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Pleading and Practice--Writ of Error--Special Bill of Exceptions-- Specification of Error

H. G. U.

West Virginia University College of Law

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cause of an injury. But the distinction is that of result or legal liability. The thought suggested by a review of the cases and particularly the principal case is that perhaps the problem of distinction is one of undue emphasis, resulting from explaining acts which although definitely of a causative nature, when viewed together with *all the facts*, are not the proximate cause of an injury. This thought is strengthened by the fact that a problem, and apparently confusion, also exists in other jurisdictions as to the importance of a condition or occasion of an injury. *Stewart v. Minneapolis St. Ry., supra*, shows how the Minnesota court is approaching the problem and at least one other court is even more definite.

In *Kinderavich v. Palmer*, 127 Conn. 85, 15 A.2d 83 (1940), the court rather tersely remarked that a statement that an act or omission is a "condition" and not a cause of an injury means no more than that it is not a "proximate cause" of that injury.

C. S. McG.

PLEADING AND PRACTICE--WRIT OF ERROR--SPECIAL BILL OF EXCEPTIONS--SPECIFICATION OF ERROR.—During a homicide trial *D* was asked and required to answer a question on cross examination over the objection of *D*'s counsel. A motion for mistrial was overruled by the trial court and an exception taken. A writ of error to the circuit court was refused on the basis that the alleged error had not been specifically made a ground in support of *D*'s motion for a new trial or incorporated in a special bill of exceptions. *Held*, that the court may and should consider alleged errors arising on the rulings of a trial court in the admission or rejection of evidence objected to, where alleged errors in the admission or rejection of evidence, to which objection has been made in the trial court, are specifically set forth as ground of a motion to set aside a verdict and grant a new trial; or incorporated in a special bill of exceptions; or are incorporated in the assignments of errors contained in the petition for writ of error; or set forth in the brief of counsel; or otherwise specifically brought to the attention of the trial court. *State v. Bragg*, 87 S.E.2d 689 (W. Va. 1955) (3-2 decision).

The court has been confronted with two conflicting lines of decision on the question of consideration of error arising on rulings of the trial court. One line of reasoning is that found in *Gregory's Adm'r v. Ohio River R.R.*, 37 W. Va. 606, 16 S.E. 819 (1893), that, "objections and exceptions to the admission or rejection of

evidence, although fully noted in the transcript of the evidence embodied in a bill of exceptions, would not be considered by the appellate court unless (1) the objection and exception were made the subject of a special bill of exceptions, or (2) the ruling of the court on the objection should be specifically assigned as ground of error on the motion for a new trial." Carlin, *The Transcript of the Evidence as a Substitute for Special Bills of Exception*, 32 W. VA. L.Q. 321, 324 (1926).

In contrast with that case and in line with the instant decision is the other position found in the leading case of *Kay v. Glade Creek R.R.*, 47 W. Va. 467, 472, 35 S.E. 973, 975 (1900), that, "if the assignment of error or brief of counsel clearly and distinctly specifies the question refused or allowed,—the particular point complained of, with a specification of its place in the report of the proceedings,—this court ought to consider it; otherwise not."

The court had previously attempted clarification of this procedural question. *Hinton Milling Co. v. New River Milling Co.*, 78 W. Va. 314, 88 S.E. 1079 (1916), adopted the principles of *Kay v. Glade Creek R.R.*, *supra*, while the court in *Ritz v. Kingdon*, 79 S.E.2d 123 (W. Va. 1953), adopted the reasoning of *Gregory's Adm'r v. Ohio River R.R.*, *supra*. The court in both cases went to some length to state that clarification of procedure was to result from the respective decisions.

Ritz v. Kingdon, *supra*, was decided subsequent to the enactment of W. VA. CODE c. 56, art. 6, § 37 (1931), which is concerned with the proper procedure for bringing errors to the notice of the appellate court. The last sentence of this section, according to the revisers note, "is in accord with the views expressed in *Hinton Milling Co. v. New River Milling Co.*," *supra*.

The judicial inconsistency of the two lines of decisions apparently stems from the issue of whether special bills of exception are necessary to point out to the appellate court the particular objections and exceptions relied upon for reversal. The lack of such necessity is pointed out by the opinion in *Kay v. Glade Creek R.R.*, *supra*. This lack of necessity coupled with the reality that "the appellate court is usually under the necessity of reading the whole evidence for other purposes, and thus becomes familiar with the context," Carlin, *The Transcript of the Evidence as a Substitute for Special Bills of Exceptions*, *supra*, when read in the light of W. VA. CODE c. 56, art. 6, § 37 (Michie 1955), supports the line of decisions stemming from *Kay v. Glade Creek R.R.*, *supra*, including the instant case.

It is submitted, however, that interpretation of the words "or otherwise specifically brought to the attention of the court," as here used, may result again in confusion as to proper appellate procedure.

H. G. U.

TAXATION—ORDINARY AND NECESSARY EXPENSE—CAPITAL LOSS DISTINGUISHED.—To insure performance of a contract with *A*, *B* was required to deposit United States government bonds in escrow. Not owning bonds, *B* borrowed money to purchase them. After performance, and release of the bonds, *B* sold them at a loss, deducting the loss from income as a business expense. The Commissioner of Internal Revenue claimed such loss must be shown as a capital loss. *Held*, that the loss was a business expense, as a sale of assets held for sale in the ordinary course of business. *Commissioner v. Bagley & Sewall Co.*, 221 F.2d 944 (2d Cir. 1955).

The principal case is the latest in a series of decisions concerning a loss incurred on resale of an asset purchased as an aid to the purchaser's business, but not directly connected with the everyday scope of the business.

The Internal Revenue Code provides in part as follows: "In computing net income there shall be allowed as deductions . . . all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on the trade of business. . . ." INT. REV. CODE OF 1939, § 23 (a) (1) (A), 53 STAT. 12 (NOW INT. REV. CODE OF 1954, § 162). A capital loss results from the sale at a loss of a capital asset, defined as ". . . property held by the taxpayer (whether or not connected with his trade or business), but does not include . . . property held by the taxpayer, primarily for sale to customers in the ordinary course of his trade or business. . . ." INT. REV. CODE OF 1939, § 117 (a) (1), 53 STAT. 50 (NOW INT. REV. CODE OF 1954, § 1221). The distinction is important, in that a corporation can deduct a capital loss only when it offsets a capital gain, being allowed to carry this loss forward for a five year period. INT. REV. CODE OF 1939, § 117 (d) (1), (e) (1), as amended, 56 STAT. 842 (1942) (NOW INT. REV. CODE OF 1954, §§ 1211, 1212). The taxpayer in the instant case had no capital gains to balance against a capital loss. The court seemed to have difficulty in placing the bonds into the exception of property held primarily for sale to customers in the ordinary course of business, particularly in view of the fact that the taxpayer had not previously engaged in dealings of this