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A PROBLEM IN INTERPRETATION

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Perhaps few aspects of the judicial process are more puzzling, to legal fundamentalists at least, than the technique of the courts in dealing with the question of the extent, if any, to which the so-called "plain meaning" of language in a written instrument may be changed by construction. This is due, in no small part, it is believed, to a tendency to look at only one element in the judicial process — a tendency to look only at the legal rules (and other legal precepts)[1] found in the decisions. Moreover, these rules are apt to be read as if their meaning could be discovered within their four corners alone, with perhaps the aid of a lexicon. But courts do not confine themselves to a method of deciding cases by precepts intrinsically interpreted and syllogistically applied. Behind the approved phraseology, which courts are wont to reiterate under the doctrine of *stare decisis*, one may observe now and again a mode of thinking, "a mode of treating legal problems",[2] which often gives new content to old precepts and which, as a basis for "prophecies of what the courts will do in fact", sometimes transcends in importance the role of form and syllogism.

To be sure, according to the official theory of the common law, courts cannot and do not legislate, not even interstitially[3] — all new decisions are deduced syllogistically from existing precedents, and this, according to the fundamentalists, with a sort of legal Biblicism. But while a judge in writing an opinion may adhere, in the foreground, as it were, to approved form, his integrated

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[1] As to legal precepts other than legal rules, see POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) 115 *et seq.* As to legal elements other than legal precepts, see Pound, *The Ideal Element in American Judicial Decision* (1931) 45 HARV. L. REV. 136; and Pound, *A Comparison of Ideals of Law* (1933) 47 HARV. L. REV. 1. The present writer has discussed these elements *en passant* in *Public Utilities, The Quest for a Concept — Another Word* (1934) 40 W. VA. L. Q. 230.

[2] See POUND, THE SPIRIT OF THE COMMON LAW (1921) 1. The significance of the general mode of treating legal problems as distinguished from the language of the courts (using language in its "normal" sense), is of course not confined to cases involving problems in interpretation. Indeed, as Dean Pound says, the common law in general "is essentially a mode of judicial and juristic thinking, a mode of treating legal problems rather than a fixed body of definite rules." *Ibid.*

[3] *Cf.* Holmes, J. in Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 S. Ct. 524 (1917): "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially: they are confined from molar to molecular motions."

word, like the word of others, may, in the perspective, "vary greatly in color and content according to the circumstances and the time in which it is used."[4] Mr. Justice Holmes, with that felicity of phrase which set him apart and with that unexcelled insight into the nature of law and the judicial process which hallmarked his writings, has indicated this on more than one occasion. In a telling page from his book on The Common Law he said:[5]

> "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."

First, then, as to the past. In the early law, as Wigmore has so fully demonstrated that extensive discussion here would be unjustifiable, the written word was sacred. It was, as he puts it,[6] "a fixed symbol. Its meaning was something inherent and objective, not subjective and personal. A man who wrote a document dealt with words as he might deal with a blunderbuss or a carpenter's tool. They had their uses; and he must understand and choose the proper word for the purpose in hand, just as he must take the risk of not handling the gun or the adze in the proper fashion."

Traces of this primitive theory can be found in the Roman law. As one jurisconsult reasoned in the Digest: "*non enim ex opinionibus singulorum, sed ex communi usu nomina exaudiri debere.*"[7] This theory obtained generally in Anglo-American law till the 1800's and, in many courts, including our own court, is still thought to be with us in the much-reiterated rule that the normal meaning of words in a written instrument cannot be disturbed by resort to interpretive evidence. In a leading West Vir-

[4] "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Holmes, J., in Towne v. Eisner, 245 U. S. 418, 38 S. Ct. 158 (1918).

[5] HOLMES, THE COMMON LAW (1881) 1-2.

[6] WIGMORE, EVIDENCE (2d ed. 1923) § 2461.

[7] "*Servius fatetur sententiam eius qui legaverit aspici oportere, in quam rationem ea solitus sit referre: verum si ea, de quibus non ambigeretur, quin in alieno genere essent, ut puta escarium argentum aut paenulas et togas, supellectili quis adscribere solitus sit, non idcirco existimari oportere supellectili legata ea quoque contineri: non enim ex opinionibus singulorum, sed ex communi usu nomina exaudiri debere.*" This and the following objection by Tubero are from MOMMSEN, DIGESTA, XXXIII, 10, 7: "*id Tubero parum sibi liquere ait: nam quorsum nomina, inquit, nisi ut demonstrarent voluntatem dicentis? equidem non arbitror quemquam dicere, quod non sentiret, ut maxime nomine usus sit, quo id appellari solet: nam vocis ministerio utimur.*"

ginia case, *Uhl v. Ohio River Railway Company,*[8] the court put the rule thus:[9]

> "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."

To this rule of construction the court added an exception which for immediate purposes may be dismissed with a word. The court continued: "but evidence cannot be received to show their [the parties'] declarations, conversations or interlocutions before or at the execution of the contract." Obviously this exception refers to *declarations of intention dealing with the subject of the document,* which, for reasons presently indicated, are admittedly inadmissible, with certain limitations not coming within the purview of this article.[10] In this connection, however, it should be noted in passing that the boundary between inadmissible "declarations" of intention and *"surrounding circumstances", including language "circumstantially" evidencing intention,* runs now and again into a zone in which it is no longer possible to dichotomize by a line of black or white — a zone in which the greying line of distinction becomes one of degree. Nevertheless the line, or rather zone, which is, in general, determined by the so-called parol evidence rule, or rather by one part of the so-called parol evidence rule,[11] is discernible in numerous cases, and it is believed that much of the confusion which exists in this field of law will disappear if this distinction is borne in mind. One part of the

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[8] 51 W. Va. 106, 41 S. E. 340 (1902).

[9] Point 1, syllabus.

[10] As to these limitations, see WIGMORE, EVIDENCE §§ 2471, 2472 *et seq.* This article is confined to a preliminary discussion of the interpretation of language which is commonly referred to as having a "plain meaning." Only a treatise could adequately cover all phases of the general problem. As to the alleged distinction between "latent" and "patent"'' ambiguities, see 2 WILLISTON, CONTRACTS (1920) § 627: "Certainly so far as contracts are concerned, it may be wholly disregarded. It was always and still is as Professor Thayer has said, 'an unprofitable subtlety'." But see *e. g.,* dictum in Collins v. Treat, 108 W. Va. 443, 152 S. E. 205 (1930), hereinafter discussed in the body of this paper.

[11] As to this, see WIGMORE, EVIDENCE § 2471. Of course, as Wigmore points out, "where the act is required by statute to be in written form — as, a will — there is the additional reason that the oral utterance would fail to fulfil that formality."

"parol evidence rule", which is really a rule of substantive law,[12] provides, sufficiently for present purposes, that where the parties to a transaction have integrated the terms of their jural act in a single memorial, "all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act."[13] This part of the parol evidence rule clearly precludes resort to declarations of intention dealing with the subject of the document (with certain limitations beyond the scope of this paper),[14] but obviously, notwithstanding much language to the contrary, does not exclude consideration of the circumstances which tend to show the meaning of the terms used by the parties.[15] The question herein considered therefore boils itself down to this: to what extent, if any, is extrinsic evidence (exclusive of declarations of intention) admissible to give to words in a written instrument a meaning other than the "normal" one?

On this question — the question of the admissibility of extrinsic evidence, and the use which a court may make of it, for the purpose, not of varying the terms of a written instrument, but of construing the language found in the document — there are two opposing theories, each supported, to a greater or less degree, by West Virginia cases, by cases in other jurisdictions and by text-writers. Of the first theory, which may be called the "ambiguity rule", the above quoted statement from the West Virginia case of *Uhl v. Ohio River Railway Company*[16] is typical. In adopting this theory the Supreme Judicial Court of Massachusetts said:[17]

> "It is settled that the normal meaning of language in a written instrument no more can be changed by construction than it can be contradicted directly by an avowedly inconsistent agreement, on the strength of talk of the parties at the time when the instrument was signed."[18]

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12 See, *e.g.*, Mears v. Smith, 199 Mass. 319, 85 N. E. 165 (1908); Higgs v. de Maziroff, 263 N. Y. 473, 189 N. E. 555 (1934); WIGMORE, EVIDENCE § 2425. But see Leckie v. Bray, 91 W. Va. 456, 113 S. E. 746 (1922): "mere rule of evidence"; JONES, EVIDENCE (3d ed. 1924) § 434. *Cf.* C. T. McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury* (1932) 41 YALE L. J. 365.

13 See WIGMORE, EVIDENCE § 2425.

14 See notes 10, 11, *supra*.

15 WIGMORE, EVIDENCE, has completely covered this point. See particularly §§ 2400, 2401, 2425, 2426, 2461, 2462, 2463, 2470, 2471.

16 *Supra* n. 8.

17 Violette v. Rice, 173 Mass. 82, 53 N. E. 144 (1899).

18 *Cf.* Goode v. Riley, 153 Mass. 585, 28 N. E. 228 (1891): "you cannot prove a mere private convention between the two parties to give language a

Holmes, who wrote this opinion, elaborated his ideas, in what is perhaps the classical exposition of the subject, in an article in the Harvard Law Review entitled "The Theory of Legal Interpretation".[19] He there said:

> "How is it when you admit evidence of circumstances and read the document in the light of them? Is this trying to discover the particular intent of the individual, to get into his mind and to bend what he said to what he wanted? No one would contend that such a process should be carried very far, but, as it seems to me, we do not take a step in that direction . . . . *we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English,* using them in the circumstances in which they were used, and it is to the end of answering this last question that we let in evidence as to what the circumstances were. But the normal speaker of English is merely a special variety, a literary form, so to speak, of our old friend the prudent man. He is external to the particular writer, and a reference to him as the criterion is simply another instance of the externality of the law." (Italics supplied.)

But in problems of interpretation is the normal speaker of English, rather than the particular speaker, the criterion? As already indicated, there is a square split of authorities on the question. In *Bank v. Catzen,*[20] the West Virginia court repudiated, in part at least, the ambiguity rule enunciated in the *Uhl* case,[21] though the court did not cite the *Uhl* case. In the *Catzen* case the court said (point 1 of the syllabus):

> "In deeds, contracts and other instruments, both technical and non-technical words are sometimes given meaning variant from the significations they ordinarily have, and, when it is manifest that the parties intended them to have a restricted or peculiar signification, such intention will be respected and enforced by the courts."

In support of this unorthodox statement in the syllabus the court used the following language in the body of its opinion:[22]

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different meaning from its common one . . . It would open too great risks if evidence were admissible to show that when they said five hundred feet they agreed it should mean one hundred inches, or that Bunker Hill Monument should signify the Old South Church." Such a private convention, being a "declaration of intention," is generally excluded by the parol evidence rule. As to exceptions, see WIGMORE, EVIDENCE §§ 2462, 2463, and Marmet Co. v. Archibald, 37 W. Va. 778, 778, 17 S. E. 299 (1893).

[19] (1899) 12 HARV. L. REV. 417.

[20] 63 W. Va. 535, 60 S. E. 499 (1908).

[21] *Supra* n. 8.

[22] At p. 539.

"That technical terms are not, and need not, always be used by the parties to a contract in their technical sense, is very well settled by the authorities. Like non-technical words, they sometimes have peculiar meaning, ascertained by reference to the subject matter, the situation and purposes of the parties and the surrounding circumstances."

It is true that in another point of the syllabus and in another part of the opinion the court, adhering to form, pays a certain amount of lip-service to the ambiguity rule, but this language, being unnecessary to the decision in the case, is not authoritative. The substance of the law of the case is indicated in the following excerpt:[23]

". . . . the attempt to apply it [the language in question] to the subject matter, a thing well known to the parties, and therefore necessarily within their contemplation, shows that it was never intended to have effect according to its literal meaning."

In support of the view sanctioned by the West Virginia court in the *Catzen* case, Williston in his monumental work on Contracts,[24] after pointing out[25] that the normal standard as to the meaning of language in a written agreement is not the correct test, says:

". . . . If the normal standard were the test, the rule would properly be as it is still not infrequently stated that only where the language is ambiguous on the face of the writing, can the circumstances under which the contract was made be admitted.

"In regard to some of these statements, it may be guessed that the court in denying the admissibility of evidence of surrounding circumstances to vary the meaning of an apparently clear writing, meant no more than that in the particular case the evidence offered would not persuade any reasonable man that the writing meant anything other than the normal meaning of its words would indicate and that therefore it was useless to hear the evidence. On the other hand, in many cases where evidence of surrounding circumstances has been admitted, the language of the contract in question, if given its normal meaning, was in fact ambiguous, so that no necessity arose for the court to decide whether admission of such evidence is dependent upon ambiguity. The correct principle has been well summarized in a recent decision. 'All the at-

[23] At p. 539.
[24] WILLISTON, CONTRACTS § 629.
[25] Partly in § 618.

> tendant facts constituting the setting of a contract are admissible, so long as they are helpful; the extent of their assistance depends upon the different meanings which the language itself will let in . . . . Yet, *as all language will bear some different meanings, some evidence is always admissible;* the line of exclusion depends on how far the words will stretch, and how alien is the intent they are asked to include.' " (Italics supplied.)

The recent decision from which Williston quotes is *Eustis Mining Co. v. Beer,*[26] opinion by Learned Hand, J. In a still more recent case, *In re Tidewater Coal Exchange,*[27] the same learned jurist further explains what Williston claims to be the "correct principle". Judge Hand there says:[28]

> ". . . . it is always necessary to know what conduct the parties had in mind when they used the words chosen for the promise. Nor is there any limitation whatever on the right of a court to hear any facts which will throw light on what that conduct was. Wigmore, § 2470. *It is indeed said at times that if the meaning of the language is clear, no proof is permissible to twist it from its usual sense. But that only means, as I understand it, that the words may be too clear to yield to the implications of any setting. It never means to preclude the comparison between the usual meaning of the words and their result under the circumstances. In short, the question is never the proper use of language, but of what future conduct the specific promise actually contemplated. If it once plainly appear that the parties must have meant to use words out of their normal meaning, that will be the measure of the promise. All that can be said is that as matter of proof a court should be slow to assume that they did not use their words normally.* There is, however, no rule of law which controls the admission of evidence of the surrounding facts, or the use which a court shall make of it, as there is, for example, touching contemporaneous declarations of intention. The ancient statements of the books that a document must be read within its four corners is [*sic*] no longer the law and has not been for a century. Words must always be translated into things or conduct, and they cannot be unless the setting is in proof in which they are used." (Italics supplied.)

The view expounded by Williston is particularly important in view of the fact that Williston, as Reporter for the Restatement of the Law of Contracts for the American Law Institute has,

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[26] 239 Fed. 976 (1917).
[27] 292 Fed. 225 (1923).
[28] At p. 232.

though in somewhat different language, incorporated his views in the Restatement. However, for reasons hereinafter appearing, the provisions of the Restatement on this point will be set out later.

In support of this view Wigmore, in his penetrating treatise on Evidence,[29] says:

> "The truth had finally to be recognized that words always need interpretation; that the process of interpretation inherently and invariably means the ascertainment of the association between words and external objects; and that this makes inevitable a free resort to extrinsic matters for applying and enforcing the document. 'Words *must* be translated into things and facts.' Instead of the fallacious notion that 'there should be interpretation only when it is needed,' the fact is that there must always be interpretation. Perhaps the range of search need not be extensive, and perhaps the application of the document will be apparent at the first view; but there must always be a travelling out of the document, a comparison of its words with people and things. The deed must be applied 'physically to the ground' . . . . Once freed from the primitive formalism which views the document as a self-contained and self-operative formula, we can fully appreciate the modern principle that the words of a document are never anything but indices to extrinsic things, and that therefore *all the circumstances must be considered which go to make clear the sense of the words . . . .*"

It is interesting to note that the last quotation in this passage is from an opinion by the West Virginia court in *Anderson v. Jarrett,*[30] opinion by Brannon, J. Cases supporting this view are numerous.[31] See, for example, the rather recent decision by the United States Supreme Court in *International Stevedoring Co. v. Haverty,*[32] in which the court in holding, by the aid of extrinsic evidence, that a word was not to be given its normal meaning, said: "Words are flexible."

An excellent illustration of this view is a leading decision by the United States Supreme Court in *Reed v. Insurance Company.*[33] There an insurance policy on a ship contained this clause: "the risk to be suspended while vessel is at Baker's Island loading". Though this phrase is quite unambiguous, the court said:[34]

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[29] WIGMORE, EVIDENCE § 2470.
[30] 43 W. Va. 246, 27 S. E. 348 (1897).
[31] See, collecting some of the cases, WILLISTON, CONTRACTS §§ 629, 630.
[32] 272 U. S. 50, 47 S. Ct. 19 (1926). See also Jamison v. Encarnacion, 281 U. S. 635, 50 S. Ct. 440 (1930).
[33] 95 U. S. 23, 9 S. Ct. 206 (1877).
[34] At p. 30.

> "This case . . . . turns upon the point whether the clause means, while the vessel is at Baker's Island *for the purpose of loading,* or while it is at said island *actually loading.* If it means the former, the company is not liable; if the latter, it is liable.
>
> "A strictly literal construction would favor the latter meaning. But a rigid adherence to the letter often leads to erroneous results, and misinterprets the meaning of the parties. That such was not the sense in which the parties in this case used the words in question is manifest, we think, from all the circumstances of the case."

This case is particularly in point for the reason that the United States Supreme Court, in the teeth of an "unambiguous" provision, let the surrounding circumstances in to show the purpose for which the contract was created, and held that in the light of this evidence the words had a meaning other than the so-called "plain meaning".

In the main, then, it may be said that the better out-of-state authorities favor the so-called modern rule. In West Virginia, however, it is difficult to generalize broadly. *Uhl v. Ohio River Railway Company,*[35] already quoted from, is one of several cases that require one to look at more than the language technique of the court. In that case one Uhl entered into a written agreement conveying to a railroad company a "right of way of the width of fifty feet . . . . in, upon and through the lands of the said Uhl . . . . And the said Uhl also hereby covenants and agrees to execute . . . . a deed conveying to the said company in fee simple the land hereinbefore described." The question raised was whether the words "right of way" *etc.* conveyed a fee simple or an easement. The court said:[36] "This agreement is not, in a legal point of view, ambiguous . . . . But", said the court, "suppose we could say that the instrument is ambiguous. When we place ourselves in the situation of the parties, and reflect that they met only to contract for a right of way, that such was the sole design of the company, that the paper so declares on its face, that such was the moving purpose, that the company did not dream of acquiring oil, or of using the land in the oil business, we cannot hesitate for a moment to conclude that merely a right of way was in the contemplation of the parties. We need no oral evidence for this [*i. e.,* to prove what the court holds]; the writing itself so speaks." The case can hardly be said to hold that extrinsic

[35] *Supra* n. 8.
[36] At pp. 109, 112.

evidence is inadmissible because the agreement is unambiguous, for the court in fact considered the extrinsic evidence and said, in effect, that by intrinsic interpretation or by extrinsic interpretation the agreement meant the same thing. The court, however, relying on an earlier case, also said:[37]

> "This controversy thus calls for the construction of said agreement. If a written contract is not ambiguous, it speaks for itself, and courts must carry its written words into effect; but if it is ambiguous, we may consider the circumstances surrounding the parties at the time they executed it, their situation, the nature of the contract which they were making as to its purpose, in order to enable us to say what that situation or occasion called for, what was their intention, so that we glean the intention of the parties, as that actual intention is the criterion, the key to unlock the meaning of the contract. *Knowlton v. Campbell,* 37 S. E. 581, 48 W. Va. 294."

It would seem therefore that what the court indicated in the *Uhl* case with reference to the inadmissibility of evidence when an agreement is not ambiguous is little more than reiterated form, born of a tendency to quote. Moreover, it is believed that the *Knowlton* case, which the court relies upon in the *Uhl* case for the above-quoted ambiguity rule, contains nothing more than a dictum on this point. That case involved a written lease having to do with the payment of rental "until work is commenced". At the trial the plaintiffs were allowed to ask Knowlton this question: "State what the bargain or agreement was in relation to the paying of rental by Mr. Campbell to you upon the lease." Knowlton answered: "The agreement was that the rental was to be paid to me until the well was completed, while that paper there says until work was commenced, and I supposed that that was the way it was written in the lease, rental to be paid until the well was completed." The court said that "the case turns upon the question whether that oral evidence was properly admitted over the defendant's objection." It is quite clear that the evidence offered is inadmissible for the reason that, being in final analysis a declaration of intention dealing with the subject of the document, it violates the parol evidence rule. Nevertheless the court, both in its opinion and in the syllabus, talks in terms of the ambiguity rule. It would seem therefore that what the court said in that case on the question of construction, though appearing in the

[37] At p. 109.

syllabus, was unnecessary to the decision and therefore mere dictum.

Lest it be contended that the reasoning herein adopted does violence to the oft-invoked doctrine that the syllabus is the law of the case in West Virginia, perhaps it is worth while to point out, parenthetically, that the West Virginia statute,[38] and the West Virginia Constitution,[39] merely state in this regard that "it shall be the duty of the court to prepare a syllabus of the points adjudicated in each case." The statutory and constitutional provision does not say that everything that appears in the syllabus is law or decision as distinguished from dictum, irrespective of whether or not the facts in the case call for an expression of opinion on the points stated in the syllabus. Nor does it say that points adjudicated but not stated in the syllabus are not law. If the syllabus is the law of the case in West Virginia, as the language of the court sometimes indicates, it is pertinent to ask what is the law of the case where, as in *Long v. Potts*,[40] the court adjudicates a point, writes an opinion stating its reasons, but does not write a syllabus. Furthermore, the court in deciding cases constantly relies on the precepts and other legal elements indicated in the opinions. Finally, the Supreme Court of Appeals has recently declared in *Henshaw v. Globe, etc. Insurance Co.*,[41] that this constitutional and statutory provision is "directory" only.[42] When all is said and done therefore the syllabus in West Virginia is, in reality, merely an *official* headnote, a headnote the language of which may be sanctioned by the court more fully than the language of the opinion, but it is none the less, if one looks at all the realities in the judicial process, merely an official headnote behind which one must search, time and again, if one would strike straight through form in order that he may discover all the operative elements in the judicial process.

Similarly in most, if not all, of the more modern West Virginia cases in which the language of the ambiguity rule appears, it is believed that the ambiguity rule is little more than reiterated form and is not, by and large, the real element which can be used as a basis for predicting what the court will do in fact in subse-

[38] W. VA. REV. CODE (1931) c. 58, art. 5, § 21.
[39] Art. 8, § 5.
[40] 70 W. Va. 719, 75 S. E. 62 (1912).
[41] 112 W. Va. 556, 166 S. E. 15 (1932).
[42] *Cf.* Horner v. Amick, 64 W. Va. 172, 61 S. E. 40 (1908).

quent cases. A few of the later West Virginia decisions in which such language is used will, it is believed, suffice to illustrate.

In *Collins v. Treat*,[43] decided in 1930, there was a written lease between William J. Collins and others containing the clause: "the said parties of the first part to receive one-eighth of the net proceeds . . . ." With reference to the admissibility of evidence for the *alleged* purpose of construing this language, the court said:[44]

> "The plaintiffs take the position that there is an ambiguity in the contract . . . . and therefore it is proper for the court to consider parol evidence in determining the intention of the parties to the contract and particularly to show what was William J. Collins' understanding of the meaning of the phrase 'net proceeds', and what had been said to him about the meaning of said phrase by one of the defendants after the said contract had been drafted . . . . and before it was executed."

The evidence offered, inasmuch as it involves a declaration of intention dealing with the subject of the document, clearly violates the parol evidence rule. Therefore the point actually adjudicated in the case, namely, that the evidence was inadmissible, is quite consistent with the modern view. In reaching this conclusion, however, the court felt called upon to answer the plaintiff's contention "that there is an ambiguity in the contract . . . . and therefore it is proper for the court to consider parol evidence in determining the intention of the parties." In disposing of this contention the court, after stating the ambiguity rule in the form hereinbefore set forth, quoted from *Uhl v. Railway Company*[45] and from *Lewis v. Flour & Feed Company*:[46]

> " '. . . . but evidence cannot be received to show their [the parties'] declarations, conversations or interlocutions before or at the execution of the contract.' " " 'The declarations of the parties as to what they intended by the language they used, are inadmissible.' *Lewis v. Flour & Feed Co.*, 90 W. Va. 471."

The language from the *Uhl* case and from the *Lewis* case sufficiently disposed of the plaintiff's contention in the *Collins* case. It is important to note, however, that the ambiguity rule

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[43] 108 W. Va. 443, 152 S. E. 205 (1930).
[44] At p. 446.
[45] *Supra* n. 8.
[46] 90 W. Va. 471, 111 S. E. 158 (1922).

therein set forth has nothing to do with the particular sort of evidence there under consideration, and such evidence, since it involved a declaration of intention dealing with the subject of the document, is, according to all generally recognized authorities, inadmissible because of the parol evidence rule. The language just quoted governs the case. Hence, what the court says in the *Collins* case about the ambiguity rule is, it would seem, dictum, not decision. At any rate the conclusion reached by the court in the *Collins* case is not only sound but also consistent with the modern view.

In *Ferimer v. Lewis, Hubbard & Company,*[47] decided by the West Virginia Supreme Court of Appeals in 1934, there was a written agreement between *R* and the defendant, providing in effect that collateral therein indicated was to secure the latter "of a certain indebtedness, being an account for merchandise" purchased by another. The defendant contended that the agreement was ambiguous and could be construed as applying to a running account as consistently as to a specific purchase, and offered, over objection, evidence that one *X* understood from an alleged conversation had in his presence between *R*, a party to the agreement, and the agent of another party to the agreement just prior to the execution of the agreement, that a running account was intended. The court held that this evidence was inadmissible, and quite correctly, for, being a direct declaration of intention dealing with the subject of the document, the testimony obviously violates the parol evidence rule. The actual holding therefore does not militate against the modern view. However, the court, partly perhaps because the defendant contended that the agreement was ambiguous, talks somewhat in terms of the approved language technique. But this is believed to be dictum, partly for the reason already indicated and partly for the reason that the court cites, in support of its conclusion, "Williston, Contracts, secs. 618, 629", which sections, as already seen, specifically support the modern view.

In addition to the declaration of intention, certain surrounding circumstances were offered in evidence in the last-mentioned case. As to these the court said that, if the contract is ambiguous, surrounding circumstances are admissible to interpret it. Thereafter the court, though regarding the writing as unambiguous, said that "the surrounding circumstances and the language of the

[47] 114 W. Va. 629, 173 S. E. 264 (1934).

agreement harmonize", which would seem to show that, after all, the court did consider the surrounding circumstances, *i. e.*, did, in fact, apply the modern rule.

The rather recent decision in *Bragg v. Peytona Lumber Company,* is one of the most important cases in point.[48] In that case there was a written contract providing, *inter alia,* that *P* was to cut "poles . . . . to conform in every way to what is known as Class 'B' of Chestnut Pole specifications". There were "standard" Class B Chestnut Pole specifications as understood in the market generally, and these had certain minimum dimensions. A question was whether *evidence of former dealings between the parties, including a former contract,* as well as their acts subsequent to the execution of the contract, was admissible to explain the sense in which the parties had used the phrase "poles . . . . to conform in every way to what is known as Class 'B' " poles. The court held that such evidence was admissible and that it showed that the parties used the words to mean something other than "standard" Class B poles as understood in the market generally. The court said:[49]

> ". . . . In the light of prior dealings 'Class B' poles could have meant, as between the contracting parties, something quite different from the standard Class B poles as generally understood by the commercial world. In such case the practical construction put upon it by the parties thereto is of great weight . . . ."

Is the language in the written instrument in the *Bragg* case ambiguous? The court intimates that it is. But the court also says: "The standard Class B pole as recognized in the commercial world is admittedly a pole of much larger dimensions than the poles" which, according to the holding of the court, the parties intended when they said in the written instrument that *"the poles are to conform in every way to what is known as Class 'B' " poles.* If, in the light of that, the agreement in the *Bragg* case is "ambiguous", it would seem that the court is not using the word "ambiguous" in its "normal" sense — that the court is, consciously or unconsciously, putting new content into old precepts.

Speaking of what the courts may mean by such language as that which appears in some of the West Virginia cases, Williston[50] says (to quote again):

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[48] 102 W. Va. 587, 135 S. E. 841 (1926).
[49] At p. 590.
[50] WILLISTON, CONTRACTS § 629.

> "In regard to some of these statements, it may be guessed that the court in denying the admissibility of evidence of surrounding circumstances to vary the meaning of an apparently clear writing, meant no more than that in the particular case, the evidence offered would not persuade any reasonable man that the writing meant anything other than the normal meaning of its words would indicate and that therefore it was useless to hear the evidence."

This diagnosis of the language technique of the courts that sometimes talk in terms of an ambiguity rule is apparently true as to *Watson v. Buckhannon River Co.*,[51] a rather recent West Virginia case, in which the court says (point 2 of the syllabus):

> "*The circumstances surrounding the parties at the time of the making of a written contract may always be shown;* but where the writing is plain, definite and unambiguous it cannot be varied by parol evidence showing facts which might have the effect of changing the plain intent expressed by the writing." (Italics supplied.)

This language involves an obvious inconsistency unless the talk about the ambiguity rule means merely that, "where the writing is plain, definite and unambiguous", such evidence, if let in, could not be given effect because a reasonably intelligent person could not, even in the light of the evidence, "stretch" the language in question far enough to include the interpretation indicated by the surrounding circumstances. Moreover, the opinion quotes with approval from Williston, Contracts, § 618, which supports the modern view. Though Williston's "guess" as to what courts may mean by the ambiguity rule, when they talk in terms of such a rule, does not, as hereinafter indicated, fit all West Virginia cases, the utmost that can be said for the ambiguity rule in West Virginia would seem to be that the West Virginia law on the point is not clear. In such a situation it would seem that we may safely rely upon the Restatement of the Law by the American Law Institute as an authoritative guide in this jurisdiction, especially since that view is supported by the best commentators and, *in fact*, if not in language technique, by recent West Virginia cases that have not been overruled, and particularly since the West Virginia court, in *City of Wheeling v. Benwood-McMechen Water Co.*,[52] has, quite recently, expressly sanctioned that

[51] 95 W. Va. 164, 120 S. E. 390 (1923).
[52] 115 W. Va. 353, 176 S. E. 234 (1934).

part of the Restatement which sets out the correct standard of interpretation.

On this point, Sections 230 and 235 of the Restatement of the Law of Contracts set forth two of the applicable rules, with comment thereon, as follows:

> "(d) All circumstances accompanying the transaction may be taken into consideration, subject in case of integrations [*i. e.,* complete written contracts] to the qualifications stated in § 230. [Section 230 reads as follows: 'The standard of interpretation of an integration, except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, *other than oral statements by the parties of what they intended it to mean.*']
>
> "Comment on Clause (d):
>
> "*e.* The court in interpreting words or other acts of the parties puts itself in the position which they occupied at the time the contract was made. In applying the appropriate standard of interpretation *even to an agreement that on its face is free from ambiguity* it is permissible to consider the situation of the parties and the accompanying circumstances at the time it was entered into — not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning to be given to the agreement.
>
> "*f. . . . . as all language will bear some different meanings, evidence of surroundings is always admissible. Its operative effect depends on how far the words will stretch, and how alien from the ordinary meaning of the words is the intent they are asked to include.*" (Italics supplied.)

It is clear from the Restatement that apart from "statements by the parties of what they intended it [the integrated instrument] to mean", or as Wigmore puts it, "declarations of intention dealing with the subject of the document", there is no rule excluding evidence for the purpose of interpreting the meaning of language in a written instrument, the only limitation upon the use of the evidence being whether the language in question will "stretch" far enough to include the meaning contended for and whether the intent wihch the writing is asked to include is, in the language of the Comment on Section 242 of the Restatement, "completely alien to anything its words can possibly express."

It seems therefore that, subject to a caveat hereinafter considered, we may start with the proposition laid down by the West Virginia court in *Watson v. Buckhannon River Co.*[53] that "The circumstances surrounding the parties at the time of the making of a written contract may always be shown" for the purpose of ascertaining the meaning which the parties attached to the words they used. To what extent, however, do these so-called "circumstances" include utterances of the parties themselves? On this point, though there is some difference of opinion, the generally accepted authority, including the Restatement, is reasonably clear. Wigmore says:[54]

> "It is worth while emphasizing that among the 'circumstances' to be investigated are included, not only the corporal objects surrounding the party, but also his utterances, *written and oral,* as applied to those objects.
>
> "Among this latter class, however, there is one forbidden variety, namely, *expressions of intention* dealing with the subject of the document."

The law on this point is stated as follows by the West Virginia court in *Redden v. Glade Creek Coal & Lumber Co.,*[55] the court quoting with approval from the Virginia case of *Pine Beach Co. v. Columbia Amusement Co.*:[56]

> " 'If the previous negotiations make it manifest in what sense the terms of the contract are used, such negotiations may be resorted to as furnishing the best definition to be applied in ascertaining the intention of the parties. The sense in which the parties understood and used the terms of the contract is thus ascertained. To explain the meaning of a writing in the true sense, and with this limit, is to develop the real meaning of the document. The admission of parol evidence for this purpose does not violate the rule which makes the written instrument the proper and only evidence of the agreement."

The Restatement of the Law of Contracts[57] provides:

> *"Previous negotiations between parties to an integrated agreement, whether the negotiations relate to that agreement or to another, are admissible to show that the agreement has*

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[53] *Supra* n. 51.
[54] WIGMORE, EVIDENCE § 2471.
[55] 105 W. Va. 138, 141 S. E. 639 (1928).
[56] 106 Va. 810, 56 S. E. 822 (1907).
[57] § 242.

any meaning which is not impossible under the standard stated in sec. 230, though that meaning would not otherwise have been given to the agreement.

"*Comment*:

"*a.* Where the parties by the language they have employed leave their meaning obscure and uncertain when applied to the subject-matter, then the expressions and general tenor of speech used in the previous negotiations, even if coming as they usually must from one or the other of the parties themselves, are admissible to show the conditions existing at the time when the writing was made. And *even where the writing is not ambiguous on its face, the circumstances under which the parties contract may be looked at* to establish an ambiguity; as well as *to indicate the proper choice of possible meanings;* and the common knowledge and the understanding of the parties themselves as shown by their previous negotiations is sometimes such a circumstance. There is, however, a limit to the application of the rule stated in the Section. Previous negotiations cannot give to an integrated agreement a meaning completely alien to anything its words can possibly express." (Italics supplied.)

The case of *Alderson v. Gauley Fuel Co.*,[58] decided by the Supreme Court of Appeals of West Virginia on February 19, 1935, may seem, at first blush, to be somewhat at variance with the general proposition herein contended for. Point 1 of the syllabus reads as follows:

"The rule of practical construction by act of the parties applies only where the contract on its face is ambiguous and uncertain, and not where by its terms the instrument expresses their intention with reasonable certainty."

In that case a written lease providing for royalties contained certain specific stipulations including one which provided that, after the aggregate royalties paid amounted to $25,000, "the *lessee* or its assigns shall be credited, without interest, by the lessors with any minimum royalty which shall have been paid before the commencement of operations by crediting the lessee or its assigns in each quarter thereafter with one-half the royalty due for said quarter . . . ." By intrinsic interpretation the court first held that the stipulations meant that the lessee was "entitled to credit for one-half of all the rental payments made" after the royalties paid totalled $25,000. Having come to this conclusion the court thereupon dealt with a contention that "by making pay-

[58] 178 S. E. 626 (W. Va. 1935).

ment of the full quarterly rental after the aggregate of rentals paid had reached the sum of $25,000, the defendant [lessee] had placed a practical construction upon the provisions of the lease . . . ." Answering this contention the court said:[59] ". . . . in the case at bar the contract itself expresses the intention of the parties with reasonable certainty, and in that case the rule sought to be invoked does not apply."

The actual conclusion reached in the Alderson case is quite consistent with the modern view adopted by the Restatement, for the language used in the writing in that case is so specific — so detailed in its specific provisions — that it falls within the above-quoted limitation put by the Restatement and by the cases upon the use of practical construction, *viz.,* the meaning evidenced by the conduct of the parties subsequent to a manifestation of intention must, to be adopted, be such a meaning that "a reasonable person could attach it to the manifestation". In the *Alderson* case a reasonable person could not attach to the written agreement, so specific in its details, the meaning rather weakly evidenced by the practical construction. In other words the language there in question will not "stretch" far enough to include the interpretation so evidenced by the subsequent conduct of the parties.

It must be admitted, however, as hereinbefore intimated, that it is not every West Virginia case that can be fitted completely into the modern view. And one case that stands out so conspicuously that it can hardly be passed by without a word is *Griffin v. Coal Company,*[60] decided by the West Virginia Supreme Court of Appeals in 1905. In that case a deed purported to convey the coal under certain land, "together with the right to . . . . mine, excavate and remove all of said coal . . . ." On a demurrer to a declaration setting out the terms of the deed, the question presented was whether by the language in the instrument, *intrinsically interpreted,* the grantor had relinquished his right of subjacent support. The court, in holding that the grantor had relinquished this right, said:[61]

> "In the case at bar there is no ambiguity in the language, and taking the words used in their common acceptation they have but one meaning, and therefore there is no room for construction."

[59] At p. 628.
[60] 59 W. Va. 480, 53 S. E. 24 (1905).
[61] At p. 495.

Judge Poffenbarger vigorously and forcefully dissented. The apparent holding in the *Griffin* case is contra to the conclusion reached by practically all courts, American and English, that have passed on the question[62] and is, it is believed, bottomed on an untenable theory, a theory, moreover, which is expressly repudiated by the Restatement.[63] And yet there is an angle to the *Griffin* case which perhaps makes the actual holding fit into the modern rule, for no extrinsic evidence was offered to show that the words in the deed should be interpreted in any other than their normal meaning, and even under the modern rule, as the Restatement puts it,[64] "The ordinary meaning of language throughout the country is given to words unless circumstances show that a different meaning is applicable." The case therefore does not hold that extrinsic evidence is inadmissible to disturb the normal meaning of the language, for that question was not before the court. The case, as presented, called for intrinsic interpretation alone, and therefore, strictly speaking, from the angle of construction alone stands only for the proposition that in the absence of evidence showing that a different meaning is applicable, the language used must be given its normal meaning — a perfectly sound rule of law. It is not beyond the realm of possibility that the case was lost because of the way in which the question was presented to the court. At any rate, in a later case where the language was only slightly different, the West Virginia court reached a contrary conclusion.[65]

There is a caveat, however, more significant to-day, it is believed, than the apparent holding in the *Griffin* case, and that is the doctrine that the judicial interpretation put upon particular words may become a so-called "rule of property", so that such interpretation, even though originally erroneous, should not be disturbed for the very cogent reason that in such situations the social interest in the security of transactions outweighs the conflicting individual and social interest in the just decision of partic-

[62] See, discussing some of the cases, Poffenbarger, J. dissenting in the Griffin case. See also, discussing the question, Comment (1933) 39 W. VA. L. Q. 358 and Caveat (1933) 39 W. VA. L. Q. 359, by Robert T. Donley.

[63] RESTATEMENT, CONTRACTS (1932) §§ 235, 242 and Comments.

[64] RESTATEMENT, CONTRACTS § 235.

[65] Hall v. Harvey Coal & Coke Co., 89 W. Va. 55, 108 S. E. 491 (1921). Here there was a conveyance of "the coal and all minerals . . . " and the grant of "the right of mining and removing the said coal and all minerals from said land." The court distinguished the Griffin case, and quite correctly, for it is not possible to say that the ordinary meaning of such language throughout the country would be that a relinquishment of the right of subjacent support was intended.

ular cases. Accordingly, when the question in the *Griffin* case arose for the second time, twenty-eight years later, in *Simmers v. Star Coal & Coke Company,*[66] the West Virginia court unhesitatingly followed the interpretation adopted in the *Griffin* case, saying, among other things, that that interpretation had become a "rule of property".[67] In other words, in the language of the Restatement,[68] the standard of interpretation otherwise applicable may be "excluded by a rule of law establishing a definite meaning." So a court may feel constrained to hold, as a West Virginia court has held,[69] that after a word has received a definite legislative interpretation supposedly applicable to all transactions, that interpretation must be accepted even in the face of a general custom giving the word a different meaning.[70] But quite different considerations applied when the question of interpretation arose in the *Griffin* case, and in the light of the latest adjudication of the West Virginia court in point it is believed that if the question were *res integra* to-day the court, if proper evidence were offered in the case, would probably reach a contrary conclusion.[71]

The recent decision which throws considerable doubt upon the purported doctrine of the *Griffin* case is *Hodge v. Garten,*[72] decided by the West Virginia Supreme Court of Appeals on November 12, 1935. In that case there was a written contract which contained words 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 had on hand mining posts in six different localities. But the defendant, in support of his claim that the contract was confined to posts in two of these localities, offered evidence (1) that prior to the execution of the contract the plaintiff had taken the defendant to those two localities (Nickelville and Huddleston farm) to look over the posts and (2) that at the time of the execution of the contract the defendant gave the plaintiff a check for $500 as part payment, and that on this check there was the notation: "$500 payment on mine props at Nickelville and Huddleston farm."

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[66] 113 W. Va. 309, 167 S. E. 737 (W. Va. 1933).
[67] At p. 313. The court also purports to adopt the rule of construction laid down in the Griffin case.
[68] RESTATEMENT, CONTRACTS § 230.
[69] Buchanan v. Louisville C. & C. Co., 98 W. Va. 470, 127 S. E. 335 (1925).
[70] As to whether the court was justified in arriving at that conclusion under the particular fact situation, see comments on the case in (1925) 39 HARV. L. REV. 212 and (1925) 32 W. VA. L. Q. 76.
[71] But see the language of the court in the Simmers case, *supra* n. 66.
[72] 182 S. E. 582 (W. Va. 1935).

Is this contract "ambiguous"? The court apparently treated it as such, and accordingly not only admitted the evidence but held that the words "all . . . . posts that the party . . . . now has" on hand did not include *all* the posts he had on hand, but only a part. The *Garten* case stands in striking contrast to the *Griffin* case, in which the court purported to hold that the word "all" can have "but one meaning" — that it cannot mean "a part". Moreover, the *Garten* case, by not citing the *Griffin* case, in fact by citing only one case and not even quoting from that, has dealt a staggering blow to formalism in matters of interpretation. Said the court:[73] "While a more comprehensive word cannot be found in the English language, 'all' has its limitations."

So "all" may not mean *all,* after all! The most comprehensive word in our language no longer has, in the eye of the law, any "plain meaning". Words are flexible indices of thought, not fixed symbols, in law as well as in reality.[74] It would seem therefore that there is no longer any excuse for talking in terms of the vacuous ambiguity rule. There is not a word in the court's latest opinion about it. True, the court, partly perhaps by force of habit, pauses briefly in the syllabus to pay its respects to the past. It is scant respect, however: "Extrinsic evidence is admissible to explain an ambiguity appearing on the face of a contract." Ambiguity — but all is ambiguity, saith the law.

And so the law moves along, or tends to move along, from a primitive formalism to a practical rationalism,[75] adding new content to old precepts, evolving new precepts, new technique, to the extent that such change will best secure what is understood by the courts to be the needs of the times.

To be sure, the periphery of the old rule is still with us to a degree. But the growth of the law, like all growth, is by and large from within. Courts do and must evolve new rules and other legal elements to be used in deciding cases, "but they can do so only interstitially", as one eminent judge has put it,[76] — an example of mild meiosis of course, but none the less candor itself compared with much of the cutaneous matter beneath which courts, in conscious or unconscious effort to secure the social interest in stability, are wont to imbed the sum and substance of change.

[73] At p. 584.

[74] The writer does not mean to predict that hereafter all cases will so hold. But the correct rule, as evidenced by the better cases and particularly by the latest West Virginia case, justifies the statement.

[75] *Cf.* Hardman, *Stare Decisis and the Modern Trend* (1926) 32 W. VA. L. Q. 163.

[76] See n. 3, *supra.*