The Camera Goes to Court

Dillard S. Gardner

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DILLARD S. GARDNER†

The other day, as I opened my mail, an advertising leaflet fluttered to my desk. Staring up at me were these words, "A picture is worth a thousand words—Confucius." It caught my fancy and set off a train of thought. These words were true. Had not Chief Justice Stacy, with that crisp, deliberate, measured precision so characteristic of his judicial style reaffirmed this oriental wisdom and given it definite legal respectability when he observed in *Powers* v. *Sternberg*,[1] "There are a few physical facts which speak louder than some of the witnesses." I recalled, too, those words of ageless truth and shimmering beauty penned by the ancient sage as he cast about for a powerful figure of speech, "A word fitly spoken is like apples of gold in pictures of silver." (I found the quotation later in Proverbs, Chapter 25.) More than a decade ago—long before the swift-rushing wings of the years brushing past me left my temples flecked with silver—I pondered the age-old problem of justice, found that men had exercised themselves much over the machinery of justice but had found little time to give to the weaknesses of those frail humans, the witnesses, who must, in the end, always furnish the grist for any mill of justice.[2] I have long thought that those supreme tragedies of society—miscarriages of justice—were more often traceable to human weaknesses and limitations than to technical defects in the machinery of justice and that any substantial improvement in the quality of justice issuing from our courts must come, not so much from new gadgets and overhaulings of the judicial machinery, but from the improvements in the quality of the evidence furnished the courts as the basis for their judgments. In this vein I toyed with a favorite whim of my youth (in keeping with the traditional growth of a lawyer, I now assert it boldly as "my profound conviction") that there should be a more liberal view governing, and a more extensive

* "In my opinion, Mr. Gardner's article: 'The Camera Goes to Court' constitutes an outstanding contribution to the development of the law of evidence. I cannot commend it too highly to the careful consideration of the students and lawyers of this State." Excerpt from letter of Mr. Richmond Rucker, the Editor of *Wigmore on Evidence*.

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[1] 213 N. C. 41, 195 S. E. 88 (1938).

[2] See "The Perception and Memory of Witnesses," an effort at pioneering in a still-neglected field, that of legal psychology. It appeared first in 18 CORNELL LAW QUARTERLY 391 (1933) and was re-printed the same year in 7 FLORIDA STATE BAR JOURNAL 13.

use of, photographs in evidence. Visual education "came of age" during the war through its demonstrated effectiveness, and already tremendous advances in photography are becoming available to the public. The potential impact of these dual forces upon trial techniques is considerable; certainly they will be felt. From such thoughts as these came this comment—

As an amateur photographer with more than a casual interest in the law of evidence, I have examined all the photographs filed as exhibits in all cases before the North Carolina Supreme Court during the past nine years. The practice with reference to photographs is rather informal. Most lawyers seem to take it for granted that photographs are admissible to illustrate testimony without giving the matter much more consideration—and in at least one recent case this view lost an important case. Photographs almost certainly could be used to advantage in a larger percentage of the cases; they are now used in, perhaps, four or five per cent of the cases. Although at times only a single copy of each photograph is filed with the Supreme Court, the general—and better—practice is to file nine prints of each photograph—one for each justice and one for counsel for each side. Each print should be marked on the back with the name of the case, the docket number, and the exhibit identification, as "Doe v. Roe, No. 320—Plaintiff's exhibit A." The rules do not fix the size of prints; they are customarily 8" x 10" glossy prints, but photostats of documents are often larger. Photostats are excellent for reproducing various written instruments; prints of insurance policies, holographic wills, checks, receipts, bills, bookkeeping entries, etc., are often filed. The most frequent use of photographs is in automobile accident cases, particularly those at railroad crossings. In such cases photographs usually show the location of the accident and often tend to show whether the driver's view was obstructed. Frequently, "on the scene" photographs of the wrecked car showing its position and the extent of damage have strong probative value. Where the value of land is involved (as in condemnation proceedings), or the condition of premises is important (as in nuisance cases), photographs are helpful. Medical and police photographs often show vividly the nature and extent of injuries. When the construction of a mechanical device is involved, a detailed photograph is a great aid to oral testimony. Where dangerous conditions or latent dangers are to be shown, photographs may become powerful witnesses. In short, whenever the appearance of a person, place or thing is relevant to a case, photographs may often supplement testimony to advantage.

Perhaps the most advanced use of the camera for evidentiary purposes is found in medicine, disputed document work, and police investi-

gations. In these fields the value of enlarged photographs has often been demonstrated. The doctor with his X-rays and photomicrographs, the document examiner with his enlargements to scale, and the police officer with his fingerprint, skid mark, and ballistic photographs are all familiar courtroom figures. A lawyer wishing a wider acquaintance with the possibilities in this field will find the readable volume on police photography—Herzog and Ezickson, *Camera, Take the Stand*—and the works by the Osborns on disputed documents most informative.

The more general use of photographs in court has been hindered by the feeling, rather widely held, that so-called trick photography can distort the real facts. The truth is that cameras *do* lie. A camera is a mechanical device without conscience—but there are limits within which it can be manipulated. The remedy for such abuses is not in excluding honest photographs.[3] We do not dispense with all witnesses because there are perjurers. If the manner and time of taking are such as to produce an accurate representation of matter material and pertinent to a question at issue, the basic reasoning of "the best evidence" rule makes it imperative that it be made available to the jury, for then the photograph becomes the perfect witness—an eye-witness who cannot forget and whose memory cannot be distorted. The elimination of the dangers of false or "trick" photographs lies not in rigid rules excluding photographs generally but in the careful qualification of such photographs on their preliminary examination. There is an unfortunate tendency in considering the admissibility of photographs to overlook that there are always two questions, not one, to be met. These are (1) competency and (2) materiality and relevancy. The first of these —competency—is too often overlooked or dealt with carelessly both by trial lawyers and judges. If the photograph is not an accurate, honest representation of the true facts it is not competent and should always be excluded, even though what it pictures may be highly relevant and material. Under such circumstances the more relevant it is, the greater the reason for exclusion as it may greatly influence the jury in reaching a verdict contrary to the facts. However, if the photograph is an accurate, honest representation, we then come to consider whether it is material and relevant, whether the matter pictured will genuinely and properly aid the jury in determining the true facts. For example, if the picture was taken with a wide-angle lens so as to distort and misrepresent the view, it is incompetent, even if it is a movie of the actual matter or event at issue; on the other hand, the picture may be an accurate representation but taken after conditions had changed materially in which case the photograph would be immaterial and irrelevant. Whether

[3] 3 WIGMORE, EVIDENCE, 185, making clear that such a weakness is one only of credibility and does not affect admissibility.

incompetent because of inaccuracy or immaterial because it might mislead the jury otherwise, in either case it might be highly prejudicial. However, if the photograph passes both the test of competency and the test of materiality and relevancy, it becomes the very highest type of evidence, entitled to a high degree of credibility because it is free of the usual and very human causes of testimonial error. It is this which McKelvey[4] recognizes when he points out that photographs—like the offering of a physical object—may be "demonstrative" evidence as opposed to the much-weaker "illustrative" evidence, and Gulson makes the same distinction when he opposes "immediate" to "transmitted" evidence. The editors of Blashfield[5] have much the same view when they speak of photographs as "documentary" evidence.

Perhaps the reason a rule-of-thumb (i.e., "admissible only to illustrate testimony") is so often applied in this field is that few lawyers and judges are familiar enough with photography to examine adequately and quickly into the competency of a photograph. Scott in his exhaustive work, *Photographic Evidence,* treats in great detail the various techniques which may be used to produce false representations by photographs, but two more concise and very satisfactory introductions to the subject will be found in Blashfield[6] and Huddy.[7] Within the scope of such an article as this, there is space to do little more than list a few of the more important and more frequent types of photographic misrepresentation. The *position of the camera* may produce distortion. It should be held at eye-level, but if it is elevated well above this it may show what a bird would have seen but not the view of a witness and if it is placed near the ground, a worm's-eye view rather than a man's results. This may be important, for example, in intersection cases where a relatively low and unimportant obstruction photographed from the ground-level may appear to obscure completely an approaching vehicle and one taken high above the ground may look over the obstruction in such a way as to give the impression that there was no obstruction of view at the approach. The two pictures shown in *In re Parker's Appeal*[8] give some indication of the possible differences in impressions which may be produced by changing the position and elevation of the camera. Another type of distortion is produced by *the position of the lens.* The lens in the camera should be what is called a normal angle lens and should be approximately the same distance from the film or plate as the distance of a diagonal line drawn between two corners of

[4] EVIDENCE, 5th ed., §378; GULSON, PHILOSOPHY OF PROOF, 140, cited in (1929) 7 N. C. L. REV. 443.
[5] 9 CYC. OF AUTO. LAW, perm. ed., §6402.
[6] *Ibid.*, Ch. 135.
[7] 19-20 CYC. OF AUTO. LAW, Ch. 1.
[8] 214 N. C. 51, 197 S. E. 706 (1938).

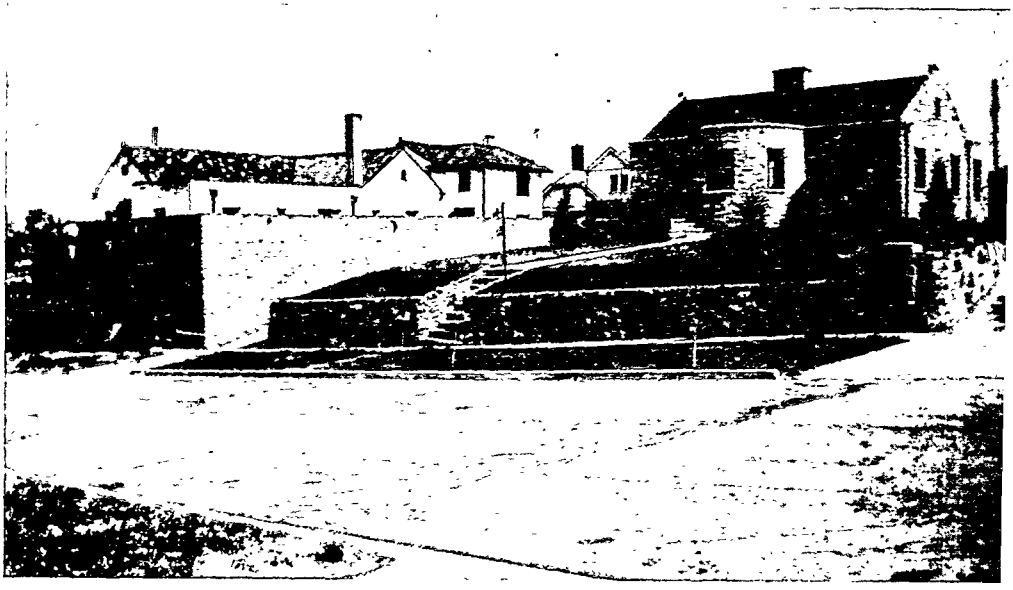
the film or plate. If the lens is placed at a considerably greater than normal distance from the plate, the distances from the camera appear much shorter and the area shown is substantially restricted; this use of the long focus or telephoto lens really magnifies the view and gives the impression that a witness could see a great deal more detail than he could actually observe. On the other hand, if the lens is placed much closer to the plate than the normal distance, the distances shown appear much lengthened and the area of view is widened far beyond normal. In the typical intersection case, neither of these views would be accurate; the first would "see" detail more clearly, the latter less clearly, than the human eye. In the exhibit from *Alberty, Adm'r* v. *Greensboro*[9] the view of an approach to an abandoned road is shown, and it was important to determine whether a driver approaching could have seen its abandoned condition. It will be readily seen how materially the use of either wide angle or long focus lens would have distorted the true view shown. Distortions, too, may result from *lighting*. The light may be too great or too little, the film too sensitive or too slow, the diaphragm may be too wide open or too small, or even the exposure time may be too great or too small. All of these light factors have to do with the amount of light which effectively registers on the film. Too great a light registering on the film tends to wipe out all shadows and too little light minimizes details. The handling and adjusting of the camera for these light factors is quite an art and, as in the case of the determination of the type and position of the lens, require more technical knowledge than most lawyers will care to acquire, but a capable photographer may be trusted to take these into account if it is made clear to him just what is to be demonstrated in the pictures. Some idea of the importance of light in photography will be gained from an examination of the picture of the shaved head of the deceased in the hatchet-murder case of *State* v. *Buchanan*.[10] It will be noted that the wounds in the skull photo are revealed as *shadows* against a lighter background. To accomplish this the photographer was required to photograph with a *minimum* of effective light, as shown by the very dark background of the picture. Had this picture been taken in a very strong, direct light, the wounds themselves would have been illuminated in such a way that they would have been minimized, perhaps, to the point of being shown merely as slight abrasions. This shadow effect is often important, particularly where variations in the surfaces shown are to be demonstrated, as where there are holes in sidewalks or cracks in buildings. In *Benton* v. *Building Co.*[11] the case turned largely upon whether the step-down from one floor level

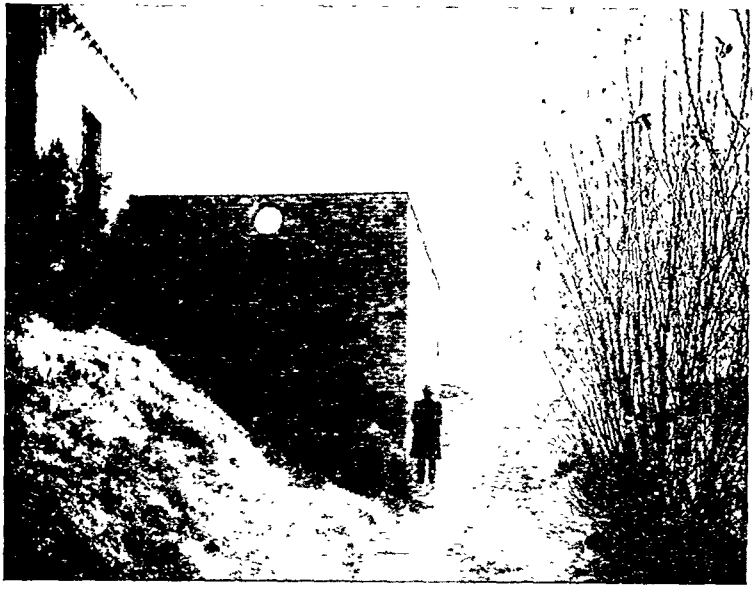
[9] 219 N. C. 649, 14 S. E. (2d) 665 (1941).
[10] 216 N. C. 34, 3 S. E. (2d) 273 (1939).
[11] 223 N. C. 809, 28 S. E. (2d) 491 (1943).

to another was adequately lighted. The photograph offered to show the extent of the visibility of the step-down is reproduced here. By focusing more sharply at the step-down, by using more or less light, by using a long focus lens, or even by taking the picture at a different time of day ,the apparent visibility at the point of the step-down could have been widely varied. This but emphasizes the importance of qualifying each photograph as to the manner and time of taking.

Most of the distortions discussed above are often produced by oversight, inadvertence, or ignorance of camera technique. There is still another class of distortions which are deliberate. Morally, these are perjuries, for they are deliberate attempts to mislead the jury. In this group are retouching, reversing negatives, and double printing. In retouching the negative may be "doctored," silver scraped off here, lead brushed on there, so that the entire picture is altered; when this is suspected, the negative may be demanded and a skilled photographer can usually detect the alterations. Where there are two similar surfaces, one may sometimes be substituted for the other photograph, by reversing the negative in printing; for example, if the steering wheel is kept out of the view a print by reversed negative will show one side of a car as the other. A call for the negative will reveal this. Again, two parts of different negatives may be fitted together so as to produce an entirely false impression; for example, by swapping the sky in a photograph of two wrecked cars the dark, cloudy day may be changed to a bright sunny day or even, with little retouching, wet streets may be "dried" out completely. Many hoax photographs, showing such odd spectacles as candles burning inside a glass of water or a monstrous sea-serpent crawling on the water, have been produced in this way. The rarity of this type of deception coupled with the marked human tendency to accept as true what is revealed in photographs make it all the more important that lawyers be aware of such possibilities.

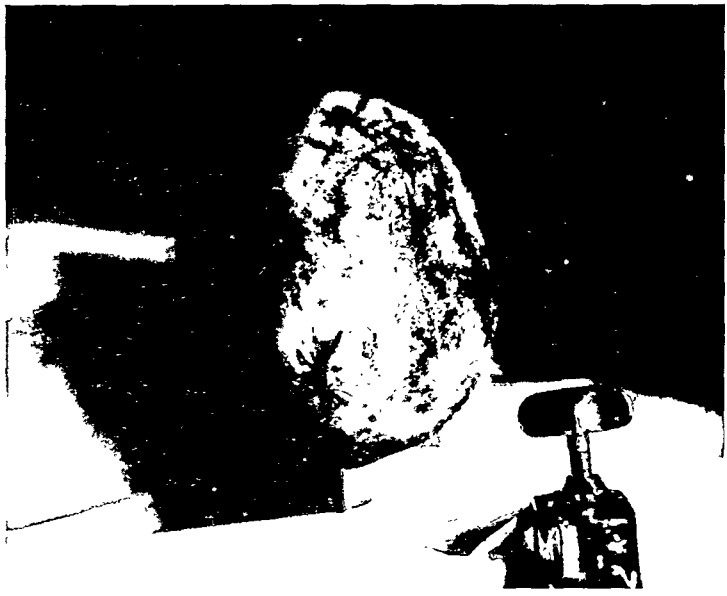
This tendency to accept as true what is mirrored in photographs has wider and more important implications. It renders doubly important that the photographer have available for each picture such details as the position of the camera, the distance from the object, the angle and type of lens, the time of day, the date, and similar data; otherwise, a perfectly competent photograph may be disqualified when it is offered and a perfectly sound case legally be weakened or destroyed. This tendency to accept photographs at face-value has another dangerous implication. One is disposed to think that distances can be easily computed from photographs accurately. This is by no means generally true. Lines tend to curve when registered through lens which have not been corrected for this curvature, for example in the meniscus lens





Photographs showing same wall from two different angles and positions in a zoning case. *In re* Parker's appeal, 214 N. C. 51.

Photograph showing approach (straight ahead) to an abandoned road. Deceased was killed in failing to take the curve to the left. Alberty, Adm'r v. Greensboro, 219 N. C. 649.



Photograph of head of deceased in a hatchet-murder. Note the sharpened focus on the head, the darkened background, and reduced light. State v. Buchanan, 216 N. C. 34.

Photograph showing space on sides of track. Deceased was struck trying to outrun train down center of track. Sherlin v. Railway Co., 214 N. C. 221, also 218 N. C. 778.

Photograph showing step-down through doorway. It was claimed this was insufficiently lighted and this caused the fall. Benton v. Building Co., 223 N. C. 809.

Photograph showing culvert ditch into which plaintiff alleged he was forced by defendant. (Used by witnesses but not offered in evidence.) Wallace v. Longest, 226 N. C. 161.

Photograph of victim in rape-murder case, showing lacerations and bruises, indicating violence. State v. Mays, 225 N. C. 486.

found in cheap cameras. In a photograph the area is increasingly "pinched" the further the object is from the camera (less if the ground rises, more if it declines, away from the camera); at the same time it "pinches" laterally as the eye moves from the sides towards the center. Thus, a very tiny spot in the upper center of the photograph may represent many times the actual area of a similar spot in the left or right foreground of the picture. As the object moves away from the camera increasingly its recorded image becomes rapidly shorter and at the same time increasingly narrower. If possible, the best way to show sizes and distances in a picture is to show an object of known size in the picture itself. Two examples of this are reproduced here. In the first of these —*Sherlin* v. *Railway Co.*[12]—it was important to determine whether there was room enough for a man to remain on the side of a trestle when a train was passing over it; this picture by showing two men at different points along the trestle edge and also by a board marked off in feet demonstrates that there was a substantial clearance in which a man might have stood safely. This picture also demonstrates the "pinching" effect of distance as the area recedes from the lens; notice how much wider the distance from cross-ties to trestle edge appears to be at the bottom of the picture than a few feet away near the center of the picture. In the second of these pictures—*Wallace* v. *Longest*[13]—it was important to show the depth of a culvert outlet partially hidden at the side of a shoulder; the man standing in this ditch and the second man standing further down the road furnish convenient guides in estimating the measurements of the depth of the ditch and the width of the shoulder.

The growth of the law of photographic evidence in North Carolina has been irregular.[14] If the reader will bear in mind throughout the remainder of the comment something that the cases have not always made clear—that photographs are admissible under two distinct rules,[15] on the one hand to illustrate testimony (by analogy to maps and diagrams) and on the other hand as independent photographic witnesses (by analogy to view by the jury)—it will be seen that the first branch of the rule has outgrown and somewhat stunted the second branch. Nearly fifty years ago the first of our cases arose. A man had been injured by falling off a path near a railroad cut; the photographs of the

[12] 214 N. C. 221, 198 S. E. 639 (1938); second trial reported in 218 N. C. 778, 10 S. E. (2d) 707 (1940).

[13] 226 N. C. 161, 37 S. E. (2d) 112 (1946).

[14] See an excellent early discussion of the subject in (1929) 7 N. C. L. REV. 443.

[15] MCKELVEY, EVIDENCE, 5th ed., §§378-382. This is the most astute analysis of the subject which has come to the present author's attention. In accord are: (1929) 7 N. C. L. REV. 443; SCOTT, PHOTOGRAPHIC EVIDENCE, §601. The discussions in WIGMORE, EVIDENCE, and 32 C. J. S., "Evidence," appear to the author to be inadequate, although they too may be cited in partial support of this view.

scene were taken two years later, after the path was eliminated. This "change of condition" was sufficient to have justified the exclusion, but in sustaining the exclusion of the pictures the majority held that they were not evidence *per se* because they did not represent "the plaintiff, the fall or the injury" but could be used only when offered for the restricted purpose of illustrating testimony.[16] Clark, J., dissented from this view speaking out vigorously for the liberal admission of photographs. Seven years later he prevailed in his view and wrote for the full court sustaining the admission of photographs of a child taken before and after injury (but before death) in a railroad case, stating that since the first case such pictures had "become a well-recognized means of evidence, and are not infrequently used in the trials below and are sometimes sent up in the record on appeal, especially in actions for personal injuries."[17] There is no intimation that the use of the photographs was restricted; to the contrary Chief Justice Clark wrote of their "accuracy not permissible to spoken words" and there is no reason to believe that he had abandoned his view that the admission of photographs should be encouraged as practical substitutes for view by the jury. Following this case Walker, J., twice wrote for the court in sustaining the use of photographs in suits for water-damage to land. In the first of these[18] he laid down the sound requirements for preliminary proof of competency[19] and sustained the use of photographs by a witness merely to explain his testimony as to the effect of the diversion of water; and, in the second,[20] in referring to a photograph exhibited on the argument (but apparently not in evidence), "*the photograph itself was competent* as explanatory of the other testimony." [Italics mine.] Later, Allen, J., writing for the court, in a case involving refusal to accept shipment of cattle, sustained the unrestricted admission (in the face of vigorous objection) of a photograph of the cattle at the time of their tender, in these words, "Photographs are admissible in evidence when shown to be a true representation and to have been taken under proper

[16] Hampton v. Railroad Co., 120 N. C. 534, 27 S. E. 96 (1897).
[17] Davis v. Railroad, 136 N. C. 115, 48 S. E. 591 (1904).
[18] Pickett v. Railroad, 153 N. C. 148, 69 S. E. 8 (1910).
[19] They were stated to be: (1) They must be accurate and correct representations, and (2) the time and manner of taking must be shown so as to show proper safeguards. In Bane v. Railroad, 171 N. C. 328, 88 S. E. 477 (1916) this was amplified and it was held that it is not necessary to have the photographer himself qualify the photograph. Such questions being preliminary ones touching upon competency are for the judge. State v. Mathews, 191 N. C. 378, 131 S. E. 743 (1925). If there is a conflict as to matters of competency, of course the judge's ruling normally will not be disturbed; likewise, if there is a conflict as to matters determining the relevancy of the photograph, as, for example, where there is dispute as to the change of conditions, the exclusion of the photograph is treated as a matter of discretion. Pearson v. Luther, 212 N. C. 412, 425, 193 S. E. 739, 747 (1937).
[20] Hoyle v. Hickory, 167 N. C. 619, 83 S. E. 738 (1914).

safeguard (citing cases)."[21] If the two Walker opinions only dealt with the use of photographs to illustrate the case, the latter of the two being a photograph merely referred to in argument on appeal, the Allen opinion certainly followed vigorously the established view that photographs are admissible generally as themselves witnesses of the facts, the view which Clark, J., had urged in the *Hampton* case when he wrote that "upon prima facie evidence of the photograph being a representation of what it is claimed to be, the courts admit it, subject to cross-examination as to the point of view from which it was taken, the skill of the artist, etc.; in short, like any other testimony, to be weighed by the jury."[22] In 1919 a case was presented which resulted in two views of photographic evidence—though both approved the use of photographs; a photograph had been used by a witness to demonstrate how the parts found at a house could be assembled into a still.[23] Since the photographs were used only to illustrate testimony, the court followed the traditionally accepted practice of going no further than required by the record; speaking through Walker, J., this use was approved by analogy to the rule governing maps and diagrams; but Clark, C. J., still acutely aware of a difference between maps and photographs and fearful of restrictions upon the use of the latter, in a concurring opinion, again insisted upon the analogy to view by the jury, referred to the "now uniform ruling of other courts that photographs are competent as evidence," and closed with this general principle, "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 to the usual safeguards]." This fear of Chief Justice Clark's was well founded for the use of photographs has more and more been confined to illustrative purposes; such use has been sustained in the following: to show scenes of automobile accidents;[24] to show condition of a rock-quarry dinky injuring plaintiff;[25] to show condition of land flooded in a malaria suit;[26] to show the scene of a crime;[27] to show wounds on body of deceased in

[21] Bane v. Railroad, 171 N. C. 328, 88 S. E. 477 (1916). It is interesting to note that here the photograph was admitted generally although the photographer did not testify as to its competence and several witnesses controverted the testimony that it was a true representation.

[22] Hampton v. Railroad, 120 N. C. 534, 540, 27 S. E. 96, 98 (1897). It was this view that he set forth for the unanimous court in Davis v. Railroad, 136 N. C. 115, 48 S. E. 591 (1904).

[23] State v. Jones, 175 N. C. 709, 95 S. E. 576 (1919).

[24] Pearson v. Luther, 212 N. C. 412, 193 S. E. 739 (1937); State v. Lutterloh, 188 N. C. 412, 124 S. E. 752 (1924).

[25] Kelly v. Granite Co., 200 N. C. 326, 156 S. E. 517 (1930).

[26] Elliott v. Power Co., 190 N. C. 62, 128 S. E. 730 (1925).

[27] State v. Wagstaff, 219 N. C. 15, 12 S. E. (2d) 657 (1941); State v. Holland, 216 N. C. 610, 6 S. E. (2d) 217 (1939); State v. Perry, 212 N. C. 533, 193 S. E. 727 (1937); State v. Mitchem, 188 N. C. 608, 125 S. E. 190 (1924).

a murder-rape;[28] to show deceased at the scene of a homicide;[29] to show the appearance of a man killed in an auto death case;[30] and even to show the position of the participants and witnesses in a murder case (but not to show a purported reconstruction of the crime).[31] Yet, a much fuller use of photographs—not to illustrate testimony but—as silent witnesses has been thoroughly approved in our law, as we have already noted, in the *Davis*[31a] case and those following. Justice Hoke in approving the view for the full court declared the *Davis* opinion to be in "accord with enlightened decisions in other courts of highest resort."[32] It was squarely approved by Allen, J., for the full court in the *Bane* case,[33] and by the elder Connor, J., for the full court in *Martin* v. *Knight*[34] in the following words, "In Hampton v. Railroad, 120 N. C. 534, 35 L. R. A. 808, a photograph was rejected, but in Davis v. R. R., 136 N. C. 116, we followed the dissenting opinion of the present Chief Justice (Clark) *sustained by the overwhelming weight of authority.*" [Italics mine.] This very quotation was again repeated as the view of the full court (presided over by the present Chief Justice) by the younger Connor, J., in the *Mathews* case.[35]

Could our analysis of the cases stop here, a synthesis of a simple and liberal rule admitting photographs, either (1) to illustrate testimony or (2) as silent witnesses, would be possible. But this is not the case. Chief Justice Clark's fears were justified. After his death no one on the court had these cases at his fingertips and took up his championship of the liberal view. In 1928 came the *Honeycutt* case.[36] A clearly accurate photograph of the actual mud-machine causing the death of the operator was introduced and received as a silent witness; the record shows that it was offered without limitations and the objection was a general one which did not request that it be limited in its scope. The trial judge treated it as admitted generally and, therefore, substantive in character. In the state of the law at the time, he was undoubtedly correct. On appeal, appellant cited only the cases admitting photographs to illustrate testimony (as Clark, C. J., had feared) stating that no others had been found, and appellee, citing no cases, took the posi-

[28] State v. Mays, 225 N. C. 486, —— S. E. (2d) —— (1945).
[29] State v. Miller, 219 N. C. 514, 14 S. E. (2d) 522 (1941).
[30] Coach Co. v. Lee, 218 N. C. 320, 11 S. E. (2d) 341 (1940).
[31] State v. Mathews, 191 N. C. 378, 131 S. E. 743 (1926).
[31a] *Supra* note 17.
[32] Bank v. McArthur, 165 N. C. 374, 81 S. E. 327 (1914).
[33] Bane v. Railroad, 171 N. C. 328, 88 S. E. 477 (1916).
[34] 147 N. C. 564, 61 S. E. 447 (1908).
[35] State v. Mathews, 191 N. C. 378, 131 S. E. 743 (1926).
[36] Honeycutt v. Brick Co., 196 N. C. 556, 146 S. E. 227 (1929). The evidence showed clearly that the gears of the mud-machine were without guards and that guards could have been placed upon it. These unguarded gears were clearly contributing causes of the death of the employee.

tion that since the picture was competent for a limited purpose, if the appellant did not request it limited, it was competent for all purposes. In the opinion for the court, these "illustration" cases were cited, the *Pickett, Jones,* and *Elliott* cases being singled out for quotations, and the admission of the photographs generally was held to be reversible error. Thus, these cases which had merely *approved* the use of photographs to illustrate testimony were unfortunately treated as *limiting* the use of photographs to illustration, and the line of cases (from *Davis* through *Bane* to *Mathews*) were overlooked originally by counsel and finally by the court. The photograph here was just the type approved in the *Davis-Martin-Bane-Mathews* cases; it is difficult to conceive of more pertinent evidence for a jury seeking to fix responsibility for a death in a suit (based upon the employer failing to provide a safe place to work) than a view of—or accurate photograph of—the very machine whose unguarded gears killed the employee. Had this case been decided upon an analysis of the reasons for the rule rather than upon a bare citation of authorities, it appears almost certain that the very able justice who wrote the opinion would have advanced, and the court would have accepted, the contrary view. This case has, undoubtedly, restricted the use of photographs in trial work,[37] for lawyers do not like to press doubtful evidence, but its soundness was questioned even at the time.[38] Fortunately, the *Honeycutt* case has already been discredited, at least to some extent, by the *Cade* case.[38a] There a photograph of deceased at the spot where the body was found was shown to the jury and Justice Barnhill, writing for a unanimous court in approving this use of the photograph declared, "The evidence merely shows that photographs were exhibited to the jury and there was no request that their use be limited or restricted." Thus, the *Cade* case overrules the *Honeycutt* case at two points: (1) In the absence of a request to restrict the purpose of a photograph, if a photograph is competent to illustrate testimony, it is admitted generally as substantive evidence; and (2) since the exhibiting of a photograph generally to a jury is treating it fully as substantive evidence, the admission of the photograph as a silent witness, restores the former settled admissibility of photographs as substantive evidence.

Even before the *Honeycutt* decision brought its confusion into the law, the use of photostats and X-rays in evidence had already been

[37] In Woods v. Broadway Express, Inc., 223 N. C. 269, 25 S. E. (2d) 856 (1943) one of the reasons assigned for excluding a photograph of an auto wreck was that it was not shown how the witness would have used it to explain testimony, though the photograph was unquestionably incompetent, as it was not shown to be a correct representation of the wreck.

[38] (1929) 7 N. C. L. Rev. 443.

[38a] State v. Cade, 215 N. C. 393, 2 S. E. (2d) 7 (1939).

accepted—upon authority of the *Davis-Martin-Bane-Mathews* theory. In 1914[39] Justice Hoke in approving a photostat of a promissory note described a photograph as "the most correct and helpful impression" obtainable and gave this very liberal view from a New York case, "The revelations of the microscope are constantly resorted to, in protection of individual and public interests. It is difficult to conceive of any reason why, in a court of justice, a different rule of evidence should exist in respect to the magnified image, presented in the lens of the photographic camera, and permanently delineated upon sensitive paper. Either may be distorted or erroneous through imperfect instruments or manipulation, but that would be apparent or easily proved. If they are relied upon as agencies for accurate mathematical results in mensuration and astronomy, there is no reason why they should be deemed unreliable in matters of evidence. Wherever what they disclose can aid or elucidate the just determination of legal controversies, there can be no well-formed objection to resorting to them." Shortly thereafter the above quotation was repeated with approval in an X-ray case wherein an expert was sustained who had interpreted an X-ray without first qualifying it as true and accurate,[40] the opinion stating that his evidence showed he had assumed its accuracy. The opinion recognized that (unlike a photograph) the accuracy of X-rays cannot be verified independently but desperately clung to the requirement that competent witnesses should show that it "truly represents the object it claims to represent," and took the very advanced position that the court will take judicial notice of the accuracy of an X-ray properly taken. This is an interesting opinion. The X-ray, which is a photograph whose accuracy cannot be checked by human vision, is welcomed in court, while the photograph, whose accuracy can be independently verified, is at times coldly turned aside. An X-ray neither verified nor accepted as competent is admitted and *the court takes judicial notice that what it represents is accurate,* while a competent, verified photograph has, at times, been limited to the doubtful status that it may be used only "to illustrate testimony." This very liberal view of X-ray photographs in the *Lupton* case is now well settled.[41] On the one hand (the *Honeycutt* case), the record made by the camera is regarded as so untrustworthy that a witness must swear that it accurately portrays the view before it can be used even to illustrate testimony; on the other hand (the *X-ray* cases), the image registered on the plate by the camera is accepted as absolute and infallible. This disparity in the treatment accorded two different groups

[39] Bank v. McArthur, 165 N. C. 374, 81 S. E. 327 (1914).
[40] Lupton v. Express Co., 169 N. C. 671, 86 S. E. 614 (1915).
[41] Eaker v. Shoe Co., 199 N. C. 379, 154 S. E. 667 (1930); Welch v. Coach Line, 198 N. C. 130, 150 S. E. 717 (1929); Liles v. Pickett Mills, 197 N. C. 772, 150 S. E. 363 (1929).

of the same character of evidence is accentuated even more in practice. We have noted how the decisions have tended to limit the use of photographs to purposes of illustration; but where X-rays are used, once an expert has commented upon the X-ray, it is the common and general practice to permit other witnesses—both plaintiff's and defendant's—to comment upon and interpret the plate. Such a practice is a reasonable one, arising out of necessity, for the X-rays are in fact the best evidence of conditions revealed only by them. This means that they are substantive evidence from which experts draw inferences. Thus, in practice, our courts accept X-ray photographs as the very highest type of substantive evidence, but discount all other photographs by permitting them only for illustration. We have drifted into this strange anomaly in our law by losing sight of this significant fact: photographs may, under proper safeguards, not only be used to illustrate testimony, but also as photographic or silent witnesses who speak for themselves. Photographs, as witnesses, have almost been driven from the North Carolina courts, yet this is the more important of the two uses. Formerly, the court found it necessary to go to the view and would have done so more often but for the practical difficulties; now these difficulties have been overcome and the camera can bring the view to the court.

Let us examine a rather extreme possibility under the present state of the North Carolina law: If a defective eye with a damaged optic nerve conveys an impression (gained in twilight or under other deceptive visual conditions) to a diseased brain, even after the eroding effects of weeks have advanced the process of forgetting, the owner of the eye—though he may be a simple soul of limited intelligence and an even more limited vocabulary—will be permitted to describe in court what he *thinks* that he *remembers* that he *saw*; but, if a camera with cold precision and absolute fidelity records the view permanently and with minute accuracy that view is kept from the jury, perhaps (under the *Honeycutt* case), or its use is sharply circumscribed (under the "illustration" rule). Such strange logic has a baffling, Alice-in-Wonderland quality far removed from the realistic directness of the man-of-the-street. Perhaps only the logic of the law, wrought from centuries of philosophic inbreeding and tortured at times by the real and apparent need of stretching or confining the implications of precedent, could arrive at such a result. Whatever the cause, it is fortunate that the X-ray cases have already recognized the proper solution; i.e., a picture taken with adequate equipment under proper conditions by a skilled photographer is itself substantive evidence to be weighed by the jury. If real evidence can be brought into court, why not a photograph of it? If a jury may view a scene in

controversy, why not a photograph of the scene? "Photographs as silent witnesses have come increasingly into use in the courts for the purpose of independent proof of their subject matter. . . . Instead of explaining to the jury the testimony of a witness, they picture original evidence which reaches the jury through no human witness. . . . Such evidence has its own independent probative worth."[42] Here is a growing field of law and a growing law is a healthy one; for when a legal principle ceases to grow, *rigor mortis* has already set in. It is fortunate for the healthy growth of the law of evidence that we already have in this State abundant and respectable case authority for restoring to the photograph the unquestioned dignity it deserves as substantive evidence. That a healthy growth is continuing in this field is shown by the recent case of *State* v. *Mays*.[43] A photograph used in the trial to show bruises upon the victim's body is reproduced here, but the case is of greater interest because it sustained the use of a moulage cast to preserve the foot-prints which led from the victim's window. In the opinion the use of the moulage was upheld as merely an advanced method of "photographing" and preserving evidence. Thus, sitting astride some convenient analogy, the law continues to move forward: in the distant past the use of diagrams were accepted in evidence; then in time more precise diagrams, or plats, were accepted; just yesterday upon the double analogy to maps and to view by the jury, first photographs were recognized followed swiftly by X-ray photographs; today the court allows moulage casts as another form of photography and in time they will be recognized as substitutes for views by the jury, for they preserve in exact, fixed forms the replicae of the real evidence; tomorrow. . . .

[42] McKELVEY, EVIDENCE, 5th ed., 670.
[43] 223 N. C. 486, 27 S. E. (2d) 149 (1943).