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John D. Lawson

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PRACTICE AND PROCEDURE

Trial Without a Jury—Use of a View to Support Court's Findings.

The extent to which a view of the *locus in quo* may be used to support findings of fact by the trial judge trying a case without a jury is not clearly marked by Washington decisions. In an early case,¹ the rule was announced that an out-of-court view of the subject in dispute may not be used by the trial judge as substantive evidence to support his findings of fact.² Whether the supreme court has continued to follow this rule in subsequent cases may be questioned. In two recent cases, the trial judge viewed the premises involved in the controversy and entered findings of fact based partly, at least, upon his observations made during his out of court inspection. In both cases the findings made were upheld on appeal. In the first case, *Elves v. King County*,³ an injunction was sought to prohibit the town of Houghton from casting water through a culvert onto the plaintiff's property. On the basis of his view of the premises, the trial judge made a finding that human and animal excreta were present in the waters constituting an enjoicable nuisance.⁴ Although the record lacked testimonial evidence of human and animal excreta, the majority in a per curiam decision held on appeal that ". . . the evidence does not preponderate against the findings of the trial court" and affirmed the judgment for the plaintiff.⁵ The dissent stated that he did not think it proper to uphold a finding which was based only upon an inspection of the premises by the trial court and argued that ". . . there must be evidence in the record to support such a finding." The second case, *In re Seattle*,⁶ was an eminent domain proceeding. After visiting the premises involved, the trial court stated that as a result of its view, it would give greater weight to the testimony of respondent's witnesses concerning the amount of damages to be awarded. In appealing the award of damages as being excessive, the appellant contended that the trial court misused its view as substantive evidence. *Held*: the trial court used the view in deciding which of con-

¹ *Elston v. McGlauffin*, 79 Wash. 355, 140 Pac. 396 (1914), discussed further on in this note.

² Dean Wigmore calls the reception of this kind of evidence as "autopic proference" and presents convincing arguments for its admission as "real evidence," which, he contends, is merely a third method by which evidence is received. The other two methods of proving a fact, he states, are testimonial and circumstantial evidence.

³ 149 Wash. Dec. 193, 299 P.2d 206 (1956).

⁴ The possibility of a prescriptive right in the city was present so that, absent a nuisance being found, an injunction would have probably been denied.

⁵ It should be noted that there *was* conflicting expert testimony as to whether the waters constituted a health menace, but only through its view did the trial court receive "evidence" of a health menace through human and animal excreta. Both the trial and the appellate courts rely upon this finding as constituting a nuisance.

⁶ 149 Wash. Dec. 240, 299 P.2d 843 (1956).

flicting testimony was correct and thus used the view for proper purposes, i. e., to assist it in understanding the testimony. The court said that the view did not disclose new facts to the trial court, but only aided it in considering the testimony in light of what it saw. Thus, in the *Elves* case, the trial judge was allowed to base a finding upon what he observed in an inspection of the *locus in quo*, while in the *Seattle* case, the trial judge was upheld because he used his view for the "proper purpose" of gaining a better understanding of testimony introduced in the trial.

It is the use and not the propriety of taking a view that is uncertain. The right of the trier of facts to visit the subject matter of the controversy in cases where it cannot be brought into the court room is firmly established in Washington. In a jury case, the trial court has statutory authority to permit a view.⁷ In a court tried case, there is no comparable statute vesting this right in the trial judge, but the decided cases have repeatedly held that a view may be properly had in such a situation.⁸ In both circumstances, the view may be taken upon the request of the parties or by the court's own motion. The propriety of making an inspection of the *locus in quo* rests entirely within the trial court's discretion and error cannot be predicated upon the court's refusal to take such a view,⁹ although the Washington court has, on occasion, criticized the refusal to take a view.¹⁰

While the trial court may properly take a view, the problem of how far the court, as the trier of facts, may go in using the observations and impressions received through such an inspection in support of its findings is not clear. May the court consider what it has seen as substantive evidence, or must the view only be used as a means of getting a clearer picture of what has been said and demonstrated in the court room? The early Washington case of *Elston v. McGlaustlin*,¹¹ concerned the question of whether a slide was caused by natural causes or because of the negligence of the defendant in excavating for an apartment house. After testimony on both sides, the trial judge visited

⁷ RCW 4.44.270 (Authorizing a jury view where the "material fact occurred.")

⁸ *Graham v New York Life Ins. Co.*, 182 Wash. 612, 47 P.2d 1029 (1935); *Forbus v. Knight*, 24 Wn.2d 297, 163 P.2d 822 (1945); *Murphy v. Murphy*, 44 Wn.2d 737, 270 P.2d 808 (1954).

⁹ *Ibid.*

¹⁰ *Cf. Forbus v. Knight*, 24 Wn.2d at 310, 163 P.2d at 828, where the court said:

It must be conceded that if the court had visited the premises and observed the conditions, it might have obtained a clearer understanding of the situation and would no doubt have avoided the mistakes made in its original memorandum decision as incorporated in the findings of fact.

¹¹ 79 Wash. 355, 140 Pac. 396 (1914) (Wigmore characterizes this case as an "unenlightened opinion." 4 WIGMORE, EVIDENCE § 1169, n. 1 (1940)).

the premises in the evening after the trial without notifying either party. In giving judgment for the plaintiff, the trial judge stated that, on the basis of his observations, he believed the plaintiff's expert witness to the effect that the slide could not have been caused by natural causes. The supreme court reversed and said:

. . . Where a view is had by a trial judge, and it appears that his inspection and observation are made an integral part of his judgment, and the parties have not consented thereto, his judgment will be rejected on appeal . . . because, 'it is difficult for this court to determine whether he has erred or not, considering what he had before him' . . . (cited cases omitted).

The supreme court probably could have rejected the findings based on the trial judge's view solely on the ground that the parties were not given an opportunity to be present during the view. However the opinion appears to be based more on the lack of evidence in the record on appeal to support the findings made by the trial court. Thus, the *Elston* case stands for the rule that a trial judge, trying a case without a jury, may not use what he has seen in viewing the premises as substantive evidence in making his findings or in rendering judgment.

Following the *Elston case*, subsequent cases have held that there must be evidence in the case, introduced through testimony, and that the only purpose of a view is to aid the trial judge in understanding this evidence¹² and in making an analysis of it.¹³ But in making an analysis and in understanding the evidence introduced by testimony, doesn't the trial judge consider the facts observed (evidence to his senses, at least) in making his findings and in rendering his judgment? In a case decided the same day as the *Elston case*, concerning whether the plaintiff was contributorily negligent in failing to stop, look and listen at a railroad crossing, the trial court directed a verdict for the defendant based upon his observations on a court and jury view of the *locus in quo*. This time the parties were given an opportunity to be present and the trial court's action was held proper on appeal.¹⁴

The court was no doubt authorized to consider such view the same as the jury; and when it appeared to the court from the testimony of the

¹² *In re Schmitz*, 44 Wn.2d 429, 268 P.2d 436 (1954); *Booten v. Peterson*, 47 Wn.2d 565, 288 P.2d 1084 (1955); and in the reported case of *In re Seattle*. In the *Booten* case, the supreme court rejected the trial judge's findings as to the location of a disputed boundary because he based his findings upon matters disclosed to him through his view and did not use the view *only* as an aid in understanding the testimony.

¹³ *Anderson v. Kurrell*, 28 Wn.2d 227, 182 P.2d 1 (1947).

¹⁴ *Aldredge v. Oregon-Washington R. & Nav. Co.*, 79 Wash. 349, 140 Pac. 550 (1914).

witnesses and the view that certain facts existed, the court could consider such facts as established facts in the case.

Thus it would seem that the trial judge may base his findings partly, at least, upon his observations gained in viewing the premises involved in the controversy, where the parties are present and there is testimony to support his findings in part, although the decisions have not been clear as to how far the view may be used in supplying a deficiency in the testimony. The real objection seems to be where there is nothing in the record, other than facts established by the view, upon which the findings of the trial judge can be reviewed by the appellate court.¹⁵ The soundness of this objection may be questioned when we consider that "real evidence," the thing itself, is usually the best and most reliable evidence obtainable. It would seem that to sacrifice somewhat the completeness of review may be justified by obtaining better justice and finality at the trial court level.

In both of the cases decided this year, the strict rule of the *Elston* case has been virtually discarded to the extent that a view may now be used in support of the trial court's findings as *additional* evidence to supplement testimony introduced in the court room. In the *Elves* case, no mention was made as to the propriety of a finding of fact based solely upon the trial court's view, although the question was presented and argued by both the appellant and respondent in their briefs.¹⁶ In the *Seattle* case, the court indicated a disposition to uphold the use of a view consented to by both parties and to search for a proper purpose of "aiding" the court in considering testimony already introduced. The use of a view can often be desirable and would seem to be an expedient in introducing the "best evidence" in court tried cases.¹⁷ It is difficult to support the artificial distinction between the "real" evidence that can

¹⁵ As stated in the *Elston* case, *supra* note 11, and *In re Schmitz*, *supra* note 12. *But cf.* *Seattle v. Montana Ry. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498 (1902), where the court said that "where there is a conflict in the testimony, they [the jury] may resort to the evidence of their senses to determine the truth" and quoted from the case of *Washburn v. Milwaukee, etc. R.R. Co.*, 59 Wis. 364, 18 N.W. 328 (1884), to the effect that if a witness testifies as to anything which the jury knows by their view to be false, they may disregard the testimony although *no witness testified* as to the fact as the jury knows it to be.

¹⁶ See note 5 *supra*.

¹⁷ For further analysis on jurisdictions outside of Washington, see 4 WIGMORE. EVIDENCE §§ 1162-1169 (1940), where the author says that the majority of jurisdictions now consider observations on a view as involving the reception of evidence which may be properly admitted and incorporated into the findings of fact. *But see*: Annot., 97 A.L.R. 335 (1935), stating as the majority rule that the trial judge should not base his findings on the results of such an inspection, either in whole or in part. An excellent article which points out that despite its confusing decisions, the West Virginia court now considers a view as involving substantive evidence, may be found in Hardman, *Evidentiary Effect of a View*, 53 W. VA. L. REV. 103 (1951).

be brought into the court room and that which cannot, merely because the latter cannot be included in the record on an appeal. Much other evidence is not included in the record such as demeanor of witnesses, physical demonstrations, etc. Where the parties are given an opportunity to be present and a proper method of showing the material facts to be observed is employed in the way of a safeguard to a fair trial, there would seem little justification for a rule as limiting as that announced by the *Elston* case. A reevaluation of the *Elston* rule by the supreme court of the extent to which a view may be used in support of the trial court's findings seems to be needed. Relaxation of the strict rule would be helpful to counsel especially in cases involving subject matter which is difficult to describe adequately by testimony, and also to the trial judge who may be confused by the supposedly descriptive testimony of a witness. It is submitted that the court should adopt a rule whereby a trial judge may utilize what he has seen upon his view as additional evidence in the case. In the two cases reported, the court seems to be moving in this direction.

JOHN D. LAWSON

Timeliness of Affidavit of Prejudice—Rulings Involving Discretion—Granting Permission for Out of State Attorney to Become Associated with an Attorney of Record. *In re William's Estate*, 48 Wn.2d 313, 293 P.2d 392 (1956), involved an application for a writ of prohibition to restrain the trial judge from presiding over a will contest in disregard of an affidavit of prejudice. Prior to the filing of the affidavit of prejudice, the trial judge had granted an oral application allowing an out-of-state attorney to become associated with the relator for the trial of the cause. *Held*: RCW 4.12.050 requires that the affidavit of prejudice be filed and brought to the attention of the trial judge "before the judge presiding has made any order or ruling involving discretion." The granting of the oral application was a ruling involving discretion within the meaning of RCW 4.12.050, and as such the affidavit of prejudice was not filed timely under the statute even though the ruling did not go to the merits of the case. The court also said that it was immaterial that under Rule 22, Revised Rules for Admission to Practice, 34A Wn.2d, May 1955, Supp. p. 36 (now Rule 7, Rules for Admission to Practice, 47 Wn.2d p. xxxvi (1956)), the judge was required to give his reasons for refusal or that the application is usually granted as a matter of comity and courtesy, since this would only have a bearing upon whether there was an abuse of discretion in rejecting the application.

PROBATE

Parties Entitled to Appointment as Administrators—Grounds for Disqualification. The Washington Court recently handed down two decisions which appear to alter the existing principles relating to the qualification and disqualification of parties entitled to be appointed as