#63.30 8/14/74

Memorandum 74-41

Subject: Study 63.30 - Evidence (Views by Triers of Fact in Civil Cases)

Attached to this memorandum is the Tentative Recommendation Relating to Views by Triers of Fact in Civil Cases which has been redrafted pursuant to the Commission's decisions at the July meeting. If it is acceptable, we would like to be able to send it to the printer after the September meeting. Please give your editorial suggestions to the staff at the next meeting.

The remainder of this memorandum is a discussion of two questions which the Commission asked the staff to research.

Authority of Judge to View Evidence Outside the Courtroom

The authority of the judge to view evidence outside the courtroom is stated by McCormick as follows:[1]

> There is a common law power in the trial judge upon due notice to the parties to order a view by the jury, or in a judge-tried case, to take a view himself, of premises or objects when their appearance or condition is relevant to the issue.

Wigmore states that the judge's power to use "autoptic proference" is a "corollary of his general power to obtain evidence."[2] Although the judge has no burden of producing evidence, Wigmore maintains that the trial judge may:[3]

> call a witness not called by the parties, or may consult any source of information on topics subject to judicial notice, or may put additional questions to a witness called by the parties, or may "ex mero motu" exclude inadmissible evidence, or may take a view of a place or thing.

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1. McCormick, Evidence § 183 (1954).

2. 4 Wigmore, Evidence § 1169 (Chadbourn rev. 1972).

3. 9 Wigmore, Evidence § 2484 (3d ed. 1940).

Some aspects of the judge's power to supplement the evidence produced by the parties are recognized in California statutes. Evidence Code Section 775 provides the court with authority to call witnesses on its own motion and to question them.[4] Division 4 (commencing with Section 450) of the Evidence Code is concerned with judicial notice.

Many cases recognize the authority of a judge to take a view although it is never discussed at length.[5] The rule that emerges is that a judge may take a view of the locus in quo whenever he wants but, if it is without the consent or presence of counsel for the parties, the information obtained at the view may only be used to understand the evidence introduced in the case.[6] Instead of limiting the power of the trial court to take a view, or specifying the conditions under which a view may be ordered, appellate courts have contented themselves with allowing broad discretion in the trial judge and achieving control by holding that the view is not evidence sufficient to sustain a finding on a controverted issue.

The staff believes that this rule is deficient. The judge should not need the consent of both parties. Arguably, the judge should have authority to take a view with full evidentiary force without the consent of either party. In such a case, the judge should give the parties the opportunity to be present but, if that right is waived, the parties should have no ground to complain.

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4. See Travis v. Southern Pacific Co., 210 Cal. App.2d 410, 26 Cal. Rptr. 700 (1962); People v. Murray, 11 Cal. App.3d 880, 90 Cal. Rptr. 84 (1970).

5. See cases cited in notes 6-15.

6. See Noble v. Kertz & Sons Feed & Fuel Co., 72 Cal. App.2d 153, 164 P.2d 257 (1945).

Although it may be a misstatement, the Noble case says that "a view without consent cannot be considered independent evidence." Later, while explaining its rationale, the court said that:

> 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.

The court seems to assume that, if the parties did not consent to the view, they would not or could not be present to protect their rights. However, in the case of jury views, the parties were not able to prevent a view by not giving consent--why should the situation have been any different at a judge view? In fact, a judge view should be even more generally available.

The staff thinks that the tentative recommendation is superior to the rule in Noble since it attempts to guarantee fairness by requiring the presence of the counsel for the parties (unless waived) and the motion of a party to initiate the proceeding. Consent may be held to prevent a person from claiming that proceedings are unfair (although even then he may have had no way to know what was going to happen after his consent); but presence goes to the heart of the matter--the fairness of the conduct of the view.

Should the recommendation (or Comment) specifically provide that the judge's common law authority is replaced by the statutory procedure?

Standard of Review

If the parties have consented to the view by the trial judge, reviewing courts considering the sufficiency and weight of evidence are guided by the following general principle: A view by the judge is independent evidence and, since it is not a part of the record on appeal, the reviewing court must

assume that the evidence so obtained is sufficient to sustain the questioned findings.[7] In answer to the contention on appeal that the view did not or could not support the finding, the appellate court will often speculate concerning what the trial judge might have seen. Hence, in Gates v. McKinnon,[8] the Supreme Court speculated that the trial judge could have concluded from the width of a stairway and a view of the scene of the accident that a driver should have seen a child who ran down the stairs.[9]

The decisions do not indicate that appellate courts are particularly disturbed by the fact that the evidence obtained at the view is not part of the record on appeal. In Estate of Sullivan,[10] involving the meaning of the word "lot" in a will, the reviewing court said that "when the trial judge views the premises in question during a trial what he sees is not a part of the transcript of the record but is independent evidence which may be considered by him in arriving at his decision and which this court will assume supports the findings." In Herbold v. Hardy,[11] where a tenant over a theater

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

8. 18 Cal.2d 179, 114 P.2d 576 (1941).

9. See also Hatton v. Gregg, 4 Cal. App. 537, 88 P. 592 (1906); Otey v. Carmel Sanitation Dist., 219 Cal. 310, 26 P.2d 308 (1933).

10. 86 Cal. App.2d 890, 195 P.2d 894 (1948).

11. 104 Cal. App.2d 417, 231 P.2d 910 (1951).

was suing for the removal of a new marquee, the reviewing court held that the trial judge's view was independent evidence which would support a finding that the tenant's view was blocked "although there is no way of making it part of the record." In Lauder v. Wright Investment Co.,[12] after taking a view, the judge found that the upper owners of a hillside ranch were not negligent in maintaining water courses even though there was other evidence in the record to the contrary. The appellate court said that, "in practical effect, the court simply resolved the conflict between what he saw and the testimony he heard. This, of course, is binding on a reviewing court."

The general principle just discussed theoretically is subject to two exceptions:

1. Where it appears that it would be impossible for the view to support the findings, for example, where the finding is contrary to known physical facts or where the view was clearly defective, the reviewing court is not bound to accept the determination of the trial judge. This exception has rarely been applied in California and, even then, the court did not clearly explain the basis of its decision. In Fendley v. City of Anaheim,[13] the trial court found after viewing the premises that the vibrations from defendant's power plant did not cause damage to plaintiff's property or personal discomfort. In a summary of the case (which was said not to be evidence), the trial judge said he discovered vibrations such as the witnesses had described but that they did not cause the alleged damage. However, the appellate court found that the view could not add sufficient weight to sustain the questioned finding since it did not appear that the judge viewed

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12. 126 Cal. App.2d 197, 271 P.2d 979 (1954).

13. 110 Cal. App. 731, 294 P. 769 (1930).

the premises at night when most discomfort complained of occurred. In other decisions where attorneys have argued that the judge could not have obtained evidence at the view which would support the findings, reviewing courts have speculated concerning what might have been observed and then rejected the challenge.[14]

2. Where the trial judge records his observations at the view, the appellate court may examine them to see if they support the questioned findings. The Fendley case, discussed in the previous paragraph, may be taken to illustrate this exception as well since the reviewing court examined the recorded observations of the trial judge as contained in his summary of the case and discovered that his observations corroborated the testimony of witnesses concerning the vibrations and that the trial judge apparently had not made an inspection at night. Several cases imply that, if a record of the trial judge's observations had been made a part of the record on appeal, then the reviewing court would not be bound by the assumption that they support the findings. For example, the court in South Santa Clara Valley Water Cons. Dist. v. Johnson,[15] said that it is:[16]

> well settled that when the trial judge views the premises and a record of what he saw has not been made a part of the transcript on appeal, an appellate court must assume that the evidence acquired by such view is sufficient to sustain the findings in question.

No case indicates that a judge should record his findings.

The staff recommends that no change be made in the rules concerning the sufficiency of evidence obtained by the trier of fact at a view, especially since the recommendation formalizes out-of-court proceedings in an effort to guarantee their fairness.

Respectfully submitted,

Stan G. Ulrich
Legal Counsel

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14. See, e.g., Hatton v. Gregg, 4 Cal. App. 537, 88 P. 592 (1906); Otey v. Carmel Sanitation Dist., 219 Cal. 310, 26 P.2d 308 (1933).

15. 231 Cal. App.2d 388, 41 Cal. Rptr. 846 (1964).

16. See also the cases cited in note 7.

TENTATIVE RECOMMENDATION

relating to

EVIDENCE

Views by Triers of Fact in Civil Cases

BACKGROUND

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.

The Commission believes that 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

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 Rapit 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.

Although no statute provides for a view where the judge is the trier of fact, it is clear from the cases that the judge may view evidence outside the courtroom.[5] However, 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] To the extent that actual consent of all parties is required, the Commission believes that this rule is overly restrictive.

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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

RECOMMENDATIONS

In order to remedy the defects in procedures for conducting a view by the trier of fact in civil cases, the Law Revision 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 where the judge determines that a view 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 judge's authority over the proceedings should remain unchanged. In this way, the solemnity of the proceedings and the proper conduct of those present should be assured.

3. Since the view would be a session of court, record should generally be kept of statements made to the trier of fact on matters concerning the trial.

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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.]

4. At the view, the court should have discretion to allow explanations of the view or other testimony, examination of witnesses by counsel, or any other evidence relevant to the case.

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

An act 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. 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 motion of any party, where the court finds that such a view 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.

(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 hear explanations or other testimony of witnesses, who may be examined by counsel, and other evidence relevant to the case. 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).

Subdivision (a) provides the standard for determining whether the trier of fact should view evidence outside the courtroom. 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). Subdivision (a) also makes clear that the judge may order a view only on the motion of a party. Former Section 610 provided that a jury view could be ordered where it is proper to do so in the opinion of the court. Under former law, 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.

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, examination by counsel, and presentation of other evidence 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, e.g., the judge may appoint a person to show the premises to the trier of fact and may call other witnesses (see Code Civ. Proc. § 128; Evid. Code § 775) and may allow the jurors to question witnesses at the view (see Evid. Code § 765).

#63