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port will be forever barred. Therefore, the wife who has valid grounds for absolute divorce is forced to bring suit for alimony before suing for divorce if she desires both. The effect of the *Beeson* decision, then, is clearly consistent with general policy for it enhances the wife's chances of getting an alimony decree before final adjudication of her husband's divorce action. Nevertheless, it is true that *Beeson* does violence to the equally sound principles of avoiding piecemeal litigation and of preventing a multiplicity of suits which frequently result in conflicting verdicts based upon substantially the same evidence.[18]

It is unlikely that the *Beeson* case will undermine *Cameron v. Cameron,* since the two cases are factually distinguishable. Furthermore the *Beeson* decision is based upon a statutory interpretation of G.S. § 50-16. The decision adds further weight to the contention that North Carolina should amend its divorce laws in order to permit a wife who has valid grounds for divorce to obtain her absolute divorce and alimony by either suing for both in the same action or by means of a counterclaim in any action instituted by her husband.[19]

JAMES N. GOLDING

Evidence—Opinion Testimony of Speed

In *Fleming v. Twiggs,*[1] the North Carolina Supreme Court held that a witness's testimony that the defendant's car was traveling seventy miles per hour when it struck the plaintiff was inadmissible because the witness had not had sufficient opportunity to form an opinion of probative value. The witness had heard the sound of brakes and looked back to see defendant's car just before it struck the deceased. She then turned her head away so as not to see the accident. The court stated: "When a witness has had no reasonable opportunity to judge speed of an automobile, it is error to permit him to testify in regard thereto."[2]

The above language was quoted from *State v. Becker,*[3] where the witness testified that she had first seen the car that struck her when it was fifteen feet away, and that it was going fifty-five miles per hour. There was other undisputed evidence that the car stopped twenty-five feet after it hit the witness. The court rejected the estimate of speed, saying that it would have been a physical impossibility for the defendant to have stopped his car in so short a distance if at the time in question it was traveling at such a rate of speed. However, this was a criminal action, requiring proof beyond a reasonable doubt, and not only was

[18] Emry v. Chappell, 148 N.C. 327, 330, 62 S.E. 411, 412 (1908).
[19] See note 14 *supra.*

[1] 244 N.C. 666, 94 S.E.2d 821 (1956).
[2] *Id.* at 669, 94 S.E.2d at 824.
[3] 241 N.C. 321, 327, 85 S.E.2d 327, 331 (1955).

there no other evidence to support the witness's testimony, but there was evidence which contradicted it. Still the case seems to have enunciated a North Carolina rule that when the observation was very limited, the witness should not be permitted to give his opinion as to the speed of the vehicle; and, if admitted, it will be considered of no probative value.

There is some conflict among the states which have ruled on the point of opinion testimony as to vehicular speed based on limited observation. California[4] and Missouri[5] have gone to the extreme by admitting testimony of witnesses who saw the vehicle in motion for a distance of only five feet, and by allowing the jury to make a finding as to speed based on this testimony alone. The Missouri court said, "The weight of that testimony was for the jury after having the benefit of plaintiff's cross-examination on the subject."[6] An Alabama court allowed testimony of a witness as to the speed of a vehicle which he saw "just before" it hit him and "just afterward," saying that the extent of the observation went to the weight of the testimony and not to its admissibility.[7] Kansas,[8] Kentucky,[9] and Texas,[10] have allowed the witness to testify where his opportunity to observe was only slightly greater. In the Kentucky case,[11] however, there was corroborating evidence.

When the witness has seen the vehicle in motion for only fifteen feet or less, most courts either will not allow him to testify as to the speed of the vehicle or will not allow the jury to make a finding as to speed based on this evidence alone.[12] The Wisconsin court allowed a witness to testify that he had first seen the automobile which struck him when it was thirty to thirty-five feet away and that in his opinion it was traveling sixty-five to seventy miles per hour;[13] the same court had

[4] Schwenger v. Gaither, 87 Cal. App. 2d 913, 198 P.2d 108 (1948) (witness estimated speed to be forty miles per hour).

[5] Johnson v. Cox, 262 S.W.2d 13 (Mo. 1953) (witness estimated speed to be fifty miles per hour). See also Nixon v. Hill, 52 S.W.2d 208 (Mo. 1932).

[6] Johnson v. Cox, *supra* note 5, at 15.

[7] Jack Cole, Inc. v. Walker, 240 Ala. 683, 200 So. 2d 768 (1941).

[8] Himmelwright v. Baker, 82 Kan. 569, 109 Pac. 178 (1910) (plaintiff saw the automobile ten or fifteen feet away and testified that it was traveling fifteen miles per hour).

[9] Eubank v. Austin, 288 S.W.2d 358 (Ky. 1956) (witness testified he saw the motorcycle when it was fifteen or twenty feet away and that it was traveling fifty-five or sixty miles per hour).

[10] Humphries v. Louisiana Ry. and Irrigation Co., 291 S.W. 1094 (Tex. Civ. App. 1927), in which the court allowed a witness who had first seen the train when it was fifteen or twenty feet away to testify that in his opinion it was traveling twenty-five miles per hour, and allowed the issue of speed to go to the jury on this evidence alone. See Note, 1 BAYLOR L. REV. 482 (1949).

[11] Eubank v. Austin, 288 S.W.2d 358 (Ky. 1956).

[12] Baker v. Shockey, 92 Ga. App. 443, 88 S.E.2d 741 (1955); Wiles v. Connor Coal and Wood Co., 143 Me. 250, 60 A.2d 786 (1948); Davidson v. Beacon Hill Taxi Service, 278 Mass. 540, 180 N.E. 503 (1932); Kelly v. Veneziale, 348 Pa. 325, 35 A.2d 67 (1944); Culver v. Webb, 244 Wis. 478, 12 N.W.2d 731 (1944).

[13] Albrecht v. Tradewell, 271 Wis. 303, 73 N.W.2d 408 (1955). Pestotnik v. Balliet, 233 Iowa 1047, 10 N.W.2d 99 (1943), also allowed a witness who had seen

stated in an earlier case, in which a witness saw a car 700 to 800 feet away and then did not look again until the car was fifteen feet from him, that "It is inconceivable that he could make a useful estimate from a fleeting glance a split second before the cars collided."[14]

In rejecting the witness's estimate of speed because he only saw the vehicle in motion for a split second, the court must implicitly accept his estimate of the speed of the vehicle and the distance which he stated he saw it travel for the purpose of determining that he saw it for only a split second.[15] Moreover, when the court rejects the estimate of speed merely because the witness testifies that he only saw the vehicle in motion for a distance of ten or fifteen feet, it is accepting as accurate the witness's estimate of the distance which he saw the vehicle travel, but is refusing to accept his estimate of its speed. Sometimes there is evidence to support the distance, such as where the witness was not able to see the car until it emerged from behind a building. In such a case the distance from where the witness could first see a car beyond the building to the point of impact could be measured.[16] Often the estimate of the distance is unsupported by other evidence and is an estimate of a witness who only saw the vehicle coming directly toward him, yet the courts seem to accept it as accurate in determining whether the witness had sufficient opportunity to judge the vehicle's speed. Why should the jury not be allowed to find that the witness observed the vehicle in motion for a greater distance, *i.e.*, that he erred in his estimate of distance and not of speed, and, therefore, that he had seen the vehicle in motion for a distance great enough to give probative value to his estimate of speed?

Michigan has made a distinction as to whether the witness saw the vehicle from a side view or coming directly toward him. A witness in each of two Michigan cases had seen the car in motion for a distance of twenty feet, but the court rejected the testimony of the one who had seen the automobile coming directly toward him,[17] and allowed the testimony of the other, a railroad engineer of long experience who had seen the moving automobile from a side view.[18] However, the court in the latter case expressly took into consideration the fact that it was the

a vehicle in motion for a distance of thirty feet to testify as to his estimate of its speed.

[14] Culver v. Webb, 244 Wis. 478, 485, 12 N.W.2d 731, 734 (1944).

[15] In Johnson v. Cox, 262 S.W.2d 13 (Mo. 1953), the court calculated that if, as the witness testified, she saw the motorcycle when it was five feet away and it was traveling forty-five to fifty miles per hour, then she saw it for only one-sixteenth to one-eighteenth of a second. In State v. Baker, 241 N.C. 321, 85 S.E.2d 327 (1955), the court calculated that if the car were traveling fifty-five miles per hour, it was traveling eighty-one feet per second, and a witness who saw it for a distance of fifteen feet only was not allowed to give his estimate of its speed.

[16] See Jackson v. Leach, 160 Md. 139, 152 A.2d 813 (1931).

[17] Wright v. Crane, 142 Mich. 508, 106 N.W. 71 (1905).

[18] Harnau v. Haight, 189 Mich. 600, 155 N.W. 563 (1915).

witness's business to estimate vehicular speeds. Maryland has allowed the testimony of a witness who, from a side view, had seen the vehicle in motion for a distance of twenty-six feet,[19] while Pennsylvania rejected the testimony of a witness who first saw the train which hit him when it was twenty-five feet away.[20] Thus it seems that when the witness has seen the vehicle in motion for a distance of only twenty or twenty-five feet, some courts will inquire into further circumstances before determining whether the witness had sufficient opportunity to form an opinion as to the speed of the vehicle.

The Arizona court has stated, "We think that the correct rule is that if there is any possibility the opinion has evidentiary value, however slight, the trial court should not be reversed for admitting it."[21] Georgia has held that opinion evidence as to speed based on a momentary view, though admissible, was not sufficient evidence to furnish a basis on which a jury could find the automobile's speed;[22] and the Nebraska court stated, "In the final analysis it resolves itself into a question of the sufficiency of the evidence to sustain a verdict, rather than the competency of the witness to testify."[23] This view salvages the corroborative value of evidence too weak, as a matter of law, to alone support a verdict. The Pennsylvania court stated the proposition in this fashion:

> There is no rule of law whereof we are aware, that excludes opinion evidence as to speed if the witness presents the requisite qualifications, viz., an observation of the vehicular movement . . . . The weight attributable to such testimony may . . . be very slight and even legally insufficient to carry the point for which offered. Indeed if it is the sole evidence of the operative negligence alleged, it may be legally insufficient to support an affirmative finding . . . or its weight may be so negligible as to justify its practical exclusion from the jury's consideration . . . .[24]

Though a witness may have seen the vehicle for only a short distance before the collision, he may have seen or felt its impact and observed the distance it traveled after the collision. Such a witness's opinion as to the speed of the vehicle might be helpful to the jury if it tends to corroborate other competent evidence of speed. However, if there is

[19] Jackson v. Leach, 160 Md. 139, 152 A.2d 813 (1931).
[20] Ealy v. New York Cent. R.R., 333 Pa. 471, 5 A.2d 110 (1939).
[21] Eldredge v. Miller, 78 Ariz. 140, 145, 277 P.2d 239, 242 (1955).
[22] Baker v. Shockey, 92 Ga. App. 443, 88 S.E.2d 741 (1955) (plaintiff testified that he saw the automobile about ten or fifteen feet before it struck him and that it was going fifty miles per hour); Allen v. Hatchet, 91 Ga. App. 571, 86 S.E.2d 662 (1955) (plaintiff testified that he saw the automobile one or two seconds before it hit him and that it was traveling seventy miles per hour).
[23] Carnes v. DeKlotz, 137 Neb. 787, 789, 291 N.W. 490, 492 (1940).
[24] Shaffer v. Torrens, 359 Pa. 187, 193, 58 A.2d 439, 442 (1948).

no other competent evidence to support the witness's testimony the trial judge could refuse to permit the witness to testify as to his opinion of the speed of the vehicle when it alone would not be sufficient evidence on which the jury could base a finding of speed.

Neither of the two previously discussed North Carolina cases[25] specifically stated that such opinion testimony could not be used to corroborate other evidence, but from the language of those two cases it would seem that North Carolina might altogether reject such evidence.[26] Yet in *State v. Fentress*,[27] the North Carolina court allowed a witness who did not see the automobile in motion or the accident to testify that in his opinion the car was traveling eighty-five miles per hour, based on the sound of the engine and the loud crash. The court stated: "The evidence of Foster who testified that he heard the car passing with a great noise and at a rapid rate of speed does not lack circumstantial support, since its roaring progress stopped with a loud crash at the point where he found it a moment later, torn to pieces and its occupants lying on the ground about the wreck."[28]

Would not one who actually sees the vehicle in motion and the collision have a better opportunity to judge the speed of the vehicle than one who only hears the sound of the motor and the following crash? It seems that when there is other competent evidence to support a witness's opinion as to the speed of a vehicle, the jury should be allowed to hear such opinion unless the witness's observation was so limited that his opinion is totally lacking in probative value.

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Evidence—Privileged Governmental Records—Production and Examination by Trial Judge

The recent decision of the United States Supreme Court in *Jencks v. United States*[1] has caused a great deal of criticism and controversy. This Note will be limited to evidentiary questions concerning privileged governmental records, their production, and examination of them by

[25] See text at notes 1 and 2 *supra*.

[26] *But see* Jones v. Bagwell, 207 N.C. 378, 177 S.E. 170 (1934), where witnesses who testified that they saw the automobile immediately after it struck deceased and while it was coming to a stop were allowed to testify that in their opinion the automobile was traveling thirty to forty miles per hour when they saw it for the purpose of inferentially showing a greater speed at the time of impact, and in corroboration of other evidence.

[27] 230 N.C. 248, 52 S.E.2d 795 (1949).

[28] *Id.* at 251, 52 S.E.2d at 797. *But see* Tyndall v. Hines Co., 226 N.C. 620, 623, 39 S.E.2d 828, 830 (1946), where the court stated: "Conversely, one who did not see a vehicle in motion will not be permitted to give an opinion as to its speed. The opinion must be a fact observed." In Campbell v. Sargent, 186 Minn. 293, 299, 243 N.W. 142, 144 (1932), it was stated: "We do not know of any way by which one can determine the speed of a car by the noise."

[1] 353 U.S. 657 (1957).