admissibility of still pictures and phonographic records.’ It would seem, therefore, that objections to the introduction of sound pictures to supplement, clarify and authenticate verbal testimony of witnesses must be based upon lack of authenticity of the particular picture which is offered in evidence, rather than on the ground of the general unreliability of the process by which such pictures are produced. From time to time the courts have recognized new agencies for presenting evidential matters. The novelty of the talking motion pictures is no reason for rejecting it if its accuracy and reliability, as aids in the determination of the truth, are established. In the words of the learned trial judge, ‘all knowledge purveys to the law, and from the domains of every art and science it draws the weapons by which it discovers truth and confounds error. The still photograph, X-ray, the dictograph, the finger print, the phonograph, the microscope, and even the bloodhound, have all been used and received by judicial tribunals in the proof of matters depending upon evidence; and, in all such cases, the preliminary investigation was directed to the proper authentication of the evidence, and not merely to the question whether imposture might be successful.’ In *Moncur v. Western Life Indemnity Co.*, 269 Pa. 213, photostatic copies were admitted for comparison with admittedly genuine signatures. In *C. & J. Elec. Ry. Co. v. Spence*, 213 Ill. 220, and *Miller v. Mintun*, 73 Ark. 183, X-ray photographs taken by an expert were held admissible. In *People v. Jennings*, 252 Ill. 534, the use of photographs of finger prints discovered at the scene of the crime were permitted. In *State v. Knight*, 43 Nev. 131, enlarged diagrams, made by an expert, of the appearance of blood in various conditions through the

microscope, were permitted to be used for the purpose of illuminating the witnesses' testimony. Telephone conversations have been freely received in evidence, upon a proper identification of the voice: *Penna. Trust Co. v. Ghriest*, 86 Pa. Superior Ct. 71. The dictograph has also been recognized as a legitimate agency for the discovery of truth: *State v. Minneapolis Milk Co.*, 124 Minn. 34. Phonographic records have been received in evidence. See *Boyne City v. Anderson*, 146 Mich. 328. See also 22 C. J. 766. These are but a few of the cases which indicate the receptive attitude of the law toward any reliable mechanism produced by scientific knowledge for the discovery or recording of facts. But few reported decisions dealing with the admissibility of motion pictures have come to our attention. In *Pandolfo v. U. S.*, 286 Fed. Rep. 8, the trial court was sustained in refusing to admit a motion picture which the defendant offered to exhibit to the jury, the reviewing court stating that 'the question of permitting the moving picture to be displayed before the jury was so far within the discretion of the court that while it might not have been error to have received it, it was not error to exclude it.' In *DeCamp v. U. S.*, 10 Fed. Rep., 2d Series, 984, an offer of evidence similar to that made in the Pandolfo case was rejected and the ruling was sustained by the Court of Appeals of the District of Columbia on the ground that it was for the trial court to determine whether the picture which was offered was sufficiently verified. In *Feeney v. Young*, 191 N. Y. App. Div. 501, which was a suit to recover damages for the public exhibition of a moving picture of a patient while being operated upon, the trial court rejected the picture on the ground that the evidence of eye-witnesses who had seen the production and identified the individual being operated upon in the picture as the plaintiff, was the best evidence. In *Gibson v. Gunn*, 206 N. Y. App. Div. 465, in a three to two decision, it was held to have been error to admit in evidence the motion picture of the plaintiff showing that prior to the accident resulting in the damages claimed, he was able to perform as a vaudeville actor despite the fact that he had an artificial leg. The decision was put upon the ground that the evidence was hearsay and incompetent. The reasoning in support of this conclusion seems to us to lose sight of the many principles underlying the admission of photographs and evidence of that character. In order to make such evidence competent it must be shown that the picture is authentic; that it reproduces an exact portrayal of the events—the movements and the voice. When this appears to the satisfaction of the trial judge there would seem to be no sound reason to prevent its acceptance in evidence. As photographs and phonographic reproduction of sounds have been held to be admissible in evidence, there would seem to be no sound reason for refusing to accept a talking moving picture, which is but a combination of the two when it is shown to be accurate and reliable.

"Upon the question of whether the movietone which was offered in evidence was a true portrayal of the actions and words of defendant at the time it was taken, the Commonwealth offered abundant evidence to authenticate it, and there was no countervailing proof. It was made in the presence and under the direction of an expert who also saw the film projected before and during the trial. When asked, 'Q. Does that or not actually represent what occurred?' he answered, 'Yes, in every way.' 'Q. And the production that you say, and the tones you heard here—did they correspond with your recollection of what took place when the picture was taken? A. Yes, sir.' The operator of the camera and the sound man took the photograph synchronously and both agreed that the projected movietone comported exactly and truthfully with the scene and the voice actually taken. Defendant's expert, who testified that talking motion pictures are readily susceptible to fabrication, conceded, after making a thorough examination of the film, that there had been no elimination or insertion in the record, and that the projected film, in his judgment, accurately reproduced the scene taken. We conclude, therefore, that the film was sufficiently authenticated to make it admissible in evidence.

"The assignments of error are overruled and the judgment is affirmed."

On July 9, 1937, the Supreme Court of California denied a petition for rehearing in the case of *People v. Hayes*, 71 Pac. (2d) 321, 322. The opinion is as follows:

"McCOMB, Justice.

"Defendant was convicted after trial by jury of manslaughter. This appeal is from the judgment and order denying defendant's motion for a new trial.

"The essential facts are these:

"During the course of the trial the court permitted a sound motion picture of defendant making a confession to certain police officers to be reproduced before the jury and received as evidence.

"Defendant relies for reversal of the judgment on the sole proposition that it was prejudicially erroneous for the trial court to receive as evidence a sound motion picture of defendant making a confession to police officers.

"This proposition is untenable. The law is settled that the confession of a defendant voluntarily made is properly received in evidence. *People v. Ford*, 25 Cal. App. 388, 419, 143 P. 1075; 8 Cal. Jur. 108, Sec. 200. Hence, there is no merit in defendant's objections that the introduction in evidence of his confession by means of a sound moving picture was error because:

"(1) It denied him

(a) the right to be confronted in the presence of the court by witnesses against him,

(b) the right to cross-examine the witnesses who testified against him,

(c) the privileges and immunity secured to him by the Constitution of the state of California.

"(2) It was

(a) unsworn testimony.

(b) hearsay evidence.

"(3) It compelled the defendant to be a witness against himself contrary to the 'due process' clause of the Fourteenth Amendment of the Constitution of the United States of America and to the provisions of section 13, article 1, of the Constitution of the State of California and of section 688 of the California Penal Code and section 1323 as amended by St. 1935, p. 1942.

"(4) It was in violation of the Fourteenth Amendment of the Constitution of the United States of America.

"We are satisfied that it should, and that it stands on the same basis as the presentation in court of a confession through any orthodox mechanical medium, that is, there is a preliminary question to be determined by the trial judge as to whether or not the sound moving picture is an accurate reproduction of that which it is alleged occurred. If after a preliminary examination, the trial judge is satisfied that the sound moving picture reproduces accurately that which has been said and done, and the other requirements relative to the admissibility of a confession are present, i. e., it was freely and voluntarily made without hope of immunity or promise of reward, then, not only should the preliminary foundation and the sound moving picture go to the jury, but, in keeping with the policy of the courts to avail themselves of each and every aid of science for the purpose of ascertaining the truth, such practice is to be commended as of inestimable value to triers of fact in reaching accurate conclusions.

"This particular case well illustrates the advantage to be gained by courts' utilizing modern methods of science in ascertaining facts. The objection is frequently heard in criminal trials that a defendant's confession has not been freely and voluntarily made, he testifying that it was induced either by threats or force or under the hope or promise of immunity or reward, which is denied by witnesses on behalf of the People. When a confession is presented by means of a movietone the trial court is enabled to determine more accurately the truth or falsity of such claims and rule accordingly.

"The conclusion we have reached finds support in *Commonwealth v. Roller* (1930), 100 Pa. Super. 125. The court in this case held on a similar state of facts that a movietone confession of a defendant was properly received in evidence. See, also, *Wigmore on Evidence*, volume II (second Edition), p. 109, wherein that learned author says: 'But where the moving picture is taken without artificial reconstruction, i.e., at the time and place of the original event (a possibility not infrequent), it lacks the above element of weakness, and is entitled to be admitted on the same principles as still photographs. The only circumstance then to be considered is that in a few matters, such a speed and direction of human movement, or relative size in the focus, the multiple nature of the films requires special allowances of error to be made; but these allowances are no different in kind from the elements of error inherent under certain conditions in still photographs.'

"For the foregoing reasons the judgment and order are, and each is, affirmed."

The foundation to be established by the evidence, prior to the introduction of motion pictures in evidence, has been fully explained by the decisions cited, and does not require further elucidation.

In order, however, to make this paper more practical, (based on actual experience in the trial of a case where he introduced such evidence for the defendant), the writer desires to call your attention to what he believes will suffice to establish the foundation for the introduction of sound and motion pictures in evidence:

First: The photographer should be required to explain in detail the kind of camera used in taking pictures, the make of camera, the film used, the lens, whether telescopic or otherwise, the speed (number of frames per second), and further describe the mechanism, that is, the method in taking the pictures.

Second: The photographer should describe in detail the object being photographed. In the case where the injured party is being photographed at a time subsequent to the injury, the action of the injured party should be described in detail. If some other object, whether it was moving or still, and particularly describe the object and each movement.

Third: The photographer should describe his location when taking the picture. It is necessary to show that the object photographed was correctly photographed, that the picture correctly represents the object photographed, the actions, if any, and the speed or movement of the object.

Fourth: The photographer should then show whether or not he developed the film. If he did not develop it, it should be traced in such a manner to show that no deletions or additions were made after the picture was taken and during the time it was being developed.

Fifth: The photographer should project the picture after its development and show that no additions or deletions were made in the picture from the time it was taken until it was developed, and that the picture, at the time it is offered in evidence, since its development, correctly represents the object photographed.

Sixth: The picture (in form of film) itself should be identified as an exhibit in the case. If more than one roll of film is used, it is suggested each roll be designated as a separate exhibit. With this preliminary foundation established, the picture should be introduced in evidence.⁷

PROJECTION OR EXHIBITING PICTURES TO THE JURY

It is necessary to establish a foundation before the pictures can be projected or exhibited to the jury. The following is a suggested method for establishing the foundation:

First: Evidence should be introduced showing the technical qualifications of the operator of the projector, a detailed description of the projector and its mechanism should be shown by the evidence, the method of projection or exhibition, the speed at which the picture will be shown. A showing should be made that the exhibition of the picture to the jury will not exaggerate or minimize the actions of the object photographed, and that the projection or exhibition of the

⁷ 27 Illinois Law Review 424.

pictures to the jury will correctly show the object as photographed, in reference to the actions and speed of the object.

Second: The operator of the projector should examine the film before he undertakes to exhibit it to the jury for the purpose of ascertaining whether there has been any deletions or additions to the film, and for the further purpose of determining whether or not the film can be projected at the same rate of speed (number of frames per second) at which the picture was taken, and that the picture correctly portrays the object and shows the conditions as they existed at the time the picture was taken, and that it can be exhibited without any distortion or misrepresentation.

Third: In exhibiting motion pictures to the jury, it is possible to have the projecting device stopped at a given point for the purpose of additional examination of a witness or for additional cross-examination of the witness, to explain the picture, if such evidence is competent.

As observed from an examination of the above authorities, when the proper foundation is established by the evidence, motion and sound pictures are competent in evidence.

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