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Evidence-Admissibility and Weight of Photographs

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EVIDENCE—ADMISSIBILITY AND WEIGHT OF PHOTOGRAPHS—In a prosecution for *fellatio*,¹ the people's only witness was a woman who testified that she had participated in the alleged activity with the defendant. Her testimony also verified for introduction a motion picture purporting to show the alleged violations. Defendant was convicted on the basis of this evidence. On appeal, *held*, reversed. A conviction cannot be sustained on the basis of an accomplice's uncorroborated testimony;² and the film, although properly admitted, could not supply the necessary corroboration, since a determination of its accuracy must rely upon the accomplice's

¹ Pursuant to CAL. PEN. CODE § 288a.

² CAL. PEN. CODE § 1111.

foundation testimony. *People v. Bowley*, 59 Cal. 2d 855, 31 Cal. Rptr. 471, 382 P.2d 591 (1963).

The statute which was dispositive of the instant case provides a safeguard against convictions resting solely on an accomplice's testimony. It clearly does not operate to prevent an accomplice from testifying³ or from laying the foundation for the introduction of demonstrative evidence.⁴ The statute, however, provides that an accomplice's testimony is insufficient to support a conviction unless there is independent corroboration connecting defendant with the crime.⁵ The question, therefore, was whether the film furnished such corroboration within the meaning of the statute.

In passing on this question, the court was required to examine the theoretical basis on which photographs and motion pictures are admitted into evidence.⁶ This problem has been the subject of a controversy focused primarily upon the evidentiary value of the photograph and the criteria for determining admissibility. When photographs were first used as evidence, they were generally admitted on the same basis as maps, diagrams, and models, since this afforded a convenient precedential link with prior decisions.⁷ This is now the most common practice, and a photograph is admitted after a *foundation* is established by fulfilling two requirements: first, a witness must demonstrate the relevance of the photograph to facts in issue by identifying the picture;⁸ and he must also verify it on the basis of personal knowledge as an accurate representation of those facts.⁹ Dean Wigmore argued that these requirements are indispensable¹⁰ and urged that a photograph should have evidentiary value *only* when verified by a witness on the basis of personal observation.¹¹ He argued that the function of a photograph, like that of maps and diagrams, is to communicate to the trier of fact information which the verifying witness has seen; as such, it is merely the witness' "pictured expression" of data which he has observed.¹² Thus, after being admitted, a photograph would be considered part of the testimony of the witness who verified it.¹³

However, this theory would appear to exclude, for instance, the me-

³ 19 CAL. JUR. 2d *Evidence* § 497 (1954).

⁴ *People v. Santos*, 134 Cal. App. 2d 738, 26 P.2d 522 (1933).

⁵ *People v. MacEwing*, 45 Cal. 2d 218, 288 P.2d 257 (1955); *People v. Wynkoop*, 165 Cal. App. 2d 540, 331 P.2d 1040 (1958).

⁶ There is no ground for distinguishing between still and motion pictures as evidence. *People v. Dabb*, 32 Cal. 2d 491, 197 P.2d 1 (1948); 3 WIGMORE, *EVIDENCE* § 798a, at 203 (3d ed. 1940).

⁷ SCOTT, *PHOTOGRAPHIC EVIDENCE* § 601, at 474 (1942).

⁸ *People v. Cunha*, 107 Cal. App. 2d 382, 237 P.2d 12 (1951); McCORMICK, *EVIDENCE* § 181, at 387 (1954).

⁹ *People v. Ah Lee*, 164 Cal. 350, 128 Pac. 1035 (1912); McCORMICK, *op. cit. supra* note 8, § 181, at 387.

¹⁰ WIGMORE, *op. cit. supra* note 6, § 790.

¹¹ Compare WIGMORE, *op. cit. supra* note 6, § 790, with *id.* § 793, at 186.

¹² *Id.* § 792, at 178.

¹³ *Id.* § 793, at 186.

chanically tripped picture of a burglar taken as he entered a building or the blown-up crowd scene placing the defendant at the scene of the crime. Examples such as these have troubled the commentators, and, although recognizing the necessity for verification of some kind, they have receded from the position that the "pictured expression" theory is the only rationale for admission of photographs. It is argued that, although verification by an eyewitness provides a sufficient basis for the admission of a photograph, such a basis is not a *sine qua non* of admissibility.¹⁴ It is further urged that a photograph should not be limited to communicating testimony and that once a proper foundation is established, a photograph may stand as an "independent witness," having its own probative force.¹⁵ In *People v. Doggett*¹⁶ the California Court of Appeals impliedly accepted this analysis. That case involved the prosecution of a husband and wife for *fellatio*, the evidence against the man consisting of photographs apparently taken by the defendants in their apartment. Since there was no eyewitness, the photographs were identified by the defendants' landlord and verified by an expert who testified that they were not composites or "faked." It was held that the photographs were properly admitted, and the conviction was sustained.

It was against this background that the court approached the principal case. Unlike the *Doggett* problem, the decisive question here was not the admissibility of photographic evidence, but its status after admission. *Doggett* was useful only in defining the relationship between the film and its foundation testimony. The court in the principal case pointed out that under the "pictured expression" theory, the film could not corroborate the woman's testimony, in that it would be part of her testimony. But, since the court approved the analysis of the *Doggett* case and adopted the "independent witness" theory, it could not base its decision on this ground. Instead, it pointed out that in order for any photograph to be admitted into evidence it must be shown to be an accurate portrayal. In the principal case, the accomplices' testimony provided this basis. But this brought the policy of the statute into play, since the film could furnish corroboration only if it was assumed to be accurate, and the determination of accuracy relied on the accomplice's inherently suspect testimony.¹⁷ As a result, the conviction rested solely on the testimony of an accomplice and fell within the prohibition of the statute. This result is clearly required by the statute, for the court's logic is unassailable. The court properly pointed out that

¹⁴ *State v. Tatum*, 58 Wash. 2d 73, 360 P.2d 754 (1961); SCOTT, *op. cit. supra* note 7, § 197.

¹⁵ *Baustian v. Young*, 152 Mo. 317, 63 S.W. 921 (1899) (dictum); MCKELVEY, EVIDENCE § 382, at 671 (5th ed. 1944). The labels "independent witness" and "pictured expression" have been coined by the writer for convenient references. The theories are not usually referred to by these names.

¹⁶ 83 Cal. App. 2d 405, 188 P.2d 792 (1948).

¹⁷ *Cf. People v. Coffey*, 161 Cal. 433, 119 Pac. 901 (1911).

to allow the film to furnish corroboration would be to allow the prosecution to lift itself by its bootstraps.

Apart from the construction placed on the statute, the most provocative aspect of the decision was the court's approval of the "independent witness" theory. The basic difference between this theory and the "pictured expression" view is suggested by a closer examination of the *Doggett* case. Since the verifying testimony in *Doggett* dealt only with the question of whether the photographs had been faked, there must have been some premise to fill the logical gap between this testimony and the conclusion that the photographs portrayed events which actually occurred. This premise assumes the form of, in effect, judicial notice of the reliability of the photographic process.¹⁸ Such recognition does not seem particularly surprising, for it is general knowledge that a camera records actual events. When such notice is taken, the function served by verification is to show that a photograph is not faked or distorted. Verification under the "pictured expression" analysis seems to have a different significance, for the theory does not recognize the testimonial properties of the photograph.¹⁹ It regards the photograph as merely a mode of communicating to the trier of fact what the verifying witness saw.²⁰ Thus, within the framework of the "pictured expression" theory, verification is probably best seen as a method of projecting a witness' testimony in pictorial form.

Theoretically, this difference would affect the weight which each view accords a photograph.²¹ Under the "independent witness" theory, once it has been clearly established that a photograph is accurate and that accuracy is unchallenged, it would be conclusive as to all matters it portrays.²² In contrast, under the "pictured expression" theory, the weight attributed to a photograph would be the same as if the testimony were oral. As a practical matter, this seems to be unrealistic. In light of the widespread knowledge of the abilities of the camera, it seems quite improbable that a court (and especially a jury) would disregard an unimpeached photograph because it conflicts with oral testimony.²³ Nor would it seem

¹⁸ A large number of courts have taken such notice. *E.g.*, *Rice v. United States*, 179 F.2d 26 (D.C. Cir. 1949); *State v. Mathison*, 130 Iowa 440, 103 N.W. 137 (1905); *State v. Evans*, 152 Mo. 317, 53 S.W. 921 (1899). Photographs are especially reliable where the fact in issue is a general representation of objects and ordinary camera distortion is not a material consideration. See *Cunningham v. Fairhaven & W. Ry.*, 72 Conn. 244, 43 Atl. 1047 (1899).

¹⁹ See WIGMORE, *op. cit. supra* note 6, § 790.

²⁰ *Id.* § 793.

²¹ Weight is usually a jury question. *E.g.*, *Wetherell v. Hollister*, 73 Conn. 662, 48 Atl. 826 (1901); *Martin Parry Corp. v. Berner*, 259 Mich. 621, 244 N.W. 180 (1932). However, many courts in reviewing evidence on appeal have considered the weight of a photograph. *E.g.*, *Hartley v. A. I. Rodd Lumber Co.*, 282 Mich. 652, 276 N.W. 712 (1937); *Mobile & O.R.R. v. Bryant*, 159 Miss. 528, 132 So. 539 (1931).

²² This principle has been occasionally referred to as the "incontrovertible physical fact rule." See *Mobile & O.R.R. v. Bryant*, *supra* note 21, at 537, 132 So. at 541; *Scott*, *op. cit. supra* note 7, § 607.

²³ *Cf. McCormick*, *op. cit. supra* note 8, § 183, at 392.

proper that it should.²⁴ Moreover, if a court recognizes the characteristics of the photograph, it should also admit into evidence a picture that is verified solely by an expert, as in *Doggett*, because such recognition is an implicit adoption of the "independent witness" theory. As a practical matter, it is unlikely that many courts would follow the "pictured expression" analysis very strictly, and, in fact, no case has been found in which a photograph was excluded after being verified solely by an expert.²⁵ The fallacy in the theory lies in the assumption that a photograph is merely a means of communication; this seems to be contrary to fact. While the theory might be justified on the ground that it provides a safeguard against distorted and faked photography, this problem can be dealt with separately. It should not necessitate resort to a theory which does not take into account modern knowledge about the camera.

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²⁴ See *Franklin v. State*, 69 Ga. 36 (1882); Gardner, *The Camera Goes to Court*, 24 N.C.L. REV. 233 (1946).

²⁵ The instances where a party to a suit attempts to use this method of verification are admittedly rare; consequently, it is perhaps dangerous to generalize on the question. However, it would be quite inconsistent for a court to recognize that photographs are generally accurate and reject a photograph when an expert has shown it is not faked or distorted.