#63.30 9/13/74

Memorandum 74-55

Subject: Study 63.30 - View by Trier of Fact in a Civil Case

Attached to this memorandum is the Recommendation Relating to View by Trier of Fact in a Civil Case, revised in accordance with the Commission's decisions at the September meeting.

The major change is the amendment of Code of Civil Procedure Section 632 to provide a procedure for requiring the court to indicate which findings are based primarily on a view and to state its observations at the view which support such findings. The text of the preliminary part has been revised to reflect this change and some editorial suggestions.

We plan to send this recommendation to the printer after the October meeting.

Respectfully submitted,

Stan G. Ulrich
Legal Counsel

[Letter of Transmittal on Commission Letterhead]

October 15, 1974

To: THE HONORABLE RONALD REAGAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

Resolution Chapter 130 of the Statutes of 1965 directs the Commission to study whether the Evidence Code should be revised. Pursuant to this directive, the Commission has made a study of views by triers of fact in civil cases and submits this recommendation as a result of this study.

Respectfully submitted,

Marc Sandstrom
Chairman

992-901 Staff Draft

RECOMMENDATION

relating to

View by Trier of Fact in Civil Case

BACKGROUND

Jury View

Where relevant evidence is immovable or can be brought into the courtroom only with great difficulty, it is necessary for the trier of fact to leave the courtroom to receive the evidence.

In a civil case heard before a jury, Section 610 of the Code of Civil Procedure provides that the judge may order that the jury be taken out of court to view the property which is the subject of the litigation or the place where a material fact has occurred. The statute requires that the jury be conducted to the property by an officer; once there, the property must be shown to the jury by "some person" appointed for that purpose by the court. Only the person so appointed is permitted by Section 610 to speak to the jurors on any subject connected with the trial.

Section 610 is deficient in several respects:

(1) Section 610 is silent concerning whether the judge is required to accompany the jury at the view. Several decisions indicate that, although the judge should accompany the jury, generally no prejudice requiring reversal results where he does not do so.[1] Since the view is

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1. In Rau v. Redwood City Woman's Club, 111 Cal. App.2d 546, 555, 245 P.2d 12, 17-18 (1952), the court said, "We expressly hold it to be improper [for the judge not to accompany the jury at the view], but we cannot say under the circumstances of this case that defendant was prejudiced by such failure." See also Haley v. Bay Cities Transit Co., 83 Cal. App.2d 950, 187 P.2d 850 (1947). Compare decisions holding that, in a criminal trial, the defendant has a right to have the judge accompany the jury at the view: People v. Yut Ling, 74 Cal. 569, 16 P. 489 (1888); People v. Akens, 25 Cal. App. 373, 143 P. 795 (1914). This recommendation is concerned only with views in civil cases. Penal Code Section 1119 provides for jury views in criminal cases.

evidence,[2] the judge should be present and thus be cognizant of all the evidence in order to be able properly to determine motions directed to the sufficiency of the evidence. The judge should also be present in order to guard against prejudice resulting, for example, from changed or differing conditions at the premises being viewed, from the actions of a witness or other persons, or from improper conduct of the jurors themselves.

(2) Section 610 is unnecessarily limited to a view of property which is the subject of litigation or of the place in which any material fact occurred. There is no good reason for the statute to ignore situations where other types of evidence, such as staged experiments or demonstrations,[3] need to be received outside the courtroom.

(3) Section 610 requires the judge to appoint some person to show the property or place to the jury. Apparently this unnecessarily rigid provision is largely ignored. In any event, the court has authority to appoint a shower where one is needed.[4]

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2. See Evid. Code § 140 (defining "evidence"); Gates v. McKinnon, 18 Cal.2d 179, 114 P.2d 576 (1941); Cutting v. Vaughn, 182 Cal. 151, 187 P. 19 (1920); People v. Milner, 122 Cal. 171, 54 P. 833 (1898); City of Pleasant Hill v. First Baptist Church, 1 Cal. App.3d 384, 414, 82 Cal. Rptr. 1, 21 (1969); San Francisco Bay Area Rapid Transit Dist. v. Central Valley Nat'l Bank, 265 Cal. App.2d 551, 555, 71 Cal. Rptr. 430, 432 (1968); Rau v. Redwood City Woman's Club, 111 Cal. App.2d 546, 554-555, 245 P.2d 12, 17 (1952); MacPherson v. West Coast Transit Co., 94 Cal. App. 463, 271 P. 509 (1928); B. Witkin, California Evidence § 645 (2d ed. 1966). The earlier holding that a view was not evidence in Wright v. Carpenter, 49 Cal. 607 (1875), was repudiated in People v. Milner, supra. In eminent domain and inverse condemnation cases, the evidence obtained at the view may be used only for the limited purpose of understanding and weighing the testimony of expert witnesses or property owners concerning value. Evid. Code § 813. See B. Witkin, California Evidence § 646 (2d ed. 1966 & Supp. 1972).

3. Courts have allowed jurors to view demonstrations despite the limited terms of Section 610. See, e.g., Newman v. Los Angeles Transit Lines, 120 Cal. App.2d 685, 262 P.2d 95 (1953).

4. See Code Civ. Proc. § 128(3)(court power to provide for orderly conduct of proceedings); Evid. Code § 775 (court power to call and interrogate witnesses).

(4) The provision of Section 610 that only the shower can speak to the jurors on matters connected with the trial is open to the interpretation that neither the judge nor any witness may speak to the jurors. This interpretation would bar the jurors from receiving instructions or testimony that may be essential to their correct understanding of the evidence viewed.

View When Court Is Trier of Fact

While it is clear that a judge acting as trier of fact may view evidence outside the courtroom,[5] several cases have announced the rule that, if the judge inspects the locus in quo without the consent of the parties or the presence of the parties or their counsel, the information obtained at the view may not be considered independent evidence sufficient to support a finding, especially on controverted matters.[6] When

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5. See Gates v. McKinnon, 18 Cal.2d 179, 114 P.2d 576 (1941); Otey v. Carmel Sanitation Dist., 219 Cal. 310, 26 P.2d 308 (1933); Hall v. Burton, 201 Cal. App.2d 72, 19 Cal. Rptr. 797 (1962); Orchard v. Cecil F. White Ranches, Inc., 97 Cal. App.2d 35, 217 P.2d 143 (1950); Noble v. Kertz & Sons Feed & Fuel Co., 72 Cal. App.2d 153, 164 P.2d 257 (1945); Hatton v. Gregg, 4 Cal. App. 537, 88 P. 592 (1906); B. Witkin, Evidence §§ 643-644 (2d ed. 1966); 4 Wigmore, Evidence § 1169 (Chadbourn rev. 1972).

6. See McCarthy v. City of Manhattan Beach, 41 Cal.2d 879, 264 P.2d 932 (1953); Hall v. Burton, 201 Cal. App.2d 72, 19 Cal. Rptr. 797 (1962); Noble v. Kertz & Sons Feed & Fuel Co., 72 Cal. App.2d 153, 164 P.2d 257 (1945); Hatton v. Gregg, 4 Cal. App. 537, 88 P. 592 (1906). The rule and its rationale was stated in Noble v. Kertz & Sons Feed & Fuel Co., supra, as follows:

> First, that, with or without consent, the trial judge may view the locus in quo for the purpose of understanding the evidence introduced; and, second, that where the view is with consent, what is then seen is itself evidence and may be used alone or with other evidence to support the findings.
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> On principle, there can be little doubt that a view without consent cannot be considered independent evidence on a controverted issue so as to support alone a finding otherwise not supported by other evidence, and, in fact, contrary to the evidence introduced. To hold otherwise would permit the trial judge to base his findings on what he observed without giving the parties the opportunity to explain or to supplement such observations, or to cross-examine the witness.
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> Nothing here said is intended to limit the trial court's power of inspection where he is empowered to take judicial notice of the facts. [Id., 72 Cal. App.2d at 159-160, 164 P.2d at 260-261.]

the view is independent evidence, it is generally not a part of the record on appeal and the reviewing court must assume that the evidence obtained at the view is sufficient to sustain questioned findings of fact.[7]

It is undesirable to require the appellate courts to assume the validity of a finding merely because the trial judge has taken a view where there is no indication in the record whether the view sustains the finding. Moreover, to preclude the trial judge from basing a finding on what he observed at the view unless all the parties consented to the view is overly restrictive.

RECOMMENDATIONS

In order to remedy the defects described above, the Commission recommends a procedure with the following features:

(1) The trier of fact, whether judge or jury, should be permitted to leave the courtroom to receive any relevant evidence, including demonstrations and experiments, where the court determines that a view would be proper and would aid the trier of fact in its determination of the case.

(2) When evidence outside the courtroom is to be received in this manner, the trial scene should simply be shifted to the location of the view. Hence, the judge, jury (if any), court reporter (if any), and any necessary officers should be in attendance at the view. The court should be in session during the view and while going to and returning from the view. The court's authority over the proceedings should remain unchanged. In this way, the solemnity of the proceedings and the proper conduct of those present can be assured.

(3) Since the view would be a session of court, a record should be kept of statements made to the trier of fact at the view in any case where a record is kept of proceedings in the courtroom.

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7. See, e.g., Gates v. McKinnon, 18 Cal.2d 179, 114 P.2d 576 (1941)(negligence); Stegner v. Bahr & Ledoyen, Inc., 126 Cal. App.2d 220, 272 P.2d 106 (1954)(nuisance); Orchard v. Cecil F. White Ranches, Inc., 97 Cal. App.2d 35, 217 P.2d 143 (1950)(water rights); Estate of Sullivan, 86 Cal. App.2d 890, 195 P.2d 894 (1948)(probate); Chatterton v. Boone, 81 Cal. App.2d 943, 185 P.2d 610 (1947)(conversion).

(4) At the view, the court should have discretion to permit explanations of the view or other testimony by witnesses and to permit direct and cross-examination of the witnesses by counsel.

(5) The court should be required to state in its findings of fact (where findings are required) those findings supported primarily by evidence obtained at the view and also its observations at the view supporting such findings. If the court includes the statement in its announcement of intended decision, the statement should not be required to be stated in the findings. This requirement will enable the reviewing court to determine whether the evidence supports the findings whereas, under existing law, the reviewing court is required to assume that the evidence obtained at the view is sufficient to support the findings where a record of the observations has not been made a part of the transcript on appeal.

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Section 632 of, to add Article 1.5 (commencing with Section 651) to Chapter 7 of Title 8 of Part 2 of, and to repeal Section 610 of, the Code of Civil Procedure, relating to views by triers of fact.

The people of the State of California do enact as follows:

Section 1. Section 610 of the Code of Civil Procedure is repealed.

~~610. When, in the opinion of the Court, it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted, in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the Court for that purpose. While the jury are thus absent, no person, other than the person so appointed, shall speak to them on any subject connected with the trial.~~

Comment. See the Comment to Section 651.

Sec. 2. Section 632 of the Code of Civil Procedure is amended to read:

632. 1. In superior courts and municipal courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required, except as herein provided.

In superior courts, upon such trial, the court shall announce its intended decision. Within the time after such announcement permitted by rules of the Judicial Council, any party appearing at the trial may request findings. Unless findings are requested, the court shall not be required to make written findings and conclusions.

In municipal courts, findings and conclusions shall be deemed waived unless expressly requested by one or more of the parties at the time of the trial; provided, that the court shall not be required to make any written findings and conclusions in any case in which the amount of the demand, exclusive of interest and costs, or the value of the property in controversy, does not exceed one thousand dollars ($1,000).

In any such trial in the superior or municipal court, findings and conclusions may be waived by consent in writing filed with the clerk or judge, or by oral consent in open court, entered in the minutes, and shall be deemed waived by a party by failure to appear at the trial.

Where findings are required, they shall fairly disclose the court's determination of all issues of fact in the case.

Where findings are required and a finding is supported primarily by evidence obtained at a view as provided in Section 651, the court shall so state in its findings and shall also state its observations at the view supporting such findings. The statements required by this paragraph are not required to be stated in the findings where the court includes such statements in its announcement of intended decision.

The procedure for requesting, preparing, and filing written findings and conclusions and the written judgment of the court shall be in accordance with rules adopted by the Judicial Council. Judgment shall be entered as provided in Section 664.

2. In justice courts, upon trial by the court, no written findings of fact and conclusions shall be required in any case, and judgment shall be entered as provided in Section 664.

Comment. Section 632 is amended to require the court to state in its announcement of intended decision or in its findings, if any are requested, which findings are based primarily on evidence obtained at a view pursuant to Section 651. In addition, the court must state its observations at the view which support the indicated findings. This provision changes the rule as stated in Gates v. McKinnon, 18 Cal.2d 179, 114 P.2d 576 (1941), that an appellate court must assume that the evidence acquired at a view by the trial judge is sufficient to sustain the findings. See also South Santa Clara Valley Water Cons. Dist. v. Johnson, 231 Cal. App. 388, 41 Cal. Rptr. 846 (1964); Stegner v. Bahr & Ledoyen, Inc., 126 Cal. App.2d 220, 272 P.2d 106 (1954); Orchard v. Cecil F. White Ranches, Inc., 97 Cal. App.2d 35, 217 P.2d 143 (1950); Estate of Sullivan, 86 Cal. App.2d 890, 195 P.2d 894 (1948); Chatterton v. Boone, 81 Cal. App.2d 943, 185 P.2d 610 (1947). If the court does not state that a finding is primarily supported by evidence obtained at a view and also state the observations supporting the finding, such a finding will not be sustained by the appellate court in the absence of sufficient evidence in the record.

Sec. 3. Article 1.5 (commencing with Section 651) is added to Chapter 7 of Title 8 of Part 2 of the Code of Civil Procedure, to read:

Article 1.5. View by Trier of Fact

651. (a) On its own motion or on the motion of a party, where the court finds that such a view would be proper and would aid the trier of fact in its determination of the case, the court may order a view of any of the following:

(1) The property which is the subject of litigation.

(2) The place where any relevant event occurred.

(3) Any object, demonstration, or experiment, a view of which is relevant and admissible in evidence in the case and which cannot with reasonable convenience be viewed in the courtroom.

(b) On such occasion, the entire court, including the judge, jury, if any, court reporter, if any, and any necessary officers, shall proceed in a body to the place, property, object, demonstration, or experiment to be viewed. The court shall be in session throughout the view and while going to and returning from the view. At the view, the court may permit explanations of the view or other testimony of witnesses and may permit examination of the witnesses by counsel. The proceedings at the view shall be recorded to the same extent as the proceedings in the courtroom.

Comment. Section 651 provides a procedure whereby the trier of fact--whether judge or jury--may leave the courtroom to receive evidence. Former Section 610 provided only for a view by a jury. Views by a judge were governed by case law. See, e.g., Gates v. McKinnon, 18 Cal.2d 179, 114 P.2d 576 (1941); Noble v. Kertz & Sons Feed & Fuel Co.,

72 Cal. App.2d 153, 164 P.2d 257 (1945). Where a view is ordered or conducted in violation of this section, the view is not independent evidence sufficient to support a finding.

Subdivision (a) provides the standard for determining whether the trier of fact should view evidence outside the courtroom. The court has discretion whether to order a view. In making the determination, the court should weigh the need for the view against such considerations as whether the view would necessitate undue consumption of time or create a danger of misleading the trier of fact because of changed conditions. The nature of evidence which may be viewed outside the courtroom has been expanded to include objects, demonstrations, and experiments. Former Section 610 provided only for a "view of the property which is the subject of litigation, or of the place in which any material fact occurred." Despite this limitation, courts had inherent authority to order a view of other forms of evidence. See, e.g., Newman v. Los Angeles Transit Lines, 120 Cal. App.2d 685, 262 P.2d 95 (1953)(operation of streetcar door).

Under former law, in a court-tried case, all the parties had to consent to a view by the judge in order for the information there obtained to be considered independent evidence. See Noble v. Kertz & Sons Feed & Fuel Co., supra. The requirement of consent by all the parties has not been continued. Of course, the judge is not required to follow the procedure of Section 651 where it is proper to take judicial notice of facts obtainable at a view. See Evid. Code §§ 450-460 (procedure where judicial notice is to be taken).

Subdivision (b) makes clear that the view by the trier of fact is a session of court, essentially the same as a session inside the courtroom. Hence, subdivision (b) requires the presence of the judge, jury (if any), and any necessary court officials, including the court reporter (if proceedings inside the courtroom are being recorded). The third sentence of subdivision (b) makes clear that the judge has discretion to limit the testimony of witnesses and examination by counsel while the court is in session outside the courtroom. See also Evid. Code § 765 (court control over interrogation). Thus, where appropriate, the court should provide the parties with the opportunity to fully examine witnesses (direct and cross-examination) at the view and to note crucial

aspects of the view for the record. Yet there may be occasions where it will be inconvenient or unnecessary to do so outside the courtroom. Former Section 610 allowed only the person appointed by the court to speak to the jurors and made no provision for the presence of witnesses or counsel for the parties. The decisions concerning a view by the judge admonish, however, that counsel for the parties should be present. See Noble v. Kertz & Sons Feed & Fuel Co., supra. The power of the judge to control the proceedings remains intact while the court is in session outside the courtroom. See Code Civ. Proc. § 128 (general authority of court to control proceedings). Hence, for example, the court may appoint a person to show the premises to the trier of fact and may allow or refuse to allow the jurors to question witnesses at the view (see Evid. Code § 765). As to when in a court-tried case the observation of the judge at the view must be made a part of the record, see Section 632 of the Code of Civil Procedure.