Volume 32 | Issue 4 Article 4

June 1926

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L. Carlin
West Virginia University College of Law

THE TRANSCRIPT OF THE EVIDENCE AS A SUBSTITUTE FOR SPECIAL BILLS OF EXCEPTIONS

L. CARLIN*

Questions of trial error pertaining to the evidence usually involve a consideration of court action with reference to some one of the following things: (1) the rejection of proffered evidence on objection; (2) the admission of evidence over objection; or (3) the effect to be given to the evidence, preëminently the probative sufficency of the evidence. The first two considerations usually call for a decision as to the propriety of questions or answers involved in the examination of witnesses. The third consideration has, perhaps, assumed its greatest importance under the inquiry whether the evidence is sufficient to support a verdict. Whatever the nature of the inquiry into the propriety of the court's ruling, since the evidence is not *per se* a part of the record, for purposes of review in an appellate court, it is necessary that the evidence, or the particular part of it to which the question of error is directed, be brought into the record by a bill of exceptions.[1] The process of incorporation by bill of exceptions involves a proffer of the evidence, an objection, the ruling of the court on the objection, and the proper authentication of all these matters in the bill of exceptions, which is then made a part of the record by an order of court or the certificate of the trial judge. In the early days of trial procedure, the courts did not have the aid of stenographic reporters. Hence in those days the evidence, as a whole, was not literally recorded and preserved in the form of a transcript. Consequently, if any question arose as to the ruling of the trial court on the sufficiency of the evidence as a whole, such as the question whether the evidence was sufficient to support a verdict, for purposes of review in the appellate court the trial court

* Professor of Law West Virginia University.

[1] See 25 W. VA. LAW QUAR. 198 *et. seq.*

certified the facts of the case as established by the evidence.[2] A bill of exceptions containing such a certification of facts was, of course, of no use where the objection and exception went to a specific question or answer, and particularly where the supposed point of error involved the form of the question or answer. In such instances, it was necessary to resort to special bills of exceptions incorporating literally the subject matter of the objection and stating the objection and exception. The practice of "certifying the facts" of the case for purposes of appellate review continued in West Virginia long after it had become customary to employ stenographic reporters for purposes of the trial. It was not until 1891 that, by way of amendment of section 9 of chapter 131 of the Code relating to bills of exceptions, it was enacted that, "if the action or opinion of the trial court be upon any question involving the evidence, or any part thereof, * * * the court shall certify the evidence touching such question * * *."[3] The effect of this amendment has been to reverse the former practice. The result has been that, in any case where the trial court would formerly have certified the facts of the case as established by the evidence, it is now almost the universal practice to certify a literal transcript of the evidence itself.[4]

Although the writer recalls no statement in the books assigning any particular reason why this amendment was enacted, it may easily be surmised that it was enacted because litigants had, for some special reason, become dissatisfied with the old practice of "certifying the facts." No doubt cases arose where litigants believed that the facts where inaccurately stated in the certification, and suspected that the decision in the appellate court might have been different if the case had been reviewed in the full and direct light of the evidence. Hence perhaps the primary legislative intent was to give the appellate court an opportunity to draw its own conclusions as to what facts are established by the evidence, in lieu of depending upon the

[2] Johnson *v.* Burns, 39 W. Va. 658, 20 S. E. 686 (1894).
[3] *Idem.*
[4] Rather strangely, it might seem, the amendment has been construed to be directory, rather than mandatory. King *v.* Jordan, 46 W. Va. 106, 32 S. E. 1022 (1899). "Section 9, chapter 131, Code 1891, does not prohibit the Supreme Court of Appeals from considering a case where the facts proven on the trial, and not the evidence, are certified." *Idem.* This case, however, seems to stand almost alone. It seems to have been cited for the proposition in question only in the case of *In re* Temple Society, 90 W. Va. 441, 111 S. E. 687 (1922).

conclusions of the trial court. Wherefore, it may be surmised that the chief end in view was to aid the appellate court in forming an accurate, first-hand estimate of the weight of the evidence in the aggregate, rather than to present in literal form parts of the evidence forming the subject matter of special objections and exceptions. It will be perceived, however, that the new practice of embodying a literal transcript of all the evidence in one bill of exceptions, and thus bringing it all in its proper sequence before the appellate court, presented new possibilities as to saving objections and exceptions with reference to specific questions and answers. Since the stenographic reporter records and transcribes not only the literal questions and answers, but also objections and exceptions interposed and saved by counsel, the transcript of the evidence, embodied in a single bill of exceptions, contains in the aggregate practically all that under the former practice would have been made to appear only by separate bills of exceptions dealing with each separate objection and exception. There is lacking only such matter as is inserted in special bills of exceptions by way of explanation or inducement, for the purpose of showing the application of the isolated question or answer to other parts of the evidence or record. When a question or answer is separated from its context, such an explanation by way of inducement is of course often absolutely necessary; but when the whole of the evidence is certified, literally and in its proper sequence, the application and effect of a specific question or answer, and any objection or exception pertaining thereto, may be determined from the context.

Whatever the possibilities, subsequent to the amendment of 1891, of dispensing with numerous separate bills of exceptions duplicating objections and exceptions contained in the bill of exceptions embodying the transcript of the evidence, it has nevertheless continued to be the usual practice, whether from definite choice or from the general force of inertia growing out of long-established precedent, to use special bills of exceptions for the purpose of preserving objections and exceptions relating to the admission or rejection of evidence. On the other hand, no few instances will be noted in the cases where practitioners, sometimes to their regret, have relied upon the bill of exceptions con-

taining the transcript of the evidence as dispensing with the necessity for such special bills of exceptions. Hence it would seem very desirable to determine, as far as practicable, to what extent and in what manner there may be an option, or alternative, as to the different methods of practice.

Without any attempt in this brief discussion to review specifically all the various cases dealing with the question since the enactment of the amendment of 1891, some of which seem to be directly in conflict and others of which may to some degree be reconciled or distinguished, it will be sufficient to note that, in general, two different views, each based on a more or less distinct line of decisions, have at one time or another prevailed.

It first seems to have been the view of the court, following from certain conclusions reached in *Gregory's Adm'r* v. *Ohio River R. R. Co.*,[5] a case decided not long after the enactment of the amendment, 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 a ground of error on the motion for a new trial. The same view has found expression in a series of subsequent decisions continuing down to a recent date.[6] A fair statement, in condensed form, of the rule evolving out of these decisions will be found in *State* v. *Jones*,[7] decided in 1916:

> "Rulings of the trial court on the admissibility of evidence will not be considered on writ of error, unless the evidence admitted or rejected is made part of the record

[5] 37 W. Va. 606, 16 S. E. 819 (1893). Although this case contains statements which led to the series of cases cited below sustaining the rule as stated in the text, the point actually decided was that, if a party assigns certain grounds in support of his motion for a new trial, he waives other grounds not assigned, although appearing by way of objection and exception in the transcript of the evidence. The case has been so distinguished by Judge Brannon in Kay *v.* Glade Creek & R. R. Co., *infra.*

[6] Halstead *v.* Horton, 38 W. Va. 727, 18 S. E. 953 (1894); State *v.* Bingham, 42 W. Va. 234, 24 S. E. 883 (1896); State *v.* Henaghan, 73 W. Va. 706, 81 S. E. 589 (1914); Ireland *v.* Smith, 73 W. Va. 755, 81 S. E. 542 (1914); Parr *v.* Howell, 74 W. Va. 413, 82 S. E. 126 (1914); Bartlett *v.* Bank of Mannington, 77 W. Va. 329, 87 S. E. 444 (1915); State *v.* Jones, 77 W. Va. 635, 88 S. E. 45 (1916); Guyandotte Coal Co. *v.* Virginian Electric & Machine Works, 94 W. Va. 300, 188 S. E. 512 (1923); Trippett *v.* Monongahela West Penn Public Service Co., 130 S. E. 483 (W. Va. 1925)

[7] *Supra.*

by special bills of exception or assigned as cause for a new trial on motion therefor, although all the evidence is made part of the record by a general bill of exceptions."

Different reasons, in some respects not altogether consistent, are given to sustain this view. It is said that the point of error, unless so saved or brought to the attention of the trial court, must be considered as having been waived; that it is not fair to the trial court, nor economical as a method of seeking a reversal of the trial court's ruling, to urge in the appellate court a ground for reversal that was not urged on the motion for a new trial; that any other method would not sufficiently point out, especially to the appellate court, the ground of error upon which the party relies for reversal. Particularly, it was emphasized in what may perhaps be considered the leading case[8] in this line of decisions, if a party assigned certain grounds of error on a motion for a new trial and failed to call the attention of the trial court to other objections and exceptions noted in the transcript of the evidence, he must be considered as having abandoned such objections and exceptions unless he embodied them in special bills of exceptions.

The first variation from the views indicated above seems to have come in *Kay* v. *Glade Creek & R. R. Co.*,[9] decided in 1900. In this case, the court says:

"Where a stenographic report of evidence is made part of the certificate of evidence upon a motion for a new trial, and it shows objections to questions or evidence, and the rulings of the court thereon, and that such rulings were excepted to, and the particular question or evidence complained of is specified distinctly in the motion for a new trial, or in an assignment of error, or in brief of counsel, so that the appellate court can readily and safely find the particular question or evidence to which the exception relates, the appellate court will consider the matter excepted to, though there is no formal bill of exceptions thereto; but such matter will not be considered without such specifications, even though such report of evidence notes such objections and exceptions."

Judge Brannon, who wrote the opinion in this case, allows no room for doubt that the bill of exceptions con-

[8] Gregory's Adm'r *v.* Ohio River R. R. Co., note 5 *supra.*
[9] 47 W. Va. 467, 35 S. E. 973 (1900).

taining the evidence brings all the objections and exceptions noted therein into the record. The only obstacle that he perceives in the way of dispensing with special bills of exceptions is the fact that they serve the purpose of pointing out to the appellate court the specific objections and exceptions relied upon for reversal; and he disposes of this difficulty by indicating that specifications of error may be made, not only in special bills of exceptions or by way of assigning grounds on the motion for a new trial, but also either (1) in the assignment of errors, or (2) in the brief of counsel. It will be recalled that prior cases had said that such specifications must be made either (1) on the motion for a new trial, or (2) in special bills of exceptions. Of course, if the specifications are made only in the assignment of errors or in the brief of counsel, they will aid only the appellate court on review, and not the trial court on the motion for a new trial; but he calls attention to the fact that the trial court has heard all the evidence, presumably has taken notes as to all crucial and doubtful matters, and hence is in a much better position than the appellate court to act on the motion for a new trial without any additional specifications of error. It will be noted that the court predicates its statements upon the assumption that "a stenographic report of evidence is made a part of the certificate of evidence upon a motion for a new trial." Perhaps this qualification is intended as a satisfaction, although a rather artificial one it would seem, of statements in prior cases to the effect that objections and exceptions noted in the transcript of the evidence will be treated as waived unless brought to the attention of the trial court by special bills of exceptions or specifically assigned as error on the motion for a new trial. It is rather apparent, however, that Judge Brannon in this case considers that the possibility of waiver has little to do with the question in controversy.

Kay v. *Glade Creek & R. R. Co.* has been approved and followed in a series of subsequent decisions.[10] The result, as already noted, has been two conflicting lines of decisions,

[10] Bodkin *v.* Arnold, 48 W. Va. 108, 114, 35 S. E. 980 (1900); Foley *v.* City of Huntington, 51 W. Va. 396, 41 S. E. 113 (1902); McClanahan *v.* Caul, 63 W. Va. 418, 60 S. E. 382 (1908); Bank *v.* Houston, 66 W. Va. 336, 342, 66 S. E. 465 (1909); Wright *v.* Ridgely, 67 W. Va. 319, 67 S. E. 787 (1910); Walters *v.* Appalachian Power Co., 75 W. Va. 676, 683, 84 S. E. 617 (1915); Bond *v.* National Fire Insurance Co., 77 W. Va. 786, 88 S. E. 389 (1916); Hinton Milling Co. *v.* New River Milling Co., 78 W. Va. 314, 88 S. E. 1079 (1916).

the court intermittently shifting from one to the other as each new case was decided, until the decision, in 1916, of *Hinton Milling Co.* v. *New River Milling Co.*[11] In this case, a motion was made to set aside the verdict and grant a new trial. No grounds whatever were assigned in support of the motion. The court, however, acted upon the motion, overruling it, and an exception was taken to the ruling of the court. The transcript of the evidence, embodied in a general bill of exceptions, showed many exceptions to rulings of the court during the trial upon the introduction of evidence. These exceptions were not shown by special bills of exceptions. Hence the court was under the necessity of deciding whether the general bill of exceptions was sufficient for purposes of review. In undertaking to decide this question, the court, recognizing the confusion that had prevailed in the past with reference to what should be the proper or permissible practice, and in order *"that there may be no confusion or misunderstanding among the profession or circuit courts upon the subject,"*[12] undertakes to state specifically and at length to what extent and in what manner objections and exceptions noted in the transcript of the evidence may be relied upon without the aid of special bills of exceptions and without specific assignments of error on the motion for a new trial. The court adopts the reasoning of *Kay* v. *Glade Creek & R. R. Co.* and goes even farther. It is recognized, as it always has been, subject to certain exceptions, that a motion to set aside the verdict and grant a new trial "is absolutely essential" as a prerequisite to seeking appellate relief. However, it is decided that this prerequisite is fully satisfied by merely making the motion, without assigning any grounds whatever in support of the motion, provided the motion be entertained and acted upon by the trial court. Hence, of course, the court has utterly abandoned any idea to the effect that the movant has waived his exceptions unless he has brought them to the attention of the trial court by special bills of exceptions or by specific assignments of error on the motion, although the practice of making specific assignments of all

[11] *Supra.*
[12] Italics ours.

errors relied upon, in fairness and as an aid to the trial court, is commended. Judge Mason, who wrote the opinion, says:[13]

> "It is well settled in this state that the appellate court will not review rulings of the trial court made during the trial by a jury, unless the erroneous rulings are in some way specifically pointed out and brought to the attention of the court, but is it essential that this should be done in the motion for a new trial? The practice in this state is to specify grounds upon the motion to set aside a verdict and grant a new trial. *Danks* v. *Rodeheaver, supra; Gregory* v. *Railroad Co.,* 37 W. Va. 606; *Hughes* v. *Frum,* 41 W. Va. 445. We do not question the propriety of this practice; it is entirely proper; but is the omission in the motion to state grounds fatal, where the grounds for the motion otherwise appear?"

Further in the opinion,[14] this query is answered as follows:

> "Where the testimony is taken by a shorthand reporter duly appointed and sworn, the report should be preserved *in extenso,* and made part of the record of the case by being incorporated into and made part of the bill of exceptions certifying the evidence. When there is a motion to set aside a verdict overruled and excepted to, and a bill of exceptions certifying all the evidence, such bill of exceptions will be considered by an appellate court without any other or special bill of exceptions, as to all facts properly certified therein. Where the certificate of evidence includes the notes of the shorthand reporter, and such notes contain the rulings of the court in receiving or rejecting evidence during the trial, and exceptions made thereto at the time, such rulings may be noticed by the appellate court without special bills of exceptions, provided such rulings are specifically pointed out in the motion for a new trial, the *assignment of errors, or brief of counsel*[15] but not otherwise. The party who objected to the rulings, and excepted, should have the benefit of his exceptions noted in the bill of exceptions of the evidence, but to do so he should be required to point out in some way to the appellate court the particular rulings to which he objects. * * * By following this rule the appellate court will have all the information, and in as accessible a form as it would have were the alleged errors spread upon the record on motion for a new trial or specified by special bills of exceptions. According to

[13] P. 318.
[14] Pp. 321-2.
[15] Italics ours.

this ruling, while it is essential that there should be a motion in the trial court before the judgment is entered, to set aside the verdict and grant a new trial, and exception taken at the time, to the ruling of the trial court refusing to set aside the verdict, yet it is not essential that the motion should state the grounds upon which the motion is based, to save to the party making the motion the alleged errors noted in such bill of exceptions, provided the rulings complained of are pointed out in the appellate court as hereinbefore indicated."

It is plain that the court, in the Milling Company Case, intended definitely to adopt and perpetuate the practice approved in *Kay* v. *Glade Creek & R. R. Co.* and subsequent cases in accord. This is indicated by the fact that the latter case is cited and quoted with approval. That the court was conscious of the contrary line of decisions, and intended impliedly at the least to supersede them, or politely to overrule them, is indicated by the following language:[16]

"Some of our decisions may seem to indicate a different ruling from the views here expressed, but upon examination they will be found to apply to the phases of the particular cases then under consideration."

It may be conceded that some of the prior cases which the court evidently had in mind may be distinguished, as Judge Brannon, in *Kay* v. *Glade Creek & R. R. Co.*, distinguished the case of *Gregory's Adm'r* v. *Ohio River R. R. Co.*,[17] where the point actually decided was that if a party assigned certain grounds on his motion for a new trial, other grounds not so assigned, although noted by way of objection and exception in the transcript of the evidence, would be treated as waived. However, it is submitted that in many of the cases the general statements and the points actually adjudicated are directly at variance with the holding in the Milling Company Case.

Considering the extended and specific statements of this case, based on actual adjudication, intended to settle a point of practice which had been controverted in the past on more than one occasion, and bearing in mind the avowed purpose for which they were made, "that there may be no

[16] P. 323.
[17] N. 5 *supra*.

confusion or misunderstanding among the profession or circuit courts upon the subject," it would have seemed that those seeking for the proper rule of practice would have been justified in looking to the Milling Company Case alone and ignoring the various prior cases laying down a different rule. However, in the light of recent decisions, the question seems to be still in doubt. In *Guyandotte Coal Co.* v. *Virginian Electric & Machine Works*,[18] decided in 1923, it is said:

> "We find numerous assignments of error in plaintiff's petition, many of which are also assigned in the brief of its counsel. There are many of these errors referred to in the plaintiff's petition which go to the introduction of testimony. * * * There are no special bills of exceptions setting up these questions and exceptions or giving the answers to them. This court has, in many cases, held that: 'Errors in the rulings of the trial court upon admission and rejection of evidence are deemed to have been waived if they are not made grounds of the motion for a new trial, nor subjects of special bills of exceptions showing the evidence and the ruling of the court thereon.' "

Various cases decided prior to the Milling Company Case are cited and quoted with approval. The Milling Company Case is not mentioned. That the court is undertaking to follow the full rule and authority of cases prior and *contra* to the Milling Company Case, is further indicated by the following paragraph in which the court quotes from *State* v. *Henaghan*:[19]

> " 'This court does not consider, and will treat as waived, a claim that evidence was improperly admitted over objection and exception, unless by bill of exceptions attention is directed to the evidence complained of. A bill of exceptions making all the evidence in the case part of the record will not avail, though therein is noted the introduction of such evidence and the objection and exception thereto, unless the record discloses reliance on such objection in support of a motion for a new trial.' "

Again, in *Trippett* v. *Monongahela West Penn Public Service Co.*,[20] decided in 1925, although it is not clear that the statement was necessary for a decision of the case, it is said:

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[18] N. 6 *supra*.
[19] *Idem*.
[20] *Idem*.

> "Objection is made to the consideration of the questions thus sought to be presented on the ground that the evidence complained of was not made the subject of special bills of exceptions, nor specifically presented to the court on the motion for a new trial. This proposition is well fortified by prior decisions rendered here; and we shall give no further consideration to the points of error based thereon."

The Milling Company Case is not mentioned in either of these two later decisions. In both of them the cases which the Milling Company Case was apparently intended to supersede are cited and approved. The Guyandotte Case, on the basis of actual adjudication, seems to be in direct conflict with the Milling Company Case. Was the Milling Company Case inadvertently overlooked in deciding the later cases? Or was there a definite intention to repudiate the rule of practice which it sanctions?

Logically, it is believed that there is much to be said in favor of the rule laid down in the Milling Company Case. The primary function of a bill of exceptions is to bring into the record something that is not *per se* a part of the record. The bill of exceptions containing a transcript of the evidence certainly can be accepted as bringing into the record all objections and exceptions noted therein. Hence special bills of exceptions should not be necessary for this purpose. Whether points of error not called to the attention of the trial court on a motion for a new trial will be treated as waived, it is believed is a question independent of the law relating to bills of exceptions. Usually, the mere fact that a party excepts to the ruling of a court is taken as an indication that any error committed on the ruling is not waived. The bill of exceptions is something that comes later. In fact, a party does not know whether it is necessary for him to assume the usually burdensome task of preparing bills of exceptions until the court has ruled on the motion for a new trial. In many of the cases cited, it is definitely assumed, if not stated, that a special bill of exceptions is an absolute substitute, seemingly at any time and for all purposes, for a specific assignment of error on the motion for a new trial. Is this logical? If the special bill of exceptions is prepared before the motion for a new trial, assuming that the doctrine of waiver has any application, why

should not the special bill of exceptions, the same as an exception noted in the transcript of the evidence, be considered as waived if the point of error which it is intended to save is not called to the attention of the trial court on the motion for a new trial? On the other hand, if the special bill of exceptions is prepared after the motion for a new trial, how can it, under any conceivable circumstances, so far as the question of waiver is concerned, be looked upon as a substitute for specific assignments of error on the motion for a new trial? It may very well be argued, as a matter of policy, that a party should not be permitted to urge in the appellate court points of trial error not made the basis in the trial court of his motion for a new trial The arguments in favor of such a policy are obvious. But would not the very force of such arguments repel any idea that the same function could properly be performed by special bills of exceptions? It is believed that the cases have unnecessarily and unprofitably confused the functions of bills of exceptions with the necessity, to the extent that it is recognized, of seeking correction of error in the trial court before applying for appellate relief. This confusion, leading to a lack of uniformity in reasoning and to conflict in the decisions, seemingly has prevented the court from establishing definite and permanent rules with reference to either bills of exceptions or the requirements on a motion for a new trial. The weight of the court's reasoning has shifted from questions of waiver to purely mechanical questions of pointing out error; from questions of rendering aid to the trial court to considerations of convenience in appellate procedure; from recognition of the primary function of a bill of exceptions as being to bring something into the record to the emphasis of its, perhaps, secondary function of pointing out error. So far as the question of pointing out grounds of error is concerned, it is conceded by all the cases that a proper way to specify points of alleged error is to assign them on the motion for a new trial. So assigning them will serve all purposes of appellate procedure and at the same time will aid the trial court in ruling on the motion. But, as Judge Brannon indicates, there is no necessity that the trial court be so aided. The judge presiding at the trial has heard all the evidence and, presumably, has taken full notes covering all important matters; particu-

larly, it would seem, of all doubtful matters as to which his rulings have been questioned by way of exceptions. As to specifying grounds of error for purposes of appellate review, it would seem that this may safely be done in the assignment of errors or in the brief of counsel. From a purely mechanical point of view, it is believed that there is something to be said in favor of dispensing with special bills of exceptions relating to the evidence. They duplicate objections and exceptions already contained in the transcript of the evidence and they further bring in additional matter in the nature of inducement, thus adding to the size and the cost of the record. There is, however, one respect in which it is conceivable that special bills of exceptions might be an aid to the appellate court. The explanation or inducement in the ordinary special bill of exceptions relating to the evidence would in some instances tend to relieve the appellate court from the necessity of examining the context of the evidence in order to determine the applicability of the objection and exception. But since the appellate court is usually under the necessity of reading the whole evidence for other purposes, and thus becomes familiar with the context, the writer questions the expediency of requiring special bills of exceptions chiefly ror the purpose of dispensing with an examination of the context. Afer all is said, however, in favor of either rule of practice, it must be conceded, perhaps, that it is not so important to determine which course is the better one to pursue as it is to be able to know which method of procedure it is safe to follow as the permanent rule of practice.