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## View by a Judge Sitting in Lieu of a Jury

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no par value. This plan might be attacked on the same ground as was mentioned above, but there should not be any valid objection to no-par stock. Under the present West Virginia law, perhaps, the best way to achieve the result previously accomplished by nonvoting stock would be to issue debentures without definite maturities, with cumulative interest, and deferred to ordinary creditors. Nothing new would be created, as modern preferred stocks are becoming more and more like unsecured debts, but if these papers were called shares, they could vote, but because they are called debentures, they could not vote.<sup>33</sup>

In 1958, the voters of West Virginia will vote on a proposed amendment to article XI, section 4 of the state constitution. If this amendment is approved by the people, section 4 will read: "The Legislature shall provide by law that every corporation, other than a banking institution, shall have power to issue one or more classes and series within classes of stock, with or without par value, with full, limited or no voting powers. . . ."<sup>34</sup> This proposed amendment has no retroactive provision so that it appears that corporations in existence prior to the adoption thereof, with charters containing provisions limiting the powers of stockholders to vote, will not be aided by the proposed amendment unless additional legislation is passed.

P. B. H.

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#### VIEW BY A JUDGE SITTING IN LIEU OF A JURY

As stated by Dean Thomas P. Hardman in his article on the evidentiary effect of views,<sup>1</sup> the question whether a judge may have a view and whether what the judge observes upon a view is usable as substantive evidence, has never been judicially decided in West Virginia. However, recently in the case of *Westover Volunteer Fire Department v. Barker*,<sup>2</sup> hereinafter referred to as the principal case, the Supreme Court of Appeals of West Virginia was, to a very limited extent, presented with those questions. Because there are today a great number of cases in which the judge sits as the trier of fact and there are statements of the court in the aforementioned

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<sup>33</sup> Note, 17 ILL. L. REV. 138, 143 (1922).

<sup>34</sup> Senate Bill No. 251.

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<sup>1</sup> Hardman, *The Evidentiary Effect of a View: Stare Decisis or Stare Dictis?*, 53 W. VA. L. REV. 103 n.3 (1951).

<sup>2</sup> 95 S.E.2d 807 (W. Va. 1956).

case from which it is felt that erroneous inferences could possibly be drawn, although the court expressly limited its decision, it is important that comment be made upon the case and upon some of the questions which were raised, at least, inferentially.

The principal case was a statutory proceeding to establish a disputed boundary line between coterminus owners of real estate.<sup>3</sup> This proceeding was on the law side of the court and tried before the judge acting in lieu of a jury. The judge, as disclosed from his written opinion which was made a part of the record, on his own volition viewed the premises in controversy, without the consent of the parties, or their attorneys, and decided the case in favor of the petitioner "solely upon his view". The Supreme Court of Appeals reversed the decision of the circuit court and entered judgment for the defendant, the judgment that should have been entered below.<sup>4</sup>

The Supreme Court of Appeals, per Riley J., noted at the beginning of the opinion that "there is no statutory authority for a trial judge trying a case in lieu of a jury, to take a view."<sup>5</sup> As one of the "prophecies of what the courts will do in fact,"<sup>6</sup> it might be said by some that this is an expression of the court that there is no authority (statutory or common law) for a judge to take a view. However, the court later states that the judge "may have acted within the inherent power of the court over which he presides (a question which we do not need to decide). . . ."<sup>7</sup> Therefore, from the opinion taken as a whole, it is very clear that the court is not deciding nor is it indicating its position on whether or not the judge has the inherent power to take a view in a proper case in the absence of express statutory authorization.

Concerning this last mentioned question, Professors Wigmore and McCormick agree that the judicial power to order a view by the judge acting as the trier of fact (or the jury) is an inherent power of the court at common law.<sup>8</sup> There are decisions in the

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<sup>3</sup> The case was instituted under the provisions of W. VA. CODE c. 55, art. 4, § 31 (Michie 1955).

<sup>4</sup> *Westover Volunteer Fire Department v. Barker*, 95 S.E.2d 807 (W. Va. 1956).

<sup>5</sup> *Id.* at 810.

<sup>6</sup> This is one theory of what the law is. See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897); Hardman, *supra* note 1, at 104-106.

<sup>7</sup> 95 S.E.2d 807, 811 (W. Va. 1956).

<sup>8</sup> See 4 WIGMORE, EVIDENCE §§ 1169, 1163, 1162 (3d ed. 1940); MCCORMICK, EVIDENCE § 183 (1954).

United States which substantiate this position relying upon the common law precedents.<sup>9</sup> Professor Wigmore further states that the statutes regulating the subject, which began over two centuries ago in England, were concerned with the details of the process rather than the limits of the power, and that statutes regulate the process in almost every jurisdiction in the United States, but "the judicial power to order a view exists independently of any statutory limitation".<sup>10</sup> With this proposition in mind, a study of the only statute in West Virginia on views<sup>11</sup> (recognizing jury views) indicates that the legislative intent and purpose in passing the statute was simply to regulate how this inherent common law power of the court, was to be exercised by requiring a view to be a judicial proceeding. There is nothing in this statute which would lead one to reasonably conclude that its purpose was to abolish all views except those specifically authorized, but rather, the statute appears to regulate jury views so as to prevent the evils arising from unregulated jury views,<sup>12</sup> and there appears to be good reasons for such regulation.<sup>13</sup> Evidently, at early common law views were sometimes not conducted under judicial supervision. Under such an interpretation of our statute then all the inherent common law powers of the court not so specifically regulated, would still exist just as they did at common law, including the power of the court when sitting in lieu

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<sup>9</sup> *Springer v. Chicago*, 135 Ill. 552, 26 N.E. 514 (1891); *State v. Perry*, 121 N.C. 533, 27 S.E. 997 (1897). See note 8 *supra* and cases cited by those authorities.

<sup>10</sup> 4 WIGMORE, EVIDENCE § 1163.

<sup>11</sup> W. VA. CODE c. 56, art. 6, § 17 (Michie 1955) which provides, "The jury may, in any case, at the request of either party, be taken to view the premises or place in question, or any property, matter or thing relating to the controversy between the parties, when it shall appear to the court that such view is necessary to a just decision, and in such case the judge presiding at the trial may go with the jury and control the proceedings; and in a felony case the judge and the clerk shall go with the jury and the judge shall control the proceedings, and the accused shall likewise be taken with the jury or, if under recognizance, shall attend the view and his recognizance shall be construed to require such attendance. The party making the motion, in a civil case, shall advance a sum sufficient to defray the expenses of the jury and the officers who attend them in taking the view, which expenses shall be afterwards taxed like other legal costs."

<sup>12</sup> See 6 WIGMORE, EVIDENCE § 1802, for instances where matters learned by the jury upon a view violated the hearsay rule.

<sup>13</sup> If this West Virginia statute on views were interpreted by the courts as being in derogation of the common law, which it appears that it is, then it should be strictly construed and under a strict construction, the statute would be limited to the situations expressly stated—views by juries. See 17 MICHIE'S JURISPRUDENCE OF VIRGINIA AND WEST VIRGINIA, *Statutes*, § 70 (1950), for cases involving the construction of statutes which are in derogation of the common law.

of a jury, to order a view in a proper case.<sup>14</sup> However, there are some courts which have held that in the absence of statutory authorization of a view by a judge sitting in lieu of a jury, the court does not have the power to order such a view,<sup>15</sup> but those courts appear to be subject to the following criticism by Professor Wigmore (in speaking of views in a criminal case):

“Some Judges seem to acquire, after mounting the Bench, a subservience towards the Legislature in matters concerning solely the Court’s own constitutional powers and responsibilities. If no statute has told them how to perform their duty in some novel or unusual situation, they feel helpless, but if a statute can be found, they suddenly feel able to act. It is impossible to see why the Court’s power to aid the investigation of truth by directing a view should be restricted. . . . and the better precedents accept this doctrine.”<sup>16</sup>

Another acceptable approach to this question, (although it is felt here that the above reasoning is better under the West Virginia statute on views), is that “a judge sitting in lieu of a jury may have a view” in Massachusetts where, as in West Virginia, the only pertinent statutory provision purports to authorize a view by the jury, or by jury and judge, but is silent as to a view by a judge sitting without a jury. In holding that a judge sitting without a jury could take a view of the scene under such a statute, the Massachusetts court said:

“The power to inform itself by a view, within or without the territory of its jurisdiction, is inherent in a court at common law. Wigmore, Evidence § 1162, 1163, and notes thereto. . . . In this commonwealth the power is conferred by statute, G.L. (Ter. Ed.) c. 234, § 35, upon courts sitting with juries in language broad enough to avoid any implication that it is confined to jury cases and to courts which sit with juries. See *Madden v. Boston Elevated Ry.*, 284 Mass. 490, 188 N.E. 234 (1933).”<sup>17</sup> Even if the trial judge acting in lieu of a jury may have a view,

<sup>14</sup> “At common law there need be no limitation . . . upon the judicial power to order a view.” 4 WIGMORE, EVIDENCE § 1163. See *id.* n.8, for statements by the American courts on what is a proper case.

<sup>15</sup> For a list of such cases, see 4 WIGMORE, EVIDENCE § 1169 n.1 with Supplement.

<sup>16</sup> 4 WIGMORE, EVIDENCE § 1163.

<sup>17</sup> *Hardman*, *supra* note 1, at 103-104 (n.3) where the following is added: “Similarly, too, in an interesting federal case in the southern district of West Virginia, in a decision by the late Judge McClintic, the judge personally took a view of the scene and concluded that on his own examination and from the (other) evidence, an alleged fact was impossible. See *United States v. Fanning* 6 F. Supp. 412 (S.D. W. Va. 1934).”

then the question whether what the judge so observes on the view can be considered as evidence, arises and this question was raised but not answered, in the principal case.<sup>18</sup> The authoritative writers apparently feel the same rule of law should apply on this question whether the view is by a judge sitting in lieu of a jury or by the jury sitting as the trier of fact.<sup>19</sup> From the language of the court in the principal case,<sup>20</sup> it appears that the court is also of the opinion that the same rule should apply whether the judge or jury is the trier of fact,<sup>21</sup> that rule being that the matters observed upon a view are "to be considered as evidence, together with the other evidence in the case."<sup>22</sup> Although the court states that such matters are evidence, it further states that "such evidence [matters observed upon a jury view (which is the same as a judge's view)] is insufficient of itself to justify the trial court in entering judgment on the basis of what the jury saw" and further that "a jury [or judge's] view will not serve to take from the party upon whom the burden of proof lies the duty of introducing sufficient other evidence on which the jury could properly hold that the party upon whom the burden of proof lies has sustained that burden by evidence other than the jury view."<sup>23</sup>

Although the position that what a judge (or jury) observes on a view is evidence, is the better view,<sup>24</sup> the further proposition that there must be sufficient other evidence, *i.e.*, evidence other than the view, in order that a judge's finding of fact (or possibly a jury verdict) be sustained upon appeal, appears to be less tenable and serves no useful purpose under facts similar to the principal case where the judge has written an opinion disclosing what facts were observed upon his view and the opinion is made a part of the record of the case. Upon setting aside jury verdicts (and some judge's

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<sup>18</sup> 95 S.E.2d 807, 811 (W. Va. 1956).

<sup>19</sup> Professors Wigmore, McCormick and Dean Hardman treat both the judge and jury as the trier of fact, together on this subject. See 4 WIGMORE, EVIDENCE § 1168; MCCORMICK, EVIDENCE § 183; Hardman, *supra* note 1, at 103; Hardman, *The Evidentiary Effect of a View—Another Word*, 58 W. VA. L. REV. 69 (1955).

<sup>20</sup> 95 S.E.2d 807, 811 (W. Va. 1956).

<sup>21</sup> *Ibid.* The court said, "This court has held . . . that a view by a jury . . . is to be considered as evidence, together with the other evidence in the case. . . . A *fortiori* the rule should be applied in this case . . .". Also, the excellent treatise, Hardman, *supra* note 1, is cited with approval by the court which treatise also indicates that the same rule should apply to both situations.

<sup>22</sup> 95 S.E.2d 807, 811 (W. Va. 1956).

<sup>23</sup> *Ibid.*

<sup>24</sup> See Hardman, *supra* note 19, at 72.

findings of fact) which are based upon a view, the reason given by the courts is that not to set them aside would allow the view to furnish essential evidence *dehors* the record.<sup>25</sup> But where the judge's opinion shows what was observed upon his view and the opinion is made a part of the record, as in the principal case, the court can plainly see upon what evidence the judge's finding is based and from that determine whether the finding is based upon sufficient evidence and under a proper factual situation, the finding of the lower court should be affirmed even though the rule were otherwise in the case of a jury verdict or a judge's finding of fact where the record does not so disclose what "evidence" or matters were observed upon the view.<sup>26</sup> Since the record discloses the facts observed, the reason,<sup>27</sup> (even if it were conceded to be a valid reason) for the rule disappears, and it is here submitted that so should the rule disappear.

The uselessness of such a rule probably appears clearer from the following factual situation: Say an action for trespass to land is brought to recover damages for injuries to the land resulting from the defendant's pumping water from his coal mine which water is caused to run on the plaintiff's land causing erosion and creating a gully through the plaintiff's property, which action is being tried before the judge sitting in lieu of a jury. Supposing it was a proper case for a view and with the consent or presence of the parties litigants or their attorneys and/or compliance with the requisite procedure, if any (which questions are discussed later), the judge takes a view of the premises and observes the water being pumped from the defendant's mine and the causing of the water to unreasonably run on to the plaintiff's land together with the resulting erosion and injury to the plaintiff's land. Would not the observations of the judge be sufficient "evidence"<sup>28</sup> to establish the trespass and injury to the land without the introduction of other evidence so as to establish a *prima facie* case requiring the defendant to come forward

<sup>25</sup> See *Chesapeake and Ohio Ry. v. Allen* 113 W. Va. 691 syl. 1, 169 S.E. 610 (1933); 4 WIGMORE, EVIDENCE § 1168.

<sup>26</sup> Whether a jury verdict or a judge's finding of fact should be upheld upon appeal where it is based upon a view and there isn't sufficient other evidence in the record to support it, is not to be fully discussed here but at least one authority believes that it should. See 4 WIGMORE, EVIDENCE § 1169 (2).

<sup>27</sup> For cases stating that the view *dehors* the record, see 4 WIGMORE, EVIDENCE § 1169.

<sup>28</sup> The court in the principal case recognizes the fact that matters observed upon a view are evidence. See note 21 *supra*.

with a defense as to those two points? It seems pretty clear that a moving picture or photograph, properly introduced, showing all of the facts stated above would be sufficient real evidence to prove the trespass and the injury.<sup>29</sup> It seems that if moving pictures or photographs showing the requisite facts would be sufficient evidence to sustain the court's finding of fact (or a jury verdict), then a view of the actual thing upon which the same facts were observed would be even more reliable evidence,<sup>30</sup> and therefore stronger proof of those facts and there would be more reason to affirm the lower court's finding, especially where it is shown in the opinion of the judge which was made a part of the record, that those facts were observed.

The view indicated by the court in the principal case appears even more questionable when (as it now is in nearly every trial court) the court's dockets are overcrowded (and the appellate courts certainly judicially know this), and where there is a view by the judge but the other evidence consists solely of testimonial evidence. There the judge in order to establish a record so the appellate court will not set aside his findings, is required to sit and listen to the witnesses relate the facts to him which he observed and knows from his view and which he can put in his written opinion and make a part of the record for the appellate court, as was done in the principal case. This is especially true where the witnesses' powers of observation and qualifications are no greater, if as great, as the judge's.

However desirable the rule may be that in a proper case and under the proper procedure the finding of a judge will be upheld where it is based solely upon a view, the language of the principal case affords no hope that such a rule will be adopted in this state.<sup>31</sup>

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<sup>29</sup> In the case, *Springer v. Chicago*, 135 Ill. 563, 26 N.E. 516 (1891), it is stated, "on a trial, in a proper case, things may be exhibited to the jury, and, if evidence of that character [pictures, photographic views, objects and things] may be brought before the jury, upon the same principal we perceive no good reason why a jury may not, under proper regulations established by the court, go upon and view premises which are the subject matter of the litigation. . . . Had a photograph or picture of the premises been taken, *it would have been competent evidence to go to the jury.* (Emphasis added.) If a plat or photograph of the premises would be competent evidence, why not allow the jury to look at the property itself instead of a picture of the same?"

<sup>30</sup> By the use of "trick photography" pictures may be given an erroneous impression and if such pictures get to the trier of fact, then the judge (or jury) might very possibly be misled. However, in the case of a view, it must be established that the premises are in substantially the same condition as at the time in question, before the view can be had (See 4 WIGMORE, EVIDENCE § 1164 and n.2) and therefore, there is less chance that the trier of fact would be misled.

<sup>31</sup> 95 S.E.2d 807, 811-812. This is believed to be dicta.

Although the language of the court might be construed as dicta, under this language no careful lawyer representing a plaintiff would rely upon facts observed upon a view without also introducing sufficient other evidence to sustain the burden of proof.<sup>32</sup>

It is also to be noted from the facts of the principal case that the judge took a view of the premises involved upon his own volition and without the consent or presence of the parties litigant or their attorneys. This raises the question as to the procedural requirements of a view by a judge.<sup>33</sup> Under the Massachusetts view,<sup>34</sup> the power of the judge sitting in lieu of a jury to take a view would appear to be the same as in the case of a jury.<sup>35</sup> If the power of the court to take a view is considered to be a part of its inherent common law power, and if in the case of a judge sitting in lieu of a jury in West Virginia this common law power has been left unchanged by statute (which is the better rule), then the power of the court to order a view appears to be broad and almost unlimited.<sup>36</sup> Therefore, the court could order a view upon its own motion and without the consent of the parties litigant or even over their objections, if it were a proper case for a view at common law,<sup>37</sup> and the other requirements (which are hereinafter discussed) were met.

Although the power to order a view seems to be very broad at common law, some courts have required that in the exercise of this common law power, the court should give the parties notice of when the view was to be taken and allow the parties and/or their attorneys to be present.<sup>38</sup> Other courts have said that the requirements of notice and an opportunity to be present at the view is discretionary with the trial court although notice should be given.<sup>39</sup>

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<sup>32</sup> This might be simply a hard case causing the court to state some bad legal principles as dicta.

<sup>33</sup> This is not repetitious! Previously we discussed whether a judge had the power to take a view under any circumstances. Here we are discussing when and how the judge can take a view—the procedural requisites.

<sup>34</sup> See note 17 *supra*.

<sup>35</sup> Since a view by a judge sitting in lieu of a jury is included within the statute providing for a view by a jury, then it would logically follow that all provisions applying to jury views would also apply to a judge's view.

<sup>36</sup> See 4 WIGMORE, EVIDENCE 272.

<sup>37</sup> See 4 WIGMORE, EVIDENCE § 1163 n.8, for what is a proper case for a view in the United States.

<sup>38</sup> *Denver Omnibus and Cab Co. v. J. R. Ward Co.*, 47 Colo. 446, 107 Pac. 1073 (1910); *Elston v. McGlauffin*, 79 Wash. 335, 140 Pac. 396 (1914).

<sup>39</sup> *Adalex Const. Co. v. Atkins*, 214 Ala. 53, 106 So. 338 (1935); *Carter v. Parsons*, 136 Neb. 515, 286 N.W. 696 (1939).

There evidently have been instances, as in the principal case, where the judge has taken an *ex parte* view with no notice to the parties or an opportunity to be present at the taking of the view.<sup>40</sup> Professor Wigmore evidently favors the latter view that a judge's finding should stand where it is based upon an *ex parte* view with no notice or opportunity for the parties to be present.<sup>41</sup> But his statements indicate that his interpretation of the decisions require that notice be given and an opportunity for the parties to be present at the view.<sup>42</sup> This would seem to be the better rule;<sup>43</sup> also, the court in the principal case seems to indicate that it would require the consent or presence of the parties litigant or their attorneys.<sup>44</sup>

In the principal case the court said that the judgment of the trial court should be reversed for the "reason alone" that "the trial Judge, having decided the case on the basis of his view alone, has not, so far as the record in this [the appellate] Court is concerned, decided this case in a manner which would permit the court to give a proper review of the case,"<sup>45</sup> but under the facts and what the court did in fact<sup>46</sup> the holding of the case seems to be better stated by the court in point one of the syllabus in which the court said:

"In a proceeding . . . pertaining to the ascertainment and designation of boundary lines between coterminus landowners, which has been instituted to establish a disputed boundary line, it is reversible error for the Judge of the trial court, acting in lieu of a jury, who has taken a view of the property of the coterminus owners, whose boundary line is in dispute in the

<sup>40</sup> See 4 WIGMORE, EVIDENCE § 1169 (2) n.2.

<sup>41</sup> *Ibid.*

<sup>42</sup> 4 WIGMORE, EVIDENCE § 1169 (1).

<sup>43</sup> If the parties or their attorneys were present, the possibility that the court might view the wrong property or thing would be reduced; also, it might possibly aid the parties in the presentation of their other evidence and especially since matters observed upon a view are evidence to be considered by the judge sitting in lieu of a jury (or a judge), the other evidence might be more limited than otherwise, which would save the court's time and the matter certainly could be more easily explained if the attorneys knew what the trier of fact had seen. Any slight changes in the condition of the thing or place viewed might be explained away if the parties know what was observed. Also since matters observed upon a view are properly considered as evidence (see note 21 *supra*) it appears that the proceeding should be the same as any other procedure for taking evidence, and in general evidence may not be taken without notice to the parties and an opportunity for the parties to be present. Lastly, such a procedure appears to be more of a judicial character and has more of the basic elements (notice and an opportunity to be present) of justice and fair play which is necessary to uphold the prestige of our courts.

<sup>44</sup> 95 S.E.2d 807, 811-812.

<sup>45</sup> *Id.* at 812.

<sup>46</sup> This is the law of a case. See note 6 *supra*.

proceeding, to enter a judgment establishing the true boundary line based solely on such view."<sup>47</sup>

In a situation such as the principal case, where the trial court is called upon to determine the true boundary between coterminus tracts of land, it seems unlikely that there could be a factual situation where the boundary could be determined solely by a view of a judge (or jury), for this is a matter that generally requires the expert testimony of a surveyor or engineer, or the question can be determined solely on the basis of the deeds, or a combination of the two.<sup>48</sup> But a view, although it might be helpful in deciding the case,<sup>49</sup> could hardly show the true boundary since an owner of real property can establish the boundary anywhere he wishes, however foolhardy it might be. Also, the law of real property requires the true boundary to be where it actually is regardless of any topographical or observable position or condition of the land.<sup>50</sup> Therefore, the final result in the principal case appears to be correct.

R. W. F.

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<sup>47</sup> Whether or not the syllabus is the law in West Virginia is not being discussed here. On this question, see Hardman, *"The Law"—In West Virginia*, 47 W. VA. L.Q. 23 (1940); *"The Syllabus Is the Law"*, 47 W. VA. L.Q. 141 (1941); *"The Syllabus Is the Law"—Another Word*, 47 W. VA. L.Q. 209 (1921); *"The Syllabus Is the Law"—Another Word by Fox, J.*, 48 W. VA. L.Q. 55 (1941).

<sup>48</sup> This is what the court in the principal case did.

<sup>49</sup> Some courts say that a view is only to "enable the jury, by the view of the premises or place, to better understand and comprehend the testimony of the witnesses respecting the same, and thereby the more intelligently to apply the testimony to the issues on trial before them . . ." See *Close v. Samm*, 27 Ia. 508 (1869); 4 WIGMORE, EVIDENCE § 1168. A view certainly could do this.

<sup>50</sup> The court in the principal case seems to follow this rule of real property.