NORTH CAROLINA LAW REVIEW

Volume 7 | Number 4 Article 16

6-1-1929

Admissibility of Photographs as Evidence

John H. Anderson Jr.

mental injury, which would include defamation and a properly limited privacy.[40] This suggestion is hardly practical. Defamation and privacy are closely related and supplementary, but they would hardly make good bedfellows. Any attempt to combine the two immediately meets the difficulties that truth is a defence in defamation and that equity will not enjoin a libel. If these distinctions are kept then there is no advantage to be gained from the fusion; if they are not kept then the fusion results in an upheaval in the law of defamation which will be much more shocking to the legalistic mind than the mere recognition of privacy. And to give a "wrongful publicity" action merely as a limited right of privacy, exclusive of the question of defamation, would serve only to make a somewhat arbitrary division of a general right, would meet with the same difficulties now confronting the growth of the law of privacy, and would probably result in the exclusion of more than one legitimate case unfortunate enough to differ in degree though not in kind. The best solution seems to be to continue along the trail now blazed by authority.

HENRY BRANDIS, JR.

ADMISSIBILITY OF PHOTOGRAPHS AS EVIDENCE

Long ago, the poet Horace spoke of the greater effect of that which is seen than of that which is described by words.[1] There are three ways of appealing to the eyes of the jury: (1) by production of the "primary real evidence",[2] a thing or object for the per-

[40] Note (1910) 24 L. R. A. (N. S.) 991. The argument is that the phrase, "wrongful publicity" presupposes that there are forms of publicity which are not actionable, and thus the field is limited.

[1] "'Aut agitur res in scenis, aut acta refertur,
Segnius irritant animos demissa per aurem,
Quam quae sunt oculis subjecta fidelibus, et quae
Ipse sibi sibi tradit spectator' (Horatius ad Pisones)."
See Warlick v. White, 76 N. C. 175, 179. For effective use of photographs in disputed document cases, see OSBORN, THE PROBLEM OF PROOF (1922). In general, see 2 WIGMORE, EVIDENCE, ch. 37, p. 1344, "Autoptic Proference."

[2] The classification by Bentham of all evidence into real evidence, as the evidence of *things*, and *personal* evidence as that of persons, has inaugurated a long train of errors in the theory of proof: see GULSON, PHILOSOPHY OF PROOF. (2d Ed. 1923). Mr. Gulson says real evidence differs from personal only in the mode in which a fact is laid before the tribunal. "It is evidence obtained by the court through the mere exercise of its own perceptive faculties, while 'personal' as defined by Mr. Best, is the evidence acquired through the perceptions of other persons or witnesses, who report or communicate their experience to the tribunal."

"Primary evidence" of a thing is the term applied by our jurists to the real evidence of its own nature afforded by the production in court of the thing or document itself; any other mode of proving the terms of the document or the nature of the thing being designated by the phrase "secondary evidence": GULSON, PHILOSOPHY OF PROOF. (2 Ed. 1923), p. 258.

sonal examination of the tribunal; (2) by photographs,[3] radiographs, skiagraphs, etc.; (3) by maps,[4] diagrams, models,[5] miniatures. Each requires identification as evidence.[6] Without it, they are valueless, as "testimonial non-entities,"[7] no more admissible than an anonymous letter. As to the accuracy and reliability of transmission from actuality, apart from the oath of the witness identifying them, they vary greatly. The first class is conclusive as to the nature of the object produced; the second is somewhat less accurate, depending upon the nature of the thing reproduced, and the certainty of the process and the skill of the photographer; the items of the third class have no reliability except insofar as the witness explains them and vouches for their correctness.

A foundation for the admission of the ordinary photograph may be laid down in two ways.[8] A witness who is familiar with the per-

[3] Photographs are within the class of real, or immediate, evidence, where a re-production of the thing comes under the cognizance of the senses. WIGMORE, EVIDENCE, §790; 4 JONES, EVIDENCE (2d. Ed. 1926) §1749, p. 3210.

[4] While embodying some elements of "autoptic proference," in that they express a meaning through sense of sight, maps and diagrams are *transmitted* evidence, rather than *immediate* evidence.

Evidence has been divided into "(1) *immediate*, where the inquirer or recipient of the evidence ascertains the proximate fact, *i.e.*, the fact whether principal or evidentiary, which is the actual subject of proof, by means of his own individual perceptions; and (2) *Transmitted* where he ascertains the same fact through the medium of the perceptive faculties of some other person, whose knowledge of the fact is manifested to him by some *voluntary* act; that is to say, either by the utterance of language written or spoken, or by voluntary signs or gestures, or even by general conduct, and behaviour; all which spontaneous manifestations or indications of knowledge may be summed up under the title of 'communications'". GULSON, PHILOSOPHY OF PROOF, p. 122.

[5] Artistic reproductions of situation, or *tableaux vivants*, however, have been excluded by courts admitting photographs of actual scenes of inanimate objects: Rodick v. Me. Cent. R. Co. 109 Me. 530, 85 Atl. 41 (1912); Colonial Refining Co. v. Lathrop, 64 Okla. 47, 166 Pac. 747, L. R. A. 1917 F 890 (1917); Fore v. State, 75 Miss. 727, 23 So. 710 (1898).

[6] WIGMORE, *Evidence* §§790, 793. The authenticity of the first type depends upon oral testimony identifying the thing with the inquiry; authenticity of photographs depends upon both identification of subject matter and verification of the reproduction.

[7] WIGMORE, *Evidence* §792.

[8] Baustian v. Young, 152 Mo. 317, 53 S. W. 921, 75 Am. St. Rep. 462, and note (1899); Louisville v. Brown, 127 Ky. 732, 106 S. W. 795, 13 L. R. A. (N. S.) 1135 (1908); McKarren v. Boston, 194 Mass. 179, 80 N. E. 477, 10 Ann. Cas. 961 (1907); Carlson v. Benton, 66 Neb. 486, 92 N. W. 600 (1902); Alberti v. Railroad, 118 N. Y. 77, 23 N. E. 35, 6 L. R. A. 765 (1889); Dederichs v. Salt Lake, 14 Utah 137, 46 Pac. 656, 35 L. R. A. 802 and note (1896); Selleck v. Janesville, 104 Wis. 570, 47 L. R. A. 691, 80 N. W. 944 (1899).

The extent of the discretion of the trial court in admitting or excluding photographs as evidence does not differ from that which it exercises with respect to other kinds of evidence: note 35 L. R. A. 805. Most cases exclud-

son, place, thing or condition which the picture purports to represent may testify that it correctly portrays this thing. Or the accuracy of the picture may be established by testimony of the photographer, that it is the result of a process mechanically reliable. The term accuracy as here used means only reasonable accuracy for the purpose of informing the jury.[9] As stated by Professor Wigmore, a photograph is somebody's non-verbal testimony;[10] hence on the one hand it can be received only when verified by a witness competent to speak to the facts represented, and on the other hand, the maker is immaterial, provided a competent witness verifies it. Where its general correctness is verified, the photograph is direct evidence of things therein which have not been specifically described by the witness as having come within his observation.[11]

The basic precautionary rules which apply to all evidence apply here as well. The subject matter of the picture must be relevant to the issues, and must not be misleading in nature, or such as to stir the passion or prejudice of the jury.[12] If inspection of the thing itself, produced before the tribunal, is proper, then the photograph is competent.[13] The possibility of the photograph misrepresenting by intentional distortion is of itself no objection to the admissibility, "any more than is the possibility of an oral witness so twisting his tongue as to lie about what he saw."[14] Against possible misrepresentation, intentional or unintentional, an adequate protec-

ing photographs do so because of improper verification or change in surroundings when taken: 55 A. L. R. 1345 note.

[9] Leland v. Leonard, 74 Vt. 496, 112 Atl. 198 (1921).

[10] 2 WIGMORE, *Evidence* §§790, 793 (1904). Clark, C. J., dissenting in Hampton v. R. R. Co., 120 N. C. 534, 27 S. E. 963 (1897) says: "A map not made under the order of the court is really only the declaration, so to speak, of the party making it. Its reliability depends entirely upon his accuracy, and conscientiousness, and is therefore only admissible as his evidence, and because it may convey to the eyes of the jury somewhat more accurately the description which the witness was endeavoring to convey to their ears by his oral testimony."

[11] 10 R. C. L. 357, p. 1155, note 4; Baustian v. Young, *supra* note 7, where it is said: "It is not admissible in evidence at all until it is proven by testimony *aliunde* to be a true photographic print of the thing in question, but after that foundation has been laid, the photograph speaks with a certain probative force in itself."

[12] 2 WIGMORE. *Evidence* §§1154-59 (1904). In Brown v. Mutual Life Ins. Co., 65 Mich. 306, 32 N. W. 610, 8 Am. St. Rep. 894 (1887), the court rejected a photograph offered to show good health, taking judicial notice that a photographer's business was to make the sitter appear at his best. If the true situation or nature of the object is not apprehensible from observation of the photograph, oral testimony may be required in explanation.

[13] The granting or refusal of a view by the jury has been within the sound discretion of the trial court. Jenkins v. R. R., 110 N. C. 438, 15 S. E. 193 (1892); State v. Perry, 121 N. C. 533, 27 S. E. 997 (1897).

[14] 2 WIGMORE, *Evidence* §792 (1904).

tion is a careful cross-examination regarding the process by which the picture was made.[14]

As against this background, the North Carolina court says that a photograph is not admissible as "substantive evidence," or even "as evidence," but "merely for the purpose of allowing the witness to illustrate his testimony."[15]

In *Honeycutt v. Cherokee Brick Co.*,[15] photographs of the machine, upon which it was alleged the deceased was killed, and the surroundings and attachments thereof, were offered in evidence. There was evidence tending to show that these photographs correctly represented the machine and the surroundings, and they were received in evidence generally, over the objection (which was general) of the defendant. *Held*: The admission of the photographs "as substantive evidence" constituted error. New trial.

Then what is evidence?[16] All three of the above means of appealing to the jury constitute evidence. The map or diagram is expressive only when coupled with the explanation of the witness; it is of evidentiary value as to the character of its subject only as a part of the witness's testimony, similar to a memorandum admitted as "past recollection recorded."[17] When used, it comes before the jury "as evidence," nevertheless. A photograph purporting to represent the actual situation or object existing at the time of the event or injury complained of, is self-explanatory. While adopted as the testimony of the witness, it goes far beyond any possible oral description.

Then is a photograph "substantive evidence"? The first use of this term was to distinguish evidence offered upon an issue in the case from impeaching evidence.[18] If the photograph is relevant at all here, it is material upon the issue in the case.[19] As an attempt

[15] Honeycutt v. Cherokee Brick Co., 196 N. C. 556, 146 S. E. 227 (1929); Kepley v. Kirk, 191 N. C. 690, 132 S. E. 788 (1926), involving use of a map.

[16] "Evidence is any matter of fact which is furnished to a legal tribunal otherwise than by reasoning or a reference to what is noticed without proof—as the basis of inference in ascertaining some other matter of fact," Thayer, *Presumptions and the Law of Evidence* 3 Harv. Law Rev. 142 (1889). See 1 WIGMORE, EVIDENCE §1: "Any knowable fact or group of facts not a legal or a logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a conviction, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law or of logic, on which the determination of the tribunal is to be asked."

[17] WIGMORE, EVIDENCE §791, note 2.

[18] Medlin v. Co. Board of Education, 167 N. C. 239, 83 S. E. 483 (1914).

[19] A possible misconception of the photograph as evidence is indicated by the headnote in the official report of Honeycutt v. Brick Co., *supra* note 14, where it is stated that the error of lower court was "admission of such photo-

to relegate photographs from the superior realm of *immediate* evidence, to the inferior plane of *transmitted* evidence, the limitation is of no substantial effect.[20] Possibly, it is a distinction between the formal introduction of a photograph as part of the record,[21] as a document, and the informal production to the jury by the witness, the latter being the usual practice. It is to be observed that the admission of photographs under the view prevailing in other jurisdictions, without the distinction between "substantive" and "illustrative" evidence, would not be admitting them as "orginal" or "independent" evidence. Although appealing to the senses, their character as secondary evidence requiring verification can not be lost sight of.[22] If the expression of our court is used in the sense that the photograph requires authentication by a witness as a correct representation, then its use is intelligible; but there is no reason to require that the jury be told about this, because when admitted it is apparent of all men that it has been authenticated.

Probably in the minds of the court is the idea that the jury should be told of the possibility of error in transmission, in reproduction of the situation or object, since the man in the street might assume the photograph was necessarily accurate.[23] This objection, however,

graph as substantive evidence of the master's failure to supply his servant with safe tools." The photograph is proper evidence of the nature of the machine, and if the defect is apparent from a view of the machine, the picture is proper to show this fact. Cf. Baustian v. Young, *supra* note 7.

[20] *Supra* note 4; GULSON, PHILOSOPHY OF PROOF, p. 140: "The true test of the distinction between *immediate* and *transmitted* evidence—between facts that are either actually perceived or legitimately inferred from others that are perceived, and facts that are only communicated—is the question, whether, in each case, the fact which is the subject of our inquiry be, or be not, as it were, *vitiated* by passing in its course to us through the mind (i.e., from the knowledge to the will) or some other rational agent."

[21] In Angelo v. Winston-Salem, 193 N. C. 207, 209, photographs of the market under consideration were "filed as exhibits," reproduced in the report and said to "fully corroborate the statements" of the court as to equipment of market. No jury was had here, however. Also in Parker v. R. R., 181 N. C. 95, 100, 106 S. E. 755 (1921), the railroad crossing scene was reproduced and apparently used before the jury without objection.

[22] But such misconception of the nature of the photograph as evidence is indicated in Hampton v. R. R., *supra* note 9, where it is said: ". . . it seems to have been altogether proper to exclude the photograph whether introduced as *original, independent* evidence or as an unauthorized map." See *supra* note 2; WIGMORE, EVIDENCE §790. Photographs are never primary or original evidence except where the issues turn about the photograph as an object in itself, such as in a prosecution for sale of obscene pictures, as in People v. Muller, 96 N. Y. 408, 48 Am. Rep. 635 (1884).

[23] Of course, they are never conclusive or unimpeachable: Higgs v. Minn. St. P. and S. St. M. Ry. Co., 16 N. D. 446, 15 L. R. A. (N. S.) 1162, 114 N. W. 722, 15 Anno. Cas. 97 note (1908), rest upon human testimony and unverified carry no conviction as to correctness; Baustian v. Young, *supra* note 7.

goes to the weight of the photograph as evidence, rather than to its admissibility. If that be the meaning, the rule ought to require explicit caution by the court to the jury, upon request to that effect, as in the case of testimony of interested parties. The omission to give such caution, unless specifically requested, ought not be grounds for reversal.

The origin of the expression "not admissible as substantive evidence but merely as illustrative of the testimony," in our cases, is vague. The first case involving the admissibility of photographs, excluded them from evidence because taken two years after the time of the event under inquiry.[24] In the next case, photographs of the deceased child before and after injury, but before death, were admitted generally without any instructions that they were not substantive evidence.[25] Also, photographs of cattle at the depot of the defendant were held "admissible in evidence when shown to be a true representation and to have been taken under proper safeguards."[26] It does not appear that these views were repudiated by the court before the case of *Honeycutt vs. Brick Company.*[27] The expression later appears in cases where the admission of photographs as "illustrative" evidence was *approved,* there being intimations by the court that they would not have been admissible for any other "purpose".[28] It is probable that the expression was originally used

The fear of the courts in this direction is indicated by Prof. Wigmore: "Does it purport to be a picture of the place of a murder? We look at it with an interest based on the unconscious assumption that it *is* that house. In short, we unwittingly give the document the credit of speaking for itself; though no human being has yet spoken for it. Now this tendency has to be sternly repressed; and . . . so it is here that the tendency has so frequently to be struck at by judicial rulings." WIGMORE, EVIDENCE §790.

[24] Hampton v. R. R., *supra* note 9, Clark, C. J. dissenting.

[25] Davis v. R. R., 136 N. C. 115, 48 S. E. 591 (1904).

[26] Bane v. R. R., 171 N. C. 328, 88 S. E. 477 (1916).

[27] *Supra* note 15.

[28] In Pickett v. R. R., 153 N.C. 148, 69 S. E. 81 (1910), where inquiry was as to effect of diversion of water upon land, witness was allowed to use photo taken after change of course of the water, to describe the condition of the land previous to the taking of the picture.

Hoyle v. Hickory, 167 N. C. 619, 83 S. E. 758 (1914): "If the lot continued to be washed by surface water, it was competent to be shown by witnesses, with aid of picture, reproduced exactly like the true situation. It might be impossible to illustrate it, or to give the jury a correct idea of the damage, if any, in any other way."

In State v. Jones, 175 N. C. 709, 95 S. E. 576 (1918), the photograph purported to represent how metal parts found on defendant's premises *might be assembled* to form a whiskey still, the arrangement requiring explanation to become fully intelligible to jury. Here Clark, C. J., in opinion of the court says: "A trial is a search for truth, and no court will exclude testimony that will be an aid to that end, whether it is oral testimony, a photograph . . . subject

in reference to diagrams which were unintelligible to the jury, or meaningless, without explanation of the witness; and the court applied the expression to the use of photographs generally without adverting to the fact that some photographs are intelligible without explanation. The photographs introduced in the cases where is found this limitation, either were not representations of the actual situations or were not intelligible apart from testimony of the witness. Notwithstanding intimations in these cases, the court admitted X-ray photographs as evidence for the consideration of the jury in a recent decision, "upon the same basis as photographs."[29]

It is submitted that the photographs in the *Honeycutt* case were properly authenticated, and warranted consideration by the jury as to the nature of the machine upon which it was alleged deceased was killed. The instructions to the jury that they were not "substantive evidence," the omission of which caused a reversal, it is believed, would have been entirely without useful influence upon the jury's consideration of them.

JOHN H. ANDERSON, JR.

ADVISORY OPINIONS IN NORTH CAROLINA

The Senate of North Carolina forwarded a resolution to the Supreme Court of North Carolina, requesting advice on the constitutionality of two bills proposing changes in the system of Superior Courts. A letter in reply, signed by the Chief Justice, expressed the view that the members of the Court would be willing to follow the precedent of their predecessors in giving opinions to the legisla-

to . . . (best evidence rule) . . . and cross-examination and opposing evidence."

State v. Kee, 186 N. C. 473, 119 S. E. 893 (1923), involved map drawn on floor, which it was said was not "evidence."

State v. Lutterloh, 188 N. C. 412, 124 S. E. 752 (1924), photograph of reconstructed scene admissible as "illustrative evidence," explanation of the reconstructed scene being necessary by witness.

State v. Mitchen, 188 N. C. 608, 125 S. E. 190 (1924), admission as "illustrative evidence" approved.

In Elliott v. Power Co., Varsar, J., said: "It was not error for the court to allow the jury to consider the pictures for this purpose (explaining witness's testimony) and *to give them such weight if any, as the jury may find they are entitled* in explaining the testimony." (Italics ours).

State v. Mathews, 191 N. C. 378, 131 S. E. 743 (1926), is probably the strongest suport for Honeycutt v. Brick Co., *supra* note 14. In that case, however, the photographs were of *tableaux vivants*, the reconstructed scene of the crime, the admission of which would have been held error by courts which admit photographs of the actual, unreconstructed scenes, *supra* note 5.

[29] Lupton v. Express Co., 169 N. C. 675, 86 S. E. 583 (1915). See 2 WIGMORE, EVIDENCE §795; Wilson, *The X-Ray in Court*, 7 CORNELL L. QT. 203.