

1-1957

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Recommended Citation

John E. Mouser and James T. Philbin, *Photographic Evidence--Is There a Recognized Basis for Admissibility*, 8 HASTINGS L.J. 310 (1957).
Available at: https://repository.uchastings.edu/hastings_law_journal/vol8/iss3/5

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PHOTOGRAPHIC EVIDENCE—IS THERE A RECOGNIZED BASIS FOR ADMISSIBILITY?

By JOHN E. MOUSER AND JAMES T. PHILBIN

The admissibility of photographs in evidence is well established; the basis of admissibility appears to be something less than well established. The most clearly articulated basis for the admittance of photographs in evidence is given by Wigmore in his analysis of a photograph as "a witness' pictured expression of the data observed by him."¹ The majority of decisions dealing with the admissibility of photographs in evidence do not fully recognize the pictured expression theory as expounded by Wigmore, and are far from clear as to what theory they do recognize. This comment will review, primarily, the California cases that appear to conflict with the pictured expression theory, and will make a brief inquiry into the possibility that a photograph may tell its own story.

A Photograph as the Pictured Communication of a Qualified Witness

If, as Wigmore states, a photograph is "a witness' pictured expression of the data observed by him,"² it follows logically that in order to be admissible it must be made a part of some qualified person's testimony. Wigmore accordingly so states: ". . . [I]n brief, it must appear that there is a witness who has competent knowledge, and that the picture is affirmed by him to represent it."³

Although there has been neither an express repudiation nor a clear recognition of a pictured expression theory by the California courts, there are occasional decisions that tend to support his analysis. Generally, however, the California courts base admissibility on the somewhat vague generality that if it is shown that the photograph is a faithful reproduction of what it purports to represent, it is admissible.⁴ No clear definition has been given as to what constitutes a showing that the photograph is a faithful reproduction of what it purports to represent, but those decisions that allow a witness, not necessarily the photographer,⁵ to establish that the photograph is a faithful reproduction are in accord with the pictured expression theory. However, no cases have been found that specifically impose the requirement that there must be a qualified witness as a requisite for introduction of photographs in evidence. It seems that the California courts recognize

¹ 3 WIGMORE, EVIDENCE § 792 (3d ed. 1940).

² *Ibid.*

³ *Id.* at § 793.

⁴ *Berkovitz v. American River Gravel Co.*, 191 Cal. 195, 201, 215 Pac. 675 (1923); *People v. Ah Lee*, 164 Cal. 350, 352, 128 Pac. 1035 (1912); *People v. Cunna*, 107 Cal. App. 2d 382, 387, 237 P.2d 12 (1951); *People v. Crooms*, 66 Cal. App. 2d 491, 496, 152 P.2d 533 (1944); *People v. Glab*, 15 Cal. App. 2d 120, 124, 59 P.2d 195 (1936); *Sim v. Weeks*, 7 Cal. App. 2d 28, 40, 45 P.2d 350 (1935).

⁵ *Holland v. Kerr*, 116 Cal. App. 2d 31, 37, 253 P.2d 88 (1953).

that the pictured expression theory is one way in which admissibility of a photograph may be established.

Indicative of the fact that the California courts recognize some other basis as well, are other decisions, the most outstanding of which is *People v. Doggett*.⁶ In that case a husband and wife were convicted of a violation of section 288a of the California Penal Code, which makes criminal all acts of oral sexual perversion. The only evidence introduced at the trial to support a conviction was a photograph of the husband and wife in the commission of the alleged act. Supporting witnesses testified only as to the probable authenticity of the photographs without having perceived the commission of the alleged act. Other cases that are contra to the pictured expression theory are those that say it is within the discretion of the trial judge to determine whether the photograph is a correct representation of the object or scene in question.⁷ Wigmore makes it plain that the objection that a photograph may misrepresent goes only to its credibility and not to its admissibility: "Occasionally a Court is found excluding a photograph as being misleading; but this is a begging of the very question which the jury have to decide; it would be as anomalous as if the judge were to order a witness from the stand because he was believed by the judge to be lying. Perjury cannot be thus determined in advance by the judge,—not more for photographic than for verbal testimony."⁸

In order to better point up another area of conflict with the pictured expression theory, it is necessary to go to the decisions of other jurisdictions. Scott groups certain decisions under the heading of "Weight and Conclusiveness"⁹ that would seem to contradict the pictorial expression theory in that a mere difference in the form of a witness' expression, from verbal to pictorial, should not increase credibility to the extent that pictorial expression testimony should, because of its form, overcome all verbal testimony that is contrary. To speak of "conclusiveness," or even "weight," except to the extent that some added weight might be given because of clarity of expression, would indicate that these courts regard photographic evidence as something more than a "pictured expression." The cases that Scott cites as giving conclusive effect to photographs do not discuss the basis for admissibility, but seem concerned primarily with the effect to be given photographic evidence once it is admitted. The language used does indicate that the courts are *not* cognizant of the pictured expression theory. For example:

"What may be seen from a certain place under admitted or undisputed conditions and circumstances, and the view or line of sight under such cir-

⁶ *People v. Doggett*, 83 Cal. App. 2d 405, 409, 188 P.2d 792 (1948).

⁷ *People v. Cunna*, 107 Cal. App. 2d 382, 387, 237 P.2d 12 (1951); *People v. Bundte*, 87 Cal. App. 2d 735, 747, 197 P.2d 283 (1948); *Miller v. Silvester*, 140 Cal. App. 345, 35 P.2d 387 (1934).

⁸ 3 WIGMORE, EVIDENCE § 792 (3d ed. 1940).

⁹ SCOTT, PHOTOGRAPHIC EVIDENCE § 607 (Supp. 1955).

cumstances is a *physical fact*, clearly and *unequivocally* demonstrable by photographic evidence."¹⁰ (Emphasis added.)

The few California decisions¹¹ that have touched on the subject of conclusiveness have held that photographs were not conclusive, but the treatment has been so general in these cases that it would be difficult to say whether the inconclusive nature of the photographs was attributed to the particular facts of the case or whether the inconclusiveness was regarded as an inherent characteristic.

A Properly Verified Photograph as a Silent Witness

In the *Doggett* case, the photographs were the only "witnesses" that testified of the commission of the alleged act. This poses the question, may a properly verified photograph tell its own story? That it may to some extent, seems implicit in decisions from other jurisdictions that have characterized a photograph as "the unvarnished truth,"¹² the "physical facts,"¹³ and as a "silent witness."¹⁴ In addition, legal writers¹⁵ and a judges' dicta¹⁶ have discussed the possibility of a photograph telling its own story. And even where it purports to be nothing more than the non-verbal testimony of a qualified witness it should be recognized that to a certain extent a photograph tells its own story. Since a photograph sees in more detail, remembers more accurately, and transmits its message more clearly than a human witness, it would seem in almost every case to testify to additional facts not recounted by its sponsor.

One example of photographs, which, when properly verified, may tell their own story are x-ray photographs. The admissibility of this class of photographs is well established.¹⁷ After the person x-rayed is identified, and testimony establishes that proper equipment and technique were employed, the expert witness testifies as to the effect of the condition reflected by the x-ray without ever having actually perceived the particular bone structure or other internal conformation.

Although no case has been found, somewhat analogous situations would exist where pictures were taken at night with an infra red flash bulb when the photographer could not perceive the objects photographed, or a picture which is automatically taken when someone actuates some type of photoelectric or mechanical trip mechanism. In such situations the time and place

¹⁰ *Lohmann v. Wabash Ry. Co.*, 364 Mo. 910, 269 S.W.2d 885, 891 (1954).

¹¹ *Elford v. Hiltabrand*, 63 Cal. App. 2d 65, 72, 146 P.2d 510 (1944); *Vaca v. Southern Pacific Co.*, 91 Cal. App. 470, 473, 267 Pac. 346 (1928).

¹² *Hartley v. A. I. Rudd Lumber Co.*, 282 Mich. 652, 267 N.W. 712 (1937).

¹³ *Lohman v. Wabash Ry. Co.*, 364 Mo. 910, 269 S.W.2d 885 (1954); *Carner v. St. Louis-San Francisco Ry. Co.*, 338 Mo. 257, 89 S.W.2d 947 (1935).

¹⁴ *Watkins v. Reinhardt*, 293 Ala. 243, 9 So.2d 113 (1942).

¹⁵ MCKELVEY, EVIDENCE § 381 (5th ed. 1944); Gardner, *The Camera Goes to Court*, 24 N.C.L. REV. 233 (1946).

¹⁶ Farris, C.J.S.C. in *Army & Navy Dept. Store (Western) Ltd. v. Retail Wholesale & Dept. Store Union Local No. 535*, 2 D.L.R. 850, 853 (Can. Sup. Ct. 1950).

¹⁷ 3 WIGMORE, EVIDENCE § 795 (3d ed. 1940); Scott, *X-ray Pictures as Evidence*, 44 MICH. L. REV. 773, 788 (1944).

could be ascertained with a high degree of accuracy, and the view of the object or scene portrayed would seem highly reliable. If such photographs were admitted in evidence, they would have to speak for themselves because of the absence of perceptive witnesses as to the scene or object portrayed. Just as in x-ray photographs, there is an absence of perceptive witnesses. X-rays are admitted into evidence by the courts with little or no recognition of this aspect.¹⁸

The foregoing discussion assumes the photograph has been properly verified. Wigmore, in his logical exposition of the pictured expression theory, states that a qualified witness need only say the photograph represents the facts as he saw them, and the photograph is thereby properly verified.¹⁹ Obviously where there is no witness something other than a qualified witness must be used as a standard, and the question of proper verification may become quite involved. X-ray photographs again serve as a good illustration. It is suggested²⁰ that they should be supported by testimony as to: (1) the person x-rayed, (2) physical condition at the time of the x-ray as compared to the time in issue, (3) proper equipment and operating technique, and (4) an explanation of the x-ray procedure employed. That courts are apt to admit x-rays with one or more of the foregoing requirements missing²¹ seems to be indicative that no one basis for admissibility is clearly recognized. Photographs in general are not taken under circumstances as controlled as are x-ray photographs, so that equipment, technique and manner would require more careful examination in order to properly verify the picture. Scott in his exhaustive work, *Photographic Evidence*, treats in great detail the various methods and techniques which may be used to produce false representations by photographs.²² Some recognition of the possibility of photographic misrepresentation can be found in the California cases.²³

Just what would amount to proper verification has never been clearly defined by the courts.²⁴ The variety of statements in the ALR annotation²⁵ would seem to indicate that the courts are making rules to fit the occasion, rather than starting with a basic theory and formulating a logical set of rules.

¹⁸ *Bruce v. Western Pipe & Steel Co.*, 177 Cal. 25, 27, 169 Pac. 660 (1917); *Wilburn v. U.S. Gypsum Co.*, 16 Cal. App. 2d 111, 112, 60 P.2d 188 (1936); *De Martini v. McDonnell*, 14 Cal. App.2d 405, 406, 58 P.2d 170 (1936); *Sim v. Weeks*, 7 Cal. App. 2d 28, 40, 45 P.2d 350 (1935).

¹⁹ 3 WIGMORE, EVIDENCE § 793 (3d ed. 1940).

²⁰ SCOTT, *op. cit. supra* note 17.

²¹ *Ibid.*

²² See generally SCOTT, PHOTOGRAPHIC EVIDENCE (1942).

²³ *People v. Dabb*, 32 Cal. 2d 491, 498, 197 P.2d 1 (1948); *Harmon v. San Joaquin Light & Power Co.*, 37 Cal. App. 2d 169, 174, 98 P.2d 1064 (1940).

²⁴ 9 A.L.R.2d 899, at 904 (1950).

²⁵ 9 A.L.R.2d 899 (1950).

Conclusion

The failure of the courts in the past to recognize the possibility of a photograph telling its own story may be ascribed to various reasons. In the first place, photographs were first offered into evidence before the photographic process was very well developed, so that the sponsoring witness was also testifying to the accuracy of the photographic process.²⁶ In addition, the overwhelming number of photographs are undoubtedly sponsored by individuals who were also eye-witnesses to the scene or object depicted therein. And finally the lack of opportunity to cross-examine the "silent witness" may have influenced the courts.

Where the photograph has been verified by an eye-witness, the practical result seems the same regardless of which theory of admissibility is adopted. The photograph is providing the testimony, and to say it is only the pictured testimony of a witness does not change the result. It is when the problem of a "no-eyewitness" picture comes up that the theories work a different practical result. A strict adherence to the pictured expression theory would keep out some highly reliable evidence, *e.g.*, x-rays. However, it has the advantage of easy application because of the development of law concerning the admissibility of verbal testimony. What theory the California courts will adopt will probably not be answered in any detail until they are faced with more *Doggett* type situations.

²⁶ SCOTT, PHOTOGRAPHIC EVIDENCE § 1 (1942).