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Thomas P. Hardman
West Virginia University College of Law

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THE EVIDENTIARY EFFECT OF A VIEW—
ANOTHER WORD

THOMAS P. HARDMAN*

In a recent important case in point, Frampton v. Consolidated Bus Lines,1 the West Virginia Supreme Court of Appeals quoted the following language from a textbook as a "well-stated" proposition of law: "A view is for the purpose of informing the jurors upon any pertinent inquiry being made in the trial of the case, and the things which they observe upon such view, so far as they are pertinent to show anything proper to be proved, are to be considered by them the same as any other evidence introduced in the case."2 Moreover, the result reached in the Frampton case fully supports the quotation.

In the latest West Virginia case in point, however, Malamphy v. Potomac Edison Co.,3 our court said (quaere: is it decision or is it dictum?) that "The primary object of having a jury view premises in question is to display the local situation so that the jury may better understand the record evidence. The view is not to furnish essential evidence dehors the record."4 And to support this proposition, commonly known as the ancillary theory, the court cited the Frampton case.

In a recent article in the Law Review5 the present writer attempted to prove that, notwithstanding numerous dicta to the contrary in this jurisdiction, all the square decisions on the question, up to and including the Frampton case, follow the theory that a view taken by a trier of fact is substantive evidence, and is to be considered by the court like any other evidence. The problem presented in these cases so frequently arises in everyday litigation that the Malamphy case seems worthy of brief comment.

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* Dean of the College of Law, West Virginia University.
4 The court quoted this statement with approval from Chesapeake & O. Ry. v. Allen, 113 W. Va. 691, 169 S.E. 610 (1933).
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In that case, in which the jury had taken a view of the damaged premises, the appellate court set aside a verdict for two thousand dollars on the ground that the proof did not establish the quantum of damages. The theory of the court purports to be that where a jury takes a view only "record evidence" may be used to support its verdict. How far then, if at all, may a view taken by a trier of fact (jury or judge) be used to sustain a verdict based in part on what the trier of fact has observed by any of the senses, sight or other?

In discussing the point raised in the instant case, the court began as follows:

"There is some argument which seems to urge that a view by the jury as to the damage done to the premises suffices to supply defects in the proof as to the quantum of damages. This Court has discussed the function and effect of a view by a jury. In Fox v. Baltimore & O. R. Co., 34 W. Va. 466, 480, 12 S.E. 757, 762, this Court, in discussing such question raised by an instruction given by the trial court, used the following language: ' * * * The object of such view must be to acquaint the jury with the situation of the premises, and the location of the property, so that they may better understand the evidence, and apply it to the local surroundings of the case. To instruct them [the jury] to disregard everything they saw, and every impression they received from the view, would be to mislead them, because it is apparent that the view would be absolutely useless, and would not conduce to a "just decision," if both sight and apprehension were to be closed against the results naturally to be derived from an inspection of the premises . . . '."

The court evidently regarded the Fox case, and rightly so regarded it,7 as supporting the theory that what a jury [or judge sitting without a jury] observes on a view is usable as substantive evidence—a theory contra to the one sponsored in the instant case.8 Moreover, the Fox case, the leading case in point in West Virginia, has never been overruled.9 To be sure, the court in the Malamphy case did use language which purports to approve the so-called ancillary theory. It is believed; however, that this theory cannot

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8 For a more or less detailed evaluation of the Fox case and other West Virginia cases cited by the court in the instant case, see Hardman, supra note 5.
9 With respect to the passage quoted in the body of this Comment, the court in the instant case said: "Later opinions of this Court, we think, state the true function and effect of a view by the jury." As to this, see Chesapeake & Ohio Ry. v. Johnson, 137 W. Va. 19, 69 S.E.2d 393 (1952). See also the reference in note 7, supra.
9 See note 7 supra.
be justifiably regarded as "the law of the case". Indeed, the court, per Lovins, J., practically conceded that its discussion of the question was obiter only. Said the court:

"The controlling question presented on this writ of error relates to the proof of the quantum of damages allegedly suffered by the plaintiff.

"Before discussing that question, we advert to other questions which we think are important, though not controlling, and should be clarified upon another trial."

Thereupon the court, before it considered the controlling question, proceeded to set forth (for use "upon another trial") what is called "the true function and effect of a view by a jury." That the theory thus expounded is obiter only is additionally evidenced by the fact that, as above indicated, the instant case, in support of its conclusion, cited the Frampton case which follows the decision in the Fox case. (Incidentally, perhaps significantly, the syllabus of the instant case does not include any reference to the point herein discussed—not that the present commentator believes that "the

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10 For one reason, it is believed that the result actually arrived at in the instant case could be readily reached by applying the theory of the Fox case and the Malamphy case, namely, that what a trier of fact observes on a view is independent evidence. In a situation such as that in the instant case, the fact that the jury had taken a view is not an insuperable objection to setting aside a verdict based in part on the "evidence" observed at the view. To be sure, the reviewing court does not have such non-record evidence before it; but if an appellate court could never set aside a verdict as unsupported by sufficient evidence except where all the evidence usable by the trial court is before the reviewing court, no verdict or almost no verdict could ever be set aside as unsupported by the evidence; for there is almost always before the trial court a very considerable amount of evidence which does not get into the record, notably, the demeanor of the witnesses on the stand—a very cogent kind of evidence which is admittedly usable in the trial court. See Wigmore, Evidence §§ 274, 946 (3d ed. 1940). Moreover, in the instant case—an action for temporary damages—the record evidence seemed quite probative to the effect that the damage to the property in question could not have been very great whereas, from the rather ephemeral nature of most of the damage, a view taken by the jury a considerable time after the injury was inflicted could not have been very enlightening. Consequently in such a case, it would seem that a verdict based in part on what a jury observed on such a view could justifiably be set aside by an appellate court on the ground that it was not supported by the evidence, (including the "evidence" obtained on the view).

11 Malamphy v. Potomac Edison Co., 83 S.E.2d at 758.

12 Id. at 759. The latest West Virginia case cited to support this "true function" of a view is the Frampton case (1950), and the concluding observation of the court in the Frampton case—cited supra in the body of this Comment—approves the theory that the knowledge obtained by a trier of fact from a view is substantive evidence.
syllabus is the law in West Virginia."

Furthermore, both the Fox case and the Frampton case state the generally accepted rule, and the rule approved by the most authoritative textbooks. Wigmore cites the West Virginia decisions as supporting the commonly approved rule. Also, in the latest textbook on Evidence published in 1954 and an excellent one, the author uses the following persuasive argument which is believed to be irrefutable:

"The impression on the senses of the jury or judge from a view of . . . [objects or other matter pertinent in a case] is information of the most direct and convincing kind about the relevant facts. It is exactly the same process of proof as obtains when objects are exhibited to the jury in the courtroom as demonstrative evidence. Some courts, however, troubled by the fact that the impressions gained from the view may not be embodied in the record on appeal in the same way that the testimony of witnesses is transmitted, have put the cart before the horse and have said that since such information cannot be reflected in the record it cannot be evidence. They have said that the purpose of the view is solely to aid the jury to understand and evaluate the testimony of the witnesses. It runs counter to common sense, however, to suppose that jurors, no matter how they may be instructed, will disregard the evidence of their own senses . . . [obtained from a view] when it comes in conflict with contrary testimony of all the witnesses. It seems that the more realistic conclusion is the one reached by a substantial number of other courts, namely, that the knowledge derived from a view is evidence which the jury may use as a basis for finding the facts so disclosed."

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13 See Hardman, supra note 5. And—interestingly—a recent West Virginia decision specifically supports the theory that the syllabus is not necessarily "the law of the case." See State v. Franklin, 79 S.E.2d 692 (W. Va. 1953); opinion by Riley, J.; dissenting opinion by Lovins, J. Said the court: "In the decision of this case we are of opinion that we need not apply the ruling of the Court in the case of State v. Collins, 108 W. Va. 98, 150 S.E. 369, though the broad wording of point 2 of the syllabus of that case, considered as an abstract statement of law, would justify us in so doing. . . . point 2 of the syllabus in the Collins case is broader than is required for a decision of the case, and the holding of this Court, as disclosed by the opinion and the facts contained therein.

"Much has been said on the question whether the syllabus or the opinion, or both, represent the law of a case decided by this Court. In Koblegard v. Hale, 60 W. Va. 37, 53 S.E. 793, 794, 116 Am. St. Rep. 868, this Court refused to apply the language of the syllabus in the case of Medford v. Levy, 31 W. Va. 649, 8 S.E. 302, 2 L.R.A. 568, saying: 'The syllabus of the case must, of course, be read in the light of the opinion.'"


15 Wigmore, Evidence § 1168. Wigmore, however, cites only the cases which he considers important.


17 Id. at 392-393.
Also, and importantly, in what seems to be the latest West Virginia decision in point prior to the instant case, *Chesapeake & Ohio Ry. Co. v. Johnson*,\(^1\) decided in 1952—a case which the court did not cite in the instant case—our court said, both in the opinion and in the syllabus, that . . . "the things which they [the jurors] observe upon such view, so far as they are pertinent to show anything proper to be proved, are to be considered by them the same as any other evidence introduced in the case."\(^2\) Furthermore, the holdings of the court fully sustains this unequivocal statement. And in a leading case decided by the United States Supreme Court, in a well-considered opinion by Justice Cardozo, the Court said with respect to a view by a jury, that "its inevitable effect is that of evidence, no matter what label the judge may choose to give it."\(^3\) Hence, notwithstanding the "label" used by the court in the instant case, perhaps it may be justifiable to paraphrase here the substance of the conclusion reached in the writer's previous discussion of the precedents in point:

To sum up, it is believed that the seeming inconsistencies in the West Virginia cases are, so far as the holdings go, seeming only and not real, and that if we look behind form to substance—if we look to the law actually enforced by the courts, whatever "labels" may be attached on occasion—our apparently conflicting decisions are reducible to one simple proposition, and a sound one, that a view by a trier of fact is substantive evidence and is usable essentially like any other evidence. It would seem to follow that the so-called ancillary theory, which the *Malamphy* case purports to support, is not a rule or principle so established by the actual holdings in the West Virginia cases as "to justify a prediction with reasonable certainty that it will be enforced by the courts [and by administrative tribunals] if its authority is challenged"—which is perhaps the best brief test or approach for determining what the law of a case


\(^{2}\) In a recent California case squarely in point, Neel v. Mannings, 19 Cal. 2d 647, 122 P.2d 576 (1942), sustaining a verdict where the jury had taken a view of damaged premises, the court said: "... the jury made an inspection of the defendant's premises and observed ... the stairway ... The knowledge acquired by this visit to the scene of the accident, supplementing the information embodied in the above-mentioned exhibits relative to the dimensional facts as to the construction of the stairway, was independent evidence in the case, and undoubtedly it had much to do with the jury's determination of this issue in accord with the plaintiff's claim."

\(^{3}\) Snyder v. Massachusetts, 291 U.S. 97, 121 (1934).
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actually is. It is deferentially submitted therefore that the purported doctrine of the instant case should not be deemed an authoritative basis of prediction as to what the courts will do in fact in this jurisdiction: it is only a dictum. Judgment *non obstante dicto!*

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21 The quotation is from Cardozo, *Growth of the Law* 52 (1924). Of course there are various tests or theories for determining the *ratio decidendi* of a case. The "prediction theory" herein adopted, and quoted from Cardozo, is based on a famous leading article by Mr. Justice Holmes in which he said: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Holmes, *Path of the Law*, 10 Harv. L. Rev. 457, 461 (1897). This statement by Holmes must be interpreted, in the light of Holmes' many other utterances on the question, to mean that law is made up of the various bases of prophecy as to what the courts [and administrative tribunals] will do in fact. See, in general, Gray, *Nature and Sources of the Law* c. 2 (2d ed. 1921); Goodhart, *Determining the Ratio Decidendi of a Case*, 40 Yale L.J. 161 (1930). Cf. Hardman, "The Law"—in *West Virginia*, 47 W. Va. L. Rev. 23 (1940).