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THE USE OF POSED PHOTOGRAPHS OF MOVABLE OBJECTS
OR PERSONS AT THE TIME OF AN ACCIDENT;
A PROPOSED CHANGE

"Photography . . . is not merely one of those subjects every lawyer should understand but probably doesn't; it is an essential medium for the presentation of evidence that all lawyers should master."¹

Introduction

Since the inception of practical photography in 1839,² it has undergone many revolutionary changes and far-reaching applications which would provide a sufficient source of material for a monumental treatise. Therefore, to provide a workable topic, this note has been narrowly restricted to a consideration, criticism, and challenge of an existing rule relating to the use of certain posed photographs as evidence in civil trials.

In General

A photograph, like a map or diagram, is a "non-verbal mode of expressing a witness' testimony" and, for evidential purposes, is simply nothing except so far as it has a human being's credit to support it.³ Consequently, as a preliminary foundation for the admission of photographs, they must be "verified"⁴ by a testimonial sponsor as correctly expressing his observation and recollection of the data in question.⁵ In addition it must be relevant and material, i.e., the subject matter of the photograph must tend to establish or disprove facts on trial, and assist a witness in explaining his testimony so that the jury may better understand the case.⁶

It may also be well to note that, although the cases have not made it clear, photographs are admissible either to *illustrate* testimony, or to stand as independent evidence having its own probative force or value.⁷ Photographs have been distinguished⁸ from maps, diagrams and models to the extent that: (1) the average juror will accept a photograph as correct on blind faith (as an accurate machine-made

¹ Scott, *Photographic Evidence*, Preface p. v (1942).

² *Encyclopedia Britannica*, Vol. 17, p. 804 (1956).

³ 3 *Wigmore*, *Evidence* sec. 790 at 174 (3d ed. 1940).

⁴ Annot. 9 *A.L.R.* 2d 899 (1950).

⁵ 3 *Wigmore*, *supra* note 3, sec. 793.

⁶ Scott, *supra*, note 1, sec. 602.

⁷ Gardner, "The Camera Goes to Court," 24 *N.C.L.R.* 233, 239 (1945-1946); see also 3 *Duke B.J.* 60 (1952-1953); cf. 9C *Blashfield*, *Cyclopedia of Automobile Law and Practice*, sec. 6353 (1954).

⁸ Scott, "Medicolegal Photography," 18 *Rocky Mtn. L. R.* 173, 189-190 (1945-1946).

reproduction of nature) whereas he knows that a map or drawing is entirely the creation of some man's mind and hand; (2) the mirror-like appearance of a photograph makes it capable of inciting passion and prejudice in the jury, while a lifeless map or drawing of the same object rarely has this effect; (3) a photograph has also been accorded the attribute of being an artificial eyewitness in that it speaks with a certain probative force itself.

It must be remembered that a photograph is not infallible; among the more common sources of photographic misrepresentation are the position of the camera, type of lens used, lighting, retouching, reversed negatives, and double printing.⁹ But the remedy for such abuses is not in excluding honest photographs; we do not dispense with all witnesses because some are perjurers.¹⁰ An objection to the use of posed photographs because of the possibility of misrepresentation should go "to the weight of the photograph as evidence, rather than to its admissibility."¹¹ To illustrate by way of analogy, in one recent case an expert witness testified that,¹² in his opinion, the Harger Drunkometer (alcohol breath) test was accurate, but admitted that there were others who disagreed with him. It was held that objections to the extent to which the scientific test is accepted goes to the weight of the evidence, rather than its admissibility.

The Problem

There is a conflict of authority as to the admissibility of posed photographs at the scene of a highway collision showing vehicles replaced in their tracks to illustrate positions at the time of the accident, where they are intended to represent the theory of one party as opposed to the other when there is a dispute as to the correct position of the colliding vehicles.¹³ The same conflict obtains in cases involving accidents between automobiles and pedestrians,¹⁴ or trains and automobiles.¹⁵ The same is true where an injured person or his representative is placed in the position the injured man allegedly occupied at the time of the accident.¹⁶

"Accuracy of reproduction" would appear to be the rule-of-thumb test of admissibility of posed photographs illustrative of the testimony

⁹ Gardner, "The Camera Goes to Court," 24 N.C.L.R. 233, 236-238 (1945-1946).

¹⁰ *Id.* at 235.

¹¹ 7 N.C.L.R. 443, 447-448 (1928-1929); see also, Busch, *Law and Tactics in Jury Trials*, sec. 265 (1949).

¹² *McKay v. State*, 155 Tex. Crim. Rpts. 416, 235 S.W. 2d 173 (1950).

¹³ Scott, *supra* note 1, sec. 671 at 587.

¹⁴ *Id.*, sec. 672 at 591.

¹⁵ *Id.*, sec. 676 at 607.

¹⁶ *Id.*, sec. 679 at 616.

of witnesses provided a proper foundation has been laid by preliminary testimony showing that the objects and situations portrayed are faithfully represented.¹⁷ Cases holding that posed photographs are inadmissible because they portray a hypothetical situation or a theory of one of the parties, as distinguished from the actual situation, merely seem to apply this "accuracy test."¹⁸ This is a succinct summary as to the status of posed photographs in Kentucky, where the courts permit the use of posed photographs when they depict conditions substantially as they were, and not according to the theory of one party or the other.¹⁹

[I]t is important that the jury shall have as clear an understanding of the situation as can be furnished, and relevant information may be conveyed to them by pictures or models that they can see and examine. . . . [W]e can think of no sound reason why a photograph that furnished an accurate reproduction of objects and places and things that are germane to the matter being investigated are not as competent as the other aids (maps, models and diagrams) that we have mentioned.²⁰

However, where a photograph is introduced to show the precise position of an injured party or the location of a moving or movable object at the time of an accident, the photograph is deemed self-serving not corroborative, and therefore incompetent.²¹ While only two Kentucky cases have been found to be directly in point, their influence may have restricted the subsequent growth and development of this phase of the law.

*Welch v. Louisville and N.R. Co.*²² was a personal injury action wherein plaintiff sought to recover damages for injuries caused by flying debris from a railroad collision. Plaintiff secured a photographer to take her picture where she was allegedly standing on a nearby public road at the time when she was struck, but her testimony on trial was to the effect that she was *by, not on*, the road at the time of the accident. The court held that the picture was inadmissible since it was essentially a self-serving declaration, and also hearsay on the part of the photographer, as if he had taken the stand and testified as to where plaintiff was standing at the time of the accident. This, it is submitted, was "erroneous reasoning to reach a proper result"

¹⁷ Annot. 19 A.L.R. 2d 877, 880 (1951), supplementing 27 A.L.R. 913 (1923).

¹⁸ *Id.*, fn. 1, at 882.

¹⁹ *Louisville and N. R. Co. v. Bell*, 276 Ky. 778, 125 S.W. 2d 239 (1939); *Cincinnati, N. O. & T. P. Ry. Co. v. Duvall*, 263 Ky. 387, 92 S.W. 2d 363 (1936); *Bowling Green Gaslight Co. v. Dean's Ex'x.*, 142 Ky. 678, 134 S.W. 1115 (1911).

²⁰ *Bowling Green Gaslight Co. v. Dean's Ex'x.*, 142 Ky. 678 at 686, 134 S.W. 1115 at 1118 (1911).

²¹ *Nunnolley's Adm'r. v. Muth*, 195 Ky. 352, 242 S.W. 622, 27 A.L.R. 910 (1922); *Welch v. Louisville and N. R. Co.*, 164 Ky. 100, 173 S.W. 338 (1915).

²² 163 Ky. 100, 173 S.W. 338 (1915).

under the facts. The picture was tendered as part of the plaintiff's own testimony, not that of the photographer, and was no more self-serving than if she had orally testified as to what the picture portrayed. In reality, the photograph should have been excluded because it depicted conditions inconsistent with the plaintiff's own testimony and, therefore, could not even serve for purposes of "illustration." While the photograph was made out of court, it was not, in effect, a "statement" made out of court so as to be excluded under the self-serving declaration rule.²³

In *Nunnelley's Adm'r. v. Muth*,²⁴ plaintiff's intestate was killed after being struck by defendant's truck as he, the decedent, started to cross the street from behind a parked automobile. A witness of the tragedy later returned to the scene with a photographer, and pictures were taken to indicate the witness' conception of the respective locations of the automobile and truck when the decedent first became visible to the truck driver. The witness also placed a person in the position which he allegedly occupied, as well as one where the decedent allegedly stood. Inasmuch as there was a diversity of opinion as to where the decedent stood in reference to the truck when he started to cross the street, the court embraced the *Welch* decision and declared that the photograph was properly excluded. The court reasoned that it amounted to a self-serving, non-corroborative, ocular demonstration of the witness' conception of the location of the injured party, or other moving objects, at the time of the accident, i.e., it was inadmissible because it represented the theory of one side, as opposed to that of the other.

No two witnesses, even though similarly situated, ever "see" an accident in an identical manner, much less can they report it in the same manner when called as witnesses; training, memory capacity, emotion, awareness and personality are variable components of the observing mind.²⁵ Conceding that the posed photographs in the *Nunnelley* and *Welch* cases were in accord with, and represented the theory of, one party as *opposed* to the other, they did not represent a hypothetical situation as such, but rather, the actual situation as seen by a witness who verifies the picture as an accurate presentation of what he saw. To that extent, any verified posed photograph is an accurate reproduction of a witness' actual observation, illustrating facts within his knowledge, and not mere conclusions, opinion or hearsay. To hold that a photograph is inadmissible merely because it

²³ *Infra*, p. 121.

²⁴ 195 Ky. 352, 242 S.W. 622, 27 A.L.R. 910 (1922).

²⁵ I Belli, *Modern Trials*, sec. 4 at 16 (1954).

represents the theory of one party as opposed to another apparently disregards other features pertaining to a party's "theory", viz., (1) if two eye-witnesses observe the same accident, one pursuant to the plaintiff's theory, and the other according to the defendant's theory, both witnesses would be able to testify as to what they saw, although their respective testimony represents the theory of one party as opposed to the other, and the jury would then "find the facts" by weighing the admitted evidence according to the credibility accorded each witness; (2) each party to a suit has a right to have the jury instructed so as to present his theory and case where the evidence or facts tend to sustain them.²⁶

A "self-serving" declaration, within the rule excluding such declarations, is one made by a party in his own interest at some place and time out of court, but *does not* include testimony which he gives as a witness at the trial.²⁷ Although the *Welch* case involved a photograph offered by a party to the action, it was of no evidential merit until "sponsored" at the trial by some competent witness²⁸ and would appear to come within the exception to the "self-serving" declaration rule, as being part of the party's testimony given at the trial. The photographs in the *Nunnolley* case were not even part of the testimony of a party to the action, but rather, by a witness who merely observed the tragedy.

Undoubtedly, the holding in the *Nunnolley* case was proper in one respect; the witness, whose pictures were tendered, died before the trial occurred and was therefore unable to be cross-examined. Aside from that, however, when a witness has a picture taken to illustrate his version of the location of persons or moving objects at the time of an accident, even though such locations are contested, there appears to be no sound reason for excluding that which has been preserved on film, while admitting the same information by oral testimony, provided: (1) general surroundings depicted by the photograph are substantially the same as those at the time of the accident; (2) the photograph will aid the jury in understanding the witness' testimony and descriptions; (3) there is an opportunity to cross-examine the witness as to what he has said and shown.

Our trials are based on the adversary system, and a conflict of oral testimony is to be expected. Why should more be required in the use of posed photographs? To elicit in detailed testimony that which

²⁶ *Maupin v. Baker*, 302 Ky. 411, 194 S.W. 2d 991 (1946); *Cincinnati N. O. & T. P. Ry. Co. v. Terry*, 267 Ky. 707, 103 S.W. 2d 65 (1937); *Equitable Life Assur. Soc. of the United States v. Green*, 259 Ky. 773, 83 S.W. 2d 478 (1935).

²⁷ *Toney v. Raines*, 224 Ark. 692, 275 S.W. 2d 771 at 774 (1955); *Hill v. Talbert*, 210 Ark. 866, 197 S.W. 2d 942 at 944 (1946).

²⁸ 3 *Wigmore*, supra note 3 at 174.

might readily be shown on a photograph could unduly prolong the trial and cause the jury to become bored and disinterested. One picture is worth a thousand proverbial words, and may well expedite legal proceedings while maintaining the jury's "enthusiasm." Who hasn't known individual jurors to disregard what transpires from time to time?

While the proposition has no direct support, it is reasonable to infer²⁹ that a witness may use an accurate photograph of an accident scene to indicate or point out the location of persons or things, even though such location is controverted. Conceding this much, it is difficult to see why the same matter should not be incorporated within the photograph itself.

Finally, the mere fact that photographs may impress the jury more strongly than other forms of evidence, and thereby emphasize one party's version of the facts somewhat, is by no means a conclusive argument for their exclusion. No one could reasonably contend that a persuasive advocate or personable witness should be excluded from a trial merely because of their peculiarly impressive attributes. By recognizing posed photographs for what they are, viz., a means to illustrate otherwise competent evidence, it would seem that such material, used merely to illustrate the testimony of a witness, need not be subjected to the strict proof of accuracy required for that which is offered as independent evidence,³⁰ especially when the jury is properly instructed on the matter. There is a distinction between the use of photographs as an independent piece of evidence to prove a particular fact, and those used merely to supplement, illustrate and aid in the presentation of a witness' testimony for a better understanding by the court and jury.

Conclusions and Recommendations

Realizing some of the prospective dangers which might inhere in the unbridled use of posed photographs, it is nevertheless believed that they could and should be used more frequently to facilitate and illustrate presentation of evidence whenever and wherever practicable. It is believed that much of the danger arising from the use of posed photographs could be alleviated by borrowing from some of the principles enunciated for the taking of Depositions upon Oral Examinations³¹ and/or Depositions of Witnesses upon Written Interroga-

²⁹ Nolan v. Commonwealth, 311 Ky. 852, 226 S.W. 2d 27 (1950); Sund v. Keating, 43 Wash. 2d 36, 259 P. 2d 1113 (1953); Desimone v. Mutual Materials Co., 23 Wash. 2d 876, 162 P. 2d 808 (1945).

³⁰ See Ross v. McLain, 246 S.W. 2d 1012, 1013 (Ky. 1952).

³¹ Ky. R. Civ. P., Rule 30.

tories.³² To illustrate, when it is desired to make *ex parte* posed photographs, timely notice should be given to all other parties to the action;³³ after notice is served and a motion seasonably made, the court in which the action is pending may, upon a good cause shown, make such orders as justice requires,³⁴ and the person who is to direct the placing of the objects for photographs could be put on oath so that his "visual testimony" may be recorded on film.³⁵ (The photographer might also be sworn to preserve testimony that the pictures he took accurately portrayed the reconstructed scene). This procedure would provide an adverse party with an opportunity to observe how the scene is being reconstructed and recorded. Objections to any part of the proceedings or methods employed could be noted³⁶ at the scene by an officer³⁷ or, if none were present, reserved for the pre-trial conference³⁸ after due notice of the objectionable matter is given to the other party so that he may have an opportunity to remedy the situation.³⁹ Similarly, if photographs were desired before an action or pending appeal, general procedures set forth under Depositions Before Action or Pending Appeal⁴⁰ could be followed, as could the procedure for depositions to be taken out of the state,⁴¹ or for those to be used out of the state,⁴² if the desired photographs come within either category.

While the above procedure may appear unduly burdensome at first blush, there should be no great difficulty shifting or extending its application so as to cover "filmed depositions" while providing an opportunity of materially reducing chances of error and misrepresentation. An adverse party could check the type of film used, lighting, position of camera, general surroundings, etc.

The clue to another possible solution of the problem may be found in the following excerpt:

[T]he decisions are not in accord on the admissibility of photographs showing (persons other than the defendant) or objects relocated at the scene of a crime in the position of the participants or objects according to the testimony of witnesses. By the great weight of authority, even though there is a dispute as to the accuracy of the positions assumed, such photographs are admissible, not as irrefutable

³² Ky. R. Civ. P., Rule 31.

³³ Ky. R. Civ. P., Rule 30.01, 31.01.

³⁴ Ky. R. Civ. P., Rule 30.02, 31.03.

³⁵ Ky. R. Civ. P., Rule 30.03.

³⁶ Ky. R. Civ. P., Rule 30.03.

³⁷ Ky. R. Civ. P., Rule 28.01.

³⁸ Ky. R. Civ. P., Rule 16.

³⁹ Ky. R. Civ. P., Rule 32.03.

⁴⁰ Ky. R. Civ. P., Rule 27.

⁴¹ Ky. R. Civ. P., Rule 28.02.

⁴² Ky. R. Civ. P., Rule 28.03.

proof of what in fact occurred, but as illustrations of the testimony of the witness vouching for the accuracy of the pictures.⁴³

This parallels a proposition tendered earlier—objections should go to the weight of the photograph as evidence, rather than its admissibility, and unless it is manifestly misleading or prejudicial, it should be admitted to provide a better understanding of the witness' conception of what transpired.

As a final alternative solution, any posed photographs might be allowed if certain simple requirements are met: (1) The photograph should be an accurate representation of subject matter within the witness' own observation and knowledge, and this subject matter as portrayed should be consistent with the witness' own testimony. The photograph should not be allowed if it merely represents a hypothetical situation which *may* have arisen. (2) There should be a relatively equal opportunity for all parties to obtain posed photographs through examination of witnesses. (3) Parties should be given an opportunity to cross-examine any witness who testifies with the aid of posed photographs; such cross-examination may touch upon both oral testimony and matters related to the photograph. (4) The jury should be admonished that the photographs offered in evidence are merely illustrative of a witness' testimony, and not conclusively binding as an established fact.

Perhaps a combination of the foregoing recommendations would ultimately be the best and most practical safeguard in this branch of the law of evidence.

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⁴³ Scott, Photographic Evidence, sec. 692 at 653 (1942).