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Courts--The Syllabus in West Virginia--Law or Official Headnote

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COURTS—THE SYLLABUS IN WEST VIRGINIA—LAW OR OFFICIAL HEADNOTE?—*D* and another were indicted for rape and *D* was found guilty of attempted rape. Upon writ of error the issue was whether *D* could be convicted for attempted rape solely on evidence which showed that if he participated in the offense at all, it was as principal in the second degree. The Supreme Court of Appeals held that *D* could not be so convicted.[1] It was contended that the decision in this case was governed by the West Virginia case of *State v. Collins*.[2] In that case the pertinent syllabus read as follows: "On a conviction for an attempt to commit rape, this court will not set aside the verdict on the ground that there was no evidence to support it, if there was sufficient evidence to warrant a conviction of rape." The court seemed to believe that if this point of the syllabus were "the law" governing this case, the syllabus would require an affirmance rather than a reversal. However, the court refused to adopt the syllabus in the *Collins* case as "the law." The case therefore squarely raises the question whether the syllabus is "the law" in West Virginia or is merely an official headnote.

There has been much discussion both in the decisions of our court and in the *West Virginia Law Quarterly*[3] as to whether the syllabus or the opinion represents the law of an adjudicated case.

We have provided by constitution and statute that "(w)hen 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."[4] This constitutional and statutory provision has been held to be merely directory, however.[5]

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[1] State v. Franklin, 79 S.E.2d 692 (W. Va. 1953).

[2] 108 W. Va. 98, 150 S.E. 369 (1929).

[3] Hardman, "The Law"—In West Virginia, 47 W. Va. L.Q. 23 (1940); Hardman, "The Syllabus Is the Law," 47 W. Va. L.Q. 141 (1941); Hardman. "The Syllabus Is the Law"—Another Word, 47 W. Va. L.Q. 209 (1941); Hardman, "The Syllabus Is the Law"—Another Word by Fox, J., 48 W. Va. L.Q. 55 (1941).

[4] W. VA. CONST. art. VIII, § 5, and W. VA. CODE c. 58, art. 5, § 21 (Michie 1955).

[5] Henshaw v. Ins. Co., 112 W. Va. 556, 565-566, 166 S.E. 15, 19 (1932).

In the early case of *Bank v. Burdette*,[6] it was contended that a demurrer filed by one of the defendants at the first term after entry of an office judgment at rules set aside such judgment as to both. The court held that a demurrer would not set aside the judgment but admitted that a Virginia case stated in its syllabus that a demurrer was a plea to issue sufficient to set aside an office judgment. But with regard to this case, our court said that "(t)he reporter so states the decision, but it is not found in the decision of the court. Then the syllabus had no binding force, being made by the reporter, not by the court. Now our constitution requires the court to make the syllabus, and it is that which is the real decision over the opinion." This statement is of course only obiter dictum, and if the syllabus is "the law," this statement is not law for it does not appear in the syllabus and hence by that reasoning cannot be the law of the case. This was also true in *Shenandoah Valley Nat'l Bank v. Hiett*.[7]

In *Carrico v. W. Va. Cent. & Pa. Ry.*,[8] an action was brought for personal injuries, and after all of the evidence was in, the defendant moved to exclude it. This motion was overruled. The court discussed the three times when such a motion is proper if offered before the defendant has introduced his evidence, which was not the case here. With regard to the second situation where such a motion is proper, the court said, "*Secondly*, if the evidence of the plaintiff is incompetent by reason of its tendency to prove a case fatally at variance with the allegations of the declaration, it should be excluded. Thus, in the leading case of *Dresser v. Transportation Co.*, although the syllabus of the case has set the unfortunate example of introducing this motion to exclude evidence for insufficiency, the motion, as will be perceived from the opinion of the Court, was in

[6] 61 W. Va. 636, 637, 57 S.E. 53, 54 (1907).

[7] 121 W. Va. 454, 456-457, 6 S.E.2d 769, 770 (1939). The question of the validity of an attachment affidavit was before the court. The court discussed another West Virginia case where the word "justly" was characterized as "indispensable" to an attachment affidavit. The court concluded 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' . . ." and after quoting from the opinion of still another West Virginia case that the omission only made the affidavit voidable, the court decided the affidavit in the instant case was only defective and not void. So while indicating that the syllabus expresses the law the court also quoted a proposition from another case which did not appear in the syllabus. It is also interesting to note that the statement as to "expressing its law" did not appear in the syllabus of the *Hiett* case and hence is not law, if it is the syllabus which represents the law of an adjudicated case.

[8] 35 W. Va. 389, 396, 14 S.E. 12, 14 (1891).

reality based 'upon the ground of a material variance' between the plaintiff's evidence and his declaration." This is of course an indication that the syllabus must be read in the light of the opinion and further that the syllabus may not be accurately stated as disclosed from a careful reading of the opinion. Our court has specifically stated that the syllabus of a case must be read in the light of the opinion.[9]

In *State v. Graham*,[10] the lower court admitted a dying declaration to the effect that the deceased and the defendant had quarrelled one month before. To support its admissibility, the prosecution relied upon a case where the court in point two of the syllabus said, "(d)ying 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."[11] But with regard to this case, the court in the *Graham* case pointed out that "(a) careful examination of that case will disclose that the language in the syllabus is broader than the opinion warrants . . . (t)he 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 the declarant becomes a general witness and that anything he 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. The declarant does not become a general witness, but his dying declarations are confined to such facts and circumstances as immediately attend the homicide and form part of the res gestae. A declaration as to a previous transaction, separate and distinct from the homicide, is not admissible, even though it be a threat made by the defendant against the declarant." Here the court repudiated a syllabus not only on the ground that it was not law but that it never was the law in West Virginia.

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[9] Koblegard, Trustees v. Hale, 60 W. Va. 37, 41, 53 S.E. 793, 794 (1906); Jones v. Jones, 133 W. Va. 306, 310, 58 S.E.2d 857, 859 (1949). In the *Hale* case, the court distinguished the syllabus in an earlier West Virginia case which indicated that certain acts which are done on one's own land wantonly and maliciously for the mere purpose of annoying one's neighbor may be enjoined. The court said that the earlier case was a bill to prevent offensive odors, while the instant case was for obstructing light or air. The court said the syllabus must of course be read in the light of the opinion.

[10] 94 W. Va. 67, 71-72, 117 S.E. 699, 700-701 (1923).

[11] State v. Burnett, 47 W. Va. 731, 35 S.E. 983 (1900).

Significantly our court has indicated in one case that it ". . . only makes the more important points of law a part of the syllabus for the general information of the legal profession and public . . ."[12] In one West Virginia case, our court did not prepare a syllabus.[13] Surely those who believe the syllabus is the law are unwilling to say this case was decided without law.

In *Sayre v. McIntosh*,[14] we find a dictum to the effect that the syllabus has some special meaning. But as evidence of the fact that the syllabus alone does not express the law of a case, there are decisions where our court stated no proposition of law in the syllabus but presented only a fact situation and a conclusion, the applicable law being found only in the opinion.[15] In another

[12] Koonce v. Doolittle, 48 W. Va. 592, 594, 37 S.E. 644, 645 (1900). There was an application for writ of peremptory mandamus to compel a circuit judge to obey the mandate of the supreme court in another case. The applicant in the instant case had been given priority for his debt in that case. The circuit judge insisted that as that part of the opinion was not stated in the syllabus, it was therefore purposely left open for further consideration and adjudication. The court concluded that this did not follow, and stated the purpose of the syllabus to be as indicated.

[13] Long v. Potts, 70 W. Va. 719, 75 S.E. 62 (1912). This was an action of assumpsit on a note. The defendants pleaded non-assumpsit and a special plea which averred that it was orally agreed before and at the time of execution of the note that if the defendants would act as sureties for the maker, the plaintiff would obtain a deed of trust from the maker as security, sufficient to secure not only payment of the note but also to indemnify the sureties. It was further alleged that plaintiff failed to secure execution of the trust deed. The judges could not agree as to the effect of the special plea, whether it was a bar in law, whether the evidence sustained the plea, or whether the evidence could be heard. The syllabus read, "(p)arol evidence to affect a promissory note. Owing to a division of opinion among the members of the Court no syllabus of law is made." Yet despite this syllabus, the court at least held the plea was of no avail and affirmed the finality of a judgment rendered on a demurrer to the evidence.

[14] 80 W. Va. 258, 262, 92 S.E. 443, 445 (1917). This was an action on a bond of indemnity in which a default judgment was entered after an office judgment was taken at rules. The defendants moved to set aside the judgment upon alleged irregularities in the proceedings at rules. The defendants relied upon statements in the opinions of two earlier West Virginia cases in support of the motion. The court remarked, "(b)ut in neither of these cases was the observation deemed of sufficient importance to become a point of the syllabus therein."

[15] Townsend v. Ward, 120 W. Va. 655, 200 S.E. 58 (1938). See Eagon v. Wollard, 122 W. Va. 565, 11 S.E.2d 257 (1940), as another illustration of this point, where the syllabus read, "(t)he owner of an automobile, maintained for a family purpose, permitted its use by his son; the son invited into the automobile two persons as his guests; one of them operated the automobile, and while doing so the other was injured. The declaration, in an action by the injured person against the owner, his son, and the guest driver, which alleges that the automobile was negligently operated 'at the direction and under the management, supervision and control' of the son states a case of legal liability for the injuries sustained as the result thereof, against the owner of the automobile, his son, and the guest operator."

case, it was indicated that a certain point of a syllabus was unnecessary to the decision of the case, demonstrating that the syllabus contained obiter dictum.[16] Furthermore, our court has said that a certain point while not carried into the syllabus was nevertheless law rather than dicta.[17]

What conclusions can be drawn from these cases as to whether the syllabus or the opinion represents the law of a case decided by our supreme court? It is of course clear that our cases contain divergent statements as to the role of the syllabus. We have dicta to the effect that it is the syllabus which is the real decision over the opinion; that the syllabus of a case has some special sacrosanct meaning. On the other hand, our court has indicated that only the more important points of law are made a part of the syllabus for the general information of the legal profession and public.

As said previously, the instant case squarely raises the question whether the syllabus is the law in West Virginia or is merely an official headnote. The court said it need not apply the ruling in the *Collins* case though the broad wording of point two of the syllabus, considered as an abstract statement of law, would justify its application. As stated previously, that syllabus reads: "On a conviction for an attempt to commit rape, this court will not set aside the verdict on the ground that there was no evidence to support it, if there was sufficient evidence to warrant a conviction of rape."[18] The court in the instant case stated that "(i)n the Collins case, the evidence conflicted on the question whether the defendant actually committed the physical act of statutory rape on the prosecutrix; and this Court simply held that embraced in the evidence tending to establish defendant's actual and physical raping of prosecutrix, there was the minor offense of the attempt to commit the crime of rape. That was the actual holding of this Court in the Collins case, though syllabus 2 held, in effect, that, on an indictment charging rape, a conviction for an attempt to commit rape will not be disturbed on the ground that there was no evi-

[16] Meadow River Lumber Co. v. Easley, 122 W. Va. 184, 187, 7 S.E. 2d 864, 865 (1940).

[17] Miller v. Bridge Co., 123 W. Va. 320, 329, 15 S.E.2d 687, 692 (1941). Here the court held that "(i)n Davis v. Bridge Commission, 113 W. Va. 110, 166 S.E. 819, the right of a citizen and taxpayer to question, by a suit in equity, the purchase of a toll bridge is recognized, and we think the ruling of the court in that case, while not carried into the syllabus is nevertheless law rather than *dicta*, if there be a distinction between the two."

[18] State v. Collins, 108 W. Va. 98, 150 S.E. 369 (1929).

dence to support it, 'if there (is) sufficient evidence to warrant a conviction of rape.' As the evidence in the Collins case showed that if rape had been committed, the defendant was the sole actor in the consummation of the crime, point 2 of the syllabus in the Collins case is broader than is required for a decision of the case, and the holding of this Court, as disclosed by the opinion and the facts contained therein." The court concludes that ". . . the broad language embraced in point 2 of the syllabus of the Collins case . . . should, in our opinion, not be carried on in the decision of the instant case."[19] It is important to note that the court cited other articles in the *Law Quarterly* on the subject, and that these articles represent the view that the syllabus is not "the law" in West Virginia.[20] The case thus, as indicated earlier, squarely presents the question of the role of the syllabus and indicates that it must be read in the light of the opinion; that the syllabus may be broader than justified by the opinion; thus the court indicates the syllabus is only an official headnote prepared for the general information of the legal profession and public at large, and the court expressly disapproved the dictum in the *Burdette* case. It is further submitted that those who believe the syllabus represents the law of an adjudicated case are forced to admit otherwise, for here in the syllabus, the court states that the syllabus of the *Collins* case was read in the light of the opinion[21]—an interesting paradox for those who believe the syllabus is "the law" in West Virginia.

J. L. McC.

UNIFORM CONDITIONAL SALES ACT—AN ANNOTATION.—With the advent of extensive credit buying, there has been an increased interest in the law of secured transactions. Therefore, it seems timely to discuss one of the more commonly used security devices, the conditional sale, as affected by West Virginia law.

The Uniform Conditional Sales Act,[1] was adopted in West Virginia in 1921[2] and was reenacted in 1925.[3] The present version

[19] State v. Franklin, 79 S.E.2d 692, 699-700, 703 (W. Va. 1953).

[20] *Id.* at 700. "For an illuminating and learned discussion of the function of the syllabus of a case decided by this Court, see 'The Law—In W. Va.', by Thomas P. Hardman, Dean of the College of Law of West Virginia University, 47 W. Va. L.Q. 23, and note by Dean Hardman, 47 W. Va. L.Q. 209."

[21] See note 1 *supra.*

[1] W. VA. CODE c. 40, art. 3 (Michie 1955).

[2] W. Va. Acts 1921, c. 75.