1931

# Procedure, Necessity of Assignment of Error in Motion for New Trial as a Basis for Appellate Review

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PROCEDURE—NECESSITY OF ASSIGNMENT OF ERROR IN MOTION FOR NEW TRIAL AS A BASIS FOR APPELLATE REVIEW.—[Illinois] In a case[1] decided by the Supreme Court of Illinois in December, 1930, the opinion by Justice Stone makes certain broad statements as to the necessity of assigning rulings at the trial in a motion for a new trial as a condition for appellate review, which apparently mark a departure from the previously accepted rule on the subject. The plaintiff in error had moved for a continuance, but was forced to trial. His motion for a new trial, which assigned a number of rulings, evidently failed to include the overruling of a motion for a continuance.

The assignment of error in the refusal of the continuance might have been disposed of in accordance with previous decisions on the ground that where a specific motion for a new trial fails to include a given ruling, such omission operates as a waiver[2] of the exception to such ruling. The opinion, however, seems to base the refusal to review on a different ground.

"Plaintiff in error next urges that his motion for continuance should have been allowed. It is a sufficient answer to say that the record shows that the question was not raised on motion for new trial filed by plaintiff in error.

*"Errors claimed to have occurred in the trial and relied on for reversal must first be called to the attention of the trial court by a motion for a new trial and an opportunity given that court to correct the same."*

If that statement be taken without qualification, no exception taken in the progress of the cause, though preserved by bill of exception, could be reviewed by an appellate court unless the party excepting also filed a motion for a new trial with appropriate specification of such ruling as a ground therefor. Such a rule prevails in some of the states.[3] And at one time it was apparently accepted in Illinois,[4] though at an earlier period the court had squarely repudiated it.[5]

Confusion doubtless arose from a failure to discriminate between: (*a*) cases holding that no motion for a new trial was necessary for appellate review of exceptions taken at the trial; (*b*) cases holding that appellate review was confined to those rulings which had been assigned in the motion for a new trial; and (*c*) cases holding that a motion for a new trial was necessary for appellate review of certain questions on which the trial court had not been called on to rule—for example whether the verdict was excessive or against the weight of the evidence, etc.

In 1908, the *Yarber* case[6] came before the court on the follow-

1. *People* v. *Colegrove* (Ill. 1930) 174 N. E. 536.
2. *Illinois Central Ry. Co.* v. *Johnson* (1901) 191 Ill. 594; *Dorwart* v. *Jacksonville* (1928) 333 Ill. 143.
3. *Bollinger* v. *Carrier* (1883) 79 Mo. 318; *Armstrong* v. *Whitehead,* (1902) 81 Miss. 35.
4. *C. B. & Q. R. R. Co.* v. *Haselwood* (1901) 194 Ill. 69.
5. *Illinois Central Ry. Co.* v. *O'Keefe* (1895) 154 Ill. 508.
6. *Yarber* v. *Chicago & Alton Ry. Co.* (1908) 235 Ill. 589.

ing state of the record. The plaintiff in error had excepted to various rulings on evidence and instructions, and preserved the same by bill of exceptions. The motion for a new trial did not specify any grounds, and no exception was taken to the order overruling it. The defendant in error insisted that the exceptions were not open to review. In what is probably the most scholarly and carefully considered opinion to be found on the subject in any jurisdiction, Mr. Justin Dunn pointed out that the whole doctrine of exceptions was based on the Statute[7] of 13 Ed. I, c. 31 (1285) and that appellate review of exceptions had been developed at a time when motions for a new trial were either unknown[8] or rarely used; that motions for a new trial were addressed to the discretion of the court and at common law the refusal of a new trial was not the subject of exception and hence not reviewable. It was accordingly held that a motion for a new trial was not necessary for a review of exceptions.

It was further pointed out, however, that the Illinois Practice Act[9] providing for exceptions to, and review of, rulings on motions for a new trial enabled a party to obtain a review of matters which formerly could not have been reviewed at all. For this purpose a proper motion for a new trial was obviously necessary.

The opinion further held that where a *specific* motion for a new trial was filed, the omission therefrom of a given ruling oper-

7. Cum aliquis implacitat. Coram aliquibus justic., proponat exceptionem et petat quod justic. eam allocent, quam si allocare noluerint, si ille qui exceptionem proposuerit, scribat illam exceptionem, et petat, quod justic. sigillum suum apponant in testimonio, justiciarii apponant sigilla sua. Et si unus apponere noluerit, apponat allius de societate. Et si forte ad querimoniam defacto justiciariorum venire fac' dominus rex recordum coram eo, et si illa exceptio non inveniatur in rotulo, et querens ostendat exceptionem scriptam sub sigillo justic. appenso, mandetur justiciario, quod fit ad certum diem ad cognoscendum sigillum suum, vel ad dedicendum. Et si justic. sigillum suum dedicere non possit, procedatur ad judicium secundum illam exceptionem, prout admittend esset vel cassand.

Mr. John M. Zane is doubtless correct in his theory that this statute was designed to cover the case where the court refused to allow an oral plea which therefore would not appear on the record (*Zane* "A Year Book of Richard II" [1915] 13 Mich. Law Rev. 439 at 456). When the original purpose was forgotten, the statute was invoked as furnishing a means for preserving rulings for appellate review.

8. The earliest instance of a new trial which the writer has noticed is Anon. 14 Hen. VII, 1 (3) in 1499, in which a new trial was awarded for misconduct of the jury. The report states that Kingsmil prayed a venire de novo because the jurors ate and drank after the charge. In later times a distinction was taken between motions for a new trial and motions for a venire de novo, in that the latter were based on matters appearing on the face of the record, and the former on matters not appearing on the record: *Witham* v. *Lewis* (1744) 1 Wilson 48. It was so unusual to move for a new trial where a bill of exceptions was taken that as late as 1848 it was argued that a motion for a new trial waived a writ of error, *United States* v. *Hodge* (1848) 6 How. (U. S.) 279.

9. Sec. 83, ch. 110: "Exceptions taken to decisions of the court overruling motions in arrest of judgment, motions for new trials, motions to amend and for continuances of causes, shall be allowed, and the party excepting may assign for error any decision so excepted."

ated as a waiver of the exception previously taken. It was accordingly held that since the motion for a new trial did not specify any grounds no waiver took place, and the exceptions were accordingly reviewed. For more than twenty years the *Yarber* case has been taken as settling the law on this point in Illinois, and it ought not to be overruled without more consideration than was given to the subject in the principal case.

Under the rule in the *Yarber* case a party need not resort to a motion for a new trial with its attendant risks of constructive waiver if he merely wanted appellate review of his exceptions taken at the trial.

Under the reasoning of the principal case he must go through the formality of a specific motion for a new trial as a condition to appellate review of any exceptions. The idea of giving the trial court a chance to correct its errors is more plausible than practical. The number of cases in which busy trial judges have been persuaded to reverse their rulings at the trial is extremely small at best. They are certainly not likely to reconsider unless the error is made apparent by the presentation of authorities.

If the party thinks it worth while to attempt to change the views of the trial judge, the way is open to him under either rule.

If he does not think it worth while to make the attempt, the motion will be a perfunctory formality, which will be overruled as a matter of course.

If the new requirement simply involved a formality with the pious wish that it might sometimes avoid an appeal, little could be urged against the change.

But wherever the rule obtains that the error must be specifically called to the attention of the trial court, the appellate courts have been swamped with an unending stream of questions that cannot be settled by rule. How specific must the motion be in order to call the ruling to the attention of the trial judge and give him a fair chance to correct it? Will it be sufficient to complain in general terms of one or more instructions, or each, and all of them, to be on the safe side? If so the trial judge will not be greatly enlightened by the motion. How specifically must the motion point out the objectionable evidence? What might suffice for one case might not for another.

Are the probable benefits from the rule worth such a price?

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PROPERTY—ESTATES—WHETHER CONTINGENT OR VESTED SUBJECT TO BE DIVESTED—[Illinois] *Crane* v. *Crane*[1] involved a provision in a will substantially as follows: X, testator, to trustees to hold in trust for A for life, then to vest in A's child or children, and in the event A shall leave no child or descendant of child, the property to revert to X's heirs.

1. (1930) 341 Ill. 363.