the same. The one is generally incidental and casual; the other is fundamental, deliberate and conclusive, and has always been held to be error for which the judgment would be reversed. The minor error was intended to be cured by the amended Act, but the greater in our judgment was not included." [50] The Act is held to apply to the assumption of several facts as well as of one, Morrison v. Hammond's lessee, 27 Md. 604. And see Young v. Mertens, 27 Md. 114; Lane v. Lantz, 27 Md. 211; Everett v. the State, 28 Md. 190. The Court may, however, in its ruling assume facts admitted by the party, Wetherall v. Clagett, 28 Md. 465.

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[50] Dunham v. Clogg, 30 Md. 284; Hamilton v. Hardesty, 32 Md. 348.

This distinction no longer obtains under the Rules of 1869. Rule 4 (Code 1911, Art. 5, sec. 9) enlarged the provisions of the Act of 1862 by adding a section which provided that no question as to the insufficiency of evidence to support an instruction actually granted should arise in the Court of Appeals, unless distinctly made to and decided by the court below. Since its adoption, therefore, an objection to a prayer because of insufficient evidence to support it, as well as because of the assumption of a fact or the submission of a question of law to the jury, must be made to and decided by the court below; and the ruling thereon must appear in the record by a bill of exception signed by the trial judge. Gunther v. Dranbauer, 86 Md. 1; Modern Woodmen v. Cecil, 108 Md. 366; Dexter Co. v. McDonald, 103 Md. 381; Vonderhorst Co. v. Amrhine, 98 Md. 406; Travellers Ins. Co. v. Parker, 92 Md. 33; Washington Water Co. v. Garver, 91 Md. 398; Lewis v. Tapman, 90 Md. 306; Gambrill v. Schooley, 89 Md. 546; Walsh v. Jenvey, 85 Md. 240; Badart v. Foulon, 80 Md. 579; Hartsock v. Mort, 76 Md. 281; People's Bank v. Morgolofski, 75 Md. 432; Stoner v. Devilbiss, 70 Md. 144; Thorne v. Fox, 67 Md. 67; Potomac Co. v. Harlan Co., 66 Md. 42; Franklin v. Claflin, 49 Md. 24; Wilson v. Merryman, 48 Md. 328; Balto. Asso. v. Grant, 41 Md. 560; Stansbury v. Fogle, 37 Md. 369; Straus v. Young, 36 Md. 246; Worthington v. Tormey, 34 Md. 182.

But Rule 4 also narrows the scope of the Act of 1862 in limiting its provisions to an instruction actually given. Gunther v. Dranbauer, *supra*. Hence no special exception, based on any of the above mentioned grounds, is necessary where the prayer is rejected. Such objections may still be urged in the Court of Appeals in support of the ruling of the trial court in refusing it. United Surety Co. v. Summers, 110 Md. 121; Mylander v. Beimschla, 102 Md. 689; Worcester Co. v. Ryckman, 91 Md. 36; Newman v. McComas, 43 Md. 70.

A mere general exception that a prayer assumes facts without pointing out what facts are assumed does not gratify the 4th Rule and will not be considered an appeal. Shriver v. State, 65 Md. 278.

It is not necessary that a special exception to a prayer on the ground of lack of evidence to support it should be made in writing, nor that it should form the subject matter of a separate bill of exception. It is sufficient if it appear by the certificate of the judge that special objection was in fact made by counsel and ruled on by the court. Moses v. Allen, 91 Md. 42.