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"THE LAW" — IN WEST VIRGINIA*

THOMAS P. HARDMAN**

The syllabus is the law. "Our constitution requires the court to make the syllabus and it is that which is the real decision over the opinion."1

How often has every West Virginia lawyer heard this argument — this supposedly authoritative theory — as to what is the law in this jurisdiction? Sometimes one hears it propounded at the bar; sometimes it assumes the form of a traditional belief that is pretty much taken for granted; occasionally it puts in an appearance in judicial pronouncement.2 That it is a wide-spread belief is beyond question. But does it fit the realities? When we look behind form to substance, when a spade is called a spade, is it a theory that is generally accepted and acted upon by the court in the everyday adjudication of cases? Is it law?

That a judicial decision has in it a directive force for deciding future cases of a similar nature is perhaps the most fundamental tenet of our common-law system.3 Yet it is not too much to say that there is no consensus among lawyers and judges as to just what constitutes that elusive something which we call the law of a case. To be sure, everyone knows that the concrete decision is binding between the parties to it. But, as everyone also knows, except a few ultraists,4 it is not the concrete decision as such that is law; it is only the abstract directive force of the precedent, the constitutive basis of prediction as to how subsequent similar cases will be de-

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**Dean of the College of Law, West Virginia University.

1 The quotation is an obiter dictum by Brannon, J., in Bank v. Burdette, 61 W. Va. 636, 57 S. E. 53 (1907). But see Koonce v. Doolittle, 48 W. Va. 592, 594, 37 S. E. 644 (1900): "This court only makes the more important points of law a part of the syllabus for the general information of the legal profession and public." (Italics ours.) Brannon, J., was a member of the court when it made this pertinent observation as to the purpose and function of the syllabus in West Virginia.

2 See, e.g., the dictum in Shenandoah Valley National Bank v. Hiett, 6 S. E. (2d) 769, 770 (W. Va. 1939). This dictum is discussed infra in the body of this article. Cf. Koblegaard v. Hale, 60 W. Va. 37, 41, 55 S. E. 793 (1906): "The syllabus of the case must, of course, be read in the light of the opinion."


4 For a rather extreme view see Oliphant, A Return to Stare Decisis (1928) 14 A. B. A. J. 71, 159.
cided, that is authoritative as regards the world at large. Writers usually call this directive element the *ratio decidendi*. But what is it? And how does one find it? And where?

That *obiter dicta* must first of all be dismissed as unauthoritative is of course axiomatic. "In order that an opinion may have the weight of a precedent," as John Chipman Gray puts it in his classic book *The Nature and Sources of the Law*, "it must be an opinion the formation of which is necessary for the decision of a particular case." But what statements and implications of an opinion are essential for the decision of the precise points involved? Few problems of the lawyer or law teacher are shrouded in deeper mystery, few problems more difficult.

But let us assume that everything the court has said in a given case is a "necessary" part of the "necessary" reasoning. How does one go about the task of determining the law of the case? In discussing this problem the leading American commentator on the question declares with considerable confidence that there are "four keys" to the discovery of the authoritative element of a judicial decision. These, he says, are:

"I. The court must decide the very case before it;
II. The court must decide the case in accordance with a general doctrine;
III. The words used by the court are not necessarily the doctrine of the case;
IV. The doctrine of the case must be the doctrine that is in the mind of the court."

"Hence", concludes this eminent jurist, "the doctrine [authoritative element] of a case is a general proposition of law from which, taken in connection with the circumstances of the case, the decision logically follows, and upon which, whether expressed in the opinion or not, the court bases its decision."

But with all deference it is submitted that there are no four keys, nor five, to the discovery of the *ratio decidendi* of a case. There are, rather, certain clues that are sometimes self-sufficient but in addition need, not infrequently, the aid of a trained intuition that runs deeper than formulae. For the problem is, basically, the problem of "What is Law?" And law, that is, case law, is some-

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5 At p. 261.
6 Gray, The *Nature and Sources of the Law* (2d ed. 1921) c. 2. For a different view as to this see Goodhart, *Determining the Ratio Decidendi of a Case* (1930) 40 Yale L. J. 161.
7 Gray, The *Nature and Sources of the Law* 29.
thing more than general propositions, something more than the rules, standards and other major-premise elements that are laid down in or that may be deduced from the decided cases, something more indeed than the aggregate of these basic generalizations. Law, in the sense of the sum total of the authoritative directive force of a precedent, the sense in which it is used in this discussion, is not made up of one kind of ingredient only, as it is commonly assumed to be; it is a compound; it is a three-ingredient compound, and two of its ingredients are rarely spelled out in full in a single case, often left largely inarticulate. These ingredients are, (1) basic generalizations, e.g., rules, standards, which serve, broadly speaking, as legal major premises and which for convenience we may call, collectively and generically, principles, (2) what many writers now designate the technique of the courts (and administrative tribunals) in interpreting and applying these basic principles, (3) the ideals of the time which courts and other law-administering agencies consciously or unconsciously employ and which thus give authoritative direction to both principles and technique. As long ago as 1881, Mr. Justice Holmes, in his famous book on The Common Law, stressed the role in the judicial process of what he called "the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy." More recently Mr. Justice Cardozo and others have given fuller meaning to this important constitutive element—this ever-present background of accepted ideas and aims which judges, avowedly or unconsciously, unconsciously in large part, use in coming to a particular decision, in deciding, for example, whether to apply this principle or that to the case before them, or, if there is only one apposite principle at hand, whether to apply it narrowly or to extend it (empirically) to a novel situation, or even to lay down a new principle.

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8 Law is a term that has at least three meanings. See Pound, What is Law? (1940) 47 W. VA. L. Q. 1.
9 These basic generalizations are commonly called rules or principles, but in reality there are four classes of these basic elements. See Pound, An Introduction to the Philosophy of Law (1922) 115 et seq. See also Pound, Law and the Science of Law in Recent Theories (1934) 43 YALE L. J. 525. These elements are: "Rules", "principles", "standards", "conceptions".
10 See Pound, The Spirit of the Common Law 1: "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." Cf. Hardman, Judicial Technique in Using the Agency Relation (1930) 36 W. VA. L. Q. 133.
12 See Cardozo, The Paradoxes of Legal Science (1928) 27 et seq. At pp. 29, 30, Cardozo says: "The whole system which they [the common-law judges] develop has been built on the assumption that it is an expression of the mores."
In general then the law of a case may be said to consist of this three-fold directive force which serves as the authoritative basis of prediction as to how other similar cases will be determined. Without a knowledge of each of these three interacting ingredients and of the role each plays in the actual adjudication of cases, one is not fully equipped to advise a client as to how a court will decide a particular point. In other words, without this knowledge one is not in a position to say what the law is. And the fact that a full knowledge of this is not always possible does not argue against the soundness of this theory; it only means, what everyone knows, that law is not completely predictable.

How then do we isolate and evaluate this collective thing we call the ratio decidendi? The answer can best be sought from a study of pertinent cases and, since law is a living organism whose "life," as Holmes put it, "has not been logic" but "experience," these decided cases must be looked at not as mere storehouses of static raw materials of decision but as the embodiment of a living generative force. They must be looked at as having at once both reproductive power and reproductive process. The moment a decision is handed down, it becomes, in the felicitous phrase of Mr. Justice Cardozo, "a new stock of descent. It is charged with vital power. It is the source from which new principles or norms may spring to shape sentences thereafter. If we seek the psychological basis of this tendency, we shall find it, I suppose, in habit." Whatever its psychological basis, it is one of the living forces of our law."

A few West Virginia decisions chosen mostly from the field of

What has once been settled by a precedent will not be unsettled over night, for certainty and uniformity are gains not lightly to be sacrificed. Above all is this true when honest men have shaped their conduct upon the faith of the pronouncement. On the other hand, conformity is not to be turned into a fetish. . . . There are many intermediate stages, moreover, between adherence and reversal. The pressure of the mores, if inadequate to obliterate the past, may fix direction for the future. The evil precedent may live, but so sterilized and truncated as to have small capacity for harm. It will be prudently ignored when invoked as an apposite analogy in novel situations, though the novel element be small. There will be brought forward other analogies, less precise, it may be, but more apposite to the needs of morals. The weights are constantly shifted to restore the equilibrium between precedent and justice." See also Cardozo, The Nature of the Judicial Process. Pound, The Ideal Element in American Judicial Decision (1931) 45 Harv. L. Rev. 136; Pound, A Comparison of Ideals of Law (1933) 47 Harv. L. Rev. 1; Pound, supra n. 8.

evidence will, it is believed, suffice to illustrate what is meant—will serve to let us focalize on the nature and source not so much of "law in books" as of "law in action",16 of law in its fullest authoritative sense.

In State v. Burnett,17 the West Virginia Supreme Court of Appeals wrote the following syllabus:

"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." (Italics ours.)

In a later West Virginia case, State v. Graham,18 the question was presented as to the admissibility of a "dying declaration" containing a statement to the effect that the dying declarant and the accused had quarreled about a month before the killing for which the accused was indicted. The State contended that the evidence was admissible under the syllabus in the Burnett case. The supreme court conceded in effect that this statement in the syllabus, if law, would let the evidence come in. And the lower court, perhaps on the ground that the syllabus is the law in West Virginia, admitted the evidence. But the supreme court held that it was error to admit it. Said the court:19

"A careful examination of ... [the Burnett] case will disclose that the language in the syllabus is broader than the opinion warrants.... The statement in the syllabus that 'If they relate to facts to which the declarant could have thus testified, they are admissible,' is too sweeping and taken apart from the facts stated in the opinion is inaccurate. This statement would imply that ... anything he [the declarant] might say in a dying declaration if he could give it in evidence were he alive, would be competent evidence upon a trial of the accused for his homicide. This is not the law, and never has been in this state." (Italics ours.)

Here, it should be noted, the West Virginia court in so many words not only repudiated the syllabus of a case purporting to state a proposition of law but repudiated it on the ground that the doctrine laid down in the syllabus "is not the law, and never has been in this state"—that it never has been the law for the reason that

10 As to how "'law in books' often differs 'from law in action'" see Pound, Law in Books and Law in Action (1910) 44 Am. L. Rev. 12.
17 47 W. Va. 731, 35 S. E. 983 (1900).
10 Pp. 71, 72.
the syllabus is broader than the opinion warrants'. Thus, in ultimate analysis, the court found the law of the case, not in the syllabus but elsewhere. And, what is even more significant, in order to show that the applicable law is something other than the general proposition set forth in the syllabus, the court cited not a single West Virginia case but three cases from other states and two well-known textbooks. Similarly, in a decision handed down on March 19, 1940, Meadow River Lumber Co. v. Easley, our Supreme Court of Appeals again refused in unmistakable terms to accept as law a proposition laid down in the syllabus of a prior decision, giving as its reason—an incontestable reason, it is submitted—that 'this point of the syllabus, and the part of the opinion upon which it is based, were unnecessary to the decision in that case.' In other words, the court held in effect that the proposition, though promulgated in the syllabus, was obiter dictum. It seems clear, therefore, that the fact that the court lays down a general principle whether in the opinion or in the syllabus does not per se make it law; the law of a case is something more than the mere ipse dixit of the court; it is something whose authoritative force proceeds in part from elements more interstitial and more elusive than the general propositions which our constitution requires the court to prefix to its opinions.

Incidentally, and yet pertinenty, the same section of the West Virginia Constitution which requires the court to prepare a syllabus also requires the court to write an opinion, and the section does not purport to give the syllabus any special efficacy.

20 It should be noted, however, that there was at least one prior West Virginia case in accord with the cases cited from the other states. See Crookham v. State, 5 W. Va. 510 (1871).
21 7 S. E. (2d) 864 (W. Va. 1940).
22 At p. 865.
23 W. VA. CONST. art. VIII, § 5 provides: 'When a judgment or decree is reversed or affirmed by the supreme court of appeals, every point fairly arising upon the record of the case shall be considered and decided; and the reasons therefor shall be concisely stated in writing and preserved with the record of the case; and it shall be the duty of the court to prepare a syllabus of the points adjudicated in each case concurred in by three of the judges thereof, which shall be prefixed to the published report of the case.' The applicable provision of the West Virginia Code follows the Constitution. W. VA. REV. CODE (1931) c. 53, art. 5, § 21. It might even be argued, not without a semblance of plausibility, that the constitutional requirement that the court should write an opinion giving reasons for all points decided is more emphatic than the requirement that the court should prepare a syllabus. At any rate the supreme court of appeals has on several occasions made it quite clear that the constitutional and statutory provision requiring it to prepare a syllabus is 'directory' only. See Henshaw v. Globe etc. Ins. Co., 112 W. Va. 556, 168 S. E. 15 (1932). Cf. Horner v. Amick, 64 W. Va. 172, 61 S. E. 40 (1908).
incidentally, the most compelling reason for the constitutional provision requiring the court to write a syllabus seems to have been to do away with the old practice whereunder the syllabus was prepared by the court reporter and therefore, not infrequently, did not accurately express the views of the court.\textsuperscript{25}

The West Virginia decisions as to the admissibility of hearsay as a part of the so-called \emph{res gestae} are particularly instructive. In the earlier cases our court made admissibility turn on contemporaneity so that hearsay assertions not made at the time of the transaction which they characterized were not receivable in evidence.\textsuperscript{26} If the statement did not accompany the act but was made later, the utterance obviously could not be said to be a part of the act and so the rule, which was narrowly applied, could not but exclude. In the later cases, however, our court, though still purporting to apply the \emph{res gestae} doctrine of its prior decisions, is now, rightly enough, by a more liberal technique, letting in evidence which under its old mode of dealing with such matters would clearly have been inadmissible. The first important case employing this technique is \textit{Starcher v. South Penn Oil Company},\textsuperscript{28} decided in 1918. In that case \textit{A} upon hearing a loud report as if from an explosion, approached the locality from which the report came and found \textit{B} lying unconscious near a broken high-pressure gas pipeline. After an unascertained length of time \textit{B} regained consciousness.

Indeed the West Virginia Supreme Court of Appeals has even handed down a decision, writing an opinion, and has \textit{not} prepared any syllabus at all of the point adjudicated. See \textit{Long v. Potts}, 70 W. Va. 719, 75 S. E. 62 (1912). If the syllabus is the law in this state, may we not pertinently ask, what is the law of the case in \textit{Long v. Potts}? Surely the case was not decided without law merely because the court declined to obey the "directory" constitutional provision.

\textsuperscript{25} \textit{Cf. Bank v. Burdette}, 61 W. Va. 636, 57 S. E. 53 (1907); also \textit{Koonce v. Doolittle}, 48 W. Va. 592, 37 S. E. 644 (1900), as to the purpose of the syllabus. At any rate, whatever the reason, or reasons, for the constitutional and statutory provision, the cases do not seem to indicate sufficient grounds for concluding that the intention was to give the syllabus any special efficacy as law. If the syllabus is "the law", it is because of judge-made law, not because of any constitutional or statutory requirement.

\textsuperscript{26} \textit{See Corder v. Talbott}, 14 W. Va. 277, 290 (1878): "When the declarations are merely a narrative of a past occurrence, though made ever so soon after the occurrence, they . . . constitute no part of the \emph{res gestae}." \textit{Lawrence v. DuBois}, 16 W. Va. 443, 463, 464 (1889): "Now what this agent said while in the very act of executing this agency by procuring this deed for his principal, which indicated what the parties considered the true and real character of the deed, would seem clearly to be evidence as a part of the \emph{res gestae}.

\textit{See Hawker v. B. R. & O. R. Co., 15 W. Va. 637; Corder v. Talbott, 14 W. Va. 277; Hanover Railroad Co. v. Coyle, 55 Pa. St. 492. If these declarations had been made after the transaction had been completed, they would not have been evidence. See Va. & Tenn. R. R. Co. v. Sayers, 20 Gratt. 351."

\textsuperscript{28} 81 W. Va. 587, 95 S. E. 28 (1918).
ness and replying to a question asked by A pointed to the broken pipe line and said, "That hit me, it struck me in the back." In an action for personal injury caused by maintaining an unsafe pipe line it was held that the hearsay statement was admissible "as part of the res gestae". The court reached a sound result, but by the empiric technique of using the reasoning of the "Spontaneous Exclamations" doctrine while adhering in form to the old res gestae rule.\(^2\)

In the latest case in point, Collins v. Equitable Life Insurance Company,\(^2\) decided on May 28, 1940, our court employed the same method and let in a statement made some ten minutes after the occurrence which it characterized. The court reached this desirable result by the simple process of saying, in the opinion, not in the

\(^2\) The court quotes at length and with approval from Wigmore, Evidence (1904) 1747, which (together with allied sections) advocates the abolition of the Res Gestae doctrine, with its limitation of contemporaneity, and the substitution of the "Spontaneous Exclamations" doctrine which has no such limitation and which has as its rationale the principle of "spontaneity". See, commenting on this case, Spontaneous Exclamations v. Res Gestae (1918) 25 W. Va. L. Q. 341.

The old principle (without more) would not reach a sound result, so the court in substance used another principle. Compare the following comment from Pound, The Spirit of the Common Law 166, 167:

"When Tom Sawyer and Huck Finn had determined to rescue Jim by digging under the cabin where he was confined, it seemed to the uninformed lay mind of Huck Finn that some old picks the boys had found were the proper implements to use. But Tom knew better. From reading he knew what was the right course in such cases, and he called for case-knives. 'It doesn't make no difference,' said Tom, 'how foolish it is, it's the right way and it's the regular way. And there ain't no other way that I ever heard of, and I've read all the books that gives any information about these things. They always dig out with a case-knife.' So in deference to the books and to the proprieties the boys set to work with case-knives. But after they had dug till nearly midnight and they were tired and their hands were blistered and they had made little progress, a light came to Tom's legal mind. He dropped his knife and, turning to Huck, said firmly, 'Gimme a case-knife.' Let Huck tell the rest:

'We had his own by him, but I handed him mine. He flung it down and says, 'Gimme a case-knife.'

'I didn't know just what to do — but then I thought. I scratched around amongst the old tools and got a pickax and give it to him, and he took it and went to work and never said a word.

'He was always just that particular. Full of principle.'

'Tom Sawyer had made over again one of the earliest discoveries of the law. When legislation or tradition prescribed case-knives for tasks for which pickaxes were better adapted, it seemed better to our forefathers, after a little vain effort with case-knives, to adhere to principle — but use the pickax. They granted that law ought not to change. Changes in law were full of danger. But, on the other hand, it was highly inconvenient to use case-knives. And so the law has always managed to get a pickax in its hands, though it steadfastly demanded a case-knife and to wield it in the virtuous belief that it was using the approved instrument.'

\(^2\) S. E. (2d) 825 (W. Va. 1940).
The syllabus, that "spontaneity rather than contemporaneity" is now the test of admissibility. Indeed the syllabus retains the old limiting language of the *res gestae* doctrine, viz., that a statement to be admissible as a part of the *res gestae* must be "reasonably coincident with, and explanatory of, the occurrence." The applicable principle still remains the same in form (or substantially the same\(^2\)), but by the empiric device of using a new rationale, the principle acquires a different directive force, a force that is just as authoritative (i.e., court-sanctioned and therefore usable as a premise for future judicial and juristic reasoning) and just as operative and just as important in predictive quality as the principle itself. This of course is nothing new in the law. All common-law courts have used this technique to a greater or less degree. It is one of the everyday ways by which courts effect needed changes in the law; it is time-honored judicial empiricism; it is the common-law custom of putting new wine in old bottles.

To be sure, we don't always concede the existence of the custom, and when we do we are apt to express it in more conventional phase. Even America's greatest liberal judge in his more conservative youth (at the age of forty; he was more liberal at ninety), conserved his words somewhat when he dealt with this point in what is now a classic passage. He said: \(^3\)

"The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past."

But "the substance of the law", as distinguished from "its form and machinery", is a far-reaching topic with which it is of course not possible to deal in full within the limits of this discussion. Accordingly the role of the ideal element will be more or less arbitrarily excluded from consideration except so far as it comes in

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\(^2\) The syllabus reads (in full): "When appearances indicate that one has suffered an injury, a statement by him, if spontaneous and reasonably coincident with, and explanatory of, the occurrence, may be regarded as part of it and be competent evidence under the doctrine of *res gestae*." True, the word "spontaneous" is new, but the rule in form still has the same limitation of contemporaneity and therefore, with respect to the point under consideration, the rule, it would seem, remains the same in form.

\(^3\) *Holmes, The Common Law* 1, 2.
incidentally and by way of indicating in some degree the nature of the completed whole.\footnote{Another reason for this exclusion is the fact that the role of this legal ingredient is touched upon at some length in another article in this issue, also by the present writer in a previous issue. See Pound, \textit{What is Law?}, the lead-off article in this issue; Hardman, \textit{Public Utilits. I. The Quest for a Concept — Another Word} (1934) 40 W. Va. L. Q. 230.}

Perhaps a word should be said here about a rather significant case, \textit{Shenandoah Valley National Bank v. Hiett},\footnote{6 S. E. (2d) 769 (W. Va. 1939).} decided in 1939, which seems to lend considerable credence to the theory that the syllabus is the law in this state. In that case the question was, sufficiently for present purposes, whether an attachment affidavit was void because of the omission of the word "justly", a supposedly indispensable term. In holding that the omission did not make the affidavit void, the court said:\footnote{At p. 770.}

"We are aware that the opinion in Sommers v. Allen, 44 W. Va. 120, 121, 28 S. E. 787, characterized the word ‘justly’ as ‘indispensable’ to an attachment affidavit. But we are of opinion that the characterization was severer than the court contemplated because (a) the syllabus of that case (expressing its law) said only that the omission of the word ‘justly’ rendered the affidavit ‘bad’; (b) the earlier case of Reed v. McCloud, 38 W. Va. 701, 706, 18 S. E. 924, held that such omission could be supplied by implication; and (c) the opinion in the later case of Miller v. White, 46 W. Va. 67, 71, 33 S. E. 332, 333, 76 Am. St. Rep. 791, expressly declared: Attachment proceedings are not void because an affidavit fails to say that the claim is ‘just.’ Accordingly, we gather from the precedents that if the word ‘justly’ is not used or implied in an attachment affidavit, it is not void but defective."

But it should be noted that even in the same breath in which the court quotes from the syllabus of a case as "expressing its law" the court also quotes, from the opinion of a later case, a proposition that does not appear in the syllabus and it actually makes use of this extra-syllabus proposition to an even greater extent than it makes use of the syllabus. Besides, the statement in this case that the syllabus of the earlier case "expresses its law" is, interestingly, not in the syllabus and therefore—if the syllabus is the law—is, it would seem, not "law". At any rate the statement was made \textit{obiter}\.\footnote{The statement is even made in a parenthesis, which would seem to indicate that the court did not attach particular weight to what it inserted therein. If this parenthetical remark of the court were left out, the reasoning of the court...}
of the general common-law technique not only in this state but, broadly, in other common-law jurisdictions; even the word "law" is there used, as it is often used by everyone, in something less than an all-inclusive sense.

In discussing this general subject at a recent "Conference on the Future of the Common Law", Lord Wright, speaking as a representative of the highest court in England, has given us a frank glimpse of what he thinks case law is tending to become and therefore, to some extent, now is. \(^\text{35}\) "I feel sure", he said, \(^\text{36}\) "that the future of the common law will lie in . . . more conscious adherence to practical exigencies. . . . Law will become more and more self-conscious and self-critical. . . . It will dwell less on distinctions which have no realistic significance. It will be less concerned with the literal interpretation and reconciliation, in a narrow and technical spirit, of decided cases. The judges will think more of the spirit of the decisions and will strive to mold and control them so as to serve the exigencies of social welfare and justice."

That this prophecy is already being fulfilled in West Virginia—that our judges are in recent years, in comparison with a few decades ago, "thinking more of the spirit of the decisions", and are "less concerned with the literal interpretation and reconciliation, in a narrow and technical spirit, of decided cases"—is excellently illustrated, and perhaps nowhere better indicated than in that class of cases dealing with the rule that if a writing is not ambiguous. \(^\text{37}\) This rule, though once applied rather "narrowly" by the West Virginia court, and though still re-

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\(^\text{35}\) "In order to know what it [the common law] is, we must know what it has been, and what it tends to become." HOMES, THE COMMON LAW 1.

\(^\text{36}\) Lord Wright in THE FUTURE OF THE COMMON LAW, HARVARD TERCENTENARY PUBLICATIONS (1936) 116, 117.

\(^\text{37}\) See Uhl v. Ohio River Ry., 51 W. Va. 106, 41 S. E. 340 (1902). The court states the rule thus (in the syllabus): "If a writing is not ambiguous, it must speak for itself by its words, without aid of any oral evidence; but if it is ambiguous, oral evidence is admissible to show the occasion of the contract, the situation of the parties, the circumstances surrounding them, their subsequent acts in executing the contract, in order to show their intention in making it; but evidence cannot be received to show their declarations, conversations or interlocutions before or at the execution of the contract."
tained in form, is now taking on a new directive force that is
making the law of today something quite different in substance
from the law of yesterday. *Bragg v. Peytona Lumber Company,*\(^{18}\) decided in 1926, is a landmark case on this point. But a still better
example, for illustrative purposes, is the highly important case of
*Hodge v. Garten,*\(^{19}\) decided in 1935, in which the West Virginia
court carried this liberalizing technique still further. In that case
there was a written contract purporting to sell "all mining posts
that the party of the first part has made and now has on hands." The
party of the first part (the plaintiff) had made and at the time
had on hand mining posts in six different localities. The defendant
claimed that the contract was intended to cover only the mining
posts in two of those localities, namely, at Nickelville and at Hud-
dleston farm, and to prove this claim he offered evidence (1) that
prior to the execution of the contract the parties had gone to those
two localities to examine the posts, and (2) that at the time of the
execution of the contract, the defendant gave the plaintiff a check
for $500.00 as part payment and that on this check there was the
notation: "$500 payment on mine props at Nickelville and Huddles-
ton farm".

Is this evidence admissible? If the law as to this in West Vir-
ginia is to be found alone in any general proposition or propositions
laid down by the court the conclusion seems inescapable that the
evidence cannot come in.

In disposing of the question of admissibility in this case the
court wrote a syllabus which contains only the following propo-
sition: "Extrinsic evidence is admissible to explain an ambiguity

\(^{18}\) 102 W. Va. 587, 135 S. E. 841 (1926). In this case there was a written
contract providing as follows with respect to the cutting of poles which con-
stituted the subject matter of the transaction: "The said poles are to conform
in every way to what is known as 'Class B Chestnut Pole specifications'."
There were standard Class B Chestnut Pole specifications as understood in the
market generally and these had certain minimum dimensions. In other words,
the language used in the written instrument had a definite "normal meaning". Is
the language then "unambiguous" so that extrinsic evidence is not admis-
sible to disturb the so-called "plain normal meaning" of words? In disposing
of the admissibility of evidence of former dealings between the parties, in-
cluding a former contract, the court adhered in the syllabus to the old am-
biguity rule [the rule as laid down in the syllabus reads as follows: "Parol
evidence of former dealings between the parties, as well as their acts subsequent
to the execution of the contract, are admissible to explain an expression in said
contract which is ambiguous."], but the court by a changed technique, dis-
coverable largely between the lines — in the interstices of the decision — let
the evidence in, and held, in effect, that the language in question meant some-
thing different from the standard Class B poles as understood in the market
generally.

\(^{19}\) 116 W. Va. 564, 182 S. E. 582 (1935).
appearing on the face of a contract." Query, then, is there any ambiguity in the phrase "all mining posts that the party of the first part has made and now has on hands"? Though the court said *ipsum verbis* that a more comprehensive word than all cannot be found in the English language, yet it let the evidence in and held that the words "all . . . posts that the party . . . now has" on hand did not include *all* the posts he had but only a part. That is to say, the word "all", though admittedly a more comprehensive word cannot be found in our language, is "ambiguous". Which is another way of saying, in the words of the *Restatement of the Law of Contracts*, that "all language will bear some different meanings". This is sound of course. But by its technique in dealing with the ambiguity doctrine our court has quite obviously given the applicable principle a new directive force; it has added, empirically, to the authoritative raw materials which courts and lawyers and law teachers will use in determining the law of that case and so in determining the law applicable to subsequent similar fact situations—it has added to the authoritative basis of prediction which is the essence of law.41

It would seem then that, speaking broadly, we may say of the law in West Virginia what America's greatest judge said of law in the well-known case of *Lochner v. New York*:42 "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." It is true that Holmes was there dealing with a question of constitutional law. And it is also true that in constitutional-law

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40 See *Restatement, Contracts* (1932) §§ 230, 235 (including Comments). See also 3 *Williston, Contracts* (Rev. ed. 1936) § 629; *Wigmore, Evidence* (3d ed. 1940) § 2470: "The truth had finally to be recognized that words always need interpretation." This does not mean of course that all relevant evidence is admissible to explain so-called "unambiguous" words. "There is one forbidden variety." See *Wigmore, Evidence* §§ 2471 et seq., as to inadmissible "Declarations of Intention".

41 For a detailed discussion of the technique of the West Virginia court in applying the so-called "ambiguity rule", see Hardman, *A Problem in Interpretation* (1936) 42 W. Va. L. Q. 110.

For a discussion of another class of decisions (including some West Virginia cases) in which courts by a somewhat similar procedure give an old doctrine a new content, see Hardman, *Judicial Technique in Using the Agency Relation* (1930) 30 W. Va. L. Q. 133. In one group of cases there discussed the West Virginia court applies the agency doctrine of *respondeat superior* so as to bring the non-agency "family purpose" automobile cases within the rule — another instance of judicial empiricism. See (perhaps the best illustration of this technique) *Jones v. Cook*, 90 W. Va. 710, 716, 111 S. E. 528 (1922): "It is not a new graft on the law of agency. It is merely applying old principles to new conditions."

cases "'general propositions'', the law's major premises, play a less important role than in most fields of the law. But the difference is one of degree, as indeed most legal distinctions are.\textsuperscript{43} In constitutional law, where the interests to be secured are constantly changing, it is the ideals of the time and the technique of the courts that usually play the leading roles. In real property, the other extreme of the law, where the interests involved are all but unvarying, general propositions almost crowd everything else off the legal stage, almost but not quite. In the fields between, in evidence for instance where the conflicting interests run the whole gamut from the need for certainty to the equally important if paradoxical need for change, general propositions play a variant role, dependent on the kind of interests that are at stake and on the long-run views of the court, avowed or unexpressed, as to what interests are paramount in the particular class of cases. But there is always an accent, though often a secondary one, at times an unconscious one, on something more subtle than legal major premises. Law is not rooted in general propositions alone: it is rooted in judicial empiricism — in ideals, in judicial technique.