Evidence--The Opinion Rule As Applicable to Dying Declarations in West Virginia--Another View

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EVIDENCE—THE OPINION RULE AS APPLICABLE TO DYING DECLARATIONS IN WEST VIRGINIA—ANOTHER VIEW.—The extra-judicial assertions of a deceased person made under the belief of impending death—though hearsay—are admissible in evidence at the trial of a person charged with the homicide of the declarant to prove the circumstances surrounding the death. The problem discussed in this note is whether such declarations must also satisfy the requirement that testimonial evidence must be based on facts rather than opinion, that is, does the opinion rule apply to these declarations?

Before attempting to progress towards the solution of this problem (if a solution exists), the few West Virginia cases that tend to cast some light on this rather obscure point must be considered. A brief statement of each case will be offered before any critical analysis is attempted. In State v. Burnett a dying declaration was discussed. The court stated that the declaration was inadmissible because it contained mere declarations of opinion and would have been inadmissible if the declarant had been so

1 5 Wigmore, EVIDENCE §§ 1431-1434 (3d ed. 1940).
2 47 W. Va. 731, 35 S.E. 983 (1900).
testifying on the stand. The syllabus pertaining to this point reads as follows: "Dying declarations, being a substitute for sworn testimony, must be such narrative statements as would be admissible had the dying person been sworn as a witness. If they relate to facts to which the declarant could have thus testified, they are admissible. *Mere declarations of opinion, which would not be received if the declarant were a witness, are inadmissible.*"

If this syllabus sets forth the law of the case and has never been overruled, this would seem to settle the problem and, irrespective of the desirability of such result, the law in West Virginia would be that the opinion rule does apply to dying declarations. However, before discussing the dying declaration the court in this case had found that the trial was conducted before a special judge who had no jurisdiction, such decision calling for reversal without necessity of a further search for error. The statement as to dying declarations was unnecessary to the decision of the case and seemingly a dictum. The court expressly stated that it was discussing this point only for the guidance of the trial court when the evidence was submitted upon a new trial.

In *State v. Hood* it was contended that the dying declaration was inadmissible on two grounds. One was that within the dying declaration the declarant set forth an extra-judicial statement of a third person. The court held that this part was inadmissible, because hearsay, and went on to say, "A dying declaration must be such as would be admissible if the party were living and giving evidence [citing the Burnett case]... Therefore hearsay cannot be rendered admissible by being included in a dying declaration." The court thus at least approved of the statement in the Burnett case, if it did not adopt it as a holding. The other ground of objection was that it was not shown that the declarant believed in

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3 Point 2 of the syllabus by the court. Italics supplied.
5 "As that was not the basis of the decision... the language was dictum." Wheeler v. Wilkin, 98 Colo. 568, 573, 58 P.2d 1223, 1226 (1936). "Dictum, however, in legal parlance is a statement of law in a court's opinion which is not necessary to the decision of the matter in controversy." Putnam v. City of Salina, 137 Kan. 731, 732, 22 P.2d 957 (1933). "We feel bound by things said in our opinions, not because we said them, but because we had to say them to reach the conclusion to which we came." Superior Oil Corp. v. Alcorn, 242 Ky. 814, 835, 47 S.W.2d 973, 984 (1931).
6 63 W. Va. 182, 59 S.E. 971 (1907).
7 *Id.* at 185, 59 S.E. at 973.
a God and rewards or punishment after death. The court went into detail to point out that a witness is not now rendered incompetent to testify in West Virginia by his religious belief, or lack thereof. Here the court, at least indirectly, indicated its acceptance of the rule that not only must the dying declaration be such as would be admissible if the party were living, but that the party must be one who would be competent to testify if he were living.

In *State v. Graham* a dying declaration was admitted by the trial court. This was declared error by the appellate court on the ground that dying declarations must be confined to the facts and circumstances relating to the homicide and forming part of the res gestae. In so holding the court disapproved of a portion of the syllabus in the Burnett case, and said it was not and never had been the law in this state. That syllabus had set forth two general propositions: (1) that the declaration must contain such statements as would be admissible had the declarant been sworn as a witness; and (2) if the statements relate to such facts they are admissible. It was the latter statement to which the court objected in the instant case in that it does not restrict the statements to the circumstances surrounding the homicide. The court makes no objection to the first proposition. In fact the court remarked as to the dying declaration here involved: "It cannot be received for any purpose as it clearly violated the rule that it must relate to facts and circumstances forming part of the res gestae. Other reasons might properly be urged against its admission, but these are sufficient." While the court does not list these other reasons, it is at least arguable that the court was referring to the objection of defendant's counsel that the declaration contained opinions of the declarant.

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8 94 W. Va. 67, 117 S.E. 699 (1923).
9 Another instance of the use of the overworked term "res gestae". Evidently in such situations in West Virginia this term is used to mean the pertinent events leading up to and surrounding the homicide.
10 The sentence disapproved reads: "If they relate to facts to which the declarant could have thus testified, they are admissible."
11 94 W. Va. at 71, 117 S.E. at 701. If, as the court states, this statement was not the law at the time it was written, it must necessarily have been a dictum thereby rendering this case fairly substantial authority for the proposition that a syllabus may amount to nothing more than a dictum.
12 94 W. Va. at 72, 117 S.E. at 701. Italics supplied.
In *State v. Shelton*\(^{13}\) the court excluded part of a declaration a portion of which contained an opinion.\(^{14}\) Yet in justifying this exclusion the court made no reference to the opinion rule, but based its action on the ground that the statements bore no relevance to the issue and were not part of the res gestae.

In *State v. McLane*\(^{15}\) the court citing the *Burnett* case stated: "The scope of a dying declaration should be confined to what, if otherwise offered, would be admissible testimony."\(^{16}\) However, the statement here excluded was not opinion, but merely irrelevant and could have been excluded without laying down any such broad principle as this.

From an analysis of the foregoing cases the situation in West Virginia would seem to be as follows. The earliest case in point\(^{17}\) lays down the broad proposition that opinions, which would not have been admitted had the declarant been on the witness stand, are inadmissible in dying declarations. While there is some authority to support a contrary view,\(^{18}\) it would seem that the more realistic approach to the rule laid down under the circumstances here involved would be to treat it as a dictum, rather than as a holding. This dictum is cited with approval in two later cases,\(^{19}\) and in a third case\(^{20}\) is seemingly given implied approval by overruling a portion of the syllabus containing this dictum, but leaving the portion here dealt with unscathed. However, in neither of the cases which approve the rule is the dictum advanced to the status of a square holding. In both cases the proposition lifted from the *Burnett* case and approved was broader than the question before the court warranted.\(^{21}\) Moreover, the *Shelton* case

\(^{13}\) 116 W. Va. 75, 178 S.E. 633 (1935).

\(^{14}\) Excluded portion reads: "I had had Buren Stephenson's gun, but gave it to him about two hours before I was shot. I knew Bill was on parole from the Federal Prison and that if I arrested him he would probably be taken back to finish his sentence. Bill Shelton had been in Luke Rhode's restaurant earlier in the evening. He seemed to be under the influence of liquor and he had been arguing and cursing and was very noisy." *Id.* at 85, 178 S.E. at 637. Italics supplied to indicate opinion.

\(^{15}\) 126 W. Va. 219, 27 S.E.2d 604 (1943).

\(^{16}\) *Id.* at 224, 27 S.E.2d at 606.

\(^{17}\) State v. Burnett, 47 W. Va. 731, 35 S.E. 983 (1900).

\(^{18}\) See Chance v. Guaranty Trust Co. of New York, 298 N.Y. Supp. 17, 23 (Sup. Ct. 1937), where the court cites with approval Corpus Juris stating that an expression, otherwise a dictum, becomes an authoritative statement when the court expressly declares it to be announced as a guide for future conduct.

\(^{19}\) State v. Hood, 63 W. Va. 182, 59 S.E. 971 (1907); State v. McLane, 126 W. Va. 219, 27 S.E.2d 604 (1943).


\(^{21}\) In *State v. Hood*, 63 W. Va. 182, 59 S.E. 971 (1907), the issue was whether hearsay statements included in a dying declaration were admissible;
overlooked an excellent opportunity to apply such rule if it actually constitutes part of the body of law of this state. In spite of the view that an often repeated dictum may acquire the force of a rule of law,\textsuperscript{22} this does not seem to have been repeated frequently enough to bring it within the operation of such principle. Thus as far as an actual holding is concerned, this question remains unsettled in West Virginia. However, considering the law to be a prophecy of what the court will do in the future, based upon what it has done and said in the past in cases considering the same question, and the general judicial trend evidenced in the decisions of the court, it is submitted that the law in West Virginia is that the opinion rule is applicable to dying declarations. The court has purported to apply this rule to dying declarations;\textsuperscript{23} moreover, so far as a fairly diligent search has revealed the court has never admitted a dying declaration which contained an opinion—with or without a discussion of this problem.

Once having assumed the position that the opinion rule does apply to dying declarations, it might be well to inquire as to the importance and consequence of this result. It is submitted that in most cases where an opinion is offered in a dying declaration, such portion of the declaration can be excluded by the application of either of two other entirely distinct evidentiary rules—the requirement of personal observation on the part of the witness,\textsuperscript{24} or the confining of the declaration to the circumstances immediately surrounding the homicide—\textsuperscript{25} without reference to the opinion rule. In those few cases where both the foregoing rules are satisfied need the application of the opinion rule necessarily exclude the opinion? It does not appear that such result inevitably follows. As pointed out by Professor Wigmore,\textsuperscript{26} the main reason for excluding an opinion is that it is superfluous, which reason

\textsuperscript{22} United States v. Guaranty Trust Co. of New York, 33 F.2d 533 (8th Cir. 1929), aff'd, 280 U.S. 478 (1930).

\textsuperscript{23} State v. Burnett, 47 W. Va. 731, 738, 35 S.E. 983, 985 (1900).

\textsuperscript{24} As to the requirement of personal observation, see 2 Wigmore, Evidence §§ 478, 658. In some cases where the court speaks of opinion it is actually dealing with statements not based on personal observation. See, e.g., State v. Burnett, 47 W. Va. 731, 35 S.E. 983 (1900); Jones v. State, 52 Ark. 347, 12 S.W. 704 (1889). Nevertheless, the courts seem to overlook the distinction between these two situations.

\textsuperscript{25} State v. Graham, 94 W. Va. 67, 117 S.E. 699 (1923).

\textsuperscript{26} 5 Wigmore, Evidence § 1447.
in most cases would not apply to a dying declaration. Opinions of a lay witness are not per se excluded. The test is whether the witness can so reproduce or describe to the jury the facts upon which the opinion is based that the jury is as capable of drawing a conclusion therefrom as the witness. It is recognized that if a witness cannot so describe the facts his opinion is admissible. Why then, if the declarant—now deceased—has stated his opinion without detailing facts, is not this opinion fully as competent to go to the jury as in the case where the witness merely lacks an adequate vocabulary or affluence sufficient to enable him to picture verbally the facts to the jury? Surely the facts are just as incapable of presentation. The same reasons for trustworthiness apply to the declarant's opinion as to his narration of facts, and the jury can determine the weight to be accorded to the opinion as well as to the remainder of the declaration. It is submitted that a logical and common-sense application of the opinion rule to dying declarations should not exclude the opinion except in those instances where the declarant has also related the facts upon which his opinion is based and thereby rendered the opinion superfluous.

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28 The writer does not mean to indicate that the test in every case depends upon the individual's ability to describe the facts to the jury. Rather it would seem to depend upon whether the fact to be described is one that an ordinary person would have difficulty in describing in words or in visualizing if he were listening to the description. See authorities cited in note 27 supra.

29 "The rules of evidence in the main are based on experience, logic and common sense, less hampered by history than some parts of the substantive law." Per Mr. Justice Holmes, dissenting in Donnelly v. United States, 228 U.S. 243, 277 (1913).