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1981 RULES OF CIVIL PROCEDURE: CONTENT AND COMMENTS

INTRODUCTION

ORVILLE C. WALKER*

On New Year's Day, 1981 Texas trial and appellate courts began operating under a number of amended rules of civil procedure. Some rules are new, some are amended, and some were repealed. In many instances far reaching changes in the rules were made. Voices have been heard to say: "Here we go again. Once a lawyer becomes familiar with a rule and the case law under it and having lived with the rule for many years, it is all changed. He has to forget all that he has learned and start over again with a new rule." This point of view is understandable. It is only natural to resist change in a rule with which counsel has practiced under for some years and with which he has become most familiar. If this approach to the rules were adhered to constantly, however, there would never be any improvement in the rules. Any amendment to the rules of civil procedure is the product of trial and error. Experience is a great teacher and through that experience we seek to improve the administration of justice. As a result, amending the rules is a never ending process. This is the way it should be, as rules of procedure should not become static or etched in stone merely for the sake of constancy.

The present changes in the rules are the product of many hours

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of thought and labor by the Committee on Administration of Justice and the Advisory Committee to the Supreme Court, as well as the Supreme Court of Texas. As stated, some drastic changes have been made. Countless cases are no longer the law. The purpose of this "Lawyers' Forum" is to acquaint the practitioner not only with the changes that have been made, but also with what the new rules seek to accomplish.

The rules have probably undergone more revision by virtue of the 1981 amendments than at any time since they were first promulgated in 1940. There will be no attempt in this introduction to detail the many changes, but mention is made of a few of the rule revisions that will be highlighted in the articles which follow.

Changes have been wrought in pre-trial discovery. Rule 167 has been entirely rewritten. The rule now allows any party to request the production of documents without a hearing; however, if an objection is made, the court may conduct a hearing. Furthermore, upon hearing non-parties may now be ordered to produce and furnish discoverable items. Rule 168 now limits the number of interrogatories to avoid harassment and overburdensome requests. Rule 201 relating to compelling appearance in the taking of depositions has been rewritten to categorize the requirements.

Numerous miscellaneous rules have been amended by the new rules. Rule 106 has been clarified. Service of citation may be obtained either by personal delivery or by mailing. Compliance with both methods is not required before resorting to substituted service. The sanctions found in rule 70 pertaining to the filing of "surprise pleadings" have been enlarged to allow the court to grant a continuance of the cause and charge the cost to the party causing the surprise. Summary judgment rule 166-A was amended to provide for notice to opposing counsel of the motion and supporting affidavits to be filed and served at least 21 days before the time for hearing. Rule 383 outlines the filing procedure for original proceedings other than habeas corpus, while rule 383a outlines the procedure for filing a habeas corpus petition in the court of civil appeals including the content of the petition. Rule 474 along with rule 475 sets forth the procedure for original proceedings in the Texas Supreme Court.

Rule 18a providing for recusal, or disqualification of the trial judge, has been added as a new rule. This new rule clarifies some procedural aspects and sets forth deadlines for filing a motion for

recusal or disqualification. In addition, the distress warrant, a remedy giving landlords a speedy and effective method of enforcing statutory liens on certain property of their tenants, has been revived as a viable writ remedy. Rules 610 through 620 dealing with the distress warrant procedure have been revised to correct the due process infirmities that have prevented the use of this extraordinary writ remedy for a number of years. Similarly, rules 717 through 734 pertaining to trial of right of property, allowing a third party claimant a summary method of asserting his right of possession in personal property that has been levied upon between other parties, have been amended to meet certain due process requirements. Under the new rules the trial of right of property is incorporated into the original writ proceeding itself, rather than tried before the main suit as provided by the old rules.

Sweeping changes have been made in rules of appellate procedure. The ultimate purpose of these amendments was to eliminate, as much as possible, the landmines enroute to the appellate courts. It is always unfortunate for an appeal to be dismissed for lack of jurisdiction without ever reaching the merits of the appeal. Most jurisdictional requirements, therefore, have been taken out of the new rules. For example, rule 329b has been amended so that a court's plenary power to modify, correct, or reform a judgment is recognized in addition to the power to grant a new trial. Rule 324 restricts the necessity of a motion for new trial for preservation of error in most cases. Furthermore, a late filed record is no longer a jurisdictional problem. In addition, deadlines have been restructured to commence from the date the judgment was signed in order that a certain time can be more readily ascertained. Also, provision is made for an extension of time for filing an appeal bond.

In response to the many rule changes outlined above, the practitioner will be called upon to change his way of doing things in the trial of a case. He will find himself in error if he continues to follow the well beaten and familiar path he learned under the former rules. Apropos to this the writer closes with a poem written by an unknown author:

One day through the primeval wood a calf walked home, as good
calves should;
But left a trail all bent askew, a crooked trail, as all calves do.
Since then, three hundred years have fled, and I infer, the calf is
dead.

But still he left behind this trail, and thereby hangs my moral tale.
 The trail was taken up next day by a lone dog that passed that way;
 And then a wise bell-wether sheep pursued the trail o'er vale and
 steep,
 And drew the flock behind him, too, as good bell-wethers always do.
 So from that day, o'er hill and glade, through those old woods a
 path was made,
 And many men wound in and out, and bent and turned and doged
 about,
 And uttered words of righteous wrath, because 'twas such a crooked
 path;
 But still they followed—do not laugh—the first migrations of that
 calf,
 And through this winding woodway stalked because he wobbled
 when he walked.
 This forest path became a lane, that bent and turned and turned
 again;
 This crooked lane became a road, where many a poor horse, with his
 load,
 Toiled on, beneath the burning sun, and traveled some three miles
 in one.
 And thus a century and a half they trod the footsteps of that calf.
 The years passed on with swiftness fleet, the road became a village
 street,
 And this, before men were aware, a city's crowded thoroughfare.
 And soon the central street was this of a renowned metropolis.
 And men two centuries and half trod the footsteps of that calf.
 Each day a hundred thousand followed the zigzag calf about;
 And o'er his crooked journey went the traffic of a continent.
 A hundred thousand men were led by one calf near three centuries
 dead.
 They followed still his crooked way, and lost one hundred years a
 day;
 For thus such reverence is lent to well-established precedent.
 A moral lesson this might teach were I ordained and called to
 preach.
 For men are prone to go it blind along the calf-paths of the mind,
 And toil away from sun to sun to do what other men have done.
 They follow in the beaten track, and out and in, and forth and back,
 And still their devious course pursue to keep the path that others
 do.
 But how the wise old wood-gods laugh, who saw the first primeval
 calf!
 Ah! many things this tale might teach;—But I am not ordained to
 preach.