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## Growth of a Dictum

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## THE GROWTH OF A DICTUM

By FRANK N. RICHMAN\*

We have Biblical authority, if it were needed, for the statement that the tongue is an unruly member. The carelessly spoken word sometimes causes a lot of trouble. Not less hazardous is the inadvertent written word. Frequently its results are far reaching, especially when it appears in the opinion of a court of last resort.

In the case of *Greer v. State*,<sup>1</sup> the opinion contains the following statement:

"The appellant did not set out in his motion for a new trial, nor has he set out in his brief, the answers given to the questions of which he complains. These answers, or at least a statement of their substance, and not merely the questions themselves, must be presented, *together with his grounds of objection*, in order for a determination to be made by this court of the existence of harmful error, and the court will not search the record for the evidence adduced by the questions complained of."

Up to this time, November 14, 1929, it is submitted, the Indiana appellate courts had consistently held that no question as to the admission of evidence was presented for decision unless the motion for new trial contained in substance the question to which objection was made, and the answer, and that no question as to the exclusion of evidence was presented unless the motion for new trial showed in substance the question, and the contents of the offer to prove. The courts had consistently held also that both the record and appellant's brief in its statement of the record, (referring to the page and line of the transcript) should show, in the one case, the question, the objection, the

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<sup>1</sup> 201 Ind. 386.

offer to prove, the ruling and the exception, and in the other, the question, the objection, the ruling, the exception, and the answer.

But up to this time, it is further submitted, the appellate courts of Indiana had never *held* that the "grounds of objection" must be stated in the motion for new trial.

The language of the opinion is that the "grounds of objection" must be "presented." Where? If in the brief, this would be in accord with the rule and precedent. If it were meant that they were to be presented in the motion for new trial, then the writer of the opinion was indicating a change in practice that has been prescribed by the Indiana text and form writers and generally, if not universally followed since the adoption of the code.<sup>2</sup> Surely he would have been more explicit if he had intended any such innovation.

The Supreme Court again, March 17, 1932, in *Eva v. State*,<sup>3</sup> states: "Appellant does not set out in his motion for a new trial his reasons for objection to the questions or to the introduction in evidence the liquor found nor the answer of the witness to such questions," citing and quoting as authority the paragraph from *Greer v. State*, *supra*. In this case (*Eva v. State*) as in the former, the point apparently raised by counsel for appellee was that the motion for new trial did not contain the answers to the questions to which objection was made, so that the ruling was correct and the statement as to the grounds of objection was obiter.

Cited also as authority is an intervening case in the Appellate Court, *Kenwood Tire Co. v. Speckman*.<sup>4</sup> "Appellee contends that this court cannot consider any of the reasons advanced for a new trial relative to the admission of evidence because of the fact that in said motion no one of said reasons states what answer was given to the question asked." This point, of course, was well taken, but the writer of the opinion, reviewing the authorities to this effect, also quoted the paragraph from *Greer v. State*, and probably made it the basis of a further ruling,<sup>5</sup> not warranted, it is submitted by the cases cited,<sup>6</sup> that "the ground of the motion to strike out not being stated in the motion

<sup>2</sup> See II Watson's Works Practice Sec. 1925; IV Watson's Works Practice Forms 1544, specifications 22 and 23; 3 Work's Practice & Pleading, Form 620; 1 Hogate's Pleading & Practice (1907), Sec. 699; 2 Elliott's General Practice (1894), Sec. 991.

<sup>3</sup> 180 N. E. 183, 184.

<sup>4</sup> (May 1, 1931) 92 Ind. App. 419, 421.

<sup>5</sup> p. 424.

<sup>6</sup> *Lafayette Agriculture Works v. Phillips*, 47 Ind. 259; *Vannatta v. Duffy*, 4 Ind. App. 168.

for a new trial, there is no reversible error in the ruling of the court in reference thereto."

Of the cases cited, *Coryell v. Stone, Exr.*,<sup>7</sup> contains a similar dictum in this language:

"The seventh cause assigned for a new trial is in the following words: 'Because the court erred in allowing the defendants to ask Jerry Dugan, a witness called by the defendants, whether or not the testator gave to witness instructions to enable him to make the survey.' This seems to us too uncertain to inform the court of what the appellants really complained, and does not refer to anything to make it more certain. It does not inform us what the question objected to was, *nor what the objection to it was*, nor what the answer to the question was, nor, indeed, whether it elicited any answer or not, nor in what way the survey mentioned was connected with the case."

This particular dictum, though quoted on one occasion,<sup>8</sup> seems to have played no part in the development of the rule, at least until the time of the citation in *Kenwood Tire Co. v. Speckman*.

The Appellate Court in *Wabash Portland Cement Co. v. Stevens*<sup>9</sup> says: "No question, however, is presented as to the admission of evidence. Grounds 9 to 20, inclusive, 22 to 32 inclusive, and 34 to 38, inclusive, in the motion for a new trial seek to raise such questions, but the motion for a new trial does not in many instances set out the questions and answers objected to or their substance, nor does such motion in any instance state the grounds of objection. No determination, therefore, can be made by this court as to the existence of harmful error on any such grounds." Of the cases cited only *Coryell v. Stone* and *Kenwood Tire Co. v. Speckman* definitely state that the motion for new trial must contain the grounds of objection. It is not clear from the opinion<sup>10</sup> that the point was necessary to a decision, for in the instances where the grounds of objection were not stated, it may have been that the question or the answer was also omitted.

In *Inter-Ocean Casualty Co. v. Wilkins*,<sup>11</sup> the Appellate Court extends the doctrine as follows:

"Error is claimed in the admission of evidence, but the questions sought to be raised are not presented. The motion for a new trial, in order to present any question for review, must

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<sup>7</sup> (1878) 62 Ind. 307, 311.

<sup>8</sup> *Indianapolis, etc., R. Co. v. Ragan*, 171 Ind. 569.

<sup>9</sup> (Oct. 16, 1931) 93 Ind. App. 209, 210.

<sup>10</sup> 93 Ind. App. 210.

<sup>11</sup> 182 N. E. 252, 256.

set out, at least, the substance of the question asked, the objection made and the answer given, in order that it may be determined as to whether harmful error exists without searching the record. In the instant case the motion fails to do this, but in each reason set forth in said motion it is merely stated that 'the court erred in permitting a named witness for the plaintiff to testify, over the objection of the defendant, to certain facts.' Neither the question nor its substance, the objection made nor the grounds for such objection, appear. The admission of certain exhibits in evidence is also questioned, but the motion does not disclose what any exhibit read in evidence purported to be, nor upon what grounds of objection made it should have been excluded."

The Greer, Kenwood and Eva cases are cited as authority and the principle is now asserted not merely as a dictum but evidently as the basis for a decision.

Again the Appellate Court in *Gaines v. Taylor*,<sup>12</sup> states the rule as follows: "Appellants did not state in their motion for new trial the objections made to the admission of the drawing in evidence, at the time it was offered in evidence, nor the substance thereof, nor did they state the ruling of the court on said objections, nor did they show the exception taken. All the foregoing must be stated in a motion for new trial based on the admission in evidence of an exhibit.

"The reason for this rule is to give the trial court a further opportunity to consider and correct its rulings, without reviewing and searching the record for all matters which had a bearing thereon."<sup>13</sup>

It appears, however, that this reason was assigned in the Kenwood case for the necessity of setting out in the motion for new trial the answers to the questions objected to, not the grounds of the objections.

So well settled is the proposition by this time that the Appellate Court in *Emrich Furniture Co. v. Valinetz*<sup>14</sup> deems it unnecessary to cite reason or authority for the statement: "The fifth, sixth, seventh, and eighth attempt to raise questions of the admission and the rejection of certain testimony, but they present no question as neither the *objections* nor any offers to prove are set out in the motion."

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<sup>12</sup> (April 21, 1933) 185 N. E. 297, 299.

<sup>13</sup> Citing *Kenwood Tire Co. v. Speckman*, supra. The same reason was also assigned in *Wabash Portland Cement Co. v. Stevens*.

<sup>14</sup> (May 18, 1933) 185 N. E. 654, 655.

And on the same day the same court in *J. K. Vaughn Bldg. Co. v. State*<sup>15</sup> cites all the recent cases except *Wabash Portland Cement Co. v. Stevens* in an opinion wherein it is stated that the whole case turns upon the admission of two exhibits and that these questions are not presented because in its motion for a new trial appellant did not set out the objections, nor their substance, to the admission in evidence of these exhibits.

So much for the history of this new rule. Apparently, it is now the law. Is it fair? Is it necessary? To what situation will the rule be extended? A motion for a new trial serves two ends. It first presents to the trial court the sufficiency of his own rulings. Secondly it points out alleged errors for review by the appellate court.

Filed within 30 days after the verdict or decision, when the trial is fresh in the mind of the trial court, supported usually by oral argument and citation of authority, the motion does not need to be voluminous in order to present to the trial judge the exact issue which was raised at the trial and which in the stress thereof may not have had adequate consideration and proper decision. When the question and the answer (or the offer to prove) are shown by the motion, the trial court can determine, without statement of the grounds of objection, whether or not his decision at the trial was right or wrong. If he is thus satisfied that objectionable evidence has been introduced to the prejudice of the losing party, in the interest of justice it is then the trial judge's duty to grant a new trial.

In an appellate court, however, the presumption is that the trial judge did his duty and that there has been a fair trial. If the reason assigned for admitting or excluding evidence was wrong but the decision was right, there is no reversible error. If an inadequate reason was assigned by the objector and the trial court overruled the objection, even though his decision should have been different had an adequate reason been assigned, there still is no reversible error. Why this is so is not here material. It is sufficient to say that the appellate court is not required to remedy the trial court's error in admission or exclusion of evidence in the absence of a proper objection made at the time the error was committed.

This error must be brought to the attention of the appellate court. How? First, of course, every detail must appear in the record; the question, the objection in full, the ruling, the exception, the answer. But this is not enough, for the appellate court

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<sup>15</sup> 185 N. E. 656.

has not the time to search the record, nor has it any personal recollection such as that possessed by the judge who presided at the trial. Obviously, therefore, the brief of appellant must point out the error. Such is the rule adopted by the Supreme Court.

Since the brief must state so much of the record as presents the question, why should the motion for a new trial duplicate that statement of the record? Ought not it be sufficient to show that the alleged error, now presented by recital of the record, was also called to the attention of the trial judge in such a way that it could not be overlooked by him, that is, by giving the substance of the question and answer in the motion for a new trial? If to this is added, as must be under Rule 22, the necessity of applying the points and authorities to the error relied upon for reversal, the appellate court can not help knowing the precise issue for decision on its merits.

Assuming that it is now settled that the motion for new trial must contain the grounds of objection to the admission or exclusion of evidence, the next step may be to apply the same rule to the instructions of which complaint is made. May we rely upon our former practice or must we quote in the motion for a new trial each instruction claimed to be erroneously given or refused? And,—one step farther—must we assign in the motion the grounds of objection to the giving or refusal?

Here we have a different situation from that presented with reference to the admission of evidence. During the trial, no reasons are required to be asserted for the giving or refusal of an instruction. If the court guesses right, there is no error regardless of the reason which guided his decision. If he guesses wrong, his error is reversible, unless it was harmless.

Since no grounds of objection to giving or refusal are required at the time of the trial court's ruling, obviously no grounds of objection then made can be set out in the motion for a new trial. Then why not set out in the motion the reasons appearing to the moving party at the time the motion is filed? This would be of material aid to the trial court in reviewing his action. But it never has been required.

If the logic of the above quotation from *Gaines v. Taylor* be followed, anything in the record that "has a bearing" upon the alleged error in the trial ought to be set out in the motion for a new trial. For instance, if excessive damages are assigned as error the motion for new trial should show why the damages are excessive and such showing would require a recital of all the

evidence "bearing" on the question. It is submitted that historically and logically the function of a motion for a new trial is to point out the error, not to serve as brief or record.

The writer has no cases pending in either court wherein this question is involved but can well believe that there are numerous cases on the dockets of the Supreme and Appellate Courts, wherein error is assigned in the admission or exclusion of evidence and where the motion for new trial, following the form given in Watson's Works or similar form, was filed before the dictum in *Kenwood Tire Co. v. Speckman*, May 1, 1931, and certainly before the decision in *J. K. Vaughn Bldg. v. State*, May 18, 1933. As to these pending cases, what will be the attitude of the courts?

If the rule announced in the last case is the law, then, like any principle of common law, it has been the law through the years, although only recently stated. It is not announced as a new rule adopted by the Supreme Court by virtue of an inherent power to prescribe rules of procedure. Attorneys certainly are bound, if any one is bound, to know the law. If they failed to set out the grounds of objection in their motion for a new trial, then the question is waived and the appellate court itself can so find, even though appellee has not raised the question.

Is this fair? The Indiana State Bar Association is committed to a bill giving the Supreme Court the right to prescribe rules of practice and procedure, not only in that court but for all courts of the state. But a cardinal feature of such bill is the due and proper promulgation of changes before they become effective. Statutory rules of procedure are not retroactive. Nor should be rules adopted by the court. If the two appellate courts are satisfied with the decision in *J. K. Vaughn Bldg. Co. v. State* and the dicta in the preceding cases, that the motion for a new trial must contain the grounds of objection in order to present the question of the admissibility of evidence, it is submitted that such rule should not be enforced in any case wherein the motion for new trial was filed prior to June 1, 1933, when first through the Northeastern advance sheets the lawyers of the state generally were advised of such decision.

The writer believes that rules of procedure should be prescribed by the Supreme Court, but not inadvertently, as this one seems to have developed. Such development may be ascribed to the pressure under which both courts are now laboring with their congested dockets and affords argument for constructive effort and perhaps legislation to enable the courts to get up to

date that they may have adequate time for consideration not only of their decisions, but also of the dicta in their opinions.

This is not the first dictum that has grown into law, nor will it be the last. Some dicta deserve to survive as bases for decisions. This one, it is submitted, does not bear analysis and ought not be extended.