hands while he was testifying (there was no other evidence on this point), stated that he purchased them, not from Mrs. Taylor, who was entitled to them according to the declaration, but from another person (her husband), whose title, if any he had, was not shown. It is true that the plaintiff might have shown, if such had been the fact, that in the sale and transfer of the notes to him Mr. Taylor was acting as the agent of his wife, and his act, therefore, would have been hers; but there was no such proof. On the contrary, the inference is that Mr. Taylor was the owner of the notes in his own right, as the plaintiff credited the greater part of the purchase price on a debt owing to him by the husband, from whom he purchased. He thus proved himself out of court. He stated one case in his declation and proved another wholly inconsistent with the one stated.

This material variance between the allegations and the proofs—the case stated and the case proved—was fatal to the plaintiff's claim on defendant's demurrer to the evidence, notwithstanding the rigorous rules applied by the law to the demurrant. It is suggested, however, that it was still in the power of the plaintiff to save himself, even after the defendant's demurrer to the evidence was tendered. First, he might perhaps, under sec. 3384 of the Code, upon asking for it, have obtained leave to amend his declaration so as to conform it to the facts developed in the evidence. It will be observed that this section has substituted the words "if it [the court] consider that substantial justice will be promoted" for the words in the former statute "if it [the court] consider the same [the variance] not material to the merits of the case." The substituted language is broader than that of the former statute and was intended to enlarge the powers of the court in cases of variance; for though the court might consider the variance material to the merits, yet, if justice would be promoted by amendment of the pleadings so as to correct the variance, such amendment was provided for. Second, the plaintiff, on discovering the variance, might have suffered a non-suit, and, in a new action, framed his pleadings to suit the facts of the case.

"In vain the net is spread in the sight of any bird," wrote the wisest of men in the olden time, but if Solomon had lived in the later times of skillfully constructed legal traps and snares he might have found occasion for some exceptions.

WARREN v. WARREN.*

Virginia Court of Appeals: At Richmond.

(April 16, 1896.)

1. APPELLATE PRACTICE—*Objections in trial court—Waiver.* A party will not be allowed to specify one or more grounds of objection to evidence offered in the trial court and rely upon other grounds in the appellate court. He is regarded as having waived all other objections to the evidence except those which he pointed out specifically.

Error to a judgment of the Circuit Court of the city of Williamsburg and county of James City, rendered November 17, 1893, in an

*Reported by M. P. Burks, State Reporter.

action of ejectment wherein the defendant in error, Henry B. Warren, was the plaintiff, and the plaintiff in error, Mary E. Warren, was the defendant. *Affirmed.*

The opinion states the case.

L. T. W. Marye, for the plaintiff in error.

J. T. Hubbard, R. L. Henley, and *H. R. Pollard,* for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

The only assignment of error relied on in this case is to the action of the court below in allowing certain evidence to go to the jury, to which the defendant (plaintiff in error here) objected. His bill of exceptions shows that he pointed out to the court the ground upon which he objected to the admission of the evidence. In this court he bases his objection to the evidence upon another and altogether different ground. His right to do this is denied.

A party will not be allowed to specify one or more grounds of objection to evidence offered in the trial court and rely upon other grounds in the appellate court. He is regarded as having waived all other objections to the evidence except those which he pointed out specifically.

It is the duty of a party, as a rule, when he objects to evidence, to state the grounds of his objection, so that the trial judge may understand the precise question or questions he is called upon to decide. The judge is not required to search for objections which counsel have not discovered or which they are not willing to disclose. It is also due to the party whose evidence is objected to, that the grounds of objection should be specified, so that he may have an opportunity to remedy the defect pointed out, if possible, and have the case tried upon its merits.

If a party is not satisfied with the rulings of the court in admitting evidence, and wishes to have them reviewed by an appellate court, the bills of exception ought to show the specific grounds of objection pointed out and relied on so that the appellate court will have the same questions presented to it for its determination as were presented to and passed upon by the trial court.

The parties must stand or fall upon the case as made in that court. An appellate court is not a forum in which to make a new case. It is merely a court of review to determine whether or not the rulings

and judgment of the court below upon the case as made there were correct. Any other rule, it has been well said, would overturn all just conceptions of appellate procedure in cases at law, and would result in making an appeal in such action a trial *de novo*, without the presence of witnesses or the means of correcting errors and omissions.

In the case of *Wynn v. Harman*, 5 Gratt. 157, 167, this court refused to consider an objection to evidence based upon a different ground from that specifically pointed out in the court below. The court said: "This objection was not taken in the court below, and cannot avail the demandant here. Specific objections were taken to the testimony before the judge of the Circuit court, and his refusal to sustain them excepted to. Other objections, raised here for the first time, cannot properly be considered by this court. The tenants may have been ready to show that the decree of partition had been duly recorded, and may have failed to furnish the proof, under the belief that the demandant had waived any objections founded upon the absence of such proof, by resting his objections to the competency of the evidence on other grounds."

In the opinion of the Supreme Court of the United States in the case of *Camden v. Doremus*, 3 How. 515, in discussing this question, it was said: "It would be more extraordinary still if, under the mask of such an objection or mere hint at an objection, a party should be permitted in the appellate court to spring upon his adversary defects which it did not appear he ever relied on, and which, if they existed, and had been openly and specifically alleged, might have been easily cured." 1 Thompson on Trials, sec. 693, &c.; *Burton v. Briggs*, 20 Wall. 125.

The case under consideration is an illustration of the wisdom and justice of the rule that a party ought not to be permitted to state one ground of objection to evidence when offered in the court below and when he comes here change his ground and rely upon another.

The ground of objection pointed out and relied on in the court below to the introduction of the copy of the will of Michael S. Warren and the decree of the court, setting it up as stated in the bill of exceptions, was, "that while the will set up by the said decree might be proper evidence, the decree itself was not, as it was a statement of what had taken place in another suit, with the judge's opinion in regard to the same, and, therefore, under the circumstances disclosed was improper evidence to go to the jury, and it could but have the effect of prejudicing the defendant's case." The objection, by impli-

cation at least, concedes that the copy of the will offered was proper evidence, but points out specifically why the decree accompanying it, and by which it was set up, was not.

The ground of objection assigned and relied on here is, that the decree setting up the will was rendered by a court of equity, and that such a court has no jurisdiction to set up the lost or destroyed records of another court. If this objection had been made in the court below, even if it be true that a court of equity can under no circumstances set up the record of a will which had been probated and recorded in another court and the record destroyed (as to which we express no opinion), the party offering the evidence might have been able to show that the proceedings in which the decree was rendered were had under secs. 3339 to 3341 of the Code, by which the circuit courts are, under certain circumstances, authorized to set up lost or illegible records. But if he were uable to do this, and the trial court had held that the court which rendered the decree setting up the will was without jurisdiction and the whole proceeding void, he would have had the right to resort to parol evidence to prove the contents of the destroyed record, and might thus have made out his case.

But if this ground of objection now made in this court for the first time could be considered and should be sustained, the result would be to decide a question not made in the lower court and reverse that court for an error which, in fact, it never committed, and the plaintiff would be compelled to pay the costs and expenses of this writ of error, when, if the objection had been made in the lower court, he might have been able to obviate the objection, if well taken, by other evidence, and had the case tried upon the merits without delay.

We are of opinion that the defendant must be held to have waived all objections to the admissibility of the evidence in question except upon the specific ground set out in his bill of exceptions, and as that ground is without merit the judgment of the Circuit Court must be affirmed. *Affirmed.*

BY THE EDITOR.—This case is valuable in the practice. Exceptions of every kind, when necessary at all, should be taken in the court whose judgment is to be reviewed. Otherwise, the appellate court would be converted into one of original jurisdiction.

The Judge delivering the opinion in *Redd v. Supervisors of Henry County*, in which opinion the other Judges concurred, 31 Gratt., at p. 711, said: "We can only review the case made and as made by the parties in the court below. We cannot go outside of the record and decide a case upon facts *dehors*. This would, in my judgment, be a palpable and flagrant abuse of appellate jurisdiction."

Again, it was said in *Harman v. City of Lynchburg*, 33 Gratt., at p. 43: "The judgment of a court of competent jurisdiction is always presumed to be right until the contrary is shown, and a party in an appellate court, alleging error in the court below, must show it in the regular way, or the presumption in favor of its correctness must prevail. When exception is taken to the admission or rejection of evidence, or the granting or refusing of instructions, or *indeed to any other ruling of the court in the trial*, the bill should be so framed by the insertion of proper matter as to make the error, if any, complained of, apparent, otherwise the exception will generally be unavailing."

This includes the rule laid down in the principal case that an exception specifying particular grounds of objection cannot be extended in the appellate court so as to embrace other grounds not specified in the exception—the specification of one ground being a waiver of every other—*expressio unius est exclusio alterius.*

The exception in every case should be specific. This is illustrated in the application of the rule to commissioners' reports. In *Simmons v. Simmons' Adm'r*, 33 Gratt., at p. 457, it is said: "Exceptions to masters' reports are said to be in the nature of special demurrers, and the party objecting must point out the error, otherwise the part not excepted to will be taken to be admitted. 2 Dan. Chanc. Prac. (4th American Ed.) 1316, note 4 and cases there cited. In all cases where exceptions are necessary at all [they are not necessary where the error is apparent on the face of the report. *Cookus v. Peyton's Ex'or*, 1 Gratt., at p. 453; *French v. Townes*, 10 Gratt., at p. 526; 2 Rob. Prac. (Old) 383 and cases there cited; *Simmons v. Simmons' Adm'r*, 33 Gratt., at p. 456 and cases cited], they should specify with reasonable certainty the *particular* grounds of objection relied on, so as to enable the opposing party to see clearly what he has to meet, and the court what it has to decide. *Crockett v. Sexton*, 29 Gratt. 46."

Attention to these settled rules and others of a kindred nature in regard to exceptions in courts of the first instance will save in the appellate courts many a case which would otherwise be lost.

Morotock Insurance Company v. Rodefer Bros.*

Supreme Court of Appeals: At Richmond.

April 2, 1896.

1. Fire Insurance—*Application—Interest of insured—Encumbrances.* If an insurance company elects to issue its policy of insurance against a loss by fire without an application, or without any representation in regard to the title to the property to be insured, it cannot complain after a loss has ensued that the interest of the insured was not correctly stated in the policy, or that an existing encumbrance was not disclosed.

2. Fire Insurance—*Policy—Unconditional and sole ownership—Mortgage.* A condition in a fire insurance policy which avoids it if the interest of the insured in the property be other than "unconditional and sole ownership" is not

*Reported by M. P. Burks, State Reporter.