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THE EVIDENTIARY EFFECT OF A VIEW: *STARE DECISIS* OR *STARE DICTIS*?*

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THERE can be no doubt that the West Virginia decisions are quite confusing if not conflicting as to the extent to which a view by a trier of fact is usable as substantive evidence. Indeed, in the latest important case in point (apart from a recent decision as yet unreported), our court frankly admitted that with respect to this problem there is a "lack of harmony in our cases which (said the court, per Kenna, J.,) we think should be commented upon."[1] In that case, however, the court did not consider it necessary to extend its comments far enough to resolve the disharmony.[2] Accordingly it is the purpose of this discussion to examine the principal cases in point, in an effort to determine whether our seemingly inconsistent decisions can be harmonized.

To begin with, it must be conceded that many West Virginia lawyers seem to believe that a view is not substantive evidence but is something which is usable, ancillarily only, to enable the trier of fact, whether jury or judge,[3] to understand the record evidence.

* Address, (written version) delivered at the annual meeting of the West Virginia Judicial Association, October 6, 1950.

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1 [The recent West Virginia case referred to, *supra,* within brackets (and officially unreported as of the time of going to press) is Frampton v. Consolidated Bus Lines. That case was decided after this address was delivered, but a brief bracketed comment on the case is included, *infra,* in the body of this paper.]

The above-quoted remark by Kenna, J., is from State v. Sanders, 125 W. Va. 143, 148, 23 S.E.2d 113, 115 (1942).

2 See, *e.g.,* Tennessee Gas Transmission Co. v. Fox, 58 S.E.2d 584, 593 (W. Va. 1950), in which our court said that "the view is not in all respects evidence."

3 The question whether a judge sitting without a jury may have a view and whether what the judge so observes is usable as substantive evidence does not seem to have been judicially decided in this jurisdiction. No reason is perceived, however, why a judge so sitting may not have a view in this state or why what he observes should be treated differently in this regard from situations in which the trier of fact is the jury. See 4 WIGMORE, EVIDENCE § 1169 (3d ed. 1940).

Moreover, this belief is unquestionably buttressed by certain language employed by our court in several cases, particularly in the more recent opinions. But notwithstanding all this judicial language, *e.g.*, the oft-repeated statement in the syllabus in *Chesapeake & Ohio Ry. v. Allen*[4] that "The view is not to furnish essential evidence *dehors* the record", the question remains: What is the West Virginia law on the subject? *Stare decisis*—or *stare dictis?*

Which raises, of course, the basic question: What is law?—a question which must be answered, consciously or unconsciously, in any serious attempt to ascertain what the law is as to any particular problem. What, then, is law—case law? Or, to put the inquiry somewhat more concretely, how do we determine as a practical matter what the law is on any particular point? Is the law of a case, or the law of a series of related cases, what the court of last resort "says" as a supposedly necessary part of its reasoning in the latest pertinent case or cases? Or is law something more than that?

Mr. Justice Holmes, one of the greatest of American judges, has given us what is perhaps the most famous general answer to these questions. He says, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[5] This classic statement 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 will do in fact. In somewhat similar vein, Mr. Justice Cardozo has advocated what may be called "the prediction theory" as to the nature of law. "A principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be

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This method of evidencing the facts of a case has been found to be a very helpful one in other states, *e.g.*, 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 languages 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).

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).

[4] 113 W. Va. 691, 169 S.E. 610 (1933).

[5] Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 461 (1897).

enforced by the courts if its authority is challenged, is, then, for the purpose of our study, [says Cardozo[6]] a principle or rule of law."

To be sure, as Dean Pound has ably pointed out, there are to be found in the cases other bases of prophecy—other legal elements than "a principle or rule of conduct"—which may become, in the language of Mr. Justice Cardozo, so well established as to justify a prediction with reasonable certainty that they will be judicially enforced if their authority is challenged.[7] One of these other authoritative bases of prediction—and the ony one which it is feasible to include in this discussion[8]—is what Pound calls the technique element in the law as distinguished from the precept element, namely, the authoritative technique of the courts and administrative tribunals in interpreting and applying rules, principles, and other legal precepts.[9]

It may be said therefore that law is made up of the various authoritative bases of prediction as to what courts and administrative tribunals will do in fact; and, sufficiently for present purposes, these bases of prophecy consist of (1) what the courts and administrative tribunals say as an essential part of their reasoning with respect to the precise point or points actually and necessarily adjudicated,[10] and (2) what these tribunals do in fact (their technique of thinking and acting) in pursuance or in purported pursuance of what they thus say in their opinions, or, indeed, in their syllabi.[11] Moreover, in evaluating these two bases of prediction in the pertinent cases, it will be helpful to bear in mind another instructive

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[6] CARDOZO, THE GROWTH OF THE LAW 52 (1924).

[7] See POUND, THE SPIRIT OF THE COMMON LAW 1 (1921): "The common law . . . is essentially a mode of judicial and juristic thinking, a mode of treating legal problems rather than a fixed body of definite rules." POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 115 *et seq.* (1922); Pound, *The Theory of Judicial Decision,* 36 HARV. L. REV. 641, 643-653 (1923); Pound *What Is Law?* 47 W. VA. L.Q. 1. *Cf.* Hardman, *Judicial Technique in Using the Agency Relation,* 36 W. VA. L.Q. 133 (1930); Hardman, *"The Law"—In West Virginia,* 47 W. VA. L.Q. 23 (1940).

[8] As to the third class of legal elements, *viz.,* legal ideals, see Pound, *The Ideal Element in American Judicial Decision,* 45 HARV. L. REV. 136 (1931); Pound, *A Comparison of Ideals of Law,* 47 HARV. L. REV. 1 (1933); Pound, *What is Law?* 47 W. VA. L.Q. 1 (1940).

[9] See authorities and articles cited note 7 *supra.* See also Pound, *The Administrative Application of Legal Standards,* 44 A.B.A. REP. 445, 454-458 (1919); POUND, OUTLINE OF JURISPRUDENCE 76-77 (5th ed. 1943).

[10] See GRAY, THE NATURE AND SOURCES OF THE LAW (2d ed. 1921), especially chapters 9, 10, 11.

[11] See, e.g., Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 461 (1897). As to whether a judicial statement in the syllabus is *per se* "law" in West Virginia, see the article and comments cited note 17 *infra.*

observation by Mr. Justice Holmes. "If you want to know the law and nothing else," says Holmes, "you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict . . ."[12] All of which is one way of stating, *inter alia,* that what the court says must be interpreted and weighed in the light of what the court does—that "law in action" is generally more important than so-called "law in books"; that the life of the law lies in its enforcement.[13] If what the court says by way of a legal precept is outweighed by what the court does in fact—by the court's technique of interpretation and application of the precept—so that the judicial utterance is not such as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged, then the judicial statement does not rise to the full stature of law: it is only a dictum.

The first and leading case dealing with the evidentiary effect of a view in this jurisdiction is *Fox v. Baltimore & Ohio Ry.*[14] In that case, an action brought for the purpose of recovering damages due to the construction of a railroad upon a street on which the plaintiff's dwelling fronted, the jury had taken a view of the *locus in quo,* and the court was asked to give an instruction to the effect that the jury must disregard all impressions they received from a view of the premises. This the court refused to do, and this refusal was assigned as error. But our supreme court approved the action of the lower court, and, in doing so, the court said, "To instruct . . . [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."[15]

It should be pointed out, however, that the court also said, in a sentence immediately preceding the language just quoted, that "the object of . . . [a] 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." But, it should be noted, this language does not necessarily conflict with the language used by the court in the subsequent passage in which the court clearly

[12] Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 459 (1897).

[13] See, *e.g.,* Pound, *Law in Books and Law in Action,* 44 AM. L. REV. 12 (1910); Pound *Enforcement of Law,* 20 GREEN BAG 401 (1908).

[14] 34 W. Va. 466, 12 S.E. 757 (1890).

[15] *Id.* at 480, 12 S.E. at 762.

expressed the principle that a view is substantive evidence.

Interestingly, the later cases which purport to sponsor the so-called ancillary theory that a view is not evidence generally rely on the last mentioned language from the *Fox* case rather than on the subsequent and final expression of the court.[16] It is submitted, however, that the subsequent expression of the court reflects the true *ratio decidendi* of the case, for that expression, and that expression only, squares fully with the actual holding in the case. Moreover, without subscribing to the theory that the syllabus is the law in West Virginia (a theory to which the writer does not subscribe for reasons which he has elsewhere expressed at some length in the pages of this Law Review[17]), it should be mentioned that the syllabus in the *Fox* case strongly supports the proposition that a view is real evidence. Point 4 of the syllabus in that case—the only language in the syllabus that is pertinent—reads as follows: "When the jury have been properly permitted to view the premises in dispute, it is not improper to refuse a request which requires the Court to instruct the jury that 'they are not to take into consideration anything they saw or any impression they received at the view of the premises.'"

The next case seems to be *State v. Henry*[18] a murder case in which the jury had, apparently, viewed the scene of the killing. There was a verdict of guilty, and it was contended that the trial court had erred in that it had not instructed the jury (on its own motion) "that they should not consider as evidence any of the objects or locations pointed out to them upon the grounds." But the supreme court not only affirmed the action of the lower court but said, citing the *Fox* case, that "such an instruction is not proper under the decisions of this Court." In other words, the court said in effect that it is error to instruct the jury that a view is not evidence. And yet, surprisingly, *State v. Henry* has been cited as authority for the ancillary theory.[19]

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[16] See, *e.g.*, State v. Sanders, 125 W. Va. 143, 148, 23 S.E.2d 113, 116: "It will be noted that in this utterance [quotation from the *Fox* case] this Court indicated that the effect of a view is to be limited to its secondary relationship to the evidence properly introduced in the case on trial."

[17] 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).

[18] 51 W. Va. 283, 41 S.E. 439 (1902).

[19] See Doman v. Baltimore & Ohio R.R., 125 W. Va. 8, 12, 22 S.E.2d 703, 705 (1942).

Then came the case of *Guyandot Valley Ry. v. Buskirk*,[20] a condemnation proceeding, in which our court unequivocally espoused the theory that a view is in every respect evidence. Said the court: "On the question of value, the jury may rest the verdict largely upon their own knowledge derived from a view of the premises.[21]

The next case of any consequence is *State v. McCausland*,[22] a murder case in which the jury viewed the scene of the alleged crime. Although a verdict of guilty was set aside by the supreme court on the ground that an experiment was conducted during the view in the absence of the accused, our court strongly advocated and adopted the theory that a view is substantive evidence. Said the court in what is undoubtedly the most exhaustive judicial expression in this jurisdiction, "Frequently in the trial of . . . cases material objects are introduced before the jury . . . Can it be said that that this is not evidence? It is stronger and more convincing to the jury than the oral testimony of any witness could possibly be. There can be no difference in the proffer of objects to the jury in the court room and such exhibition by taking the jury to view such objects, when they are not susceptible of being brought into court. The reason the jury is taken to view the ground is simply because it is physically impossible to bring it into the court room, and it is therefore necessary, in order that the jury may have all of the light obtainable upon the subject to which the inquiry is directed, that it be taken and shown these objects which form a part of the subject of inquiry. In this case can it be doubted that the actual demonstration made upon the ground to show whether or not certain objects were visible from a certain point was the strongest sort of evidence that could be introduced upon that question? Likewise, the view of the jury was the very strongest evidence as to the distance between the scene of the tragedy and the place where the witness was standing whose testimony was questioned. A dozen witnesses might testify that they observed this tragedy from a certain point, and the jury would not believe a single one of them, if from the observation made upon the ground the physical conditions were such as to preclude the possibility of the truth of the witnesses'

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[20] 57 W. Va. 417, 50 S.E. 521 (1905).
[21] *Id.* at 430, 50 S.E. at 526.
[22] 82 W. Va. 525, 96 S.E. 938 (1918).

statements. This view is fully sustained by what we consider the better authorities."[23]

The court also wrote the following syllabus in the *McCausland* case:

> ". . . 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."

The next West Virginia case worthy of comment is *Harvey v. Huntington,*[24] a condemnation proceeding in which the jury was taken to view the property. In upholding a verdict based in part on this inspection, the court said: "The view of the jury was the very strongest evidence."[25]

Then followed *Clay County Court v. Adams,*[26] a condemnation proceeding in which our court said, and backed what it said by what it did, "Peculiar weight is given to the verdict where a view has been had."[27]

Up to this point, it seems indisputable that our court was committed to the theory that a view is evidence in every respect. Then, however, came the important case of *Chesapeake & Ohio Ry. v. Allen,*[28] which our court, in a recent case[29] hereinafter to be discussed, seems to regard as a precedent for the ancillary theory.

The *Allen* case was a condemnation proceeding in which the jury had viewed the premises. But in that case what the court says on the question of the evidentiary effect of a view is believed to be only a dictum, for the reason that the court set aside the verdict on the ground that the record disclosed "no substantial evidence to support it." No argument would seem to be needed to convince anyone that a verdict should be set aside if there is no substantial

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[23] *Id.* at 528-529, 96 S.E. at 939. The court here cites the following authorities: "2 Wigmore on Evidence, p. 1372, etc. and authorities there cited; 3 Jones on Evidence, § 408 etc.; Underhill on Criminal Evidence, § 230; Bishop's New Criminal Procedure, § 965; Wharton's Criminal Evidence, § 312; *People* v. *Thorne,* 156 N.Y. 286, 42 L.R.A. 368."

[24] 103 W. Va. 186, 136 S.E. 840 (1927). In State v. Lemon, 84 W. Va. 25, 99 S.E. 263 (1919), the court repeated with approval a statement in the *McCausland* case that, so far as things viewed by the jury on the premises were pertinent to show things proper to be proved, they were to be considered by the jury "the same as any other evidence introduced in the case."

[25] 103 W. Va. at 189, 136 S.E. at 841.

[26] 109 W. Va. 421, 155 S.E. 174 (1930).

[27] *Id.* at 426, 155 S.E. at 176.

[28] 113 W. Va. 691, 169 S.E. 610 (1933).

[29] State v. Sanders, 125 W. Va. 143, 23 S.E.2d 113 (1942).

evidence to support it. But our court neither says nor holds in the *Allen* case that what the jury observes on a view is not usable at all as substantive evidence. On the contrary, the court made this significant statement: "The jury viewed the premises in question. We are aware that this Court usually accords special weight to verdicts in such cases. . . . [*the jury*] *may properly consider what they observe which is ancillary to the record evidence.*"[30] With respect to the italicized part of this statement (italics ours), it should be observed that the court merely says (what is quite obvious and nothing new) that what the jury observes is ancillary to the record evidence. Of course, what the jury observes on a view is ancillary to the record evidence, that is, in aid of the record evidence. But the court said, and that is the important thing, that *the jury "may properly consider what they observe"* on a view. Moreover, the court cited, as authority for this quotation, *State v. McCausland,*[31] which, as heretofore pointed out, unequivocally espoused the principle that a view is substantive evidence and is to be considered by the jury "the same as any other evidence."

The court did, however, throw in, quite gratuitously, the following statement which seems to have started all the confusion in the West Virginia cases: "The view is not for the purpose of providing essential evidence *dehors* the record."[32] Perhaps the most revealing thing about this statement is the fact that the court cited, as its sole authority for the proposition, an early California case, *Wright v. Carpenter,*[33] and the further fact that the court cited an out-of-state case for the reason that not only does no previous West Virginia case in point support the proposition, but, as we have seen, the actual holdings in all the prior West Virginia cases are *contra.*

Furthermore, as already indicated in part, the statement is clearly enough not a necessary part of the court's reasoning, is not sanctioned by the actual holding in the case, is inconsistent with prior West Virginia decisions which the court cited with approval, and is therefore only a dictum. Moreover, it is an extremely weak dictum for the reason—a rather startling one—that the California case cited as sole authority for the statement had, many years prior

30 113 W. Va. at 696-697, 169 S.E. at 612. Italics ours.
31 82 W. Va. 525, 96 S.E. 938 (1918).
32 113 W. Va. at 697, 169 S.E. at 612.
33 49 Cal. 607 (1875).

to the *Allen* case, been repudiated by the California supreme court.[34]

To be sure, as heretofore indicated, this statement found its way into the syllabus in the *Allen* case. But, as our supreme court has said and held, with respect to another too-broad statement by the court which had unfortunately found its way into the syllabus: it (the statement in the syllabus) "is not the law and never has been in this state": it is not the law for the reason, as the court well put it, that "the language in the syllabus is broader than the opinion warrants."[35] In other words, a proposition which would otherwise be dictum does not become "law" in West Virginia merely because it is included in the syllabus of a case.[36]

That this is a warranted explanation of the *Allen* case is believed to be fully sustained by our court's holding in what seems to be the next noteworthy case in point, *Thorn v. Addison Brothers & Smith.*[37] That was a death by wrongful act proceeding in which the jury had taken a view of the premises and had brought in a verdict in favor of the plaintiff. The supreme court refused to disturb the verdict of the jury, and in so doing, said: "That the jury was entitled to take into consideration, along with the testimony introduced in the case, what it observed on the view, is well sustained by our authorities." And as an authority sustaining this proposition the court cited, significantly, the *Allen* case.[38] Thereupon, however, the court quoted the above-discussed statement from the *Allen* case that a "view is not to furnish essential evidence *dehors* the record." But—and this is believed to be the real core of the decision—the court's final statement on the point was as follows: "The view had in this case, and the effort made to represent to the jury the premises as they were at the time of the accident, were proper and the jury was warranted in considering that view in connection with the testimony of witnesses introduced in the case"[39]—a statement which clearly treats the view as being in every respect evidence.

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[34] See, repudiating the *Wright* case, People v. Milner, 122 Cal. 171, 185, 54 Pac. 833, 839 (1898). See also 4 WIGMORE, EVIDENCE § 1168, that the California case cited had been repudiated in California.

[35] See State v. Graham, 94 W. Va. 67, 117 S.E. 699 (1923), thus commenting on the syllabus in State v. Burnett, 47 W. Va. 731, 35 S.E. 983 (1900).

[36] See Hardman, *"The Law"—In West Virginia,* 47 W. VA. L.Q. 23 (1940).

[37] 119 W. Va. 479, 194 S.E. 771 (1937).

[38] The court also cited (with approval) most of the prior West Virginia cases.

[39] 119 W. Va. at 484, 194 S.E. at 773.

The next case worthy of discussion is *Doman v. Baltimore & Ohio Ry.*[40] In that case, an action for damage to the plaintiff's land resulting allegedly from a construction of a bridge by the defendant, the jury took a view of the premises and brought in a verdict for the defendant. The supreme court upheld the verdict. Said the court: "The jury viewed the land claimed to have been so greatly damaged, and what they saw, while not in all respects evidence, did enable them better to understand the testimony given in court."[41] The court cited as authority for this statement, *Fox v. Baltimore & Ohio Ry.*, and *State v. Henry,* heretofore discussed, neither of which cases in its actual holding, sanctions the ancillary theory. Moreover, the precise holding in the *Doman case,* which is unquestionably correct, does not support the proposition.

Perhaps it should be added in passing that in the latest reported West Virginia case in point, *Tennessee Gas Transmission Co. v. Fox,*[42] the court repeated the dictum in the *Doman* case, without comment. The actual decision in the *Tennessee Gas* case is clearly sound, and the case therefore does not call for further comment.

There remains only one other decision (apart from the recent unreported case) which is believed to be noteworthy enough to justify inclusion in this discussion, *viz.,* the supposedly all-important case of *State v. Sanders,*[43] which is regarded by many as an authoritative precedent sanctioning the ancillary theory. Being the latest reported case of consequence on the question, it deserves careful consideration.

The pertinent facts in the *Sanders* case, a condemnation proceeding, were as follows: The jury had brought in a verdict based in part on a view of the premises. The lower court set this verdict aside on the ground that an instruction given by the court contained an erroneous statement of the law—*a statement which did not in any way relate to the view;* and the supreme court affirmed the action of the lower court—a sound result.

By way of an obvious dictum, however, the supreme court discussed at some length a part of the lower court's written opinion

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[40] 125 W. Va. 8, 22 S.E.2d 703 (1942).
[41] *Id.* at 12, 22 S.E.2d at 705.
[42] 58 S.E.2d 584 (W. Va. 1950).
[43] 125 W. Va. 143, 23 S.E.2d 113 (1942).

dealing with the effect of a view. In his written opinion, the trial judge had stated that he had based his holding (setting aside the verdict) in part on the knowledge which he had derived from viewing the premises. This statement by the lower court raises a point quite different from the question whether a view by the trier of fact is to be treated as substantive evidence: it raises, rather, a problem of how far a judge in setting aside a verdict based in part on a view may himself rely in part on his own view of the premises. In fact, the precise problem thus presented in the *Sanders* case lies somewhat beyond the scope of this discussion; but it is so closely related that it is perhaps permissible to say just a word about it. Indeed, it would seem that essentially the same considerations should govern both problems; for in both situations the most plausible objection to giving evidentiary effect to a view is the fact that such evidence cannot, normally at least, be made a part of the record for purposes of review by an appellate court. But this objection to the substantive use of a view as evidence is believed to be wholly untenable; for, according to present-day methods of making up a record, there could seldom be an unimpeachable record prepared for an appellate court if *all* the evidence usable by the trier of fact had to be included in the record.

Apropos of the unsoundness of this objection, Wigmore on *Evidence*[44] quotes with approval the following argument by a Texas court—an unanswerable argument, it is believed:

> "[One of the objections to the view as evidence was that it] cannot be made a part of the record herein. '. . . Is it true, or is it a standard test or even a test at all, that the legality and admissibility of evidence depends upon the fact that it must be such as can and must be incorporated into and brought up with the record? We know of no such rule announced by any standard work on the law of evidence. If it be true, then the identification, the pointing out of a defendant in court, is not legitimate or admissible, because "he cannot be sent up here with the record." A witness's countenance, tone of voice, mode and manner of expression, and general demeanor on the stand oftentimes influence the jury as much in estimating the weight they give and attach to his testimony as the words he utters, and 'yet they cannot be sent up with record. . .' "[45]

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[44] 4 WIGMORE, EVIDENCE § 1168.
[45] Per White, P. J., in Hart v. State, 15 Tex. App. 202, 228 (1883).

Another argument against this objection is that cases are tried, or should be tried, for the purpose of achieving the best possible results in the first court of record, where most trials end, and should end, even though the achieving of such results must often deprive reviewing tribunals of some of the advantages held by the trial court. Because of the inescapable inperfections inherent in a review by an appellate tribunal, this is a price we must pay if we hope to obtain the most socially desirable results in the greatest possible number of cases.

At any rate, it is submitted that the much-misunderstood *Sanders* case decides nothing whatever as to the evidentiary effect to be given to a view by the trier of fact. Moreover, the essence of the dictum in the *Sanders* case is, as stated by the court, that "the result of a view should not be considered as . . . overcoming a decidedly clear preponderance [of the evidence] with nothing of record to justify that course."[46] The court also said in the syllabus: "It is error for the trial judge to set aside a verdict in a condemnation proceeding because information relating to the value of the land involved gained by him upon a jury view of the premises outweighs a clear preponderance of the evidence appearing of record."

[Finally, in order that this discussion may be brought completely up to date, there should be included here, more or less by way of an appendix, some reference to a very recent West Virginia case, *Frampton v. Consolidated Bus Lines,* which has been decided since this paper was written. The *Frampton* case is, as of the time this discussion is going to press, officially unreported; but, according to an unofficial report (which is commented upon briefly in the accompanying footnote) the court says in effect—and seems to hold —that what a trier of fact observes on a properly conducted view is in every respect evidence.[47] The case, so far as it deals with the

[46] 125 W. Va. at 151, 23 S.E.2d at 117.

[47] The "unofficial" opinion of the court, per Riley J., contains this pertinent language: "Defendant's instruction No. 12 was properly given. It simply told the jury that in arriving at its verdict, in addition to the evidence introduced by plaintiff and defendant, the jury had a right 'to take into consideration the view of the point, or points, where said collision happened, and in weighing the testimony of the witnesses, you [the jurors] have the right to consider the physical facts ascertained from your view.' This instruction conforms substantially to the holding of this Court in the case of *Thorn, Admr. v. Addison Bros. & Smith,* 119 W. Va. 479, 484, 194 S.E. 771, in which this Court, citing many West Virginia cases involving the effect of a view by a jury, said at page

present problem, may well be regarded as having buried, ceremoniously enough, the *corpus delicti* of the ancillary theory. *Requiescat in pace!*]

It would seem therefore that the various statements in the cases tending to support the ancillary theory, when read in the light of the holdings, mean nothing more than that a view, though usable as substantive evidence, is not proof *per se*: it is, like most other evidence, merely a probative datum even though it is, in many if not most instances, "the very strongest evidence." But the record evidence may be controlling, or record evidence may be necessary.[48] Also, as in the *Sanders* case, what a judge observes on a view taken by both judge and jury is not sufficient countervailing evidence to justify setting aside a verdict which is supported by "a clear preponderance of the evidence appearing of record"—supported, too, presumably, by what the jury observed on the view. And these statements, so interpreted, are thoroughly defensible.

To sum up, it is believed that the seeming inconsistencies in the 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

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484 of the opinion: 'That the jury was entitled to take into consideration, along with the testimony introduced in the case, what it had observed on the view, is well sustained by our authorities.'

"This Court in its most recent decision involving the effect of a view by the jury in the case of *Tennessee Gas Transmission Co. v. Fox*, W. Va. , 58 S.E.2d 484, citing and drawing from the opinion in the case of *Doman v. The Baltimore and Ohio Railroad Co.*, 125 W. Va. 8, 22 S.E.2d 703, said: '* * * and, though the view is not in all respects evidence, it enabled the jury to understand the opinion evidence adduced in court.' By the limitation on the evidentiary effect of the jury view suggested in the *Tennessee Gas Transmission Company* and *Doman* cases, this court did not depart from the position which prevails in this jurisdiction that a jury view may be considered by a jury, together with the evidence introduced by plaintiff and defendant. Clearly, in the sense that matters brought to the attention of the jury on a view of the premises, the view is evidence. But a jury 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. As well stated in 6 [11, *semble*] M.J., Jury, Section 65: 'A view is for the purpose of informing the jurors upon any pertinent inquiry being made in the trial of a 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.'"

[48] *Cf.* Riley, J., in Frampton v. Consolidated Bus Lines, *supra* note 47: ". . . a jury 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."

actually enforced by the courts, whatever language may be employed on occasion—our apparently conflicting decisions are reducible to one simple proposition, namely, that a view by a trier of fact is substantive evidence and is usable essentially like any other evidence. From this conclusion it would seem to follow that the ancillary theory, allegedly deducible from the West Virginia decisions, is not so established by the actual holdings in the cases as "to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged." It is submitted therefore that the ancillary theory is not law in this jurisdiction: it is not an authoritative basis of prediction as to what the courts will do in fact: it is only a dictum. Judgment *non obstante dicto!*